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PROTECTING THE RIGHTS OF CRIME VICTIMS

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, FEDERALISM, AND PROPERTY RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

EXPLORING THE ROLE THAT THE FEDERAL GOVERNMENT CAN HAVE IN SAFEGUARDING THE RIGHTS OF VICTIMS AND EXAMINING THE CONSTITUTIONAL RIGHTS OF VICTIMS

ST. LOUIS, MO

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PROTECTING THE RIGHTS OF CRIME VICTIMS

SATURDAY, MAY 1, 1999

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION, FEDERALISM,
AND PROPERTY RIGHTS,
COMMITTEE ON THE JUDICIARY,
St. Louis, MO.

The subcommittee met at 9:30 a.m., at the Old Federal Courthouse, 11 North Fourth Street, St. Louis, MO, Hon. John Ashcroft (chairman of the subcommittee) presiding.

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

Senator ASHCROFT. Good morning. Welcome to our hearing on the important issue of protecting victims' rights. I look forward to this opportunity to explore the role that the Federal Government can have in safeguarding the rights of victims.

This is both an appropriate time and place to have such a discussion, and to examine the Constitutional rights of victims. It is an appropriate time because today is the last day of National Victims' Week, a week of each year that we set aside especially to try and think about serious ways that we could mitigate the victimization of individuals as it relates to criminal behavior.

The old courthouse is an appropriate place for this hearing because of the important role this particular Courthouse has played in the struggle for individual rights.

Back in Washington, DC, the Senate Judiciary Committee has been considering a proposed Constitutional amendment to put the rights of crime victims on at least equal footing, with the rights of those who commit crimes against the victims. That proposed amendment, Senate Joint Resolution 3, is cosponsored by Senator John Kyl of Arizona and Senator Diane Feinstein of California, and has been referred to the Constitution Subcommittee.

This is a hearing of the Constitution Subcommittee of the Senate Judiciary Committee. The proposal will give victims of violent crime a Federal Constitutional right to participate at critical stages in the criminal justice process. I plan to hold an executive business session of the Subcommittee the week of May 10 to consider the matter further.

Now, what executive business session of the Subcommittee means, is that the bill would be marked up. And when you mark up a bill, you consider proposed amendments, you make the final

adjustments of a particular bill or resolution for purposes of sending it to the full committee or ultimately to the floor of the Senate.

And I hope that today's field hearing will help inform that discussion, will help shape that final hearing with the thoughts and experiences of Americans outside Washington's Beltway.

I, personally, have long supported the recognition and protection of the rights of crime victims. For too long victims were the forgotten individuals in our criminal justice system. As the Warren Court expanded the rights of criminals well beyond their original conception, the rights of victims were all too frequently ignored. In the name of promoting individual rights, the Warren Court sided with criminal defendants over State prosecutors, leaving the individual rights of victims entirely out of the Court's calculus.

As a consequence, movements started in many states to guarantee victims of crime a place at the table of justice. Many States attempted to guarantee victims the essential components of "due process," notice of the proceedings affecting them, and an opportunity for victims to be heard, as well as the prosecutor and the defendant to be heard.

I had the privilege of supporting this process in Missouri during my time as Governor. It was during my time as Governor that I signed the law putting the Missouri Victims' Rights Constitutional Amendment on the ballot in this State. The measure was then approved overwhelmingly by the people of Missouri.

Unfortunately, these State efforts, while critically important, fail to provide sufficient protection for crime victims. When the Federal Constitutional rights created for criminal defendants clash with the statutory framework or the Constitution of any State, Federal judges impose and State judges are required to impose a Supremacy of the Federal Constitution's laws, and as a result, judges are always forced to set aside, in a conflict, the State law about victims' rights in favor of the Federal regard for the criminal defendant's rights.

The only way to ensure that the victims are treated with dignity and fairness is to enshrine the rights of victims in the Federal Constitution so that they won't be displaced in Federal courts or as a result of Federal rulings by Federal judges.

So, the proposed amendment that we are considering in Washington would do that; it would provide enforceable Federal rights for victims of violent crime to be present at trial and during sentencing, and to have input in parole decisions, and to receive notification of a prisoner's release or escape.

This last March, the full Judiciary Committee held a hearing on the proposed Constitutional Amendment in Washington, DC. At that time, I raised two concerns about the proposed amendment that I would like to explore at today's hearing:

First, I am concerned that the proposed amendment fails to provide any explicit rights to the victim when an executive commutes the sentence of a convicted criminal. At every other critical stage in the process from the trial, to sentencing, to release—the amendment guarantees victims the right to notice, and where appropriate, the right for an opportunity to be heard.

It just doesn't make sense to me to provide these important rights to victims when the court imposes the original sentence and

when the parole board considers deviating from the sentence, but to deny this same opportunity or right to them when an executive considers reducing the sentence with a stroke of his pen.

What good does it do to amend the Constitution to guarantee a right to be present at sentencing if the State retains the right to revisit and to revise the sentence without notice to the victims?

This is, in my judgment, an omission in the law that is worth rectifying. The recent experience of the Lawrence family has made clear the profound impact that a commutation can have on the victims of crime. I am grateful that members of the Lawrence family asked to testify at any victims' rights hearing to share their tragic personal experience, and I'm pleased as well, that representatives of the organization of Parents of Murdered Children, a victims advocacy group, have been able to join us as well.

I know that all of you have to wrestle with the serious problems that these tragedies revisit for you, but I appreciate the fact that you are willing to endure that kind of discomfort—to use a word that is inadequate to explain what is happening—in order to try and help avoid it for other people.

The second concern I have about the proposed Constitutional amendment we'll be addressing today is that it limits its important protection to the victims of violent crime. While violent crimes certainly bring home the need to protect victims, there are victims of nonviolent crimes, crimes like major elderly fraud where people lose their homes or where there are serious nonviolent affronts to individuals that deserve our protection as well.

The Warren Court certainly did not distinguish between violent and nonviolent crimes when it created the rights for criminals. That doesn't seem to be any better basis for making a distinction between violent and nonviolent rights of crime victims.

Indeed, the victims of some nonviolent crimes, such as fraud where criminals carefully select their victims to prey on the elderly or the ailing, are among the most deserving of protection. Victims of elder-fraud and identity theft should not be left unprotected.

Our second panel this morning will include the discussion of this issue, as well as the application of the proposed Constitutional amendment to cases of domestic crime.

The tragic experiences of crime victims underscore the need for vigorous protection of the rights and interests of individuals who have been the victims of criminal activity. Frankly, there are very few Government functions that are more important than helping the people who are victims of crimes. The proposed Constitutional amendment makes necessary strides to guarantee victims a seat at the table to ensure that the rights of criminal defendants are not the only individual rights considered by judges and parole officers.

However, there is still room for improvement, and I hope that today's hearing will help us move forward in an effort to improve this amendment that we ultimately hope to enshrine as a part of the Constitution of the United States. We can work together to provide crime victims with the full measure of protection they need and deserve.

PANEL CONSISTING OF CAROL ANGELBECK, DIRECTOR, LEWIS & CLARK CHAPTER, PARENTS OF MURDERED CHILDREN, TROY, MO; MATA WEBER, PARENT OF A MURDERED CHILD; ANITA AND BUCK LAWRENCE, PARENTS OF WILLIE LAWRENCE, BIG FORK, MT; DAVID LAWRENCE, UNCLE TO WILLIE LAWRENCE, SON OF LLOYD AND FRANKIE LAWRENCE, SHELL KNOB, MO; AND RETHA LAWRENCE, AUNT TO WILLIE LAWRENCE, DAUGHTER OF LLOYD AND FRANKIE LAWRENCE, SHELL KNOB, MO

STATEMENT OF CAROL ANGELBECK

Senator ASHCROFT. It is pleasing now for me to have the opportunity to call up the witnesses for our first panel.

Our first witness this morning is Carol Angelbeck from St. Charles, Mo. Ms. Angelbeck is the leader of the Lewis & Clark Chapter of Parents of Murdered Children.

Tragically, Ms. Angelbeck's daughter, Mindy Griffin, was murdered on September 30, 1995. She has been active on the issue of victims' rights ever since.

Ms. Angelbeck, thank you for coming to share your experiences with us, and we look forward to learning from you. Would you proceed with your testimony at this time.

Ms. ANGELBECK. Thank you, Senator Ashcroft. Thank you for allowing me to speak. When our 24-year-old daughter, Mindy Griffin, was found raped and strangled in her Lake St. Louis condominium on September 30, 1995——

Senator ASHCROFT. Can I interrupt you for a minute? Can staff do anything to elevate the sound? Are these for recording? These are not going to do anything then to help people in the room, so if you could, please speak up. It seems like people in the room are having trouble hearing, and I want people to hear your testimony. Pardon me. These will record the testimony, they are not amplifying your voice.

Ms. ANGELBECK. Do you want me to start over?

Senator ASHCROFT. Please do.

Ms. ANGELBECK. When our 24-year-old daughter, Mindy Griffin, was found raped and strangled in her Lake St. Louis condominium on September 30, 1995, by a complete stranger, my world stopped. I couldn't breathe, sleep, eat or do any of the normal, everyday tasks that we take for granted.

The pain that a mother or father feels when the loss of a child occurs, especially with the violence of rape or murder, it's like a scream starting in your very soul, and it moves like a wave in the ocean, getting larger and larger until your whole being is engulfed in this pain.

It is like watching my life from a distance. I have no idea how I made it through the wake and the funeral. I assume shock helps us make it through this hard time.

I remember seeing Mindy lying in a coffin for the first time; also, Mindy's body being removed from her condominium in a body bag. I just knew it couldn't be my daughter, the baby that I brought into this world. Then, the reality hits you in the face, the first meeting with the police to identify items of my daughter's.

The first time you are in court with the criminal justice system, everything is overwhelming. The same question keeps going through your mind: Why, God, why my daughter? I asked the police why that Sunday, and they said that Mindy was in the wrong place at the wrong time. I ask: Is being in your own home the wrong place at the wrong time? I do not think so.

We are no longer safe in our own home in our country. The city where Mindy lived had never had a homicide in the 20 years it was a city.

We went through 3 years of living hell, with our minds fluctuating between why Michael Shane Worthington picked our daughter, and why did she have to die alone, and such a violent death. Our coroner said in court that it takes 4 to 7 minutes to die by strangulation, and Michael Worthington testified in court that he strangled Mindy twice.

We went through three judges, many court delays caused by the defense attorneys. Joel Eisenstein was the first. He lost his license due to a Federal tax problem. Then came Rosenblum, Kessler, and Green. Mr. Green tried to make a deal with Judge Cundiff behind our back. That is the day I fully realized what our criminal justice was all about.

We never had any dealings with the court and lawyers, so it was quite a shock for us. St. Charles prosecuting attorney, Tim Braun, our Prosecutor Ross Buheler, and victims assistant Maggie Lipman, have been very, very helpful during the 3 years. They kept us informed of all the court hearings.

When Judge Cundiff offered a plea for life, we were told, and we requested a meeting with the judge. Mr. Braun and Mr. Buheler set up this hearing, and when I asked Judge Cundiff why he offered to plea for life instead of death, his exact words to me were he wanted the SOB to stand up in front of him and tell him what he did to my daughter. And I asked him: Did you look at a crime scene photo? Did you read the police reports? Did you read the coroner's reports? He answered "no" to all these questions. I said Judge Cundiff, you would know what he did to my daughter if you had done one of these three.

I realized again the games that are played between judges and attorneys. The Judge asked if we would like him to remove himself from the case, and I said "yes." This resulted in a 9-month delay. It is important for victims to be included in the justice system and to be able to work closely with the prosecutor attorney's office.

In Missouri, we have a good Victims Program. House bill 325, if passed, would allow victims to be in the courtroom even if they are to testify. Missouri victims' rights is supposed to do mandatory notification if anything changes with the inmate.

However, I believe it is just like the judges, the defense lawyers, and the prosecuting attorneys: They need to be educated also regarding victims' rights.

It is often easier for them not to get involved with the victims. I understand in a capital murder, the court or the prosecuting attorney's office is to give information for notifying families of any changes. However, as a victim myself, I feel I should also be responsible for giving this information to the Attorney General's office to make sure they have a way to contact us of any changes.

My husband and I are submitting an initiative petition to the Secretary of State for approval to form for the proposed Constitutional amendment, which would prohibit a Governor from being able to commute a death penalty. I feel when all appeals have been met, and no new evidence has been brought forward, there is absolutely no reason to detain or commute a death penalty.

Victims should have the right to testify in person before the jury, as the defendant is in the courtroom for the entire trial, and also have the right to take the stand in his own defense.

However, the Victims' Rights Amendment has to be enforced. We need to make the judges and attorneys aware of these rights. There has to be a way to ensure the victims' rights are carried out in all of our communities.

We have approximately 60 members of the Lewis & Clark Chapter of POMC. Some are new in grief; for others of us, it has been a few years. However, we all have times when we need to feel the need to lean on each other.

I believe we need to have much stronger laws for victims' rights. We must find ways to enforce the Victims' Rights Amendment, and to make sure all judges and attorneys—both prosecutors and defense lawyers—are aware and uphold the amendment to assure that the victims have the same rights as the defendant.

After all, we are the ones who will spend the rest of our life living without our loved one, and will have to find a place in our heart and soul to go on with life, and to help others who suffer the greatest tragedy in life, which is the murder of our loved one.

Thank you, very much.

Senator ASHCROFT. Thank you, Ms. Angelbeck.

I understand we also have a chapter leader of the St. Louis Chapter of the Parents of Murdered Children with us this morning, Ms. Mata Weber.

Ms. Weber, I would be very pleased for you to add anything that you would like to add to the record by virtue of remarks.

Please direct your voice to the microphone. We need for you to speak up.

STATEMENT OF MATA WEBER

Ms. WEBER. Thank you, very much, Senator, for being here, and for allowing us to be here and speak to you.

My name is Mata Weber, and I am a parent of a murdered child. My daughter, Karen, was 21 years old. She was murdered April 27, 1982, in Madison County. She was kidnaped from her place of business, driven 15 miles to the Livingston Reservoir where she was very cruelly murdered.

She left two children; they were two and three at the time, and how do you tell a child that their mother is never coming back? It's been the worst thing that has ever happened to me in my entire life. And if you talk to anyone who has had a loved one murdered, they will tell that also. You can have a death in the family, you can have a divorce, you can have illness. Nothing is as bad as having your child or your loved one murdered.

We were fortunate, if I can use that word, to say that we came in contact with very sensitive and kind police, District Attorney, support people from the Victims Service in Madison County. I

ended up with people's home telephone numbers. If I needed to call the prosecutor with a question, he was always there.

I don't know that the murder of my daughter made a difference with them or not, but they were very good to me. We went to trial right away. Supposedly, this man's attorney didn't believe he was guilty. We went to trial—Karen was murdered in April; we went to trial in September.

The jury found him guilty of first-degree murder, gave him 50 years, and when I walked out of the courtroom, I said to the prosecutor well, maybe now I can get on with my life. He said, oh, no, you're going to hear from this guy soon. I said what do you mean? His first appeal will be about 3 years from now.

Well, it was almost 3 years to the day. He won an appeal for a brand new trial. So we had to go through the same thing over again. It took a whole year because he was trying to say that the evidence that convicted him the first time, there was an error in it. So he sent the blood work to California, looking for some changes, something wrong with it.

At the end of the year, the judge said we've delayed long enough, we're going to go to trial. So his attorney approaches and asks for a plea bargain. Well, in 1982, we had no victims' rights, so most of us didn't know anything about what was going on in the justice system.

You could not tell the jury where this man had been for 3 years. You could not tell the jury that this is the second trial for the same offense for this man. Many things were not going to be allowed in the second time. So I agreed to a plea bargain: For 25 years, this man would stand in front of me and tell me that he murdered my daughter.

But in the state of Illinois at that particular time, 25 years didn't mean 25 years. You got 1 day off for every day you served in prison. So, in June 1994, this man walked out of prison, free and clear on a murder charge.

It's been the most horrible thing that has ever happened to me my entire life. I joined Parents of Murdered Children in 1985, one of the original people. I am now the chapter leader. We probably have spoken to somewhere between 500 and 1,000 people in all this period of time, listened to their stories.

People come to the meetings, sometimes just once. People come off and on, and some people are there every single month. They need some support; they need to know that every time they walk in that room, you know how they feel, you know what's going on.

All of you people in this room can tell Carol and I and the families—the Lawrence family, that you understand, and you know what we're going through, but you don't. You have to have a child or a loved one murdered to know what we're going through.

I'm here today for this Constitutional Amendment. We have to work harder on it. I'm not sure of the time, but I think it has been worked on now for 5 years. How much longer is this going to take to get us victims' rights on the Federal level? We don't want anything elaborate, we just want plain simple rights.

It's true right now, in the state of Missouri and Illinois, if a prisoner is paroled, they will contact you. But that's only if you contact the Department of Corrections first. How about if they send the

prisoner back and forth through the prison system? Nobody lets you know about that. You're not allowed to know if they've been transferred. We'd like to have that right, too. If they're going to release him, then they will let us know that. If they're going to commute his sentence, we don't have a right to know that, and we want to know.

All of us here are victims. Remember our faces, and try to work harder to get this amendment passed. Thank you, very much.

Senator ASHCROFT. Ms. Weber, I am sorry. I think I mispronounced your name.

Ms. WEBER. That's OK.

