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CRIME VICTIMS' RIGHTS AMENDMENT

NOVEMBER 7, 2003.—Ordered to be printed

Mr. HATCH, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S.J. Res. 1]

The Committee on the Judiciary, to which was referred the joint resolution (S.J. Res. 1) to propose an amendment to the Constitution of the United States to protect the rights of crime victims, having considered the same, reports favorably thereon, without amendment, and recommends that the joint resolution do pass.

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I. PURPOSE

The Crime Victims' Rights Constitutional Amendment is intended to restore, preserve, and protect, as a matter of right for the victims of violent crimes, the practice of victim participation in the

administration of criminal justice that was the birthright of every American at the founding of our Nation.

At the birth of this Republic, victims could participate in the criminal justice process by initiating their own private prosecutions. It was decades after the ratification of the Constitution and the Bill of Rights that the offices of the public police and the public prosecutor would be instituted, and decades beyond that before the victim's role was reduced from that of the moving party in most criminal prosecutions, to that of a party of interest in the proceedings, to that of mere witness, stripped even of membership in "the public" under the Constitutional meaning of "a public trial." See, e.g., Statement of U.S. Senator Dianne Feinstein, Congressional Record, May 2, 2000.

Much, of course, was gained in the transformation of criminal justice from one of private investigation and prosecution to an enterprise of government. The overall community's stake in how the system operated was recognized; the policies governing the system, the public servants hired by the system, and the resources needed by the system all became accountable to the democratic institutions of government. In many ways, crime victims themselves benefitted from the change. They had the aid of public law enforcement, which was more skilled than the average victim in investigating the crime, and the aid of public prosecutors, who were more skilled than the average victim in pleading their case in court. No longer would the wealth of the violated party be a significant determinant as to whether justice was done.

However, in the evolution of the Nation's justice system, something ineffable has been lost, evidenced in this plea of a witness speaking to the 1982 President's Task Force on Victims of Crime: "Why didn't anyone consult me? I was the one who was kidnaped—not the state of Virginia."

One of the most extraordinary aspects of the several hearings the Committee has held on this issue is the broad consensus among proponents and opponents alike that violent crime victims have a deep, innate, and wholly legitimate interest in the cases that victims bring to the justice system for resolution. It is beyond serious question that for many or most crime victims the prosecution and punishment of their violators are the most important public proceedings of their lifetimes.

This, then, is the purpose of the Crime Victims' Rights Amendment: That we make it part of our highest law to honor the humanity and dignity of crime victims within our borders who entrust the Government to seek justice for them. In pursuit of this purpose, the Committee seeks to continue the great theme of the Bill of Rights—to ensure the rights of citizens against the deprecations and intrusions of government—and to advance the great theme of the later amendments, extending the participatory rights of American citizens in the affairs of government.

II. Background and Legislative History

For more than 20 years, a Federal Crime Victims' Rights Amendment has been under consideration in this country. The idea dates back to at least 1982, when the Presidential Task Force on Victims of Crime convened by President Reagan recommended, after hearings held around the country and careful consideration of the issue,

that the only way to fully protect crime victims' rights was by adding such rights to the Constitution. The President's Task Force explained the need for a constitutional amendment in these terms:

> In applying and interpreting the vital guarantees that protect all citizens, the criminal justice system has lost an essential balance. It should be clearly understood that this Task Force wishes in no way to vitiate the safeguards that shelter anyone accused of crime; but it must be urged with equal vigor that the system has deprived the innocent, the honest, and the helpless of its protection.
>
> The guiding principle that provides the focus for constitutional liberties is that government must be restrained from trampling the rights of the individual citizen. The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed. To that end it is the recommendation of this Task Force that the sixth amendment to the Constitution be augmented.—President's Task Force on Victims of Crime, Final Report 114 (1982).

Following that recommendation, proponents of crime victims' rights decided to seek constitutional protection in the states initially before undertaking an effort to obtain a federal constitutional amendment. See Paul G. Cassell, Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment, Utah L. Rev. 1373, 1381–83 (1994) (recounting the history of crime victims' rights). As explained in testimony before the Committee, "[t]he 'states-first' approach drew the support of many victim advocates. Adopting state amendments for victim rights would make good use of the 'great laboratory of the states,' that is, it would test whether such constitutional provisions could truly reduce victims' alienation from their justice system while producing no negative, unintended consequences." Senate Judiciary Committee Hearing, April 23, 1996, statement of Robert E. Preston, at 40. A total of 33 states, in widely differing versions, now have state victims' rights amendments.[1] In addition, all 50 states have passed rights and protections for crime victims—although these vary widely from state to state.

With the passage of and experience with these State constitutional amendments came increasing recognition of both the national consensus supporting victims' rights and the difficulties of protecting these rights with anything other than a Federal amendment. As a result, the victims' advocates—including most prominently the National Victim Constitutional Amendment Project (NVCAP)—decided in 1995 to shift its focus towards passage of a Federal amendment. In 1997, the National Governors Association passed a resolution 49 to 1 supporting a Federal constitutional

[1] See Ala. Const. amend. 557; Alaska Const. art. I, § 24; Ariz. Const. art. II, § 2.1; Cal. Const. art. I, §§ 12, 28; Colo. Const. art. II, § 16a; Conn. Const. art. I, § 8(b); Fla. Const. art. I, § 16(b); Idaho Const. Art. I, § 22; Ill. Const. art. I, § 8.1; Ind. Const. art. I, § 13(b); Kan. Const. art. 15, § 15; La. Const. art. 1, § 25; Md. Decl. of Rights art. 47; Mich. Const. art. I, § 24; Miss. Const. art. 3, § 26A; Mo. Const. art. I, § 32; Neb. Const. art. I, § 28; Nev. Const. art. I, § 8; N.J. Const. art. I, § 22; New Mex. Const. art. 2, § 24; N.C. Const. art. I, § 37; Ohio Const. art. I, § 10a; Okla. Const. art. II, § 34; OR. Const.; R.I. Const. art. I, § 23; S.C. Const. art. I, S 24; Tenn. Const. art. 1, § 35; Tex. Const. art. 1, § 30; Utah Const. art. I, § 28; Va. Const. art. I, § 8–A; Wash. Const. art. 2, § 33; Wis. Const. art. I, § 9m. These amendments passed with overwhelming popular support.

amendment: "The rights of victims have always received secondary consideration within the U.S. judicial process, even though States and the American people by a wide plurality consider victims' rights to be fundamental. Protection of these basic rights is essential and can only come from a fundamental change in our basic law: the U.S. Constitution." National Governors Association, Policy 23.1.

In the 104th Congress, S.J. Res. 52, the first Federal constitutional amendment to protect the rights of crime victims, was introduced by Senators Jon Kyl and Dianne Feinstein on April 22, 1996. Twenty-seven other Senators cosponsored the resolution. A similar resolution (H.J. Res. 174) was introduced in the House by Representative Henry Hyde. On April 23, 1996, the Senate Committee on the Judiciary held a hearing on S.J. Res. 52. Representative Hyde testified in support of the amendment. Victims and representatives of victims' rights organizations also spoke in favor of the amendment: Katherine Prescott, the president of Mothers Against Drunk Driving (MADD); Ralph Hubbard, board member and State Coordinator of Parents of Murdered Children of New York State; John Walsh, the host of "America's Most Wanted"; Collene Campbell, a leader in the victims' rights movement in California; Rita Goldsmith, the national spokesperson of Parents of Murdered Children; and Robert E. Preston, co-chairman of the National Constitutional Amendment Network. Two legal experts testified in support of the amendment: Professor Paul Cassell of the University of Utah College of Law and Steve Twist, a member of the board of the National Organization for Victim Assistance and the former Chief Assistant Attorney General of Arizona. Two legal experts testified against the amendment: Professor Jamin Raskin of Washington College of Law at American University and noted commentator Bruce Fein, former official at the U.S. Department of Justice.

At the end of the 104th Congress, Senators Kyl and Feinstein introduced a modified version of the amendment (S.J. Res. 65). As first introduced, S.J. Res. 52 embodied eight core principles: notice of the proceedings; presence; right to be heard; notice of release or escape; restitution; speedy trial; victim safety; and notice of rights. To these core values another was added in S.J. Res. 65, the right of every victim to have independent standing to assert these rights.

In the 105th Congress, Senators Kyl and Feinstein introduced S.J. Res. 6 on January 21, 1997, the opening day of the Congress. Thirty-two Senators became cosponsors of the resolution. On April 16, 1997, the Senate Committee on the Judiciary held a hearing on S.J. Res. 6. Representative Robert C. Scott testified in opposition to the amendment and Representative Deborah Pryce testified in support of the amendment. U.S. Attorney General Janet Reno testified that "[b]ased on our personal experiences and the extensive review and analysis that has been conducted at our direction, the President and I have concluded that an amendment to the U.S. Constitution to protect victims' rights is warranted." Senate Judiciary Committee Hearing, April 16, 1997, statement of Attorney General Reno, at 40–41.

Others testifying in support of the amendment included John Walsh, the host of "America's Most Wanted"; Marsha Kight of Oklahoma City; Wisconsin Attorney General Jim Doyle; Kansas At-

torney General Carla Stovall; Pima County Arizona attorney Barbara LaWall; and Professor Paul Cassell of the University of Utah College of Law. The following people testified in opposition to the amendment: Lynne Henderson of Bloomington, Indiana; Donna F. Edwards, the executive director of the National Network to End Domestic Violence; and Virginia Beach Commonwealth Attorney Robert J. Humphreys.

Over the course of two years, many changes were made to the original draft, many responding to concerns expressed in hearings and by the Department of Justice. S.J. Res. 44 was introduced by Senators Kyl and Feinstein on April 1, 1998. Thirty-nine Senators joined Senators Kyl and Feinstein as original cosponsors: Senators Biden, Lott, Thurmond, Torricelli, Breaux, Grassley, DeWine, Ford, Reid, Gramm, Mack, Landrieu, Cleland, Coverdell, Craig, Inouye, Bryan, Snowe, Thomas, Warner, Lieberman, Allard, Hutchison, D'Amato, Shelby, Campbell, Coats, Faircloth, Frist, Robert Smith, Gregg, Hagel, Helms, Gordon Smith, Hutchinson, Inhofe, Murkowski, Bond, and Grams. Senator Wyden subsequently joined as a cosponsor. The amendment included the core principles contained in the earlier versions. The scope of the amendment as originally proposed reached to crimes of violence and other crimes that may have been added by law. In the present text, the amendment is limited to crimes of violence.

On April 28, 1998, the Senate Committee on the Judiciary held a hearing on S.J. Res. 44. U.S. Associate Attorney General Raymond C. Fisher testified in support of an amendment. Additionally, the following witnesses testified in support of S.J. Res. 44: Professor Paul Cassell; Steve Twist, a member of the National Victims' Constitutional Amendment Network and the former Chief Assistant Attorney General of Arizona; Norm Early, a former Denver district attorney and a board member of the National Organization for Victim Assistance; and Marlene Young, the executive director of the National Organization for Victim Assistance. The following witnesses testified in opposition to the amendment: Professor Robert Mosteller of Duke Law School and Kathleen Kreneck, the executive director of the Wisconsin Coalition Against Domestic Violence.

On July 7, after debate at three executive business meetings, the Senate Committee on the Judiciary approved S.J. Res. 44, with a substitute amendment by the authors, by a vote of 11 to 6. The following Senators voted in favor of the amendment: Hatch, Thurmond, Grassley, Kyl, DeWine, Ashcroft, Abraham, Sessions, Biden, Feinstein, and Torricelli. The following Senators voted against the amendment: Thompson, Leahy, Kennedy, Kohl, Feingold, and Durbin. Senator Specter did not vote.

In the 106th Congress, Senators Kyl and Feinstein introduced S.J. Res. 3 on January 19, 1999, the opening day of the Congress. Thirty-three Senators cosponsored the resolution. On March 24, 1999, the Senate Committee on the Judiciary held a hearing on S.J. Res. 3. Professor Paul Cassell and Steve Twist, a member of the National Victims' Constitutional Amendment Network and the former Chief Assistant Attorney General of Arizona, testified in support of S.J. Res. 3. Beth Wilkinson, a partner at Latham & Watkins and a former federal prosecutor and Department of Justice official, testified in opposition.

On May 26, 1999, the Subcommittee on the Constitution, Federalism, and Property Rights approved S.J. Res. 3, with an amendment, to the full Committee by a vote of 4 to 3. On September 30, 1999, the Senate Committee on the Judiciary approved S.J. Res. 3 with a sponsors' substitute amendment by a vote of 12 to 5. The following Senators voted in favor of the amendment: Hatch, Thurmond, Grassley, Kyl, DeWine, Ashcroft, Abraham, Sessions, Smith, Biden, Feinstein, and Torricelli. The following Senators voted against the amendment: Leahy, Kennedy, Kohl, Feingold, and Schumer. Senator Specter did not vote.

In the 108th Congress, Senators Kyl and Feinstein introduced S.J. Res. 1 on January 7th, 2003, the opening day of Congress. On April 8, 2003, the Senate Judiciary Committee held a hearing on S.J. Res. 3. U.S. Assistant Attorney General Viet Dinh, the head of the Office of Legal Policy, testified in support of S.J. Res. 3. Mr. Dinh testified that "[b]oth the President and the Attorney General strongly support guaranteeing rights to victims of violent crime, and we agree with the sponsors that these rights can only be fully protected by amending the Constitution of the United States. S.J. Res. 1 is the right way to do it because it strikes a proper balance between the rights of victims and the rights of criminal defendants." In addition, the following people testified in favor of the resolution: Steve Twist; Collene Campbell of San Juan Capistrano, California; Earlene Eason of Gary, Indiana; and Duane Lynn of Peoria, Arizona. The resolution was opposed by James Orenstein of New York, New York, and Patricia Perry of Seaford, New York.

On June 12, 2003, the Subcommittee on the Constitution, Civil Rights, and Property Rights approved S.J. Res. 3, without amendment, for full Committee consideration by a vote of 5 to 4. On September 4, 2003, after debate at markups on July 24, July 29, July 31, and September 4, the Senate Committee on the Judiciary approved S.J. Res. 3 by a vote of 10 to 8 and ordered it to be reported favorably, without amendment. The following senators voted in favor of the Amendment: Hatch, Grassley, Kyl, DeWine, Sessions, Graham, Craig, Chambliss, Cornyn, and Feinstein. The following Senators voted against the amendment: Leahy, Kennedy, Biden, Kohl, Feingold, Schumer, Durbin, and Edwards. Senator Specter did not vote.

III. The Need for Constitutional Protection

After extensive testimony in hearings held over seven years, the Committee concludes that a Federal constitutional amendment is needed to protect victims' rights in the Nation's criminal justice system. While a wide range of State constitutional amendments and other State and Federal statutory protections exist to extend rights to victims, that patchwork has not fully succeeded in ensuring comprehensive protection of victims' rights within the criminal justice system. A Federal amendment can better ensure that victims' rights are respected in the Nation's State and Federal courts.

The U.S. Supreme Court has held that "in the administration of criminal justice, courts may not ignore the concerns of victims." *Morris* v. *Slappy,* 461 U.S. 1, 14 (1983). Yet in today's world, without protection in our Nation's basic charter, crime victims are in fact often ignored. As one former prosecutor told the Committee, "the process of detecting, prosecuting, and punishing criminals con-

tinues, in too many places in America, to ignore the rights of victims to fundamental justice." Senate Judiciary Committee Hearing, April 23, 1996, statement of Steve Twist, at 88. In some cases victims are forced to view the process from literally outside the courtroom. Too often victims are left uninformed about critical proceedings, such as bail hearings, plea hearings, and sentencings. Too often their safety is not considered by courts and parole boards determining whether to release dangerous offenders. Too often they are left with financial losses that should be repaid by criminal offenders. Too often they are denied any opportunity to make a statement that might provide vital information for a judge. Time and again victims testified before the Committee that being left out of the process of justice was extremely painful for them. One victim even found the process worse than the crime: "I will never forget being raped, kidnaped, and robbed at gunpoint. However my disillusionment [with] the judicial system is many times more painful." President's Task Force on Victims of Crime, Final Report 5 (1982).

S.J. Res. 1, addresses many of the concerns raised by Senators during the floor debate on the previous version, S.J. Res. 3. As noted constitutional scholar Professor Tribe has observed:

> The current version of the Amendment, S.J. Res. 1, incorporates language worthy of Constitutional Amendment. I think your final version of January 7, 2003, resolves that problem in a thoughtful and sensitive way, improving in a number of respects on the earlier drafts that I have seen. Among other things, the greater brevity and clarity of this version makes it more fitting for inclusion in our basic law. That you have achieved such conciseness while fully protecting defendants rights and accommodating the legitimate concerns that have been voiced about prosecutorial power and presidential authority is no mean feat.—Laurence Tribe, Letter To Senators Feinstein and Kyl in Support of S.J. Res. 1., April 8, 2003.

President George W. Bush announced his support for the bipartisan Victims' Rights Amendment S.J. Res. 1, on April 16, 2002—at a ceremony honoring crime victim advocates during National Crime Victims Rights Week:

> This amendment makes some basic pledges to Americans. Victims of violent crime deserve the right to be notified of public proceedings involving the crime. They deserve to be heard at public proceedings regarding the criminal's sentence or potential release. They deserve to have their safety considered. They deserve consideration of their claims of restitution. We must guarantee these rights for all the victims of violent crime in America.
>
> The Feinstein-Kyl Amendment was written with care, and strikes a proper balance. Our legal system properly protects the rights of the accused in the Constitution. But it does not provide similar protection for the rights of victims, and that must change.
>
> The protection of victims' rights is one of those rare instances when amending the Constitution is the right thing

> to do. And the Feinstein-Kyl Crime Victims' Rights Amendment is the right way to do it.

Assistant Attorney General Viet Dinh testified on behalf of the Justice Department in support of S.J. Res. 1:

> Both the President [Bush] and the Attorney General [Ashcroft] strongly support guaranteeing rights to victims of violent crime, and we agree with the sponsors that these rights can only be fully protected by amending the Constitution of the United States. S.J. Res. 1 is the right way to do it because it strikes the proper balance between the rights of victims and the rights of criminal defendants.
>
> As the principal Federal law enforcement agency, the Department of Justice is keenly aware of the effects that the Crime Victims' Rights Amendment would have on the landscape of the criminal justice system. There is no doubt that, were the amendment to pass, it would prompt significant adjustments in how Federal, State and local prosecutors discharge their responsibilities. Accordingly, the Department has reviewed the proposed amendment in light of our prosecutorial function within the criminal justice system, our commitment to fundamental fairness and justice for defendants, and our support of the rights of crime victims. We believe the language of the proposed amendment properly advances all of these interests.—Written Testimony of Viet Dinh before the Senate Judiciary Committee, April 8, 2003.

It should be noted at the outset that a Federal amendment for victims' rights is intended to provide benefits to society as a whole, and not just individual victims. As former Attorney General Reno has testified:

> [T]he President and I have concluded that a victims' rights amendment would benefit not only crime victims but also law enforcement. To operate effectively, the criminal justice system relies on victims to report crimes committed against them, to cooperate with law enforcement authorities investigating those crimes, and to provide evidence at trial. Victims will be that much more willing to participate in this process if they perceive that we are striving to treat them with respect and to recognize their central place in any prosecution.

Senate Judiciary Committee Hearing, April 16, 1997, statement of Attorney General Reno, at 41. In an April 8, 2003 letter to Senators Kyl and Feinstein, 42 state Attorneys General expressed their strong support to pass S.J. Res. 1, the proposed amendment to protect the rights of crime victims:

> As Attorneys General from diverse regions and populations in our nation, we continue to see a common denominator in the treatment of crime victims throughout the country. Despite the best intentions of our laws, too often crime victims are still denied basic rights to fair treatment and due process that should be the birthright of every citizen who seeks justice through our courts. We are convinced that statutory protections are not enough; only a

> federal constitutional amendment will be sufficient to change the culture of our legal system.
>
> The rights you propose in S.J. Res. 1 are moderate, fair, and yet profound. They will extend to crime victims a meaningful opportunity to participate in critical stages of their cases. At the same time, they will not infringe on the fundamental rights of those accused or convicted of offenses. In addition, extending these fundamental rights to victims will not interfere with the proper functioning of law enforcement.

The Committee heard compelling testimony from several witnesses whose own experiences with the justice system are evidence of the need for victims' rights to be protected by our fundamental law. First among them was Collene Thompson Campbell, from San Juan Capistrano, California, whose son Scott was murdered in 1982 and whose brother, racing legend Mickey Thompson and his wife Trudy, were murdered in 1989. Collene and her husband Gary were not permitted to be in the courtroom during three trials for the men who murdered their son Scott. They literally were forced to sit in the hallway outside the courtroom while the murderers family was ushered in to reserved seats in the front row of the gallery.

Now, more than twenty years after Scott's murder and the beginning of their nightmare in the justice system, Collene and Gary Campbell await trial for the man accused of murdering Collene's brother and sister-in-law, and they have been told they will not be allowed to be in the courtroom during the trial. Their right to fair treatment remains illusory and unfulfilled. Collene asked the Committee in her testimony, "* * * [H]ow in this great nation have we allowed the violent criminals to have more rights than honest, law-abiding good American citizen, who, through no fault of their own, have become victims of violent crime?" It is a question that will continue to haunt our justice system until we establish constitutional rights for crime victims. Collene Campbell concluded, "We, who have lived the tortures of being crime victims, but who have also had the privilege to live our lives as honorable Americans, are simply asking to have the same level of constitutional rights as the criminal, no more—no less; that seems more than fair doesn't it?" The Committee agrees that it is fair to give crime victims constitutional rights.

Earlene Eason, of Gary, Indiana, told the Committee about the murder of her 16 year old son Christopher in Minneapolis, Minnesota while he visited friends during summer recess. She testified how she was not notified of proceedings and how she was not notified of the plea bargain that was offered to her son's murderer. She was not given an opportunity to attend the proceeding where the plea bargain was offered and accepted. As she told the Committee, "I was unable to appear in court to try to object to the plea bargain or speak at sentencing, even though it was very important to do so." She was told she could not get restitution. In clear and unequivocal terms Ms. Eason concluded, "People receive more compassion for the loss of a pet than we received from the justice system for the loss of our son."

The Committee heard powerful testimony from Mr. Duane Lynn of Phoenix, Arizona. Duane and his wife Nila were three months

short of their 50th wedding anniversary when Richard Glassel, angered at their homeowner's association, walked into the association meeting and started shooting. Mrs. Lynn was one of two murdered; she died in Mr. Lynn's arms speaking her last words to him. Mr. Lynn told the Committee that "[i]t took almost 3 years" before he was able to offer a victim impact statement to the court regarding his wife. Mr. Lynn also noted that he was "told that I had to stop short of talking about how I felt this murderer should be sentenced. I could give no comment on that. * * * The jury never heard that I wanted to recommend a life sentence. They gave him the death penalty."

The experiences of the Campbells, Earlene Eason, and Duane Lynn demonstrate just how far off course our justice system has gone in its treatment of crime victims. Only an amendment to the U.S. Constitution can restore fairness and balance to this system—and such an amendment is fully within the mainstream tradition of the Constitution. As witness Steve Twist told the Committee, "Our cause today is a cause in the tradition of the great struggles for civil rights. When a woman who was raped is not given notice of the proceedings in her case, when the parents of a murdered child are excluded from court proceedings that others may attend, when the voice of a battered woman or child is silenced on matters of great importance to them and their safety—on matters of early releases and plea bargains and sentencing—it is the government and its courts that are the engines of these injustices." Only an amendment to the U.S. Constitution can remedy great injustice once and for all.

THE CONSTITUTION TYPICALLY PROTECTS PARTICIPATORY RIGHTS

The Committee has concluded that it is appropriate that victims' rights reform take the form of a Federal constitutional amendment. A common thread among many of the previous amendments to the Federal constitution is a desire to expand participatory rights in our democratic institutions. For example, the 15th Amendment was added to ensure African-Americans could participate in the electoral process, the 19th Amendment to do the same for women, and the 26th amendment expanded such rights to young citizens. In fact, one interesting aspect of the debate on S.J. Res. 1 is that many of the arguments opponents have made to a Victims' Rights Amendment are similar to arguments made against proposed successful amendments conferring rights on racial minorities and women. See, e.g., Statement of Senator Dianne Feinstein, Senate Judiciary Committee, Sept. 4, 2003.

Other provisions of the Constitution guarantee the openness of civil institutions and proceedings, including the rights of free speech and assembly, the right to petition the Government for redress of grievances, and perhaps most relevant in this context, the right to a public trial. It is appropriate for this country to act to guarantee rights for victims to participate in proceedings of vital concern to them. These participatory rights serve an important function in a democracy. Open governmental institutions, and the participation of the public, help ensure public confidence in those institutions. In the case of trials, a public trial is intended to preserve confidence in the judicial system, that no defendant is denied a fair and just trial. However, it is no less vital that the public—

and victims themselves—have confidence that victims receive a fair trial.

In a Rose Garden ceremony on June 25, 1996, endorsing a constitutional amendment, former President Clinton explained the need to constitutionally guarantee a right for victims to participate in the criminal justice process:

> 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.

Two leading constitutional law scholars reached similar conclusions:

> [The proposed Crime 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 heard at appropriate stages in the process. These are rights not to be victimized again through the process by which government officials prosecute, punish, and release accused or convicted offenders. These are the very kinds of rights with which our Constitution is typically and properly concerned—rights of individuals to participate in all those government processes that strongly affect their lives.—Laurence H. Tribe & Paul G. Cassell, Embed the Rights of Victims in the Constitution, L.A. Times, July 6, 1998, at B7.

Participation of victims is not only a value consistent with our constitutional structure but something that can have valuable benefits in its own right. As experts on the psychological effects of victimization have explained, there are valuable therapeutic reasons to ensure victim participation in the criminal justice process:

> 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 defendants 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 the victims, with a corresponding increase in crime-related psychological harm.—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).

For all these reasons, it is the view of the Committee that it is vital that victims be guaranteed an appropriate opportunity to participate in our criminal justice process.

LESS THAN FEDERAL CONSTITUTIONAL PROTECTION HAS BEEN INADEQUATE

In testimony on S.J. Res. 3, an earlier version of the Amendment, most of the witnesses testifying before the Committee shared the view that victims' rights were inadequately protected today and that, without a Federal amendment, they would so remain. Attorney General Reno, for example, reported after careful study that:

> Efforts to secure victims' rights through means other than a constitutional amendment have proved less than fully adequate. Victims' rights advocates have sought reforms at the State level for the past twenty years, and many States have responded with State statutes and constitutional provisions that seek to guarantee victims' rights. However, these efforts have failed to fully safeguard victims' rights. These significant State efforts simply are not sufficiently consistent, comprehensive, or authoritative to safeguard victims' rights.—Senate Judiciary Committee Hearing, April 16, 1997, statement of Attorney General Reno, at 64.

Similarly, a comprehensive report from those active in the field concluded that "[a] victims' rights constitutional amendment is the only legal measure strong enough to rectify the current inconsistencies in victims' rights laws that vary significantly from jurisdiction to jurisdiction on the state and federal level." U.S. Department of Justice, Office for Victims of Crime, New Directions From the Field: Victims' Rights and Services for the 21st Century 10 (1998). Indeed, Professors Tribe and Cassell have reached a similar conclusion: "Congress and the states already have passed a variety of measures to protect the rights of victims. Yet the reports from the field are that they have all too often been ineffective." Laurence H. Tribe and Paul G. Cassell, Embed the Rights of Victims in the Constitution, L.A. Times, July 6, 1998, at B7.

EXAMPLES OF VICTIMS DENIED THE OPPORTUNITY TO PARTICIPATE

It is the view of the Committee that a Federal amendment is the only way to ensure that victims' opportunity to participate in the criminal justice process is fully respected. The Committee heard significant testimony about how the existing patchwork fails to transform paper promises to victims into effective protections in the criminal justice system. Marlene Young, a representative of the National Organization for Victim Assistance (NOVA), gave some powerful examples to the Committee:

- Roberta Roper, who testified eloquently before the Committee in her capacity as the co-chair of the National Victims Constitutional Amendment Network, was denied the opportunity to sit in the courtroom at the trial of her daughter's murderer because it was thought she might, by her presence, influence the outcome.
- Sharon Christian, 20 years old, a young victim of rape reported the crime. After the offender was arrested, she was victimized by the system when, two weeks later she was walking down the street in her neighborhood and saw the young man hanging out on the corner. He had been released on personal recognizance with no no-

tice to her and no opportunity to ask for a restraining order or for the court to consider the possibility of bond.

• Virginia Bell, a retired civil servant, was accosted and robbed in Washington, DC some five blocks from the Committee's hearing room, suffering a broken hip. Her medical expenses were over $11,000, and the resulting debilitation required her to live with her daughter in Texas. While her assailant pled guilty, Ms. Bell was not informed, and the impact of her victimization was never heard by the court. The court ultimately ordered restitution in the entirely arbitrary and utterly inadequate amount of $387.

• Ross and Betty Parks, who's daughter Betsy was murdered, waited seven years for a murder trial. The delay was caused, in part, by repeated motions that resulted in delay—thirty-one motions at one point.

Reports from the field are that there are countless other victims that have been mistreated in similar ways. Yet sadly and all too often, the plight of crime victims will never come to the attention of the public or the appellate courts or this Committee. Few victims have the energy or resources to challenge violations of even clearly-established rights. In those rare cases when they do so, they face a daunting array of obstacles, including barriers to their even obtaining "standing" to be heard to raise their claims. No doubt today many frustrated victims simply give up in despair, unable to participate meaningfully in the process.

STATISTICAL QUANTIFICATION OF VIOLATIONS OF VICTIMS' RIGHTS

The statistical evidence presented to the Committee revealed that the current regime falls well short of giving universal respect to victims' rights. In the mid-1990's, the National Victim Center, under a grant from the National Institute of Justice, reviewed the implementation of victims' rights laws in four States. Two states were chosen because they had strong State statutory and State constitutional protection of victims' rights, and two were chosen because they had weaker protection. The study surveyed more than 1,300 crime victims and was the largest of its kind ever conducted. It found that many victims were still being denied their rights, even in States with what appeared to be strong legal protection. The study concluded that State protections alone are insufficient to guarantee victims' rights:

> The Victims Rights Study revealed that, while strong state statutes and state constitutional amendments protecting crime victims' rights are important, they have been insufficient to guarantee the rights of crime victims. While this sub-report focused on reports by crime victims regarding their personal experiences, the responses of local criminal justice and victim service providers to similar questions in the Victims Rights Study corroborate the victim responses. Even in states with strong protection large numbers of victims are being denied their legal rights.—National Victim Center, Statutory and Constitutional Protection of Victims' Rights: Implementation and Impact on Crime Victims-Sub-Report: Crime Victim Responses Regarding Victims' Rights 7 (April 15, 1997).

Important findings of the study included:

• Nearly half of the victims (44 percent) in States with strong protections for victims and more than half of the victims (70 percent) in States with weak protections did not receive notice of the sentencing hearing—notice that is essential for victims to exercise their right to make a statement at sentencing.

• While both of the States with strong statutes had laws requiring that victims be notified of plea negotiations, and neither of the weak protection States had such statutes, victims in both groups of States were equally unlikely to be informed of such negotiations. Laws requiring notification of plea negotiations were not enforced in nearly half of the violent crime cases included in the study.

• Substantial numbers of victims in States with both strong and weak protection were not notified of various stages in the process, including bail hearings (37 percent not notified in strong protection states, 57 percent not notified in weak protection states); the pretrial release of perpetrators (62 percent not notified in strong protection states, 74 percent not notified in weak protection States); and sentencing hearings (45 percent not notified in strong protection States, 70 percent not notified in weak protection States).

A later report based on the same large data base found that racial minorities are most severely affected under the existing patchwork of victims' protections. National Victim Center, Statutory and Constitutional Protection of Victims' Rights: Implementation and Impact on Crime Victims-Sub-Report: Comparison of White and Non-White Crime Victim Responses Regarding Victims' Rights 5 (June 5, 1997). Echoing these findings of disparate impact, another witness reported to the Committee, "There being no constitutional mandate to treat all of America's victims, white and non-white, with dignity and compassion * * * minority victims will continue to feel the sting of their victimization much longer than their white counterparts. Because of the large percentage of minority victims in the system, their neglect * * * continues to create disrespect for a process in the communities where such disrespect can be least afforded." Senate Judiciary Committee Hearing, April 28, 1998, statement of Norm S. Early, at 96. A recent report concluded, after reviewing all of the evidence from the field, that "[w]hile victims" rights have been enacted in states and at the federal level, they are by no means consistent nationwide. All too often they are not enforced because they have not been incorporated into the daily functioning of all justice systems and are not practiced by all justice professionals." U.S. Department of Justice, Office for Victims of Crime, New Directions from the Field: Victims' Rights and Services for the 21st Century 9 (1998).

