

# VICTIMS' RIGHTS AMENDMENT

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## HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION  
AND CIVIL JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

ON

**H.J. Res. 45**

MAY 1, 2015

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## VICTIMS' RIGHTS AMENDMENT

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FRIDAY, MAY 1, 2015

HOUSE OF REPRESENTATIVES  
SUBCOMMITTEE ON THE CONSTITUTION  
AND CIVIL JUSTICE

COMMITTEE ON THE JUDICIARY

*Washington, DC.*

The Subcommittee met, pursuant to call, at 9:08 a.m., in room 2141, Rayburn House Office Building, the Honorable Trent Franks (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, DeSantis, King, Cohen, and Conyers.

Staff Present: (Majority) John Coleman, Counsel; Tricia White, Clerk; (Minority) James J. Park, Minority Counsel; and Veronica Eligan, Professional Staff Member.

Mr. FRANKS. The Subcommittee on the Constitution and Civil Justice will come to order.

Before Chairman Royce leaves the room, it's rather unusual to have a full Committee Chairman attending these hearings. But in Chairman Royce's circumstances, it's a very unique situation because he was the original sponsor of the victims' rights legislation in Congress many years ago and has worked very hard with Colleen Campbell to pass the victims' rights legislation in California.

And we've had some profound advances in the victims' rights, getting major statutory language in the Congress last time, and without Chairman Royce, none of this would have occurred. He has absolutely been a pioneer in this effort, and he'll have a lot of legacy. But there will be a lot of people that will be grateful that this man walked the Halls of Congress because he did some things related to this issue that will really mitigate a lot of the abuses the victims go through.

And it's my hats off to you, Chairman Royce. I'm grateful that you're here, sir. It's so appropriate that you be with us, because I will say to you there is no greater champion for victims' rights legislation in this the United States Congress than Chairman Ed Royce.

[Applause.]

[The resolution, H.J. Res. 45, follows:]

114TH CONGRESS  
1ST SESSION

# H. J. RES. 45

Proposing an amendment to the Constitution of the United States to protect the rights of crime victims.

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## IN THE HOUSE OF REPRESENTATIVES

APRIL 16, 2015

Mr. FRANKS of Arizona (for himself, Mr. GOSAR, Mr. SALMON, and Mr. SCHWEIKERT) introduced the following joint resolution; which was referred to the Committee on the Judiciary

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## JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States to protect the rights of crime victims.

1       *Resolved by the Senate and House of Representatives*  
2 *of the United States of America in Congress assembled*  
3 *(two-thirds of each House concurring therein), That the fol-*  
4 *lowing article is proposed as an amendment to the Con-*  
5 *stitution of the United States, which shall be valid to all*  
6 *intents and purposes as part of the Constitution when*  
7 *ratified by the legislatures of three-fourths of the several*  
8 *States:*



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

○

Mr. CONYERS. Mr. Chairman, may I just make a comment about the gentleman from California? Because I, too, have been impressed.

Mr. FRANKS. Absolutely.

Mr. CONYERS. We in the Congressional Black Caucus have worked on this subject continually, and Brother Royce has always been there for us. And I join with you fully in the comments and commendations that you made toward him.

Mr. FRANKS. Well, thank you, sir. And I tell you, a lot of times we pass along a lot of plaudits around here, but there are some times when someone has a seminal impact on something that gets the train rolling and things happen and they never really are recognized for it.

Chairman Royce has always been just very low-key about it, but he is a cosponsor of this legislation and, without him, we would not be anywhere in the same universe where we are.

So again thank you, Mr. Chairman.

Without objection, the Chair is authorized to declare recesses of this Committee at any time.

And I'm going to go ahead and do an opening statement. We're grateful you're all here, and I'll introduce you a little bit better in a few moments.

Since 1789, there have been over 11,000 measures proposed in the House and Senate to amend the United States Constitution. Last Congress alone, 84 such amendments were introduced. These numbers are substantial, given the fact that the Constitution has only been amended 27 times in the span of our Nation's history.

However, one proposed amendment called the "next amendment" by some legal scholars stands out because of its extraordinary importance to ensuring fairness in our criminal justice system. This amendment is H.J. Res 45, the bipartisan Victims' Rights Amendment, or the VRA, for short.

Last month America observed the National Crime Victims' Rights Week, which lasted from April 19 to April 25. Across the country victims' rights advocates challenged Americans to learn about and confront issues related to how victims are treated in our criminal justice system. Today we honor this and all the year-round efforts by examining this important Constitutional amendment before us.

An amendment to the United States Constitution for the rights of victims was first proposed by President Ronald Reagan's Task Force on Victims' Rights in 1982. The task force stated, "We do not make this recommendation lightly. The Constitution is the foundation of national freedom, the source of national spirit. But the combined experience brought to this inquiry and everything learned during its program and progress affirmed that an essential change must be undertaken. The fundamental rights of innocent citizens cannot adequately be preserved by any less decisive action."

Since that time, victims' rights legislation has enjoyed broad support at the State and Federal levels, passing by 80-percent margins in the States and securing influential bipartisan support at the highest levels of the Federal Government. Senators Kyl and Feinstein championed victims' rights in the Senate, and multiple House

and Senate hearings have been devoted to advancing the victims' rights legislation.

Supporters for victims' rights amendments include President George H.W. Bush, President Bill Clinton, President George W. Bush, Attorneys General Janet Reno, John Ashcroft and Alberto Gonzales, Professor Larry Tribe of the Harvard Law School, The National Governors Association, 50 State attorneys general, Mothers Against Drunk Driving, the National Association of Parents of Murdered Children, the National Organization for Victims Assistance, and, finally, the National District Attorneys Association, which is the voice of the Nation's prosecutors.

Despite the best efforts of the State and the Federal Governments to bring balance through statutes or State constitutional amendments, they have proven inadequate whenever they come into conflict with bureaucratic habit, traditional indifference, sheer inertia, or the mere mention of an accused's rights, even when those rights are not genuinely threatened.

At the U.S. Justice Department, they concluded that the, quote, "existing haphazard patchwork of rules is not sufficiently consistent, comprehensive, or authoritative to safeguard victims' rights." Given these inadequate protections in our current laws, it's time the U.S. Constitution was amended to guarantee them. True justice will only be reached when victims have the same rights anywhere in the United States, regardless of the State in which they live.

These rights, which are enumerated in the VRA, include the right to reasonable notice of and the right not to be excluded from public proceedings related to the offense, the right to be heard at any release, plea, sentencing, or other such proceeding involving any right established in the amendment, the right to reasonable notice of the release or escape of the accused, the right to due consideration of the crime victim's safety, dignity and privacy, and the right to restitution. Moreover, the amendment expressly provides standing for the victim to defend these enumerated rights.

I welcome our witnesses here today, and I look forward to hearing from them on this critical issue. And I am just grateful that you are all here. I know you are here for sometimes personal, but always noble, reasons.

And before I yield to Ranking Member Cohen, I would like to ask unanimous consent to put into the record support letters for H.J. Res. 45 submitted to my office by the National Organization for Victims' Assistance, the National Organization of Parents of Murdered Children, and Mothers Against Drunk Driving.

And so, hearing no objection, so ordered.

[The information referred to follows:]



Honorable Trent Franks  
U. S. House of Representatives  
2435 Rayburn HOB  
Washington, DC 20515

April 23, 2015

Dear Representative Franks,

NOVA, the nation's largest and oldest victim advocacy organization, strongly endorses H.J.R. 45, the proposed federal constitutional amendment for victims' rights.

Crime victims continue to endure trauma not only at the hands of criminals, but also because of a criminal justice system that still today treats them with indifference or worse. Victims still today are denied notice of proceedings, the right to be present at proceedings, and the right to be heard at critical stages. The amendment will end these injustices and bring balance to our justice system.

We urge Congress to pass the amendment and send it to the States for ratification.

Sincerely yours,

A handwritten signature in black ink that reads "Marsha Probst". The signature is written in a cursive, flowing style.

Marsha Probst *M.P.A.C.A.*  
President and Treasurer  
National Organization for Victim Assistance  
510 King Street, Suite 424  
Alexandria, VA 22314  
(435) 615-3850



National Organization of  
**Parents Of Murdered Children, Inc.**

*For the families and friends of those who have died by violence.*

Dan Levey, Executive Director • Phone: (480) 946-3422 • E-mail: [dlevey@pomc.org](mailto:dlevey@pomc.org)  
Satellite Office Location: P.O. Box 625, Phoenix, AZ 85001

April 24, 2015

Hon. Trent Franks  
Washington, DC Office  
2435 Rayburn HOB  
Washington, DC 20515

Dear Congressman Franks,

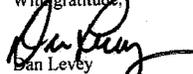
On behalf of The National Organization of Parents Of Murdered Children, Inc. (POMC) I would like to thank you for your efforts to help crime victims by introducing HJR45, the Victims' Rights Amendment. POMC is a strong supporter of the effort to pass a constitutional amendment for victims and commend you for your leadership in this important effort.

POMC was founded in 1978, in Cincinnati, Ohio and currently has over 60 chapters and 100 contact people throughout the United States providing services to family and friends of those killed by violence. Tragically, in 2013 an estimated 14,196 persons were murdered in the United States. POMC's vision is to provide support and assistance to all survivors of homicide victims while working to create a world free of murder is enhanced.

Thirty four years after the President Regan's Task Force on Victims of Crime first proposed a federal constitutional victims' rights amendment the need still exists to make victims' rights the fundamental law of the land, the U.S. Constitution. We believe inclusion in the U.S. Constitution can ensure full, meaningful and consistent rights for all citizens throughout our nation. Only a constitutional amendment will begin to change the culture that treats crime victims with less than the fairness, dignity and respect to which they are entitled.

As you know, that while legal rights for crime victims are provided by state constitutional amendments in 33 states and by statute in all states and at the federal level, those rights vary in strength and scope. POMC strongly supports HJR 45 and believes that enshrining crime victims' rights in our nation's constitution will also provide that any crime victim anywhere in the country can expect the same basic level of victims' rights.

POMC stands with you and your colleagues in supporting HJR45 and are extremely grateful for all of your efforts to ensure victims are treated with fairness, dignity and respect throughout the criminal justice process.

With gratitude,  
  
Dan Levey  
Executive Director

*Dedicated to the Aftermath and Prevention of Murder*



Mothers Against Drunk Driving  
National Office  
madd.org

1025 Connecticut Avenue, NW  
Suite 1210  
Washington, DC 20036

877.ASK.MADD  
877.MADD.HELP victim support

April 29, 2015

The Honorable Trent Franks  
U.S. House of Representatives  
2435 Rayburn House Office Building  
Washington, D.C. 20515

Dear Congressman Franks:

On behalf of Mothers Against Drunk Driving, I am writing today in support of H.J.R. 45, the proposed federal constitutional amendment for victim's rights.

In 2013, over 10,000 people were killed in drunk driving crashes. This represents almost one-third of all traffic deaths. MADD is here to support and assist victims of this violent crime. We are the leading victim's rights organization in traffic safety serving over 60,000 drunk driving victims each year.

Unfortunately, the rights of drunk driving victims, and all crime victims, are not fully protected by current laws. This amendment is critical to ensure equal protection for crime victims.

Again, thank you for your work on behalf of all crime victims. We look forward to working with you to make sure this amendment becomes law.

Sincerely,

Colleen Sheehy-Church  
National President, MADD

Mr. FRANKS. I would now yield to the Ranking Member for his opening statement.

Mr. COHEN. Thank you, Mr. Chairman.

All of us can agree that our criminal justice system must treat crime victims with dignity and provide them with some measure of justice for the acts perpetrated against them. It's awful that people are victims of crime in our world, and unfortunately it happens.

Most of those who are victims of crime disproportionately are just people from disadvantaged communities, and those are people in the majority of my district I represent.

Oftentimes they are not given the justice they should have on several levels. According to the Bureau of Justice Statistics, between 2008 and 2012, Americans living at or below the Federal poverty line had more than double the rate of violent crime victimization as high-income people.

According to the January 2014 report by the Violence Policy Center, African Americans were four times more likely to be homicide victims than the national average. These are frightening figures.

It's hard to disagree with the belief that all crime victims need and deserve assistance, counseling, notification, protections, and respect. We all have concern for crime victims. However, those rights that may be extended through statute must be balanced with the fundamental rights guaranteed in our Constitution, and that is why I have concerns about a Constitutional amendment.

By putting these rights in a Constitutional amendment, you do what the majority side often is concerned about, and that leaves the implementation of them to judges. And much of what the majority side has been trying to do this year is take power away from judges, not allow them to proceed on class actions as they see fit, but to change the statutes that legislature and Congress might want, not to allow them to determine if attorneys have filed appropriate papers in court on rule 11, but take that away and make it mandatory. Here they want to give judges the right to interpret.

The Bill of Rights is to protect those most vulnerable from the tyranny of Government and protect people from the majority that might be, at times, in a state that is not allowing for a fair trial, the powerless, the controversial, the politically unpopular, even the despised.

That's why our Constitution guarantees procedural rights for those accused of committing a crime, including the most heinous crimes, like murder. And I must say, concerning murder, the greatest victims' right ever was DNA evidence. I've been a great supporter of DNA evidence, passed it in the Tennessee General Assembly.

And one of the greatest victims in our history have been people who have been unjustly convicted and been freed because of DNA evidence and The Innocence Project. Those are also victims and real victims who have been put behind bars for innumerable years, some 30, some lesser times. But those are victims who have been released because of DNA evidence and science. Those are really victims' rights bills, the DNA evidence bills and DNA restitution.

House Joint Resolution 45 would enshrine certain rights for crime victims and our Constitution and they could threaten the

rights of the accused, for instance, a crime victim with the right to proceedings free from unreasonable delay.

What's that mean? Well, it could be seen that that could conflict with a defendant's due process rights to fully investigate a case and prepare a defense. The judge would, I guess, determine at some level whether there was unreasonable delay and might see the delay as being from the perspective of the victim rather than the perspective of the defense preparing a Constitutional defense.

It also provides an absolute right for crime victims, quote, "to be heard in a release, plea sentencing, or other proceeding involving any right established by the proposed amendment." That could be interpreted, indeed, to give a Constitutional right to participate at a stage as early as bail. That could put statements made by the victim at a hearing concerning bail or early pretrial release—could interfere with the prosecution's attempt to have a good defense. Statements could be used against that victim at trial, and that would be harmful. There are other rights that again need to be balanced.

And this is an important area. And I agree victims should have rights. I don't think they should be enshrined in the Constitution. But there is another set of victims that we have in this country, which are people who are being killed by police and where there is not a victim in a court because the police are not being indicted. In South Carolina, there was an indictment. In many cases, there aren't.

I would ask the Chair to consider having a hearing on these victims that are in the papers and the news and are causing urban conflict that threatens, really, the economic prosperity of this country and the safety of citizens and their property.

And I yield back the balance of my time.

Mr. FRANKS. Well, the Chair is concerned with all victims, and we certainly would consider that. Let me just suggest that—I want to go on the record as saying that, if it weren't for the police departments of this country, there would be an awful lot more victims.

So I would thank the gentleman.

Without objection, the other Members' opening statements—well, let's see. We're going to go to the Chairman of the Committee, Mr. Conyers.

How are you, sir?