Senator ASHCROFT. It is Mata, and I did not mean to do that, and I do not know why I would have said that. I apologize. Thank you for being willing to come and help us this morning.

Our next witnesses are Buck and Anita Lawrence. The Lawrences are parents of Willie Lawrence, and live in Big Fork, MT. Buck is the son of Lloyd and Frankie Lawrence. I deeply appreciate their willingness to share their tragic story, and I call upon Anita to go first and Buck to go second.

And after that, I will call upon other members of the Lawrence family. Please pull that microphone close to you so that we can record what you are saying.

STATEMENT OF ANITA LAWRENCE

Ms. LAWRENCE. I'm glad I have the opportunity to testify here today to keep another family from going through what we've just had to go through.

My name is Anita Lawrence. I'm the mother of Willie Lawrence. Willie was killed on May 15, 1988. He was killed because, the killer's words, "He would have recognized me."

Willie was 19 and was paralyzed from the waist down from a car accident. Willie loved life, and when he was in the hospital, the nurses recommended that we further some kind of education for him to help other people because of his good outlook that he had and his good attitude about being paralyzed.

And he loved his grandparents, and on a particular occasion, he had went down to West Fork with his grandparents, and they just happened to be at the wrong place, I guess.

Senator ASHCROFT. Just take your time.

Ms. LAWRENCE. He left a note on the refrigerator that he was with his grandparents, and I have never seen him after that day, that morning I left home. He had spent the night down at West Fork with his grandparents, and Retha went down the next day at 2:20 on Sunday afternoon, and she found them. All had been murdered.

So she called Buck, and Buck looked around and told me and Linda that it was the worst nightmare that we could ever possibly think happened.

Then we went—after they arrested Mease, he went to trial. We attended every day. And one day, they asked us to step out because the guy that done the autopsy was going to do the testimony, and they told us that it was so bad that we didn't need to hear how he looked.

They never showed the photographs publicly; only Retha and the jury ever seen the photographs. The jury took a week, and they made the decision, and they give him the death penalty. We were happy with the verdict from the jury.

We expected the system to work for us. When it come time to put Darrell to death, then that would close the book. We could put it on the shelf and try to get on with our lives.

But as you know, that didn't happen, because Mr. Carnahan opened it back up for us when he commuted Darrell. And we found out on January 28. We were visiting friends, and we sat down to watch the evening news with our friends. They always watch Jeopardy. So we watched Jeopardy, and then we watched the evening news.

And then when the news come on, the first thing on the news was Mease walking through in his orange suit with a smile on his face. And then, they showed a picture of my mother-in-law and father-in-law and my son on their four-wheelers at the scene. We had never seen this picture. I had never seen Willie's body. I had never seen Willie in that condition, and it was a nightmare.

I had nightmares for a week afterwards. I would actually get up and have to go to the bathroom and throw up. I had to see a doctor, and take tranquilizers just to get me through it. I'd walk the floor. My emotions was just—I don't know how to explain it.

The other mothers here know how I felt. I think that if the Governor would have just took the time to look at the pictures and heard our side; if he had just talked to us, I think it would have made a difference on how the case would have come out.

If he would have just called us and gave us a warning to let us know what was going—what would be showed on TV, maybe we wouldn't have had to watch the news to find out—to see those.

At least if he would have called, I could have spoke in Willie's behalf. I feel that the Governor ignored the victims' side of this. It's like he don't care about us. He don't care about us as a family and what we've had to go through.

All we are asking is that the next family at least be given the chance to be heard from. That the decision of the Governor may not be changed; at least, we would be able to say that we tried to have justice done, rather than having to say we were left completely out of the process.

We had a promise from the judicial system that we thought was going to work with us that Darrell Mease was going to get the death penalty, and it's hard to live now with the fact that he's not. Thanks for letting me be here.

Senator ASHCROFT. Well, I thank you for working so hard to get through that, and while none of us can fully understand, we are at least aware in some measure of how difficult this is for you.

Mr. Lawrence.

STATEMENT OF BUCK LAWRENCE

Mr. LAWRENCE BUCK. Thank you, Senator, for allowing us to be in this hearing on the issues of victims' rights to be notified.

My name is Buck Lawrence, and my son Willie was murdered on May 1988. At the same time, my father and mother were also murdered. The guilty received a sentence of death from the jury that

heard the case. That sentence was upheld in every court hearing during the past 10 years. Then, with no forewarning to us, the killer's death sentence was commuted by the Governor of Missouri.

I sat through the trial. The testimony showed that early in the morning of May 15, 1988, Darrell Mease constructed a blind, and cut tree branches and placed them in a semi-circle near a large tree about 15 feet from a road leading from the Lawrence cabin to where the road forded a small creek. Mease hid in the blind for several hours.

About noon, my son and my parents approached Mease's position, riding four-wheel, all terrain vehicles. Willie was driving fast and was the first to pass Mease's position. Because Willie was paralyzed due to a 1986 car accident, his feet were tied to the handlebars by the shoe laces to keep them on the vehicle.

Some distance behind him and driving slower, were my parents Lloyd and Frankie. Both were riding on one vehicle. As my father came even with Mease's location, Mease shot him, then my mother, then my father again, using a shotgun loaded alternately with buckshot and slugs. Their vehicle went forward slowly and came to a stop in the creek.

At that point, Mease came out of the woods. By that time, my son Willie had turned around and was returning toward the scene. It was then that Mease shot Willie using a 12-gauge shotgun still alternately loaded with double-aught buckshots.

Mease then shot my mother, father, and son in the head at point-blank range. Mease took my father's wallet, a watch, and two rings. My father's money, $600, was removed from the wallet, and the wallet was hidden under a log.

Mease later confessed to all the killings, and stated he killed Willie because Willie would have recognized me, and I had to do him, too. Mease was given a death sentence by the jury, and that sentence was commuted by the Governor.

At this hearing today, I will tell you how I came to know about commutation, and how that hurt myself and my family. As Anita stated earlier, we were visiting some friends at their home in Montana on January 28, 1999. We all sat down to watch the evening news. Then, to our amazement, the news anchor announced that the death sentence of Mease had been commuted at the request of the Governor.

Then the news program showed photographs of the scene of the murder. We had never seen these photographs before. I was in shock. I really feared at the same time for my wife. She's in very bad health. I looked over at her, and it was just like when we had initially been told.

We just couldn't hardly think at all. We wondered how could this happen to us? I could only think why we would have not been notified of something like this. I couldn't believe the system had failed like that.

It was, like I said, bad as when we first learned of the news of the killings. It brought back so many emotions as when we were just told. I wish the Governor would have called. He wouldn't have wanted to do a commutation after he talked to us. I could have told him how many lives was destroyed, and that he was going to do this all over again if he did this.

What did we do to him for us to get this kind of treatment? It was a complete violation of us to have to hear of this without even getting a chance to voice our opinion. We're never going to be the same. Our intentions for this whole thing is to make sure no other family has to deal with these things.

It's terribly unfair for the Governor to rattle off as he did, but then to say he's exempt from it to do whatever he wants to do or to say, this law doesn't pertain to me. By not getting any notice beforehand, we were not even able to talk about this as a family before the numerous news media calls came into the family members.

The news media knew about it before we did. That's how we found out about it like we did, was through the news. I, for sure, thought the system would carry out whatever punishment was recommended by the jury. Whatever the jury said was something that was OK with us. We couldn't change their verdict.

But once the jury did give him the death sentence, we were required to go along with the punishment, and that should be carried out. We didn't think we had to do—to do anything to make the system work. During that time the punishment was imposed, the family endured a week-long trial. I attended that trial each day. We had to walk right by the killer. That was pretty rough.

What we're asking is that the next family not have to learn about it the way we did. We're now going to crave justice for the rest of our lives. And that's all. Thank you, Senator.

Senator ASHCROFT. Thank you, Anita, and thank you, Buck.

There are other members of the Lawrence family here today, David Lawrence and Retha Lawrence, and I would welcome their comments at this time, if they would like to add anything.

STATEMENT OF DAVID LAWRENCE

First of all, I'd like to thank you, Senator Ashcroft, for allowing me to appear up here today before this Committee. I wish the circumstances had not brought me here, but—I would prefer that just took its course, and I was back home in Shell Knob. But I feel it's necessary that I be here today.

Again, my name is David Lawrence. I'm the uncle to Willie Lawrence. Lloyd was my dad, and Frankie was my mom. On May 15, 1988, they were rudely murdered by Darrell Mease. This was the beginning of a very trying time for our family.

After sitting through a jury trial which I attended every day, I was accepting the jury's punishment. It really wouldn't have mattered at the time if Darrell Mease had received life in prison without parole, or the death sentence. Of course, everyone knows he received the death sentence.

For 10 years, we lived with that. We learned to live with the fact that he would be put to death. Then there was a turn of events, events that turned our family upside-down. And this is something that could have been avoided if someone would have made just one phone call to any of our members. I'd like to tell you how I heard about the situation of his being commuted.

I was called by a friend in Chicago, Diane Karmas. She asked me to turn the TV on to World News, the CNN Headline News. She said there was something on there about our mom and dad and Mease. While she was telling me these things, I'd turned the TV

on to CNN News, and sure enough, they were showing something on there about Mease and our folks.

Well, I have call waiting and there was a call coming in, so I asked Diane to hold on for a minute, and I took the call, and it was the media. They asked me how I felt, what my reaction was to the Governor's decision. And I told them, I said, you're going to have to wait a minute. I said, I'm just now hearing about.

At this time, I couldn't make a statement. In fact, everything just started spinning. I was confused as to what in the world is happening. And so—and another thing, how can this be going on?

So, when they said they was going to put him to death, again, all of a sudden, things were not going right. Again, it took us a long time to prepare mentally for what was going to take place, and we're talking a 10-year period here that we prepared ourselves for this.

And then whenever this come up, it actually puts you in shock; you don't know what to do. And one thing that does happen is that your mind starts going back to May 15, 1988. You're right back there on the crime scene again. And something like that will probably never leave a person.

Today, as we have tried talking about this, the emotions are still there after all these years. We continued on that afternoon. Diane got a hold of me around 2 o'clock, and from that point on, the phone continued to ring. We had calls coming in from California, New York, Texas, Chicago, Kansas City, St. Louis, many of the local stations, TV and radio. They was all trying to get a hold of us. The phone calls continued to come in until 10:40 that night, we took our last call.

And, of course, we had a pretty rough night, not much sleep. And at 5:40 that morning, the phone calls started coming in again, and they continued throughout the day. And so—I mean, this was—it was really pretty hard to deal with. You don't know, at first, what to say because of the shock that you've been put in.

But then, as the day goes on, your mind starts clearing up a little bit, so I did make a few statements throughout the day. But there is one point that I'd like to make: We lived in Shell Knob all of our lives. Linda and I have had the same phone number for 20 years. She's a postal employee; my sister works at the post office; I'm a part-time worker at the post office. All three of us have businesses in Shell Knob.

We are not hard people to get a hold of. So, all it would have taken would have been a simple phone call. And had we had that chance, if someone would have called us, we would have had the opportunity to talk together as a family , but we didn't have that chance.

It would be of great service to anyone in the same circumstances or similar circumstances not to have to go through the shock, the anxieties, the stress that something like this causes. It really turns your life upside down. And all it would have taken would have been one phone call to any one of the family members. Thank you, Senator.

Senator ASHCROFT. Thank you. Retha.

STATEMENT OF RETHA LAWRENCE

I would like to take this time to thank you, Senator Ashcroft, to listen to us, and I appreciate the time and effort that has been put forth here. I hope that something like this will never have to happen to anyone else. No one, no living human being should have to go through what we have gone through.

My name is Retha Lawrence. I'm the daughter of Frankie and Lloyd. Willie is my nephew, and I am the one that found them. About 2:20, May 15, 1988, I was on my way down to our vacation area. I'm a single person. I had a little schnauzer dog with me that day; her name was Colby.

And I stopped at the top of the hill and got an ice cream cone. I was driving down to our cabin. We had certain gates to go through; I went through. And I talked to Colby just like who she was, part of the family, you know.

I come around the corner, and when you come around the corner, it drops down into the creek, and I said there they are Colby. And I realized what I had found. I went on up, and then, within a split second, I knew what I had found.

My mother and my father on one four-wheeler, shot to death, and my nephew on another, shot to death.

It's funny what the mind will do, because at that point, from the tip of my toes, I felt heat. It went from the tip of my toes to the top of my head. I thought I was going to explode. I realized many years later that I had gotten out of that car that day, and I walked up to see my mother and my father.

They were shot in the face. My father's head was gone; my nephew Willie's face was gone. This man had killed my mother and my father and my nephew, point-blank range. He shot them in the face.

It has taken me 11 years, Mr. Ashcroft, to deal with this, and as you can see, it's not easy. I work for the Postal Service; I have for 11 years. I've lived in Shell Knob my whole life, 38 years.

My grandfather homesteaded there at the turn of the century. The Lawrences are well known, and have been since 1900. We are not a hard people to find. I have a commercial business, along with my brothers and sisters there. So a phone call would have helped.

And coming up to the commutation of Mr. Mease. The way I found out about it was through a phone call. Like I said, I'm a mail carrier, and I work many hours a day. I have my own commercial business, so I work several hours through the day. And when Mr. Mease was given this death sentence, I fully expected it to be carried out.

It wasn't something that the family would talk about. We wouldn't sit around and say this guy—oh, this guy is going to die; we're going to get justice. This was a painful subject. Our family did not wish to sit around and talk about it. It's just something that you don't do. But we prepared for 11 years that the sentence would be carried out.

I was a witness at the trial. I was the first witness on the stand, and I sat there for a week. The first day I went in, they give me some pictures of the crime scene. And we were standing up there prior to the trial, and they asked me to review these pictures. I did.

They handed me one picture of Willie, and they said Retha, can you identify this? And I remember distinctly, I shoved the picture back and I said, can you? So, I sat there at the trial, and they handed me these pictures again, asking me to identify Willie. As they passed me the pictures, they would take them and pass them to the jurors. There was 12 jurors there who had also sat there for a week.

And as the pictures was passed around, you could see they would break down. They would break down, and you could see that they was nauseated at what they had saw. So, they sat there for a week, my family sat there for a week, all the law enforcement, all the investigations that had gone on for a year. And the one day, Mr. Ashcroft, one man took all of this and put it in a waste can. And that's how we feel.

We feel that we're not that important. My family members were ambushed. My family was ambushed the day of the commutation. That's how we felt. When I learned of the commutation, I was on my mail route. I was training a sub, and my brother Dave called me on the cell phone. He said baby, where are you? I said, I'm at the end of my route, and I'll be coming in.

He said don't turn the radio on. He said there's something I've got to tell you. Are you alone? No, my sub is with me. So, he told me what had happened. And you just don't know what to do, you know. Here you have this person with you that's so meek and mild, my sub, and she said what's wrong?

And I just put my hand up, and I said I can't talk. And I felt, Mr. Ashcroft, that very same way. I felt the heat from my toes, and it went to the top of my head. Finally, I stopped the truck, and just got out. I wanted to run. But there really wasn't anyplace to go.

So, I came back and finished my route, and went to Dave's. And from that point, for 2 weeks after, I had someone with me for 24 hours. The media did call, and I said how did you get my number? How did you find me? She said it only took about 5 minutes to get a hold of you. I said oh, OK, I was just wondering because I had talked to the Governor's office, I guess, 1 day or 2 later—time kind of got away from me; I didn't really know.

But I had talked to the Governor's office, Mr. Bednar, I guess was his name, I don't really remember—and he wanted to apologize for not contacting us. He said, we've tried for several months to get a hold of you. Well, I'm sorry, but that's the lamest excuse I ever heard in my life.

Like I said before, we have commercial businesses. If he had wanted a hair cut, if he had wanted carpets cleaned or his mail delivered or even a bag of cotton candy, all he would have had to do was pick up a phone. We didn't get that, and I feel that we deserve that.

We deserve—here at this table, all of us deserve a little bit of respect on that matter. It's bad enough to have to lose a family member, three family members, any family members.

It's only human respect to be able to pick up a phone and be able to show a little bit of human compassion instead of saying, I didn't give it a second thought, Mr. Carnahan's words.

Well, we've given it a second thought. We've thought about it for 11 years. The book was almost closed; Mr. Mease was going to be

executed, and then for some unknown reason—who knows—it was all put in the trash.

Our wounds were opened again, and I hope and I pray that it doesn't take another 11 years for this to heal. As you can see, my family has gone through hell for the last 11 years, and I hope that through this meeting, this hearing, that no one will have to go through this again.

I would beg and pray that we could at least get a phone call. I'd like to thank you, Mr. Ashcroft.

Senator ASHCROFT. I'm sure that every person appreciates very much the fact that you would be willing to come and share with us what is clearly a serious pain for you, and your testimony just makes crystal clear the need to protect the rights of crime victims.

And the Lawrence family's testimony demonstrates the need to extend the protections in the proposed amendment to cover commutations. What I heard you say is that commutation needlessly had an effect that, because of the surprise of it, was aggravated and intensified.

This is one of the issues that we'll take up when we mark up this Bill at the executive business session committee on the week of May 10. I have discussed, particularly, the commutation matter, broadening the amendment to cover commutations with the sponsors and Senator Kyl.

And Senator Kyl has indicated to me that he believes that it should be broadened at the Federal level. And, of course, at the Federal level it would cover these types of situations. What is important about this hearing today is that when Senator Kyl and I explain the need to extend the provisions of the proposed amendment to commutations, your testimony, your circumstances will support that effort and in real life terms, will help Senators to understand why it's important to have that extension.