In sum, as Harvard Law Professor Laurence H. Tribe has concluded, rules enacted to protect victims' rights "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." Laurence H. Tribe, Statement on Victims' Rights, April 15, 1997, p. 3.

The Committee also rejects the view, offered by some opponents of the amendment, that the nation should simply leave victims to fare as best they can under the current patchwork quilt of victims provisions and see how things sort themselves out. For example,

one constitutional commentator opposing the amendment took the position that "if you have struggled with a problem for 10, 11, 15 years at the State level and the statutes just don't seem to be working, fine, I understand the need [for a federal constitutional amendment]." Senate Judiciary Committee Hearing, April 23, 1996, statement of Bruce Fein, at 108. However, as victims' advocates aptly pointed out in response, problems with the treatment of victims in the criminal justice system were widely recognized by at least 1982. At that time, a Presidential Task Force concluded after comprehensive study that "the innocent victims of crime have been overlooked, their pleas for justice have gone unheeded, and their wounds-personal, emotional, and financial-have gone unattended." President's Task Force on Victims of Crime, Final Report (1982). In the twenty years since that report, the country has attempted to find ways to protect victims through less than constitutional means. Yet while hundreds of statutes and more than two dozen statement constitutional amendments have been passed in the intervening years, full justice for victims remains a distant goal. During those years, literally millions of victims have participated—or attempted to participate—in a criminal justice system without full protection of their interests. Each year of delay is a year in which countless victims are denied their rights. Rather than take a wait-and-hope-things-improve approach, the Committee is of the view that prompt, decisive, and comprehensive action is needed to protect victims' basic rights. In that respect, the Committee simply adopts the long expressed view that "Justice, though due to the accused, is due to the accuser also." *Payne* v. *Tennessee,* 501 U.S. 808, 827 (1991) (quoting *Snyder* v. *Massachusetts,* 291 U.S. 987, 1222 (1934) (Cardozo, J.)). The time for justice is now, not later.

A FEDERAL AMENDMENT IS COMPATIBLE WITH IMPORTANT FEDERALISM PRINCIPLES

The proposed victims' rights constitutional amendment is fully compatible with the principles of federalism on which our Republic is based. First, of course, the constitutionally specified process for amending the Constitution fully involves the States, requiring approval of three-quarters of them before any amendment will take effect. There is, moreover, substantial evidence that the States would like to see the Congress act and give them, through their State legislatures, the opportunity to approve an amendment. For example, a number of Governors have endorsed the constitutional amendment and voters in the states have endorsed victims' rights whenever they have had the chance.

The important values of federalism provide no good reason for avoiding action on the amendment. Already many aspects of State criminal justice systems are governed by Federal constitutional principles. For example, every State is required under the sixth amendment to the Federal constitution as applied to the States to provide legal counsel to indigent defendants and a trial by jury for serious offenses. Victims' advocates simply seek equal respect for victims' rights, to give the similar permanence to victims' rights. Constitutional protection for victims' rights is in no sense an "unfunded mandate" or "arrogation of power" by the federal government. Constitutional protection is instead the placing of a birth-

right into the Constitution—a line across which no government, be it federal, state, or local, can cross. Adding protections into the U.S. Constitution, our fundamental law, will thus serve to ensure that the protection of victims rights will be a part of our political architecture and therefore fully protected. This same point was recognized by James Madison in considering whether to add a Bill of Rights to the Constitution. He concluded the Bill of Rights would acquire, by degrees, "the character of fundamental maxims." James Madison, The Complete Madison, ed. Saul K. Padover, p. 254 (1953). Federalism was intended to be a protection for the liberties of Americans against the encroachment of excessive government power. It cannot, therefore, be a violation of federalist principles to expand liberty by extending participatory rights to crime victims.

Amending the Constitution is, of course, a significant step—one which the Committee does not recommend lightly. But to protect victims, it is an appropriate one. As Thomas Jefferson once said: "I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times." Thomas Jefferson, letter to Samuel Kercheval, July 12, 1816, The Writings of Thomas Jefferson, ed. Paul L. Ford, vol. 10, pp. 42–43 (1899). Throughout the country, there is a strong consensus that victims' rights deserve to be protected. But at the same time, as a country, we have failed to find a way to fully guarantee rights for victims in criminal justice processes of vital interest to them. It is time to extend Federal constitutional recognition to those who are too often forgotten by our criminal justice system—the innocent victims of crime.

IV. The Need for Specific Rights in the Process

With this need for Federal constitutional protection of victims' rights in mind, the Committee finds that rights under eight general headings should be protected in an amendment to the Federal constitution. Each of these nine rights is discussed in turn.

1. Right to notice of public proceedings

Rights for victims in the criminal justice process are of little use if victims are not aware of when criminal justice proceedings will be held. The Committee heard testimony about the devastating effects on crime victims when hearings about the crime are held without prior notice to them.

For example, Earlene Eason, in testifying in support of S.J. Res. 1 stated:

> We also experienced significant financial hardship because of other failures to give us adequate notice. All of this wasted expense, which we could not afford, was due to constant trips to Minneapolis for court dates, which were frequently changed without adequate notice to me and my fiancé. My son's father, who resides in California, purchased several airline tickets, but he was never advised by the District Attorney's office of changes in court dates.

> He became so frustrated that he gave up on coming to any hearing due to the expense of cancelled tickets and the fear of losing his job from the disruption in his work schedule. Senate Judiciary Committee Hearing, April 8 2003, Prepared Statement of Earlene Eason.

For example, Rita Goldsmith, a witness from Parents of Murdered Children (POMC) testified:

> Each week at our national office, we receive more than 1,000 murder-related calls. Of these calls, about half involve homicide survivors who believe that they have been treated unfairly by some part of the criminal justice system. Some of our members even have as much anger about their unfair treatment by the criminal justice system as they do about the murder. * * *
>
> Many of the concerns arise from not being informed about the progress of the case. * * * [V]ictims are not informed about when a case is going to court or whether the defendant will receive a plea bargain. * * * [I]n many cases, the failure to provide information arises simply from indifference to the plight of the surviving family members or a feeling that they have no right to the information.
>
> 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' family should not have to bear the added burden of trying to obtain information. It should be their automatic right.—Senate Judiciary Committee Hearing, April 23, 1996, prepared statement of Rita Goldsmith, at 35–36.

The Committee concludes that victims deserve notice of important criminal justice proceedings relating to the crimes committed against them. In those rare circumstances when notice may compromise the safety of another person or may compromise a law enforcement investigation the language of the amendment would allow the right to be restricted as long as necessary to achieve the stated ends. Moreover, the right only attaches to "public" proceedings and there are mechanisms in the law that permit the closure of proceedings.

Based on a demonstrated need for victims to receive notice, as long ago as 1982 the President's Task Force on Victims of Crime recommended that legislation and policies to guarantee that victims receive case status information, prompt notice of scheduling changes of court proceedings, and prompt notice of a defendant's arrest and bond status. Reviewing this status of these recommendations, a recent Department of Justice Report found:

> Twenty years later, many states, but not all, have adopted laws requiring such notice. While the majority of states mandate advance notice to crime victims of criminal proceedings and pretrial release, many have not implemented mechanisms to make such notice a reality. * * *

> Many states do not require notification to victims of the filing of an appeal, the date of an appellate proceeding, or the results of the appeal. Also, most do not require notification of release from a mental facility or of temporary or conditional releases such as furloughs or work programs.
>
> Some state laws require that notice be made "promptly" or within a specified period of time. * * * Victims also complain that prosecutors do not inform them of plea agreements, the method used for disposition in the overwhelming majority of cases in the United States criminal justice system.—U.S. Department of Justice, Office for Victims of Crime, New Directions from the Field: Victims' Rights and Services for the 21st Century 13 (1998).

This report confirms the testimony that the Committee received that victims are too often not notified of important criminal justice proceedings. It is time to protect in the Constitution this fundamental interest of victims.

2. Right to notice of release or escape

The Committee heard testimony about Sharon Christian, 20 years old, a young victim of rape who reported the crime and whose offender was arrested. She was doubly victimized when 2 weeks later she was walking down the street in her neighborhood and saw the young man hanging out on the corner. He had been released on personal recognizance with no notice to her and no opportunity to ask for a restraining order or for the court to consider the possibility of a bond. Senate Judiciary Committee Hearing, April 28, 1998, statement of Marlene Young, at 105.

Defendants who are released from confinement often pose grave dangers to those against whom they have committed crimes. In a number of cases, notice of release has been literally a matter of life and death. As the Justice Department recently explained:

> Around the country, there are a large number of documented cases of women and children being killed by defendants and convicted offenders recently released from jail or prison. In many of these cases, the victims were unable to take precautions to save their lives because they had not been notified of the release.—U.S. Department of Justice, Office for Victims of Crime, New Directions From the Field: Victims' Rights and Services for the 21st Century 14 (1998).

The problem of lack of notice has been particularly pronounced in domestic violence and other acquaintance cases, in which the dynamics of the cycle of violence lead to tragic consequences. For example, on December 6, 1993, Mary Byron was shot to death as she left work. Authorities soon apprehended Donovan Harris, her former boyfriend, for the murder. Harris had been arrested three weeks earlier on charges of kidnaping Byron and raping her at gunpoint. A relative's payment of bond money allowed Harris to regain his freedom temporarily. No one thought to notify Byron or the police of her release. See Jeffrey A. Cross, Note, The Repeated Sufferings of Domestic Violence Victims Not Notified of Their Assailant's Pre-Trial Release from Custody: A Call for Mandatory Domestic Violence Victim Notification Legislation, 34 J. Family L. 915

(1996) (collecting this and other examples). The Committee concludes that victims deserve notice before violent offenders are released.

Recent technological changes have also simplified the ability to provide notice to crime victims. Today some jurisdictions use automated voice response technology to notify victims of when offenders are released. New York City, for example, recently implemented a system in which any victim with access to a telephone can register for notification simply by calling a number and providing an inmate's name, date of birth, and date or arrest. If an inmate is released, the victim receives periodic telephone calls for 4 days or until the victim confirms receiving the message by entering a personal code. Victim assistance providers and police have been trained to explain the system to victims. Other jurisdictions have developed other means of notification, including websites that allow victims to track the location of inmates at all times. While recent developments in these innovative jurisdictions are encouraging, notification needs to be made uniformly available for crime victims around the country.

3. Right not to be excluded

The Committee concludes that victims deserve the right not to be excluded from important criminal justice proceedings related to crimes perpetrated against them. This is no new insight. In 1982, the President's Task Force on Victims of Crime concluded:

> The crime is often one of the most significant events in the lives of victims and their families. They, no less than the defendant, have a legitimate interest in the fair adjudication of the case, and should therefore, as an exception to the general rule provided for the exclusion of witnesses, be permitted to be present for the entire trial.—President's Task Force on Victims of Crime, Final Report 80 (1982).

Allowing victims to attend court proceedings may have important psychological benefits for victims. "The victim's presence during the trial may * * * facilitate healing of the debilitating psychological wounds suffered by a crime victim." Ken Eikenberry, The Elevation of Victims' Rights in Washington State: Constitutional Status, 17 Pepperdine L. Rev. 19, 41 (1989). In addition, without a right not to be excluded from court proceedings, victims suffer a further loss of dignity and control of their own lives. In addition, without a right to attend trials, victims suffer a further loss of dignity and control of their own lives. Applying witness sequestration rules in rape cases, for example, has proven harmful. See Lee Madigan and Nancy C. Gamble, The Second Rape: Society's Continued Betrayal of the Victim 97 (1989).

The primary barrier to victims attending trial is witness sequestration rules that are unthinkingly extended to victims. Not infrequently defense attorneys manipulate these rules to exclude victims from courtrooms simply because the defendant would like the victim excluded. The Committee heard no convincing evidence that a general policy excluding victims from courtrooms is necessary to ensure a fair trial. As a Department of Justice report recently explained:

> There can be no meaningful attendance rights for victims unless they are generally exempt from [witness sequestration rules]. Just as defendants have a right to be present throughout the court proceedings whether or not they testify, so too should victims of crime. Moreover, the presence of victims in the courtroom can be a positive force in furthering the truth-finding process by alerting prosecutors to misrepresentations in the testimony of other witnesses.—U.S. Department of Justice, Office for Victims of Crime, New Directions from the Field: Victims' Rights and Services for the 21st Century 15 (1998).

Some defense attorneys suggests that allowing victims to attend trial might somehow lead to victims "tailoring" their testimony to match that of other witnesses. Such claims were not documented with any real world examples, and they seem implausible. As one witness reminded the Committee:

> And what of the fear of perjury? Consider the civil justice system. If a lawsuit arises from a drunk driving crash, both the plaintiff (the victim of the drunk driver) and the defendant (the drunk driver) are witnesses. Yet both have an absolute right, as parties in the case, to remain in the courtroom throughout the trial. Do we value truth any less in civil cases? Of course not. But we recognize important societal and individual interests in the need to participate in the process of justice.
>
> This need is also present in criminal cases involving victims. How can we justify saying to the parents of a murdered child that they may not enter the courtroom because the defense attorney has listed them as witnesses. This was a routine practice in my state, before our constitutional amendment. And today, it still occurs throughout the country. How can we say to the woman raped or beaten that she has no interest sufficient to allow her the same rights to presence as the defendant? Closing the doors of our courthouses to America's crime victims is one of the shames of justice today and it must be stopped.—Senate Judiciary Committee Hearing, April 28, 1998, statement of Steve Twist, at 90–91.

For these reasons, the Committee finds persuasive the experience of the growing number of States that have guaranteed victims an unequivocal right to attend a trial. See, e.g., Ariz. Const. Art. 2, § 2.1(A)(3) (victim right "[t]o be present * * * at all criminal proceedings where the defendant has the right to be present"); Mo. Const. Art. I, § 32(1) (victim has "[t]he right to be present at all criminal justice proceedings at which the defendant has such right"); Idaho Const. Art. I, § 22(4) (victim has the right "[t]o be present at all criminal justice proceedings"). The Committee concludes that an alternative approach—giving victims a right to attend a trial unless their testimony would be "materially affected" by their attendance—would be inadequate. Congress has previously adopted such a standard, see 42 U.S.C. § 10606(b)(4), but the results have proven to be unfortunate. In the Oklahoma City bombing case, for example, a district court concluded that testimony about the impact of their loss from family members of deceased vic-

tims of the bombing would be materially affected if the victims attended the trial. This perplexing ruling was the subject of unsuccessful emergency appeals (see Cassell 1997 testimony) and ultimately Congress was forced to act. See Victim Rights Clarification Act of 1997 (Pub. L. 105–6, codified at 18 U.S.C. §§ 3510, 3481, 3593). Even this action did not fully vindicate the victims' right to attend that trial. The Committee heard testimony from a mother who lost her daughter in the bombing that even this Act of Congress did not resolve the legal issues sufficiently to give the victims the legal assurances they need to attend all the proceedings. Senate Judiciary Committee Hearing, April 16, 1997, statement of Marsha Kight, at 73–74. Rather than create a possible pretext for denying victims the right to attend a trial or extended litigation about the speculative circumstances in victim testimony might somehow be affected, the Committee believes that such a victim's right to attend trial should be unequivocally recognized.

While a victim's right to attend is currently protected in some statutes or State constitutional amendments, only a Federal constitutional amendment will fully ensure such a right. The Committee was presented with a detailed legal analysis that convincingly demonstrated that there is no general federal constitutional right of criminal defendants to exclude victims from trials. See Senate Judiciary Committee Hearing, April 23, 1996, statement of Paul Cassell, at 48–57. While this appears to be an accurate assessment of constitutional legal principles, the fact remains that the law has not been authoritatively settled. In the wake of this uncertainty, State rights for victims to attend trials are not fully effective.

Confirmation of this point came when the Committee heard testimony that "even in some States which supposedly protect a victims' right to attend a trial, victims are often 'strongly advised' not to go in because of the possibility that it might create an issue for the defendant to appeal." Senate Judiciary Committee Hearing, April 23, 1996, statement of Rita Goldsmith, at 36. Federal prosecutors in the Oklahoma City bombing case, for example, were forced to give victims less-than-clear-cut instructions on whether victims could attend proceedings. See Senate Judiciary Committee Hearing, April 16, 1997, statement of Marsha Kight, at 73–74.

Moreover, efforts to obtain clear-cut legal rulings have been unsuccessful. In Utah, for example, despite a strongly written amicus brief on behalf of a number of crime victims organizations requesting a clear statement upholding the right of victims to attend, the Utah Court of Appeals has left unsettled the precise standards for exclusion of crime victims. See Senate Judiciary Committee Hearing, April 16, 1997, statement of Paul Cassell, at 114–15 (discussing *State* v. *Beltran-Felix,* No. 95–341–CA). The result has been that, in Utah and presumably many other States, crime victims must struggle with the issue of whether to attend trials of those accused perpetrating crimes against them at the expense of creating a possible basis for the defendant to overturn his conviction. The issue of a victim's right to attend a trial should be authoritatively settled by Federal constitutional protection.

4. Right to be heard

The Committee concludes that victims deserve the right to be heard at specific points in the criminal justice process: public release, plea, sentencing, reprieve and pardon hearings. Giving victims a voice not only improves the quality of the process but can also be expected to often provide important benefits to victims.

Victims have vital interests at stake when a court decides whether to accept a plea. One leading expert on victims' rights recently explained that:

> The victim's interest in participating in the plea bargaining process are many. The fact that they are consulted and listened to provides them with respect and an acknowledgment that they are the harmed individual. This in turn may contribute to the psychological healing of the victim. The victim may have financial interests in the form of restitution or compensatory fine * * * [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.—Douglas E. Beloof, Victims in Criminal Procedure 464 (1999).

Victim participation in bail hearings can also serve valuable functions, particularly in alerting courts to the dangers that defendants might present if released unconditionally. Without victim participation, courts may not be fully informed about the consequences of releasing a defendant. "It is difficult for a judge to evaluate the danger that a defendant presents to the community if the judge hears only from the defendant's counsel, who will present him in the best possible light, and from a prosecutor who does not know of the basis for the victim's fear. * * * The person best able to inform the court of [threatening] statements that may have been made by the defendant and the threat he poses is often the person he victimized." President's Task Force on Victims of Crime, Final Report 65 (1982).

The Committee heard chilling testimony about the consequences of failing to provide victims with this opportunity from Katherine Prescott, the President of Mothers Against Drunk Driving (MADD):

> I sat with a victim of domestic violence in court one day and she was terrified. She told me she knew her ex-husband was going to kill her. The lawyers and the judge went into chambers and had some discussions and they came out and continued the case. The victim never had the opportunity to speak to the judge, so he didn't know how frightened she was. He might have tried to put some restrictions on the defendant if he had known more about her situation, but it was handled in chambers out of the presence of the victim.
>
> That night, as she was going to her car after her shift was over at the hospital where she was a registered nurse, she was murdered by her ex-husband, leaving four young children, and then he took his own life—four children left orphans. I will always believe that if the judge could have heard her and seen her as I did, maybe he could have done something to prevent her death.—Senate Judiciary Com-

mittee Hearing, April 23, 1996, statement of Katherine Prescott, at 25–26.

Victim statements at sentencing also serve valuable purposes. 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.—President's Task Force on Victims of Crime, Final Report 77 (1982).

Courts have found victim information helpful in crafting an appropriate sentence. For instance, in *United States* v. *Martinez,* the District Court for the District of New Mexico stated that it "has welcomed such [allocution] statements and finds them helpful in fashioning an appropriate sentence." 978 F. Supp. 1442, 1452 (D.N.M. 1997). Likewise in *United States* v. *Smith,* 893 F. Supp. 187, 188 (E.D.N.Y. 1995), Judge Weinstein explained that the "sensible process [of victim allocution] helps the court gauge the effects of the defendant's crime not only on the victim but on relevant communities." Victim statements can also have important cathartic effects. For example, a daughter who spoke at the sentencing of her step-father for abusing her and her sister: "When I read [the impact statement], it healed a part of me—to speak to [the defendant] and tell him how much he hurt me." Senate Judiciary Committee Hearing, April 28, 1998, statement of Paul Cassell, at 36 (quoting statement of victim). The sister also explained: "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." Id.

Victims deserve the right to be heard by parole boards deciding whether to release prisoners. Without victim testimony, the boards may be unaware of the true danger presented by an inmate seeking parole. An eloquent example of this point can be found that was provided by Patricia Pollard, who testified before the Committee in 1996. She was abducted, raped, brutally beaten, and had her throat slashed with the jagged edge of a beer can, and left to die in the Arizona desert. Miraculously she survived. In moving testimony, she described for the Committee what happened next:

> Eric Mageary, the man who attacked me, was caught and convicted. He was sentenced to 25 years to life in the Arizona State Prison. While he was still 10 years short of his minimum sentence he was released on parole, but no one ever told me or gave me a chance to say what I

> thought about it. The system had silenced me, just like Mageary did that night outside of Flagstaff * * *
>
> But my story does not end with Eric Mageary's first parole. Within less than a year he was back in prison, his parole [r]evoked for drug crimes. Then in 1990, the people of Arizona voted State constitutional rights for crime victims. In 1993, Mageary again applied for release from prison and, incredibly, he was again released without any notice to me. I was again denied any opportunity to tell the parole board about the horrible crime or the need to protect others in that community. They ignored my rights, but this time, I had a remedy.
>
> The county attorney in Flagstaff filed an action to stop the release and the court of appeals in Arizona forced the board, because they had denied me my constitutional rights, to hold another hearing and to hear from me. This time, after they heard from me directly and heard firsthand the horrible nature of the offense, they voted for public safety and Mageary's release was denied.—Senate Judiciary Committee Hearing, April 23, 1996, statement of Patricia Pollard, at 31–32.

Voices such as Patricia Pollard's must not be silenced by the system. Victims deserve the right to be heard at appropriate times in the process.

The last step in the criminal process is the decision by the President, a governor, or a clemency board on whether to grant executive clemency. Here too victims, deserve notice of any such decision made at a public proceeding or that would lead to a release of the individual in question, and an opportunity to be heard before reprieve or pardon action is taken.

Finally, victims deserve the right to be heard when the President, governors, or clemency boards consider whether to pardon or commute the sentence of a prisoner. Here again, victims can provide vital information that is useful in making such decisions. As the President's Task Force on Victims of Crime concluded, "No one knows better than the victim how dangerous and ruthless the candidate was before" the clemency application. President's Task Force on Victims of Crime, Final Report 84 (1982). Moreover, as a simple matter of fairness, victims deserve the opportunity to be heard, if they so desire. The prisoner seeking clemency, of course, has an opportunity to make his case. Equity demands that victims, too, be heard on this issue. A subcommittee of this Committee heard moving testimony from Anita Lawrence, whose son was murdered. The murderer's death sentence was later commuted without any notice to her. Ms. Lawrence eloquently explained why she should have had an opportunity to be heard: "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." Senate Judiciary Committee Hearing, Subcommittee on Constitution, Federalism, and Property Rights, St. Louis Field Hearing, May 1, 1999. It may be noted that the commuting Governor in this instance later apologized to the family, agreeing that they should have been consulted.

The Committee agrees with Ms. Lawrence that victims like her, Patricia Pollard, and others who have suffered greatly at the hands

of criminals must not be left completely out of the process. At the appropriate time, victims deserve the right to heard.

Failure to provide notice to victims of a commutation of a sentence can have devastating psychological effects. A subcommittee of this Committee heard stark testimony about what it is like for a victim to be surprised to learn about a previously-granted commutation. Anita Lawrence's son Willie Lawrence was murdered in 1988, along with two of his grandparents. Ms. Lawrence learned from watching television in January 1999 that the death sentence of her son's murderer had been commuted:

> We were visiting friends, and we sat down to watch the evening news with our friends. * * * And then when the news came on, the first thing on the news was Mease [the convicted triple murderer] 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 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 were just—I don't know how to explain it.—Senate Judiciary Committee Hearing, Subcommittee on Constitution, Federalism, and Property Rights, St. Louis Field Hearing, May 1, 1999.

Ms. Lawrence concluded her tearful appearance before the subcommittee with a plea that something be done so that the "the next family" would not have to suffer through the same horrors as hers. The Committee agrees that no family should have to suffer the anguish of learning for the first time about a pardon or commutation on a television news program. Victims deserve advance notice before such a decision is made.

It has long been the practice in many states that the sentencing judge and prosecutor are given notice and asked to comment before executive clemency is granted. There is a trend toward greater public involvement in the process, with the federal system and a number of states now providing notice to victims. The federal victims bill of rights, for example, guarantees victims the "right to information about the * * * release of the offender." 42 U.S.C. § 10606(b)(7). In Alaska, 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." Alaska Stat. § 33.20.080. 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." Ohio Rev. Code Ann. § 2967.12.

While the trend toward notice is encouraging, problems remain both in the breadth of these provisions and, particularly, in their implementation. Recently, the Committee heard testimony that the

federal provision had not been effectively implemented. The surviving family members of victims of the FALN bombing were not notified that the President had granted clemency to 16 FALN prisoners, apparently learning of about the clemency for the first time through the media. Their treatment, unfortunately, appears to be typical. Roger Adams, the U.S. Pardon Attorney for the Department of Justice, reported that consulting with victims during the federal process "will cause a big change in the way we operate." Email from Roger Adams to Jamie Orenstein, Aug. 23, 1999 (exhibit in the FALN hearings). If victims do not receive their statutorily-mandated notice even in high profile federal cases, it is hard to imagine that their treatment is other situations is any better.

Victims deserve this notice so that they gain the opportunity to provide information about the proposed clemency. Victims, of course, do not demand a veto over any decision—nor would they be accorded one in the Amendment. They simply seek a voice in that process, to be heard before an executive clemency decision is made. As has been explained, victims can provide unique information about the seriousness of the crime.

A constitutional amendment would unequivocally ensure that victims are notified and given the opportunity to be heard at any public proceeding held before a pardon or reprieve decision is made, improving disparate and haphazard treatment that victims currently suffer in the clemency process. Only a constitutional amendment can insure this treatment. The Committee heard suggestions that any statutory effort to provide such protections at the federal level would interfere with the President's pardon power, conferred by U.S. Const., Art. II, § 2. The Committee is skeptical of those suggestions. While the President has the constitutional power to pardon, it would seem that Congress has the power to specify reasonable procedures before the President makes the decision. In any event, the Committee agrees that a federal constitutional amendment is the best way to definitively answer any such constitutional concerns.

5. Right to have safety considered

Victims are often placed at risk whenever an accused or convicted offender is released from custody. The offender may retaliate against or harass the victim for vindictive reasons or to eliminate the victim as a possible witness in future proceedings. Not only are victims threatened by offenders, but recent reports from across the country suggest that the intimidation of victims and other witnesses is a serious impediment to effective criminal prosecution.

Under current law, the safety of victims is not always appropriately considered by courts and parole boards making decisions about releasing offenders. Laws concerning whether victim safety is a factor in such decisions varies widely. The result, unsurprisingly, is that in too many cases offenders are released without due regard for victims. From witness after witness, the Committee heard testimony about the danger in which crime victims are placed when their attackers are released without any regard for their safety.

The Committee concludes that, in considering whether to release an accused or convicted offender, courts and parole boards should give appropriate consideration to the safety of victims. Of course,

victim safety is not the only interest that these entities will need to consider in making these important decisions. But the safety of victims can be literally a life and death matter that should be evaluated along with other relevant factors. In evaluating the safety of victims, decisionmakers should also take into account the full range of measures that might be employed to protect the safety of victims. For example, a defendant in a domestic violence case might be released, but subject to a "no contact" order with the victim. Or a prisoner might be paroled, on the condition that he remain within a certain specified area. If directed to consider victim safety, our Nation's courts and parole boards are up to the task of implementing appropriate means to protect that safety.

6. Right to consideration of the victim's interest in avoiding unreasonable delay

Today in the United States, criminal defendants enjoy a constitutionally protected right in the Sixth Amendment to a "speedy trial." This is as it should be, for criminal charges should be resolved as quickly as is reasonably possible. Defendants, however, are not the only ones interested in a speedy disposition of the case. Victims, too, as well as society as a whole, have an interest in the prompt resolution of criminal cases. "Repeated continuances cause serious hardships and trauma for victims as they review and relive their victimization in preparation for trial, only to find the case has been postponed." U.S. Department of Justice, Office for Victims of Crime, New Directions From the Field: Victims' Rights and Services for the 21st Century 21 (1998). For victims, "[t]he healing process cannot truly begin until the case can be put behind them. This is especially so for children and victims of sexual assault or any other case involving violence." President's Task Force on Victims of Crime, Final Report 75 (1982).

The Supreme Court has generally recognized such interests in explaining that "there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interest of the accused." *Barker* v. *Wingo,* 407 U.S. 514, 519 (1972). However, as two leading scholars have explained, while the Supreme Court has acknowledged the "societal interest" in a speedy trial, "[i]t is rather misleading to say * * * that this 'societal interest' is somehow part of the [sixth amendment] right. The fact of the matter is that the Bill of Rights does not speak of the rights and interests of the government." Wayne R. LaFave and Jerold H. Israel, Criminal Procedure § 18.1(b), at 787–88 (2d ed. 1992). Nor does the Bill of Rights currently speak, as it should, to the rights and interests of crime victims. Of course, a victim's right to consideration of his or her interest to avoid unreasonable delay will not overcome a criminal defendant's due process right to a reasonable opportunity to prepare a defense. But the interests of a crime victim in a trial free from unreasonable delay must be protected.

The Committee heard ample testimony about the problem of delay that victims face. In one case, for example, a case of child abuse involving a five year old child spanned more than fifteen months from the arraignment to the trial. Many of the delays appeared to be for no good reason. For example, during the preliminary hearing the defense attorney asked for a recess at 4:00 p.m. one day because he anticipated two more hours of questioning of

the child's mother. Continuance of the cross examination was set for ten days later. The victims family then canceled a long-planned trip out of state. The day before the resumption of the cross examination was to take place, the defense attorney reported that he now had a scheduling conflict. Resumption of the cross-examination was not set for seven weeks later. Seven weeks later, the cross-examination was resumed. Contrary to previous claims, the defense attorney had less than 10 minutes of perfunctory questions. Senate Judiciary Committee Hearing, April 16, 1997, statement of Paul Cassell, at 115–16. Victims should not be forced to endure extensive delays for no apparent good reason.

As Collene Campbell testified concerning her families experience after the murder of her son and brother:

> I'm certain this is not what the Founders of this great nation and the authors of our Constitution intended and it needs to be corrected immediately. At a huge cost to taxpayers, and my families personal life, we have continued to be in the court system for 21 straight years, with no right for a speedy trial and there is no end in sight.

Defendants have ample tactical reasons for seeking delays of criminal proceedings. Witnesses may forget details of the crime or move away, or the case may simply seem less important given the passage of time. Delays can also be used to place considerable pressure on victims to ask prosecutors to drop charges, particularly in cases where parents of children who have been sexually abused want to put matters behind them. Given natural human tendencies, efforts by defendants to unreasonably delay proceedings are frequently granted, even in the face of State constitutional amendments and statutes requiring otherwise. The Committee concludes that this problem can be solved only by unequivocally creating a federal constitutional right of victims to have a court consider their speedy trial interests.

7. Consideration of just and timely claims to restitution

Crime imposes tremendous financial burdens on victims of crime. The Bureau of Justice Statistics reports that each year approximately two million people in America are injured as the result of violent crime. Approximately 51 percent of the injured will require some medical attention, with 23 percent requiring treatment at a hospital with an average stay of 9 days. While the true cost of crime to the victims is incalculable, the direct costs are simply staggering. In 1991, the direct economic costs of personal and household crime was estimated to be $19.1 billion, a figure that did not include costs associated with homicides.

The perpetrators of these crimes need to be held accountable to repay such costs to the extent possible. Victims deserve restitution from offenders who have been convicted of committing crimes against them. The Committee has twice previously explained that:

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

state of well-being.—S. Rep. 104–179 at 12, Senate Judiciary Committee, Victim Restitution Act of 1995, 104th Cong., 1st Sess. 12 (1995), quoting S. Rept. 97–532 at 30 (Judiciary Committee), Aug. 19, 1982 (to accompany S. 2420).

Consistent with this principle, Federal and State courts have long had power to order restitution against criminal offenders. In practice, however, restitution orders are not entered as frequently as they should be. At the Federal level, for example, this Committee recently investigated Federal restitution procedures and found that restitution orders were often entered haphazardly and that "much progress remains to be made in the area of victim restitution." S. Rep. 104–179, at 13. Similarly, a recent report from the U.S. Department of Justice concluded that "[w]hile restitution has always been available via statute or common law, it remains one of the most underutilized means of providing crime victims with a measurable degree of justice. Evidence of this is apparent both in decisions to order restitution and in efforts to monitor, collect, and disperse restitution payment to victims." U.S. Department of Justice, Office for Victims of Crime, New Directions From the Field: Rights and Services for the 21st Century 357 (1998).