Mr. CONYERS. Thank you very much. I'm the former Chairman, but I appreciate the compliment.

I'd like to build on our Ranking Subcommittee—Mr. Cohen's remarks and speak directly to House Joint Resolution 45, which would amend the United States Constitution to give crime victims various rights enforceable in court.

While no one disputes the goal of protecting the rights of crime victims, this measure is, I think, flawed for several reasons that I want to mention as the hearings begin.

Number one, there's no reason to amend the Constitution of the United States. There already are various laws and other provisions that provide meaningful assistance to victims that protect their rights. Importantly, the Crime Victims' Rights Act of 2004 affords

crime victims many of the very same rights and protections as H.J. Res. 45, and Federal courts are obligated to enforce those rights.

In addition to providing for judicial enforcement of the rights it guarantees, the act requires the Justice Department to implement regulations requiring Federal prosecutors to enforce the rights of victims through training.

Further, the act authorizes the disciplinary sanctions for employees who willfully or wantonly fail to comply with provisions of Federal law pertaining to the treatment of crime victims.

To the extent that enforcement of the act has been uneven, enshrining victims' rights into the Constitution, I'm sorry to say, will not solve that problem. Better awareness of the rights provided for and the obligations imposed by the act not through the cumbersome process of a Constitutional amendment is the answer.

Secondly, H.J. Res. 45 could undermine the Constitutional rights of the accused. H.J. Res. 45 is silent on the question of how the rights of the accused are to be treated should a victim's right conflict with the rights of the accused. The amendment only contains a conclusory statement that such rights are not in conflict, but simply saying this doesn't make it so.

H.J. Res. 45 could prejudice judges and juries against an accused who is entitled to a presumption of innocence until proven guilty by giving crime victims a constitutional right to participate in the earliest stages of a criminal trial. This right includes pretrial proceedings, such as a bail hearing where an accused has no opportunity to cross-examine the victim who may make prejudicial statements against the accused.

H.J. Res. 45 could also jeopardize the accused's right to a fair trial because it requires criminal proceedings to be free from unreasonable delay, a right that a crime victim could enforce in court. In determining what constitutes an unreasonable delay, a court could judge this issue from the victim's perspective. As a result, the defendant's right to properly prepare his or her defense would be undermined as well as deny the defendant the effective assistance of counsel.

As we know, too many innocent individuals are wrongfully convicted of crimes they did not commit and they are exonerated only after spending years behind bars seeking justice.

And so, finally, H.J. Res. 45 could undermine the ability of prosecutors to seek justice. The amendment would create numerous opportunities for interference by a crime victim with the exercise of prosecutorial discretion.

For instance, the measure could empower victims to prevent or undo plea agreements. Beth Wilkinson, one of the prosecutors in the 1995 Oklahoma City bombing trial, testified before the Senate Judiciary Committee in 1999 in opposition to a substantially similar version of H.J. Res. 45 specifically for this reason.

She explained that the prosecution's efforts leading to Timothy McVeigh's conviction could have been substantially impaired if the victims' right amendment had been in place because victims would have opposed the acceptance of a guilty plea from a co-defendant whose cooperation, in exchange for a plea deal, was critical to securing the conviction against McVeigh.

For these and other reasons, H.J. Res. 45 would do little to help crime victims. It would undermine the constitutional rights of the accused, and it would hamper effective prosecutions. Surely we could provide more meaningful relief for crime victims than to engage in what most everyone knows is a purely symbolic gesture.

I thank the witnesses for appearing today, and I look forward to hearing their testimony.

I thank the Chairman of this Subcommittee.

Mr. FRANKS. I thank the gentleman.

And I would just remind the gentleman that the accused has constitutional rights outlined specifically in the Constitution whereas the victim heretofore does not. And we want to try to address that.

We want to try to protect everyone's constitutional rights. It always occurs to me sometimes that those who have been the victim of crime have a perspective on this that those who never have seem to somehow escape.

With that, I have to announce that they've just called votes. It's an unusual and unfortunate situation. I don't know why they don't check with me on these things.

But we're going to have to recess for approximately 1 hour to go and finish the votes. And I do hope you can all come back at that time, and we will continue forward. I'll introduce all the witnesses, and we will move forward with the hearing.

So, with that, the Committee stands in recess.

[Recess.]

Mr. FRANKS. Let me thank you all for your profound patience. This is a little unique today. We called votes much earlier than we usually do, and it was just one of those things. And I truly do apologize.

And I'm especially grateful for Mr. King for coming. I know this is a day when all Members are heading in different directions, and it's just unique situation.

So let me now introduce our witnesses. And just for the record—it has been for the record. You know, there is a recording and things like that taking place. So this always goes far beyond just the people in this room.

Our first witness is Paul Cassell. Paul is a professor of law at the University of Utah S.J. Quinney College of Law. Professor Cassell has written and lectured on the subjects of crime victims' rights as well as argued cases relating to crime victims' rights before numerous State and Federal courts, including before the United States Supreme Court.

Thank you for being here, Paul.

Our second witness is Collene Campbell. Collene and her husband, Gary Campbell—Gary—have been ardent victim advocates since the murder of their son, Scott, and the murder of Mrs. Campbell's brother, Mickey Thompson, and his wife Trudy.

Their personal experiences have led them to try to enact change in criminal justice reforms to benefit victims of violence and violent crime. Mrs. Campbell has been honored for her fight against crime by numerous top officials, including George H.W. Bush and including me. Thank you very much.

Our third witness, Amy Baron-Evans, National Sentencing Resource Counsel and Assistant Federal Public Defender for the Fed-

eral Public and Community Defenders in Boston, Massachusetts. She represents defenders' interests in sentencing policy matters, provides litigation support before the Supreme Court and Courts of Appeals, and teaches sentencing advocacy. She's authored numerous articles, papers, and briefs on Federal sentencing and other criminal law issues.

And thank you for being here with us.

Our fourth and final witness, Steven Kelly, a member of Silverman, Thompson, Slutkin & White, LLC, a litigation firm in the Baltimore, Washington area. Mr. Kelly is recognized nationally as an authority on crime victims' rights, and he regularly change—trains—I said change prosecutors. That might work better, huh?—trains prosecutors, law enforcement officers, and crime victims' rights on these topics.

Mr. Kelly has achieved significant victories on behalf of crime victims in civil suits against criminal offenders and third parties. Mr. Kelly is also a crime victim. His older sister, Mary, was raped and murdered in 1988.

Thank you for being here, Mr. Kelly.

Mr. KELLY. Thank you, Mr. Chairman.

Mr. FRANKS. Each of the witnesses' written statements will be entered into the record in its entirety. And I'd ask that each witness summarize his or her testimony in 5 minutes or less.

To help you stay within that time, there is a timing light in front of you. The light will switch from green to yellow, indicating that you have 1 minute to conclude your testimony. When the light turns red, it indicates that the witness' 5 minutes have expired.

Now, before I recognize the witness, it is the tradition of the Subcommittee that they be sworn. So if you'll please stand to be sworn.

Do you solemnly swear that the testimony you're about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

[Witnesses sworn.]

Mr. FRANKS. You may be seated. Let the record reflect that the witnesses answered in the affirmative.

And so I would now recognize—I would now recognize the distinguished gentleman from Iowa, Mr. King, for an opening statement.

Mr. KING. Thank you, Mr. Chairman.

I thank the witnesses for traveling and being here today to testify before this congressional hearing.

And I wanted to just lay down a couple of things about how I think about this. I think it's maybe not unique, but it might be unique in this Congress.

The narrative starts like this. Sometime back in 1987 I had my heavy equipment vandalized by a couple of people that were attempting to destroy my company, and we did catch them. And I believed it was my job to cooperate in all ways with the prosecution of those people that have brought out hundreds of thousands of dollars of damage out of the tiny little capital base that I had accumulated over the years in that construction business.

And I recall sitting in the courtroom in Sac County, Iowa. When they read the case in, they said, "This is the case of the State versus Jason Martin Powell." And I was sitting there and I realized at that moment I'm not in this equation. This is the State versus

Jason Martin Powell, a now-convicted perpetrator of those hundreds of thousands of dollars' worth of damage to my life's work, and it caused me to think about crime and punishment in a different way.

So I would just say take this back to Old English common law, the root of this, of our crime, our criminal law here in this country, how if you poached a deer, it was the king's deer. If you damaged or killed one of the serfs, it was the king's serf whose job it was to work and grow the economy for the king. The king owned everything. It was under his control. If you were born there, you were his subject. And so the crime was against the king, not against the individual.

And so the crime victims really don't have rights under the origin of the Old English common law. And for a long time in this country, until the last couple of decades, crime victims have had no rights either.

And I recall also a study that was done by Cato back in about 1994, and they calculated the cost to the crime victim due to crime. And there was a chart there on how they assigned it. I remember that they assigned \$82,000 as the cost of a rape. I have never heard of anybody that wanted to submit to such a thing for 82,000, but that was their price.

Also, back in the early 1990's, the Department of Justice did a study that quantified in numerical terms the loss to our society as the price paid by—not by the taxpayers, not by the king, not by our criminal justice system in this country, but the price that's paid by crime victims.

And the reason that we haven't addressed this any better is because—and you know this far better than I do—the price for crime is paid not by the taxpayers across the board, on average, so that we all share in that, but it's paid in great, huge, whopping chunks from the victims of crimes themselves. And so, because their voices are few in proportion to the broader society, we haven't listened as much as we need to about the rights of the victims of crimes.

And so, in that Cato study, their calculation was then that it was costing \$18,000 to incarcerate a typical criminal and that typical criminal, on average, though, if they were loose on the street, would commit 444,000 dollars' worth of damage to society paid by maybe a single crime victim or a handful of crime victims.

And it occurred to me, as I thought this through, having been forced into this as a crime victim myself, that we are subject to the criminal justice system and we are asked never to be vigilantes, to always accept that law enforcement will enforce the law, criminal prosecution will get justice, and then we are a bystander as crime victims.

Well, if that's the case and if Government gets justice, then, that is fine. I'm good with that. But if the taxpayers that were funding then at \$18,000 a year to incarcerate criminals actually had to pay the full amount of the damage due to crime, they would then incarcerate criminals—more of them and longer because it would be a better return on their investment.

But they are getting off without paying the price. The victims are paying the price. And I'm hopeful that some of the things we talk about here today helps shift that balance in the direction more of

the rights of crime victims and that we put that equation in place that there's a return on investment for prosecution, incarceration, of criminals and for everyone that's locked up, at least in theory, we're protecting victims by incarcerating criminals.

And there's a little bit of a crime restitution fund that's in a good number of the States. It doesn't amount to very much. It's a token. But I would like us to take a good look at that token and find a better way to respect and honor the rights of the crime victims in a more objective approach.

So that, Mr. Chairman, was a little bit out of the ordinary this morning, but I appreciate you recognizing me to speak. And I appreciate this hearing. And I appreciate our witnesses.

Thank you. And I yield back

Mr. FRANKS. Well, thank you, Mr. King, and I certainly appreciate you being here, sir.

I would now like to recognize our first witness, Mr. Paul Cassell.

And, sir, if you would, turn on your microphone before you start and maybe pull it close to you.

Mr. CASSELL. All right. There we go. How is that?

Mr. FRANKS. Yes, sir.

**TESTIMONY OF PAUL G. CASSELL, RONALD N. BOYCE PRESIDENTIAL PROFESSOR OF CRIMINAL LAW, S.J. QUINNEY COLLEGE OF LAW AT THE UNIVERSITY OF UTAH**

Mr. CASSELL. Well, Chairman Franks and distinguished Members of the Committee, I appreciate you inviting me here today.

When we talk about our Constitution, it enumerates certain rights for defendants, but it doesn't say even a single word on behalf of crime victims. How shocking it would be to describe a system in which defendants didn't have any right to notice of court hearings, to attend those hearings, to speak at appropriate points in those hearings. And, yet, that's the exactly the situation that crime victims in America find themselves today, at least under our Constitution.

I think Representative King put it very eloquently a moment ago when he said victims aren't even in the equation, and that's the situation of our Constitution. Every year, 2 out of 100 Americans will become victims of violent crimes and 13 out of 100 Americans will become victims of property crimes. And, yet, when they come forward to report those crimes, all too often they'll find that the system doesn't consider their interests at all.

And we know who these victims are. I think Representative Cohen and Representative Conyers mentioned this morning that disproportionately victims are from the ranks of the poor, from people of color, and others who are in the worst position, in some ways, to protect themselves.

In the trials, defendants will be allowed, obviously, to attend the hearing. And, yet, we will hear later today from the Campbells about how they were excluded from a trial involving a murder of a family member.

We'll hear later today from Steve Kelly, who will talk about some of his clients. They go into court hearings and discover that they can't say anything about a plea bargain or aren't consulted about important steps in the process.

Now, if we're talking about responding to these kinds of injustices, I think we need to go back to 1982, when President Reagan's task force on the victims of crime recommended that our Constitution be amended to provide protection for victims of crime.

And after that recommendation, victims' rights advocates went to the great laboratories of the States, and now more than 30 States have passed their own State amendments protecting victims' rights. And those have certainly improved the treatment of victims in our system, but, sadly, they haven't accomplished the job.

Attorney General Janet Reno asked her Justice Department to survey the situation, and the Justice Department reported that efforts to secure victims' rights through means other than a Federal constitutional amendment have proved less than fully adequate. These significant State efforts simply are not sufficiently consistent, comprehensive, or authoritative to safeguard victims' rights.

So the Federal amendment would draw on the experience of the State system, but elevate victims' rights to the level of Federal constitutional protection. At the core of the amendment is a guarantee that victims of violent and other serious crimes will receive notice of court hearings. They'll be able to attend those hearings, and they'll be able to speak at appropriate points in the process, such as bail hearings, plea hearings, and sentencing hearings. They will also have the right to proceedings free from unreasonable delay.

And let me just pull that out as an illustration of how the amendment would work. Representative Cohen said earlier this morning that he thought that would interfere with a defendant's right to adequately investigate a case. Not at all. The provision in the proposed amendment is that victims would have rights to proceedings free from unreasonable delays. And, of course, giving the defendant an opportunity to prepare would not be unreasonable delay.

And so I challenge those who are critics of the amendment to come forward with real-world examples of where these kinds of provisions have created these parade of horrors that they trot out.

I was interested to read Ms. Baron-Evans' testimony. There are five States now—or, actually, more—Arizona, California, Illinois, Michigan, Missouri, and Wisconsin—that all have in their State Constitutions provisions that protect the right to be free from unreasonable delay. And, yet, there isn't a single illustration that they've been able to offer of a defendant being deprived of a chance to investigate his case.

So the Federal amendment would establish a basic package of victims' rights, a floor below which States would not be able to go. This thwarts no new violence to the important principle of Federalism. Rightly or wrongly, our Supreme Court has already constitutionalized many aspects of our criminal justice system. And all the amendment would say is, if we're going to have a constitutionalized set of rights for defendants that applies through the country, let's do the same for victims of crimes.

As you mentioned earlier today, the amendment has broad bipartisan support. Earlier versions of the amendment were endorsed by President Bill Clinton, President George Bush, then-Senator and now-Vice President Joe Biden. And so Congress should follow the

bipartisan advice of these leaders and make this amendment the next amendment.