So, we will try and keep you posted about the progress that is made on this matter, and we will work on the development of this improvement to the proposal, which I think in large measure has been advanced by your own appearance and your testimony.

The hearing will now take a short break, and I will escort the first panel from the chamber, if they choose to leave. I would ask that as I am doing that, the second panel assemble and begin to get ready for the testimony when we reconvene in about 5 minutes.

[Recess.]

Senator ASHCROFT. Thank you for helping reconvene the hearing. On our second panel, it's my pleasure to introduce a group of notable individuals with direct awareness and knowledge of this topic whose testimony should be valuable to us in constructing and developing the improvements and implementation of our effort to place before America an opportunity to ratify an amendment regarding victim's rights.

Our first witness on this panel is Darrell Ashlock, who serves as president of the Missouri Victim Assistance Network, and also serves as Director of the Victim Services in Buchanan County over on the western side of the State.

Mr. Ashlock was active in the drive to pass the Victims' Rights Amendment, and has been helpful to me in my office in dealing with crime and victim's issues. We're grateful to you for your as-

sistance, and we look forward to your testimony in this respect. Mr. Ashlock.

PANEL CONSISTING OF DARRELL ASHLOCK, PRESIDENT, MISSOURI VICTIMS' ASSISTANCE NETWORK, JEFFERSON CITY, MO; KIM LeBARON, EXECUTIVE DIRECTOR, VICTIMS SUPPORT SERVICES, KIRKSVILLE, MO; JOE TAYLOR, PRESIDENT OF THE BOARD, AID FOR VICTIMS OF CRIME, ST. LOUIS, MO; JOE BEDNAR, LEGAL COUNSEL, OFFICE OF THE GOVERNOR, JEFFERSON CITY, MO; PAUL CASSELL, PROFESSOR OF LAW, UNIVERSITY OF UTAH, COLLEGE OF LAW, SALT LAKE CITY, UT

STATEMENT OF DARRELL ASHLOCK

Mr. ASHLOCK. The first thing I'd like to say is, my heart goes out to those folks that went before us, and I've been fortunate that I've never had to experience that type of pain, and pray that those others who haven't experienced it don't have to go through that. And my heart certainly goes out to those folks.

I appreciate this opportunity to testify on this important issue. As you said, I am president of the Missouri's Victims Assistance Network here in Missouri. An acronym for that is MoVA, and we'll use that from time to time. I was the founding Board member, and served as cochairperson of MoVA when it was organized in 1984, so we've been around awhile.

MoVA is a statewide organization, and its membership represents 105 victim service agencies, including the State Prosecuting Attorney's offices, law enforcement, rape crisis centers, domestic violence shelters, Mothers Against Drunk Drivers, Parents of Murdered Children, and general not-for-profit agencies.

MoVA members drafted the Missouri's Crime Victims' Constitutional Amendment, which went before the Missouri legislature and was passed in 1991. In 1992, the voters of Missouri passed the amendment by the largest majority of any amendment in the history of the State of Missouri: 86 percent. So, it's a very important issue to the voters in the State of Missouri.

And I feel if we get the right amendment before the U.S. Congress, we'll have an equal passage by the ratification of the States. I understand that Senate Joint Resolution—we'll refer to as the Constitutional Amendment for Crime Victims—is pending before the Senate.

This testimony is meant to inform you that MoVA does not support that amendment in its current form. We feel that S.J. Res. 3 is too exclusive as currently written. Those who want to limit this amendment to only those who are victims of violent crime, we feel those folks are well-meaning, and we feel probably some of the rationale is similar to what we heard in the State of Missouri, that "An overall inclusive amendment would inundate the criminal justice system, slow down the cases, thus further harming crime victims."

I haven't been able to find an accurate source in the State of Missouri to accurately reflect all the crime victims. I went to the publication put out by the Missouri Highway Patrol which just lists index crimes, and index crimes only include eight crimes, but I

kind of wanted to give you a feel for those crimes. Like I said they still leave out a lot of crimes.

The index crimes include only eight crimes: murder, forcible rape, robbery, aggravated assault, burglary, theft, motor vehicle, and arson. As you can tell by the list, it includes only crimes in which there are victims, and even that list is limited.

There were 245,909 total index crimes in 1997, which is the latest year that's available for those figures. Violent crimes accounted for 28,962 or roughly 11.7 percent of all crimes in the State of Missouri.

Therefore, the victims of 11.7 percent of all crimes would have the rights granted under S.J. Res. 3 as it's currently written. The other 88.3 percent would not have those rights, those rights including: reasonable notice of, and not to be excluded from any public proceedings relating to the crime; the right to be heard and present and submit a statement at all such proceedings to determine a conditional release from custody, acceptance of a negotiated plea or sentence;

the foregoing rights of parole hearings that is not public to the extent that these rights are afforded the convicted offender; to reasonable notice of a release or escape from custody related to crime; to consideration of interest of the victim that any trial be free from unreasonable delay; to an order of restitution from the convicted offender; and to consideration for the safety of the victim when determining any conditionable release from custody relating to the crime.

That's what's currently in S.J. Res. 3. But, again, it's limited only to the victims of violent crime.

Let me share with you some of Missouri's experience since our Crime Victims' Constitutional Amendment passed, and our Crime Victims' Constitutional Amendment isn't all inclusive. It's noted as being one of the stronger Constitutional amendments in the United States.

Let me start off by saying my position as president of MoVA is a volunteer position. My full-time position, the one in which I make my living at, is Director of the Victim/Witness Services for the Buchanan County Prosecuting Attorney's Office, which is the state's attorney.

My staff viewed all the cases prosecuted by our office, and I'll share some of those results with you. Thirty-nine percent of all cases filed by our office involve an identifiable victim other than the State of Missouri. Thirty-nine percent of all cases filed by our office have identifiable victims other than the State of Missouri.

Victims representing 13.6 percent of all cases filed participate by requesting to be informed or be present at court proceedings. OK, of all cases, only 13.6 percent request the rights or are required under ours, because if it's a case that's a dangerous felony, which is a more serious violent crime, they are to be afforded those rights automatically.

Senator ASHCROFT. May I just ask, is it 13.6 percent of the 39 percent?

Mr. ASHLOCK. No, it's 13.6 of all the crimes.

Senator ASHCROFT. So, it's about a third of the crimes with which you can associate a victim?

Mr. ASHLOCK. Yes. About a third of the crimes in which we file charges, about a third of them have victims other than the State of Missouri

Senator ASHCROFT. But I mean, is it 13 percent of the 39 percent?

Mr. ASHLOCK. No, 13 percent of——

Senator ASHCROFT. 13 is a third of 39, that's what you are saying?

Mr. ASHLOCK. That's right.

By Missouri statute, notification is mandated to all crime victims—all victims of what we call dangerous felonies. Violent crime requiring crime notification in our office account for only 5 percent of the crimes that are filed by our office. Again, that's 100 percent of all crimes that are filed.

You will note in my written testimony, I've included a copy of a checkoff form that we send to all crime victims when cases are filed, to make it easy on them if they want to be notified, if they want to be present and so on. All they have to do is check this off, and we will provide a stamped, self-addressed envelope for them to send it back in.

We make it as easy as possible for them, and still we're at that 13.6 percent who elect to participate. I've surveyed other prosecutors' offices in the State, and the highest percentage that I can find of any prosecutor's office was about 20 percent of the victims who want to participate in the system at that time.

Today is the last day of National Victims' Rights Week. This year's theme is "Victims Voice Is Silent No More." If S.J, Res. 3 is passed in its current form, a vast majority of crime victims will continue to be kept silent by the very justice system which is supposed to act in their behalf.

The second argument that extending victim rights will slow down the system is also false. Our experience has shown that those 13.6 percent to 20 percent of all crime victims choosing to participate, as long as they have been properly notified has not slowed down our system at all. And I kind of wish we had more witnesses here. We could bring in some of our judges to testify to that, too. It does not slow down the system.

Another issue MoVA feels the Subcommittee should consider, which is lacking in S.J. Res. 3, is recourse. MoVA's amendment also lacks recourses. Large jurisdictions in Missouri have implemented, if not all, a majority of the Crime Victims' Constitutional amendment. But there are still some individual prosecutors, judges, and juvenile courts that ignore the amendment that the statutes mandate in the State of Missouri. The worst offenders are the third and fourth class counties, the rural areas.

In 1997, MoVA, with the assistance of the Department of Corrections, conducted a survey of victims of violent crime, and the status of victims' participation in the criminal justice system since the passage of Crime Victims' Constitutional Amendment. Of all those surveyed—all those surveyed were victims of violent crime. The results of this survey indicated that the change since the implementation of the Constitutional Amendment was so slight that the researchers could not rule out that it occurred only by chance.

Until Missouri enacts legislative recourse measures, criminal justice officials who currently deny the Constitutional rights will continue to do so. Do not make the same mistake that we did here in Missouri, by not including recourse for crime victims.

It's cruel to tell crime victims they have rights, but to continue to deny them. I've also included as an attachment a copy of the research from our office so you can see the type of crimes and so on that we deal with. Thank you.

Senator ASHCROFT. Well, thank you very much for your contribution to our awareness of this issue in two areas: one, in terms of the breadth of the criminal activity covered, and second, in terms of the enforceability of any item, which you call recourse, which I think is appropriate.

Next, we have Kim LeBaron, who is executive director of the Victims Support Services in Kirksville, MO. Her organization provides assistance to victims of domestic abuse. I'm pleased to have Ms. LeBaron here today, and to welcome her insights into how we should be dealing with victims' rights in the context of domestic abuse.

Ms. LeBaron.

STATEMENT OF KIM LEBARON

Ms. LEBARON. Thank you, Senator. I'm speaking to you today as a person who has dealt with the effects of domestic violence for all of her life. I grew up in a family where domestic violence was a daily part of our living. I am very lucky because domestic violence was not a generational part of my family history.

My mother had the knowledge to impart to me that living with the fear our family lived with was not my only choice. I have not repeated or continued the cycle of violence in my own family, but I have chosen this to be my life's work.

I work at Victims Support Services in Kirksville, MO. Our agency, located in the northeast part of the State, serves seven rural counties, and has been serving all victims of violent crime, including domestic violence and sexual assault, for over 10 years.

Every single day, I talk with women and children about their lives and living in fear, living with that fear in their own homes. I think all of us would agree, the one place you should feel safest and most cared for is in our own homes. In our society, we have come to recognize that domestic violence is something that can happen to anyone. It knows no discrimination.

What we haven't achieved is a consistent way for these same victims to have a voice that is heard. Victims have voices that can offer us much needed insight to changes that must happen within our system. They want to feel that justice will have a positive effect on their situation.

I look at what we're doing in northeast Missouri, and I know that it is not enough. We have many supporters of our program, both from the professional sector and private citizens. This is not enough. We must have laws that protect victims of violent crimes and assure them they will receive fair and equitable treatment under Federal law. Laws that will not make them feel like they're the least important part of the criminal justice system.

I have yet to meet a victim of violent crime who ever expected to find themselves with this label. This also includes every victim of domestic violence. Even when I interview women who have long histories of violence, where they can tell about several generations of abuse, they will tell me that they truly believed their life would be different.

They are disappointed by their reality. I feel it is imperative that we treat all crime victims consistently with a professional and caring approach. No matter what the crime is, including domestic violence, no one deserves or asks to be a victim.

I recently worked with a victim who applied for and received an ex parte order against her husband. She requested the city marshal to accompany her to her home to retrieve some uniforms so she could continue to work. When they arrived at her home, they found the husband there.

He proceeded to threaten to kill her and to kill every other person in the shelter to get their daughter back. He went into great detail about the plan he wanted to implement. The city marshal told the victim he didn't know what to do about the threats because he didn't have much experience with these types of situations.

Fortunately, a State highway patrol officer stopped at the scene and arrested the man for violation of his ex parte order and assault. He then was transported to a county jail where he was released until Wednesday because the judge was out of town. This happened on a Saturday evening.

This man who was so angry, who threatened to kill several people in the presence of two law enforcement officers, was immediately released from custody and told to wait until Wednesday to be officially arrested. This caused us to move this client to another shelter 90 miles away, and hire two off-duty police officers to stay in the shelter for protection of our other clients and staff.

Then, on the day there should have been a hearing regarding this violation and assault charge, no witnesses were subpoenaed, including our client. I went to court to observe, and it was quite clear the intent was just to dismiss this case.

There was no notification given to this victim regarding any part of this criminal justice process, even though the prosecutor was notified in writing that this victim wanted to be notified. This batterer received a very clear message to continue conducting his business as usual.

I live in a rural area where everybody knows everybody, so there often is much disbelief that John Doe could hurt his family, or there is a general laissez faire attitude with people saying things like oh, he can't help it, he's just like his dad. They're reluctant to agree to testify during prosecution because everybody knows nothing will happen.

In my city, fewer than 25 percent of domestic cases where charges were brought were disposed of in 1998. In the majority of these cases, the defendant received a suspended imposition of sentence or 1 to 2 years of unsupervised probation. The most severe sentence received was 30 days incarceration in the county jail.

The message that domestic violence is a violent crime must be clear to all people and the remedies available under the law be afforded to all victims, even when they live in rural areas. They must

be treated consistently with laws that will ensure all levels of our judicial system will respond in a timely and just manner.

I not only believe that we need the Constitutional amendment, but it must also contain the proper language to ensure victims that if they are not being afforded their rights in the judicial system, there is a process to hold those who violate their rights accountable for their indifference. I would urge you to consider that a very clear penalty be included so victims who are revictimized will be offered relief.

In closing, I find it difficult to find words that are powerful enough to convey to you how strongly victims feel about their need to be treated fairly and consistently within the judicial system. Just as important, they need to be treated with the dignity and respect that would be afforded to them by this Constitutional amendment. Thank you.

Senator ASHCROFT. Well, thank you very much. The ideals of fairness and consistency I think are very important in the sense that we all want to be able to understand that we are part of the rule of law, and that it is not capricious. Any disparity between rural and urban settings would be similarly unnerving.

Thank you for your testimony.

Joe Taylor is the president of the Board of Aid for Victims of Crime. He's a partner of the Taylor and Taylor law firm, which represents victims of crime.

Aid to Victims of Crime is one of the oldest not-for-profit organizations helping victims in the Nation, and we're grateful for your appearance here. Thank you for your willingness to come and help us better understand how we might address these issues.

STATEMENT OF JOE TAYLOR

Mr. TAYLOR. Thank you, Senator.

I'm proud to be here this morning representing an institution that has helped thousands of people regain dignity they lost due to a criminal act.

Aid For Victims of Crime was the first victims assistance program founded in this country. Carol Vittert, our founder and current Board member, began what is now known as Aid for Victims of Crime by gathering daily police reports from local law enforcement. She and other volunteers would go knock on the doors of crime victims, reaching out to their needs.

Aid for Victims of Crime now plays an integral role in victims services locally, regionally, State, and nationwide. Each year AVC serves between 1,500 and 2,000 victims of crime in the St. Louis area. The range of services available is so broad, and often requiring improvisation, they cannot be sufficiently cataloged in this forum.

However, by way of example, I would like to describe how AVC responded to two victims who called the agency for help. These illustrations are relevant to the hearing this morning as they involve victims of nonviolent crime.

A woman in her 30's, a professional woman, contacted AVC after her home was burglarized. AVC staff went to her house with plywood and nails to temporarily secure the broken window through

which the intruder entered. Staff noticed that the victim was physically shaking as if she had been victimized by violent crime.

AVC staff offered her services as if she had been victimized by violent crime. The victim told Ed Stout, our executive director, that this invasion was the closest thing to her being raped as she ever could imagine experiencing.

In another instance, an educated woman and neighborhood leader from North St. Louis was cheated out of several thousand dollars by two men who talked her into investing in a "no-lose" situation. She almost immediately realized she had been deceived and reported the crime. During the ensuing criminal prosecution, Aid for Victims of Crime staff pursued restitution on her behalf.

The victim did not know she might be entitled to such a remedy, but due to the embarrassment and guilt she felt for allowing herself to be so deceived, she probably would have never asked to what, if anything, she was entitled.

Regionally, AVC staff initiated and now actively correlates a three-county crises response team that organized services of 20 agencies when responding to crises in the workplace, in neighborhoods, and in corporations of all sizes. This crisis response team supplied valuable services to help our community, the campus of Washington University, and family members deal with the trauma of Melissa Aptman's brutal murder and her friend's abduction and unspeakable attack in May 1995.

The same crisis response team also responded to the suffering of St. Louis employees of TWA in the aftermath of the crash of Flight 800 en route to Paris in 1996.

Statewide, AVC participated and is active in the MoVA, the Missouri Victims' Assistance Network, which has been instrumental in making victims part of the criminal justice system, rather than an appendage to the system. MoVA, as was already testified to, was integral in supporting and passing the 1992 amendment to the Missouri Constitution guaranteeing rights in this State.

Finally, nationally, AVC have been active and well represented on the Board of NOVA, the National Organization for Victims' Assistance. NOVA's accomplishments are just too numerous to address here today.

I would like to recognize Ed Stout, our Executive Director, for his never-ending efforts to restore dignity to all those victimized by crime.

Senator ASHCROFT. Is Mr. Stout here?

Mr. TAYLOR. He is not able to be with us today. He is out of town.

Senator ASHCROFT. If he were, I would have asked him to stand up.