The President's Task Force on Victims of Crime long ago recommended that "[a] restitution order should be imposed in every case in which a financial loss is suffered, whether or not the defendant is incarcerated." President's Task Force on Victims of Crime, Final Report 79 (1982). As a step in this direction, in 1982 Congress passed the Victims Witness Protection Act (Pub. L. 97–291, codified at 18 U.S.C. §§ 1501, 1503, 1505, 1510, 1512–1515, 3146, 3579, 3580). More recently, to respond to the problem of inadequate restitution at the Federal level, this Committee recently recommended, and Congress approved, the Mandatory Victim Restitution Act, codified at 18 U.S.C. § 3663A and 3664. Valuable though this legislation may turn out to be, it applies only in Federal cases. To require just and timely consideration of restitution throughout the country, Federal constitutional recognition of the significance restitution is appropriate. Victims advocates in the field recently recommended that "restitution orders should be mandatory and consistent nationwide." U.S. Department of Justice, Office for Victims of Crime, New Directions From the Field: Victims' Rights and Services for the 21st Century 364 (1998). Of course, there will be many cases in which a convicted offender will not be able to pay a full order of restitution. In such cases, realistic payment schedules should be established and victims appraised of how much restitution can realistically be expected to be collected. But even nominal restitution payments can have important benefits for victims. And by having a full restitution order in place, the offender can be held fully accountable for his crime should his financial circumstances unexpectedly improve.

In a letter to the committee Sue Russell of Vermont wrote of the failure of her state's justice system to award any restitution for her in the aftermath of the devastating assault committed against her, despite the fact that her attacker now earns a significant wage from the state prison system. This injustice must stop, and stop uniformly across the nation for every American.

8. The right to standing

If victims rights are to be meaningful and enforceable victims need one simple legal tool: Standing. Section 3 of the amendment makes it clear that victims and their representatives have standing to enforce their rights in court.

V. Section-by-Section Analysis

The Committee intends that the amendment be construed to effectuate its remedial purposes: to guarantee the protection of and appropriate participation by crime victims in the criminal justice process. Courts have long experience in applying federal constitutional rights for defendants in the criminal justice system, and the Committee believes that this experience can be used to effectively apply victims' rights as well.

*Section 1. The rights of victims of violent crime, being capable of protection without denying the constitutional rights of those accused of victimizing them * * **

This preamble establishes two important principles about the rights established in the amendment: First, they are not intended to deny the constitutional rights of the accused, and second, they do not, in fact, deny those rights. The task of balancing rights, in the case of alleged conflict, will fall, as it always does, to the courts, guided by the constitutional admonition not to deny constitutional rights to either the victim or the accused. (See Killian and Costello, The Constitution of the United States of America: Analysis and Interpretation, Senate Document 103–6, U.S. Gov't Printing Office, p. 1105 (1992). ["Conflict between constitutionally protected rights is not uncommon." The text continues discussing the Supreme's Court balancing of "a criminal defendant's Fifth and Sixth Amendment rights to a fair trial and the First Amendment's rights protection of the rights to obtain and publish information about defendants and trials."] Id.).

Nothing removes from the States their plenary authority to enact definitional laws for purposes of their own criminal justice systems. Such legislative definition is appropriate because criminal conduct depends on State and Federal law for its definition in the first instance. Since the legislatures define what is criminal conduct, the courts will naturally turn to them to determine who is a "victim."

In determining how to structure a "victim" definition, ample precedents are available. To cite but one example, Congress has previously defined a "victim" of a crime for sentencing purposes as "any individual against whom an offense has been committed for which a sentence is to be imposed." Fed. R. Crim. Pro. 32(f). The Committee anticipates that courts, in interpreting the amendment, will use a similar definition focusing on the criminal charges that have been filed in court.

In most cases, determining who is the victim of a crime will be straightforward. The victims of robbery, and sexual assault are, for example, not in doubt. The victim of a homicide is also not in doubt, but the victim's rights in such cases will be exercised by a surviving family member or other appropriate representative, as will be defined by law. Similarly, in the case of a minor or incapacitated victim, an appropriate representative (not accused of the

crime or otherwise implicated in its commission) will exercise the rights of victims.

The amendment extends broadly to all victims of a "violent crime." The phrase "violent crime" should be considered in the context of an amendment extending rights to crime victims, not in other possibly narrower contexts." The most analogous federal definition is Federal Rule of Criminal Procedure 32(f), which extends a right of allocution to victims of a "crime of violence" and defines the phrase as one that "*involved* the use or attempted or threatened use of physical force against the person or property of another. * * *" (emphasis added). The Committee anticipates that the phrase "violent crime" will be defined in these terms of "involving" violence, not a narrower "elements of the offense" approach employed in other settings. See, e.g., 18 U.S.C. § 16. Only this broad construction will serve to protect fully the interests of all those affected by criminal violence.

"Violent crimes" will include 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 classification of the offense as a felony or a misdemeanor. It should also be obvious that a "violent crime" can include not only acts of consummated violence but also of intended, threatened, or implied violence. The unlawful displaying of a firearm or firing of a bullet at a victim constitutes a "violent crime" regardless of whether the victim is actually injured. Along the same lines, conspiracies, attempts, solicitations and other comparable crimes to commit a crime of violence should be considered "violent crimes" for purposes of the amendment, if identifiable victims exist. Similarly, some crimes are so inherently threatening of physical violence that they could be "violent crime" 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. See *United States* v. *Guadardo,* 40 F.3d 102 (5th Cir. 1994); *United States* v. *Flores,* 875 F.2d 1110 (5th Cir. 1989). Similarly, sexual offenses against a child, such as child molestation, can be "violent crimes" because of the fear of the potential for force which is inherent in the disparate status of the perpetrator and victim and also because evidence of severe and persistent emotional trauma in its victims gives testament to the molestation being unwanted and coercive. See *United States* v. *Reyes-Castro,* 13 F.3d 377 (10th Cir. 1993). Sexual offenses against other vulnerable persons would similarly be treated as "violent crimes," as would, for example, forcible sex offenses against adults and sex offenses against incapacitated adults. 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 violent crime, as is a victim of stalking or other threats who is reasonably put in fear of his or her safety. Also, crimes of arson involving threats to the safety of persons could be "violent crimes."

Of course, not all crimes will be "violent" crimes covered by the amendment. For example, the amendment does not confer rights on victims of larceny, fraud, and other similar offenses. At the same time, many States have already extended rights to victims of such offenses and the amendment in no way restricts such rights. In other words, the amendment sets a national "floor" for the protecting of victims rights, not any sort of "ceiling." Legislatures, including Congress, are certainly free to give statutory rights to all victims of crime, and the amendment will in all likelihood be an occasion for victims' statutes to be re-examined and, in some cases, expanded.

Because of the formulation used in the amendment—"a victim of violent crime"—it is presumed that there must be an identifiable victim. Some crimes, such as drug or espionage offenses, do not ordinarily have such an identifiable victim and therefore would not ordinarily be covered by the amendment. However, in some unusual cases, a court might conclude that these offenses in fact "involved" violence against an identifiable victim. For example, treason or espionage against the United States resulting in death or injury to an American government official would produce an identifiable victim protected by the amendment.

are hereby established

The amendment provides that the rights of victims are "hereby established." The phrase, which is followed by certain enumerated rights, is not intended to "deny or disparage" rights that may be established by other federal or state laws. The amendment establishes a floor and not a ceiling of rights and States will remain free to enact (or continue, as indeed many have already enacted) more expansive rights than are "established" in this amendment. Rights established in a state's constitution would be subject to the independent construction of the state's courts. See *Michigan* v. *Long,* 463 U.S. 1032 (1983). The Committee does not intend the use of the words "hereby established" to elevate the rights of victims over any other rights in the Constitution.

and shall not be denied by any State or the United States and may be restricted only as provided in this article.

In this clause, and in Section 2 of the amendment, an important distinction between "denying" rights and "restricting" rights is established. As used here, "denied" means to "refuse to grant," see Webster's New Collegiate Dictionary 304 (1977). In other words, it means to prohibit the exercise of the right completely. The amendment, by its terms, prohibits such a denial. At the same time, the language recognizes that no constitutional right is absolute and therefore permits "restrictions" on the rights, but only, as provided in Section 2, in three narrow circumstances. This direction settles what might otherwise have been years of litigation to adopt the appropriate test for when, and the extent to which, restrictions will be allowed.

being capable of protection without denying the constitutional rights of those accused of victimizing them.

The Committee heard testimony that the proposed constitutional rights for victims would clash with, and triumph over, the pre-

existing constitutional rights of accused and convicted offenders. Typically these claims were advanced without specific examples. No convincing evidence was offered to support such a contention. This is unsurprising because, as the Chief Justice of the Texas Court of Criminal Appeals has written, "[v]ictims" rights versus offenders" rights is not a "zero-sum-game." The adoption of rights for the victim need not come at the expense of the accused's rights. Chief Justice Richard Barajas and Scott Alexander Nelson, The Proposed Crime Victims' Federal Constitutional Amendment: Working Toward a Proper Balance, 49 Baylor L. Rev. 1, 17 (1997) (internal citation omitted).

The Committee accordingly rejected an amendment that would have required the courts to resolve any conflict between the constitutional rights of defendants and those of victims, in favor of defendants' rights. The Crime Victims' Rights Amendment creates rights, not in opposition to those of defendants, but in parallel to them. The parallel goal in both instances is to erect protections from abuse by State actors. Thus, just as defendants have a Sixth Amendment right to a "speedy trial," the Crime Victims' Rights Amendment extends to victims the right to consideration of their interest "in a trial free from unreasonable delay." "[I]f any conflict were to emerge, courts would retain ultimate responsibility for harmonizing the rights at stake." Laurence H. Tribe and Paul G. Cassell, Embed the Rights of Victims in the Constitution, L.A. Times, July 6, 1998, at B7.

The language also eliminates a previous concern that the courts will woodenly interpret the later-adopted Crime Victims' Rights Amendment as superseding provisions in previously-adopted ones. Such a canon of construction can be useful when two measures address precisely the same subject. See Laurence H. Tribe, Statement on Victims' Rights, April 15, 1997; cf. Laurence H. Tribe and Paul G. Cassell, Embed the Rights of Victims in the Constitution, L.A. Times, July 6, 1998, at B7. But no rigid rule of constitutional interpretation requires giving unblinking precedence to later enactments on separate subjects.

Instead, the Committee intends that courts harmonize the rights of victims and defendants to ensure that both are appropriately protected. The courts have, for example, long experience in accommodating the rights of the press and the public to attend a trial with the rights of a defendant to a fair trial. The same sort of accommodations can be arrived at to dissipate any tension between victims' and defendants' rights. Finally, language in Section 3 provides assurance that in harmonizing these rights "[n]othing in this article shall be construed to provide grounds for a new trial."

Sec. 2. A victim of violent crime shall have the right to reasonable and timely notice of any public proceeding involving the crime

To make victims aware of the proceedings at which their rights can be exercised, this provision requires that victims be notified of public proceedings relating to a crime. "Notice" can be provided in a variety of fashions. For example, the Committee was informed that some States have developed computer programs for mailing form notices to victims while other States have developed automated telephone notification systems. Any means that provides reasonable notice to victims is acceptable. "Reasonable" notice is

any means likely to provide actual notice to a victim. Heroic measures need not be taken to inform victims, but due diligence is required by government actors. It would, of course, be reasonable to require victims to provide an address and keep that address updated in order to receive notices. "Reasonable" notice is notice that permits a meaningful opportunity for victims to exercise their rights. In cases involving victims with special needs, such as those who are hearing impaired or illiterate, officials may have to make special efforts in order for notice to be reasonable. Notice, whether of rights, proceedings, or events, should be given as soon as practicable to allow victims the greatest opportunity to exercise their rights. In rare mass victim cases (i.e., those involving hundreds of victims), reasonable notice could be provided to means tailored to those unusual circumstances, such as notification by newspaper or television announcement.

Victims are given the right to receive notice of "public proceedings." Proceedings are official events that take place before, for example, trial and appellate courts (including magistrates and special masters) and parole boards. They include, for example, hearings of all types such as motion hearings, trials, and sentencings. They do not include, for example, informal meetings between prosecutors and defense attorneys. Thus, while victims are entitled to notice of a court hearing on whether to accept a negotiated plea, they would not be entitled to notice of an office meeting between a prosecutor and a defense attorney to discuss such an arrangement.

Victims' rights under this provision are also limited to "public" proceedings. Some proceedings, such as grand jury investigations, are not open to the public and accordingly would not be open to the victim. Other proceedings, while generally open, may be closed in some circumstances. For example, while plea proceedings are generally open to the public, a court might decide to close a proceeding in which an organized crime underling would plead guilty and agree to testify against his bosses. See 28 C.F.R. 50.9. Another example is provided by certain national security cases in which access to some proceedings can be restricted. See The Classified Information Procedures Act, 18 U.S.C. app. 3. A victim would have no special right to attend. The amendment works no change in the standards for closing hearings, but rather simply recognizes that such nonpublic hearings take place. Of course, nothing in the amendment would forbid the court, in its discretion, to allow a victim to attend even such a nonpublic hearing.

The public proceedings are those "relating to the crime." Typically these would be the criminal proceedings arising from the filed criminal charges, although other proceedings might also relate to the crime. Thus, the right applies not only to initial hearings on a case, but also rehearings, hearing at an appellate level, and any case on a subsequent remand. It also applies to multiple hearings, such as multiple bail hearings. In cases involving multiple defendants, notice would be given as to proceedings involving each defendant.

*Sec. 2. Right to "reasonable notice of * * * any release or escape of the accused"*

To ensure that the victim is not surprised or threatened by an escaped or released prisoner, the amendment gives victims a right to reasonable notice of such escape or release. As with other notice rights in the amendment, the requirement is not one of extraordinary measures, but instead of "reasonable" notice. As with the phrase used earlier in the amendment, "reasonable" notice is one likely to provide actual notice. New technologies are becoming more widely available that will simplify the process of providing this notice. For example, automated voice response technology exists that can be programmed to place repeated telephone calls to victims whenever a prisoner is released, which would be reasonable notice of the release. As technology improves in this area, what is "reasonable" may change as well. "Reasonable" notice would also need to be considered in light of the circumstances surrounding the case. While mailing a letter would be "reasonable" notice of an upcoming parole release date, it would not be reasonable notice of the escape of a dangerous prisoner bent on taking revenge on his accuser.

The requirement of notice is limited to a "release from custody." Thus, victims are not entitled to notice under this amendment if, for example, a prisoner is simply moved from one custodial facility to another, reclassified in terms of his security level, or allowed to participate for an afternoon in a supervised work detail outside the prison walls. Victims are, however, entitled to notice of any government decision to finally or conditionally release a prisoner, such as allowing a prisoner to enter a noncustodial work release program or to take a weekend furlough in his old home town.

The release must be one "relating to the crime." This includes not only a release after a criminal conviction but also, for example, a release of a defendant found not guilty of a crime by reason of insanity and then hospitalized in custody for further treatment, or a release pursuant to a habitual sex offender statute.

*Sec. 2. * * * not to be excluded from such public proceedings*

Victims are given the right "not to be excluded" from public proceedings. This builds on the 1982 recommendation from the President's Task Force on Victims of Crime that victims "no less than the defendant, have a legitimate interest in the fair adjudication of the case, and should therefore, as an exception to the general rule providing for the exclusion of witnesses, be permitted to be present for the entire trial." President's Task Force on Victims of Crime, Final Report 80 (1982).

The right conferred is a negative one—a right "not to be excluded"—to avoid the suggestion that an alternative formulation—a right "to attend"—might carry with it some government obligation to provide funding, to schedule the timing of a particular proceeding according to the victim's wishes, or otherwise assert affirmative efforts to make it possible for a victim to attend proceedings. Accord Ala. Code §15–14–54 (right "not [to] be excluded from court or counsel table during the trial or hearing or any portion thereof * * * which in any way pertains to such offense"). The amendment, for example, would not entitle a prisoner who was attacked in prison to a release from prison and plane ticket to enable him to attend the trial of his attacker. This example is important because there

have been occasional suggestions that transporting prisoners who are the victims of prison violence to courthouses to exercise their rights as victims might create security risks. These suggestions are misplaced, because the Crime Victims' Rights Amendment does not confer on prisoners any such rights to travel outside prison gates. Of course, as discussed below, prisoners no less than other victims will have a right to be "heard" at various points in the criminal justice process. Because prisoners ordinarily will not be "present," they will exercise their rights by submitting a "statement." This approach has been followed in the states. See, e.g., Utah Code Ann. §77–38–5(8); Ariz. Const. Art. II, §2.1.

In some important respects, a victim's right not to be excluded will parallel the right of a defendant to be present during criminal proceedings. See *Diaz* v. *United States,* 223 U.S. 442, 454–55 (1912). It is understood that defendants have no license to engage in disruptive behavior during proceedings. See, e.g., *Illinois* v. *Allen,* 397 U.S. 337, 343 (1977); *Foster* v. *Wainwright,* 686 F.2d 1382, 1387 (11th Cir. 1982). Likewise, crime victims will have no right to engage in disruptive behavior and, like defendants, will have to follow proper court rules, such as those forbidding excessive displays of emotion or visibly reacting to testimony of witnesses during a jury trial.

Sec. 2. "reasonably to be heard at public release, plea, sentencing, reprieve, and pardon proceedings

The amendment confers on crime victims a right to be heard by the relevant decision makers at four critical points in the criminal justice process before the final decisions are made.

First, crime victims will have the right to be heard at "release" proceedings. Under this provision, for example, a victim of domestic violence will have the opportunity to warn the court about possible violence if the defendant is released on bail, probation, or parole. A victim of gang violence will have the opportunity to warn about the possibility of witness intimidation. The court will then evaluate this information in the normal fashion in determining whether to release a defendant and, if so, under what conditions. Victims have no right to "veto" any release decision by a court, rather simply to provide relevant information that the court can consider in making its determination about release.

This phrase also encompasses, for example, hearings to determine any release (including comparable releases during or after an appeal) on bail, personal recognizance, to the custody of a third person, or under any other conditions, including pre-trial diversion programs. Other examples of release include work release and home detention. It also includes parole hearings or their functional equivalent, both because parole hearings have some discretion in releasing offenders and because releases from prison are typically subject to various conditions such as continued good behavior. It would also include a release from a secure mental facility for a criminal defendant or one acquitted on the grounds of insanity. There would be no right to be heard when a prisoner is released after serving the statutory maximum penalty, or the full term of his sentence. There would be no proceeding to "determine" a release in such situations and the release would also be without condition if the court's authority over the prisoner had expired. The

victim would, however, be notified of such a release, as explained in connection with the victims' right to notice of a release.

Second, crime victims have the right to be heard at public plea proceedings. This gives victims the right to be heard before the court accepts a plea bargain entered into by the prosecution and the defense before it becomes final. The Committee expects that each State will determine for itself at what stage this right attaches. It may be that a State decides the right does not attach until sentencing if the plea can still be rejected by the court after the pre-sentence investigation is completed. As the language makes clear, the right involves being heard when the court holds its hearing on whether to accept a plea. Thus, victims do not have the right to be heard by prosecutors and defense attorneys negotiating a deal. Nonetheless, the Committee anticipates that prosecutors may decide, in their discretion, to consult with victims before arriving at a plea. Such an approach is already a legal requirement in many States, see National Victim Center, 1996 Victims' Rights Sourcebook 127–31 (1996), *People* v. *Stringham,* 253 Cal. Rptr 484 (Cal. Ct App. 1988), is followed by many prosecuting agencies, see, e.g., Senate Judiciary Committee Hearing, April 28, 1998, statement of Paul Cassell, at 35–36, and has been encouraged as sound prosecutorial practice. See U.S. Department of Justice, Office for Victims of Crime, New Directions from the Field: Victims' Rights and Services for the 21st Century 15–16 (1998). This trend has also been encouraged by the interest of some courts in whether prosecutors have consulted with the victim before arriving at a plea. Once again, the victim is given no right of veto over any plea. No doubt, some victims may wish to see nothing less than the maximum possible penalty (or minimum possible penalty) for a defendant. Under the amendment, the court will receive this information, along with that provided by prosecutors and defendants, and give it the weight it believes is appropriate deciding whether to accept a plea. The decision to accept a plea is typically vested in the court and, therefore, the victims' right extends to these proceedings. See, e.g., Fed. R. Crim. Pro. 11(d)(3); see generally Douglas E. Beloof, Victims in Criminal Procedure, 462–88 (1999).

Third, crime victims have the right to be heard at any proceeding to determine a "sentence." This provision guarantees that victims will have the right to "allocute" at sentencing. Defendants have a constitutionally protected interest in personally addressing the court. See *Green* v. *United States,* 365 U.S. 301 (1961). This provision would give the same rights to victims, for two independent reasons. First, such a right guarantees that the sentencing court or jury will have full information about the impact of a crime, along with other information, in crafting an appropriate sentence. The victim would be able to provide information about the nature of the offense, the harm inflicted, and the attitude of the offender, among other things. Second, the opportunity for victims to speak at sentencing can sometimes provide a powerful catharsis. See *United States* v. *Smith,* 893 F. Supp. 187, 188 (E.D.N.Y. 1995), *United States* v. *Hollman Cheung,* 952 F. Supp. 148, 151 (E.D.N.Y. 1997). Because the right to speak is based on both of these grounds, a victim will have the right to be heard even when the judge has no discretion in imposing a mandatory prison sentence.

State and Federal statutes already frequently provide allocution rights to victims. See, e.g., Fed. R. Evid. 32(c), Ill. Const. Art. 1, § 8.1(a)(4). The Federal amendment would help to insure that these rights are fully protected. The result is to enshrine and perhaps extend the Supreme Court's decision in *Payne* v. *Tennessee,* 501 U.S. 808 (1991), recognizing the propriety of victim allocution in capital proceedings. Victim impact statements concerning the character of the victim and the impact of the crime remain constitutional. See Douglas E. Beloof, Constitutional Implications of Crime Victims as Participants, 88 Cornell Law Review 282 (2003). The Committee does not intend to alter or comment on laws existing in some States allowing for victim opinion as to the proper sentence. Also, a right to have victim impact statements offered at sentencing does not confer any right to have such statement heard at trial. See *Sager* v. *Maass,* 907 F. Supp. 1412, 1420 (D. Or. 1995) (citing cases). The victim's right to be heard does not extend to the guilt determination phase of trials, although victims may, of course, be called as a witness by either party. The Committee, however, intends no modification of the current law, with deep historical roots, allowing a crime victim's attorney to participate in the prosecution, to whatever extent presently allowed.

The victim's right is to "be heard." The right to make an oral statement is conditioned on the victim's presence in the courtroom. As discussed above, it does not confer on victims a right to have the Government transport them to the relevant proceeding. Nor does it give victims any right to "filibuster" any hearing. As with defendants" existing rights to be heard, a court may set reasonable limits on the length of statements, but should not require the victim to submit a statement for approval before it is offered. No such requirement is put on the defendant and none should be imposed on the victim. The Due Process clause requires that the victim's statement not be "unduly prejudicial," see *Payne* v. *Tennessee.* At the same time, victims should always be given the power to determine the form of the statement. Simply because a decision making body, such as the court or parole board, has a prior statement of some sort on file does not mean that the victim should not again be offered the opportunity to make a further statement.

Even if not present, the victim is entitled to submit a statement at the specified hearings for the consideration of the court. The Committee does not intend that the right to be heard be limited to "written" statements, because the victim may wish to communicate in other appropriate ways. For example, a victim might desire to present an impact statement through a videotape or via an Internet message over a system established by the courts. The right to be heard is sufficiently flexible to encompass such communications.

The right to be heard is also limited to "public proceedings." As discussed previously at greater length, a victim has no right to be heard at a proceeding that the court has properly closed under the existing standards governing court closures.

The right to be heard at public release proceedings confers on victims the right to be heard at public parole proceedings. In some jurisdictions, however, parole decisions are not made in public proceedings, but rather in other ways. For such jurisdictions, the amendment places victims on equal footing with defendants. If defendants have the right to provide communications with the parol-

ing or releasing authority, then victims do as well. For example, in some jurisdictions the parole board might review various folders on prisoners in making a parole decision. If the defendant is given an opportunity to provide information for inclusion in those folders, so will the victim. The phrase "the foregoing rights" encompasses all of the previously listed rights in the amendment, including the right to notice, to not be excluded, and to be heard, if present, and to submit a statement.

Many jurisdictions are moving away from "parole" but still have a form of conditional release. The term also encompasses comparable hearings on conditional release from secure mental facilities.

Sec. 2 (cont.). The right reasonably to be heard at reprieve, and pardon proceedings

The amendment extends the right to be heard in connection with pardons and reprieves only to those cases in which the decision is reached after a "proceeding."

Finally, Section 4 provides that "nothing in this article shall affect the President's authority to grant reprieves or pardons."

Sec. 2 (cont.). Right to "adjudicative decisions that duly consider the victim's safety"

This right requires judges, magistrates, parole boards, and other such officials to consider the safety of the victim in determining any conditional release. As with the right to be heard on conditional releases, this right will extend to hearings to determine any pre-trial or post-trial release on bail, personal recognizance, to the custody of a third person, on work release, to home detention, or under any other conditions as well as parole hearings or their functional equivalent. At such hearings, the decisionmaker must give consideration to the safety of the victim in determining whether to release a defendant and, if so, whether to impose various conditions on that release to help protect the victims' safety, such as requiring the posting of higher bail or forbidding the defendant to have contact with the victim. These conditions can then be enforced through the judicial processes currently in place.

This right does not require the decisionmaker to agree with any conditions that the victim might propose (or, for that matter, to agree with a victim that defendant should be released unconditionally). Nor does this right alter the Eighth Amendment's prohibition of "excessive bail" or any other due process guarantees to which a defendant or prisoner is entitled in having his release considered. The Supreme Court, however, has already rejected constitutional challenges to pretrial detention, in appropriate circumstances, to protect community safety, including the safety of victims. See *United States* v. *Salerno,* 481 U.S. 739 (1987). This right simply guarantees victim input into a process that has been constitutionally validated.

Custody here includes mental health facilities. This is especially important as sex offenders are frequently placed in treatment facilities, following or in lieu of prison.

*Sec. 2 (cont.). Right to adjudicative decisions that duly consider * * * interest in avoiding unreasonable delay"*

Just as defendants currently have a right to a "speedy trial," this provision will give victims a protected right in having their interests to a reasonably prompt conclusion of a trial considered. The right here requires courts to give "consideration" to the victims' interest along with other relevant factors at all hearings involving the trial date, including the initial setting of a trial date and any subsequent motions or proceedings that result in delaying that date. This right also will allow the victim to ask the court to, for instance, set a trial date if the failure to do so is unreasonable. Of course, the victims' interests are not the only interests that the court will consider. Again, while a victim will have a right to be heard on the issue, the victim will have no right to force an immediate trial before the parties have had an opportunity to prepare. Similarly, in some complicated cases either prosecutors or defendants may have unforeseen and legitimate reasons for continuing a previously set trial or for delaying trial proceedings that have already commenced. But the Committee has heard ample testimony about delays that, by any measure, were "unreasonable." See, e.g., Senate Judiciary Committee Hearing, April 16, 1997, statement of Paul Cassell, at 115–16. This right will give courts the clear constitutional mandate to avoid such delays.

In determining what delay is "unreasonable," the courts can look to the precedents that exist interpreting a defendant's right to a speedy trial. These cases focus on such issues as the length of the delay, the reason for the delay, any assertion of a right to a speedy trial, and any prejudice to the defendant. See *Barker* v. *Wingo,* 407 U.S. 514, 530–33 (1972). Courts will no doubt develop a similar approach for evaluating victims' claims. In developing such an approach, courts will undoubtably recognize the purposes that the victim's right is designed to serve. Cf. *Barker* v. *Wingo,* 407 U.S. 514, 532 (1972) (defendant's right to a speedy trial must be "assessed in the light of the interest of defendant which the speedy trial right was designed to protect"). The Committee intends for this right to allow victims to have the trial of the accused completed as quickly as is reasonable under all of the circumstances of the case, giving both the prosecution and the defense a reasonable period of time to prepare. The right would not require or permit a judge to proceed to trial if a criminal defendant is not adequately represented by counsel.

The Committee also anticipates that future legislation may help implement this right. For example, the Speedy Trial Act of 1974 (Pub. L. 93–619 (amended by Pub. L. 96–43), codified at 18 U.S.C. §§ 3152, 3161) complements, protects, and gives content to a defendant's constitutional speedy trial right. Similar legislation could enforce the victims' new right in this area.

*Sec. 2 (cont.). Right to "adjudicative decisions that duly consider * * * just and timely claims to restitution from the offender"*

This provision recognizes that an offender should be held responsible for the harm his crime caused, through an order of restitution at sentencing. The Committee has previously explained this philosophy in some detail in connection with the Mandatory Victim Restitution Act, codified at 18 U.S.C. §§ 3663A and 3664. The relevant

details for implementing the Amendment will be spelled out under the resulting case law or, more likely, statutes to enforce the amendment. However, this amendment does not confer on victims any mandatory right to restitution, nor any rights with regard to a particular payment schedule.

The right conferred on victims is to consideration of just and timely claims of restitution. The right is, of course, limited to "convicted" defendants, that is, those who pled guilty, are found guilty, or enter a plea of no contest. Even before a conviction, however, courts remain free to take appropriate steps to prevent a defendant's deliberate dissipation of his assets for the purpose of defeating a restitution order, as prescribed by current law.

Sec 2. (cont.). These rights shall not be restricted except when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity."

Constitutional rights are not absolute. There is no First Amendment right, for example, to yell "Fire!" in a crowded theater. Courts interpreting the Crime Victims' Rights Amendment will no doubt give a similar, commonsense construction to its provisions.

The amendment does not impose a straightjacket that would prevent the proper handling of unusual situations. The restrictions language in the amendment explicitly recognizes that in certain rare circumstances restrictions may need to be created to victims' rights.

First, in mass victim cases, there may be a need to provide certain limited restrictions to victims' rights. For instance, for a crime perpetrated against hundreds of victims, it may be impractical or even impossible to give all victims the right to be physically present in the courtroom. In such circumstances, an exception to the right to be present may be made, while at the same time providing reasonable accommodation for the interest of victims. Congress, for example, has specified a close-circuit broadcasting arrangement that may be applicable to some such cases. Similar restrictions on the number of persons allowed to present oral statements might be appropriate in rare cases involving large numbers of victims.

Second, in some cases of domestic violence, the dynamics of victim-offender relationships may require some modification of otherwise typical victims' rights provisions. This provision offers the ability to do just that.

Third, situations may arise involving inter-gang violence, where notifying the member of a rival gang of an offenders' impending release may spawn retaliatory violence. Again, this provision provides a basis for dealing with such situations.

The Committee-reported amendment provides that restrictions are permitted for a "substantial interest" in public safety or the administration of criminal justice. In choosing this standard, formulated by the U.S. Supreme Court, the Committee seeks to provide adequate procedures for law enforcement and the courts while ensuring that the restriction does not swallow the rights. The Committee also notes that the administration of criminal justice exception covers habeas corpus filings and proceedings, including those pursuant to 28 U.S.C. §§2254 and 2255. In all other contexts only

a "compelling" interest, also a standard formulated by the U.S. Supreme Court, will operate to limit the right. The Committee stresses that defendants' constitutional rights may well meet this standard in many cases. It is also important to note that the Constitution contains no other explicit "restrictions" to victims" rights.

Sec. 3. "Nothing in this article shall be construed to provide grounds for a new trial

This provision is designed to protect criminal trials 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.

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. However, 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 leaves open the possibility that Congress and the states, within their respective jurisdictions, could draft legislation providing remedies in appropriate circumstances.

*Sec. 3 (cont.). "Nothing in this article shall be construed to * * * authorize any claim for damages."*

This provision imposes the conventional limitations on victims' rights, providing that the amendment does not give rise to any claim for money damages against governmental entities or their employees or agents. While some existing victims' rights provisions provide for the possibility of damage actions or fines as an enforcement mechanism in limited circumstances, see, e.g., Ariz. Rev. Stat. Ann. §13–4437(B) (authorizing suit for "intentional, knowing, or grossly negligent violation" of victims rights), the Committee does not believe that consensus exists in support of such a provision in a Federal amendment. Similar limiting language barring damages actions is found in many state victims' rights amendments. 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), (5) (similar); 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"). The limiting language in the provision also prevents the possibility that the amendment might be construed by courts as requiring the appointment of counsel at State expense to assist victims. Cf. *Gideon* v. *Wainwright,* 372 U.S. 335 (1963) (requiring counsel for indigent criminal defendants).

This provision in no way affects—by way of enlargement or contraction—any existing rights that may exist now or be created in the future independent of the amendment, at either the state or federal level. Nor does it limit appropriate remedies within the criminal process itself.