It's no accident that the symbol of justice is a set of scales. Justice for both a defendant and a victim is a worthy goal to pursue, and the proposed victims' rights amendment would help make that lofty goal a reality.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Cassell follows:]

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STATEMENT  
OF

PAUL G. CASSELL

RONALD N. BOYCE PRESIDENTIAL PROFESSOR OF CRIMINAL LAW  
S.J. QUINNEY COLLEGE OF LAW AT THE UNIVERSITY OF UTAH

BEFORE

THE HOUSE JUDICIARY COMMITTEE  
SUBCOMMITTEE ON THE CONSTITUTION

ON

THE VICTIM'S RIGHTS AMENDMENT

ON

MAY 1, 2015

WASHINGTON, D.C.

## I. INTRODUCTION

Mr. Chairman and Distinguished Members of the Subcommittee:

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

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

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

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

Part III discusses normative objections to a constitutional amendment protecting victims' rights — that is, objections to the desirability of the rights. This part begins by reviewing the defendant-oriented objections leveled against a few of the rights, specifically the victim's right to be heard at sentencing, the victim's right to be present at trial, and the victim's right to a trial free from unreasonable delay. These objections all lack merit. I conclude by refuting the prosecution-oriented objections to victims' rights, which revolve primarily around alleged excessive consumption of scarce criminal justice resources. These claims, however, are inconsistent with the available empirical evidence on the limited cost of victims' rights regimes in the states.

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

Part V then turns to structural objections to the Amendment — claims that victims' rights are not properly constitutionalized. Contrary to this view, protection of the rights of citizens to participate in governmental processes is a subject long recognized as an appropriate one for a constitutional amendment. Moreover, constitutional protection for victims also can be crafted in ways that are sufficiently flexible to accommodate varying circumstances and varying criminal justice systems from state to state.

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

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

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

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

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

## II. A BRIEF HISTORY OF THE EFFORTS TO PASS A VICTIMS' RIGHTS AMENDMENT<sup>1</sup>

### A. *The Crime Victims' Rights Movement.*

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

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

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

<sup>3</sup> See generally BELOOF, CASSELL & TWIST, *supra* note 2, at 29-38; Douglas E. Beloof, *The Third Wave of Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 255 [hereinafter Beloof, *Standing, Remedy, and Review*]; Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1380-82.

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

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

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

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

<sup>5</sup> *Id.* at 114.

<sup>6</sup> *Id.* at 63.

<sup>7</sup> *Id.* at 72-73.

<sup>8</sup> *Id.* at 114 (emphasis omitted).

<sup>9</sup> See S. REP. NO. 108-191 (2003).

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

<sup>11</sup> Pub. L. No. 97-291, 96 Stat. 1248 (1982).

<sup>12</sup> Pub. L. No. 98-473, 98 Stat. 1837 (1984).

<sup>13</sup> Pub. L. No. 101-647, 104 Stat. 4789 (1990).

<sup>14</sup> Pub. L. No. 103-322, 108 Stat. 1796 (1994).

<sup>15</sup> Pub. L. No. 104-132, 110 Stat. 1214 (1996).

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

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

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

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

<sup>16</sup> Pub. L. No. 105-6, 111 Stat. 12 (1997).

<sup>17</sup> Pub. L. No. 108-405, 118 Stat. 2260 (2004).

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

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

<sup>20</sup> *Id.* § 502(b).

<sup>21</sup> *Id.* § 502(b)(1).

<sup>22</sup> *Id.* § 502(b)(3).

<sup>23</sup> *Id.* § 502(b)(5).

<sup>24</sup> *Id.* § 502(b)(4).

<sup>25</sup> *Id.* § 502(a).

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

<sup>27</sup> See generally U.S.C. tit. 18.

<sup>28</sup> THOMSON WEST, FEDERAL CRIMINAL CODE AND RULES (2012 ed. 2012).

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

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

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

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

To place victims’ rights in the Constitution, victims’ advocates (led most prominently by the National Victims Constitutional Amendment Network<sup>32</sup>) approached the President and Congress about a federal amendment.<sup>33</sup> In April 22, 1996, Senators Kyl and Feinstein introduced a federal victims’ rights amendment with the backing of President Clinton.<sup>34</sup> The intent of the amendment was “to restore, preserve, and protect, as a matter of right for the victims of violent crimes, the practice of victim participation in the administration of criminal justice that was the birthright of every American at the founding of our Nation.”<sup>35</sup> A companion resolution was introduced in the House of Representatives.<sup>36</sup> The proposed amendment embodied seven core principles: (1) the right to notice of proceedings; (2) the right to be present; (3) the right to be heard; (4) the right to notice of the defendant’s release or escape; (5) the right to restitution; (6) the right to a speedy trial; and (7) the right to reasonable protection. In a later resolution, an eighth principle was added: standing.<sup>37</sup>

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

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

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

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

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

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

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

<sup>36</sup> H.R.J. Res. 174, 104th Cong. (1996).

<sup>37</sup> S.J. Res. 65, 104th Cong. (1996).

<sup>38</sup> S.J. Res. 6, 105th Cong. (1997).

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

the following year.<sup>40</sup> The Senate Judiciary Committee held hearings<sup>41</sup> and passed the proposed amendment out of committee.<sup>42</sup> The full Senate did not consider the amendment. In 1999, Senators Kyl and Feinstein again proposed the amendment.<sup>43</sup> On September 30, 1999, the Judiciary Committee again voted to send the amendment to the full Senate.<sup>44</sup> But on April 27, 2000, after three days of floor debate, the amendment was shelved when it became clear that its opponents had the votes to sustain a filibuster.<sup>45</sup> At the same time, hearings were held in the House on the companion measure there.<sup>46</sup>

Discussions about the amendment began again after the 2000 presidential elections. On April 15, 2002, Senators Kyl and Feinstein again introduced the amendment.<sup>47</sup> The following day, President Bush announced his support.<sup>48</sup> On May 2, 2002, a companion measure was proposed in the House.<sup>49</sup> On January 7, 2003, Senators Kyl and Feinstein proposed the amendment as S.J. Res. 1.<sup>50</sup> The Senate Judiciary Committee held hearings in April of that year,<sup>51</sup> followed by a written report supporting the proposed amendment.<sup>52</sup> On April 20, 2004, a motion to proceed to consideration of the amendment was filed in the Senate.<sup>53</sup> Shortly thereafter, the motion to proceed was withdrawn when proponents determined they did not have the sixty-seven votes necessary to pass the measure.<sup>54</sup> After it became clear that the necessary super-majority was not available to amend the Constitution, victims' advocates turned their attention to enactment of a comprehensive victims' rights statute.

#### *B. The Crime Victims' Rights Act.*

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

<sup>40</sup> S.J. Res. 44, 105th Cong. (1998).

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

<sup>42</sup> See 144 CONG. REC. 22496 (1998).

<sup>43</sup> S.J. Res. 3, 106th Cong. (1999).

<sup>44</sup> See 146 CONG. REC. 6020 (2000).

<sup>45</sup> *Id.*

<sup>46</sup> H.R.J. Res. 64, 106th Cong. (1999).

<sup>47</sup> S.J. Res. 35, 107th Cong. (2002).

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

<sup>49</sup> H.R.J. Res. 91, 107th Cong. (2002).

<sup>50</sup> S. REP. NO. 108-191, at 6 (2003).

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

<sup>52</sup> S. REP. NO. 108-191.

<sup>53</sup> Kyl et al., *supra* note 38, at 591.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 591-92.

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

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

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

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

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

<sup>56</sup> 150 CONG. REC. 7295 (2004) (statement of Sen. Feinstein).

<sup>57</sup> *Id.* at 7296 (statement of Sen. Feinstein).

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

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

<sup>60</sup> § 3771.

<sup>61</sup> *Id.* § 3771(c).

<sup>62</sup> *Cf.* Bloof, *Standing, Remedy, and Review*, *supra* note 8, at 283 (identifying this as a pervasive flaw in victims' rights enactments).

<sup>63</sup> § 3771(d).

<sup>64</sup> *Id.* § 3771(d)(3).

<sup>65</sup> *Id.* § 3771(b)(1).

<sup>66</sup> 150 CONG. REC. 7302 (2004) (statement of Sen. Kyl).

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

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

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

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

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

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

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

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

<sup>71</sup> *Id.* at 1095.

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

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

<sup>74</sup> *Id.* at 1316-17.

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

<sup>76</sup> *In re Antrobus*, 563 F.3d at 1099.

<sup>77</sup> Nate Carlisle, *Notes Confirm Suspicions of Trolley Square Victim's Family*, SALT LAKE TRIB., June 25, 2009, [http://www.sltrib.com/news/ci\\_12380112](http://www.sltrib.com/news/ci_12380112).

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

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

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

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

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

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

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

<sup>80</sup> See *In re Dean*, 527 F.3d at 392.

<sup>81</sup> *Id.* at 394.

<sup>82</sup> See *id.* at 392.

<sup>83</sup> *Id.* at 394.

<sup>84</sup> *Id.* at 396.

<sup>85</sup> *Id.* at 396.

<sup>86</sup> *Id.*

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

<sup>88</sup> See *National Clinic Network*, NAT'L CRIME VICTIM L. INST., [http://law.lclark.edu/centers/national\\_crime\\_victim\\_law\\_institute/projects/clinical\\_network/](http://law.lclark.edu/centers/national_crime_victim_law_institute/projects/clinical_network/).

<sup>89</sup> See *id.*

Because of the problems with implementing the CVRA, in early 2012 the National Victim Constitutional Amendment Network (“NVCAN”) decided it was time to re-approach Congress about the need for constitutional protection for crime victims’ rights.<sup>90</sup> Citing the continuing problems with implementing other-than-federal constitutional protections for crime victims, NVCAN proposed to Congress a new version of the Victims’ Rights Amendment. In 2012, Representatives Trent Franks (R-AZ) and Jim Costa (D-CA), introduced House Joint Resolution 106, a proposed constitutional amendment protecting victims right. This Subcommittee held a hearing on the proposal on April 26, 2012, but no further action was taken in that year. Again in 2013, Representatives Franks and Costa introduced a proposed amendment, House Joint Resolution 40. The Subcommittee held a hearing on the proposal on April 25, 2013,<sup>91</sup> but took no further action.

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

### III. NORMATIVE CHALLENGES<sup>92</sup>

The most basic level at which the proposed Victims’ Rights Amendment could be disputed is the normative one: victims’ rights are simply undesirable. Few of the objections to the Amendment, however, start from this premise. Instead, the vast bulk of the opponents flatly concede the need for victim participation in the criminal justice system. For example, during the 2013 hearing before this Committee, Representative Conyers, while raising concerns about the Amendment, called on Congress to consider “what more we can do to aid the victims of crime.”<sup>93</sup> Similarly, the senators on the 1998 Senate Judiciary Committee who dissented from supporting the Amendment<sup>94</sup> began by agreeing that “[t]he treatment of crime victims certainly is of central importance to a civilized society, and we must never simply ‘pass by on the other side.’”<sup>95</sup> Additionally, various law professors who sent a letter to Congress opposing the Amendment similarly begin by explaining that they “commend and share the desire to help crime victims” and that “[c]rime victims deserve protection.”<sup>96</sup> Further, Professor Mosteller agrees that

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

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

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

<sup>93</sup> 2013 House Hearing, *supra* note 91, at 7.

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

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

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

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

Many of the critics of the Amendment agree not only with the general sentiments of victims’ rights advocates but also with many of their specific policy proposals. For example, Representative Nadler stated during the 2013 hearing before this Subcommittee that protecting victims’ rights is “a subject of great importance to every Member of this House” and noted “our responsibility to ensure that the victims of crime have their rights respected [and] their needs met.”<sup>98</sup> Striking evidence of this agreement comes from the federal statute, originally proposed by the dissenting senators, which extends to victims in the federal system most of the same rights provided in the Amendment.<sup>99</sup> Other critics, too, have suggested protection for victims in statutory rather than constitutional terms.<sup>100</sup> Reviewing the relevant congressional hearings and academic literature reveals that many of the important provisions of the Amendment garner wide acceptance. Few disagree, for example, that victims of violent crime should receive notice that the offender has escaped from custody and should receive restitution from an offender. What is most striking, then, about debates over the Amendment is not the scattered points of disagreement, but rather the abundant points of *agreement*.<sup>101</sup> This harmony suggests that the Amendment satisfies a basic requirement for a constitutional amendment—that it reflect values widely shared throughout society. There is, to be sure, normative disagreement about some of the proposed provisions in the Amendment, and these disagreements are analyzed below. But the natural tendency to focus on points of conflict should not obscure the substantial points of widespread agreement.

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

#### A. Defendant-Oriented Challenges to Victims’ Rights.

Perhaps the most frequently repeated claim against the Amendment is that it would harm defendants’ rights. Often this claim is made in general terms, relying on little more than the reflexive view that anything good for victims must be bad for defendants.<sup>102</sup> But, as the general

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

<sup>98</sup> 2013 House Hearing, *supra* note 91, at 8.

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

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

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

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

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

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

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

### 1. The Right to Be Heard

<sup>103</sup> Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B5. For a more detailed exposition of Professor Tribe's views, see *1996 House Judiciary Comm. Hearings*, *supra* note , at 238 (letter from Prof. Tribe).

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

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

<sup>106</sup> See generally Part VI, *infra*.

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

Some opponents of the Amendment object that the victim's right to be heard will interfere with a defendant's efforts to mount a defense. At least some of these objections refute straw men, not the arguments for the Amendment. For example, to prove that a victim's right to be heard is undesirable, objectors sometimes claim (as was done in the Senate Judiciary Committee minority report) that "[t]he proposed Amendment gives victims [a] constitutional right to be heard, if present, and to submit a statement at *all* stages of the criminal proceeding."<sup>108</sup> From this premise, the objectors then postulate that the Amendment would make it "much more difficult for judges to limit testimony by victims *at trial*" and elsewhere to the detriment of defendants.<sup>109</sup> This constitutes an almost breathtaking misapprehension of the scope of the rights at issue. Far from extending victims the right to be heard at "all" stages of a criminal case including the trial, the Amendment explicitly limits the right to public "proceedings to determine a conditional release from custody, an acceptance of a negotiated plea, or a sentence."<sup>110</sup> At these three kinds of hearings—bail, plea, and sentencing—victims have compelling reasons to be heard and can be heard without adversely affecting the defendant's rights.

Proof that victims can properly be heard at these points comes from what appears to be a substantial inconsistency by the dissenting senators. While criticizing the right to be heard in the Amendment, these senators simultaneously sponsored federal legislation to extend to victims in the federal system precisely the same rights.<sup>111</sup> They urged their colleagues to pass their statute in lieu of the Amendment because "our bill provides the very same rights to victims as the proposed constitutional amendment."<sup>112</sup> In defending their bill, they saw no difficulty in giving victims a chance to be heard,<sup>113</sup> a right that already exists in many states.<sup>114</sup>

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

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

<sup>109</sup>*Id.* (emphasis added).

<sup>110</sup>S.J. Res. 3, 106th Cong. § 1 (1999).