Mr. TAYLOR. Right. If asked, few, if any, would report being against victims' rights in theory. There are many, however, that oppose extending Constitutionally recognized rights to victims of nonviolent crimes for fear that the already overloaded criminal justice system would grind to a halt if these victims were allowed to participate and to receive reasonable notice of criminal proceedings.

This attitude is often heard by victims of nonviolent crimes as the system telling them, of course we support victims' rights, as long as they don't get in our way. The uncomfortable truth, how-

ever, is that this attitude adds to the trauma already suffered by the victim. All too often, the victims of nonviolent crime suffer the same type and intensity of trauma as those victimized by rape, robbery, and assault.

These victims will perceive the crime against them as life-threatening. Burglaries, for instance, can shatter the family fabric. Their victims are infused with feelings of vulnerability and fear for years beyond the actual crime. "What if" questions overflow their thoughts. What if my family had returned home too early? What if they come back?

How many times have we heard of the devastation caused by the likes of telemarketing fraud committed against our elderly, as you spoke of earlier? These crimes go far beyond the financial losses alone.

The victims' fears must be heard over those whose fears are simply an inconvenience to our justice system. Fundamental rights do not come free. Ask anyone who has ever fought for the right to vote or for the right to simply be free of oppression. Rights do not come without pain and sacrifice.

Moreover, those anxious individuals opposed to guaranteeing the rights of all victims are not considering the success in those States that have. Reports from the States where victims' rights amendments have been implemented show that the system is not bogged down as a result. And, in fact, the system may become more efficient because those victims whose rights are being honored are inherently going to be more cooperative and responsive to the system's needs.

A constitutional amendment is not taken lightly by our Government or by those governed. Victims of all crimes have earned basic fundamental rights, and victims of nonviolent crime represent over 80 percent of all crime victims.

If we only guarantee those rights for the vast minority of crime victims, we will only engender a greater lack of respect for the criminal judicial system by those precluded from participation. Thank you.

Senator ASHCROFT. Thank you very much.

Senator ASHCROFT. Our next witness is Joseph Bednar. Mr. Bednar is the chief counsel for the Governor of Missouri.

STATEMENT OF JOSEPH BEDNAR

Mr. BEDNAR. Good morning, and thank you, Senator, for inviting me to testify.

My name is Joe Bednar, chief counsel for Governor Mel Carnahan. Before that I was an attorney in private practice. I'm also the former chief assistant prosecutor in Jackson County. In recent news accounts, your spokesman has raised a question about the status of Missouri victims' rights laws.

I'm pleased to be here today to update you and your committee on the status of our law. It is important to remember that for every crime, there is a victim who will feel the crime's impact for a long time to come. Governor Carnahan recognizes the importance with the aftermath of crime and with helping victims recover. Working with the law enforcement community and the advocates for victims,

we have made a tremendous amount of progress on the behalf of crime victims.

In 1993, the Governor supported and signed into law House bill 476 and Senate bill 19. House bill 476 increases protection for victims of stalking and makes stalking a crime. Senate bill 19 expands the rights of victims, including the right to more information: About the crime, about charges filed against the offender, hearing dates, court dates, sentencing and probation revocation hearings, and commutation.

In 1994, the Governor supported and signed into law Senate bill 554, which extended victims' rights to include the rights to be notified and present at each and every phase of parole hearings. In 1995, House bill 174 and House bill 232 were signed and supported by the Governor. House bill 174 increased the amount a crime victim could receive for counseling.

House bill 232 requires the courts of Missouri to honor adult protective orders issued in other States and registered in Missouri. The Governor also supported and signed House bill 104 in 1997, which expanded the statute of limitations for sexual offenses against people under the age of 18 to 10 years after the victim reaches the age of 18. In 1998, the Governor supported and signed House bill 1405, House bill 1918, and Senate bill 722.

House bill 1405 mandates that the Attorney General inform victims of sexually violent offenses of all actions regarding civil commitments of sexually violent predators. Senate bill 722 prohibits insurers from discriminating against victims of domestic violence. House bill 1918 establishes a minimum sentence for persons proven to be prior or persistent domestic violent offenders, and allows the admissions of prior convictions into order to demonstrate a history or pattern of domestic violence.

Governor Carnahan has also taken administrative actions that has focused much needed attention on victims' rights. Under the Governor's direction, the office of Victims' Service Coordinator to provide services, notification and information to victims of crime in Missouri. And even though no action is required by law for victims of crimes that occurred prior to 1991, our Corrections Department went through 21,000 of those pre-1991 files and contacted the prosecuting attorneys across the State to seek information on those victims.

Ours is one of only three States that actively seeks out victim information. Legally, victims of dangerous felons are supposed to be notified of certain information regarding offenders. However, the law allows States to play a rather passive role in how it obtains the names of the victims. In Missouri, we actively seek to identify victims by sending inquiry letters to prosecutors.

This year, the Carnahan administration invested the largest amount of funds in our States' history for services that support crime victims. That funding represents a 230 percent increase since 1992. Also, the Carnahan administration was the first to dedicate general revenue funds for services for domestic violence victims, funds that you vetoed during your term.

In fact, our efforts to assist the families of crime victims date back to January 1993, when the Board of Probation and Parole made the first effort to contact the family members of two homicide

victims. You may not recall the details, Senator, but you commuted the sentences of the defendants in those two cases, yet made no effort to contact the families of those victims. You and your staff are quick to point out our deficiencies in this area, but you did the exact same thing as Governor.

The only difference, Senator, is that we made the effort. We didn't know they existed. We tried to contact them. We tried to find out if there were relatives; we were told there were none. It was a human error. I say this not because I want to be here to take you or anyone else to task for this. We are all imperfect human beings.

I say it because it's obvious that you created this forum not so much to learn about the needs of crime victims, but for the purpose of exploring a controversial decision and related human error by the Carnahan administration to further your own reelection campaign. I believe it is not only unjust and inappropriate, but it is also a disservice to the cause of crime victims' rights, which I personally worked on for 26 years and continue to work on today.

Let me address the Mease and Lawrence case. Specifically, Governor Carnahan believes very strongly that victims' families need to be notified, and they were not, in this instance, solely because of human error, not because the law didn't require it.

On behalf of the Governor, I apologized to the family members I could reach the day after the commutation, and I apologize again today. This is especially troubling to me. As a former prosecutor, I was an advocate for the victims of crime, and I made victims advocacy a priority during my time in Jackson County. We deeply regret the mistake and are committed to ensuring that it never happens again. Thank you for the opportunity to testify.

Senator ASHCROFT. Our next witness is Professor Cassell, Professor of Law at the University of Utah College of Law, and very active in working for Federal protection for victims. He has worked closely with Senators Kyl and Feinstein on their proposed Amendment, and has testified numerous times in support of the Amendment.

Professor Cassell is testifying here at the request of both Senator Kyl of Arizona and of me, and I would like to welcome Professor Cassell to the St. Louis area and welcome his testimony at this time.

STATEMENT OF PAUL CASSELL

Mr. CASSELL. Thank you, Mr. Chairman. I am pleased to be here on behalf of the National Victims' Constitutional Network, which is an umbrella organization of victims' groups around the country that are concerned with the Constitutional protection of victims' rights.

Senate Joint Resolution 3 is strongly supported by the great bulk of network's members, including some of the Nation's oldest and most prominent crime victims organizations; members such as the National Organization for Victims' Assistance, Mothers Against Drunk Driving, and Parents of Murdered Children.

Now, in possible contrast to the previous speaker, we very much appreciate the Chairman setting up this forum, particularly in this historic building, and indeed on this very day. May 1, as the Sen-

ator may know, is Law Day, the day Congress has set aside to reflect on the way in which our legal system works.

And today, unfortunately, while our Federal Constitution contains numerous rights for those who commit acts of violence, it contains no rights for those who have been victimized. Around the country, there is a growing appreciation of that imbalance and the need to remedy it. We need to do something—or do something for victims of crimes.

Thirty-one States, including the State of Missouri, have amended their own State constitutions to protect the rights of crime victims, and every State has adopted statutes extending some form of protection to victims. Now, victim participation in the criminal justice process serves a number of important interests: Crime victims can provide criminal justice decisionmakers with important information about the full extent of the damage from criminal violence.

Victim participation can often have important cathartic effect, helping victims move forward with their lives after the devastation caused by crime. Anita Lawrence, for example, I thought this morning put it well when she talked about how proper participation can help victims close the book on one chapter in their lives and move forward.

And finally, allowing victims to participate is consistent with our ideas of fundamental justice. As President Clinton put it in endorsing the Federal Victims' Rights Amendment, when someone is a victim, he or she should be at the center of the criminal justice process, not on the outside looking in.

Now, one question about victim participation that has apparently arisen recently is the extent to which crime victims should participate in and be notified of executive clemency decisions. I don't want to comment on the specifics of any commutation decision, but instead try and step back and provide a more objective view as to how victims should be integrated into the clemency process.

I think earlier this morning, Chairman Ashcroft, you hit the nail on the head when you said that given the widespread recognition of the importance of victim participation in earlier stages of the process, that it makes no sense to deny them the opportunity to be involved at the ultimate step in the process. Throughout this Nation, States have tried to make—ensure that victims can have a say before a defendant is released on bail or given an unduly lenient plea bargain.

States have also tried to make sure victims can attend trials to see that justice is being served. And victims throughout the country now have an opportunity to provide a victim impact statement when an offender is sentenced or when a possible parole is being considered. Given all these efforts to involve victims from the start of the criminal justice process, it makes no sense to exclude them from the last step, a Governor's decision to grant or not to grant a prisoner's application for clemency.

Victims deserve the right to be heard at this stage, not to have a veto over the Governor's decision, but rather to provide a voice, to provide information about the full harm of the crime that the Governor can consider in reaching his or her decision. Similarly, victims deserve to be notified of any decision the Governor might reach so that they are not surprised and traumatized by unexpect-

edly learning of a commutation. No family should be ambushed by a decision, as Retha Lawrence so eloquently put it this morning.

Now, many States, particularly in recent years, have passed statutes that requiring that victims be informed of clemency applications, and be given a fair opportunity to comment on them. Along these lines, it may well be desirable to amend Senate Joint Resolution 3 to extend these rights to victims, and my prepared testimony providing some possible language for doing just that.

Senate Joint Resolution 3 already contains an extensive list of rights for crime victims, including the right to be notified of court and parole proceedings, and to be heard at appropriate points in the process. These are rights not to be victimized again through the process by which Government officials prosecute, punish, and release accused and convicted offenders.

These are the very kinds of rights with which our Constitution is typically and properly concerned. Rights of individuals to participation in all those governmental processes that strongly affect their lives. Now as you would expect with the proposed Federal Constitutional Amendment, Senate Joint Resolution 3 is a product of consensus; it's crafted to try to attract the super majority that will be necessary in Congress to send the measure to the States.

For example, Senate Joint Resolution 3 extends rights to victims of crimes of violence a narrower formulation than when first introduced. It is important to understand that crimes of violence, as used in Senate Joint Resolution 3, is a broad phrase that includes crimes with the potential for violence. For example, courts have frequently held that burglaries of homes are crimes of violence because of the potential for armed or dangerous conflict.

And thus, Senate Joint Resolution 3 would cover one of the situations that Mr. Taylor talked about earlier this morning, and also, Mr. Ashlock's numbers may need to be revised slightly to reflect the definition used in Senate Joint Resolution 3 is somewhat broader than narrower definitions used by other criminal justice agencies. Now, of course, in considering this issue, we cannot rely simply on numbers. Some crimes have more serious consequences than others, as the testimony from Carol Angelbeck, Mata Weber, and the Lawrence family this morning eloquently demonstrated. Violent crimes cover the vast bulk of cases in which victims' rights seriously are at issue.

The National Organization for Victims' Assistance, mentioned by Mr. Taylor, mentioned, for example, has estimated for of the thousands of calls that come in to its toll free 800-number every year, more than 95 percent are from victims of violence. Now to be sure, it would be desirable to extend Senate Joint Resolution 3 that extra 5 percent to cover those crimes beyond those of violence.

But here it's important not to let the perfect become the enemy of the good. It appears that insisting on coverage of all crimes will destroy the consensus that surrounds Senate Joint Resolution 3 and prevent the passage of any Constitutional amendment.

The better course, obviously, is to pass Senate Joint Resolution 3, which will protect the rights of violent crime victims and improve the climate in the criminal justice system for all victims. Thank you, Mr. Chairman.

[The prepared statement of Mr. Cassell follows:]

PREPARED STATEMENT OF PAUL G. CASSELL

Mr. Chairman and Distinguished Members of the Committee, I am pleased to be here today on behalf of the National Victims' Constitutional Amendment Network to testify in support of Senate Joint Resolution No. 3, the proposed Victims' Rights Amendment to the United States Constitution. The Amendment is strongly supported by the National Victims Constitutional Amendment Network, and the great bulk of the Network's members — including many of the nation's largest and most prominent crime victims' organizations such as the National Organization for Victim Assistance (NOVA), Mother's Against Drunk Driving (MADD), and Parents of Murdered Children (POMC). I have previously provided general testimony to the Senate Judiciary Committee about why the Victims' Rights Amendment is a necessary step to for protecting crime victims,[1] and today will attempt to narrow my focus somewhat to issues that are apparently of specific interest to the subcommittee.

It is fitting that this hearing is being held on May 1 — Law Day — a day set aside by Act of Congress to reflect on our judicial system and to remember our legal liberties and legal protection of our rights. It is a day to celebrate the legal heritage of our country and our Constitution. But at the same time, it is a day for considering how our the legal system can be improved to protect the rights of *all* the people. Sadly, while our Constitution today has ample protections for those who commit criminal offenses, it contains no protections for those who have been victimized by criminal violence. Law Day is the appropriate day to move toward a constitutional amendment that will give victims of crimes of violence the rights they need and deserve.

A federal constitutional amendment for victims would be the capstone of a long-developing movement to protect the rights of crime victims. The United States Supreme Court has itself held that "in the administration of criminal justice, courts may not ignore the concerns of victims."[2] In furtherance of that goal, a majority of the states have passed amendments to their own state constitutions protecting victims' rights and more amendments are passed at every national election. It may be of particular interest here, for example, that Missouri passed its own state amendment in 1992,[3] with more than 85% of the electorate supporting the proposal. Even in those states without constitutional amendments, extensive statutory protections have promised to victims a considerable array of rights at every step in the criminal justice process, from the initiation of criminal cases through the trial through the sentencing and even, in many states, when decisions about whether to commute a sentence are under consideration. These enactments across the country provide strong evidence that the citizens of this country firmly believe that victims should be respected in the criminal process.

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[1] *See The Victims' Rights Amendment: Hearings Before the Senate Comm. on the Judiciary*, 106th Cong., 1st Sess. (Mar. 24, 1999); *The Victims' Rights Amendment: Hearings Before the Senate Comm. on the Judiciary*, 105th Cong., 2nd Sess. (Apr. 28, 1998); *Crime Victims' Rights Amendment: Hearing Before the Senate Comm. on the Judiciary*, 105th Cong., 1st Sess. (Apr. 16, 1997); *The Victims' Bill of Rights Amendment: Hearings Before the Senate Comm. on the Judiciary*, 104th Cong., 2d Sess. (April 23, 1996).

[2] Morris v. Slappy, 461 U.S. 1, 14 (1983).

[3] *See* MO. CONST., art. I, § 32.

Yet while these enactments promise crime victims rights in the process, as a country we have yet to deliver. In too many cases, victims of criminal violence find that they are not consulted by those responsible for making criminal justice decisions. While the interests of criminal defendants are considered every step of the way, victims interests are too often forgotten. The United States Department of Justice has concluded that current protection of victims is inadequate, and will remain inadequate until a federal constitutional amendment is in place. As the Attorney General has explained, "These significant State efforts simply are not sufficiently consistent, comprehensive, or authoritative to safeguard victims' rights."[4]

My testimony today will attempt to explain why it is so important that victims of violent crimes be given the federal constitutional right to participate in all phases of the criminal justice process. My testimony is divided into four parts.

Part I develops the theoretical framework for victim participation, explaining both why victim participation is vital both for victims and for society as a whole. For victims, the mere act of participating in the criminal justice may serve valuable therapeutic goals. On the other hand, denying victims the chance to participate adds insult to injury by piling a government-inflicted harm on top of the injury inflicted by violent criminals. For these reasons and others, the proposed Victims' Rights Amendment contained in Senate Joint Resolution 3 extends to victims of violent crime the right to participate in the criminal justice process in appropriate ways. It guarantees that victims will receive notice of criminal justice events and that they can be heard at appropriate points in the process.

Part II applies this framework in the specific context of sentence commutation decisions, a subject apparently of considerable recent interest here in Missouri. Part II provides some historical background on the clemency process and then notes that many states have placed certain procedural requirements that the executive branch must follow in reaching clemency decisions. Many states require that the executive provide notice and an opportunity to be heard to prosecutors and sentencing judges before any final clemency determination is made. Increasingly in recent years, states are extending the same kind of notice and an opportunity to be heard to victims of the crime. This is the only approach that is fully consistent with the national recognition that victims properly have a role to play in the criminal justice process. In particular, the victims of crimes, including the surviving family members in homicide cases, are often in a unique position to provide information about the injuries inflicted by the criminal seeking clemency, an important factor that should be considered in any clemency determination. Part II concludes by suggesting some language that could be included in Senate Joint Resolution 3 to make certain that crime victims are not unfairly excluded from the clemency process.