Sec. 3 (cont.). Only the victim or the victim's lawful representative may assert the rights established hereunder, and no person accused of the crime may obtain any form of relief hereunder.

This provision confers on victims and their lawful representatives standing to assert their rights. The term "standing" is used here in its conventional legal sense as giving victims the opportunity to be heard about their treatment, that is, to have the merits of their claims considered. For example, under this provision victims have the right to challenge their exclusion from the trial of the accused perpetrators of the crime. This overrules the approach adopted by some courts of denying victims an opportunity to raise claims about their treatment. See, e.g., *United States* v. *McVeigh,* 106 F.3d 325, 334–35 (10th Cir. 1997) (finding victims of the Oklahoma City bombing lacked standing to challenge their exclusion from certain proceedings). The provision is phrased in exclusive terms—"Only the victim or the victim's lawful representatives"—to avoid any suggestion that other, potentially intermeddling, persons have the right to be heard in criminal proceedings, and to avoid the suggestion that the accused or convicted offender has standing to assert the rights of the victim.

There will be circumstances in which victims find it desirable to have a representative assert their rights or make statements on their behalf. This provision recognizes the right of a competent victim to choose a representative to exercise his or her rights, as provided by law. Typically victims' rights statutes have provided a means through which victims can select their representatives without great difficulty.

Other "lawful representatives" will exist in the context of victims who are deceased, are children, or are otherwise incapacitated. In homicide cases, victim's rights can be asserted by surviving family members or other persons found to be appropriate by the court. This is the approach that has uniformly been adopted in victims' rights statutes applicable in homicide cases, thus insuring that in this most serious of crimes a voice for a victim continues to be heard. Of course, in such cases the "lawful representative" would not necessarily be someone who was the executor of the estate, but rather someone involved in issues pertaining to the criminal justice process. In cases involving child victims, a parent, guardian or other appropriate representative can do the same. For victims who are physically or mentally unable to assert their rights, an appropriate representative can assert the rights.

In all circumstances involving a "representative," care must be taken to ensure that the "representative" truly reflects the interests—and only the interests—of the victim. In particular, in no circumstances should the representative be criminally involved in the crime against the victim. The mechanics for dealing with such issues and, more generally, for the designation of "lawful" representatives will be provided by law—that is, by statute in relevant jurisdiction, or in its absence by court rule or decision.

Finally, no one accused of the crime could assert any of the rights or obtain any form of relief under the provisions of the Amendment.

Sec. 4. The Congress shall have the power to enforce by appropriate legislation the provisions of this article.

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 ensure 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.

Sec. 4 (cont.). Nothing in this article shall affect the President's authority to grant reprieves or pardons

The language of the amendment is clear. As Assistant Attorney General Viet Dinh testified before the Committee, on behalf of the Justice Department, "* * * the language will prevent Congress from enacting legislation that would affect the President's power to grant reprieves and pardons. The President's reprieve and pardon power under Article II of the Constitution is plenary and is in no way affected by the proposed amendment."

Sec. 5. This article shall be inoperative unless it has been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several states within 7 years from the date of its submission to the States by the Congress.

Section 5 (cont.). This article shall take effect on the 180th day after the ratification of this article.

The Committee has included a 180 day "grace period" for the amendment to allow all affected jurisdictions ample opportunity to prepare to implement the amendment. After the period has elapsed, the amendment will apply to all crimes and proceedings thereafter.

A few courts have held that retroactive application of changes in standards governing restitution violates the Constitution's prohibition of ex post facto laws. See, e.g., *United States* v. *Williams,* 128 F.3d 1239 (8th Cir. 1997). The Committee agrees with those courts that have taken the contrary view that, because restitution is not intended to punish offenders but to compensate victims, ex post facto considerations are misplaced. See, e.g., *United States* v. *Newman,* 144 F.3d 531 (7th Cir. 1998).

VI. Vote of the Committee

The committee considered on S.J. Res. 1 (Add votes on Amendments and the Bill).

1. Senator Durbin offered an amendment. The amendment to redesignate sections 4 and 5 as sections 5 and 6, and insert a new section 4, "Nothing in this article shall be construed to deny or diminish the rights of the accused as guaranteed under this Constitution." The amendment was defeated by a vote of 6 yeas to 11 nays, with 2 voting pass.

YEAS	NAYS
Leahy	Grassley
Kennedy (proxy)	Kyl
Kohl	DeWine (proxy)

Feingold	Sessions (proxy)
Durbin	Graham (proxy)
Edwards (proxy)	Craig
	Chambliss
	Cornyn
	Feinstein
	Schumer
	Hatch

2. Senator Feingold offered an amendment. The amendment to add that the federal government as well as state government can "restrict" as well as "deny" victims' rights. The amendment was defeated by a vote of 7 yeas to 10 nays, with 2 voting present.

YEAS	NAYS
Leahy	Grassley
Kennedy (proxy)	Kyl
Kohl (proxy)	DeWine (proxy)
Feingold	Sessions (proxy)
Schumer (proxy)	Graham
Durbin	Craig
Edwards (proxy)	Chambliss
	Cornyn
	Feinstein
	Hatch

3. Senator Leahy offered a statutory amendment. The amendment in the nature of a complete substitute. The amendment was defeated by a vote of 7 yeas to 10 nays, with 2 voting present.

YEAS	NAYS
Leahy	Grassley
Kennedy (proxy)	Kyl
Kohl (proxy)	DeWine (proxy)
Feingold	Sessions (proxy)
Schumer (proxy)	Graham
Durbin	Craig
Edwards (proxy)	Chambliss (proxy)
	Cornyn
	Feinstein
	Hatch

4. Senator Durbin offered an amendment. The amendment to add that a victim's right not to be excluded from public proceedings does not apply when the court determines that the victim's testimony would be materially affected if the victim hears other testimony at trial. The amendment was defeated by a vote of 7 yeas to 10 nays, with 2 voting present.

YEAS	NAYS
Leahy	Grassley
Kennedy (proxy)	Kyl
Kohl (proxy)	DeWine
Feingold	Sessions
Schumer (proxy)	Graham
Durbin	Craig

Edwards (proxy)	Chambliss
	Cornyn
	Feinstein
	Hatch

5. Senator Durbin offered an amendment. The amendment to add that victims' rights amendment shall not be construed to provide grounds to stay or continue any trial, reopen any proceeding, or invalidate any ruling (with exceptions) or to provide victims' rights in future proceedings. The amendment was defeated by a vote of 8 yeas to 10 nays, with 1 voting present.

YEAS	NAYS
Leahy	Grassley
Kennedy (proxy)	Kyl
Biden (proxy)	DeWine (proxy)
Kohl (proxy)	Sessions
Feingold	Graham (proxy)
Schumer (proxy)	Craig
Durbin	Chambliss
Edwards (proxy)	Cornyn
	Feinstein
	Hatch

6. Senator Leahy offered an amendment. The amendment to make clear that this constitutional amendment does not affect the President or a "Governor's" authority to grant reprieves or pardons. The amendment was defeated by a vote of 7 yeas to 10 nays, with 2 voting present.

YEAS	NAYS
Leahy	Grassley
Kennedy (proxy)	Kyl
Kohl (proxy)	DeWine (proxy)
Feingold	Sessions (proxy)
Schumer (proxy)	Graham (proxy)
Durbin	Craig
Edwards (proxy)	Chambliss
	Cornyn
	Feinstein
	Hatch

7. Senator Feingold offered an amendment. The amendment to expand the reasons victims' rights may be restricted to include a substantial interest in the "administration of justice." The amendment was defeated by a vote of 7 yeas to 10 nays, with 2 voting present.

YEAS	NAYS
Leahy	Grassley
Kennedy (proxy)	Kyl
Kohl (proxy)	DeWine (proxy)
Feingold	Sessions
Schumer (proxy)	Graham (proxy)
Durbin (proxy)	Craig

Edwards (proxy)	Chambliss
	Cornyn
	Feinstein
	Hatch

8. Senator Feingold offered an amendment. The amendment to delete the phrase that states that the rights of victims of violent crime "are hereby established." The amendment was defeated by a vote of 7 yeas to 10 nays, with 2 voting present.

YEAS	NAYS
Leahy	Grassley
Kennedy (proxy)	Kyl
Kohl (proxy)	DeWine (proxy)
Feingold	Sessions
Schumer (proxy)	Graham (proxy)
Durbin (proxy)	Craig
Edwards (proxy)	Chambliss
	Cornyn
	Feinstein
	Hatch

9. The Committee voted on final passage. The resolution was ordered favorably reported, without amendment, by a roll call vote of 10 yeas to 8 nays, with 1 voting pass.

YEAS	NAYS
Grassley	Leahy
Kyl	Kennedy (proxy)
DeWine (proxy)	Biden (proxy)
Sessions	Kohl (proxy)
Graham (proxy)	Feingold
Craig	Schumer
Chambliss	Durbin (proxy)
Cornyn	Edwards (proxy)
Feinstein	
Hatch	

VII. Cost Estimate

S.J. Res. 1—Proposing an amendment to the Constitution of the United States to protect the rights of crime victims

S.J. Res. 1 would propose amending the Constitution to protect the rights of crime victims. The legislatures of three-fourths of the states would be required to ratify the proposed amendment within seven years for the amendment to become effective. By itself, this resolution would have no impact on the federal budget. If the proposed amendment to the Constitution is approved by the states, this could result in additional costs for the federal court system. CBO does not expect any additional costs would be significant because the amendment would apply to crimes of violence, which are rarely prosecuted at the federal level. Enactment of S.J. Res. 1 would not affect direct spending or receipts.

S.J. Res. 1 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments. For the amendment to become part of the Constitution, three-fourths of the

state legislatures would have to ratify the resolution within seven years of its submission to the states by the Congress. However, no state would be required to take action on the resolution, either to reject it or to approve it.

The CBO staff contacts for this estimate are Mark Grabowicz (for federal costs), and Melissa Merrell (for the state and local impact). This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

VIII. Regulatory Impact Statement

Pursuant to paragraph 11(b), rule XXVI of the Standing Rules of the Senate, the Committee, after due consideration, concludes that S.J. Res. 1 will not have a direct regulatory impact.

IX. ADDITIONAL VIEWS OF SENATOR HATCH

At the outset, I would like to commend Senators Kyl and Feinstein for their unwavering commitment and tireless efforts to providing a constitutional guarantee for the rights of crime victims. I firmly believe that we should protect the rights of victims of crime.

The version of the Victims' Rights Amendment introduced in this Congress contains some significant differences from earlier versions. While I always have supported a constitutional amendment for victims' rights, I previously expressed concerns over various provisions in earlier texts. I am heartened to see that most of my earlier concerns have been addressed by these revisions.

For example, the last clause of Section 1 of the amendment proposed in S.J. Res. 3 in the 106th Congress and in S.J. Res. 44 in the 105th Congress provided that victims have the right "to reasonable notice of the rights established" by the amendment. I was concerned that this language was unnecessary and that it was unlike other constitutional provisions because it created an affirmative duty on the Government to provide notice of what rights the Constitution provides. I am pleased to note that the troublesome language has been deleted from S.J. Res. 1.

I also appreciate the deletion of a provision in earlier versions of this amendment that allowed victims to "reopen" proceedings relating to conditional release. Although I have always supported the consideration of a victim's views and safety concerns, allowing a victim to "reopen" a bail decision might infringe upon a defendant's constitutionally protected liberty interest in conditional release, once such release is granted.

The latest version of S.J. Res. 1 also modified the standard for restricting victims' rights. I was concerned that earlier versions provided a standard that could in some circumstances prove too rigid to adequately protect the public and ensure the administration of justice. In particular, earlier versions provided that "[e]xceptions to the rights established by this article may be created only when necessary to achieve a compelling interest." This compelling interest standard presumably was intended to be analogous to Supreme Court jurisprudence in strict scrutiny cases.

By contrast, the current version of S.J. Res. 1 includes a more flexible and workable standard for restricting victims' rights while still providing strong protection for those rights. It states that "[t]hese rights shall not be restricted except when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity." While I still believe that it may be more prudent to remain silent on the appropriate standard of review, my reservations are significantly diminished by the new flexible standard.

In prior years, I also expressed concern with the use of the term "immunities" in the final section of the amendment. All of the ear-

lier provisions of the amendment referred to victims' "rights," and the rationale for introducing the term "immunities" in the final section was unclear. Considering the problems that courts have had in defining and applying this term elsewhere in the Constitution, I thought it most prudent to delete the term here. I am pleased that my colleagues now agree with my assessment.

Although I find that the revised language of S.J. Res. 1 cured many of my earlier criticisms, it also created some new concerns. For example, I had concerns with respect to the new provision which states that "[n]othing in this article shall affect the President's authority to grant reprieves or pardons." Specifically, I feared that application of the principles inclusius unius exclusio alterius might result in an inappropriate interpretation of the amendment as restricting a Governor's ability to grant reprieves or pardons. However, as Senator Kyl explained during the Executive Committee meetings, the provision regarding Presidential pardons was added because the President's pardon authority is explicitly mentioned in the U.S. Constitution. In contrast, a Governor's pardon authority is never mentioned in the federal Constitution, so the victims' rights amendment could not be construed as infringing upon a Governor's authority to grant reprieves and pardons. I want to make clear that it is the intent of the framers of this constitutional amendment to preserve a Governor's authority to grant reprieves and pardons to the same extent as the President.

In addition, I continue to have reservations about the appropriateness of limiting a constitutional amendment to victims of "violent" crimes. According to advocacy groups, this might remove as many as 30 million victims of non-violent crimes from the amendment's safeguards. I believe that we must tread carefully when assigning constitutional rights on the arbitrary basis of whether the legislature has classified a particular crime as "violent" or "non-violent." It is unclear to me that a person who suffers a minor assault is more deserving of constitutional rights than an elderly widow who lost her life savings in a fraudulent investment scheme. While I appreciate the need to preserve governmental resources for those cases that are most likely to need victim protections, I continue to question whether the violent/non-violent distinction is the best way to do so. Another alternative might be to vest rights for certain classes of felonies, which would ensure that the victims of the most serious crimes—no matter whether violent or non-violent—have the protections they need when a criminal case is brought. This would not be the first time that a constitutional right turned on the classification of an offense. For example, it is well-established that a defendant's right to counsel does not attach if the offender is convicted of a misdemeanor and is not sentenced to jail. *Scott* v. *Illinois,* 440 U.S. 367 (1979). Similarly, a defendant only has a right to a jury trial when he is charged with a Class A misdemeanor or a felony. *Baldwin* v. *New York,* 399 U.S. 66 (1970). Notwithstanding these concerns, I agree with my friends from Arizona and California that we must avoid the temptation to let the "perfect" become the enemy of the "good." I find the revised victims' rights amendment to be significantly improved and believe

that victims right need protection. Accordingly, I support S.J. Res. 1.

ORRIN HATCH.

X. ADDITIONAL VIEWS OF SENATORS LEAHY AND KENNEDY

All of us agree that victims of crime deserve our support and deserve to have strong and enforceable rights. The question is whether these rights should be added as an amendment to the Constitution.

The framers made the Constitution difficult to amend because it was never intended to be used for general legislative purposes. If it is not necessary to amend the Constitution to achieve a particular goal, it is necessary not to amend it. The proponents of S.J. Res. 1 would amend the Constitution—over the vigorous objections of constitutional scholars, victims' rights groups, judges, prosecutors, and even the Chief Justice of the United States Supreme Court—even though their goal can be achieved through legislation. We strongly support victims' rights. We are confident that we can achieve this goal by the enactment of legislation, and we have introduced S.805 to do so.

THE CRIME VICTIMS ASSISTANCE ACT, S.805

To establish effective and enforceable rights for victims of crime, we introduced S.805, the Crime Victims Assistance Act, on April 7, 2003. In fact, our proposed statute will do more to protect crime victims than S.J. Res. 1—without taking the unnecessary and time-consuming step of amending the Constitution, and without opening a Pandora's box of serious, long-term consequences.

Unlike S.J. Res. 1, which leaves important terms and concepts undefined, our statute clearly defines the rights of victims and the mechanisms for their implementation and enforcement. Unlike S.J. Res. 1, which is limited to victims of violent crime, our statute provides protection for *all* victims of crime. It creates specific rights and specific support services for victims, and it authorizes the funds needed to guarantee those rights and services. It achieves the goals of S.J. Res. 1, without burdening state and local governments with unfunded mandates or requiring the diversion of scarce resources from criminal prosecutions. Instead of replacing programs that have already been implemented by a majority of states, it enables states to retain their full power to protect victims in the ways most appropriate to local concerns and local needs.

In sum, the Crime Victims Assistance Act accomplishes three major goals. It provides enhanced rights and protections for victims of federal crimes. It assists victims of state crimes through grants to promote compliance with state laws on victims' rights. And it improves the manner in which the Crime Victims Fund is managed and preserved.

Title I

Title I of our bill modifies federal law and the Federal Rules of Criminal Procedure to enhance protections for victims of federal crimes, and to give victims a greater voice in the prosecution of the criminals who commit such crimes.

Section 101 requires the government to consult with the victim prior to a detention hearing to obtain information on any threat the suspected offender may pose. During the detention hearing, the court must make an inquiry about the views of the victim and consider these views in determining whether the suspect should be detained.

Section 102 requires the court to consider the interests of the victim in the prompt and appropriate disposition of the case, free from unreasonable delay.

Section 103 requires the government to make reasonable efforts to notify the victim of any proposed or contemplated plea agreement, and to consider the victim's views about it.

Section 104 extends the Victim Rights Clarification Act to apply to televised proceedings, and it amends the Victims' Rights and Restitution Act to strengthen the right of crime victims to be present at trials and other court proceedings.

Section 105 requires probation officers to include as part of the presentence report any victim impact statements submitted by victims. It extends to all victims the right to make statements or present information at sentencing, and it requires courts to consider victims' views before imposing sentence.

Section 106 requires the government to give victims the earliest possible notice of hearings on modification of probation or supervised release, discharges from psychiatric facilities, and grants of executive clemency.

Section 107 establishes specific steps to enforce the rights of federal crime victims, including the rights established by our proposed statute. An office within the Department of Justice will be established to receive and investigate complaints relating to the violation of the rights of crime victims. Employees who fail to protect these rights will be disciplined. In addition, Section 104 gives standing to prosecutors and victims to assert the rights of victims to attend and observe trials.

The rights established by Title I fill existing gaps in federal criminal law and represent a major step toward ensuring that the rights of victims of federal crimes receive full, appropriate, and sensitive treatment. Unlike S.J. Res. 1, these rights work together with existing state laws. They protect victims without overriding the efforts of states to protect victims in ways appropriate to each state's unique needs.

Title II

Title II of the Crime Victims Assistance Act will assist victims of crime at the state and local level, to ensure that they receive the counseling, information, and assistance they need to participate in the criminal justice system to the fullest extent possible.

Section 201 authorizes pilot programs in five states to establish and operate compliance authorities to promote the effective enforcement of state laws on the rights of victims of crime. These compli-

ance authorities will receive and investigate complaints relating to the provision or violation of victims' rights and issue findings.

Section 202 provides resources to develop state-of-the-art procedures for notifying victims of important dates and developments.

Section 203 authorizes grants to establish juvenile justice programs to promote victim participation in the criminal justice system.

Section 204 supports the development of case management programs to coordinate the various programs that affect or assist victims, in order to streamline access to services and reduce "revictimization" by the criminal justice system.

Section 205 expands the capacity of providers of victim services to serve victims with special communication needs, such as limited English proficiency, hearing disabilities, and developmental disabilities.

Instead of compelling states to modify their criminal justice procedures in particular ways, these initiatives provide federal resources to establish effective victims' rights compliance and assistance programs at the state level.

Title III

To make additional improvements possible, the Crime Victims Assistance Act provides increased federal financial support for victim assistance and compensation programs. It replaces the cap on spending from the Crime Victims Fund, which has prevented millions of dollars in fund deposits from reaching victims and supporting essential services. It adopts an approach supported by victim groups to strengthen the stability of the fund and protect its assets, while enabling more funds to be distributed for victim programs. It also ensures that the amounts deposited in the Crime Victims Fund will be distributed in a timely manner to assist victims of crime, as intended by current law—and will not be diverted to offset increased spending.

CONCLUSION

Our statutory proposal is clear and comprehensive. It protects the core rights contained in S.J. Res. 1, provides essential victims' services, and authorizes funding to implement these rights and services. There is no need to amend the Constitution. S.J. Res. 1 is both unnecessary and unwise. The proposed constitutional amendment would make the same promises on victims' rights, but it provides no meaningful remedy for violations of these rights. It imposes mandates on state and local prosecutors, but it fails to provide funding. As a result, it will overburden already tight federal, state, and local budgets, and compromise diligent and effective prosecutions.

With a simple majority of both Houses of Congress, S.805, the Crime Victims Assistance Act, can be sent to the President immediately. Its provisions will make an immediate and large difference in the lives of crime victims throughout the country. There is no need to go through the elaborate and time-consuming procedures of amending the Constitution. It would be foolish to do so, when all it means is that once the constitutional amendment is approved by Congress and ratified by the states, Congress will then have to

enact a statute like S.805 to implement the amendment. Why not pass the statute now, and protect victims' rights as soon as possible?

PATRICK J. LEAHY.
EDWARD M. KENNEDY.

XI. MINORITY VIEWS OF SENATORS LEAHY, KENNEDY, KOHL, FEINGOLD, SCHUMER, AND DURBIN

A. INTRODUCTION

Never before in the history of the Republic have we passed a constitutional amendment to guarantee rights to a politically popular group of citizens at the expense of a powerless minority. Never before in the history of the Republic have we passed a constitutional amendment to guarantee rights that every State is already striving to protect. Never before in the history of the Republic have we passed a constitutional amendment to guarantee rights that intrude so technically into such a wide area of law, and with such serious implications for the Bill of Rights.

The emotional engine feeding this amendment is not, however, without precedent. There has been one instance in our history in which we amended the Constitution without carefully thinking through the consequences. Andrew Volstead led the Congress to the passage of the 18th amendment, and opened a Pandora's Box of unintended consequences. The 18th amendment was appealing and entirely well meaning. It also was an utter failure that the American people were required to undo with the 21st amendment.

The disaster of Prohibition should remind us that constitutional amendments based on sentiment are a dangerous business. It would be well for Congress to heed the words of James Madison, when he urged that amendments be reserved for "certain great and extraordinary occasions," and to heed the text of article V, which reserves amendments for things that are "necessary."

The treatment of crime victims certainly is of central importance to a civilized society. The question is not whether we should help victims, but how. It long has been and is now open to Congress immediately to pass a statute that would provide full victims' rights throughout the federal system and, at the same time, either require the States to follow suit as a condition of federal funding, or assist the States in giving force to their own, locally-tailored statutes and constitutional provisions. Instead, the proponents of S.J. Res. 1 invite Congress to delay relief for victims with a complex and convoluted amendment to our fundamental law—an amendment that is less a remedy than another Pandora's Box which, like the 18th amendment, will loose a host of unintended consequences.

The majority appears to believe that it can control some of the inevitable damage through explications in the Committee report about how the amendment will operate. We doubt that the courts will care much for such efforts. They will look first to the plain meaning of the text of the amendment. They will seek guidance in Supreme Court precedents interpreting provisions using similar language. They will not resort to the majority report to interpret

wording that is clearly understood in current legal and political circles.

Any interpretative value of the majority report is further undermined by the inconsistency of the document, which in some situations narrows the impact of the amendment (e.g., by construing away the unpopular consequences for battered women and incarcerated victims) and in other circumstances expands the impact of the amendment (e.g., by devising a role for States in implementing the amendment). Such inconsistency may be politically expedient, but it leaves the final product unreliable as an interpretive tool. Weaknesses in the text of the amendment cannot with any confidence be cured by the majority's views, especially not when the majority's analysis is so directly at odds with the amendment's plain language and with settled constitutional doctrine.

B. IT IS NOT NECESSARY TO AMEND THE CONSTITUTION TO PROTECT VICTIMS' RIGHTS

Every proposal to amend our federal Constitution bears a very heavy burden. Amendment is appropriate only when there is a pressing need that cannot be addressed by other means. No such need exists in order to protect the rights of crime victims. The proposed amendment therefore fails the standard contained in article V of the Constitution: it is not "necessary."

1. Congress and the States Have the Power To Protect Victims' Rights Without a Federal Constitutional Amendment

Nothing in our current Constitution inhibits the enactment of State or federal laws that protect crime victims. On the contrary, the Constitution is generally supportive of efforts to give victims a greater voice in the criminal justice system. No victims' rights amendment was necessary, for example, to secure a role for victims at pretrial detention and capital sentencing hearings.[1] Nor do we need a constitutional amendment to provide victims with notice of hearing dates or to require just and timely consideration of restitution.

Where, then, is the objectionable body of law that might justify the extraordinary step of amending the United States Constitution? There is none. The Senate will search the pages of the majority report in vain for any such basis for this extraordinary proposal.

A letter sent to the Committee by 450 professors of constitutional and criminal law concludes, "There is no pressing need for a victim's rights amendment, as virtually every right provided victims by the amendment can be or is already protected by state and federal law."[2] Even Professor Laurence Tribe, an outspoken supporter of a victims' rights amendment, has acknowledged that "the States and Congress, within their respective jurisdictions, already have

[1] See *United States* v. *Salerno,* 481 U.S. 739 (1987) (Constitution does not prohibit courts from considering safety of victims in making pretrial detention decision); *Payne* v. *Tennessee,* 501 U.S. 808 (1991) (Constitution does not prohibit jury from considering victim impact statement at sentencing phase of capital trial).

[2] Letter from Law Professors Regarding the Proposed Constitutional Amendment, Nov. 3, 2003.

ample affirmative authority to enact rules protecting these rights."[3]

Given our ability to proceed without amending the Constitution, one might reasonably wonder why so much time and effort has been expended on the project. The majority report offers one explanation. Quoting Professor Tribe, the majority tells us (in part III) that statutes and State constitutional amendments "are likely * * * 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."

Have we so lost confidence in our ability to govern and to regulate the conduct of public officials sworn to follow the law that we now insist on amending our basic charter of government in the hope of sending a signal that might overcome habit, indifference and inertia? Do we really believe that a constitutional amendment will accomplish this objective? Habit, indifference, inertia—none is automatically extinguished by the existence of a constitutional amendment. We are especially unlikely to overcome such real-world influences with a constitutional amendment like S.J. Res. 1, which creates rights riddled with qualifications and prohibits the award of damages for their violation.

In a 1998 commentary, conservative constitutional scholar Bruce Fein discussed the problem of official indifference to victims' rights, noting that a federal constitutional right would provide no guarantee of effectiveness:

> It is said by amendment proponents * * * that state judges and prosecutors often short-change the scores of existing victims' rights statutes. If so, they would equally be inclined to flout the amendment. The judicial oath is no less violated in the first case as in the second.[4]

John Perry was a New York City police officer who lost his life attempting to rescue individuals from the attack on the World Trade Center on September 11, 2001. A lawyer, he had served with the NYPD for 8 years when he decided to return to the practice of law. He submitted his retirement papers and surrendered his badge early on the morning of September 11, 2001. Immediately thereafter, he learned of the attack on the World Trade Center. He retrieved his badge, bought an NYPD shirt and ran to the World Trade Center, located just blocks away. Officer Perry saved the lives of workers in the underground plaza but lost his own life that day. His mother, Patricia Perry, testified that her son "would appreciate the concern for victims, but would oppose the Victims' Rights Amendment." She continued, "instead of focusing on this Amendment, Congress should ensure that resources are offered as needed to help heal the pain and loss of victims and victims' families."[5]

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[3] A Proposed Constitutional Amendment To Protect Crime Victims, Hearing on S.J. Res. 3 before the Senate Comm. on the Judiciary, 106th Cong., 1st Sess. 216, 218 (Mar. 24, 1999) [hereinafter "Hearing of Mar. 24, 1999"].

[4] Bruce Fein, Deforming the Constitution, Wash. Times, July 6, 1998, at A14.

[5] A Proposed Constitutional Amendment to Protect Crime Victims, Hearing on S.J. Res. 1 before the Senate Comm. on the Judiciary, 108th Cong., 1st Sess. (Apr. 8, 2003) [hereinafter

Two supporters of S.J. Res. 1—John Gillis, the current Director of the Justice Department's Office for Victims of Crime ("OVC") and Professor Douglas Beloof—point to the failure to educate lawyers in crime victim law as one of the most substantial barriers to enforcement to victims' rights. While they think a federal constitutional amendment would achieve such education, they acknowledge a simpler solution: Require State bar examiner to include these rights on State bar exams.[6]

We believe the only way to change entrenched attitudes toward victims' rights is through systematic training and education of everyone who works with victims-prosecutors and law enforcement officers, judges and court personnel, victim's rights advocates, trauma psychologists and social workers. Why then undertake a massive effort to amend our Constitution if what we really need to do is spend time and money on training and education?

2. Statutes Are Preferable To Amending the Federal Constitution

Ordinary legislation not only is sufficient to correct any deficiencies in the provision of victims' rights that currently exist, but also is vastly preferable to amending the Constitution. Indeed, the statutory approach is favored by a broad cross-section of the participants in the criminal justice system.

The United States Judicial Conference "strongly prefers a statutory approach as opposed to a constitutional amendment" because it "would allow all participants in the federal criminal justice system to gain experience with the principles involved without taking the unusual step of amending our nation's fundamental legal charter."[7]

The State courts also favor a statutory approach to protecting victims' rights. The Conference of Chief Justices has underscored [t]he inherent prudence of a statutory approach," which could be refined as appropriate and "is more certain and immediate, an advantage to victims who under the proposed amendment approach, may wait years for relief during the lengthy and uncertain ratification process."[8]

Other major organizations, including several victims groups, concur.

• The National Clearinghouse for the Defense of Battered Women "strongly opposes" this amendment and argues that statutory alternatives are "more suitable":

> The federal constitution is the wrong place to try to "fix" the complex problems facing victims of crime; statutory al-

"Hearing of Apr. 8, 2003"] (statement of Patricia Perry). At the time of this writing, the printed record of this hearing was not yet available.

[6] John Gillis & Douglas Beloof, "The Next Step For a Maturing Victim Rights Movement: Enforcing Crime Victim Rights In the Courts," 33 McGeorge L. Rev. 689, 697–698 (Summer 2002).

[7] Letter from Leonidas Ralph Mecham, Secretary, Judicial Conference of the United States, to Sen. Hatch, Chairman, and Sen. Leahy, Ranking Member, Senate Comm. on the Judiciary, Apr. 30, 2003.

[8] Statement of the Conference of Chief Justices regarding H.J. Res. 71 and H.R. 1322, prepared for the House Comm. on the Judiciary (June 25, 1997). See also Letter from E. Norman Veasey, Chief Justice, Supreme Court of Delaware, to Sen. Biden, June 26, 2003 ("The Conference of Chief Justices has long opposed [the proposed constitutional amendment"); Letter from Joseph Weisberger, Chief Justice, Supreme Court of Rhode Island, to Rep. Charles Canady, Chairman, and Rep. Melvin Watt, Ranking Member, House Subcomm. on the Constitution, Feb. 8, 2000 ("CCJ concurs with the recommendations of the U.S. Judicial Conference regarding a statutory alternative to this issue"); Hearing of Mar. 24, 1999, at 251 (same).

> ternatives and state remedies are more suitable. Our nation's constitution should not be amended unless there is a compelling need to do so and there are no remedies available at the state level. Instead of altering the U.S. Constitution, we urge policy makers to consider statutory alternatives and statewide initiatives that would include the enforcement of already existing statutes, and practices that can truly assist victims of crimes, as well as increased direct services to crime victims.[9]

• Safe Horizon is the nation's leading victims' assistance organizations, serving over 350,000 victims per year. In the aftermath of the September 11 attacks, Safe Horizon distributed over $90 million in financial assistance to 40,000 victims and survivors. This victim assistance agency also opposes S.J. Res. 1. It wrote to the Committee that the proposed amendment "may be well intentioned, but good intentions do not guarantee just results":

> We believe considerable progress with respect to victims' rights has been made in New York and elsewhere in recent years, although we recognize that still more needs to be done. Almost everywhere, statutory frameworks provide victim protections and a majority of states have also passed constitutional amendments. However, these statutory reforms, such as requiring officials to take steps to notify victims about court proceedings, must be enforced to be meaningful. Additionally, services for victims desperately need more financial support. When so much remains to be done to enforce existing victims' rights provisions and to expand the support services so vital to victims, we find it difficult to justify the extensive resources needed to pass a Constitutional amendment.[10]

• The National Network to End Domestic Violence cautions that S.J. Res. 1 would "drain valuable resources from the system," "prevent innovative solutions," "provide[s] inadequate protections for victims of domestic violence," and generally constitute "an empty promise to victims"; it concludes, "[T]he objectives of the victims' rights amendment can be met more effectively through far less drastic means and means that can be more easily altered if circumstances change or experience yields unanticipated consequences."[11]

• The Pennsylvania Coalition Against Domestic Violence states that "S.J. Res. 1 would fundamentally alter the nation's founding charter with negligible benefits for victims and enormous consequences for states." In the experience of this organization, "victim's rights can be sufficiently established through the development of state codes."[12]

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[9] Position paper by the National Clearinghouse for the Defense of Battered Women, prepared for the Senate Comm. on the Judiciary, Hearing of Apr. 8, 2003.