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

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

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

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

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

<sup>116</sup>See *id.* at 390-93.

provides no general basis for objecting to a victim's right to be heard at sentencing. Her criticism of victim impact statements is limited to *capital* cases, a tiny fraction of all criminal trials.<sup>117</sup>

Professor Bandes' objection is important to consider carefully because it presents one of the most thoughtfully developed cases against victim impact statements.<sup>118</sup> Her case, however, is ultimately unpersuasive. She agrees that capital sentencing decisions ought to rest, at least in part, on the harm caused by murderers.<sup>119</sup> She explains that, in determining which murderers should receive the death penalty, society's "gaze ought to be carefully fixed *on the harm they have caused* and their moral culpability for that harm."<sup>120</sup> Bandes then contends that victim impact statements divert sentencers from that inquiry to "irrelevant fortuities" about the victims and their families.<sup>121</sup> But in moving on to this point, she apparently assumes that a judge or jury can comprehend the full harm caused by a murder without hearing testimony from the surviving family members. That assumption is simply unsupported. Any reader who disagrees with me should take a simple test. Read an actual victim impact statement from a homicide case all the way through and see if you truly learn nothing new about the enormity of the loss caused by a homicide. Sadly, the reader will have no shortage of such victim impact statements to choose from. Actual impact statements from court proceedings are accessible in various places.<sup>122</sup> Other examples can be found in moving accounts written by family members who have lost a loved one to a murder. A powerful example is the collection of statements from families devastated by the Oklahoma City bombing collected in Marsha Kight's affecting *Forever Changed: Remembering Oklahoma City, April 19, 1995*.<sup>123</sup> Kight's compelling book is not unique, as equally powerful accounts from the family of Ron Goldman,<sup>124</sup> children of Oklahoma City,<sup>125</sup> Alice Kaminsky,<sup>126</sup> George Lardner Jr.,<sup>127</sup> Dorris Porch and Rebecca Easley,<sup>128</sup> Mike

<sup>117</sup> See *id.* at 392–93.

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

<sup>119</sup> See Bandes, *supra* note 115, at 398.

<sup>120</sup> *Id.* (emphasis added).

<sup>121</sup> *Id.*

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

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

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

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

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

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

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

Reynolds,<sup>129</sup> Deborah Spungen,<sup>130</sup> John Walsh,<sup>131</sup> and Marvin Weinstein<sup>132</sup> make all too painfully clear. Intimate third-party accounts offer similar insights about the generally unrecognized, yet far-ranging consequences of homicide.<sup>133</sup>

Professor Bandes acknowledges the power of hearing from victims' families. Indeed, in a commendable willingness to present victim statements with all their force, she begins her article by quoting from the victim impact statement at issue in *Payne v. Tennessee*,<sup>134</sup> a statement from Mary Zvolanek about her daughter's and granddaughter's deaths and their effect on her three-year-old grandson:

He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie.<sup>135</sup>

Bandes quite accurately observes that the statement is "heartbreaking" and "[o]n paper, it is nearly unbearable to read."<sup>136</sup> She goes on to argue that such statements are "prejudicial and inflammatory" and "overwhelm the jury with feelings of outrage."<sup>137</sup> In my judgment, Bandes fails here to distinguish sufficiently between prejudice and *unfair* prejudice from a victim's statement. It is a commonplace of evidence law that a litigant is not entitled to exclude harmful evidence, but only *unfairly* harmful evidence.<sup>138</sup> Bandes appears to believe that a sentence imposed following a victim impact statement rests on unjustified prejudice; alternatively, one might conclude simply that the sentence rests on a fuller understanding of all of the murder's harmful ramifications. Why is it "heartbreaking" and "nearly unbearable to read" about what it is like for a three-year-old to witness the murder of his mother and his two-year-old sister? The answer, judging from why my heart broke as I read the passage, is that we can no longer treat the crime as some abstract event. In other words, we begin to realize the nearly unbearable

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

<sup>130</sup> See DEBORAH SPUNGEN, AND I DON'T WANT TO LIVE THIS LIFE (1983).

<sup>131</sup> See JOHN WALSH, TEARS OF RAGE: FROM GRIEVING FATHER TO CRUSADER FOR JUSTICE: THE UNTOLD STORY OF THE ADAM WALSH CASE (1997). Professor Henderson describes Walsh as "preaching [a] gospel of rage and revenge." Henderson, *supra* note 118, at [18]. This seems to me to misunderstand Walsh's efforts, which Walsh has explained as making sure that his son Adam "didn't die in vain." WALSH, *supra*, at 305. Walsh's Herculean efforts to establish the National Center for Missing and Exploited Children, *see id.* at 131-58, is a prime example of neither rage nor revenge, but rather a desirable public policy reform springing from a tragic crime.

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

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

<sup>134</sup> 501 U.S. 808 (1991).

<sup>135</sup> Bandes, *supra* note 115, at 361 (quoting *Payne*, 501 U.S. at 814-15).

<sup>136</sup> *Id.* at 361.

<sup>137</sup> *Id.* at 401.

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

heartbreak—that is, the actual and total harm—that the murderer inflicted.<sup>139</sup> Such a realization undoubtedly will hamper a defendant’s efforts to escape a capital sentence. But given that loss is a proper consideration for the jury, the statement is not unfairly detrimental to the defendant. Indeed, to conceal such evidence from the jury may leave them with a distorted, minimized view of the impact of the crime.<sup>140</sup> Victim impact statements are thus easily justified because they provide the jury with a full picture of the murder’s consequences.<sup>141</sup>

Bandes also contends that impact statements “may completely block” the ability of the jury to consider mitigation evidence.<sup>142</sup> It is hard to assess this essentially empirical assertion, because Bandes does not present direct empirical support.<sup>143</sup> Clearly many juries decline to return death sentences even when presented with powerful victim impact testimony, with Terry Nichols’s life sentence for conspiring to set the Oklahoma City bomb a prominent example. Indeed, one recent empirical study of decisions from jurors who actually served in capital cases found that facts about adult victims “made little difference” in death penalty decisions.<sup>144</sup> A case might be crafted from the available national data that Supreme Court decisions on victim impact testimony did, at the margin, alter some cases. It is arguable that the number of death sentences imposed in this country fell after the Supreme Court prohibited use of victim impact statements

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

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

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

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

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

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

in 1987<sup>145</sup> and then rose when the Court reversed itself a few years later.<sup>146</sup> As discussed in greater length in elsewhere,<sup>147</sup> however, this conclusion is far from clear and, in any event, the effect on likelihood of a death sentence would be, at most, marginal.

The empirical evidence in noncapital cases also finds little effect on sentence severity. For example, a study in California found that “[t]he right to allocution at sentencing has had little net effect . . . on sentences in general.”<sup>148</sup> A study in New York similarly reported “no support for those who argue against [victim impact] statements on the grounds that their use places defendants in jeopardy.”<sup>149</sup> A careful scholar reviewed comprehensively all of the available evidence in this country and elsewhere, and concluded that “sentence severity has not increased following the passage of [victim impact] legislation.”<sup>150</sup> It is thus unclear why we should credit Bandes’s assertion that victim impact statements seriously hamper the defense of capital defendants.

Even if such an impact on capital sentences were proven, it would be susceptible to the reasonable interpretation that victim testimony did not “block” jury understanding, but rather presented enhanced information about the full horror of the murder or put in context mitigating evidence of the defendant. Professor David Friedman has suggested this conclusion, observing that “[i]f the legal rules present the defendant as a living, breathing human being with loving parents weeping on the witness stand, while presenting the victim as a shadowy abstraction, the

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

<sup>146</sup> See *Payne*, 501 U.S. at 830 (overruling *Booth*).

<sup>147</sup> See Cassell, *Barbarians at the Gates?*, *supra* note 92, at 540-44.

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

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

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

result will be to overstate, in the minds of the jury, the cost of capital punishment relative to the benefit.<sup>151</sup> Correcting this misimpression is not distorting the decision-making process, but eliminating a distortion that would otherwise occur.<sup>152</sup> This interpretation meshes with empirical studies in noncapital cases suggesting that, if a victim impact statement makes a difference in punishment, the description of the harm sustained by the victims is the crucial factor.<sup>153</sup> The studies thus indicate that the general tendency of victim impact evidence is to enhance sentence accuracy and proportionality rather than increase sentence punitiveness.<sup>154</sup>

Finally, Bandes and other critics argue that victim impact statements result in unequal justice.<sup>155</sup> Justice Powell made this claim in his since-overturned decision in *Booth v. Maryland*, arguing that “in some cases the victim will not leave behind a family, or the family members may be less articulate in describing their feelings even though their sense of loss is equally severe.”<sup>156</sup> This kind of difference, however, is hardly unique to victim impact evidence.<sup>157</sup> To provide one obvious example, current rulings from the Court invite defense mitigation evidence from a defendant’s family and friends, despite the fact that some defendants may have more or less articulate acquaintances. In *Payne*, for example, the defendant’s parents testified that he was “a good son” and his girlfriend testified that he “was affectionate, caring, and kind to her children.”<sup>158</sup> In another case, a defendant introduced evidence of having won a dance choreography award while in prison.<sup>159</sup> Surely this kind of testimony, no less than victim impact statements, can vary in persuasiveness in ways not directly connected to a defendant’s culpability;<sup>160</sup> yet, it is routinely allowed. One obvious reason is that if varying persuasiveness were grounds for an inequality attack, then it is hard to see how the criminal justice system could survive at all. Justice White’s powerful dissenting argument in *Booth* went unanswered, and remains unanswerable: “No two prosecutors have exactly the same ability to present their arguments to the jury; no two witnesses have exactly the same ability to communicate the facts; but there is no requirement . . . [that] the evidence and argument be reduced to the lowest common denominator.”<sup>161</sup>

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

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

<sup>153</sup> See Erez & Tontodonato, *supra* note 150, at 469.

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

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

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

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

<sup>158</sup> *Payne*, 501 U.S. at 826.

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

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

<sup>161</sup> *Booth*, 482 U.S. at 518 (White, J., dissenting).

Given that our current system allows almost unlimited mitigation evidence on the part of the defendant, an argument for equal justice requires, if anything, that victim statements be allowed. Equality demands fairness not only *between* cases, but also *within* cases.<sup>162</sup> Victims and the public generally perceive great unfairness in a sentencing system with “one side muted.”<sup>163</sup> The Tennessee Supreme Court stated the point bluntly in its decision in *Payne*, explaining that “[i]t is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant . . . without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims.”<sup>164</sup> With simplicity but haunting eloquence, a father whose ten-year-old daughter, Staci, was murdered, made the same point.<sup>165</sup> Before the sentencing phase began, Marvin Weinstein asked the prosecutor for the opportunity to speak to the jury because the defendant’s mother would have the chance to do so.<sup>166</sup> The prosecutor replied that Florida law did not permit this.<sup>167</sup> Here was Weinstein’s response to the prosecutor

What? I’m not getting a chance to talk to the jury? He’s not a defendant anymore. He’s a murderer! A convicted murderer! The jury’s made its decision. . . His mother’s had her chance all through the trial to sit there and let the jury see her cry for him while I was barred.<sup>168</sup> . . . Now she’s getting another chance? Now she’s going to sit there in that witness chair and cry for her son, that murderer, that murderer who killed my little girl!

Who will cry for Staci? Tell me that, who will cry for Staci?<sup>169</sup>

There is no good answer to this question,<sup>170</sup> a fact that has led to a change in the law in Florida and, indeed, all around the country. Today the laws of the overwhelming majority of states admit victim impact statements in capital and other cases.<sup>171</sup> These prevailing views lend strong support to the conclusion that equal justice demands the inclusion of victim impact statements, not their exclusion.

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

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

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

<sup>165</sup> See SHAPIRO, *supra* note 132, at 215.

<sup>166</sup> See *id.* at 215–16.

<sup>167</sup> See *id.*

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

<sup>169</sup> *Id.* at 319–20.

<sup>170</sup> A narrow, incomplete answer might be that neither the defendant’s mother nor the victim’s father should be permitted to cry in front of the jury. But assuming an instruction from the judge not to cry, the question would still remain why the defendant’s mother could testify, but not the victim’s father.

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

These arguments sufficiently dispose of the critics' main contentions. Nonetheless, it is important to underscore that the critics generally fail to grapple with one of the strongest justifications for admitting victim impact statements: avoiding additional trauma to the victim. For all the fairness reasons just explained, gross disparity between defendants' and victims' rights to allocute at sentencing creates the risk of serious psychological injury to the victim.<sup>172</sup> As Professor Douglas Beloof has nicely explained, a justice system that fails to recognize a victim's right to participate threatens "secondary harm"—that is, harm inflicted by the operation of government processes beyond that already caused by the perpetrator.<sup>173</sup> This trauma stems from the fact that the victim perceives that the "system's resources are almost entirely devoted to the criminal, and little remains for those who have sustained harm at the criminal's hands."<sup>174</sup> As two noted experts on the psychological effects of crime have concluded, failure to offer victims a chance to participate in criminal proceedings can "result in increased feelings of inequity on the part of the victims, with a corresponding increase in crime-related psychological harm."<sup>175</sup> On the other hand, there is mounting evidence that "having a voice may improve victims' mental condition and welfare."<sup>176</sup> For some victims, making a statement helps restore balance between themselves and the offenders.<sup>177</sup> Others may consider it part of a just process or may want "to communicate the impact of the offense to the offender."<sup>178</sup> And if the judge acknowledges what the victim has said in the statement, the judge's words can be (as one victim put it) "balm for her soul."<sup>179</sup> This multiplicity of reasons explains why victims and surviving family members want so desperately to participate in sentencing hearings, even though their participation may not necessarily change the outcome.<sup>180</sup>

<sup>172</sup> For general discussion of the harms caused by disparate treatment, see LINDA E. LEDRAY, *RECOVERING FROM RAPE* 125 (2d ed. 1994) (noting that it is important in healing process for rape victims to take back control from rapist and to focus their anger towards him); LEE MADIGAN & NANCY C. GAMBLE, *THE SECOND RAPE: SOCIETY'S CONTINUED BETRAYAL OF THE VICTIM* 97 (1989) (noting that during arraignment, survivors "first realized that it was not their trial, [and] that the attacker's rights were the ones being protected."); Deborah P. Kelly, *Victims*, 34 WAYNE L. REV. 69, 72 (1987) (noting that "victims want[] more than pity and politeness; they want[] to participate"); Marlene A. Young, *A Constitutional Amendment for Victims of Crime: The Victims' Perspective*, 34 WAYNE L. REV. 51, 58 (1987) (discussing ways in which victims feel aggrieved from unequal treatment).

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

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

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

<sup>176</sup> Erez, *supra* note 139, at 10.

<sup>177</sup> See *id.*

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

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

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

The possibility of the sentencing process aggravating the grievous injuries suffered by victims and their families is generally ignored by the Amendment's opponents. But this possibility should give us great pause before we structure our criminal justice system to add the government's insult to criminally inflicted injury. For this reason alone, victims and their families, no less than defendants, should be given the opportunity to be heard at sentencing.