Part III turns to the issue of why a federal constitutional amendment is needed to protect crime victims. Numerous reports from the states indicate that the current patchwork quilt of victims'

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

protections has failed to fully protect the interests of crime victims. Too often, the existing rights have been ignored or haphazardly implemented by the criminal justice system. The result has been a system that fail to deliver all the rights that have been promised to victims. The rights of victims of criminal violence will only be fully protected when enshrined in our nation's charter, the federal Constitution.

Finally, Part Part IV explain why the Senate Joint Resolution No. 3, although not going as far as some victims' advocates would like, would nonetheless be an giant step forward in protecting the rights of crime victims. It is a carefully crafted measure that provides all the "core" rights that the National Victims Constitutional Amendment Network and many other crime victims organizations have been seeking. While it extends only to victims of violent crimes and contains restrictions on the ways in which victims can enforce their rights, it undeniably would work a fundamental change in the criminal justice system by recognizing in our nation's charter that victims, too, deserve rights in the criminal justice process.

Before turning to these points, it may be a appropriate to give a bit of background information. I am a Professor of Law at the University of Utah College of Law, where I teach criminal procedure, criminal process, and a course devoted exclusively to the rights of crime victims I graduated from Stanford Law School in 1984, where I was president of the law review, and went on to clerk for then-Judge Antonin Scalia of the U.S. Court of Appeals for the District of Columbia and Chief Justice Warren Burger of the U.S. Supreme Court. I then served for two years as an Associate Deputy Attorney General in the United States Department of Justice and for three-and-a-half years as an Assistant United States Attorney in the Eastern District of Virginia. Since assuming my teaching duties, I have represented crime victims (always on a *pro bono* basis) on a number of legal issues and written and lectured on the subject of crime victims' rights. I also serve on the executive board of the National Victim Constitutional Amendment Network, an organization devoted to bringing constitutional protection to crime victims across the country. I speak on its behalf today.

I. Victims Deserve to be Heard Throughout the Criminal Justice Process

Across the country, the law now recognizes the vital importance of victim participation in the criminal justice process. Thirty-one states have chiseled victims' rights into their respective constitutions.[5] The federal government and the rest of the states have a vast array statutory rights for victims. In short, a consensus is developing around the country that victims deserve rights in the criminal justice process.

This recognition of victims of crime rests on several mutually supporting grounds. Allowing victim participation may help to allow the victim and family members harmed by the crime to recover, at least to some extent, from debilitating psychological injuries inflicted by the criminal. There is

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[5] *See* Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. ___ (forthcoming) (collecting citations).

mounting evidence that victims' rights "may improve victims' mental condition and welfare."[6] The victims rights to attend trials, for example, may "facilitate healing of the debilitating psychological wounds suffered by a crime victim."[7] Similarly, a victim's right to make an impact statement before sentencing can be part of a cathartic process. For some victims, making a statement helps restore balance between themselves and the offenders. Others may consider it part of a just process or may want to communicate the impact of the offense to the offender.[8] As a young victim of sexual assault at the hands of their step-father explained, "when I read [the victim impact statement], it healed a part of me—to speak to [the defendant] and tell him how much he hurt me." Her sister agreed, explaining "I believe that I was helped by the victim impact statement. I got to tell my step-father what he did to me. Now I can get on with my life. I don't understand why victims don't have the same rights as criminals, to say the one thing that might help heal them."[9] 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.[10]

The other side of this coin is that excluding a crime victim from participation perpetuates the subordinate position that the crime itself placed the victim in, perhaps exacerbating the psychic harm caused by a crime. Two psychiatric experts have explained:

> The criminal act places the victim in an inequitable, "one-down" position in relationship to the criminal, and the victims' trauma is thought to result directly from this inequity. Therefore, it follows that the victims' perceptions about the equity of their treatment and that of the defendant's affects their crime-related psychological trauma. [F]ailure to . . . offer the right of [criminal justice] participation should result in increased feelings of inequity on the part of victims, with a corresponding increase in crime-related psychological harm.[11]

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[6] Edna Erez, *Who's Afraid of the Big Bad Victim? Victim Impact statements as Victim Empowerment and Enhancement of Justice*, __ CRIM. L. REV. ___ (forthcoming 1999).

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

[8] *Id.*; *see also* S. REP. NO. 105-409 at 17. .

[9] Chrissie Beeson, Remarks at the Seventh Annual Governor's Conference on Victims, Salt Lake City, Utah (Apr. 28, 1994); *cf.* Jason N. Swensen, *Survivor Says Measure Would Dignify Victims*, DESERET NEWS (Salt Lake City), Oct. 21, 1994, at B4 (reporting anguish widow suffered when denied chance to speak at sentencing of husband's murderer).

[10] Erez, *Who's Afraid of the Victim?*, *supra* note 6 ("the majority of victims of personal felonies wished to participate and provide input, even when they thought their input was ignored or did not affect the outcome of their case. Victims have multiple motives for providing input, and having a voice serves several functions for them").

[11] Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 WAYNE L. REV. 7, 19 (1987) (emphasis added).

The victims' right to attend trials provides a good illustration of the frustration victims suffer when their interests are not protected. Without a right to attend trials, for example, "the criminal justice system merely intensifies the loss of control that victims feel after the crime."[12] 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."[13] One crime victim put it more directly: "All we ask is that we be treated just like a criminal."[14] The inequity of treatment between defendants and victims can be so pronounced as to make recovery from the crime quite difficult. Drs. Lee Madigan and Nancy C. Gamble have aptly described the feelings of rape victims on discovering that they will not be allowed to attend trial: "Many survivors remarked that this was when they first realized that it was not their trial, that the attacker's rights were the ones being protected, and that they had no control over what happened to their bodies. The structure of the system often results in a second rape."[15] This "second rape" can be devastating for rape recovery efforts, an essential component of which is the need for a victim to feel that she has taken back control over events in her life.[16]

The Supreme Court recently explained that "'Justice, though due to the accused, is due to the accuser also.'" [17] To do otherwise is a recipe for alienation of victims from the criminal justice process[18] and is, finally, at odds with fundamental justice.[19] As President Clinton succinctly put it in endorsing the Victims' Rights Amendment, "when someone is a victim, he or she should be at the center of the criminal justice process, not on the outside looking in."[20]

The Victims' Rights Amendment, as reflected in Senate Joint Resolution 3, guarantees that victims will have the right to be involved in the process by establishing a list of rights of crime victims. Included among these rights are the right to notice of proceedings, to attend those proceedings, and

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

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

[14] *Id.* at 59 (quoting crime victim).

[15] LEE MADIGAN & NANCY C. GAMBLE, THE SECOND RAPE: SOCIETY'S CONTINUE BETRAYAL OF THE VICTIM 97 (1989).

[16] *See* LINDA E. LEDRAY, RECOVERY FROM RAPE 125 (2d ed. 1994) ("Taking back control from him" is an important step in the recovery process).

[17] *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Snyder v. Massachusetts*, 291 U.S. 97 122 (1934) (Cardozo, J.); *see also Morris v. Slappy*, 461 U.S. 1, 14 (1983) ("In the administration of criminal justice, courts may not ignore the concerns of victims.").

[18] *See generally* GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS CRIMINAL TRIALS (1995).

[19] *See* Paul S. Hudson, *The Crime Victim and the Criminal Justice System: Time for Change*, 11 Pepperdine L. Rev. 23, 34 (1984) ("justice cannot be done without taking the victim's interest in account, and . . . far from being irrelevant, victim participation in and support of the criminal justice system is essential for the system to operate effectively.").

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

to be heard at appropriate proceedings.

The Victims' Rights Amendment would extend to victims of violent crimes the right to notice of important events in the criminal justice process, including the right "to reasonable notice of . . . any public proceedings relating ot the crime . . . ." This right to be kept informed about the progress of a case is the foundation on which other rights build, for without notice of proceedings it is impossible for victims to begin to assert their rights. A recent Department of Justice report concluded that "[t]he right for crime victims to be notified about public court proceedings in a timely fashion is fundamental to their exercise of other rights such as the right to be present and heard. Without timely notification of proceedings, victims cannot exercise other participatory rights."[21] Victim advocates have long recognized the hardship that failure to notify victims can cause. A witness from Parents of Murdered Children (POMC) recently testified that many of the calls their national office receive involved "concerns aris[ing] from not being informed about the progress of the case. . . . Because they do not know what is going on, victims frequently must take it upon themselves to call . . . the prosecutor, or the courts for information about their case. All too often, such calls have to be made when victims' families are in a state of shock or are grieving from the loss of their loved ones. Victims' families should not have to bear the added burden of trying to obtain information. It should be their automatic right."[22]

The Victims' Rights Amendment would also extend to victims of violent crimes the right "not to be excluded" from public proceedings related to the offense. The President's Task Force on Victims of Crime held hearings around the country in 1982 and concluded that victims should have the right to attend criminal justice proceedings, such as trials:

> 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.[23]

This recognition of a victims right to attend in reflected in victims rights amendments around the country. In Missouri, for example, a victim has "the right to be present at all criminal justice proceedings at which the defendant has such right."[24]

The Victims' Rights Amendment also extends to victims the right to be heard at appropriate points in the process. The Amendment identifies three specific junctures in the process where a

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[21] U.S. DEP'T OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY 12-13 (1998).

[22] *The Victims' Bill of Rights Amendment: Hearings Before the Senate Comm. on the Judiciary*, 104th Cong., 2d Sess. 35-36 (April 23, 1996) (statement of Rita Goldsmith).

[23] PRESIDENT'S TASK FORCE OF VICTIMS OF CRIME, FINAL REPORT 80 (1982).

[24] Mo. Const., art. I, § 32(4).

victim statement is permitted.

First, the Amendment extends the right to be heard to "public proceedings to determine a release from custody." This will allow, for example, a victim of domestic violence to warn about possible violence if the defendant is released on bail. At the same time, however, it must be emphasized that nothing in the Amendment gives victims the ability to veto the release of any defendant. The ultimate decision to hold or release a defendant remains with judge or other decisionmaker. The Amendment will simply provide the judge with more information on which to base that decision. Proceedings that will "determine a release from custody" include not only bail hearings but other hearings involving release decisions, such as parole and commutation hearings and any other hearing that will determine a release. Victim statements to parole boards are particularly important because they "can enable the board to appreciate fully the nature of the offense and the degree to which the particular inmate may threaten the victim or others upon release."[25]

Second, the right to be heard also extends to any proceeding involving the acceptance of a negotiated plea. Under the present rules of procedure in most states, every agreement between a defendant and the state to resolve a case before trial must be submitted to the trial court for approval.[26] If the court believes that the agreement is not in the interest of justice, the court may reject it.[27] Unfortunately, victims do not also 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."[28] Yet victims have compelling reasons for some role in the plea bargaining process. As one of the nation's leading experts on crime victims' rights recently observed,

> The victim's interests in participating in the plea bargaining process are many. The fact that they are consulted and listened to provides them with respect and an acknowledgment that they are the harmed individual. This in turn may contribute to the psychological healing of the victim. The victim may have financial interests in the form of restitution or compensatory fine . . . . [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.[29]

It should be noted that nothing in the Victims' Rights Amendment requires a prosecutor to consult

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[25] Frances 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. OF VICTIMOLOGY 121, 134 (1994).

[26] *See generally* DOUGLAS E. BELOOF, VICTIMS IN CRIMINAL PROCEDURE: A CASEBOOK 462-64 (1999) (helpfully discussing this issue).

[27] *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 ....").

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

[29] BELOOF, *supra* note 26, at 462-63.

with a victim before agreeing to a plea bargain. The language is specifically limited to a victim's right to be heard at "*proceedings* to determine . . . an *acceptance* of a negotiated plea." A meeting between a prosecutor and a defense attorney to negotiate a plea is not a "proceeding" involving the "acceptance" of a 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. Again, 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 victims suggested course of action on the plea, but simply has more information on which to base such a determination.

Third, the Victims' Rights Amendment also extends the right to be heard to proceedings to determine a sentence. Defendants have the right to directly address the sentencing authority before sentence is imposed.[30] The Victims' Rights Amendment extends the same basic right to victims. Victims have found that making statements at sentencing brings a sense of healing and closure, as explained earlier. Moreover, allowing victims to be heard provides useful information to the sentencing judge and provides a sense of fundamental fairness. As the President's Task Force on Victims of Crime concluded:

> Victims of violent crime should be allowed to provide information at two levels. One, the victim should be permitted to inform the person preparing the presentence report of the circumstances and consequences of the crime. Any recommendation on sentencing that does not consider such information is simply one-sided and inadequate. Two, every victim must be allowed to speak at the time of sentencing. The victim, no less than the defendant, comes to court seeking justice. When the court hears, as it may, from the defendant, his lawyer, his family and friends, his minister, and others, simple fairness dictates that the person who has borne the brunt of the defendant's crime be allowed to speak.[31]

The victims' right to be heard under the Amendment is subject to limitations. A victim does not have the right to speak at proceedings other than those identified in the amendment. For example, the victim has no right to speak at the trial. Given the present construction of these proceedings, there is no realistic design for giving a victim an unqualified right to speak. At trial, however, victims will often be called as witnesses by the prosecution and, if so, they will testify as any other witness would.

In short, the proposed Victims' Rights amendment would constitutionally recognize that victims have important interests in the criminal justice and have a vital role to play in criminal justice decisions if the process to be perceived as fair and just.

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[30] *See, e.g.*, FED. R. EVID. 32(C); UTAH R. CRIM. P. 22(a).

[31] PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 77 (1982).

II. Victims Deserve the Right to be Heard Before a Sentence is Commuted.

With these widely accepted principles of victim participation in mind, it is useful to consider the victims role in the process of determining whether to a validly imposed sentence should be commuted or otherwise modified by executive action. I understand that this subject has been in the news here in Missouri lately, where Governor Carnahan recently commuted the capital sentence of convicted triple killer Darrell Mease, apparently without consulting or notifying all of the surviving family members of his decision.[32] Others testifying at this hearing today will be discussing the circumstances surrounding that particular action. What I would like to do is step back and attempt to provide an objective overview of the commutation process around the country and suggest why it is vitally important for victims to have the opportunity for involvement in commutation decisions, no less than elsewhere in the process.

A brief history of the commutation power may be in order. A commutation of a sentence is merely type of executive action that might be usefully grouped under the rubric of "clemency."[33] Clemency is a broad term which can include not only a commutation of a sentence, but also a pardon, a reprieve, or a remission of fines or forfeitures. The United States Supreme Court has described a pardon as "an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual, on whom it is bestowed from the punishment the law inflicts for a crime he has committed."[34]

Clemency power is more than the personal predilection of the chief of state, exercised according to his own concept of mercy or justice. Clemency, instead, is designed to provide a means for modifying, in particular circumstances, the application of otherwise rigid, uniform laws. It is a recognized part of a constitutional system, as the Supreme Court has explained:

> A pardon in our days is not a private act of grace from an individual happening to possess power. It is part of the constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.[35]

The power to grant clemency is most often used to mitigate some deficiency in the judicial process. While this power was originally thought necessary to correct perceived harsh excesses of the common law, it now provides relief from the potential injustice of the application of highly technical and

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[32] *See Carnahan Spares Murderer's Life; Brief Meeting with Pope Led Governor to Cancel Execution*, ST. LOUIS POST-DISPATCH, Jan. 29, 1999, at A1.

[33] For a helpful overview of the issues, see NATIONAL CENTER FOR STATE COURTS, CLEMENCY: LEGAL AUTHORITY, PROCEDURE, AND STRUCTURE (1977). My summary here will draw liberally on this useful sourcebook.

[34] United States v. Wilson, 32 U.S. (7 Pet.) 150, 160 (1833).

[35] Biddle v. Perovich, 274 U.S. 480, 486 (1927).

complicated rules of law.[36] The clemency power thus functions in a manner akin to equity in order to consider special, extenuating circumstances that cannot always be considered during the course of the normal judicial process. In our system, "the judge see only with judicial eyes, and know nothing respecting any particular case, of which he is not informed judicially, the Supreme Court has explained in distinguishing pardons from other judicial acts.[37]

At the federal level, the clemency power is vested solely in the President. The Pardon Clause, as finally adopted by the Constitutional Convention, provides: "And he [the President] shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."[38] This federal approach is reflected in many of state provisions dealing with executive clemency, although increasing states are placing the clemency board in an executive board rather than the hands of the governor. According to one recent tabulation, of the 38 states that allow the death penalty, 24 (including Missouri) vest the governor with the exclusive power to grant clemency, 3 states give the power solely to the parole board (usually appointed by the governor) and 16 states have a mixed system in which both the parole board and the governor play a role.[39] The mixed system often entails a recommendation of clemency by the parole board, which is either accepted or rejected by the governor.

The states that have chosen not to give the governor absolute clemency power have apparently done so because of concern that the power in the hands of a single person might be abused. Even in states where the governor has absolute clemency power, the legislature has typically has the power to establish appropriate procedures for the exercise of the power. In some states, new procedures have been put in place following what appeared to be abuses of the process by the governor. For example, in Ohio, Governor Richard F. Celeste commuted the death sentences of eight convicted killers two business days before he left office in January, 1991.[40] After the Ohio Supreme Court upheld most of the commutations, [41] the voters in Ohio approved a state constitutional amendment making clear that the legislature could regulate the commutation process.[42] The legislature then passed legislation insuring a careful process in commutation decisions, including the

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[36] *See* M. Belli, *The Story of Pardons*, 80 CASE AND COM. 26, 26 (1975).