[10] Letter from Gordon J. Campbell, Chief Executive Officer, Safe Horizon, to Sen. Hatch, Chairman, and Sen. Leahy, Ranking Member, Senate Comm. on the Judiciary, Apr. 7, 2003.

[11] Statement of Lynn Rosenthal, Executive Director, National Network to End Domestic Violence, prepared for the Senate Comm. on the Judiciary, Hearing of Apr. 8, 2003.

[12] Letter from Susan Kelly-Dreiss, Executive Director, Pennsylvania Coalition against Domestic Violence, to Sen. Specter, Apr. 7, 2003.

• The NOW Legal Defense and Education Fund writes that the proposed constitutional amendment "raises concerns that outweigh its benefits," but "fully endorse[s] ? initiatives to ensure consistent enforcement of existing federal and state laws, and enactment and enforcement of additional statutory reform that provide important protections for [victims]." [13]

• The National Sheriffs' Association, the Leadership Conference on Civil Rights, the Independence Institute, the National Association of Criminal Defense Attorneys, the National Legal Aid and Defenders Association, the NAACP, the ACLU, the Justice Policy Institute, the Center on Juvenile and Criminal Justice, the Youth Law Center, the National Center on Institutions and Alternatives, the American Friends Service Committee, the Friends Committee on National Legislation, and 450 law professors—all believe that the treatment and role of victims in the criminal justice process can and should be enhanced, but not by amending the federal Constitution.

The widespread support for enacting victims' rights by statute arises in part from evidence that statutes work—they can ensure that victims of crimes are accorded important rights in the criminal justice process. When ordinary legislation is more easily enacted, more easily corrected or clarified, more directly applied and implemented, and more able to provide specific, effective remedies, the Senate should not propose to amend the Constitution. That is an extraordinary action of last resort, not undertaken as a first option.

3. An Extensive Framework of Victims' Rights Has Already Been Created

In the past two decades, the victims' movement has made historic gains in addressing the needs of crime victims, on both the national and local level. An extensive framework of victims' rights has already been created through federal and State legislation and amendments to State constitutions. Moreover, given the extraordinary political popularity of the victims' movement, there is every reason to believe that the legislative process will continue to be responsive to enhancing victims' interests, so that there is simply no need to amend the Constitution to accomplish this.

Federal crime victims initiatives

At the federal level, Congress has enacted several major laws to grant broader protections and provide more extensive services for victims of crime. Among the first such legislation was the Victim and Witness Protection Act of 1982,[14] which provided for victim restitution and the use of victim impact statements at sentencing in federal cases, and the Victims of Crime Act of 1984,[15] which encouraged the States to maintain programs that serve victims of crime. The Victims of Crime Act also established a Crime Victims' Fund, which now matches up to 60 percent of the money paid by States for victim compensation awards.

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[13] Position paper by the NOW Legal Defense and Education Fund, prepared for the Senate Comm. on the Judiciary, July 2003.

[14] P.L. 97–291, Oct. 12, 1982, 96 Stat. 1248.

[15] P.L. 98–473, title I, ch. XIV, Oct. 12, 1984, 99 Stat. 1837.

In 1990, Congress enacted the Victims' Rights and Restitution Act.[16] This Act increased funding for victim compensation and assistance, and codified a victims' Bill of Rights in the federal justice system. Federal law enforcement agencies must make their best efforts to accord crime victims with the following rights: (1) to be treated with fairness and respect; (2) to be protected from their accused offenders; (3) to be notified of court proceedings; (4) to be present at public court proceedings related to the offense under certain conditions; (5) to confer with the government attorney assigned to the case; (6) to receive restitution; and (7) to receive information about the conviction, sentencing, imprisonment, and release of the offender.

The Violence Against Women Act of 1994 (VAWA)[17] authorized over $1.6 billion over six years to assist victims of violence and prevent violence against women and children. Programs authorized under VAWA include the National Domestic Violence Hotline, S.T.O.P. grants for training police and prosecutors to respond more effectively to violent crimes against women, and funding for battered women's shelters and rape crisis centers, as well as other crucial services for victims of domestic and sexual violence. That Act has produced dramatic results: hundreds of thousands of women have been provided shelter to protect themselves and their children; a new national domestic violence hotline has answered hundreds of thousands of calls for help; and there has been a fundamental change in the way victims of violence are treated by the legal system.[18]

The Mandatory Victims Restitution Act of 1996[19] required courts to order restitution when sentencing defendants for certain offenses. As part of the same crime bill, the Justice for Victims of Terrorism Act of 1996[20] appropriated funds to assist and compensate victims of terrorism and mass violence. The Act also filled a gap in our law for residents of the United States who are victims of terrorism and mass violence that occur outside the borders of the United States. In addition, Congress provided greater flexibility to our State and local victims' assistance programs and some greater certainty so they can know that our commitment to victims' programs will not wax and wane with current events. And we were able to raise the assessments on those convicted of federal crimes in order to fund the needs of crime victims.

The Victim Rights Clarification Act of 1997[21] reversed a presumption against crime victims observing any part of the trial proceedings if they were likely to testify during the sentencing hearing. Specifically, this legislation prohibited courts from (1) excluding a victim from the trial on the ground that he or she might be called to provide a victim impact statement at sentencing, and (2) excluding a victim impact statement on the ground that the victim had observed the trial. As a result of this legislation, victims of the

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[16] P.L. 101–647, title V, Nov. 29, 1990, 104 Stat. 4789.
[17] P.L. 103–322, title IV, Sept. 13, 1994, 108 Stat. 1796.
[18] VAWA was reauthorized in 2000 and extended in 2003. See P.L. 106–386, Oct. 28, 2000, 114 Stat. 1464; P.L. 108–21, §612, Apr. 30, 2003, 117 Stat. 650 (authorizing new transitional housing program).
[19] P.L. 104–132, title IIA, Apr. 24, 1996, 110 Stat. 1214.
[20] Id., title IIC.
[21] P.L. 105–6, § 2(a), Mar. 19, 1997, 111 Stat. 12.

Oklahoma City bombing were allowed both to observe the trials of Timothy McVeigh and Terry Nichols and to provide victim impact testimony.

In October 1998, Congress passed the Crime Victims With Disabilities Awareness Act[22] which focused attention on the too-often overlooked needs of crime victims with disabilities. It directed the National Academy of Sciences to conduct research, so as to increase public awareness of victims of crimes with disabilities, to understand the nature and extent of such crimes, and to develop strategies to address the safety and needs of these peculiarly vulnerable victims.

The same month, Congress passed the Identity Theft and Assumption Deterrence Act,[23] which, among other things, created a centralized complaint and consumer education service for victims of identity theft. Under the Act, the Federal Trade Commission is responsible for establishing procedures to (1) log and acknowledge the receipt of complaints by victims of identity theft; (2) provide informational materials to victims; and (3) refer victim complaints to the appropriate entities, including national consumer reporting agencies and law enforcement agencies.

Also in October 1998, the Torture Victims Relief Act[24] amended the Foreign Assistance Act of 1961, authorizing the President to provide grants to programs in foreign countries that are carrying out projects or activities specifically designed to treat victims of torture. In addition, this legislation provided grants for U.S. rehabilitation programs, social and legal services for victims, and training of foreign service officers with respect to torture victims, including gender-specific training on the subject of interacting with women and men who are victims of torture by rape or any other form of sexual violence.

The Victims of Trafficking and Violence Protection Act[25] was signed into law in October 2000. This law requires the State Department to establish an office to monitor and combat trafficking in persons and provide assistance to trafficking victims. It also provides support for victims of international terrorism, by facilitating the enforcement of court-ordered judgments against state sponsors of terrorism, and by enabling the OVC to provide more immediate and effective assistance to victims of terrorism abroad.

Congress acted swiftly to help the victims of the September 11, 2001, terrorist attacks. Within 10 days, we passed the September 11th Victim Compensation Fund of 2001,[26] to provide fair compensation to those most affected by this national tragedy. A few months later, we passed the Victims of Terrorism Tax Relief Act,[27] which exempted from income taxes any individual who died as a result of wounds or injury incurred in the September 11 attacks, the anthrax attacks in the fall of 2001, or the Oklahoma City bombing in April 1995. In addition, as part of the USA PATRIOT

[22] P.L. 105–301, Oct. 17, 1998, 112 Stat. 2838.
[23] P.L. 105–318, § 5, Oct. 30, 1998, 112 Stat. 3007.
[24] P.L. 105–320, Oct. 30, 1998, 112 Stat. 3016.
[25] P.L. 106–386, Oct. 28, 2000, 114 Stat. 1464.
[26] P.L. 107–042, Sept. 22, 2001, 115 Stat. 230.
[27] P.L. 107–134, Jan. 23, 2002, 115 Stat. 2427.

Act of 2001,[28] we made several significant changes to the Victims of Crime Act, aimed at improving the manner in which the Crime Victims Fund is managed and preserved.

All these federal statutes have made an immediate difference in the lives of victims, including victims of terrorism. But despite these gains, some constitutional amendment proponents continue to assert that statutes do not work to provide victims with participatory rights. In particular, they cite the Victim Rights Clarification Act of 1997 as evidence that statutes cannot adequately protect a victim's rights.[29] Given these assertions, we believe it important to revisit the history of the Victim Rights Clarification Act.

On June 26, 1996, during proceedings in the first Oklahoma City bombing case against defendant Timothy McVeigh, Chief Judge Richard Matsch issued what many of us thought was a bizarre pretrial order. He held that any victim who wanted to testify at the penalty hearing, assuming McVeigh was convicted, would be excluded from all pretrial proceedings and from the trial, to avoid any influence from that experience on their testimony. The prosecution team moved for reconsideration, but the judge denied the motion and reaffirmed his ruling on October 4, 1996.

Congress proceeded to pass the Victim Rights Clarification Act, which President Clinton signed into law on March 19, 1997. One week later, Judge Matsch reversed his pretrial order and permitted observation of the trial proceedings by potential penalty phase victim impact witnesses.[30] In other words, Judge Matsch did what the statute told him to do. In fact, not one victim was prevented from testifying at Timothy McVeigh's sentencing hearing on the ground that he or she had observed part of the trial.

Two members of the government team that prosecuted the Oklahoma City bombing case—Beth Wilkinson and James Orenstein—attested to the efficacy of the Victim Rights Clarification Act in their appearances before the Committee. According to Ms. Wilkinson:

> What happened in [the McVeigh] case was once you all passed the statute, the judge said that the victims could sit in, but they may have to undergo a voir dire process to determine * * * whether their testimony would have been impacted. * * * I am proud to report to you that every single one of those witnesses who decided to sit through the trial * * * survived the voir dire, and not only survived, but I think changed the judge's opinion on the idea that any victim impact testimony would be changed by sitting through the trial. * * * [T]he witnesses underwent the voir dire and testified during the penalty phase for Mr. McVeigh.
>
> It worked in that case, but it worked even better in the next case. Just 3 months later when we tried the case

[28] P.L. 107–056, title VI, subtitle B, Oct. 26, 2001, 115 Stat. 272.

[29] For example, the two lead sponsors of S.J. Res. 1 have repeatedly stated that the trial judge in the Oklahoma City bombing case either ignored the Act or willfully refused to enforce it. See, *e.g.,* Transcript of Markup, Senate Comm. on the Judiciary, July 24, 2003, at 40–44 (Sen. Feinstein); Transcript of Markup, Senate Comm. on the Judiciary, June 25, 1998, at 16 (Sen. Feinstein); *id.* at 25 (Sen. Kyl). The majority report echoes this view, stating (in part IV(3)) that the Act "did not fully vindicate the victims' right to attend the trial."

[30] *United States* v. *McVeigh,* 958 F. Supp. 512, 515 (1997).

> against Terry Nichols, every single victim who wanted to watch the trial either in Denver or through closed-circuit television proceedings that were provided also by statute by this Congress, were permitted to sit and watch the trial and testify against Mr. Nichols in the penalty phase * * * without even undergoing a voir dire process.[31]

Similarly, Mr. Orenstein testified, "As a result of the [Victim Rights Clarification Act], no victim was excluded from testifying at the defendants' penalty hearing on the basis of having attended earlier proceedings."[32]

The testimony of Ms. Wilkinson and Mr. Orenstein on this point has never been contested. In addition, we are unaware of any case after the Oklahoma City bombing trials in which the Victim Rights Clarification Act has been less than fully effective.

To summarize, in the Timothy McVeigh case, the trial judge got the law of victims' rights wrong in an initial pretrial ruling. That ruling was promptly opposed by prosecutors, swiftly corrected by Congress, and duly reversed by the trial judge himself before the trial began. By the time McVeigh's codefendant went to trial, any uncertainty about the new legislation had been resolved. What that history shows is not that statutes don't work; it shows precisely why they do. If we got the law of victims' rights wrong in a constitutional amendment, or the Supreme Court interpreted a constitutional victims' rights amendment wrongly, a solution would not come so swiftly. That is why Congress has been slow to constitutionalize new procedural rights that can be provided by statute, and that is why it should remain so.

State crime victims initiatives

The individual States have also done their part in enhancing the role and protection of crime victims. Every State and the District of Columbia has some type of statutory provision providing for increased victims' rights, including some or all of the rights enumerated in S.J. Res. 1, as well as others. In addition, some 33 States have amended their State constitutions to provide a variety of protections and rights for crime victims. As the majority report notes (in footnote 1), "These amendments passed with overwhelming popular support."

While there may be room for improvement in the States' administration of their existing victims' rights laws, in general, victims and criminal justice personnel believe that these laws are sufficient to ensure victims' rights. In 1989, the American Bar Association's Victim Witness Project analyzed the impact of State victims' rights laws on criminal justice practitioners and victims. The researchers found that prosecutors, judges, probation officers, and victim-witness advocates were almost universally satisfied with the State laws. They also found that those practitioners who had concerns about existing victims' rights provisions were generally dissatisfied with levels of funding for victims' services. With regard to victim satisfaction, the researchers concluded that "many victims in States with victims rights legislation believe the criminal justice

[31] Hearing of Mar. 24, 1999, at 65.
[32] Hearing of Apr. 8, 2003 (statement of James Orenstein).

system is doing a satisfactory job of keeping them informed, providing them an opportunity to have a say in certain decisions and notifying them about case outcomes."[33]

Since 1989, States have continued to strengthen their victims' rights provisions and services. Indeed, the majority acknowledges (in part IV(4)) that "[t]here is a trend toward greater public involvement in the process, with the federal system and a number of States now providing notice to victims," and many of the anecdotes sprinkled throughout the majority report demonstrate that change toward better implementation of victims' rights is occurring in the States.

Several studies support this assessment. A 1995 report by the State of Arizona's Auditor General found that in the four counties studied, "many agencies are offering victim services above and beyond those mandated by the [Arizona Victims' Rights Implementation] Act, primarily at their own expense."[34] A 1997 report by the National Criminal Justice Association concluded: "It appears evident that the trend to expand the statutory rights of victims on the state level is continuing."[35]

More recently, the Vera Institute of Justice completed a 56-page report on the Effects of State Victims Rights Legislation on Local Criminal Justice Systems. The Vera Institute surveyed 396 prosecutors' offices across the country, in large and small jurisdictions, and found that by and large, victims' rights were being honored. It states: "During the last decade, researchers who studied victim rights tended to be pessimistic about the extent to which statutes were followed in practice by local criminal justice officials. In the sites we visited, however, *we are confident that, overall, people are making a serious effort to implement the state statutes.*"[36]

The majority relies (in part III) on two reports that found past protections for victims to be inadequate. The first is a 1997 report by the National Victim Center, now known as the National Center for Victims of Crime ("NCVC")—a member of the National Victims Constitutional Amendment Network and a leading advocate for a victims' rights amendment.[37] The remarkable point about this report is that it provides so little support for a federal constitutional amendment. Instead, it suggests that it is money and additional State law provisions that are needed, not a federal constitutional amendment. The "violations" discussed in the study are failures of enforcement, not instances of defendants' rights trumping the rights of victims. When local officials were surveyed and asked for suggestions to improve treatment of victims of crime, the leading proposal was for increased funding.

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[33] Susan W. Hillenbrand & Barbara E. Smith, *Victims Rights Legislation: An Assessment of its Impact on Criminal Justice Practitioners and Victims* 26 (May 1989).

[34] *Victims' Rights Compensation and Victim-Witness Programs in Maricopa, Pima, Coconino, and Cochise Counties,* Report to the Arizona State Legislature by the Auditor General (Dec. 1994).

[35] *Victims Rights Compliance Efforts: Experiences in Three States* (1997). This publication is available on the Internet at <http://www.ojp.usdoj.gov/ovc/>.

[36] Criminal Justice Newsletter, Vol. 32, No. 10 (June 2002) (quoting Vera Institute study; emphasis added). The Vera Institute report has not been released, apparently because the Justice Department, which funded the research, is unhappy with some of the findings.

[37] See Statutory and Constitutional Protection of Victims' Rights: Implementation and Impact on Crime Victims—Subreport: Crime Victim Responses Regarding Victims' Rights (Apr. 15, 1997).

Another unsurprising conclusion of the NCVC report: States with stronger legal protections for victims provide stronger enforcement of victims' rights. It should be obvious to all that a State that does not mandate the provision of a particular right will not enforce that right. Moreover, as the NCVC researchers themselves acknowledged, "it is reasonable to assume that States with stronger legal mandates for the provision of victims' rights tend to provide more funds for implementation than States with weaker mandates."[38] Before we conclude that State laws are inadequate to protect victims, there should at least be such laws, as well as sustained efforts to fund, implement and enforce such laws. The NCVC report suggests that we should do more to encourage States to adopt and enforce victims' rights, not that we should amend the Constitution.

The NCVC report also fails to provide a clear picture of the impact of State victims' rights laws because its methodology was so seriously flawed. Indeed, manifest flaws in the NCVC's methodology led the OVC to conclude that "more research would be needed before any policy recommendations could be made based on the data."[39]

The second report cited by the majority was compiled by the OVC based on anecdotal information from "the field"—that is, "crime victims themselves and representatives of the agencies and organizations that serve them."[40] Once again, however, the deficiencies identified in the report—deficiencies in the implementation of State victims' rights laws and in the scope of some States' provisions—can be corrected without a federal constitutional amendment.

There has been no impartial, comprehensive analysis done to indicate that victims' rights cannot adequately be protected by State and federal laws. Certainly, there is no body of case law supporting such a conclusion. Before we take the fundamental step of amending the Constitution, we should know precisely how the Constitution fails to protect victims' rights. We should be certain that federal statutes are not working and cannot work, no matter how carefully crafted. We should have evidence that State statutes and constitutional provisions are not doing the job, and that they cannot. Further study, we believe, will show that solutions short of a federal constitutional amendment can provide effective and meaningful relief to crime victims.

4. Victims' Rights Do Not Need To Be "Restored"

The case for a victims' rights constitutional amendment is based in large part on a faulty premise. Without citing a single historical source, the majority report asserts (in part I):

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[38] Hearing of Mar. 24, 1999, at 160 (Dec. 1998 summary of NCVC report).

[39] Letter from Kathryn M. Turman, Acting Director, OVC, to Robert P. Mosteller, Professor, Duke University School of Law, Sept. 18, 1998. An earlier intra-office memorandum memorializes the Justice Department's wish that the complete report not be published at all. Memorandum from Sam McQuade, Program Manager, National Institute of Justice, to Jeremy Travis, Director, National Institute of Justice, May 16, 1997 ("OVC has requested that the complete report NOT be published because, in its view, the report contains contradictory information * * *."; emphasis in original). For a detailed critique of the NCVC report and its flawed methodology, see Robert P. Mosteller, The Unnecessary Victims' Rights Amendment, 1999 UTAH L. REV. 443, 447–449 n.13.

[40] New Directions from the Field: Victims' Rights and Services for the 21st Century vii (May 1998).

> At the birth of this Republic, victims could participate in the criminal justice process by initiating their own private prosecutions. It was decades after the ratification of the Constitution and the Bill of Rights that the offices of the public police and the public prosecutor would be instituted, and decades beyond that before the victim's role was reduced from that of the moving party in most criminal prosecutions, to that of a party of interest in the proceedings, to that of mere witness.

Based upon this premise, we are told that S.J. Res. 1 would simply "restore" the various notice and participation rights that victims in the late 18th century inherently enjoyed by virtue of being parties to the litigation.

History tells us otherwise. There was a place that had a system of private prosecutions in the late 18th century, and even well into the 19th century. But that place was England, not New England. Most American colonies followed the English model of private prosecutions in the 17th century but, as one distinguished scholar has written, that system "proved even more poorly suited to the needs of the new society than to the older one." For one thing, victims abused the system by initiating prosecutions to exert pressure for financial reparation. These colonies shifted to a system of public prosecutions because they viewed the system of private prosecutions as "inefficient, elitist, and sometimes vindictive."[41] While private prosecutions turn justice into a variable proposition based on the wealth and power of the victim, public prosecutions give the chance for equal justice.[42]

The clear trend during the colonial period and immediately after the Revolution was for the expansion of public prosecutions and, with it, the decline of private prosecutions.[43] These developments, as well as the social, economic, and intellectual factors that led to

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[41] Abraham S. Goldstein, Prosecution: History of the Public Prosecutor, in 3 Encyclopedia of Crime and Justice 1286, 1286–1287 (S. Kadish ed. 1983).

[42] The public prosecutors of the United States represent "The People," not just the individual crime victim. They are required to seek justice for all, not justice based on wealth or social status or the communication skills of victims or their survivors. If this amendment were adopted, what would happen in cases where the victim either does not support—or is not effective at articulating—prosecution strategy? What about cases where victims of the same offender disagree on sentencing or release issues? The principle that the prosecutor's duty is to do justice for all and not individual justice is fundamentally sound. The interests of "The People" and the interests of the victim are often identical, but when they diverge, it is appropriate for the public prosecutor to pursue what is in the broader public interest.

[43] See, e.g., Goldstein, supra, at 1287 ("[B]y the time of the American Revolution, each colony had established some form of public prosecution and had organized it on a local basis. In many instances, a dual pattern was established within the same geographical area, by county attorneys for violations of state law and by town prosecutors for ordinance violations. This pattern was carried over into the states as they became part of the new nation."); Juan Cardenas, The Crime Victim in the Prosecutorial Process, 9 Harv. J.L. & Pub. Pol'y 357, 371 (1986) ("[B]y the time of the American Revolution * * * local district attorneys were given a virtual monopoly over the power to prosecute. Crime victims were no longer allowed to manage and control the prosecution of their crimes."); Joan E. Jacoby, The American Prosecutor: A Search for Identity 19 (1980) ("By the advent of the American Revolution, private prosecution had been virtually eliminated in the American colonies and had been replaced by [a] series of public officers who were charged with handling criminal matters."); Randolph N. Jonakait, The Origins of the Confrontation Clause: An Alternative History, 27 Rutgers L.J. 77, 99 (1995) ("By the time of the Revolution, public prosecution in America was standard, and private prosecution, in effect, was gone."); Jack M. Kress, "Progress and Prosecution," in 423 The Annals of the American Academy of Political and Social Science 99, 103 (1976) ("[P]ublic prosecution was firmly established as the American system by the time the Judiciary Act of 1789 created United States district attorneys to prosecute federal crimes."); Robert L. Misner, "Recasting Prosecutorial Discretion," 86 J. Crim. L. & Criminology 717, 729 (1996) ("By the outbreak of the Revolution, private prosecution was replaced by public prosecution through county officials.* * *").

these developments, were clear at the time of the framing and would have been appreciated by the Framers of the Constitution and Bill of Rights. In Virginia—home of some of the foremost architects of these documents—a deputy attorney general was appointed to each county in the early 1700s and "had complete control over all prosecutions within his county" by 1789.[44] North Carolina established prosecuting attorneys for each county in 1738, "to carry on all Proceedings in the [County] Courts for the Punishing of crimes."[45] Connecticut adopted a system of county prosecutors in 1704—over 80 years before the Constitution was written.[46] In other colonies, particularly in areas settled by the Dutch in the 17th century, public prosecution emerged earlier and more directly.[47]

Indeed, so established were public prosecutors at the inception of the new Federal Republic that they were, without debate, granted exclusive control over prosecutions in federal courts. In the Judiciary Act of 1789—enacted the same year the Constitution was ratified—the First Congress created local U.S. district attorneys offices, appointed by the President, and granted them plenary power over all federal crimes occurring in their jurisdictions.[48] And when, also in 1789, the First Congress approved the Bill of Rights and transmitted it to the State legislatures for ratification, it did so without establishing special rights for victims of crimes prosecuted in the federal system—then the only criminal justice system to which the Bill of Rights was directed.[49]

In sum, the proposed constitutional amendment cannot be justified as "restoring" victims rights enjoyed in the late 18th century. Public prosecution was the rule, not the exception, by the time that Mr. Madison and Mr. Hamilton and all the other Framers of our Constitution got together in Philadelphia in 1787 to draft our nation's founding charter. If the Bill of Rights, which was written a few years later, provides no special rights for crime victims, it is not because the Framers thought they were protected by a system of private prosecutions. Rather, if we are to draw any lesson from history, it is that the Framers believed victims and defendants alike were best protected by the system of public prosecutions that was then, and remains, the American standard for achieving justice.

5. The Bill of Rights Does Not Need To Be "Rebalanced"

Proponents of a federal constitutional amendment for crime victims contend that it is necessary to correct an "imbalance" in our constitutional structure. According to this argument, the criminal justice system is improperly tilted in favor of criminal defendants and against victims' interests, as evidenced by the fact that the Constitution enumerates several rights for the accused and none,

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[44] Cardenas, supra, at 370.
[45] Paul M. McCain, The County Court in North Carolina before 1750, at 18–19, 33 (1954).
[46] Goldstein, supra, at 1287.
[47] Id.
[48] Jonakait, supra, at 99 & n.107; Goldstein, supra, at 1287.
[49] The Framers never intended the Bill of Rights to be concerned with the State criminal justice systems; rather, they conceived the Bill of Rights as a means of protecting Americans against the new federal government. The Bill of Rights did not apply as against State action until after ratification of the 14th amendment in 1868, and the subsequent incorporation of many of the protections afforded by the Bill of Rights into the 14th amendment's due process clause.

specifically, for the victim. The argument is wide of the mark, both in its conception of the criminal justice system, and in its notion of what warrants constitutional change.

First, the paramount purpose of a criminal trial is to determine the guilt or innocence of the accused, not to make victims whole. As discussed above (in section (B)(4)), we have historically and proudly eschewed private criminal prosecutions based on our common sense of democracy. The interests of the victim are directly served by the right to bring a civil suit against the accused, by court-ordered restitution if the accused is convicted, and by victim compensation programs.

Second, while rhetorically pleasing, the concept of "balance" often makes little sense in the context of a criminal proceeding. It assumes that we can identify the "victim" at the outset of every case, but this may not be possible. In some cases—as where the defendant claims that she acted in self-defense—identifying the "victim" is what the trial is all about.

Third, the "balance" argument mistakes the fundamental reason for elevating rights to the constitutional level. The rights enshrined in the United States Constitution are designed to protect politically weak and insular minorities against governmental overreaching or abuse, not to protect individuals from each other.[50] When the government unleashes its prosecutorial power against an accused, the accused faces the specter of losing his liberty, property, or even his life. The few and limited rights of the accused in the Constitution are there precisely because it will often be unpopular to enforce them—so that even when we are afraid of a rising tide of crime, we will be protected against our own impulse to take shortcuts that could sacrifice a fair trial of the accused and increase the risk of wrongful conviction. In contrast, there is no need to grant constitutional protections to a class of citizens that commands virtually universal sympathy and substantial political power.

In the words of Bruce Fein, Deputy Attorney General during the Reagan Administration:

> [C]rime victims have no difficulty in making their voices heard in the corridors of power; they do not need protection from the majoritarian political process, in contrast to criminal defendants whose popularity characteristically ranks with that of General William Tecumseh Sherman in Atlanta, Georgia.[51]

Similarly, Professor Lynne Henderson wrote the Committee in 1999, "Victims of crime are hardly an insular minority, nor are they the victims of prejudice and hostility. * * * Special treatment of victims under the constitution is not necessary to insure that their interests be preserved or recognized.[52] She recently updated her statement, adding, "No new reason exists to believe that vic-

[50] Cf. *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152 n.4 (1938).

[51] A Proposed Constitutional Amendment to Establish a Bill of Rights for Crime Victims, Hearing on S.J. Res. 52 before the Senate Comm. on the Judiciary, 104th Cong., 2d Sess. 100 (Apr. 23, 1996) [hereinafter "Hearing of Apr. 23, 1996"]. See also Bruce Fein, Deforming the Constitution, Wash. Times, July 6, 1998, at A14 (Crime victims "command virtual universal sympathy, a fail-safe formula for legislative success" and "need no constitutional protection from political overreaching").

[52] Hearing of Mar. 24, 1999, at 248.

tims of crime cannot adequately protect their interests through the democratic political process such that a constitutional amendment is necessary to protect them."[53]

The Bill of Rights is not askew. We do not need to create a panoply of special rights for victims in order to set it straight.

6. There Is No Need for a "One-Size-Fits-All" Set of Victims' Rights

Another common argument for the proposed constitutional amendment is that it offers the only way to fix the "patchwork" of State victims' rights laws. It is not enough that every State already protects the rights of crime victims, whether by statute or by constitutional amendment, or both—those protections should be made uniform nationwide.

As a preliminary matter, there is some question whether S.J. Res. 1 would have the desired effect of promoting uniformity in the protection of victims' rights, given the majority's insistence that States would retain substantial authority to implement the amendment and define its key terms. Rather, as we discuss in section (D), infra, if the rights established by the amendment carry a different meaning in every State, the amendment could simply replace one "patchwork" of victim's rights with another.

More fundamentally, the argument that we need to achieve uniformity in this area is unconvincing. It assumes that there is one and only one way to do this, and that only the federal government can discern the best approach, even though most of the experience has been in the States. We cannot accept this assumption; to the contrary, we believe that the States' continued experimentation in this area is constructive and valuable.[54]

We would agree that there are times when Congress must step in and ensure a uniform national floor with respect to a particular policy issue—the Civil War Amendments are good examples. If States in the 21st century were as unwilling to protect victims as some States were, in the 19th century, to end slavery and racial discrimination, we might agree on the need to set a national floor for victims' rights. But States are not unwilling to protect victims—far from it. To quote five Republican law professors who oppose S.J. Res. 1:

> In some rare cases, where the nation's stability demands it, or where fundamental human rights are in imminent jeopardy, the Constitution might need to be amended to provide a national standard. That's why the Civil War amendments, for instance, prohibit race discrimination, and protect the freedom of speech and other rights that we have found are vital for our survival as a strong and decent nation. But though there may be some faults in the

[53] Letter from Lynne Henderson, Professor, Boyd School of Law, to Sen. Hatch, Chairman, and Sen. Leahy, Ranking Member, Senate Comm. on the Judiciary, Apr. 7, 2003.

A recent story out of Lake County, Michigan, illustrates the political power of crime victims today. In September 2003, Lake County voters recalled a county prosecutor after a murder victim's family launched a campaign against him for orchestrating a plea bargain with the killer. The plea deal had resulted in a 23 to 50–year sentence for second-degree murder. The prosecutor, who had negotiated 105 guilty pleas from January 2001 through October 2002, said he was trying to avoid costly trials on a shoestring $200,000 annual budget. "Michigan county votes to recall prosecutor; was criticized by victim's family for plea deal," Associated Press, Sept. 18, 2003.

[54] See section (D)(1), infra.

> way some states protect certain victims' rights, there's nothing comparable to the disaster and oppression that prompted those Amendments. At most, there's honest and reasonable disagreement between states on difficult questions related to balancing the interests of victims, the interests of criminal defendants, and the limited resources of the state governments.[55]

Even assuming that a "one-size-fits-all" approach to victims' rights is desirable or even necessary, that does not mean that we need to amend the Constitution. There are other ways to achieve uniformity. For example, Congress could simply pass spending power-based legislation, which conditioned money to the States on the States' implementing a uniform national standard of victim rights.[56] As the Justice Department has acknowledged, "such legislation would do away with one of the main concerns with statutory remedies, the need for uniformity." [57]

7. A Constitutional Amendment Is Unnecessary To Provide Victims With Legal Standing

Just as a constitutional amendment is unnecessary to provide uniformity, it is also unnecessary to provide standing. Indeed, statutes have long been the principal way in which legislators establish a new cause of action.