## 2. The Right to Be Present at Trial

The allegation that the Amendment will impair defendants' rights is most frequently advanced in connection with the victim's right to be present at trial.<sup>181</sup> The most detailed explication of the argument is Professor Mosteller's, advanced in the *Utah Law Review* Symposium on crime victims' rights.<sup>182</sup> In brief, Mosteller believes that fairness to defendants requires that victims be excluded from the courtroom, at least in some circumstances, to avoid the possibility that they might tailor their testimony to that given by other witnesses.<sup>183</sup> While I admire the doggedness with which Mosteller has set forth his position, I respectfully disagree with his conclusions for reasons articulated at length elsewhere.<sup>184</sup> Here it is only necessary to note that even this strong opponent of the Amendment finds himself agreeing with the value underlying the victim's right. He writes: "Many victims have a special interest in witnessing public proceedings involving criminal cases that directly touched their lives."<sup>185</sup> This view is widely shared. For instance, the Supreme Court has explained that "[t]he victim of the crime, the family of the victim, [and] others who have suffered similarly . . . have an interest in observing the course of a prosecution."<sup>186</sup> Victim concern about the prosecution stems from the fact that society has withdrawn "both from the victim and the vigilante the enforcement of criminal laws, but [it] cannot erase from people's consciousness the fundamental, natural yearning to see justice done—or even the urge for retribution."<sup>187</sup>

Professor Mosteller also seems to suggest that defendants currently have no constitutional right to exclude victims from trials, meaning that his argument rests purely on policy.<sup>188</sup> Mosteller's policy claim is not the general one that most victims ought to be excluded, but rather the much narrower one that "victims' rights to attend . . . proceedings should be guaranteed unless their presence threatens accuracy and fairness in adjudicating the guilt or innocence of the

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

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

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

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

<sup>185</sup> Mosteller, *Recasting the Battle*, *supra* note 97, at 1699.

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

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

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

defendant.”<sup>189</sup> On close examination, it turns out that, in Mosteller’s view, victims’ attendance threatens the accuracy of proceedings not in a typical criminal case, but only in the atypical case of a crime with multiple victims who are all eyewitness to the same event and who thus might tailor their testimony if allowed to observe the trial together.<sup>190</sup> This is a rare circumstance indeed, and it is hard to see the alleged disadvantage in this unusual circumstance outweighing the more pervasive advantages to victims in the run-of-the-mine cases.<sup>191</sup> Moreover, even in rare circumstances of multiple victims, other means exist for dealing with the tailoring issue.<sup>192</sup> For example, the victims typically have given pretrial statements to police, grand juries, prosecutors, or defense investigators that would eliminate their ability to change their stories effectively.<sup>193</sup> In addition, the defense attorney may argue to the jury that victims have tailored their testimony even when they have not<sup>194</sup>—a fact that leads some critics of the Amendment to conclude that this provision will, if anything, help defendants rather than harm them. The dissenting Senators, for example, make precisely this helps-the-defendant argument,<sup>195</sup> although at another point they present the contrary harms-the-defendant claim.<sup>196</sup> In short, the critics have not articulated a strong case against the victim’s right to be present.

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

Opponents of the Amendment sometimes argue that giving victims a right to “proceedings free from unreasonable delay” would impinge on a defendant’s right to prepare an adequate defense. For example, in 2013, Representative Conyers argued that the amendment “could wreak havoc” because it could allow a victim “to demand that a trial move ahead when the prosecution or the defense are trying to assemble a case.”<sup>197</sup> This argument fail to consider the precise scope of the victim’s right in question. The right the Amendment confers is one to

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

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

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

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

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

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

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

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

<sup>197</sup> 2013 House Hearing, *supra* note 91, at 8.

“proceedings free from *unreasonable* delay.”<sup>198</sup> The opponents never seriously grapple with the fact that, by definition, all of the examples that they give of defendants legitimately needing more time to prepare would constitute reasons for “reasonable” delay. Indeed, it is interesting to note similar language in the American Bar Association’s directions to defense attorneys to avoid “unnecessary delay” that might harm victims.<sup>199</sup>

Such a right, while not treading on any legitimate interest of a defendant, will safeguard vital interests of victims. Victims’ advocates have offered repeated examples of abusive delays by defendants designed solely for tactical advantage rather than actual preparation of the defense of a case.<sup>200</sup> Abusive delays appear to be particularly common when the victim of the crime is a child, for whom each day up until the case is resolved can seem like an eternity.<sup>201</sup> Such cases present a strong justification for this provision in the Amendment.

As long ago as 1982, the President’s Task Force on Victims of Crime offered suggestions for protecting a victim’s interest in a prompt disposition of the case.<sup>202</sup> In the years since then, it has been hard to find critics of victims’ rights willing to contend, on the merits, the need for protecting victims against abusive delay.<sup>203</sup> If anything, the time has arrived for the opponents of the victim’s right to proceedings free from unreasonable delay to address the serious problem of unwarranted delay in criminal proceedings or to concede that, here too, a strong case for the Amendment exists.

#### *B. Prosecution-Oriented Challenges to the Amendment*

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

It is sometimes argued (as Representative Conyers did in 2013) that the Amendment would allow “a victim who objected to the prosecution’s strategy . . . [to] sue an assert that his or her constitutional rights had been violated under this Amendment.”<sup>205</sup> But the VRA does not

<sup>198</sup> See Twist & Seiden, *supra* note 92, at 374.

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

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

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

<sup>202</sup> See PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 76 (1982).

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

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

<sup>205</sup> 2013 House Hearing, *supra* note 91, at 8.

allow victims to initiate or otherwise control the course of criminal prosecutions.<sup>206</sup> Instead, the Victims' Rights Amendment assumes a prosecution-directed system and simply grafts victims' rights onto it. Victims receive notification of decisions that the prosecution makes and, indeed, have the right to provide information to the court at appropriate junctures, such as bail hearings, plea bargaining, and sentencing. However, the prosecutor still files the complaint and moves it through the system, making decisions not only about which charges, if any, to file, but also about which investigative leads to pursue and which witnesses to call at trial. While the victim can follow her "own case down the assembly line" in Professor Belooof's colorful metaphor,<sup>207</sup> the fact remains that the prosecutor runs the assembly line. This general approach of grafting victims' rights onto the existing system mirrors the approach followed by all of the various state victims' amendments, and few have been heard to argue that the result has been interference with legitimate prosecution interests.

Perhaps an interferes-with-the-prosecutor objection might be refined to apply only against a victim's right to be heard on plea bargains, since this right arguably hampers a prosecutor's ability to terminate the prosecution. But today, it is already the law of many jurisdictions that the court must determine whether to accept or reject a proposed plea bargain after weighing all relevant interests,<sup>208</sup> and these kinds of problems have not materialized.<sup>209</sup> Given that victims undeniably have relevant, if not compelling, interests in proposed pleas, the Amendment neither breaks new theoretical ground nor displaces any legitimate prosecution interest. Instead, victim statements simply provide more information for the court to consider in making its decision.<sup>210</sup> The available empirical evidence also suggests that victim participation in the plea bargaining process does not burden the courts and produces greater victim satisfaction even where, as is often the case, victims ultimately do not influence the outcome.<sup>211</sup>

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

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

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

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

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

<sup>211</sup> See, e.g., Elizabeth N. Jones, *The Ascending Role of Crime Victims in Plea-Bargaining and Beyond*, 117 W. VA. L. REV. 97, 132-33 (2014) (concluding that while "[v]ictim participation in proceedings necessarily increases the time, however slight, involved in resolving cases," the "financial costs of allowing victims to participate during the plea-bargaining process in particular are minimal."); DEBORAH BUCHNER ET AL., INSLAW, INC., *EVALUATION OF*

In addition, critics of victim involvement in the plea process almost invariably overlook the long-standing acceptance of judicial review of plea bargains. These critics portray pleas as a matter solely for a prosecutor and a defense attorney to work out. They then display a handful of cases in which the defendant was ultimately acquitted at trial after courts had the temerity to reject a plea after hearing from victims. These cases, the critics maintain, prove that any outside review of pleas is undesirable.<sup>212</sup> The possibility of an erroneous rejection of a plea is, of course, inherent in any system allowing review of a plea. In an imperfect world, judges will sometimes err in rejecting a plea that, in hindsight, should have been accepted. The salient question, however, is whether as a whole judicial review does more good than harm—that is, whether, on balance, courts make more right decisions than wrong ones. Just as cases can be cited where judges possibly made mistakes in rejecting a plea, so too cases exist where judges rejected plea bargains that were unwarranted.<sup>213</sup> These reported cases of victims persuading judges to reject unjust pleas form just a small part of the picture, because in many other cases, the mere prospect of victim objection undoubtedly has restrained prosecutors from bargaining cases away without good reason. My strong sense is that judicial review of pleas by courts after hearing from victims more often improves rather than retards justice. The failure of the critics to contend on the issue of *net* effect and the growing number of jurisdictions that allow victim input is powerful evidence for this conclusion.

Another prosecution-based objection to victims' rights is that, while they are desirable in theory, in practice they would be unduly expensive.<sup>214</sup> But once victims arrive at the courthouse, their attendance at proceedings imposes no significant incremental costs. In exercising their right to attend, victims simply can sit in the benches that have already been built. Even in cases involving hundreds of victims, innovative approaches such as closed-circuit broadcasting have proven feasible.<sup>215</sup> As for the victim's right to be heard, the state experience reveals only a modest cost impact.<sup>216</sup>

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THE STRUCTURED PLEA NEGOTIATION PROJECT: EXECUTIVE SUMMARY 15, 21 (1984) (examining effects of structured plea negotiations in which judge, defendant, victim, prosecutor, and defense attorney all participate).

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

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

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

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

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

Most of the cost arguments have focused on the Amendment's notification provisions. Yet, it has long been recognized as sound prosecutorial practice to provide notice to victims. The National Prosecution Standards prepared by the National District Attorneys Association recommend that victims of violent crimes and other serious felonies should be informed, where feasible, of important steps in the criminal justice process.<sup>217</sup> In addition, many states have required that victims receive notice of a broad range of criminal justice proceedings. For nearly two decades, every state provides notice of the trial, sentencing, and parole hearings.<sup>218</sup> In spite of the fact that notice is already required in many circumstances across the country, the dissenting senators on the Judiciary Committee argued that the "potential costs of [the Amendment's] constitutionally mandated notice requirements alone are staggering."<sup>219</sup> Perhaps these predictions should simply be written off as harmless political rhetoric, but it is important to note that these suggestions are inconsistent with the relevant evidence. The experience with victim notice requirements already used at the state level suggests that the costs are relatively modest, particularly since computerized mailing lists and automated telephone calls can be used. The Arizona amendment serves as a good illustration. That amendment extends notice rights far beyond what is called for in the federal amendment,<sup>220</sup> yet, prosecutors did not find any incremental expense burdensome in practice.<sup>221</sup> Indeed, during the 2013 hearing, Maricopa County Attorney William Montgomery testified strongly in favor of the Amendment, explaining that even though his office is the fourth largest prosecuting office in the United States handling more than 35,000 felony each year, providing notice has not been burdensome and that "having crime victims present in a court room has actually assisted in prosecuting a because because they are often essential to the truth seeking function we serve."<sup>222</sup>

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

This CBO report is a good one on which to wrap up the discussion of normative objections to the Amendment. Here is an opportunity to see how the critics' claims fare when put

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

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

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

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

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

<sup>222</sup> 2013 House Hearing, *supra* note 91, at 20.

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

to a fair-minded and neutral assessment. In fact, the critics' often-repeated allegations of "staggering" costs were found to be exaggerated.

#### IV. JUSTIFICATION CHALLENGES<sup>224</sup>

Because the normative arguments for victims' rights are so powerful, some critics of the Victims' Rights Amendment take a different tack and mount what might be described as a justification challenge. This approach concedes that victims' rights may be desirable, but maintains that victims already possess such rights or can obtain such rights with relatively minor modifications in the current regime. An illustration of this attack is found in Professor Mosteller's testimony before this Committee in 2013,<sup>225</sup> building on a longer article entitled "The Unnecessary Victims' Rights Amendment" published in a 1999 *Utah Law Review* Symposium.<sup>226</sup> Mosteller contends that a constitutional amendment is not needed because the obstacles that victims face—described by Mosteller as "official indifference" and "excessive judicial deference"—can all be overcome without a constitutional amendment.<sup>227</sup>

Professor Mosteller's position is ultimately unpersuasive because it supplies a purely theoretical answer to a practical problem. In theory, victims' rights could be safeguarded without a constitutional amendment. It would only be necessary for actors within the criminal justice system—judges, prosecutors, defense attorneys, and others—to suddenly begin fully respecting victims' interests. The real-world question, however, is how to actually trigger such a shift in the *Zeitgeist*. For nearly two decades, victims have obtained a variety of measures to protect their rights. Yet, the prevailing view from those who work in the field is that these efforts "have all too often been ineffective."<sup>228</sup> Rules to assist victims "frequently fail to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indifference, [or] sheer inertia."<sup>229</sup> The view that state victim provisions have been and will continue to be often disregarded is widely shared, as some of the strongest opponents of the Amendment seem to concede the point. For example, Ellen Greenlee, President of the National Legal Aid and Defender Association, bluntly and revealingly told Congress that the state victims' amendments "so far have been treated as mere statements of principle that victims ought to be included and consulted more by prosecutors and courts. A state constitution is far . . . easier to ignore[] than the federal one."<sup>230</sup>

Professor Mosteller attempts to minimize the current problems, conceding only that "existing victims' rights are not uniformly enforced."<sup>231</sup> This is a grudging concession to the

<sup>224</sup> See generally Cassell, *Barbarians at the Gates?*, *supra* note 92, at 507-22.

<sup>225</sup> See 2013 House Hearings, *supra* note 91, at 34-39.

<sup>226</sup> Mosteller, *Unnecessary Amendment*, *supra* note 92.

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

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

<sup>229</sup> Tribe & Cassell, *supra* note 103, at B5.

<sup>230</sup> See, e.g., 2013 House Hearings, *supra* note 91, at 16-17.

<sup>231</sup> Mosteller, *Unnecessary Amendment*, *supra* note 92, at 445.

reality that victims' rights are often denied today, as numerous examples of violations of rights in the congressional record and elsewhere attest.<sup>232</sup> A comprehensive view comes from a careful study of the issue by the Department of Justice. As reported by the Attorney General, the Department found that efforts to secure victims' rights through means other than a constitutional amendment have proved less than fully adequate. Victims' rights advocates have sought reforms at the state level for the past twenty years, and many states have responded with state statutes and constitutional provisions that seek to guarantee victims' rights. However, these efforts have failed to fully safeguard victims' rights. These significant state efforts simply are not sufficiently consistent, comprehensive, or authoritative to safeguard victims' rights.<sup>233</sup>

Similarly, an exhaustive report from those active in the field concluded that “[a] victims’ rights constitutional amendment is the only legal measure strong enough to rectify the current inconsistencies in victims’ rights laws that vary significantly from jurisdiction to jurisdiction on the state and federal levels.”<sup>234</sup>

Hard statistical evidence on noncompliance with victims' rights laws confirms these general conclusions about inadequate protection. A 1998 report from the National Institute of Justice (“NIJ”) found that many victims are denied their rights and concluded that “enactment of State laws and State constitutional amendments alone appears to be insufficient to guarantee the full provision of victims’ rights in practice.”<sup>235</sup> The report found numerous examples of victims not provided rights to which they were entitled. For example, even in several states identified as giving “strong protection” to victims’ rights, fewer than 60% of the victims were notified of the sentencing hearing and fewer than 40% were notified of the pretrial release of the defendant.<sup>236</sup> A follow-up analysis of the same data found that racial minorities are less likely to be afforded their rights under the patchwork of existing statutes.<sup>237</sup>

Given such statistics, it is interesting to consider what the defenders of the status quo believe is an acceptable level of violation of rights. Suppose new statistics could be gathered that show that victims’ rights are respected in 75% of all cases, or 90%, or even 98%. America is so far from a 98% rate for affording victims’ rights that my friends on the front lines of providing victim services probably will dismiss this exercise as a meaningless law school hypothetical. But would a 98% compliance rate demonstrate that the amendment is “unnecessary”? Even a 98% enforcement rate would leave numerous victims unprotected. As the Supreme Court has observed in response to the claim that the Fourth Amendment exclusionary rule affects “only” about 2% of all cases in this country, “small percentages . . . mask a large absolute number of”

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

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

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

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

<sup>236</sup> NIJ REPORT, *supra* note 235, at 4 exh.1.