[37] United States v. Wilson, 32 U.S. (7 Pet.) 150, 160-61 (1833).

[38] U.S. CONST., art. II, § 2.

[39] Michael A.G. Korengold et al., *And Justice for Few: The Collapse of the Capital Clemency System in the United States,* 20 HAMLINE L. REV. 349, 354 (1996).

[40] *See* Alan Johnson, *Battle Enters New Stage Over Celeste Commuting Death Sentences*, The Columbus Dispatch, November 28, 1993.

[41] State ex rel. Mauer v. Sheward, 644 N.E.2d 369 (Oh. 1994).

[42] *See* Ohio Const., art. III, § 11 ("The governor shall have power, after conviction, to grant reprieves, commutations, and pardons, for all crimes and offenses, except treason and cases of impeachment, upon such conditions as the governor may think proper; subject, however, to such regulations, as to the manner of applying for commutations and pardons, as may be prescribed by law.").

involvement of crime victims.[43]

Pursuant to their powers to regulate the commutation process, a number of states have established at least some procedures governing applications for executive clemency. Most states require that the clemency applicant's prosecuting attorney be given notice of the clemency application and an opportunity to comment on it.[44] In New Hampshire, for example, "[o]n all petitions to the governor and council for pardon or commutation of sentence written notice thereof shall be given to the state's counsel, and such notice to others as the governor may direct; and the prosecuting officer may be required to furnish a concise statement of the case as proved at the trial and any other facts bearing on the propriety of granting the petition."[45] In Maine "[o]n all petitions to the Governor for pardon or commutation of sentences, written notice thereof shall be given to the Attorney General and the district attorney for the county where the case was tried at least 4 weeks before the time of the hearing thereon . . . ."[46] And, as a last example, in Vermont, "[i]f the governor, in his opinion, believes the reason stated in the application, if proved true, would constitute cause for granting the pardon, within reasonable time he shall designate a time and place for hearing the same. He shall cause notice of the application and of the hearing to be given to the applicant and to the state's attorney of the county in which the applicant was convicted and sentenced."[47]

Some states require notice to the applicant's prosecuting attorney and the sentencing judge. In Kansas, for example, "no pardon or commutation of sentence shall be granted until more than 30 days after written notice of the application therefor has been given to . . . [t]he prosecuting attorney and the judge of the court in which the defendant was convicted . . . ."[48] And in North Dakota, "[t]he pardon clerk shall provide written notice of an application for a commutation, reprieve, pardon, conditional pardon, or remission of fine to the district court and the state's attorneys in the county or counties where the judgment of conviction was entered against the applicant."[49] The obvious object of these provisions is to make sure that those with valuable information about the offense committed by the prisoner — specifically the prosecutor and sentencing judge — have an opportunity to provide that information to decisionmaker on the clemency issue.

In more recent years, states have increasingly recognized that others in addition to judges and prosecutors may have vital interests at stake in clemency decisions. In the states, a clear trend is emerging for "placing a greater emphasis on the provision for public notice of clemency applications. The mechanics of filing a clemency application may vary from state to state, but the central idea seems to be to provide an opportunity for concerned individuals to support or oppose a pending

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[43] *See* Ohio Rev. Code Ann. . § 2967.12 (providing for three weeks notice to, among others, victims and prosecutors).

[44] NATIONAL CENTER FOR STATE COURTS, *supra* note 33, at 2.

[45] N.H. REV. STAT. ANN. § 4:21.

[46] ME. REV. STAT. ANN. tit. 15, § 2161.

[47] VT. ST. ANN. tit. 28, § 809.

[48] KANS. STAT. ANN. § 22-370.1

[49] N.D. CENT. CODE § 12-55.1-07

clemency application and to open the process to public view. . . . Clemency notification procedures . . . are being developed to insure that clemency decisions are rooted in a broad opinion base."[50] As part of this broad opinion basis, states are increasing recognizing that crime victims, too, have valuable information to provide before any clemency decision is made. To provide victims an opportunity to comment on clemency applications and to be aware of any clemency decisions that are made, states have provided mechanisms for crime victims, and even communities affected by a violent criminal act, to provide input in the clemency process.

A variety of approaches protect the rights of victims in the clemency process. It may be of particular interest here to note that Missouri law requires notice to victims of any commutation decision. The implementing statute to Missouri Victims' Rights Amendment provides that victim's can receive notice of commutation decisions. The law confers on victims the following rights:

> For victims and witnesses, upon their written request, the right to be informed by the appropriate custodial authority, including any municipal detention facility, juvenile detention facility, county jail, correctional facility operated by the department of corrections, mental health facility, division of youth services or agency thereof if the offense would have been a felony if committed by an adult, postconviction or commitment pursuant to the provisions of chapter 552, RSMo, of the following: *. . . any decision by the governor to commute the sentence of such person or pardon such person . . . .*[51]

Other states appear to have gone further than Missouri and provide not simply notice to a victim but some kind of opportunity to comment on any decision.[52] In Alaska, for example, the governor may refer applications for executive clemency to the board of parole. If the case involves a crime of violence, "the board shall send notice of an application for executive clemency submitted by the state prisoner who was convicted of that crime. The victim may comment in writing to the board on the application for executive clemency."[53] In Arkansas, notice of an application for pardon or

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[50] NATIONAL CENTER FOR STATE COURTS, CLEMENCY: LEGAL AUTHORITY, PROCEDURE, AND STRUCTURE 4-5 (1977).

[51] MO. REV. STAT. § 595.209 (emphasis added).

[52] Clearly additional laws could be passed in Missouri regulating the commutation process. The Missouri Constitution provides that:

> The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, *subject to provisions of law as to the manner of applying for pardons.*

MO. CONST. art. 4, § 7 (emphasis added).

[53] ALASKA. STAT. § 33.20.080.

commutation must be filed with the sheriff and prosecuting attorney of the county in which the offense was committed, the sentencing judge, and "[t]he victim of the crime or the victim's next of kin, if he or she files a request for notice with the prosecuting attorney."[54] Arkansas has put in place special protections for capital cases, requiring that if "the application involves a conviction for capital murder, a notice of the application shall be published by two insertions, separated by a minimum of seven days, in a newspaper of general circulation in the county or counties in which the offense or offenses of the applicant were committed."[55] Arkansas also requires that notice be sent to a victim at least 30 days before any pardon or commutation is actually granted.[56] In Colorado, victims have "[t]he right to be informed, upon written request from the victim, of any proceeding at which any postconviction release from confinement in a secure state correctional facility is being considered for any person convicted of a crime against the victim and the right to be heard at any such proceeding or to provide written information thereto. For purposes of this subsection (1), 'proceeding' means reconsideration of sentence, a parole hearing, or commutation of sentence."[57] In Idaho, a notice of consideration of any pardon or commutation application must be published in a general circulation newspaper at least once a week for four consecutive weeks and notice sent to the prosecuting attorney.[58] In Indiana, before the parole board submits to the governor its recommendation regarding a commutation, the board must notify "[t]he victim of the crime for which the person was convicted (or the next of kin of the victim if the victim is deceased or incompetent for any reason), unless the victim has made a written request not to be notified."[59] In Iowa, before granting any commutation to an offender convicted of a violent crime, the governor is required "to notify a registered victim that the victim's offender has applied for a reprieve, pardon, or commutation. The governor shall notify a registered victim regarding the application not less than forty-five days prior to issuing a decision on the application. The governor shall inform the victim that the victim may submit a written opinion concerning the application."[60] In Kansas, written notice, at least 30 days in advance of any decision, must be sent not only to the prosecuting attorney and sentencing judge but also to "any victim of the person's crime or the victim's family, if the person was convicted of a [specified] crime . . . ."[61] In Minnesota, notice of a hearing on a pardon application must be sent not only to the sentencing judge and prosecutor but also be published "in the local newspaper of the county where the crime occurred. The secretary shall also make all reasonable efforts to locate any victim of the applicant's crime. The secretary shall mail notice of the application and the time and place of the hearing to any victim who is located. This notice shall specifically inform the victim of the victim's right to be present at the hearing and to submit an oral or written statement to the board . . . ."[62] In Nevada, the state board of pardons (which consists of the governor, the justices of the supreme court and the attorney

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[54] ARK. STAT. ANN. § 5-4-607

[55] *Id.*

[56] ARK. STAT. ANN. § 16-93-207.

[57] COLO. REV. STAT. § 24-4.1-302.5.

[58] IDAHO CODE § 20-213.

[59] IND. CODE ANN. § 11-9-2-2.

[60] IOWA CODE § 910A.10A.

[61] KANS. STAT. § 22-3701.

[62] MINN. STAT. § 638.06.

general) "shall give written notice at least 15 days before a meeting to each victim of the crimes committed by each person whose application for clemency will be considered at the meeting, if the victim so requests in writing and provides his current address."[63] In Ohio, three weeks before any pardon or commutation can be granted, the adult parole authority sends notice to the prosecuting attorney, presiding judge in the county of conviction, *and* "the victim or the victim's representative."[64] If any pardon or commutation is granted, notice is likewise provided to the victim.[65] In Wisconsin, notice of any pardon application shall be served on the prosecuting district attorney, the sentencing judge, and "[t]he victim or, if the victim is dead, an adult member of the victim's family."[66]

Providing victims an opportunity to be heard before clemency decisions are made, as these states have done, makes considerable sense both as a matter of public policy and fundamental justice. Just as sentencing judges and prosecutors possess important information about a case, so too do victims have vital information about the effects of the crime that ought to be considered before any clemency decision is finalized. As the President's Task Force on Victims of Crime has explained, "No one know better than the victim how dangerous and ruthless the [clemency] candidate was before . . . ."[67] Victim participation at the clemency stage is also vital to insure that victim participation at earlier points in the process is not rendered irrelevant. If makes little sense to give victims a right to be heard at proceedings concerning plea bargains, sentencing and parole (as provided in Senate Joint Resolution 3 and in the laws of Missouri and many states) if, after all that, a pardon or commutation can be granted without their involvement or, indeed, even their knowledge. Finally, it is important that victims be notified that a possible commutation of sentence when that commutation might entail release of an offender. Victims have legitimate interests, the President's Task Force concluded, "not only because of the desire for the service of a just sentence but also because of their legitimate fear of revictimization once the defendant is released."[68]

In light of the need to protect victim involvement in the clemency process, it may well be desirable to amend Senate Joint Resolution 3 to general protect victims' interests in the clemency process, while at the same time leaving it to the states the craft the particular measures to effect those rights. Among the states, there appears to be growing agreement that victims deserve, at the very least, the rights to be notified of pending clemency decisions and to be heard, in an appropriate way, before any final clemency decision is made. Possible language that would protect these interests would be an amendment extending to victims' the right to:

> *". . . to reasonable notice of and an opportunity to submit a statement concerning any proposed commutation of a sentence."*

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[63] NEV. REV. STAT. § 213.010.
[64] OHIO REV. CODE ANN. § 2967.12.
[65] *Id.*
[66] WIS. STAT. 304.09.
[67] PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 84 (1982).
[68] *Id.* at 64.

As used in this provision, "commutation" would include any alteration of a sentence, including not only a commutation of a sentence, but also a pardon, a reprieve, or a remission of fines or forfeitures. This is consistent with conventional legal usage.[69] Such a provision would insure that victims would neither be surprised by a commutation of a sentence nor denied the opportunity to be heard concerning that decision.

Such provision would seem to be unobjectionable from a policy standpoint, but might be criticized as being too lengthy. A less prolix formulation would be add three words into the current language concerning the victims right to be heard. This formulation would change the Victims' Rights Amendment to read as follows:

> *"A victim of a crime of violence . . . shall have the rights . . . to be heard, if present, and to submit a statement at all [public] proceedings to determine a conditional release from custody, an acceptance of negotiated plea, ~~or~~ a sentence[,] <u>or a commutation</u> . . . ."*

This formulation would insure that victims would be heard if a public proceeding of any sort were held on the clemency application. While shorter than the alternative formulation, it might suffer from the possible disadvantage that it would not protect victims in situations were clemency decisions could be made by the executive without any sort of "proceeding." In Missouri, for example, it appears that public proceedings are not held on clemency decisions. Missouri law provides that:

> All applications for pardon, commutation of sentence or reprieve shall be referred to the board for investigation. The board shall investigate each such case and submit to the governor a report of its investigation, with all other information the board may have relating to the applicant together with any recommendations the board deems proper to make.[70]

If Missouri law were clarified to require the board to hold a public hearing on clemency applications, then the shorter formulation would protect victims in Missouri.

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[69] *See, e.g.*, BLACK'S LAW DICTIONARY (defining "commutation" in "criminal law" as "the change of a punishment to one which is less severe").

[70] MO REV. STAT. 217.800. A related provision provides:

> In the exercise of his powers under article IV, section 7 of the constitution of Missouri to grant reprieves, commutations and pardons after conviction, the governor may, in his discretion, appoint a board of inquiry whose duty it shall be to gather information, whether or not admissible in a court of law, bearing upon whether or not a person condemned to death should be executed or reprieved or pardoned, or whether the person's sentence should be commuted.

MO. REV. STAT. § 552.070.

In considering these various formulations, the Committee may wish to carefully identify the procedures used to grant clemency in the various states and determine how victims' participation can best be protected in them. There seems little doubt, however, that victims' interests should be recognized in the clemency process. Victims are given rights at every step of the way leading up to the clemency decision. They deserve a voice in that ultimate decision as well.

III. Federal Constitutional Protection is Necessary for to Fully Protect Victims' Rights.

While victims' rights amendments and statutes have been passed across the country, there appears to be, unfortunately, a general recognized by those who have carefully studied the issue that these measures have been insufficient to fully protect the rights of crime victims. The United States Department of Justice has concluded that current protection of victims is inadequate, and will remain inadequate until a federal constitutional amendment is in place. As the Attorney General explained:

> efforts to secure victims' rights through means other than a constitutional amendment have proved less than fully adequate. Victims rights advocates have sought reforms at the State level for the past 20 years . . .. However, these efforts have failed to fully safeguard victims' rights. These significant State efforts simply are not sufficiently consistent, comprehensive, or authoritative to safeguard victims' rights.[71]

A number of legal commentators have reached similar conclusions. For example, Harvard Law Professor Laurence Tribe has explained that the existing statutes and state amendments "are likely, as experience to date sadly shows, to provide too little real protection whenever they come into conflict with bureaucratic habit, traditional indifference, sheer inertia, or any mention of an accused's rights regardless of whether those rights are genuinely threatened."[72] Similarly, Texas Court of Appeals Justice Richard Barajas has explained that "[i]t is apparent . . . that state constitutional amendments alone cannot adequately address the needs of crime victims."[73]

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

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

[72] Laurence Tribe, *The Amendment Could Protect Basic Human Rights*, HARV. L. BULL., Summer 1997, at 19, 20.

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

Constitution should be amended to guarantee fundamental rights for victims of crime."[74] The report went on to explain,

> A victims' rights constitutional amendment is the only legal measure strong enough to rectify the current inconsistencies in victims' rights laws that vary significantly from jurisdiction to jurisdiction on the state and federal levels. . . . Today, many victims do not report crime or participate in the criminal justice system for a variety of reasons, including fear of revictimization by the system and retaliation by the offender. Victims will gain confidence in the system if their rights are recognized and enforced, their concerns for safety are given serious consideration, and they are treated with dignity and respect.[75]

These impressionist conclusions find strong support in a December, 1998 report from the National Institute of Justice (NIJ) finding that many victims are denied their rights and concluding that "enactment of State laws and State constitutional amendments alone appears to be insufficient to guarantee the full provision of victims' rights in practice."[76] 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.[77] 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.[78] In short, the reality today is that victims rights are often denied, as numerous examples of violations of rights found in the congressional record and elsewhere attest.[79] Opponents of the Amendment offer no competing statistics, and such other data as exist tend to corroborate the NIJ findings of substantial noncompliance.[80]

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[74] U.S. DEP'T OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY 9 (1998).

[75] *Id.* at 10-12.

[76] NAT'L INST. OF JUSTICE, RESEARCH IN BRIEF, THE RIGHTS OF CRIME VICTIMS -- DOES LEGAL PROTECTION MAKE A DIFFERENCE? 1 (Dec. 1998).

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

[78] NATIONAL VICTIM CENTER, STATUTORY AND CONSTITUTIONAL PROTECTION OF VICTIMS' RIGHTS: IMPLEMENTATION AND IMPACT ON CRIME VICTIMS: SUB-REPORT ON COMPARISON OF WHITE AND NON-WHITE CRIME VICTIM RESPONSES REGARDING VICTIMS' RIGHTS 5 (1997).

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

[80] *See, e.g.,* SUSAN W. HILDENBRAND & BARBARA E. SMITH, VICTIMS RIGHTS LEGISLATION: AN ASSSSEMENT OF ITS IMPACT ON CRIMINAL JUSTICE PRACTITIONERS AND VICTIMS, A STUDY OF THE ABA CRIMINAL JUSTICE SECTION VICTIM WITNESS PROJECT 112 (1989) (prosecutors and victims consistently report that victims "not usually" given notice or consulted in a significant proportion of cases); Edna Erez, *Victim Participation in Sentencing: And the Debate Goes On . . .* 3 INT'L REV. OF VICTIMOLOGY 17, 26 (1994) (finding victims rarely informed of right to make statements and victim impact statements not always prepared).