As a preliminary matter, let us define our terms. What would it mean to provide victims with "standing"? This is not a question of whether victims should be entitled to attend the trial, provide victim impact testimony, or receive restitution—of course they should be. The "standing" question is a procedural one, about whether victims' rights and the interests of an efficient and effective criminal justice system are best protected by allowing prosecutors to run the prosecution, or by bringing in teams of victims' lawyers to argue over how the case should be conducted.

We are committed to giving victims real and enforceable rights. But we are not convinced that prosecutors are so incapable of protecting those rights, once we make them clear, that every victim needs to retain his or her own trial lawyer to raise claims and challenge rulings during the course of a criminal case. To the contrary, we believe that prosecutors have victims' interests at heart.[58]

Assuming that we want to provide standing for victims and their lawyers to make legal arguments as well as to testify in criminal cases, we do not need a constitutional amendment to achieve that. Indeed, the statutory alternative to S.J. Res. 1 that Senators Leahy and Kennedy offered at the Committee's September 4 markup—the

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[55] Letter from Republican Law Professors Regarding the Proposed Victim's Rights Constitutional Amendment, to Sen. Hatch, Chairman, and Sen. Leahy, Ranking Member, Senate Comm. on the Judiciary, July 11, 2003.

[56] See, *e.g., United States* v. *American Library Assn.,* 123 S. Ct. 2297, 2303 (2003) ("Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives."); *South Dakota* v. *Dole,* 483 U.S. 203, 206 (1987).

[57] Hearing of Apr. 8, 2003 (response of Viet Dinh, Assistant Attorney General, to follow-up question 2 by Sen. Leahy).

[58] The majority (in part IV(4)) provides one example. Patricia Pollard testified in 1996 that after her assailant was released from prison without any notice to her—in violation of her State's new constitutional amendment—the county attorney filed an action to stop the release. As a result, the parole board was ordered to hold a new hearing and, after hearing from Ms. Pollard, it reversed its prior decision. See Hearing of Apr. 23, 1996, at 31–32.

Crime Victims Assistance Act of 2003—offers one model for giving victims standing. Specifically, it would amend the Victim Rights Clarification Act of 1997 to authorize prosecutors and victims to assert the victim's right to attend and observe the trial.

Constitutional amendment proponents have cited a Tenth Circuit decision in the Oklahoma City bombing case for the proposition that "under Article III of the Constitution of the United States * * * victims have no standing to assert [their rights]. Only a constitutional amendment can give them that right."[59] In fact, the Tenth Circuit did not hold that no statute can confer standing on victims; rather, after noting that standing may derive from various sources, including statutes, the Court held that the only statute cited by the victims, which explicitly denies any private cause of action, did not confer standing on victims.[60] Nothing in the Tenth Circuit decision—and more importantly, nothing in the U.S. Constitution—prevents us from giving victims a statutory cause of action to assert all sort of rights. We could do it today.

C. THE PROPOSED AMENDMENT COULD HAVE DANGEROUS AND UNCERTAIN CONSEQUENCES FOR THE ADMINISTRATION OF JUSTICE

While the proposed amendment is at best unnecessary, at worst, it could help criminals more than it helps victims and result in the conviction of some who are innocent and wrongly accused. Patricia Perry, the mother of a police officer lost while rescuing victims of the World Trade Center attacks on September 11, 2001, testified:

> [Our family] believes that this constitutional amendment threatens the system of checks and balances in the current justice system and that it could actually compromise the ability of prosecutors to obtain the convictions of those responsible for the carnage on 9–11. We believe that to the extent that this amendment is effective, it is unworkable and even dangerous. And to the extent that it does nothing, it is an empty promise among many for victims that need real resources and real support.[61]

We share the Perry family's concerns. Passage of S.J. Res. 1 would enshrine new rights in the Constitution that would fundamentally realign this nation's criminal justice system, opening a Pandora's Box of dangerous unintended consequences. It could also have serious consequences beyond the criminal justice system, both in civil and military proceedings.

1. The Amendment Could Impair the Ability of Prosecutors To Convict Violent Criminals and Disrupt the War on Terror

Since we first began holding hearings on a victims' rights amendment, prosecutors and other law enforcement authorities all across the country have cautioned that creating special constitutional rights for crime victims would have the perverse effect of impeding the effective prosecution of crime.

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[59] Transcript of Markup, Senate Comm. on the Judiciary, July 24, 2003, at 44 (Sen. Feinstein).

[60] *United States* v. *McVeigh,* 106 F.3d 325, 334–335 (10th Cir. 1997) (discussing the Victims' Rights and Restitution Act of 1990). The Court also rejected the victims' argument that the first amendment right of public access to criminal proceedings provided a constitutional basis for standing. *Id.* at 335–336.

[61] Hearing of Apr. 8, 2003 (statement of Patricia Perry).

RESTRICTING PROSECUTORIAL DISCRETION

Most egregiously, the proposed amendment could compromise prosecutorial discretion and independence by allowing crime victims to second-guess and effectively dictate policy decisions made by prosecutors accountable to the public. As the National District Attorneys Association ("NDAA") cautioned in 1998, it could afford victims the ability to place unknowing, and unacceptable, restrictions on prosecutors while strategic and tactical decisions are being made about how to proceed with a case.[62] A constitutionally-empowered crime victim could override the professional judgment of the prosecutor concerning the investigation of the case, the timing of the proceedings, the disposition of the charges, and the recommendation as to sentence.

Prosecutorial discretion over plea bargaining is particularly at risk if S.J. Res. 1 passes, for it is here that the interests of the victim and the broader interests of the public most often diverge. Prosecutors enter into plea agreements for many reasons. A prosecutor may need to obtain the cooperation of a defendant who can bring down an entire organized crime ring; may need to protect the identity of an informant-witness; may think that the evidence against the defendant will not convince a jury beyond a reasonable doubt; may just want to speed the processes of adjudication. In each instance, the prosecutor may be acting contrary to the wishes of the victim, or causing resentment on the part of one set of victims in order to do basic justice or provide immediate security to another set of victims.

How will this play out in the courts? A Miami defense lawyer tells of representing a murder defendant who accepted a plea offer from the prosecution. The judge refused to accept the offer after the victim's mother spoke out against it. His client went to trial and was acquitted.[63] In California, relatives of a homicide victim complained to a judge that a plea bargain struck with the accused shooter was too lenient. They got what they wanted: withdrawal of the plea and prosecution of the man on murder charges. But at the close of the trial, the defendant was acquitted.[64]

Under the proposed amendment, well-meaning victims could obstruct plea proceedings, scuttling plea bargains, as in the Florida and California cases, or forcing prosecutors to disclose investigative strategies or weaknesses in their cases in order to persuade courts to accept victim-contested pleas. In this and other stages of the criminal process, prosecutors could be induced to make bad choices, or even to disregard their professional and ethical obligations, rath-

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[62] Letter from William L. Murphy, President, NDAA, to Sen. Leahy, Ranking Member, Senate Comm. on the Judiciary, May 27, 1998. In a more recent letter to the Committee, the former NDAA President asks, "Will the Amendment be used to call into question the judgment of prosecutors about how a case is to be handled—to the point of interference and impedance?" Letter from William L. Murphy, District Attorney, Richmond County, New York, to Sen. Hatch, Chairman, Senate Comm. on the Judiciary, Apr. 3, 2003.

[63] Robert Fichenberg, The Controversial Victims' Rights Amendment, 30-Oct Prosecutor 38 (1996).

[64] See Wayne Wilson, Man acquitted in killing after protest by victim's kin torpedoed plea deal, The Sacramento Bee (July 2, 1997). Defendant Loren Joost originally pleaded no contest to voluntary manslaughter, with the understanding that he would be sentenced to no more than six years in prison. The victim's family opposed the plea agreement by gathering more than 200 signatures denouncing the proposed settlement as too lenient.

er than risk violating the constitutional rights that this amendment would create for victims.

The Committee heard the thoughtful testimony of Beth Wilkinson, a lead prosecutor in the Oklahoma City bombing case. With insight and compassion, Ms. Wilkinson shared with us her experience in dealing with the victims and family members who suffered losses as a result of that tragedy. She came to understand firsthand their grief and frustration during the two and a half years she worked as part of the federal government team that successfully prosecuted Timothy McVeigh and Terry Nichols. She is a true victims' advocate. And she opposes a victims' rights amendment.

Ms. Wilkinson cautioned this Committee that a constitutional amendment has the dangerous potential to undermine prosecutorial strategy in criminal cases. She described how the prosecution of McVeigh and Nichols could have been substantially impaired if a constitutional amendment had been in place:

> [J]ust months after the bombing, the prosecution team, which was responsible for determining the most effective strategy for convicting those most culpable, McVeigh and Nichols, determined that it would be in the best interest of the case to accept a guilty plea from Michael Fortier. While not a participant in the conspiracy to bomb the building and the people inside of it, Fortier knew of McVeigh and Nichols' plans and he failed to prevent the bombing.
>
> If the victims had a constitutional right to address the Court at the time of the plea, I have no doubt that many would have vigorously and emotionally opposed any plea bargain between the Government and Fortier. From their perspective, their opposition would have been reasonable. Due to the secrecy rules of the grand jury, we could not explain to the victims why Fortier's plea and cooperation was important to the prosecution of Timothy McVeigh and Terry Nichols.
>
> What if the judge had rejected the plea based on the victims' opposition or at least forced the government to detail why Fortier's testimony was essential to the Government's case? Timothy McVeigh's trial could have turned out differently. Significant prosecutorial resources would have been diverted from the investigation and prosecution of McVeigh and Nichols to pursue the case against Fortier and we would have risked losing the evidence against McVeigh and Nichols that only Fortier could have provided. In the end, the victims would have been much more disappointed if Timothy McVeigh had been acquitted than they were when Michael Fortier was permitted to plead guilty.[65]

Ms. Wilkinson further described how another major terrorism case that she handled could have been put at risk if the proposed con-

[65] Hearing of Mar. 24, 1999, at 21. See also Beth A. Wilkinson, Victims' Rights: A Better Way: The proposed constitutional amendment could have let McVeigh go free, Washington Post (Aug. 6, 1999).

stitutional amendment were adopted. That case involved a Colombian narco-terrorist who sabotaged a civilian airliner which exploded over Bogota, Colombia, in 1989, killing more than 100 people.[66]

James Orenstein, a former federal prosecutor with extensive experience in organized crime cases, echoed Ms. Wilkinson's concerns. He gave the following illustration of how the amendment could make it more difficult for prosecutors to do their jobs when they need secrecy at some stage of a proceeding in order to ensure the safety of a witness and the integrity of an investigation:

> When a mob soldier decides to cooperate with the government, he typically pleads guilty as part of his agreement, and in some cases then goes back to his criminal colleagues to collect information for the government. If his [cooperation] is revealed, he is obviously placed in great personal danger, and the government's efforts to fight organized crime are compromised. Under this Amendment, such disclosures could easily come from crime victims who are more sympathetic to the criminals than the government.[67]

The rights of victims must be recognized and respected throughout the criminal process, but the victim's most important right—the right to the fair and just conviction of the guilty—must remain paramount. This right is far too important to jeopardize by adopting this unnecessary proposal to amend the Constitution. We must not create entitlements for victims that will tie prosecutors' hands and cripple law enforcement.

There is no doubt that prosecutors would feel personally constrained by the proposed amendment. The express prohibition on claims for damages proposed in section 3 of S.J. Res. 1 only increases the likelihood that courts would find other ways to vindicate its newly-minted rights. In 1997, the United States Supreme Court confirmed that the federal civil rights laws permit criminal prosecutions in federal court of any State official who willfully and under color of law deprived any person of any rights secured or protected under the federal Constitution.[68] At a minimum, prosecutors who made choices unpopular with victims would expose themselves to disciplinary action. Meanwhile, prosecutors who become adversaries to victims because of judicially-contested conflicts over a case could be required to recuse themselves from the case in order to defend themselves in the ancillary proceeding—another

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[66] Hearing of Mar. 24, 1999, at 97.

[67] Hearing of Apr. 8, 2003 (statement of James Orenstein). The majority assumes (in part V) that the need for secrecy in certain proceedings, as when a mob soldier pleads guilty pursuant to a cooperation agreement, is readily accommodated by closing the courtroom, thereby rendering such proceedings non-public and not subject to the proposed amendment. But, in fact, prosecutors rarely seek such closure due to the high barriers erected by the first and sixth amendments. Id. See also 28 C.F.R. §50.9 ("Because of the vital public interest in open judicial proceedings, the Government has a general overriding affirmative duty to oppose their closure. There is, moreover, a strong presumption against closing proceedings or portions thereof, and the Department of Justice foresees very few cases in which closure would be warranted."). The majority also suggests (in part V) that a State may decide that the victim's right to be heard at a public plea proceeding does not attach until sentencing, if the court can still reject the plea at that time. But even if the amendment could be read to allow such a practice—which we doubt—the problem would remain, given the victim's separate and independent right not to be excluded from the plea proceeding.

[68] *United States* v. *Lanier,* 520 U.S. 259 (1997).

unintended consequence that could have significant adverse effects on the nation's criminal justice system.

Other adverse consequences

Creating an absolute right for crime victims to attend criminal proceedings could raise other serious problems for law enforcement. Consider the problem of the victim-witness. In many cases, the victim is the government's key witness. If she insists on exercising her constitutional right to sit through the entire trial, there is a substantial danger that her testimony will be influenced by hearing and seeing other evidence concerning the same set of facts. Whether consciously or unconsciously, she could tailor her testimony to fit the other evidence.

During Committee consideration of S.J. Res. 1 on September 4, Senator Durbin proposed to limit the victim's right to attend proceedings when "the victim is to testify and the court determines that the victim's testimony would be materially affected if the victim hears other testimony at trial." A lead sponsor of S.J. Res. 1 assured the Committee that the right to attend proceedings "is not an absolute right,"[69] and the Committee rejected the proposal by a 7-to-10 vote. Thereafter, however, the majority report (in part IV(3)) confirmed that S.J. Res. 1 "unequivocally recognized" the victim's right to attend the trial. In so doing, the majority characterized the "materially affected" limitation as "inadequate," while dismissing as "implausible" the very idea that a victim would ever modify her testimony to comport with that of earlier witnesses.

If the tailoring of testimony is so "implausible," then we are at a loss to explain the sequestration rules that are in effect in every jurisdiction in the country. The commentary to the federal sequestration rule, Fed. R. Evid. 615, explains that "[t]he efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion." Indeed, witness sequestration has been described as "'one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice.'"[70] Just three years ago, the Supreme Court found it "natural and irresistible"—and permissible—for a jury to infer that a defendant tailored his testimony from the fact that he heard the testimony of all those who preceded him.[71]

Apart from the obvious fairness concerns implicated by a procedure that facilitates and even encourages collusive and inaccurate testimony, there is also the danger that the victim's presence in the courtroom during the presentation of other evidence will cast doubt on her credibility as a witness. Defense attorneys will cross-examine victims at length on this point and argue, credibly, that the vic-

[69] Transcript of Markup, Senate Comm. on the Judiciary, Sept. 4, 2003, at 56 (Sen. Kyl; "It is not an absolute right, and we have discussed before the ability of the judge to exclude witnesses or victims under certain circumstances").

[70] *Opus 3 Ltd.* v. *Heritage Park,* Inc., 91 F.3d 625, 628–29 (4th Cir.1996) (quoting 6 John H. Wigmore, Wigmore On Evidence § 1838, at 463 (James H. Chadbourn ed., 1976). The same court observed that the practice of sequestering witnesses has been recognized since at least biblical times. The Apocrypha relates how Daniel vindicated Susanna of adultery by sequestering the two elders who had accused her and asking each of them under which tree her alleged adulterous act took place. When they gave different answers, they were convicted of falsely testifying. Id. at 628.

[71] *Portuondo* v. *Agard,* 529 U.S. 61, 67 (2000).

tims' testimony was irretrievably tainted. Inevitably, in some cases, this tactic will succeed: the jury will discredit or discount the victim's testimony. Whole cases, or important counts, may be lost in this way.

As a practical matter, prosecutors may be able to shield victim testimony from the appearance of taint by putting the victim on the stand first. But what happens in the event that the victim is recalled for additional testimony? What happens in cases involving more than one victim-witness? A forced reshuffling of the witness list might not help, and could well compromise the coherence and effectiveness of the prosecution's presentation to the jury.

Constitutionalizing the right not to be excluded from public criminal proceedings could also give rise to actions by victims against decisions to close the courtroom for certain proceedings. This could compromise courtroom closure laws designed to protect child witnesses.[72] Similarly, it could cause disruption in the context of juvenile justice proceedings, which are often closed to the public.

Finally, S.J. Res. 1's creation (in section 2) of a victim's right to "adjudicative decisions that duly consider the victims' * * * interest in avoiding unreasonable delay" raises another set of concerns for prosecutors. The majority report ignores the fact that defendants are not the only parties who seek continuances in criminal cases. Prosecutors, too, often seek additional time to prepare for trial. The proposed constitutional amendment would appear to give victims standing to seek an "adjudicative decision" on the timing of trial, opening the door to victim demands for the immediate commencement of court proceedings. But forcing prosecutors to try cases before they are fully prepared plays into the hands of the defense and could result in cases being dropped or lost.

Military Commissions

We have discussed how the proposed amendment could impair law enforcement and make it more difficult for prosecutors to convict criminals. The damage would not stop there, however, since nothing in the amendment prevents its application beyond the criminal justice system, both to civil proceedings in federal and State court (discussed section (E)(3), infra) and to proceedings held by the U.S. military.

The legislative history of this proposal suggests that it is intended to apply to military proceedings. While previous versions specified that the new constitutional rights would apply in military proceedings "to the extent that Congress may provide by law,"[73] the current version contains no such jurisdictional language. Accordingly, the rights it establishes for "victims of violent crimes" would presumptively be held by all such victims throughout the United States, regardless of where the proceedings against those accused of victimizing them may be held. That would mean, at a minimum, military courts martial, and could also extend to the less traditional tribunal known as the military commission. If so, the amendment could impact substantially on any efforts by this or any

[72] See, e.g., 18 U.S.C. § 3509(e).
[73] S.J. Res. 3, 106th Cong., § 5 (1999); S.J. Res. 44, 105th Cong., § 5 (1998).

other Administration to use military commissions to try suspected terrorists.

Two months after the devastating attacks of September 11, 2001, President Bush signed a military order authorizing the use of military commissions to try suspected terrorists.[74] On March 21, 2002, the Department of Defense issued an order prescribing the procedures for such trials.[75] The order plainly states that, except in limited circumstances implicating national security, "Proceedings should be open to the maximum extent practicable," and "may include * * * attendance by the public and accredited press."[76]

Imagine a trial by military commission post-victims' rights amendment. With respect to any open proceedings, victims would presumably enjoy all the rights established in section 2, including the right to reasonable and timely notice, the right not to be excluded, and the right reasonably to be heard. With respect to any proceedings that may be closed for national security reasons, victims could still enjoy the right to "adjudicative decisions that duly consider the victim's safety, interest in avoiding unreasonable delay, and just and timely claims to restitution."[77] Either way, the amendment could undermine one of the most cited advantages of military commissions over civilian trials—the ability to dispense justice swiftly.

For example, suppose that the defendant being tried by military commission is charged in connection with the September 11 attacks. Must the military notify the thousands of victims and families of victims of every open proceeding, and provide them an opportunity to be heard? Could victims challenge a decision by the military to hold proceedings at a remote location outside the continental United States, such as the naval base at Guantanamo Bay, Cuba, on the ground that it effectively precludes their attendance and participation? Would there be a right of appeal, and if so, would it be to an Article III court (making military commissions subject to the kind of civilian court review that the President has obviously taken pains to avoid) or to whatever body may have been designated to hear appeals by the accused? Both the exercise of victims' rights and the inevitable litigation associated with their assertion would substantially increase case processing times in these highly sensitive cases.

2. The Amendment Could Impose Tremendous New Costs on the System

The proposed constitutional amendment could impose a tremendous new administrative burden on State and federal law enforcement agencies. These agencies would be constitutionally required to make reasonable efforts to identify, locate and notify crime vic-

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[74] Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (Nov. 16, 2001).

[75] U.S. Dep't of Defense, Military Commissions Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (Mar. 21, 2002).

[76] Id. § 6(B)(3). Even before these procedures issued, the President's counsel announced that "Trials before military commissions will be as open as possible, consistent with the urgent needs of national security." Gonzalez, "Martial Justice, Full and Fair," New York Times, Nov. 30, 2001.

[77] Because the "adjudicative decisions" clause lacks the "public proceeding" limitation that qualifies other parts of section 2, it arguably applies to decisions made at both public and non-public proceedings. See section (E)(4), infra.

tims in advance of "any public proceeding involving the crime." As the majority report confirms (in part V), the amendment's broadly-worded mandate covers court proceedings of all types, even the most insignificant scheduling conferences, of which there may be dozens in the course of a single case. It extends to parole hearings, appellate arguments, and habeas corpus proceedings held long after the trial is concluded, generating additional expenses in relocating all the victims. The Department of Justice once acknowledged that instituting a system that would integrate the necessary investigative information, prosecutive information, court information, and corrections information would be a complex undertaking, and costly.[78]

The Congressional Budget Office ("CBO") estimates that ratification of S.J. Res. 1 would not result in significant costs for the federal court system because "the amendment would apply to crimes of violence, which are rarely prosecuted at the federal level." In fact, thousands of violent offenses are prosecuted federally each year, and the number continues to rise with every indiscriminate passage of new federal crimes that duplicate existing State crimes. More importantly, the CBO's estimate did not include any of the costs that would be borne by State and local law enforcement and prosecutors, State and local court systems, and the providers of legal services to indigent defendants. Noting these costs, former Attorney General Janet Reno urged the Committee in 1997 to "reach out to all interested parties to explore the serious resource implications of a constitutional amendment."[79] Six years later, the Committee still has not done this.

The potential costs of S.J. Res. 1's constitutionally-mandated notice requirements alone are staggering, especially when—as the majority acknowledges (in part V)—"[i]n cases involving victims with special needs, such as those who are hearing impaired or illiterate, officials may have to make special efforts in order for notice to be reasonable." And that is without regard to the many hidden costs that may flow from the vague promises that this amendment proposes.

Consider as an example the right of crime victims "reasonably to be heard at public * * * plea * * * proceedings." The vast majority of all criminal cases are now resolved by plea bargaining. Although it is unclear how much weight judges would be required to give to a victim's objection to a plea bargain, even a small increase in the number of cases going to trial would seriously burden prosecutors' offices.

The proliferation of victim participatory rights at all accusatory and trial stages could give rise to even greater hidden costs. Most significantly, the right to be heard could be read to entitle indigent victims to court-appointed counsel (and, if necessary, a translator or interpreter) so that they can exercise the right fully and equally. Indeed, some States that have provided victims' rights in their constitutions have employed advocates to represent victims and also created special offices of oversight. If S.J. Res. 1 were interpreted

[78] A Proposed Constitutional Amendment to Protect Victims of Crime, Hearing on S.J. Res. 6 before the Senate Comm. on the Judiciary, 105th Cong., 1st Sess. 131–132 (Apr. 16, 1997) [hereinafter "Hearing of Apr. 16, 1997"].

[79] Id. at 132.

to provide this sort of protection to indigent victims—as the sixth amendment has been interpreted with respect to indigent defendants—then we would be confronted with a funding problem of enormous proportion.

Cognizant of this problem, the majority report (in part V) purports to find a solution in the amendment's prohibition on claims for damages. Section 3 of the amendment states in part,

> Nothing in this article shall be construed to provide grounds for a new trial or to authorize any claim for damages.

According to the majority report, this language "prevents the possibility" that courts might construe the amendment as requiring the appointment of counsel at State expense to assist victims. We fail to see how a limitation on the remedies available for government violations of victims' rights could even remotely affect a court's determination regarding the government's duty to assist indigent victims in exercising those rights. This is especially so in light of the majority's acknowledgment (in part III) that "every State is required under the sixth amendment * * * to provide legal counsel to indigent defendants" and that victims are entitled to equal treatment.

Incarcerated victims are another cause for concern. What happens when one inmate commits a crime of violence against another inmate? With a constitutional guarantee, as opposed to a more flexible statutory approach, prison authorities could be required to transport the victim inmate to all relevant proceedings. As James Orenstein, a former federal prosecutor, testified,

> [If] the current language of the Amendment creates a right to be present in court proceedings involving the crime, or at a minimum to be heard orally at some such proceedings, prison administrators will be faced with the Hobson's choice between cost- and labor-intensive measures to afford incarcerated victims their participatory rights and foregoing the prosecution of offenses within prison walls. Either choice could undermine orderly prison administration and the safety of corrections officers.[80]

The majority report contradicts itself on this point. It promises (in part V) that the proposed amendment "does not confer on prisoners any * * * rights to travel outside prison gates," yet asserts, in the very next paragraph: "[A] victim's right not to be excluded will parallel the right of a defendant to be present during criminal proceedings."

Regardless, courts will pay little attention to the majority's commentary when interpreting the comparatively clear language of S.J. Res. 1. Under established principles of constitutional law, a court could easily conclude that the costs involved in transporting prisoners to court to exercise their constitutional rights as victims are not sufficiently "compelling" to justify an exception under section 2 of the amendment.

The amendment would also impose a costly, time-consuming drain on the nation's courts. As we discuss in section (E), infra, the

[80] Hearing of Apr. 8, 2003 (statement of James Orenstein).

amendment is so vague and rife with ambiguity that it is certain to generate a host of knotty legal questions requiring decades of litigation to resolve. Moreover, these questions will be litigated at every stage of every proceeding, causing the time for processing what would otherwise be a simple case to skyrocket. The potential cost to taxpayers is beyond estimation.

How would all these new costs be funded? Unless funding adequate to implement the amendment on a nationwide basis accompanies its passage, resources would, of necessity, be diverted from other law enforcement and judicial efforts. There would be less money spent fighting crime and prosecuting criminals. And there would be less court time available for individual and business users of the courts, including crime victims.

3. The New Constitutional Rights for Victims Could Undermine Bedrock Constitutional Protections Afforded to the Accused by the Bill of Rights

The Bill of Rights has safeguarded the rights of all Americans for more than 200 years. It has served us well. We should be very careful about creating new constitutional rights that may distort or endanger any existing constitutional rights, of the accused or of anyone else.

During the markup of S.J. Res. 1, the Committee voted down an amendment proposed by Senator Durbin that stated: "Nothing in this article shall be construed to deny or diminish the rights of the accused as guaranteed under this Constitution." This straightforward language would not give criminal defendants any new rights; it would simply ensure the preservation of essential constitutional rights that have protected Americans, albeit imperfectly, from unjust prosecution and false imprisonment for over 200 years. There is similar language in the victims' rights provisions of several state Constitutions, including those of Alabama, Florida, Indiana, Kansas, Mississippi, Ohio, Oregon, Virginia, and Wisconsin.

Why the opposition to the Durbin amendment? Over the years, supporters of the proposed constitutional amendment have said that it would not affect the rights of criminal defendants.[81] But if that is true, why the reluctance to say so, clearly, in the text of the amendment? Why take a chance that courts will read the victims' rights amendment, as the later in time, to trump any conflicting rights of the accused under the fifth, sixth, and eighth amendments? Why run the risk of eroding the right to a fair trial, and making it more likely that innocent people will be convicted?

The answer appears to be that the proposed amendment will, in fact, affect existing constitutional rights, insofar as it invites courts

[81] Most recently, at this year's markups of S.J. Res. 1, Senator Kyl offered several assurances in response to Senator Durbin's amendment. See, e.g., Transcript of Markup, Subcomm. on the Constitution, Civil Rights, and Property Rights of the Senate Comm. on the Judiciary, June 12, 2003, at 44 ("I recognize the legitimate issue raised, but defendants' rights are fully backed by a couple of centuries, in some cases, of case law. They are clearly well established in our jurisprudence and it seems to me that we are not about to lose those defendants' rights simply by the adoption of these victims' rights."); Transcript of Markup, Senate Comm. on the Judiciary, July 31, 2003, at 43 ("So the language in [S.J. Res. 1] is simply a reaffirmation of those rights [of the defendant], and nobody can take those away from a defendant. The record should be absolutely clear * * * [T]here is "no later in time" kind of argument here."); Transcript of Markup, Senate Comm. on the Judiciary, July 31, 2003, at 46 (agreeing that "administration of criminal justice" language in section 2 would protect rights of the accused, even if those rights conflict with newly-created rights for victims).

to "balance" the rights of the accused with the new rights of crime victims. We find this notion troubling. If the point of the victims' rights amendment is to recalibrate the balance of liberty struck by the Framers in the Constitution, there is reason indeed to fear for the rights of criminal defendants.

Even more troubling, the proposed amendment could be read to do more than "balance" rights: it could be read to establish the preeminence of victims' rights in all cases. Section 1 states that victims' rights may never be denied and may be restricted only under the limited circumstances "as provided in this article." Section 2 provides the three exclusive grounds for restricting victims' rights: (1) "a substantial interest in public safety"; (2) "the administration of criminal justice"; and (3) "compelling necessity." The constitutional rights of the accused do not fit comfortably into any of these categories. It is therefore unclear how a court could "balance" those rights with the new rights that are being established.

The majority report (in part V) points to the precatory language in section 1 as calling for judicial balancing of rights. But section 1 does not, by its terms, say that victims' rights are to be balanced against the rights of the accused. Instead, it simply declares that those rights are compatible: "The rights of victims of violent crime, being capable of protection without denying the constitutional rights of those accused of victimizing them, are hereby established. * * *" Nothing in this language suggests how courts are to resolve a conflict should one arise.

Some proponents of S.J. Res. 1 have argued that nothing in the Constitution is an absolute and that, therefore, any conflicts between the constitutional rights of victims and defendants would inevitably be resolved through balancing. In fact, some constitutional rights are unquestionably absolute, including the rights of citizens not to be denied a vote on account of race (15th amendment) or gender (19th amendment). But more importantly, no existing constitutional provision identifies exclusive restrictions upon the rights being established. By using this novel formulation, S.J. Res. 1 would appear to establish a novel set of rights that are indeed absolute, except insofar as they are expressly limited.

Conflicts between the victims' rights established by S.J. Res. 1 and the protections accorded defendants by the Bill of Rights likely would be infrequent, but they could occur. Indeed, as currently drafted, S.J. Res. 1 practically invites conflict in several important areas.

Giving victims rights at the accusatory stage of criminal proceedings undercuts the presumption of innocence

Not all who claim to be victims are indeed victims and, more significantly, not all those charged are the actual perpetrators of the injuries that victims have suffered. By naming and protecting the victim as such before the accused's guilt or the facts have been determined, the proposed amendment would undercut one of the most basic components of a fair trial, the presumption of innocence.

Consider a simple assault case in which the accused claims that she was acting in self-defense. Absent some sort of corroborating evidence, the jury's verdict will likely turn on who it believes, the accused or her accuser. The amendment treats the accuser as a

"victim," granting him broad participatory and other rights, before a criminal or even a crime has been established. Once charges have been brought—and the charges may be based on little more than the accuser's allegations—the accuser is entitled to attend all public proceedings and to have a say as to whether the accused should be released on bond, making it more likely that the accused will be imprisoned until the conclusion of the trial. While society certainly has an interest in preserving the safety of the victim, this fact alone cannot be said to overcome a defendant's liberty interest as afforded to him under the due process and excessive bail clauses.

A victim's right not to be excluded could undermine the accused's right to a fair trial

The proposed amendment gives victims a constitutional right not to be excluded from public proceedings. Establishing such a preference for victims does not require a constitutional amendment, unless it is intended to create an absolute right that would be used to overcome a right currently afforded defendants. That is precisely what this provision would accomplish—the majority report (in part IV(3)) confirms the intention of giving victims an "unequivocal" right to attend proceedings. But while crime victims have a legitimate interest in attending public proceedings involving matters that impacted their lives, this is not a limitless interest. At the point where the victims' presence threatens or interferes with the accuracy and fairness of the trial, restrictions should be imposed.

Accuracy and fairness concerns may arise, as we have already discussed (in section (C)(1)), where the victim is a fact witness whose testimony may be influenced by the testimony of others. Another example is the case in which the victim or her family acts emotionally or disruptively in front of the jury. Indeed, by making the right of victims to be present very difficult, if not impossible, to forfeit, this amendment may unintentionally encourage disruptive displays by victims.[82] Whether done purposefully or, more likely, unintentionally, a victim exhibiting such behavior may unfairly prejudice the defendant.

Proponents of S.J. Res. 1 dismiss such concerns out-of-hand. The majority report declares (in part V) that crime victims would have "no right" to engage in either disruptive behavior or excessive displays of emotion. But it is not at all clear how courts could control such conduct if victims have an unequivocal constitutional right not to be excluded. In sum, either the amendment will amount to nothing in this context that could not be achieved by statute or rule, or it may provide too much, and undercut the courts' ability to protect the fairness of criminal trials.