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

cases<sup>238</sup> A rough calculation suggests that even if the Victims' Rights Amendment improved treatment for only 2% of the violent crime cases it affects, a total of about 16,000 victims would benefit each year.<sup>239</sup> Even more importantly, we would not tolerate a mere 98% "success" rate in enforcing other important rights. Suppose that, in opposition to the Bill of Rights, it had been argued that 98% of all Americans could worship in the religious tradition of their choice, 98% of all newspapers could publish without censorship from the government, 98% of criminal defendants had access to counsel, and 98% of all prisoners were free from cruel and unusual punishment. Surely the effort still would have been mounted to move the totals closer to 100%. Given the wide acceptance of victims' rights, they deserve the same respect.

Of course the Amendment will not eliminate all violations of victims' rights, particularly because practical politics have stripped from the Amendment its civil damages provision.<sup>240</sup> But neither will the Amendment amount to an ineffectual response to official indifference. On this point, it is useful to consider the steps involved in adopting the Amendment. Both the House and Senate of the United States Congress would pass the measure by two-thirds votes. Then a full three-quarters of the states would ratify the provision.<sup>241</sup> No doubt these events would generate dramatic public awareness of the nature of the rights and the importance of providing them. In short, the adoption of the Amendment would constitute a major national event. One might even describe it as a "constitutional moment" (of the old fashioned variety) where the nation recognizes the crucial importance of protecting certain rights for its citizens.<sup>242</sup> Were such events to occur, the lot of crime victims likely would improve considerably. The available social science research suggests that the primary barrier to successful implementation of victims' rights is "the socialization of [lawyers] in a legal culture and structure that do not recognize the victim as a legitimate party in criminal proceedings."<sup>243</sup>

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

<sup>239</sup> FBI estimates suggest an approximate total of about 1.1634 million arrests for violent crimes each year and 12.1 million property crimes. See *Crime in the United States 2013*, Table 1, available at [http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/1tabledatacovervcrwpcr/table\\_1\\_crime\\_in\\_the\\_united\\_states\\_by\\_volume\\_and\\_rate\\_pcr\\_100000\\_inhabitants\\_1994-2013.xls](http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/1tabledatacovervcrwpcr/table_1_crime_in_the_united_states_by_volume_and_rate_pcr_100000_inhabitants_1994-2013.xls). A rough estimate is that about 70% of these cases will be accepted for prosecution, within the adult system. See Brian Forst, *Prosecution and Sentencing*, in CRIME 363–64 (James Q. Wilson & Joan Petersilia eds., 1995). Assuming the Amendment would benefit 2% of the victims within these charged cases produces the figure in text. For further discussion of issues surrounding such extrapolations, see Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 438–40; Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—And From Miranda*, 88 J. CRIM. L. & CRIMINOLOGY 497, 514–16 (1998).

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

<sup>241</sup> See U.S. CONST. art. V.

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

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

Professor Mosteller seems to agree generally with this view, noting that these rights “may not be fully enforced,” but contending that this “is through ineptitude, lack of resources, or difficulty of accomplishing the task.”<sup>244</sup> A constitutional amendment, reflecting the instructions of the nation to its criminal justice system, is perfectly designed to attack these problems and develop a new legal culture supportive of victims. To be sure, one can paint the prospect of such a change in culture as “entirely speculative.”<sup>245</sup> Yet this means nothing more than that, until the Amendment passes, we will not have an opportunity to precisely assay its positive effects. Constitutional amendments have changed our legal culture in other areas, and clearly the logical prediction is that a victims’ amendment would go a long way towards curing official indifference. This hypothesis is also consistent with the findings of the NIJ study on state implementation of victims’ rights. The study concluded that “[w]here legal protection is strong, victims are more likely to be aware of their rights, to participate in the criminal justice system, to view criminal justice system officials favorably, and to express more overall satisfaction with the system.”<sup>246</sup> It is hard to imagine any stronger protection for victims’ rights than a federal constitutional amendment. Moreover, we can confidently expect that those who will most often benefit from the enhanced consistency in protecting victims’ rights will be members of racial minorities, the poor, and other disempowered groups. Such victims are the first to suffer under the current, “lottery” implementation of victims’ rights.<sup>247</sup>

Professor Mosteller challenges the claim that the Amendment is needed to block excessive official deference to the rights of criminal defendants. Proponents of the Amendment have argued that, given two hundred years of well-established precedent supporting defendants’ rights, the apparently novel victims’ rights found in state constitutional amendments and elsewhere too frequently have been ignored on spurious grounds of alleged conflict. Professor Mosteller, however, rejects this argument on the ground that there is no “currently valid appellate opinion reversing a defendant’s conviction because of enforcement of a provision of state or federal law or state constitution that granted a right to a victim.”<sup>248</sup> As a result, he concludes, there is no evidence of a “significant body of law that would warrant the remedy of a constitutional amendment.”<sup>249</sup>

This argument does not refute the case for the Amendment, but rather is a mere straw man created by the opponents. The important issue is not whether victims’ rights are thwarted by a body of *appellate* law, but rather whether they are blocked by *any* obstacles, including most especially obstacles at the trial level where victims must first attempt to secure their rights. One would naturally expect to find few appellate court rulings rejecting victims’ rights; there are few victims’ rulings anywhere, let alone in appellate courts. To get to the appellate level—in this context, the “mansion” of the criminal justice system—victims first must pass through the

<sup>244</sup> 2013 House Hearing, *supra* note 91, at 35. See also Mosteller, *Unnecessary Amendment*, *supra* note 92, at 447 (conceding that “officials fail to honor victims’ rights largely as a result of inertia, past learning, insensitivity to the unfamiliar needs of victims, lack of training, and inadequate or misdirected institutional incentives.”).

<sup>245</sup> Mosteller, *Unnecessary Amendment*, *supra* note 92, at 445.

<sup>246</sup> NIJ REPORT, *supra* note 235, at 10.

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

<sup>248</sup> Mosteller, *Unnecessary Amendment*, *supra* note 92, at 450.

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

“gatehouse”—the trial court.<sup>250</sup> That trip is not an easy one. Indeed, one of the main reasons for the Amendment is that victims find it extraordinarily difficult to get anywhere close to appellate courts. To begin with, victims may be unaware of their rights or discouraged by prosecutors from asserting them. Even if aware and interested in asserting their rights in court, victims may lack the resources to obtain counsel. Finding counsel, too, will be unusually difficult, since the field of victims’ rights is a new one in which few lawyers specialize.<sup>251</sup> Time will be short, since many victims’ issues, particularly those revolving around sequestration rules, arise at the start of or even during the trial. Even if a lawyer is found, she must arrange to file an interlocutory appeal in which the appellate court will be asked to intervene in ongoing trial proceedings in the court below. If victims can overcome all these hurdles, the courts still possess an astonishing arsenal of other procedural obstacles to prevent victim actions, as many commentators have recognized.<sup>252</sup> In light of all these hurdles, appellate opinions about victim issues seem, to put it mildly, quite unlikely.

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

In short, nothing in the appellate landscape provides a basis for concluding that all is well with victims in the nation’s trial courts. The Amendment’s proponents have provided ample examples of victims denied rights in the day-to-day workings of the criminal trials. The Amendment’s opponents seem tacitly to concede the point by shifting the debate to the more

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

<sup>251</sup> See Henderson, *supra* note 118, at 427.

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

<sup>253</sup> As shown earlier, victims’ rights do not actually conflict with defendant’s rights. Frequently, however, it is the defendant’s mere *claim* of alleged conflict, not carefully considered by the trial court, that ends up producing (along with the other contributing factors) the denial of victims’ rights.

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

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

rified appellate level. Thus, here again, the opponents have not fully engaged the case for the Amendment.

As one final fallback position, the Amendment's critics maintain that it will not "eliminate" the problems in enforcing victims' rights because some level of uncertainty will always remain.<sup>256</sup> However, as noted before, the issue is not *eliminating* uncertainty, but *reducing* it. Surely giving victims explicit constitutional protection will vindicate their rights in many circumstances where today the trial judge would be uncertain how to proceed. Moreover, the Amendment's clear conferral of "standing" on victims<sup>257</sup> will help to develop a body of precedents on how victims are to be treated. There is, accordingly, every reason to expect that the Amendment will reduce uncertainties substantially and improve the lot of crime victims.

#### V. STRUCTURAL CHALLENGES<sup>258</sup>

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

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

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

##### I. *Republican Members.*

###### 1. *Rep. Ron DeSantis.*

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

###### 2. *Rep. Steve King.*

<sup>256</sup> Mosteller, *Unnecessary Amendment*, *supra* note 92, at 462.

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

<sup>258</sup> See generally Cassell, *supra* note 92, at 522-33.

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

*3. Rep. Louie Gohmert.*

An Amendment to define marriage as an act between a man and woman  
 A Balanced Budget Amendment  
 An Amendment to prohibit Congress from making any law imposing a tax on a failure to purchase goods or services  
 An Amendment to grant the States power to repeal federal law if two-thirds of the States concur  
 An Amendment to require a 2/3rds vote by Congress when it amends tax law  
 An Amendment prohibiting the United States from owning stock, or other equity interest  
 An Amendment providing that a parent's right to parent their children is a fundamental right  
 An Amendment prohibiting the President of the United States from adopting any legal currency other than the United States Dollar  
 An Amendment to allow the death penalty for a person found guilty of raping a child twelve years or younger and providing that it does not violate the Eighth Amendment

*4. Rep. Jim Jordan.*

An Amendment to prohibit the burning of the U.S. flag  
 An Amendment to allow the death penalty for a person found guilty of raping a child twelve years or younger and providing that it does not violate the Eighth Amendment  
 An Amendment to define marriage as an act between a man and woman  
 An Amendment to grant the States power to repeal federal law if two-thirds of the States concur  
 A Balanced Budget Amendment  
 An Amendment to prohibit annual spending from exceeding one-fifth of the economic output of the United States  
 An Amendment providing that a parent's right to parent their children is a fundamental right  
 An Amendment requiring that Representatives be apportioned based on each state's resident U.S. citizens

*II. Democratic Members.*

*1. Rep. Steve Cohen.*

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

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

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

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

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

2. *Rep. Jerrold Nadler.*

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

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

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

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

3. *Rep. Ted Deutch.*

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

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

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

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

One exponent of the view that victims' rights do not belong in the Constitution is scholar Bruce Fein, who has testified before Congress that the Amendment is improper because it does not address "the political architecture of the nation."<sup>259</sup> Putting victims' rights into the Constitution, the argument runs, is akin to constitutionalizing provisions of the National Labor Relations Act or other statutes, and thus would "trivialize" the Constitution.<sup>260</sup> Indeed, the argument concludes, to do so would "detract from the sacredness of the covenant."<sup>261</sup>

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

These are rights not to be victimized again through the process by which government officials prosecute, punish and release accused or convicted

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

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

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

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.<sup>262</sup>

Indeed, our Constitution has been amended a number of times to protect participatory rights of citizens. For example, the Fourteenth and Fifteenth Amendments were added, in part, to guarantee that the newly freed slaves could participate on equal terms in the judicial and electoral processes, the Seventeenth Amendment to allow citizens to elect their own Senators, and the Nineteenth and Twenty-Sixth Amendments to provide voting rights for women and eighteen-year-olds.<sup>263</sup> The Victims' Rights Amendment continues in that venerable tradition by recognizing that citizens have the right to appropriate participation in the state procedures for punishing crime.

Confirmation of the constitutional worthiness of victims' rights comes from the judicial treatment of an analogous right: the claim of the media to a constitutionally protected interest in attending trials. In *Richmond Newspapers, Inc. v. Virginia*,<sup>264</sup> the Court agreed that the First Amendment guaranteed the right of the public and the press to attend criminal trials.<sup>265</sup> Since that decision, few have argued that the media's right to attend trials is somehow unworthy of constitutional protection, suggesting a national consensus that attendance rights to criminal trials are properly the subject of constitutional law. Yet, the current doctrine produces what must be regarded as a stunning disparity in the way courts handle claims of access to court proceedings. Consider, for example, two issues actually litigated in the Oklahoma City bombing case. The first was the request of an Oklahoma City television station for access to subpoenas for documents issued through the court. The second was the request of various family members of the murdered victims to attend the trial.<sup>266</sup> My sense is that the victims' request should be entitled to at least as much respect as the media request. However, under the law that exists today, the television station has a First Amendment interest in access to the documents, while the victims' families have no constitutional interest in challenging their exclusion from the trial.<sup>267</sup> The point here is not to argue that victims deserve greater constitutional protection than the press, but simply that if press interests can be read into the Constitution without somehow violating the "sacredness of the covenant," the same can be done for victims.

A further variant on the unworthiness objection is that our Constitution protects only "negative" rights against governmental abuse. Professor Henderson has written, for example, that the Amendment's rights differ from others in the Constitution, which "tend to be individual

<sup>262</sup> Tribe & Cassell, *supra* note 103, at B5.

<sup>263</sup> U.S. CONST. amcnds. XIV, XV, XIX, XXVI.

<sup>264</sup> 448 U.S. 554 (1980).

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

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

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

rights *against* government.”<sup>268</sup> Setting aside the possible response that the Constitution ought to recognize affirmative duties of government,<sup>269</sup> the fact remains that the Amendment’s thrust is to check governmental power, not expand it.<sup>270</sup> Again, the Oklahoma City case serves as a useful illustration.<sup>271</sup> When the victims filed a challenge to a sequestration order directed at them, they sought the liberty to attend court hearings. In other words, they were challenging the exercise of government power deployed against them, a conventional subject for constitutional protection. The other rights in the Amendment fit this pattern, as they restrain government actors, rather than extract benefits for victims. Thus, the State must give notice before it proceeds with a criminal trial; the State must respect a victim’s right to attend that trial; and the State must consider the interests of victims at sentencing and other proceedings. These are the standard fare of constitutional protections, and indeed defendants already possess comparable constitutional rights. Thus, extending these rights to victims is no novel creation of affirmative government entitlements.