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.[81] A rough calculation suggests that even if the Victims' Rights Amendment improved treatment for only 2% of the violent crime cases it affects, a total of about 30,000 victims would benefit each year.[82] Even more importantly, we would not tolerate a mere 98% "success" rate in enforcing other important rights. Suppose that, in opposition to the Bill of Rights, it had been argued that 98% of all Americans could worship in the religious tradition of their choice, 98% of all newspapers could publish without censorship from the government, 98% of criminal defendants had access to counsel, and 98% of all prisoners were free from cruel and unusual punishment. Surely the effort still would have been mounted to move the totals closer to 100%. Given the wide acceptance of victims' rights, they deserve the same respect.

For reasons such as these, the Victims' Rights Amendment has attracted considerable bi-partisan support, as evidenced by its endorsement by the President[83] and strong approval in this Committee at the end of the 104th Congress.[84] Based on this vote, the widely-respected *Congressional Quarterly* has identified the Amendment as perhaps "the pending constitutional amendment with the best chance of being approved by Congress in the foreseeable future."[85]

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[81] United States v. Leon, 468 U.S. 897, 907 n.6 (1984); *see also* CRAIG M. BRADLEY, THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION 43-44 (1993).

[82] FBI estimates suggest an approximate total of about 2,303,600 arrests for violent crimes each year, broken down as follows: 729,000 violent crimes within the crime index (murder, forcible rape, robbery, aggravated assault), 1,329,000 other assaults, 95,800 sex offenses, and 149,800 offenses against family and children. U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES — 1996 at 214 tbl.29 (1997). A rough estimate is that about two-thirds of these cases (66%) will be accepted for prosecution, either within the adult or juvenile system. *See* Brain Forst, *Prosecution and Sentencing*, in CRIME 363, 36(James Q. Wilson & Joan Petersilia eds. 1995). Assuming the Amendment would benefits 2% 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).

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

[84] *See* S. REP. No. 105-409 at 37 (Amendment approved by 11-6 vote).

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

In theory, of course, 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."[86] Rules to assist victims "frequently fail to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indifference, or sheer inertia . . . ."[87] The view that state victims provisions have been and will continue to be often disregarded is widely shared, as some of the strongest opponents of the Amendment seem to concede the point. For example, Ellen Greenlee, President of the National Legal Aid and Defender Association bluntly and revealingly told Congress that the state victims' amendments "so far have been treated as mere statements of principle that victims ought to be included and consulted more by prosecutors and courts. A state constitution is far . . . easier to ignore than the federal one."[88] It is time to stop ignoring crime victims and their rights. Senate Joint Resolution 3 provides a means for doing so.

IV. Senate Joint Resolution 3 Will Improve the Treatment of Crime Victims Throughout the Process.

To deal with the failure to fully implement crime victims rights, Senate Joint Resolution 3 would amend the federal constitution by establishing a list of protected rights for crime victims. This would follow in a venerable constitutional tradition, as Harvard Law Professor Laurence Tribe and I have explained:

> [The proposed Victims' Rights Amendment] would protect basic rights of crime victims, including their rights to be notified of and present at all proceedings in their case and to be hard at appropriate stages in the process. These are rights not 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.[89]

Moreover, constitutional recognition of victims would guarantee that our criminal justice process

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[86] Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B5. *See, e.g., 1996 Sen. Judiciary Comm. Hearings*, *supra* note 1, at 109 (statement of Steven Twist); *id.* at 30 (statement of John Walsh); *id.* at 26 (statement of Katherine Prescott).

[87] *See* Tribe & Cassell, *supra* note 86, at B5.

[88] *Proposals for a Constitutional Amendment to Provide Rights for Victims of Crime: Hearings Before the House Judiciary*, 104th Cong., 2d Sess. 147 (1996).

[89] Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B7.

operates in a fully democratic fashion. President Clinton articulated this point in endorsing the proposed amendment in a Rose Garde ceremony:

> Participation in all forms of government is the essence of democracy. Victims should be guaranteed the right to participate in proceedings related to crimes committed against them. People accused of crimes have explicit constitutional rights. Ordinary citizens have a constitutional right to participate in criminal trials by serving on a jury. The press has a constitutional right to attend trials. All of this is as it should be. It is only the victims of crime who have no constitutional right to participate, and that is not the way it should be.[90]

The Amendment would also provide particular benefits to victims of domestic violence and battered women, who are all too often mistreated in our criminal justice system. Joan Zorza, then Chair of the Legislative Committee of the National Coalition Against Domestic Violence, has expressed her view that a federal amendment "is the only way to rebalance the criminal justice system so that the victim's safety and her role in the process will be seen as fundamental — not extraneous to nor conflicting with — the system as a whole."[91]

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

[91] Joan Zorza, *Victims' Rights Amendment Empowers All Battered Women*, (www.nvc.org/newsltr/battwom.htm).

In some unusual cases, victims of domestic violence end up as defendants in the criminal justice system even where they are the victim, rather than the perpetrator, of a crime. In such situations, the victim of domestic violence will not be in any way harmed by the passage of the Victims' Rights Amendment, just as other criminal defendants will not be harmed.. Professor Laurence Tribe, for example, has concluded that the proposed Amendment is "a carefully crafted measure, adding victims' rights that can coexist side by side with defendant's." *See* Tribe & Cassell, *supra* note 86, at B5. Similarly, Senator Joseph Biden agrees that "I am now convinced that no potential conflict exists between the victims' rights enumerated in the [proposed Amendment] and any existing constitution right afforded to defendants." S. REP. 105-409 (additional views of Sen. Biden). A recent summary of the available research on the purported conflict of rights supports these views, concluding that the studies show that there "is virtually no evidence that the victims' participation is at the defendant's expense." Richard Barajas & Scott Alexander Nelson, *The Proposed Crime Victims' Federal Constitutional Amendment: Working Toward a Proper Balance*, 49 Baylor L. Rev. 1, 18-19 (1997) (internal quotation omitted). As an additional protection for domestic violence victims and others unfairly entangled in the criminal justice system, the Victims' Rights Amendment provides that exceptions can be made for "compelling reasons." As a way of illustrating what exceptions might be appropriate, the Senate Judiciary Committee report specifically indicated that "in some cases of domestic violence, the dynamics of victim-offender relationships may require some modification of otherwise typical victims' rights provisions. This [exceptions] provision offers the flexibility to do just that." S. REP. NO. 105-409 at 36.

While Senate Joint Resolution 3 would go a long way towards insuring victims a right to participate in criminal proceedings, there are those who claim that it does not go far enough. To be sure, no matter how broadly the Amendment were drafted, it would always possible to add additional protections for victims. The relevant question today is whether Senate Joint Resolution 3 strikes a reasonable balance between protecting the rights of crime victims while at the same time reflecting consensus measures that will attract the necessary political support to for passage. It is well known that obtaining approval for a constitutional amendment is a difficult process. Two-thirds of both Houses of Congress must approve any amendment before sending it along for ratification by three-quarters of the states.[92] Thus, a constitutional amendment must command broad support from all quarters of the political spectrum.

Against this backdrop, it is unsurprising to find that Senate Joint Resolution 3 contains some compromises in it. It does not — nor will any real amendment ever — contain everything that the victims' rights movement has ever sought. Even so, Senate Joint Resolution 3 contains an extensive list of constitutional rights for crime victims. It would give victims of crimes of violence the constitutional rights to each of the following:

1. "[T]o reasonable notice of . . . . all public proceedings related to the crime";
2. "To not to be excluded from all public proceedings related to the crime";
3. "To be heard, if present, and to submit statement at such proceedings to determine a conditional release from custody, an acceptance of a negotiated plea, or a sentence";
4. "To the foregoing rights [that is, the right to reasonable notice of, and not to be excluded from, to be heard if present, and to submit a statement] at a parole proceedi.., that is not public, to the extent those rights are afforded to the convicted offender";
5. "To reasonable notice of a release or escape from custody relating to the crime";
6. "To consideration for the interests of the victim in a trial free from unreasonable delay";
7. "To an order of restitution from the convicted offender";
8. "To consideration for the safety of the victim in determining any release from custody"; and
9. "To reasonable notice of the rights established by this article."

This list of rights includes, in the judgment of the National Victims Constitutional Amendment Network, all of the "core" rights that the victims' movement seeks in a constitutional amendment. Concerns have been expressed, however, about two features of Senate Joint Resolution 3: first, its limitation to "crimes of violence," and second, its limitations on the mechanisms for enforcing the rights. These two issues are addressed in the following two sections.

A. Limitation to victims of "a crime of violence"

Senate Joint Resolution 3 extends constitutional rights to "[a] victim of a crime of violence."

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

This limitation means that victims of a "property" crime would not be protected constitutionally, while victims of a crime of violence would be protected. In not automatically extending all rights to all crime victims, Senate Joint Resolution 3 follows in a long line of state amendments, state amendments it should be recalled that form the basis for assessing the national consensus that must underlie any federal amendment. Many if not most state amendments protect crime victims "as defined by law."[93] The Missouri amendment is typical on this point. It provides "crime victims, *as defined by law*, shall have the following rights, as defined by law . . . ."[94] Thus, the citizens of Missouri have implicitly suggested that which victims deserve protection in the state constitution does not automatically comprehend all victims, but instead can be left to legislative discretion.[95]

The state definitions of "victims" have typically not included all victims for all purposes, and in some cases have been restricted to victims of crimes of violence. The Illinois Constitutional Amendment, widely endorsed by victims' advocates, illustrates this point. After the amendment was passed, victims as "defined by law" included "any person against whom a violent crime has been committed."[96] Similarly, the Arizona amendment, often regarded as among the best state amendments, defined "victim" in the constitution as "a person against whom the criminal offense has been committed."[97] 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."[98] At least one state amendment has been limited to victims of felony crimes.[99] At least one state amendment has been further restricted specifically to victims of crimes of violence.[100] Indeed most of the state amendments do not cover all victims of all crimes.[101] Federal statutes also extend rights to victims of crimes of violence,[102] and some of the

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[93] *See, e.g.*, ILL. CONST. § 8.1(a) (extending rights to "crime victims, as defined by law").

[94] *See* MO. CONST., art. I, § 32 (emphasis added).

[95] The Missouri legislature ultimately passed a broad statutory definition of which victims qualify for protection that embraces all "natural person[s] who suffer[] direct or threatened physical, emotional or financial harm as the result of the commission or attempted commission of a crime." MO. REV. STAT. 595.200(6). But the point remains that, in principle, the Missouri amendment itself, endorsed by many of Missouri's leading crime victims' advocates, recognizes that distinctions can be drawn among different victims of crimes.

[96] ILL. CORP. STAT., ch. 725 CT 120 § 3. In 1994, the definition was broadened slightly in include, *inter alia*, "a person who suffers injury to or loss of property as a result of a violent crime perpetrated or attempted against that person." *Id.*

[97] ARIZ. CONST. art. 2.1(C).

[98] ARIZ. STAT. § 13-4401.

[99] *See* WASH. CONST., art. I, § 25 (extending right to "a victim of a crime charged as a felony"); *see also* MD. CONST. (similar limitation).

[100] *See* NEW MEX. CONST. art. 2, § 24 (extending rights to "the victim of a violent crime").

[101] *See, e.g.*, COLO. STAT. ANN. § 24-4.1-302 (extending rights to victims of various crimes of violence such as murder, kidnaping, sexual assault, robbery, child abuse, and domestic violence); FLA. STAT. ANN. § 960.001 (limiting rights to notice to cases of homicide, sexual assault, attempted

recommendations of the President's Task Force on Victims of Crime extended only to victims of crimes of violence.[103]

Statistically speaking, crimes of violence are the predominant concern of the crime victims' movement. To be sure, there are more property crime cases than violent crime cases. But we should not equate a homicide or rape with a petty larceny in determining this issue. Instead, we need to look at other measures, such as the number of litigated cases involving the rights of crime victims — a measure of the intensity with which victims are concerned about their rights. Of the cases that have been litigated involving victims rights, I estimate that over 90% involved crime of violence that would be covered by Senate Joint Resolution 3. Similarly, the National Organization for Victim Assistance (NOVA) estimates that of the thousands of calls its receives from victims all over the country every year to its national toll-free 800 number (1-800-TRYNOVA), more than 95% are from victims of crimes of violence who are covered by the Amendment.

None of this is to suggest in any way that victims of property crimes can have very substantial interests in the criminal justice process. I understand that the subcommittee may indeed hearing testimony concerning such victims and they have very legitimate interests in having full and enforceable rights in the criminal justice process. Indeed, the National Victims' Constitutional Amendment Network would not support Senate Joint Resolution 3 unless it were convinced that the Resolution would do considerable good not only in the more than 90% of contested cases involving victims of violent crimes but also in the remaining cases involving victims of property crimes to which it does not directly apply. For example, a major concern of victims of non-violent crime is restitution. The passage of the constitutional amendment, with its provision conferring a right to "an order of restitution from the convicted offender," will likely spur adoption of implementing language in Congress and all fifty states. No doubt the implementing language will cover, among other issues, restitution. In all likelihood the implementing language will establish superior mechanisms for collecting restitution that will be of benefit to all victims. Moreover, even apart from specific implementing language, a Victims' Rights Amendment will create a judicial "mindset" that is quite favorable to all victims. Judges will become used to ordering full restitution and it will no longer be the exceptional or unusual event that it too often is today,. Nor would defendant's be able to argue that ordering restitution somehow deprived them of constitutional rights. Judges would know that ordering restitution was the routine, not the exception. This hope that the legislature, courts, and criminal justice officials would broaden the effective reach of victims' rights beyond the confines of

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homicide, domestic violence, or stalking); IDAHO STAT. ANN. § 19-5306 (extending rights to victims of felony or a misdemeanor involving physical injury, threat of physical injury, or a sexual assault); TEXAS CODE CRIM. P. art . 56.01 (extending rights to victims of sexual assault, kidnaping, aggravated robbery, or crimes involving bodily injury or death).

[102] *See, e.g.*, Fed. R. Crim. P. 32 (extending right of allocution to a victim of a crime of violence).

[103] *See* PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 76-77 (1982) (recommending that "victims of violent crime" should have the right to make a statement at sentencing).

what the amendment requires is realistic – for, as victims advocates have repeatedly pointed out, this is exactly the experience they have had in their states after a less-than-ideal amendment was adopted.

Occasionally it has been argued that Senate Joint Resolution 3 would somehow be "unique" in the annals of American constitutional law in extending rights only to a certain "subgroup" of citizens or of crimes. This claim is incorrect. The United States Constitution already contains a whole host of provisions that, as written or interpreted, draw such 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."[104] 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,"[105] and, in any event, it is not extended to any state prosecutions. The Sixth Amendment seemingly extends to "all criminal prosecutions,"[106] but courts have drawn various limiting lines. For instance, the Amendment's right to trial "by an impartial jury" does not extend to "petty crimes or offenses."[107] The Sixth Amendment's right "to the assistance of counsel" applies to all offenses, but the Supreme Court has spoken of the right to court-appointed counsel at state expense as extending only to "indigent" defendants without precise definition. State and federal appellate courts have then developed "a series of guidelines for determining indigency."[108] The "subgroup" of defendants charged with treason are given special protection so as not to be convicted "unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."[109]

As a final point in the legal analysis, it is important to understand how broadly the phrase "crime of violence" extends. The Senate Judiciary Committee report on this provision noted that this phrase

> extends broadly to . . . all forms of homicide (including voluntary and involuntary manslaughter and vehicular homicide), sexual assault, kidnaping, robbery, assault, mayhem, battery, extortion accompanied by threats of violence, carjacking, vehicular offenses (including driving while intoxicated) which result in personal injury, domestic violence and other similar crimes. A "crime of violence" can arise without regard to technical classifications of the offense as a felony or a misdemeanor. It should also be obvious that a "crime of violence" can include not only acts of consummated violence but also of intended, threatened, or implied violence. . . . Similarly, some

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[104] U.S. CONST. amend. VII.

[105] U.S. CONST. amend. V.

[106] U.S. CONST. amend. VI.

[107] Duncan v. Louisiana, 393 U.S. 145 (1968); *see also* Baldwin v. New York, 399 U.S. 66 (1970) ("petty" offenses involves authorization for less than six months imprisonment).

[108] LAFAVE & ISRAEL, CRIMINAL PROCEDURE § 11.2(g) (2d ed. 1992).

[109] U.S. CONST. art. 3, § 3.

> crimes are so inherently threatening of physical violence that they could be "crimes of violence" for purposes of the amendment. Burglary, for example, is frequently understood to be a "crime of violence" because of the potential for armed or other dangerous confrontation. . . . [S]exual offenses against a child, such as child molestation, can be "crimes of violence" because of the fear of the potential for force which is inherent in the disparate status of the perpetrator and victims and also because evidence of severe and persistent emotional trauma in its victims gives testament to the molestation being unwanted and coercive. . . . .Finally, an act of violence exists where the victim is physically injured, is threatened with physical injury, or reasonably believes he or she is being physically threatened by criminal activity of the defendant. For example, a victim who is killed or injured by a driver who is under the influence of alcohol or drugs is the victim of a crime of violence, as is a victim of stalking or other threats who is reasonably put in fear of his or her safety.[110]

With all this said, I should state my own view that I would prefer a Victims' Rights Amendment that extended beyond crimes of violence. I preferred, for example, the formulation used in the Amendment in a previous Congress, that extended to victims of crimes of violence and other crimes as a defined by Congress. It appears, however, that the political support to pass this broader formulation is lacking, and Senators Kyl and Feinstein have, with great reluctance, acceded to the narrower formulation because the alternative — passing no Victims' Rights Amendment at all — is clearly so much less desirable. Crime victims cannot let the perfect become the enemy of the good. Senate Joint Resolution 3 extends rights to most cases where they are most desperately need. That is why most crime victims' organizations who are members of the National Victims Constitutional Amendment Network have strongly endorsed it.