A victim's right to be heard could undermine the accused's right to due process

The proposed amendment gives victims a constitutional right "reasonably to be heard" at many stages in the criminal proceeding, including guilty pleas and sentencing. While laws pro-

[82] See Robert P. Mosteller, Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation, 85 GEO. L.J. 1691, 1703–1704 (1997).

viding for reasonable victim input generally improve the criminal justice system, inserting this ill-defined right into the Constitution risks the denial of defendants' due process rights. That risk is heightened in capital cases where, unlike most other cases, jurors are asked to determine the sentence and emotions can easily overcome reason.

This point was poignantly made by Bud Welch, who lost his daughter in the Oklahoma City bombing. Mr. Welch wrote to the Committee that after the bombing, he was so angry that he "wanted McVeigh and Nichols killed without a trial":

> I consider that I was in a state of temporary insanity immediately after [my daughter's] death. It is because I was so crazy with grief that I oppose the Victims' Rights Amendment. It would give victims the right to give input in the criminal case even before a conviction. I do not think crime victims should have a constitutional right to give input into bail decisions and plea agreements. I think crime victims are too emotionally involved in the case and will not make the best decisions about how to handle the case.[83]

Another bereft parent, Patricia Perry, testified, "Victims and family members are not dispassionate. We are angry, depressed, and mourning. As families, we have a torrent of emotions that are not useful in preparing a legal case. We usually lack expertise and have a desire for vengeance that we claim is the need for justice."[84]

We share Mr. Welch's and Mrs. Perry's concern that injecting too much emotion into criminal proceedings will increase the chance of unfair and wrongful results, in violation of a defendant's right to due process. Such problems are especially troubling in capital cases, where the emotional impact of the crime is at its zenith and the consequences of injustice are intolerable. That is why it is particularly important to preserve the Constitution's careful balance in such cases between giving victims their voice and protecting the defendant's right to due process.

The Supreme Court recognized over a decade ago, in *Payne* v. *Tennessee*, that rules prohibiting victims from telling sentencing jurors about the impact a murder has had on their lives—and thereby skewing the information available to a sentencing jury about the defendant's blameworthiness—are "an affront to the civilized members of the human race."[85] But as the Court recognized, there is an important difference between allowing sentencing juries to learn about the full impact of a defendant's crime and allowing victims to make a plea for a certain sentencing result, which carries the very risks of injustice that Mr. Welch and Mrs. Perry so eloquently described. For that reason, the Supreme Court interpreted the Constitution to allow victim impact statements in capital sentencing

[83] Statement of Bud Welch, submitted to Senate Comm. on the Judiciary, Hearing of Apr. 8, 2003.

[84] Hearing of Apr. 8, 2003 (statement of Patricia Perry).

[85] 501 U.S. 808, 826 (1991).

hearings, but to prohibit victims—or any other witnesses—from recommending a sentence.[86]

The proposed amendment could undo this delicate balance and erode capital defendants' due process rights. The majority report (in part V) suggests in passing that S.J. Res. 1 would "enshrine and perhaps extend the Supreme Court's decision in *Payne* v. *Tennessee*." But there is no need to "enshrine" the decision—the Supreme Court has already done so. And "extending" it can only be a euphemism for undoing it—because the only kind of victim input that *Payne* forbade was the kind that would violate a defendant's due process rights. Thus, if the proposed amendment were read to give victims the right to recommend for or against imposition of a death sentence,[87] there would be a conflict between the rights of the victim and the accused, despite the assurance to the contrary in section 1.[88]

A victim's right to expedite trial proceedings could undermine the accused's sixth amendment rights

The proposed amendment gives victims of violent crimes a right to "adjudicative decisions that duly consider the victim's * * * interest in avoiding unreasonable delay." Just as this provision risks forcing prosecutors to trial before they are fully prepared, it risks forcing defendants to do the same. Defendants may also seek to postpone the trial to let prejudicial publicity about the case dissipate. Under the proposed amendment, the defendant's need for more time could be outweighed by the victim's assertion of his right to have the matter expedited, seriously compromising the defendant's ability to receive a fair trial.

The majority report (in part IV(6)) is characteristically muddled on this point. On the one hand, it asserts that "the interests of a crime victim in a trial free from unreasonable delay must be protected." On the other hand, it assures us that, "Of course, a victim's right to consideration of his or her interest to avoid unreasonable delay will not overcome a criminal defendant's due process right to a reasonable opportunity to prepare a defense." Is rights language proposed to be added to the Constitution only to be reduced to hortatory sentiment?

Constitutionalizing victims' rights raises equal protection concerns

We should consider the question of equal protection and equality of treatment of our defendants. During a hearing on the amend-

[86] Id. at 830, n.2 (preserving prior holding that admission of a murder victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the eighth amendment.)

[87] The majority provides no guidance as to how courts could implement a victim's right to recommend a sentence to a capital case jury. What would the judge tell the jurors about how to weigh such pleas? Normally, judges instruct jurors that they must make their decisions "without fear, favor, or sympathy" to any person—but the precise point of allowing victims to make such recommendations would be to permit them to try to persuade jurors to act on the basis of sympathy. Judges also tell capital jurors that their sentencing decisions should reflect the community's moral judgment. How could they reconcile that instruction with a rule allowing victims (but presumably not other witnesses) to recommend sentences, when, as Mr. Welsh and Mrs. Perry have shown, it is unreasonable to expect that victims will discard their personal interests and reflect the dispassionate will of the community in their recommendations?

[88] See generally Hearing of Apr. 8, 2003 (response of James Orenstein to follow-up question 5 by Sen. Leahy).

ment in the 105th Congress, Representative Robert C. ("Bobby") Scott of Virginia asked what happens when a prosecutor routinely recommends a one-year sentence for first-offense burglary, but the victim is unusually emotional or articulate: should that defendant get more time than a defendant whose victim is inarticulate or even absent?[89] By the same token, should the amount of time that a defendant spends in jail turn on the effectiveness of the victim's attorney?

The United States is world renowned and admired for its system of public prosecutions. It bespeaks our leadership in the precepts of democracy that justice is mandated for all citizens. No individual or group should be favored. Wealth should not determine whose case gets prosecuted, or how well. Crime victims themselves benefit from this system, as the majority report acknowledges (in part I). We should think long and hard before we accept the majority's invitation to create a system in which the dangers of private prosecutions might resurface.

Construed to avoid any conflicts with defendants rights, the proposed amendment becomes purely hortatory

Attempting to divert attention from the foreseeable consequences of this proposal, some supporters of S.J. Res. 1 maintain that it would not, and was never intended to, denigrate the rights of the accused in any way. The problem with this position, however, is that it proves too much. For if it were always possible to accommodate the victim's interests without diminishing the constitutional rights of the accused in the same proceeding—a prospect that we find unlikely—then the proposed amendment would become purely hortatory. Professor Philip Heymann, a former Associate Deputy Attorney General, stated the matter succinctly:

> If it is not intended to free the States and Federal Government from restrictions found in the Bill of Rights—which would be a reckless tampering with provisions that have served us very well for more than 200 years—it is unclear what purpose the amendment serves.[90]

The Constitution of the United States is no place for symbolic ornaments that fail to define real rights or to give real remedies.

4. Passage of the Proposed Amendment Could Actually Hurt Victims

For all the reasons discussed above, passage of this well-meaning amendment could well prove counter-productive, accomplishing little while making the lives of crime victims more difficult. Former Attorney General Janet Reno once stated, "the very best way that [we] * * * can serve victims of crime is to bring those responsible for crime to justice."[91] The National District Attorneys Association has also observed that a federal victims' rights amendment "cannot truly be of help to a victim if it, in any way, assists a criminal de-

[89] Hearing of Apr. 16, 1997, at 34, 35.
[90] Philip B. Heymann, A Proposed Victims' Rights Constitutional Amendment: Against an Amendment, State-Federal Judicial Observer, No. 14, at 1 (Apr. 1997).
[91] Hearing of Apr. 16, 1997, at 42.

fendant in escaping justice."[92] Crime victims would be the first to suffer—and criminals the first to benefit—from a constitutional amendment that hindered prosecutors, forced law enforcement agencies to divert scarce resources from actual crime-fighting efforts, and clogged the courts with time-consuming, justice-delaying litigation. Moreover, few benefit if, in the end, the proposed amendment undermines core constitutional guarantees designed to protect all of us from wrongful convictions.

D. THE PROPOSED AMENDMENT INFRINGES UNDULY ON STATES' RIGHTS

The proposed amendment constitutes a significant intrusion of federal authority into a province traditionally left to State and local authorities. Many of our colleagues, in making their arguments in support of the proposed constitutional amendment, point out that the overwhelming majority of crimes are prosecuted by the States. It is precisely that rationale that leads us to conclude that grants of rights to crime victims are—whenever possible—best left to the States to provide.

If the federal government had the general police power, then mandating a companion power to protect the rights of victims of crime would at least be consistent. The federal government does not have the general police power. As the Supreme Court reminded us in *United States* v. *Lopez*, "Under our federal system, *the States* possess primary authority for defining and enforcing the criminal law."[93] The proposed amendment would dramatically alter this framework by locking States into an absolutist national pattern regarding the participation of victims in the criminal justice system.

It has been suggested that this "States" rights" argument is meant to mask resistance to victims' rights, just as similar arguments were made earlier in the century to mask resistance to the 19th amendment, giving women the right to vote. In fact, those of us who oppose S.J. Res. 1—including many of the largest victims' organizations in the country—are strong supporters of victims' rights; we differ with the majority only in that we believe the preferred way to protect those rights is by statute and not by constitutional amendment.[94]

The majority report attempts to deflect the federalism concerns raised by S.J. Res. 1 by claiming (in part V) that "the States will retain their power to implement the amendment." The majority

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[92] Letter from William L. Murphy, President, NDAA., to Sen. Leahy, Ranking Member, Senate Comm. on the Judiciary, May 27, 1998.

[93] 514 U.S. 549, 561 n.3 (1995) (internal quotation marks omitted; emphasis added). See also *Screws* v. *United States*, 325 U.S. 91, 109 (1945) (plurality opinion) ("Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States.")

[94] Beyond that, the current debate over S.J. Res. 1 is simply not comparable to the last century's debate over women's suffrage. In 1918, just before the 19th amendment was ratified, only 15 States gave women full suffrage. See Congressional Research Service, Women's Electoral Participation and Representation in Elective OffIce, RS20014, Jan. 4, 1999, at 2, n. 4. This amounted to less than one-third of the 48 States that were members of the Union at that time. By contrast, as the majority acknowledges (in part II), every State in the Union has passed rights and protections for crime victims, and 33 have adopted victims' rights amendments to their State constitutions. The "States' rights" argument is therefore not, as it was in earlier times, a smokescreen masking the unwillingness of many legislators to protect a disfavored group—to the contrary, it is an affirmation that our colleagues in the States have already proved themselves willing and able to pass effective laws on behalf of the crime victims we all support.

also asserts (in part V) that "Nothing removes from the States their plenary authority to enact definitional laws for purposes of their own criminal justice systems," noting specifically that State legislatures will define key terms such as "victim" and determine when the right to be heard attaches.[95] If this interpretation were correct, it would undermine the majority's own rationale for the amendment, which is to repair the existing "patchwork" of victims" protections and establish a uniform national baseline. That is, it would simply replace one patchwork with another.[96]

More likely, however, is that the majority's interpretation, while politically expedient, is legally untenable. For one thing, as we discuss in section (E)(8), infra, even Congress may be without authority to define the substance of the rights established by S.J. Res. 1. In addition, the notion that S.J. Res. 1 empowers States to pass implementing legislation is flatly inconsistent with the plain language of section 4: "*The Congress* shall have power to enforce by appropriate legislation the provisions of this article." (emphasis added). Virtually identical language in earlier constitutional amendments has been read to vest enforcement authority exclusively in the Congress.

In the case of S.J. Res. 1, moreover, the text is illuminated by the legislative history. Earlier drafts of the amendment expressly extended enforcement authority to the States.[97] These drafts drew fire from constitutional scholars, who expressed doubt that constitutionally-authorized State laws could be supreme over State constitutions or even over Federal laws, and concern that, for the first time, rights secured by the Federal Constitution would mean different things in different parts of the country. The Committee then amended the text to its current formulation. Faced with this history and text, courts will surely conclude that S.J. Res. 1 deprives States of authority to legislate in the area of victims' rights. Indeed, both Chairman Hatch and the States' Chief Justices have read the proposed amendment in precisely this way.[98]

This is troubling in three regards. First, S.J. Res. 1 would have an adverse effect on the many State and local governments that already are experimenting with a variety of innovative victims' rights initiatives. Second, it would create an enormous unfunded burden for State courts, prosecutors, law enforcement personnel and corrections officials. Third, it would lead inevitably to Federal court supervision and micro-management of noncomplying State and

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[95] Similarly, a leading advocate of S.J. Res. 1 has explained, "It is intended that both the word 'victim' and the phrase 'victim's lawful representative' will be the subject of statutory definition, by the State Legislatures and the Congress, within their respective jurisdictions. *No single rule will govern these definition.*" Hearing of Apr. 8, 2003 (statement of Steve Twist; emphasis added).

[96] Robert P. Mosteller & H. Jefferson Powell, With Disdain for the Constitutional Craft: The Proposed Victims' Rights Amendment, 78 N.C.L. Rev. 371, 378 (Jan. 2000).

[97] For example, S.J. Res. 52, introduced in the second session of the 104th Congress, provided: "The several States, with respect to a proceeding in a State forum, and the Congress, with respect to a proceeding in a United States forum, shall have the power to implement further this article by appropriate legislation." Similarly, S.J. Res. 6, introduced in the first session of the 105th Congress, provided: "The Congress and the States shall have the power to enforce this article within their respective jurisdictions by appropriate legislation, including the power to enact exceptions."

[98] See S.J. Res. 44—Proposing An Amendment to the Constitution of the United States to Protect the Rights of Crime Victims, S. Rep. No. 105–409, 105th Cong., 2d Sess. 44 (1998) (additional views of Sen. Hatch); Hearing of Mar. 24, 1999, at 252 (Letter from Conference of State Justices to Sen. Ashcroft, urging modification of proposed constitutional amendment that would allow State legislatures to implement it with respect to State proceedings).

local authorities. Beyond this, S.J. Res. 1 threatens to cut back on the historic power of our State Governors to grant executive clemency.

1. The Amendment Would End Constructive Experimentation by the States

In the words of Supreme Court Justice Louis D. Brandeis, writing in *New State Ice Co.* v. *Liebmann:* "It is one of the happy incidents of the Federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[99] The victims' movement has induced all 50 States to serve as laboratories. Through statutes and State constitutional amendments, the States are experimenting with varied approaches to blending the competing interests of victims, prosecutors, and defendants.

State experimentation with victims' rights initiatives is relatively new and untested; the laboratory evidence is as yet inconclusive. Indeed, in the few years since the Committee first reported out a victims' rights amendment, three more States have amended their Constitutions to protect victims. The proposed amendment creates a national standard for victims' rights and gives Congress exclusive power to enforce that standard by appropriate legislation. It thus forecloses the States from experimenting and exercising their judgment in an area to which the States lay claim by right of history and expertise.

That is why the States' top jurists oppose it. The Conference of Chief Justices has expressed serious concerns with the federalism issues presented by the amendment:

> Preempting each State's existing laws in favor of a broad Federal law will create additional complexities and unpredictability for litigation in both State and Federal courts for years to come. We believe that the existing extensive State efforts provide a significantly more prudent and flexible approach for testing and refining the evolving legal concepts concerning victims' rights.[100]

Five Republican law professors wrote the Committee to emphasize the benefits of our current State-based approach to protecting crime victims:

> [S]tate legislators can take advantage of the experience of the other States: Laws that prove too costly, too vague, or counterproductive can get replaced. Laws that prove effective can be adopted in other States. And as time goes on and new needs arise, State legislatures can adapt to these needs. This experimentation would be much harder if the matter were given to the Federal courts.[101]

Former Senator Fred Thompson echoed these same concerns in 1998, when he served on this Committee:

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[99] 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[100] Letter from Joseph Weisberger, Chief Justice, Supreme Court of Rhode Island, to Congressmen Charles Canady and Melvin Watt, Feb. 2, 2000. The Conference recently reaffirmed this position in a letter dated June 26, 2003, from Chief Justice E. Norman Veasey to Sen. Biden.

[101] Letter from Republican Law Professors Regarding the Proposed Victims' Rights Constitutional Amendment, supra.

> Our federalist system is not only faster and more effective than amending the Constitution, but it also offers the great benefit of flexibility. The victims' rights movement is challenging us to fundamentally rethink our approach to criminal justice. Traditionally, our criminal justice system has focused on the State's interest in punishment versus the rights of the accused. Now we are being asked to graft into this adversarial system constitutional rights of crime victims. It may well be time to rethink our criminal justice system. But, if so, the experimentation and flexibility that the States offer are all the more important. If the current balance between the interests of the State and the accused is complex—and it surely is—then our adversarial system will be vastly complicated by a three-way relationship among the State, the accused, and victims. Each crime is different, and balancing these three interests on a case-by-case basis would be no small task. *It is critical we learn from the experience of the States before deciding to add new victims' rights to the Constitution.*[102]

The Pennsylvania Coalition Against Domestic Violence wrote in its letter opposing S.J. Res 1:

> Most [State constitutional amendment protecting victims' rights] have passed only within the last decade, yielding little opportunity to learn from the implementation process. It is premature to move forward on something as sweeping and long-lasting as a Federal Constitutional amendment without taking the time to learn from the remedies provided by State constitutional victims' rights amendments.[103]

Similarly, the National Network to End Domestic Violence cautioned the Committee in 1999, "Without benefiting from the State experience, we run the risk of harming victims."[104]

The majority report urges us (in part III) to dispense with further experimentation on the ground that "Each year of delay is a year in which countless victims are denied their rights." Of course, the swifter process to providing victims' rights is by statute, not by constitutional amendment. Years, even decades, could ensue before real change is seen by means of such a top-down path.

Moreover, the process of amending the United States Constitution is not a sprint to a popular goal. It should be reserved for fundamental changes in that charter that are necessary to achieve goals unachievable by other means. The proponents of constitutional change must first establish that there is no alternative path to that goal by less drastic means. With the experimentation that is ongoing in the States, they have not come close.

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[102] S. Rep. No. 105–409, supra, at 48 (minority views of Sen. Thompson; emphasis added).

[103] Letter from Susan Kelly-Dreiss, Executive Director, Pennsylvania Coalition Against Domestic Violence, to Sen. Specter, Apr. 7, 2003.

[104] Hearing of Mar. 24, 1999, at 233 (emphasis added). More recently, the National Network advised, "we have learned the hard way in domestic violence cases that remedies need to be flexible and allow for innovative solutions. Every policy and practice that we have seen implemented at the State and local level has resulted in unintended consequences." Statement of Lynn Rosenthal, Executive Director, National Network to End Domestic Violence, submitted to the Senate Comm. on the Judiciary, Hearing of Apr. 8, 2003.

At a minimum, we should explore the effectiveness of the State efforts and the nuances of their various approaches before grafting a rigid, untested standard onto the Constitution. We should have more information about what the States are failing to do before the Federal Government shuts down their research.

Example: The States' experimentation has not yet led to a consensus on the appropriate scope of the victim's right to attend trial proceedings at which they are going to be called as witnesses. A few States, including Alabama, Arkansas, and Louisiana, have specifically provided that the rule regarding exclusion of witnesses does not apply to victims.[105] Other States have taken a hybrid approach, whereby the victim has the right to attend only after the victim has testified, as in Michigan, New Jersey, and Washington.[106] Washington's law also specifies that while a victim may be excluded until after testifying, the victim has the right to be scheduled as early in the proceedings as possible. Overall, a majority of States give the trial judge discretion to exclude a victim in order to preserve the defendant's right to a fair trial. A categorical Federal constitutional rule that victims must never be excluded would nullify these State judgments about the appropriate way to balance the competing interests involved.

2. The Amendment Would Impose an Unfunded Mandate on the States

We have already discussed (in section (C)(2)) the potentially staggering costs that S.J. Res. 1 could impose on the 50 States. Congress has a responsibility to investigate these costs thoroughly and to explore the shift in resources that could result if the amendment were ratified. Congress has not yet undertaken this important task. We need more information from the States about how much it costs to implement these programs, and what sort of resources are needed to be successful before we rush to validate a series of rights that could overwhelm the Nation's criminal justice system.

Largely for this reason there is opposition to the proposed amendment among some of the very people who most strongly support victims' rights—prosecutors and law enforcement officers. They are sympathetic to victims, and would welcome the resources to enable them to provide victims with notice and other assistance. They do not, however, want another unfunded mandate that will have the Federal courts and special masters directing the activities of their under-funded offices. Instead of unfunded mandates, we need to encourage States to provide the support and services that many victims of crimes need and deserve.

3. The Amendment Would Lead to Extensive Federal Court Supervision of State Law Enforcement Operations

Under S.J. Res. 1, a victim does not have the ability to sue for damages. A victim may, however, ask a Federal court for injunctive relief against State officials, and possibly a writ of mandamus. The

[105] Ala. Stat. § 15–14–55; Ark. R. Evid. 616; La. Code Evid. Art. 615(B)(4).

[106] Mich. Comp. Laws Ann. § 780.761(11); N.J. Const. Art. 1, ¶ 22; Wash. Rev. Code Ann. § 7.69.030(11). Louisiana took this approach until 1999, when it amended its sequestration rule to follow the Alabama/Arkansas model.

resulting interference with State criminal proceedings would be unprecedented and ill-advised.

Even more alarming is the specter of Federal class actions against noncomplying State authorities. When local prosecutors' offices fail, as some now are failing, to provide full notice for victims, the only effective relief would be court orders like those in prison reform litigation. There is the potential for big costs to States, enormous expenditure of judicial resources, and undignified hauling into court of local prosecutors, judges, and corrections officers.

The States' Chief Justices have expressed grave concern that the proposed amendment would lead to "extensive Federal court surveillance of the day to day operations of State law enforcement operations," and could also result in victims seeking injunctive relief against State officials in Federal court.[107]

Former Senator Fred Thompson characterized the proposal as "a dramatic arrogation of Federal power" that would "effectively * * * amend the 10th amendment and carve away State sovereignty."[108] We share these concerns. The laudable goal of making State and local law enforcement personnel more responsive to victims should not be achieved by establishing Federal court oversight of the criminal justice and correctional systems of the 50 States.

"[F]ederalism was the unique contribution of the Framers to political science and political theory,"[109] and it has served this country well. We do not need a constitutional amendment to turn this system on its head. We have no pressing reason to thwart the States' experimentation with innovative victims' rights initiatives and to displace State laws in an area of traditional State concern. We have no compelling evidence pointing to the need for another unfunded mandate. And we certainly do not need more Federal court supervision and micro-management of State and local affairs, when every State is working hard to address the issue in ways that are best suited to its own citizens and its own criminal justice system.

4. The Amendment Would Adversely Affect the Authority of Governors to Grant Clemency

At the request of the Administration, this year's version of the proposed constitutional amendment contains savings language, in section 4, that expressly reserves the President's power to grant reprieves or pardons to those convicted in the Federal system. Although the vast majority of defendants are convicted in the State systems, section 4 contains no similar language regarding the clemency power of State governors. Indeed, during the markup of S.J. Res. 1, the Committee expressly rejected a proposal by Senator Leahy to modify this section to read, "Nothing in this article shall affect the authority of the President or a Governor to grant reprieves or pardons."

The majority argues (in part IV(4)) that Congress already has the power to ensure that victims are notified and given an opportunity to be heard before the President exercises his pardon power.

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[107] Letter from Joseph Weisberger, Chief Justice, Supreme Court of Rhode Island, to Congressmen Charles Canady and Melvin Watt, Feb. 2, 2000.

[108] S. Rep. No. 105–409, supra, at 49 (minority views of Sen. Thompson).

[109] Lopez, 514 U.S. at 575 (Kennedy, J., concurring).

If so, it is further evidence that the proposed constitutional amendment is unnecessary.

However, because every word in a constitutional amendment is meaningful, we must assume that without the savings language in section 4 regarding the President's authority to grant pardons, S.J. Res. 1 would affect that power in some way. It follows that, without similar language, S.J. Res. 1 will affect the clemency authority of State Governors. In fact, by expressly preserving the President's authority and not the Governors', S.J. Res. 1 implicitly affirms that it is intended to affect the Governors' authority.

Executive clemency is the historic remedy for preventing miscarriages of justice where the judicial process has failed. Chief Justice Rehnquist wrote in 1993:

> Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice when the criminal justice system has been exhausted. * * * It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible. But history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence. * * * Recent authority confirms that over the past century clemency has been exercised frequently in capital cases in which demonstrations of "actual innocence" have been made.[110]

Restricting the governors' clemency power risks increasing the chance that a wrongfully convicted person will remain incarcerated or, much worse, be put to death. We should not take that risk unnecessarily. Moreover, basic principles of federalism dictate that we should not do so at all unless it is clear on the face of the amendment that this is our purpose, such that the States, when asked to ratify, understand the consequences with respect to their governors' historic power to grant clemency.

E. THE WORDING OF THE PROPOSED AMENDMENT IS PROBLEMATIC

As the preceding analysis has shown, any amendment to the Constitution to provide for victims' rights would be fraught with problems, ranging from resource and training issues to a plethora of unintended consequences. But in addition to the general problems associated with a constitutional amendment, the specific language of S.J. Res. 1 is problematic.

This is not for lack of trying. There have been some 64 drafts of this proposed constitutional amendment, and they have differed substantially. Indeed, this year's version is radically different—and about 140 words shorter—than the last version that the Committee reported, in September 1999. The fact that this proposal changes in form and substance from year to year does not inspire confidence that we have discerned the correct formulation. We continue to believe that the kind of legislative fine-tuning that this important subject requires simply cannot be done in the context of a constitu-

[110] Herrera v. Collins, 506 U.S. 390, 411–415 (1993).

tional amendment that can only be modified, once it is ratified, through another constitutional amendment.

Nevertheless, leaving that more general objection aside for the moment and taking the amendment on its own terms, we have grave concern about the lack of specificity in some key areas. In particular, many of the amendment's key words remain undefined. We do not even know whether these words would have one meaning (if Congress alone could define them) or more than 50 (if, as the majority claims in part V, the States would also enjoy "plenary authority to enact definitional laws for purposes of their own criminal system."). Years of litigation would be necessary to flesh out the amendment's actual scope, enforcement mechanisms, and remedial nature.

1. The Term "Victim" Is Undefined

The most basic point about any constitutional right is, whose right is it? In August 1997, the ABA House of Delegates resolved that any measure to recognize victims' rights in the criminal justice system should, among other things, define the class of protected "victims." More than six years later, the proposed constitutional amendment still fails to adhere to this basic principle.

By contrast, other constitutional provisions are relatively clear. The 6th amendment, to which the proposed victims' rights amendment is often compared, guarantees rights to those who have been formally accused of a crime and (after some clarification by the Supreme Court) we know who they are. The 5th amendment is equally clear, although written in terms of a restriction on government power ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * * nor shall any person be subject for the same offence to be twice put in jeopardy. * * *"). The other amendments to our present Constitution are even more straightforward, since they apply without exception to "the people," or to "citizens of the United States," or, in the case of the fourteenth amendment, to "all persons born or naturalized in the United States and subject to the jurisdiction thereof."

Who would have rights under the proposed victims' rights amendment? The answer in the text of the amendment is "victims of violent crime," but what does that mean? Consider the most obvious violent crime—murder. Ordinarily, we would think of the victim of this crime as the dead person, but that answer—what Justice Scalia might call the plain language approach to interpretation—will not do here. Maybe no one gets the benefit of the proposed constitutional rights in a murder case. Maybe the reference in section 3 to "the victim's lawful representative" refers, in a murder case, to the executor or co-executors of the victim's estate (assuming the victim left a will), although people selected for their financial management abilities may not be the people most interested in the criminal prosecution. Or maybe the amendment's supporters are banking on so-called "activist judges" to add words to

the amendment that are not there and extend the new rights to members of the murder victim's family.[111]

This would raise other questions, like which family members would be covered. Would the eight-year-old son of a murder victim be entitled to make arguments in connection with a negotiated guilty plea? Would unmarried couples, be they heterosexual or homosexual, count as families? What about members of the extended family—aunts and uncles, cousins, grandparents, or in-laws? And what happens when members of the victim's family hold different views about the death penalty, or each wants a share of the mandatory restitution order?

Let us consider another sort of violent crime—armed robbery of a convenience store. Who must be notified of public proceedings involving this crime: The security guard who was shot and physically injured? The 10 customers who were psychologically traumatized but not physically injured? The store owners (or their insurance company), who were not present during the robbery but suffered financial loss? Is the answer the same when it comes time to award restitution, or are the "victims" for that purpose limited to those who actually lost money?

We have discussed two relatively straightforward crimes, murder and robbery. Other crimes, such as crimes involving terrorism and mass violence, or compound crimes under the federal RICO statute that can include lots of different criminal acts, some violent and some non-violent, over an extended period of years, will involve even harder problems when courts try to identify who is, and who is not, a "victim." The list of potential victims is lengthy. In cases like the Oklahoma City bombing, where 168 people were killed and hundreds more were injured, would the State and federal courts be required to hear statements from possibly thousands of people claiming victim status? Would all the relatives of the thousands killed in the terrorist attacks of September 11, 2001, be entitled to weigh in on any plea bargains offered to defendants implicated in that catastrophe?

The failure to define "victim" raises another set of problems with respect to crimes committed, or allegedly committed, in self defense. In a typical case, the police get a call from neighbors who hear shouting and screaming and pots and pans being thrown. They reach the house and find the husband and wife hysterically angry at one another and a young child cowering in the corner. It is not entirely clear who attacked whom, but the husband is injured and the police arrest the wife and charge her with assault. The wife claims it was self-defense; the husband claims she attacked him without provocation.

Under current law, it is up to the jury to determine who is the victim and who is the criminal in this sad domestic scenario, and the jury makes that determination after hearing all the evidence from both sides at trial. Under the proposed amendment, however, that determination must be made at the outset, before the wife's bail hearing and, in many cases, before there has been a full investigation of the facts. Once the wife is charged, the husband gets the

[111] This appears to be the majority's strategy. The majority report states (in part V): "In homicide cases, victim's rights can be asserted by surviving family members or other persons found to be appropriate by the court."

special new constitutional rights of a crime victim. Maybe he will push for bail or for a plea with a minimum sentence conditioned on his getting custody of the child, perhaps accompanied by a new kind of child support called "restitution." Or maybe the husband will be satisfied with his new constitutional right to notice of his wife's release from custody, which will help him track her down and exact revenge. The National Clearinghouse for the Defense of Battered Women, the National Network to End Domestic Violence, and several State and local domestic violence support organizations—including organizations from Louisiana, Iowa, Wisconsin, Pennsylvania, and Wyoming—all oppose a victims' rights constitutional amendment for these reasons.

Illustrative of the peculiar problems raised by domestic violence cases is *State ex rel. Romley* v. *Superior Court*.[112] Defendant Ann Roper was charged with stabbing her husband. She claimed that she had been the victim of horrendous emotional and physical abuse by her husband during their marriage; that the husband was a violent and psychotic individual who had been treated for multiple personality disorder for over a decade; that he was manifesting one of his violent personalities at the time of the assault; and that she had acted in self-defense. It was undisputed that the husband was mentally ill; that he had three prior arrests and one conviction for domestic violence toward his partner, now the defendant. Moreover, the defendant, not the husband "victim," made the 911 call to the police, asking for help because her husband was beating her and threatening her with a knife. Under these circumstances, the Arizona Court of Appeals came to the sensible conclusion that the defendant's due process rights superseded the State law right of the husband/"victim" to refuse to disclose his medical records.

While nothing in S.J. Res. 1 would directly compromise the holding in *Romley,* the case does expose the risk in creating blanket constitutional protections for "victims" without first considering and resolving who these "victims" may be. In a world where the rights of the accused must yield to the rights of the accuser, we must define our terms carefully. The sponsors of S.J. Res. 1 want to shelve the difficult definitional debate until such time as Congress is called upon to implement the amendment. But it is premature to pass this proposal on to the States for ratification without providing clear guidance on this basic issue.

2. The Term "Violent Crime" Is Undefined and Arbitrary

The scope of the proposed amendment also turns on a second undefined term, "violent crime." Ordinarily, violent crimes are those involving some use of physical force against a person. Thus, the term may be limited to crimes that produce physical injury (e.g., murder, assault, and rape). In some contexts, however, the term "violent crime" (or the comparable term "crime of violence") has been defined or interpreted to include crimes involving some use of force against another's property (e.g., arson) and crimes that merely threaten physical injury or property damage (e.g., extortion, robbery, and burglary). Existing federal law already provides several

[112] 836 P.2d 445 (Ariz. Ct. App. 1992).

different definitions of "crime of violence," including one that covers statutory rape, abusive sexual contact, and sexual exploitation of minors.[113]

Other crimes present hard cases, too. Is drunk driving a crime of violence if the driver physically injures a pedestrian? What if the driver runs over the pedestrian's dog, or crashes into a parked car? Can the same offense be a crime of violence if someone is physically injured, but not otherwise?