Still another form of this claim is that victims’ rights need not be protected in the Constitution because victims possess power in the political process—unlike, for example, unpopular criminal defendants.<sup>272</sup> This claim is factually unconvincing because victims’ power is easy to overrate. Victims’ claims inevitably bump up against well-entrenched interests within the criminal justice system,<sup>273</sup> and to date, the victims’ movement has failed to achieve many of its ambitions. Victims have not, for example, generally obtained the right to sue the government for damages for violations of their rights, a right often available to criminal defendants and other ostensibly less powerful groups. Additionally, the political power claim is theoretically unsatisfying as a basis for denying constitutional protection. After all, freedom of speech, freedom of religion, and similar freedoms hardly want for lack of popular support, yet they are appropriately protected by constitutional amendments. A standard justification for these constitutionally guaranteed freedoms is that we should make it difficult for society to abridge such rights, to avoid the temptation to violate them in times of stress or for unpopular claimants.<sup>274</sup> Victims’ rights fit perfectly within this rationale. Institutional players in the criminal justice system are subject to readily understandable temptations to give short shrift to

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

<sup>269</sup> See Bades, *The Negative Constitution*, *supra* note 252, at 208–09 (suggesting that Constitution should be read to recognize and protect affirmative rights).

<sup>270</sup> See Bcloof, *supra* note 2, at 295 n.32.

<sup>271</sup> See Cassell, *Barbarians the Gates?*, *supra* note 92, at 515–22.

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

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

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

victims' rights, and their willingness to protect the rights of unpopular crime victims is sure to be tested no less than society's willingness to protect the free speech rights of unpopular speakers.<sup>275</sup> Indeed, evidence exists that the biggest problem today in enforcing victims' rights is inequality, as racial minorities and other less empowered victims are more frequently denied their rights.<sup>276</sup>

A final worthiness objection is the claim that victims' rights "trivialize" the Constitution,<sup>277</sup> by addressing such a mundane subject. It is hard for anyone familiar with the plight of crime victims to respond calmly to this claim. Victims of crime literally have died because of the failure of the criminal justice system to extend to them the rights protected by the Amendment. Consider, for example, the victims' right to be notified upon a prisoner's release. The Department of Justice has explained that

[a]round the country, there are a large number of documented cases of women and children being killed by defendants and convicted offenders recently released from jail or prison. In many of these cases, the victims were unable to take precautions to save their lives because they had not been notified.<sup>278</sup>

The tragic unnecessary deaths of those victims is, to say the least, no trivial concern.

Other rights protected by the Amendment are similarly consequential. Attending a trial, for example, can be a crucial event in the life of the victim. The victim's presence can not only facilitate healing of debilitating psychological wounds, but also help the victim try to obtain answers to haunting questions. As one woman who lost her husband in the Oklahoma City bombing explained, "When I saw my husband's body, I began a quest for information as to exactly what happened. The culmination of that quest, I hope and pray, will be hearing the evidence at a trial."<sup>279</sup> On the other hand, excluding victims from trials—while defendants and their families may remain—can itself revictimize victims, creating serious additional or "secondary" harm from the criminal process itself. In short, the claim that the Victims' Rights Amendment trivializes the Constitution is itself a trivial contention.

#### *B. The Problem of Inflexible Constitutionalization.*

Another argument raised against the Victims' Rights Amendment is that victims' rights should receive protection through flexible state statutes and amendments, not an inflexible,

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

<sup>276</sup> See NVC RACE SUB-REPORT, *supra* note 237, at 5 ("[I]n many instances non-white victims were less likely to be provided [crime victims'] rights . . .").

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

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

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

federal, constitutional amendment. If victims' rights are placed in the United States Constitution, the argument runs, it will be impossible to correct any problems that might arise. The Judicial Conference explication of this argument is typical: "Of critical importance, such an approach is significantly more flexible. It would more easily accommodate a measured approach, and allow for 'fine tuning' if deemed necessary or desirable by Congress after the various concepts in the Act are applied in actual cases across the country."<sup>280</sup>

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

Such a claim is untenable. To begin with, the Victims' Rights Amendment spells out in considerable detail the rights it extends. While this wordiness has exposed the Amendment to the charge of "cluttering the Constitution,"<sup>282</sup> the fact is that the room for surprises is substantially less than with other previously adopted, more open-ended amendments. On top of the Amendment's precision, its sponsors further have explained in great detail their intended interpretation of the Amendment's provisions.<sup>283</sup> In response, the dissenting Senators were forced to argue not that these explanations were imprecise or unworkable, but that courts simply would ignore them in interpreting the Amendment<sup>284</sup> and, presumably, go on to impose some contrary and damaging meaning. This is an unpersuasive leap because courts routinely look to the intentions of drafters in interpreting constitutional language no less than other enactments.<sup>285</sup> Moreover, the assumption that courts will interpret the Amendment to produce great mischief requires justification. One can envision, for instance, precisely the same arguments about the need for flexibility being leveled against a defendant's right to a trial by jury.<sup>286</sup> What about petty offenses?<sup>287</sup> What about juvenile proceedings?<sup>288</sup> How many jurors will be required?<sup>289</sup> All

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

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

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

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

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

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

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

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

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

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

these questions have, as indicated in the footnotes, been resolved by court decision without disaster to the Union. There is every reason to expect that the Victims' Rights Amendment will be similarly interpreted in a sensible fashion. Just as courts have not read the seemingly unqualified language of the First Amendment as creating a right to yell "Fire!" in a crowded theater,<sup>290</sup> they will not construe the Victims' Rights Amendment as requiring bizarre results.

### C. Federalism Objections

A final structural challenge to the Victims' Rights Amendment is the claim that it violates principles of federalism by mandating rights across the country. For example, a 1997 letter from various law professors objected that "amending the Constitution in this way changes basic principles that have been followed throughout American history. . . . The ability of states to decide for themselves is denied by this Amendment."<sup>291</sup> Similarly, the American Civil Liberties Union warned that the Amendment "constitutes [a] significant intrusion of federal authority into a province traditionally left to state and local authorities."<sup>292</sup>

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

Precisely because of the constitutionalization and nationalization of criminal procedure, victims now find themselves needing constitutional protection. In an earlier era, it may have been

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

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

<sup>292</sup> 1997 Senate Judiciary Comm. Hearings, *supra* note 39, at 159.

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

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

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

While the Victims' Rights Amendment will extend basic rights to crime victims across the country, it leaves considerable room to the states to determine how to accord those rights within the structures of their own systems. For starters, the Amendment extends rights to a "victim of a crime of violence, as these terms may be defined by law."<sup>295</sup> The "law" that will define these crucial terms will come from the states. Indeed, states retain a bedrock of control over all victims' rights provisions—without a state statute defining a crime, there can be no "victim" for the criminal justice system to consider.<sup>296</sup> The Amendment also is written in terms that will give the states considerable latitude to accommodate legitimate local interests. For example, the Amendment only requires the states to provide "reasonable" notice to victims, avoiding the inflexible alternative of mandatory notice (which, by the way, is required for criminal defendants<sup>297</sup>).

In short, federalism provides no serious objection to the Amendment. Any lingering doubt on the point disappears in light of the Constitution's prescribed process for amendment, which guarantees ample involvement by the states. The Victims' Rights Amendment will not take effect unless a full three-quarters of the states, acting through their state legislatures, ratify the Amendment within seven years of its approval by Congress.<sup>298</sup> It is critics of the Amendment who, by opposing congressional approval, deprive the states of their opportunity to consider the proposal.<sup>299</sup>

#### VI. THE PROVISIONS OF THE VICTIMS' RIGHTS AMENDMENT<sup>300</sup>

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

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

<sup>296</sup> See BELOOF, CASSELL & TWIST, *supra* note 2, at 41–43 (discussing and listing various legal definitions of "victim").

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

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

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

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

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

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

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

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

#### *A. Section 1*

##### *The following rights of a crime victim . . .*

This clause extends rights to victims of both violent and property offenses. This is a significant improvement over the previous version of the VRA—S.J. Res. 1—which only extended rights to “victims of violent crimes.”<sup>301</sup> While the Constitution does draw lines in some situations,<sup>302</sup> ideally crime victims' rights would extend to victims of both violent and property

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

<sup>302</sup> Various constitutional provisions draw distinctions between individuals and between crimes, often for no reason other than administrative convenience. For instance, the right to a jury trial extends only to cases “where the value in controversy shall exceed twenty dollars.” U.S. CONST. amend. VII. Even narrowing our view to criminal cases, frequent line-drawing exists. For instance, the Fifth Amendment extends to defendants in federal cases the right not

offenses. The previous limitation appeared to be a political compromise.<sup>303</sup> There appears to be no principled reason why victims of economic crimes should not have the same rights as victims of violent crimes.<sup>304</sup>

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

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

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

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

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

At the same time, the VRA will eliminate a common reason for failing to protect victims' rights: the misguided view that the mere assertion of a defendant's constitutional right automatically *trumps* a victim's right. In some of the litigated cases, victims' rights have not been enforced because defendants have made vague, imprecise, and inaccurate claims about their federal constitutional due process rights being violated. Those claims would be unavailing after the passage of a federal amendment. For this reason, the mere fact of passing a Victims' Rights Amendment can be expected to bring a dramatic improvement to the way in which victims'

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to stand trial "unless on a presentment or indictment of a Grand Jury"; however, this right is limited to a "capital, or otherwise infamous crime." U.S. CONST. amend. V. Similarly, the right to a jury trial in criminal cases depends in part on the penalty a state legislature decides to set for any particular crime.

<sup>303</sup> S. REP. NO. 106-254, at 45 (2000).

<sup>304</sup> See Jayne W. Barnard, *Allocation for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39 (2001).

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

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

<sup>307</sup> U.S. CONST. amend. VI.

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

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

rights are enforced, even were no enforcement actions to be brought by victims or their advocates.

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

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

It is true that plausible arguments could be made for trimming the reach of incorporation doctrine.<sup>313</sup> But it is unlikely that we will ever retreat from our current commitment to afford criminal defendants a basic set of rights, such as the right to counsel. Victims are not asking for any retreat, but for an extension—for a national commitment to provide basic rights in the process to criminal defendants *and* to their victims. This parallel treatment works no new damage to federalist principles.

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

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

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

<sup>311</sup> U.S. CONST. amend. XIV.

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

<sup>313</sup> See, e.g., Donald A. Dripps, *Foreword: Against Police Interrogation—And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 701–02 (1988) (arguing for reduction of federal involvement in *Miranda* rights); Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965) (criticizing interpretation that would become so extensive as to produce, in effect, a constitutional code of criminal procedure); Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Disincorporation*, 87 J. CRIM. L. & CRIMINOLOGY 63, 63–70 (1996) (arguing that state constitutional development has reduced need for federal protections).

<sup>314</sup> NAT’L GOVERNORS ASS’N, POLICY 23.1 (1997).

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

It is important to emphasize that the amendment would establish a floor—not a ceiling—for crime victims' rights<sup>316</sup> 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.<sup>317</sup>

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

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

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

No doubt, in implementing language Congress and the states will provide additional details about how reasonable notice is to be provided. I will again draw on my own state of Utah to provide an example of how notice could be structured. The Utah Rights of Crime Victims Act provides that "[w]ithin seven days of the filing of felony criminal charges against a defendant,

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

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

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

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

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

<sup>320</sup> *Id.*

<sup>321</sup> 18 U.S.C. § 3771(a)(2).

<sup>322</sup> CAL. CONST. art. I, § 28(b)(7).

the prosecuting agency shall provide an initial notice to reasonably identifiable and locatable victims of the crime contained in the charges, except as otherwise provided in this chapter.”<sup>323</sup> The initial notice must contain information about “electing to receive notice of subsequent important criminal justice hearings.”<sup>324</sup> In practice, Utah prosecuting agencies have provided these notices with a detachable postcard or computer generated letter that victims simply return to the prosecutor’s office to receive subsequent notices about proceedings. The return postcard serves as the victims’ request for further notices. In the absence of such a request, a prosecutor need not send any further notices.<sup>325</sup> The statute could also spell out situations where notice could not be reasonably provided, such as emergency hearings necessitated by unanticipated events. In Utah, for instance, in the event of an unforeseen hearing for which notice is required, “a good faith attempt to contact the victim by telephone” meets the notice requirement.<sup>326</sup>

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

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

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

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

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

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

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

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

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

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

<sup>329</sup> HERRINGTON ET AL., *supra* note 4, at 80.

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

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

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

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

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

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

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

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

<sup>333</sup> HERRINGTON ET AL., *supra* note 4, at 80.

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

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

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

suggest that *they* could be validly excluded from the trial if the prosecution requests *their* sequestration. Defendants frequently take full advantage of their right to be in the courtroom.<sup>337</sup>

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

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

The right is limited to *public* proceedings. While the great bulk of court proceedings are public, occasionally they must be closed for various compelling reasons. The Victims' Rights Amendment makes no change in court closure policies, but simply indicates that when a proceeding is closed, the victim may be excluded as well. An illustration is the procedure that courts may employ to prevent disclosure of confidential national security information.<sup>341</sup> When court proceedings are closed to the public pursuant to these provisions, a victim will have no right to attend. Finally, the victims right to attend is limited to proceedings relating to the offense, rather than open-endedly creating a right to attend any sort of proceedings.

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

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

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

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

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

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

<sup>342</sup> Mosteller, *Recasting the Battle*, *supra* note 97, at 1702.

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

held that these constitutional rights do not confer on defendants any right to engage in disruptive behavior.<sup>344</sup>

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

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

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

The right to be heard also extends to any proceeding involving a plea. Under the present rules of procedure in most states, every plea bargain between a defendant and the state to resolve a case before trial must be submitted to the trial court for approval.<sup>348</sup> If the court believes that

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

<sup>345</sup> 18 U.S.C. § 3771(a)(4) (2006).

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

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

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

the bargain is not in the interest of justice, it may reject it.<sup>349</sup> Unfortunately in some states, victims do not always have the opportunity to present to the judge information about the propriety of the plea agreements. Indeed, it may be that in some cases “keeping the victim away from the judge . . . is one of the prime motivations for plea bargaining.”<sup>350</sup> Yet victims have compelling reasons for some role in the plea bargaining process:

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

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

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

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

Elsewhere I have argued at length in favor of such statements.<sup>353</sup> The essential rationales are that victim impact statements provide information to the sentencer, have therapeutic and other benefits for victims, explain the crime’s harm to the defendant, and improve the perceived

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

<sup>350</sup> HERBERT S. MILLER ET AL., *PLEA BARGAINING IN THE UNITED STATES* 70 (1978).

<sup>351</sup> BELOOF, CASSELL & TWIST, *supra* note 2, at 423.

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

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

fairness of sentencing.<sup>354</sup> The arguments in favor of victim impact statements have been universally persuasive in this country, as the federal system and all fifty states generally provide victims the opportunity to deliver a victim impact statement.<sup>355</sup>

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

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

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

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

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

This provision is designed to be the victims' analogue to the defendant's right to a speedy trial found in the Sixth Amendment.<sup>360</sup> The defendant's right is designed, *inter alia*, "to minimize anxiety and concern accompanying public accusation" and "to limit the possibilities that long delay will impair the ability of an accused to defend himself."<sup>361</sup> The interests

<sup>354</sup> *Id.* at 619-25.