B. Enforcement Issues

Senate Joint Resolution 3 also contains certain restrictions on the manner in which the extensive list of rights conferred on victims can be enforced. Here again, the extent of the restrictions should not overstated. Section 3 provides:

> Only the victim or the victim's lawful representative shall have standing to assert the rights established by this article. Nothing in this article shall provide grounds to stay or continue any trial, reopen any proceeding or invalidate any ruling, except with respect to conditional release or restitution or to provide rights guaranteed by this article in future proceedings, without staying or continuing a trial. Nothing in this article shall give rise to or authorize the creation of a claim for damages against the United States, a State, a political subdivision, or a public officer or employee.[111]

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[110] S. Rep. No. 105-409 at 24.
[111] S.J. RES. 3, § 2 (1999).

This language was not invented solely for the federal amendment. To the contrary, it follows on the heels of similar language in a number of state victims' amendment. It is instructive on this point, for example, to consider the language in the Missouri amendment, which provides:

> 3. Nothing in this section shall be construed as creating a cause of action for money damages against the state, a county, a municipality, or any of the agencies, instrumentalities, or employees provided that the General Assembly may, by statutory enactment, reverse, modify, or supercede any judicial decision or rule arising from any cause of action brought pursuant to this section.
>
> 4. Nothing in this section shall be construed to authorize a court to set aside or to void a finding of guilt, or an acceptance of a plea of guilty in any criminal case.[112]

The Missouri provision is by no means unique, as virtually every other state amendment contains, either directly or indirect, provisions limiting the manner in which they can be enforced. Senate Joint Resolution 3, then, simply reflects the current consensus in the states that means of enforcing victims' rights cannot be unlimited.

In analyzing the effect of Section 3's restrictions on enforcement, they must be read in connection with all of the other provisions in the proposed Amendment. Under Section 1, victims will have extensive constitutional rights, and under Section 2, they will have "standing" to enforce those rights. The only effect of Section 3 is to limit the manner of enforcing some of these rights. In assessing the effect of this limitation, we must bear in mind how radically different the legal landscape would look with all of the Section 1 rights in place. If a Victims' Rights Amendment passes Congress and is ratified by the states, virtually every judge, prosecutor, defense attorney, court clerk, governor, and crime victim in the country would know about victims rights and that they were constitutionally protected in our nation's fundamental charter. Both the House and Senate of the United States Congress would pass the measure by two-thirds votes and then a full three-quarters of the states would ratify the provision.[113] 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.[114]

Were such events to all 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

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[112] MO. CONST., art. I, § 32.

[113] *See* U.S. CONST., art. V.

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

recognize the victim as a legitimate party in criminal proceedings."[115] Even a critic of the amendment, Professor Mosteller, seems to agree with this view, explaining that "officials fail to honor victims' rights largely as a result of inertia and past learning, insensitivity to the unfamiliar needs of victims, lack of training, and inadequate or misdirected institutional incentives."[116]

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."[117] Yet this means nothing more than that, until the Amendment passes, we will not have an opportunity to precisely assay its positive effects. Constitutional amendments have changed our legal culture in other areas, and clearly the logical prediction is that a victims' amendment would go a long way towards curing official indifference.

This hypothesis is also consistent with the findings of the NIJ study on state implementation of victims' rights. The study concluded that "[w]here legal protection is strong, victims are more likely to be aware of their rights, to participate in the criminal justice system, to view criminal justice system officials favorably, and to express more overall satisfaction with the system."[118] 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.[119]

In short, the mere passage of a constitutional amendment is an "enforcement" power that, even by itself, goes far beyond anything we have today in any of the state amendments. The simple 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 other provisions of our Constitution — freedom

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[115] Erez, *Victim Participation, supra* note 80, at 29; *see also* WILLIAM PIZZI, TRIALS WITHOUT TRUTH (1999) (discussing problems with American trial culture); William Pizzi, *Rethinking Our System*, 1999 UTAH L. REV. ___ (forthcoming) (noting trial culture emphasis on winning and losing that may overlook victims); William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37, 41 (1996) ("So poor is the level of communication that those within the system often seem genuinely bewildered by the victims' rights movement, even to the point of suggesting rather condescendingly that victims are seeking a solace from the criminal justice system that they ought to be seeking elsewhere")

[116] Robert Mosteller, *The Victims' Rights Amendment: The Unnecessary Amendment*, 1999 UTAH L. REV. ___ (forthcoming).

[117] *Id.*

[118] NIJ Study, *supra* note 76, at 10.

[119] *See supra* note 81 (finding minority victims least likely to be afforded rights today). *Cf.* Lynn Henderson, *Victim's Rights in Theory and Practice*, 1999 UTAH L. REV. ___ (forthcoming) (criticizing "lottery approach to affording victims' rights).

of speech, freedom of the press, freedom of religion — are all generally honored even without specific "enforcement" provisions.

Senate Joint Resolution 3 also eliminates another common reason for failing to protect victims rights: the misguided view that a defendant's constitutional rights "trump" a victim's assertion of a right. In a number of cases, victims' rights have not been enforced because defendants have made vague and imprecise claims about their federal constitutional "due process" rights being violated. Those claims would be unavailing after the passage of a federal amendment. For these reasons, the mere fact of passing a Victims' Rights Amendment can be expected to bring a dramatic change to the way in which victims rights are enforced even were no enforcement actions to be brought by victims and their advocates. The remaining enforcement problems will be limited to the truly narrow subset of cases involving truly malevolent or badly misinformed actors in the criminal justice system.

Turning now to the specific effect of the Section 3 language, the provision will have no bearing on the enforcement of many victims' rights. The language specifically allows victims to seek to enforce rights "in future proceedings . . . ." Thus, the limitation can have no effect on the victims' interest in enforcing the right to a trial free from "unreasonable delay," since by definition the right can only concern future proceedings.

Even with respect to rights that are potentially implicated by the "no invalidating" language in Section 3, the only remedy that is restricted is the appellate remedy of "invalidating" a previously made ruling. If the trial court mistakenly denies a right to a victim, it would be free to correct the error. Rectifying that mistake would not be "invalidating" the trial court's sentence or plea. As the Senate Judiciary Committee report on this language explained, "Of course, limits on the ability of victims to 'invalidate' a court ruling do not forbid a victim from asking a court to reconsider its own ruling or restrict a court from changing its own ruling."[120] Thus, the only practical effect that the provision will have is curtailing the ability of victims to obtain an *appellate* remedy, and even there, only where that appellate would necessitate reversing some previously-entered order that relate to issues that cannot be remedied prospectively. In the real world, victim appeals will be extraordinarily rare under any conceivable constitutional amendment, so we are discussing what can only be regarded as a subsidiary issue.

The provision also allows invalidating rulings "with respect to conditional release or restitution." Thus, if a sentence were to be imposed without restitution to the victim, remanding for resentencing at which restitution would be included in the sentence is expressly permitted; if a bail decision were reached without involvement by victim, the victim could demand a new bail hearing.

It is also vitally important to remember that the provision in Senate Joint Resolution 3 will not bar all possibility of victims overturning a sentence or a plea as a means of enforcing the amendment. The provision is found in a section that reads "nothing *in this article* shall provide grounds to . . . ." The phrase "in this article" means that the Victims' Rights Amendment — the "article" in

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[120] S. REP. NO. 105-409 at 34.

constitutional terms — by itself does not automatically create a right to overturn a sentence or a plea. This is a limitation on the power of the Supreme Court to craft, on its own authority, judicial remedies for overturning sentences and pleas. Congress and the states would remain entirely free to pass implementing statutes allowing such overturning, because these statutes would not be found "in this article." The Senate Judiciary Report on this language is explicit on this point:

> This provision is designed to protected completed criminal proceedings against judicially-created remedies that might interfere with finality. At the same time, the provision leaves open appropriate avenues for victims to challenge violations of their rights as well as the ability of Congress and the States to provide additional remedies.
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> In drafting the amendment, the Committee was faced with balancing the competing concerns of giving victims an effective means of enforcing their rights and of ensuring that court decisions retain a reasonable degree of finality. The Committee was concerned that, if victims could challenge and overturn all criminal justice proceedings at which their rights were violated, the goal of finality, and conceivably other goals, could be seriously frustrated. On the other hand, the Committee recognized that if victims were never given an opportunity to challenge previously-taken judicial actions, victims rights might remain routinely ignored. The Committee's solution to the dilemma was to leave the issue of the most controversial remedies to the legislative branches. These branches have superior fact finding capabilities, as well as abilities to craft necessary exceptions and compromises. Thus, the provision provides that "Nothing in this article" shall provide ground for victims to challenge and overturn certainly previously taken judicial actions.[121]

Of course, the victims' movement has always taken the view that the politically accountable legislative branch is more hospitable to victims' claims than the judicial branch.

The possibility of subsequent implementing language is important because it has been generally understood that the Victims' Rights Amendment would never stand by itself but instead would be accompanied by federal and state statutes in the various jurisdictions that would handle the "nitty gritty" details of implementation and enforcement. Many of the questions surrounding enforcement are details that one would expect to find in these statutes rather than in the constitutional text itself. Indeed, in express recognition that subsequent legislative action will follow on the heels of the passage of the Amendment, Senate Joint Resolution 3 provides in Section 4 that: "The Congress shall have the power to enforce this article by appropriate legislation . . . ." This is an important provision, which tracks similar language in many state provisions. The Missouri Amendment, for example, provides that "the general assembly shall have the power to enforce this section by appropriate legislation."[122]

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[121] S. REP. NO. 105-409 at 34.

[122] MO. CONST., art. I, § 32.

The enforcement provision will allow Congress to assist in the enforcement of victims' rights, as recognized in the report of the Senate Judiciary Committee:

> This provision is similar to existing language found in section 5 of the 14th amendment to the Constitution. This provision will be interpreted in similar fashion to allow Congress to "enforce" the rights, that is, to insure that the rights conveyed by the amendment are in fact respected. At the same time, consistent with the plain language of the provision, the Federal Government and the States will retain their power to implement the amendment. For example, the States will, subject to the Supremacy Clause, flesh out the contours of the amendment by providing definitions of "victims" of crime and "crimes of violence."

Even after from subsequently-enacted legislation, victims would still automatically have available other enforcement mechanisms for vindication of their rights. I have been involved in many victims' efforts to assert their rights. The major problem in these cases is whether victims have "standing" to assert their rights in a crime case — a case filed by the state against a defendant. Senate Joint Resolution 3 guarantees that the victim or the victim's representative "shall have standing to assert the rights established by this article." This removes the single biggest barrier in existence today to effective crime victim enforcement actions. For example, the Oklahoma City bombing victims actions to protect their right to attend trial and testify at sentencing was thrown out by both the federal district court and the Tenth Circuit on standing grounds.[123]

Section 3 also forbids the judicial creation of civil damage actions against state actors. A number of states, including Missouri, have explicitly provided that their victims' rights amendments create no right to sue for damages.[124] 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.[125] Section 3's language on civil damage actions thus treads no new ground but simply follows the prevailing view in denying the possibility of a claim for "damages" under the Amendment.

Lest I be accused of overstating the case, I should give my own view that the provision could

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[123] *See* United States v. McVeigh, 106 F.3d 325, 334 (10th Cir. 1997) (victims' "failure to satisfy constitutional standing requirements . . . preclude[s] our consideration of both their appeal and their petition for mandamus relief").

[124] *See, e.g.*, KAN. CONST. art. 15, § 15(b) ("Nothing in this section shall be construed as creating a cause of action for money damages against the state . . . ."); MO. CONST. art. 1, § 32(3) (same); TEX. CONST. art. I, § 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.").

[125] *See, e.g.*, ILL. CONST. art. I, § 8.1(b) ("he General Assembly may provide by law for the enforcement of this section."); ILL. ANN. STAT. ch. 725 para. 120/9 (Smith Hurd Supp. 1994) ("This Act does not . . . grant any person a cause of action for damages which does not otherwise exist.").

be more narrowly crafted.[126] Yet it is important to be aware of the realities of victims' litigation today. I am not aware of an significant precedent allowing victims of crimes to overturn a sentence or negotiated plea as a means of enforcing their rights. On these issues, the limited enforcement provision "takes away" something that no crime victim has every had. Moreover, here again, it appears that the political support is lacking for a broader provision. Senators Kyl and Feinstein have, bowing to that unfortunate but undeniable reality, adopted the language on enforcement found in Senate Joint Resolution 3.

* * * *

In sum, passing Senate Joint Resolution 3 in its current form will preserve the momentum for a constitutional amendment and, more important, offers the prospect of making a real change for crime victims around the country. The Resolution guarantees the full list of constitutional rights that most crime victims' organizations seek. It extends those rights to all victims of violent crime and will create quite favorable dynamics for victims of other crimes as well. It gives victims standing to enforce those rights and will allow legislatures to fill in the necessary gaps in the future. To fail to take the Amendment that is currently on the table in the hope that some years down the road we will have a shot at a better one is a high stakes gamble that, in the view of the National Victims Constitutional Amendment Network, is not in the best interest of crime victims.

CONCLUSION

The United States Supreme Court has promised that "in the administration of criminal justice, courts may not ignore the concerns of victims."[127] Yet to crime victims, it has appeared in recent years that courts and others in the criminal justice system have been doing just that. Some level of victim frustration with the system is inevitable. But the examples of victims' problems reported to the Judiciary Committee during its series of hearings on this issue suggest substantial justification for that frustration. Common sense suggests that victims should not be kept in the dark about sentencing and commutation proceedings, should not be summarily excluded from courtrooms during trial, should not be denied the right to speak at sentencing and other proceedings. Yet without the passage of the federal Victims' Rights Amendment, victims of violent crimes around the country will continue to be subjected to all of these indignities.

Congress should approve the amendment and send it on its way to the states for ratification. Our criminal justice system already provides ample rights for the guilty; it can — and should — do the same for the innocent.

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[126] *Cf.* S.J. RES. 6 (1996).
[127] *Morris v. Slappy*, 461 U.S. 1, 14 (1983).

Senator ASHCROFT. Well, let me thank all of you for coming and for adding your voices to what I think is a near unanimous understanding that a federal amendment to protect the victims of crime would be helpful.

Professor Cassell, are there times when the state amendments and the State provisions come into conflict with Federal laws that result in, basically, the evisceration of the State's efforts. Does that provide a basis for requiring the additional protection of a uniform Federal Amendment to the Constitution?

Mr. CASSELL. What we've seen—and I say "we" as victim advocates—is the situation recurring over and over again that a defense attorney or defendant will make some claim that I have a Federal right to Due Process, and therefore, you can't do whatever the victim is requesting. In my view, those conflicts are illusory, that there is really no zero sum gain here.

We can give rights to victims and give rights to defendants, and Senate Joint Resolution 3 does not take rights away from criminal defendants. The problem, however, is that because of this perceived conflict and the certain imbalance that you mentioned, that defendant's rights are here in the Federal, while victims rights are, at best, down here in the State Constitutions, that defendant's rights have been trumped and created problems of enforcement throughout the country.

Senator ASHCROFT. Mr. Ashlock, have you had any problems like that here?

Mr. ASHLOCK. I have not seen any conflicts with Federal laws. We enjoy a good relationship in our little corner of the state up there.

Senator ASHCROFT. Do defense attorneys ever object to the presence of a victim in a room while other testimony is undertaken?

Mr. ASHLOCK. In our jurisdiction when they've objected, the judges have overruled. But in other jurisdictions of the state, victims sometimes are continued to be kept out of the courtroom.

Senator ASHCROFT. Ms. LeBaron, I see you nodding your head on this.

Mr. ASHLOCK. It's not by statute; it's by rule of the Court. Our stand is, the Constitution is a little higher than the rule of the Court.

Ms. LEBARON. We had that happen this week in a murder trial that was going on in Kirksville. They subpoenaed the mother of the murdered victim, and she was unable to be in the courtroom for a period of time, so we see it happening.

Mr. ASHLOCK. In our experience, we've had it happen, there's not been a problem; there's not been someone who has complained afterwards that the victim witness was able to use what they heard in the courtroom, which is always the complaint for barring witnesses out of the courtroom. So we just haven't had a problem with that happening. And as I said, it's our view of it that that's included in our Constitutional Amendment.

But there are some jurisdictions in the state of Missouri that continue to keep victims out, and oftentimes, what we found, prior to Constitutional Amendment and even now, is that you've got defense attorneys subpoenaing someone they have absolutely no hope of calling as a witness; they just don't want them in the courtroom.

Senator ASHCROFT. I want to thank you all for coming today. I believe that today's hearing will be extremely helpful to the Subcommittee, and to the Judiciary Committee as a whole as we proceed to mark up the proposed Amendment in the few days that are coming ahead.

This morning's hearing demonstrates to me both the need for a Federal role in the protection of victims' rights, as well as some ways that the present proposal may be improved. So, I thank you for your participation, and I now adjourn the meeting of the Subcommittee.

Thank you.

[Whereupon, the subcommittee was adjourned.]

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