What about elder abuse or child abuse that takes the form of extreme neglect? Neglect of the weak and vulnerable in our society by those who have taken the responsibility of being their caregivers can cause as much harm as almost any violence, without a hand ever being lifted against them. But are neglect and psychological abuse "violence"?

The crime of parental kidnapping raises similar questions. If a parent who has been denied legal custody of a child kidnaps the child, is that a crime of violence, and if so, who is the victim—the child, the custodial parent or both?

The text of the proposed amendment does not answer these questions. The majority report (in part V) suggests answers, some of which seem to stretch the concept of a "violent crime" to the breaking point. It suggests, for example, as possible crimes of violence, burglary, driving while intoxicated, espionage, stalking, and the unlawful displaying of a firearm—very serious crimes, but crimes that usually do not involve "violence" in the normal sense of the word.

Again, the sponsors of the proposed amendment leave it to future legislation and the courts to sort out the meaning of "violent crime." Again, we believe it is imprudent to ask States to ratify a constitutional amendment before they know the full scope and scale of its effects.

Beyond the problem of defining "violent crime," limiting the scope of the amendment to such a concept is unconscionably arbitrary. Chairman Hatch discussed this problem with respect to an earlier version of the proposed amendment. He wrote:

> I believe we must tread carefully when assigning constitutional rights on the arbitrary basis of whether the legislature has classified a particular crime as "violent" or "non-violent." Consider, for example, the relative losses of two victims. First, consider the plight of an elderly woman who is victimized by a fraudulent investment scheme and loses her life's savings. Second, think of a college student who happens to take a punch during a bar fight which leaves him with a black eye for a couple of days. I do not believe it to be clear that one of these victims is more deserving of constitutional protection than the other. While such distinctions are commonly made in criminal statutes, the implications for placing such a disparity into the text of the Constitution are far greater.[114]

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[113] *See,* e.g., 18 U.S.C. §§ 16,924(c)(3), 3156(a)(4); 28 U.S.C. § 2901. Section 3156(a)(4) incorporates felonies under chapter 109A and chapter 110, relating to sexual abuse and sexual exploitation of children.

[114] S. Rep. No. 105–409, supra, at 42 (additional views of Sen. Hatch).

The sponsors of S.J. Res. 1 do not in any way disagree that the scope of their proposed amendment is arbitrary. Instead, they explain it as a political compromise.[115] But surely we owe the American people something more than arbitrary political compromises when we amend their Constitution.

3. The Right to "Reasonable and Timely Notice of Any Public Proceeding Involving the Crime" Is Undefined and May Have Unintended Consequences in Civil and Military Proceedings

The proposed amendment requires that victims be given "reasonable and timely notice of any public proceeding involving the crime and of any release or escape of the accused." But, again, key terms are left undefined. Most importantly, what constitutes "reasonable and timely notice"? For example, in cases where an inmate is released from custody, what is a reasonable amount of time to wait before notifying the crime victim? Is it thirty minutes? Two hours? Twenty-four hours? Does it depend on where the inmate was imprisoned, or the distance of the inmate from the victim at the time of release?

Besides the ambiguity of the timing requirement, the term "reasonable and timely notice" gives no indication as to what manner of notice a victim must receive. Must the government invariably provide direct written notice to victims? May the government simply publish notice in a local newspaper, as it may sometimes do to perfect the forfeiture of a person's property? Is it enough that the court publishes its calendar? Until we have some idea what notice is reasonable, we cannot begin to assess what the proposed amendment will actually mean in terms of administrative time and cost.

The term "public proceeding," while seemingly straightforward, may also be less clear than it seems. For example, the majority report (in part V), reads section 2's right to be heard at public release proceedings to apply even in jurisdictions where parole decisions are not made in public proceedings. "For such jurisdiction," the majority writes, "the amendment places victims on equal footing with defendants. If defendants have the right to provide communications with the paroling or releasing authority, then victims do as well." That reading may have been correct under the provisions of a previous version of the proposed amendment, which explicitly extended the right to be heard to the context of "a parole proceeding that is not public, to the extent those rights are afforded to the convicted offender,"[116] but it is plainly incorrect now that such language has been excised from the bill. That the majority blithely assumes the amendment will mean what they want it to mean, regardless of its actual text, betrays a cavalier attitude unworthy of either our Constitution or of the victims to whom they are making promises they cannot possibly keep.

To what extent would the notification right established by S.J. Res. 1 apply to civil proceedings? The Justice Department has said

[115] See, e.g., Crime Victims' Rights Constitutional Amendment, S. Rep. No. 106–254, 106th Cong., 2d Sess., part IX (additional views of Sens. Kyl and Feinstein).

[116] S.J. Res. 3, 106th Cong., § 1 (1999).

"not at all,"[117] but we are not so sure. Section 2 states that a victim shall have the right to reasonable and timely notice "of any public proceeding involving the crime." While most public proceedings involving a crime arise from a criminal prosecution, the plain language of section 2 encompasses some civil proceedings.

Consider, for example, a wrongful death action brought by the mother of a homicide victim against the suspected killer. Who would have the constitutional obligation to provide "reasonable and timely notice" to the plaintiff's estranged husband (and father of the victim)? The plaintiff (who, as a crime victim, should not be burdened by this amendment), the court (which is already overburdened and may lack the information necessary to provide the required notice), or the law enforcement agencies that investigated and prosecuted the crime (which may not even know that the civil action has been brought)? We agree with one former prosecutor, who argued that this burden would inevitably fall to law enforcement, even though it was "totally unrelated to improving the lot of crime victims in the criminal justice system and * * * would further deplete the already strained resources of prosecutors and police, assuming that they even have sufficient knowledge of the ancillary suit to fulfill their obligations."[118]

Just as the amendment could, by its terms, apply in civil cases, it could also be construed to apply in proceedings brought by the U.S. military. As previously discussed (in section (C)(1)), such application could impact substantially on any efforts to use military commissions to try suspected terrorists.

4. The "Adjudicative Decisions" Clause Creates a Morass of Undefined Issues and May Effect a Profound Change in Criminal Adjudication

One of the new features in the latest version of the proposed amendment is the establishment of a right to obtain "adjudicative decisions that duly consider the victim's safety, interest in avoiding unreasonable delay, and just and timely claims to restitution from the offender." This ill-defined clause will, at a minimum, lead to extensive litigation, and could have extraordinary adverse consequences.

What are "adjudicative decisions"? The term is not defined as a matter of constitutional law, and it appears expansive. In the typical criminal case, a facially reasonable interpretation would apply to scores, perhaps hundreds, of rulings. Moreover, there is no reason to believe that "adjudicative decisions" can be made only by judges. Is a Governor's decision to commute a sentence "adjudicative"? What about a jury's verdict or sentencing recommendation in a capital case?

Virtually the only input we have had on the meaning of the new language, offered by a leading supporter of the amendment, confirms that it is intended to be far-reaching: "'[A]djudicative decisions' includes both court decisions and decisions reached by adjudicative bodies, such as parole boards. Any decision reached after

[117] See Hearing of Apr. 8, 2003 ("I do not believe that the amendment as written grants victims the right to be informed of civil actions. * * *"; response of Viet Dinh, Assistant Attorney General, to follow-up question 6 by Sen. Leahy).

[118] Hearing of Apr. 8, 2003 (statement of James Orenstein).

a proceeding in which different sides of an issue would be presented would be an adjudicative decision."[119]

Further, because the section 2 clause respecting "adjudicative decisions" lacks the "public proceeding" limitation written into other parts of that section, it will likely apply to decisions made at both public and closed proceedings. That fact creates yet another question that the majority has left unresolved: In a non-public proceeding, at which the victim has no participatory rights, who will present the information about victim safety that the decisionmaker must "duly consider"? If it is the victim, then the participatory rights granted in section 2 are broader than previously imagined. If it is the prosecutor, then the mandate in section 3 that only the victim may assert the victim's rights is narrower than previously imagined. Moreover, if the prosecutor fails to present information about victim safety that the victim subsequently articulates, that may open the decision to challenge, appeal, and rehearing.

As vexing as the attempt to define "adjudicative decisions" may prove, it could pale in comparison to the daunting task of deciding whether each such decision has "duly considered" the various interests identified in section 2. Even if the courts eventually decide that only judges make "adjudicative decisions," the requirement that each such decision "duly consider the victim's safety, interest in avoiding unreasonable delay, and just and timely claims to restitution from the offender" could lead to endless litigation in criminal cases. Courts will have to grapple with any number of questions, the resolution of which could make the prosecution of offenders a far lengthier and more complicated process.

Consider the first of the three interests that, under section 2, must be duly considered in all adjudicative decisions: the victim's safety. In the typical criminal case, victim safety is normally considered in relation to bail and other conditional release decisions, and may also be considered in relation to decisions involving sentencing, revocation of probation, parole, and clemency. Victim safety generally is not considered in relation to decisions that affect, directly or indirectly, whether the defendant is convicted, such as decisions involving suppression of evidence on constitutional grounds, privilege and other evidentiary issues, and jury instructions. If these types of potentially outcome-determinative decisions—or the final determination as to guilt or innocence—must duly consider the victim's safety, the consequences for the defendant's right to a fair trial could be severe.

Previous versions of the proposed amendment approved by the Committee avoided such problems, but only by using a level of precision more suited to a statute than an amendment to the Constitution. They provided the right "to consideration for the safety of the victim in determining any conditional release from custody relating to the crime."[120] While unnecessary, in that there are no current constitutional provisions that prevent such consideration—and indeed the Supreme Court has specifically endorsed such consideration as to preventive detention[121]—the grant of the right was rel-

[119] Hearing of Apr. 8, 2003 (statement of Steve Twist).
[120] S.J. Res. 3, 106th Cong., § 1 (1999); S.J. Res. 44, 105th Cong., § 1 (1998).
[121] *United States* v. *Salerno,* 481 U.S. 739 (1987).

atively clear, understandable, and limited. It would have allowed courts to extend the new right at appropriate points in the proceedings, and not elsewhere. By contrast, the right granted by S.J. Res. 1 is ill-defined, unjustified, and potentially radical in its scope and impact.

The other interests of victims that must be "duly considered" under this proposal—i.e., the interests in "avoiding unreasonable delay" and "just and timely claims to restitution"—also raise troubling questions. Could victims object to the admission of evidence on the ground that it would lengthen the trial, and thus impair their interest in avoiding unreasonable delay? Must every "adjudicative decision" in a criminal case examine the effects of the ruling on the right to restitution? Examples could be multiplied, and undoubtedly some would be more fanciful than others. But given the change in language from the previous proposal, and given the countless adjudicative decisions that are made in the course of every criminal prosecution, it seems inevitable that the current version of the proposed amendment would cause real mischief.

5. The Remedial Scheme Is Uncertain and Could Substantially Increase Case Processing Times

Unlike every other provision in the Constitution, the proposed amendment would by its own terms limit the scope of remedies available for the violation of the rights it purports to guarantee. Section 3 provides, in part: "Nothing in this article shall be construed to provide grounds for a new trial or to authorize any claim for damages." The fact that any such limitation is necessary highlights the potential for mischief that the proposed amendment could visit upon our criminal justice system.

More importantly, the lack of precision as to what remedies are and are not intended to be permitted by this provision will lead to more costly and time consuming litigation and could place an enormous drag on our already overburdened courts. That is because, unlike past versions of the proposed amendment, S.J. Res. 1 could be construed to provide grounds to stay trials, reopen proceedings, and invalidate rulings. Indeed, such a construction seems likely, given the relevant legislative history.

The previous version of the proposed amendment stated, "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."[122] When the Committee approved that version in 1999, it explained that the prohibitions on judicially-created remedies "to stay or continue any trial" and "reopen any proceeding or invalidate any ruling" were added "because of the concern that a broad judicial remedy might allow victims to inappropriately interfere with trials already underway."[123] By omitting these prohibitions—and by specifically rejecting a proposal to reinsert

[122] S.J. Res. 3, 106th Cong., § 2 (1999).
[123] S. Rep. No. 106–254, supra, at 40.

them[124]—the Committee invites courts to grant victims' requests for such relief to remedy violations of their rights.

The previous Administration, which like the current one supported a victims' rights amendment, nevertheless expressed concern that it might "unduly disrupt the finality of sentences" by allowing victims to reopen completed criminal cases to revisit the issue of restitution.[125] In commenting on the current proposal—which allows for even greater interference with criminal prosecutions-Justice Department officials have brushed aside such concerns, but made no attempt to explain why they were unfounded.[126] Thus, while the Department professes to believe that "the proposed amendment should not be used as a tool to slow down criminal proceedings," acknowledging that this "would ultimately benefit the criminal defendant,"[127] that is precisely what S.J. Res. 1 threatens to do.

The current language could cause any number of problems, but three examples will suffice. First, by failing to stipulate that a victim has no grounds to reopen a negotiated plea, S.J. Res. 1 could substantially interfere with the prosecutor's ability to secure convictions. As explained by the U.S. Judicial Conference:

> Permitting the challenge of a proposed plea interferes with the prosecutor's ability to obtain convictions of defendants whose successful prosecution may rest on the cooperation of another defendant. Guilty pleas are sometimes also negotiated because the prosecution witnesses are, for various reasons, not as strong as they appear to be on paper. Also, the sheer volume of cases would generally overwhelm any prosecutor's office and the courts unless the vast majority were settled.

Our federal judges concluded, "The significance of this issue should not be underestimated."[128]

Second, under S.J. Res. 1, if a criminal defendant is sentenced without prior notice to the victim, his sentence could potentially be vacated and remanded for a new sentencing hearing. At a minimum, this re-sentencing would tax the resources of the court, the prosecutor, the marshal or sheriff, and possibly prison officials. At worst, if the court imposed a more severe sentence, the defendant could allege a colorable violation of the 5th amendment's double jeopardy clause.

Third, suppose that a judge, during the penalty phase of a capital case, issues an "adjudicative decision" that, according to the victim, did not "duly consider the victim's safety * * * and just and

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[124] The vote on this proposal, offered by Sen. Durbin at the Committee's September 4 markup, was 8 in favor, 10 opposed.

[125] Rights of Crime Victims Constitutional Amendment, Hearing on H.J. Res. 64 before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 106th Cong., 2d Sess. 291 (Feb. 10, 2000) (statement of Eleanor D. Acheson, Assistant Attorney General).

[126] See, e.g., Hearing of Apr. 8, 2003 (response of Viet Dinh, Assistant Attorney General, to follow-up question 8 by Sen. Leahy); S.J. Res. 35, Proposing a Victims' Rights Amendment to the United States Constitution, Hearing before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 107th Cong., 2d Sess. 48 (July 17, 2002) (response of John Gillis, Director, OVC, to follow-up question 15 by Sen. Leahy).

[127] Id.

[128] Letter from Leonidas Ralph Mecham, Secretary, Judicial Conference of the United States, to Sen. Hatch, Chairman, and Sen. Leahy, Ranking Member, Senate Comm. on the Judiciary, Apr. 30, 2003.

timely claims to restitution." Under the previous version of the amendment, the proceeding could not be stayed pending the victim's appeal of the decision; under the current proposal, it probably could. Such a delay would at a minimum complicate the sentencing process, and could possibly undermine the prosecution's efforts to secure a death sentence. Among other problems, the delay could result in the loss of some of the jurors who decided the defendant's guilt, thereby requiring the empanelment of a new sentencing jury.

The second part of the section 3 remedies clause establishes a blanket prohibition on "any claim for damages." The majority report attempts to assuage victims" groups by suggesting that this prohibition may not be as absolute as it sounds. According to the report (in part V), while the proposed amendment does not itself authorize a claim for damages, nor does it preclude such a claim if established under other legislation. If so—if Congress could establish a statutory damages remedy for violations of S.J. Res. 1—then section 3's "no-damages" clause is illusory, and promises States more protection than it actually provides. More likely, however, is that Congress could not establish such a remedy without exceeding its section 4 enforcement authority.[129]

Roger Pilon, director of the Cato Institute's Center for Constitutional Studies, compared an earlier version of the proposed amendment to the generous legacy in a pauper's will: It promises much but delivers little.[130] To the extent that the remedies it permits undermine the criminal justice system, it ill-serves the victims whose primary interest is to see that offenders are convicted and punished. To the extent that it creates rights without remedies, it is worse than useless. Rights without remedies are empty promises that in time undermine confidence in the very document that contains them—in this case, the United States Constitution.

6. The "Restrictions" Clauses Are Inflexible And Could Undermine Law Enforcement

In addition to recognizing the need to limit the remedies available for violations of the proposed new constitutional rights, supporters of the amendment have consistently acknowledged a pressing need to limit the rights themselves, so that law enforcement and prison officials can continue doing their jobs effectively. The last version of the proposed amendment endorsed by the majority attempted to address this concern by including language that would have allowed "exceptions" to the newly-established rights in certain very limited circumstances.[131] We expressed the concern then that the permitted exceptions were too narrow and would undermine law enforcement. The new version only makes matters worse: Instead of allowing at least some exceptions, the current bill explicitly states in section 1 that a victim's rights may never be "denied" but may only be subject to very limited "restrictions," the contours of which are only vaguely identified in section 2.

During the Committee markup of S.J. Res. 1, Senator Feingold offered an amendment to clarify that victims" rights can, in certain circumstances, be "denied" as well as merely "restricted." This

[129] See *City of Boerne* v. *Flores*, 521 U.S. 507 (1997).
[130] Hearing of Apr. 16, 1997, at 47.
[131] S.J. Res. 3, 106th Cong., § 3 (1999).

change would have accommodated those situations where a complete denial of a victim's rights may be required in the interests of effective law enforcement or public safety. The Committee rejected this amendment by a 7–to–10 vote.

In light of this legislative history, as well as the dictionary definitions of the relevant terms, courts are bound to interpret the ability to allow "restrictions" of victims" rights to mean something other than permission to "deny" or carve out "exceptions" to those rights. As the majority report (in part V) explains:

> [In sections 1 and 2 of the amendment], an important distinction between "denying" rights and "restricting" rights is established. As used here, "denied" means to "refuse to grant;" see Webster's New Collegiate Dictionary 304 (1977). In other words, it means to prohibit the exercise of the right completely. The amendment, by its terms, prohibits such a denial. At the same time, the language recognizes that no constitutional right is absolute and therefore permits "restrictions" on the rights, but only, as provided in section 2, in three narrow circumstances.

As thus interpreted, the proposed amendment could pose enormous difficulties for law enforcement in a variety of contexts.

In organized crime cases, for example, prosecutors may need to secure cooperation agreements under which one gangster agrees to plead guilty and then, upon release on bail, surreptitiously gather information about others. Often, the prospective cooperator has previously committed violent crimes in which the victims are themselves criminals. The proposed amendment would confer on such victims the right to "reasonable and timely notice" of the cooperator's guilty plea, the same right with respect to the cooperator's bail hearing, and the rights "not to be excluded from" and "reasonably to be heard at" both. Those rights could be "restricted" in certain circumstances, but not "denied."

For the law enforcement interest to be vindicated in this context, the victims must receive no notice of the cooperator's plea or release, at least until well after the fact. While alerting the victims to these events would endanger the cooperator and undermine his ability to assist law enforcement by collecting evidence, it may be unavoidable under S.J. Res. 1. The prosecutor might argue that the court should for good cause postpone the notice required by the amendment, but such an argument would likely fail. Even if the delayed notice could be considered "reasonable," it could not be considered "timely," which the amendment also requires.[132] Moreover, taking affirmative steps to delay notice would effectively exclude the victim from the proceeding—that would be the precise point of the delay—and would make it impossible for the victim "reasonably to be heard" with respect to the plea or the cooperator's release. And, as previously discussed (in section (C)(1)), the problem is not easily avoided by closing proceedings to the public (and so depriving victims of any rights under the proposed amendment), given the vital first amendment interest in open judicial proceedings. In

[132] As one pro-amendment witness told the Committee, "'Timely' notice would require that the victim be informed enough in advance of a public proceeding to be able reasonably to organize his or her affairs to attend." Hearing of Apr. 8, 2003 (statement of Steve Twist).

short, the victim's rights would plainly have been "denied," in violation of section 1.

None of this would be a problem if the amendment permitted "denials" of rights or "exceptions," as the facts would likely be held to implicate "a substantial interest in public safety or the administration of criminal justice." But S.J. Res. 1 allows only "restrictions" that do not "deny" a victim's rights—and the necessary restrictions would in most cases do just that.

The "restrictions" language could also cause enormous problems in mass victim cases. As a practical matter, courts will sometimes be unable to allow every victim "reasonably to be heard" at every bail, plea, and sentencing proceeding.[133] The pragmatic approach generally adopted in such cases is to hear from a representative cross-section of victims. If the proposed amendment permitted "denials" of, or "exceptions" to, victims' * * * rights in appropriate circumstances, this pragmatic approach would plainly be constitutional insofar as it is "dictated by a substantial interest in the administration of criminal justice." But such a solution would not work under an amendment that permits "restrictions" but not "denials" or "exceptions." A victim excluded from the representative group in this scenario could plainly show that her right reasonably to be heard had been "denied," in violation of section 1. The fact that others with similar interests had been allowed to speak might fairly be considered an appropriate "restriction" on the collective interest of all victims in being heard, but the proposed amendment creates rights for individual victims, not a group.[134]

In mass victim cases, the right to "reasonable and timely notice" could also put a serious strain on judicial and law enforcement resources, and divert attention from the effective prosecution of the case. If the perpetrator of a horrific event like the September 11 attacks is apprehended, must prosecution be delayed until all victims can be identified and notified? Does every victim have standing to challenge a plea or sentence that was entered in violation of her notice and participatory rights?

As discussed above (in section (E)(1)), one significant problem with the proposed amendment is how it will affect the treatment of battered women, who may be either victim or defendant depending upon whether they are being beaten or whether they react to their beatings by self-help violence that may be legally justified but nonetheless prosecuted. The majority report (in part V) asserts without explanation that in such cases, the restrictions clauses offer sufficient flexibility to modify victims' rights provisions. It is not so easy. While a court could reasonably decide that allowing a batterer the full panoply of victims' rights would be abhorrent to

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[133] Amendment proponents have suggested that, in mass victim cases, the right to be heard may be protected by allowing victims to submit written statements. But this may not be possible given the text and history of S.J. Res. 1. In the previous version approved by the Committee, victims had a right "to be heard, if present, and to submit a statement" at certain proceedings. Courts could rule that the switch to a right "reasonably to be heard" was intended to confer a absolute right to make an oral statement, subject to appropriate limitations on, for example, scheduling, duration of the live presentation, and subject matter. A victim permitted only to submit a statement has not been permitted "reasonably to be heard"—she has not been "heard" at all—and accordingly her right has been "denied" rather than merely "restricted."

[134] It is clear from the language of S.J. Res. 1 that it grants rights to individual victims, not to victims as a group. As one pro-amendment witness told the Committee, "The rights [conferred by S.J. Res. 1] are individual, even as the rights of defendants are individual." Hearing of Apr. 8, 2003 (response of Steve Twist to follow-up question 4 by Sen. Leahy).

the administration of justice, it could only "restrict" and not "deny" these rights. As a result, it could be forced to allow a batterer to use court proceedings to inflict new trauma on the true victim.

Further, by allowing victims' rights to be restricted only "when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice," section 2 fails to allow courts to consider an interest in the administration of civil justice, however substantial. As Senator Feingold explained during the Committee's September 4 markup of S.J. Res. 1, inclusion of the word "criminal" will prevent courts from limiting a victim's rights, even when the exercise of such rights would be terribly disruptive of a proceeding in a habeas corpus or mass tort case involving the crime.[135] Surely, the civil justice system is no less worthy of protection than the criminal justice system. Yet the Committee inexplicably rejected Senator Feingold's proposal to strike the word "criminal" from section 2.

As disturbing as the current proposal's rigidity should be to all of us who favor effective law enforcement, more flexibility is not the answer. If we really need a constitutional amendment, it should be to bind the hands of government. The fact that this amendment, unlike any other, requires a built-in exceptions clause of even greater flexibility does not mean that we should try to rewrite it for the 65th time. Rather, it proves yet again that a constitutional amendment simply is not the right approach.

Finally, the restrictions clause in section 2 is also problematic because it does not identify who may restrict the victims' rights. Does the power to allow restrictions, like the general enforcement power, fall exclusively to Congress? This would further weaken State and local control over law enforcement operations and criminal proceedings. Could restrictions be crafted by State judges in individual cases? This runs the risk that federal constitutional rights would, for the first time, mean different things in different States.

These concerns are just a sampling of the possible problems that will be confronted by law enforcement officers, prosecutors, and judges as they grapple with the implementation and enforcement of the provisions of the proposed amendment. As the Federal Public Defenders aptly said of an earlier version, "the proposed amendment is a litigator's dream and a victim's nightmare."[136]

7. The Phrase "Are Hereby Established" Is Unnecessary and Does Not Conform to Existing Constitutional Amendments

No rights in the Bill of Rights or other constitutional amendments are "established"; rather, they are simply recognized. During Committee consideration of S.J. Res. 1, Senator Feingold offered an amendment to conform the language of S.J. Res. 1 to existing constitutional amendments by striking the phrase "are hereby established" from section 1. The Committee rejected this amendment by a 7–to–10 vote.

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[135] The majority (in part V) asserts without explanation that "the administration of criminal justice exception covers habeas corpus filings and proceedings." But the Supreme Court has consistently recognized that habeas corpus proceedings are civil, not criminal, in nature. *Hilton* v. *Braunskill,* 481 U.S. 770, 776 (1987).

[136] A Proposed Constitutional Amendment to Protect Crime Victims, Hearing on S.J. Res. 44 before the Senate Comm. on the Judiciary, 105th Cong., 2d Sess. 170 (Apr. 28, 1998).

In drafting an amendment to the United States Constitution, we must be especially deliberative and careful. The operative language of the proposed amendment should be consistent with language that protects other individual rights in the Constitution.

For example, the fourth amendment states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The fourth amendment does not say that these rights are "established." The fifth amendment provides that "No person shall be * * * deprived of life, liberty, or property, without due process of law." Again, like the fourth amendment, the fifth amendment's due process and other rights and protections are not "established" by the amendment.

It has been argued that the phrase "are hereby established" is necessary because the rights of victims were not protected by the original Bill of Rights, so we need to call more attention to them in this constitutional amendment. But the adoption of a constitutional amendment is a very significant event—it does not need to be underscored by textual surplusage. Beyond that, it is not how we have proceeded in the past. Women were not given the right to vote in the original Constitution, yet the 19th amendment did not "establish" the right to vote for women, it simply stated: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex."

If the current version of the victims' rights amendment were enacted and ratified, it could be interpreted to undermine other constitutional rights long recognized, even though these rights are not described as "established" by the Constitution. This may be unlikely, but we see no reason to permit such an interpretation by including the words "are hereby established." They serve no real purpose, and they are inconsistent with the way that amendments to our great governing document have been drafted in the past.

8. The Definitional Failures of S.J. Res. 1 Cannot Be Cured Through Enforcement Clause Legislation

We have discussed several ways in which the proposed constitutional amendment is vague and subject to competing interpretations, and there are others. It has been suggested that the answer lies in section 4, which provides that "Congress shall have the power to enforce by appropriate legislation the provisions of this article." For example, one of the lead sponsors of S.J. Res. 1 said at this year's hearing, "It was our intention that questions such as definitions of who are victims, what kind of notice is required and by whom, and * * * the definition of violent crime, could well be dealt with by appropriate congressional legislation [enacted under section 4]."[137] But this use of the section 4 enforcement power may not be possible given well-established constitutional precedent.

[137] Transcript of Hearing of Apr. 8, 2003, at 46–47 (Sen. Kyl).

As witnesses on both sides of the constitutional debate agreed, "the power to enforce is not the power to define."[138] In recent years, the Supreme Court has issued a series of decisions interpreting the enforcement clause of the 14th amendment, upon which section 4 of the proposed amendment is modeled. Those cases state that Congress may not, under the guise of "enforcing" a constitutional amendment, either diminish the rights of the persons it was designed to protect or impose substantive new restrictions on State governments.

Thus, in the leading case of *City of Boerne* v. *Flores*,[139] the Court struck down a federal statute that purported to redefine the scope of the 1st amendment right to the free exercise of religion (which is incorporated in the fundamental concept of liberty embodied in the 14th amendment's due process clause). In so doing, the Court explained the difference between measures that remedy or prevent unconstitutional actions, and measures that make a substantive change in the governing law:

> Congress' power under § 5 [of the Fourteenth Amendment] * * * extends only to "enforcing" the provisions of the Fourteenth Amendment. * * * The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. *Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation.*[140]

Post-*Boerne* case law has further clarified the limits of Congress enforcement power. Just this Term, for example, that Court confirmed that "it falls to this Court, not Congress, to define the substance of constitutional guarantees."[141]

Given this case law, any attempt by Congress to define the proposed amendment's key terms could well be held invalid. Such legislation would necessarily either restrict the rights of some persons who might otherwise be considered victims of violent crimes, or expand the substantive obligations of States whose laws would otherwise exclude certain persons from the protected class of victims. Either way, it would exceed Congress' enforcement power under section 4.

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[138] Hearing of Apr. 8, 2003 (statement of Steve Twist); id. (response of James Orenstein to follow-up question 6 by Sen. Leahy).

[139] 521 U.S. 507 (1997).

[140] *Id.* at 519 (emphasis added).

[141] *Nevada Dept. of Human Resources* v. *Hibbs,* 123 S. Ct. 1972, 1977 (2003). See also *Kimel* v. *Fla. Bd. of Regents,* 528 U.S. 62, 88 (2000) (assessing the constitutionality of enforcement clause legislation requires court to determine whether statute "is in fact * * * an appropriate remedy or, instead, merely an attempt to substantively redefine the States' legal obligations"); *Fla. Prepaid Postsecondary Educ. Expense Bd.* v. *College Savings Bank,* 527 U.S. 627, 637–648 (1999) (invalidating Patent Remedy Act because historical record and scope of the Act's coverage demonstrated that it was not merely remedial or prophylactic, but changed States' substantive obligations); *Saenz* v. *Roe,* 526 U.S. 489, 508 (1999) ("Congress' power under § 5, however, 'is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.'") (quoting *Katzenbach* v. *Morgan,* 384 U.S. 641, 651 n.10 (1966)).

Despite the need for something other than an enforcement provision, this version of the proposed amendment, unlike earlier versions, contains nothing else that could be construed as granting Congress, or even individual States, the power to define key terms.[142] As a result, key terms are likely to be defined piecemeal by individual judges interpreting the new constitutional language, compounding the problem of a "patchwork" of victims' rights, and making the amendment the vaguest, blankest check that has ever been written to the judiciary.

F. CONCLUSION

We who oppose this constitutional amendment are supporters of victims' rights. We have no less concern for the pain of victims of violent crime, or any crime, than those who support this amendment, and no less desire to promote their participation in the criminal justice system.

We regret that the time and energy that could have led to increased improvements in the implementation of real protections for victims, better training for courts and prosecutors, better notification systems, and more consistent recognition of victims' rightful place in the criminal justice system, have, instead, been focused on this constitutional amendment process. That focus has been to the detriment of efforts toward federal statutory change, both comprehensive and incremental. Much to our regret, victim assistance programs have suffered, the Crime Victims Fund has been capped, and the pace of victims' rights legislation has slowed over the last four years. Fortunately, the States are continuing to move ahead.

It is not victims' rights but this well-intentioned yet controversial constitutional amendment that we oppose. We must not hamstring our prosecutors and sacrifice core protections guaranteed by the Bill of Rights to enact this unnecessary and problematic constitutional amendment, which promises much, but may deliver very little. For all these reasons—it is not necessary to amend the Constitution to protect victims' rights; the proposed amendment could have dangerous and uncertain consequences for the administration of justice; the proposed amendment infringes unduly on States' rights; and the wording of the proposed amendment is problematic—the proposed constitutional amendment should not pass.

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EDWARD M. KENNEDY.
HERB KOHL.
RUSS FEINGOLD.
CHARLES E. SCHUMER.
RICHARD J. DURBIN.

[142] Compare S.J. Res. 44, 105th Cong., § 3 (1998) ("The Congress and the States shall have the power to implement and enforce this article. * * *"); S.J. Res. 3, 106th Cong., § 1 (1999) ("A victim of a crime of violence, as these terms may be defined by law. * * *"). For a detailed account of the relevant legislative history, see Hearing of Apr. 8, 2003 (response of James Orenstein to follow-up question 6 by Sen. Leahy).

XII. Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee finds no changes in existing law caused by passage of S.J. Res. 1.

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