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

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

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

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

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

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

<sup>361</sup> *Smith v. Hoey*, 393 U.S. 374, 378 (1969) (citing *United States v. Ewell*, 383 U.S. 116, 120 (1966)).

underlying a speedy trial, however, are not confined to defendant. Indeed, the Supreme Court has acknowledged that:

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

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

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

It is not a coincidence that these delays are found most commonly in cases of child sex assault.<sup>364</sup> Children have the most difficulty in coping with extended delays. An experienced victim-witness coordinator in my home state described the effects of protracted litigation in a recent case: "The delays were a nightmare. Every time the counselors for the children would call and say we are back to step one. The frustration level was unbelievable."<sup>365</sup> Victims cannot heal from the trauma of the crime until the trial is over and the matter has been concluded.<sup>366</sup>

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

<sup>362</sup> *Barker v. Wingo*, 407 U.S. 514, 519 (1972).

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

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

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

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

<sup>367</sup> 18 U.S.C. § 3771(a)(7) (2006).

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

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

It is also noteworthy that statutes in federal courts and in most states explicate a defendant’s right to a speedy trial. For example, the Speedy Trial Act of 1974 specifically implements a defendant’s Sixth Amendment right to a speedy trial by providing a specific time line (seventy days) for starting a trial in the absence of good reasons for delay.<sup>375</sup> In the wake of the passage of a Victims’ Rights Amendment, Congress could revise the Speedy Trial Act to include not only defendants’ interests but also victims’ interests, thereby answering any detailed implementation questions that might remain. For instance, one desirable amplification would be a requirement that courts record reasons for granting any continuance. As the Task Force on Victims of Crime noted, “the inherent human tendency [is] to postpone matters, often for insufficient reason,” and accordingly the Task Force recommended that the “reasons for any granted continuance . . . be clearly stated on the record.”<sup>376</sup>

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

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

<sup>371</sup> See *id.* See generally LAFAYETTE ET AL., *supra* note 341, at § 18.2.

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

<sup>373</sup> *Id.* at 531-32.

<sup>374</sup> *Id.* at 532.

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

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

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

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

Such dangers are particularly pronounced for victims of domestic violence and rape. For instance, Colleen McHugh obtained a restraining order against her former boyfriend Eric Boettcher on January 12, 1994.<sup>377</sup> Authorities soon placed him in jail for violating that order.<sup>378</sup> He later posted bail and tracked McHugh to a relative's apartment, where on January 20, 1994, he fatally shot both Colleen McHugh and himself.<sup>379</sup> No one had notified McHugh of Boettcher's release from custody.<sup>380</sup>

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

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

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

This provision guarantees that victims' safety will be considered by courts, parole boards, and other government actors in making discretionary decisions that could harm a crime victim.<sup>385</sup>

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

<sup>378</sup> See *id.*

<sup>379</sup> *Id.*

<sup>380</sup> See *id.* (providing this and other helpful examples).

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

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

<sup>383</sup> 18 U.S.C. § 3771(a)(1) (2006).

<sup>384</sup> CAL. CONST. art. I, § 28(b)(2)-(3).

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

For example, in considering whether to release a suspect on bail, a court will be required to consider the victim's safety. This dovetails with the earlier-discussed provision giving victims a right to speak at proceedings involving bail. Once again, it is important to emphasize that nothing in the provision gives the victim any sort of a veto over the release of a defendant; alternatively, the provision does not grant any sort of prerogative *require* the release of a defendant. To the contrary, the provision merely establishes a requirement that *due consideration* be given to such concerns in the process of determining release.

Part of that consideration will undoubtedly be whether the defendant should be released subject to certain conditions. One often-used condition of release is a criminal protective order.<sup>386</sup> For instance, in many domestic violence cases, courts may release a suspected offender on the condition that he<sup>387</sup> refrain from contacting the victim. In many cases, *consideration* of the safety of the victim will lead to courts crafting appropriate *no contact* orders and then enforcing them through the ordinary judicial processes currently in place.

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

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

. . . to *restitution* . . .

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

The principle of restitution is an integral part of virtually every formal system of criminal justice, of every culture and every time. It holds that, whatever else the sanctioning power of society does to punish its wrongdoers, it

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

<sup>387</sup> Serious domestic violence defendants are predominantly, although not exclusively, male.

<sup>388</sup> 18 U.S.C. § 3771(a)(8).

<sup>389</sup> ARIZ. CONST., art. II, § 2.1.

<sup>390</sup> CAL. CONST., art. I, § 28(b)(1).

<sup>391</sup> 18 U.S.C. §§ 3663A, 3664.

<sup>392</sup> § 3663A(a)(1) (emphasis added).

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.<sup>393</sup>

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

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

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

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

The Victims’ Rights Amendment would effectively operate in much the same fashion as the MVRA, although it would elevate the importance of restitution.<sup>396</sup> Courts would be required to enter an order of restitution against the convicted offender. Thus, the offender would be legally obligated to make full restitution to the victim. However, not infrequently offenders lack the means to make full restitution payments. Accordingly, the courts can establish an appropriate repayment schedule and enforce it during the period of time in which the offender is under the court’s jurisdiction.<sup>397</sup> Moreover, the courts and implementing statutes could provide that restitution orders be enforceable as any other civil judgment.

In further determining the contours of the victims’ restitution right, there are well-established bodies of law that can be examined.<sup>398</sup> Moreover, details can be further explicated in implementing legislation accompanying the amendment. For instance, in determining the compensable losses, an implementing statute might rely on the current federal statute, which includes among the compensable losses medical and psychiatric services, physical and

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

<sup>394</sup> S. REP. 104-179, at 13.

<sup>395</sup> CAL. CONST. art. I, § 28(b)(13).

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

<sup>397</sup> Cf. 18 U.S.C. § 3664 (establishing restitution procedures).

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

occupational therapy and rehabilitation, lost income, the costs of attending the trial, and in the case of homicide, funeral expenses.<sup>399</sup>

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

This language will confer standing on victims to assert their rights. It tracks language in the CVRA, which provides that “[t]he crime victim or the crime victim’s lawful representative . . . may assert the rights described [in the CVRA].”<sup>400</sup>

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

The Victims’ Rights Amendment would eliminate once and for all the difficulty that crime victims have in being heard in court to protect their interests by conferring standing on the victim. A victim’s lawful representative can also be heard, permitting, for example, a parent to be heard on behalf of a child, a family member on behalf of a murder victim, or a lawyer to be heard on behalf of a victim-client.<sup>402</sup> The VRA extends standing only to victims or their representatives to avoid the possibility that a defendant might somehow seek to take advantage of victims’ rights. This limitation prevents criminals from clothing themselves in the garb of a victim and claiming a victim’s rights.<sup>403</sup> In Arizona, for example, the courts have allowed an unindicted co-conspirator to take advantage of a victim’s provision.<sup>404</sup> Such a result would not be permitted under the Victims’ Rights Amendment.

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

<sup>399</sup> See § 3663A.

<sup>400</sup> § 3771(d)(1).

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

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

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

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

<sup>403</sup> E.g., KAN. CONST. art. 15, § 15(c).

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

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

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

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

It is true that one powerful way of enforcing victims' rights is through a lawsuit for money damages. Such actions would create clear financial incentives for criminal justice agencies to comply with victims' rights requirements. Some states have authorized damages actions in limited circumstances.<sup>407</sup> On the other hand, civil suits filed by victims against the state suffer from several disadvantages. First and foremost, in a time of limited state resources and pressing demands for state funds, the prospect of expensive awards to crime victims might reduce the prospects of ever passing a Victims' Rights Amendment. A related point is that such suits might give the impression that crime victims seek financial gain rather than fundamental justice. Because of such concerns, a number of states have explicitly provided that their victims' rights amendments create no right to sue for damages.<sup>408</sup> Other states have reached the same

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

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

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

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

destination by providing explicitly that the remedies for violations of the victims' amendment will be provided by the legislature, and in turn by limiting the legislatively-authorized remedies to other-than-monetary damages.<sup>409</sup>

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

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

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

No doubt, some of the means for victims to enforce their rights will be spelled out through implementing legislation. The CVRA, for example, contains a specific enforcement provision designed to provide accelerated review of crime victims' rights issues in both the trial and appellate courts.<sup>413</sup> Similarly, state enactments have spelled out enforcement techniques. One obvious concern with the enforcement scheme is whether attorneys will be available for victims to assert their rights. No language in the Victims' Rights Amendment provides a basis for arguing that victims are entitled to counsel at state expense.<sup>414</sup> To help provide legal representation to victims, implementing statutes might authorize prosecutors to assert rights on behalf of victims, as has been done in both federal and state enactments.<sup>415</sup>

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

<sup>410</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>411</sup> *Arizona v. Fulminante*, 499 U.S. 279 (1991).

<sup>412</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>413</sup> 18 U.S.C. § 3771(d)(3).

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

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

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

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

#### B. Section 2

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

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

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

Under the Arizona amendment, the legislature was given the power to define these terms, which it did by limiting the phrase “criminal offense” to mean “conduct that gives a peace officer or prosecutor probable cause to believe that . . . [a] felony . . . [or that a] misdemeanor involving physical injury, the threat of physical injury or a sexual offense [has occurred].”<sup>419</sup> A ruling by the Arizona Court of Appeals, however, invalidated that definition, concluding that the legislature had no power to restrict the scope of the rights.<sup>420</sup> Since then, Arizona has operated under an unlimited definition—without apparent difficulty.

The second part of the two-pronged definition of victim is a person who is directly and proximately harmed by the commission of a crime. This definition follows the definition of

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

<sup>417</sup> ARIZ. CONST. art. II, § 2.1(C).

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

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

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

victim found in the CVRA, which defines “victim” as a person “directly and proximately harmed” by a federal crime.<sup>421</sup>

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

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

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

The Victims’ Rights Amendment would also extend rights to victims in juvenile proceedings. The VRA extends rights to those directly harmed by the commission of an act, which, if committed by a competent adult, would constitute a crime. The need for such language stems from the fact that juveniles are not typically prosecuted for crimes but for delinquencies—in other words, they are not handled in the normal criminal justice process.<sup>428</sup> From a victim’s perspective, however, it makes little difference whether the robber was a nineteen-year-old committing a crime or a fifteen-year-old committing a delinquency. The VRA recognizes this

<sup>421</sup> 18 U.S.C. § 3771(c) (2006) (emphasis added).

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

<sup>423</sup> See Cassell, *supra* note 68, at 616-19.

<sup>424</sup> 42 U.S.C.A. § 10607(c)(2) (Westlaw through 2012 P.L. 112-89) (emphasis added).

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

<sup>426</sup> See *id.*

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

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

fact by extending rights to victims in both adult criminal proceedings and juvenile delinquency proceedings. Many other victims' enactments have done the same thing.<sup>429</sup>

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

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

#### *Factual Background of the Sater Case.*<sup>431</sup>

The disturbing case involves a defendant named Felix Sater.<sup>432</sup> Sater pled guilty in 1998 to racketeering for running a stock fraud that stole more than forty million dollars from victims.<sup>433</sup> Sater then provided unspecified cooperation to the Government. In 2004, he came up for sentencing. The U.S. Attorney's Office declined to provide the list of Sater's victims to the probation office, preventing the probation office from contacting the victims.<sup>434</sup> As a result, the pre-sentence report did not include any restitution, even though a restitution order was "mandatory" under the Mandatory Victim Restitution Act.<sup>435</sup> In any event, when he was

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

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

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

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

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

<sup>434</sup> *Id.* at 7.

<sup>435</sup> *Id.*

ultimately sentenced five years later in 2009, Sater escaped paying to his victims any restitution for the more than forty million dollars that he pilfered.<sup>436</sup> Sater's victims received no notice of the sentencing, even though the Crime Victims' Rights Act requires notice to victims of all public court hearings.<sup>437</sup>

Of course, Sater's 1999 conviction should have signaled the end of Sater's business career and created the possibility of restitution for the victims of his crimes. Unfortunately, the Government concealed what it was doing by keeping the entire case under unlawful seal.<sup>438</sup> And it appears that Sater wasted little time in defrauding new victims.<sup>439</sup> By 2002, he had infiltrated a real estate venture and apparently used it to launder tens of millions of dollars, skim millions more in cash, and once again defraud his investors and partners.<sup>440</sup> An attorney, Fred Oberlander has diligently and fearlessly represented many of Sater's victims.<sup>441</sup> While preparing a civil RICO complaint against Sater, Oberlander received – unsolicited – documents from a whistleblower at Sater's company that provided extensive information about Sater's earlier crimes.<sup>442</sup> Those documents included a presentence report (“PSR”) from the 1998 case, which revealed that Sater was hiding his previous conviction from his partners in the new firm.<sup>443</sup> In May 2010, Oberlander filed the RICO complaint on behalf of Sater's victims in U.S. District Court for the Southern District of New York, with portions of the PSR attached as an exhibit.<sup>444</sup> Instead of taking steps to help Sater's victims recover for their losses, two district courts quickly swung into action to squelch any public reference to the earlier criminal proceedings and, apparently, to punish Oberlander for disclosing evidence of Sater's crimes.<sup>445</sup> The S.D.N.Y. court sealed the civil RICO complaint four days after Oberlander filed it.<sup>446</sup> And the E.D.N.Y. court in which Sater was secretly prosecuted issued a temporary restraining order barring Oberlander from disseminating the PSR and other documents – even though Oberlander was not a party to that case, and even though the court could not identify any actual sealing or other order

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

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

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

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

<sup>440</sup> *Id.*

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

<sup>442</sup> *Id.*

<sup>443</sup> *Id.*

<sup>444</sup> *Id.*

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

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

that applied to Oberlander.<sup>447</sup> The court subsequently converted the TRO into a permanent injunction, and the Second Circuit affirmed.<sup>448</sup>

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

*Violation of the Mandatory Victim Restitution Act.*

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

Congress enacted the MVRA specifically to eliminate any judicial discretion to decline to award restitution. The MVRA amended the Victim and Witness Protection Act of 1982 (VWPA), which had provided for restitution to be ordered in the court's discretion. Congress was concerned that leaving restitution to the good graces of prosecutors and judges resulted in few victims recovering their losses. As the legislative history explains, “Unfortunately, . . . while significant strides have been made since 1982 toward a more victim-centered justice system,

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

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

<sup>449</sup> *Roe* was represented by two very capable appellate attorneys, Richard E. Lemcr, Esq., and Paul Clement, former Solicitor General of the United States.

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

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

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

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

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

much progress remains to be made in the area of victim restitution.”<sup>455</sup> Congress noted that despite the VWPA, “federal courts ordered restitution in only 20.2 percent of criminal cases.”<sup>456</sup>

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

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

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

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

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

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

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

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

<sup>459</sup> Fed. R. Crim. P. 32(d)(2)(B) (emphasis added).

<sup>460</sup> Fed. R. Crim. P. 32(d)(2)(D).

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

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

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

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

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

*Violation of the Crime Victim’s Rights Act.*

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

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

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

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

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

<sup>465</sup> 18 U.S.C. § 3771.

<sup>466</sup> See Part II.B., *supra*.

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

<sup>468</sup> 18 U.S.C. § 3771.

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

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

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

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

In the *Sater* case, the U.S. Attorney's Office's willingness to ignore the CVRA has a "business as usual" feel to it – suggesting that many other victims are having their rights violated by the Government though the simple expedient of hiding the case.<sup>479</sup> For example, in a recent case in the Southern District of New York, an experienced defense attorney candidly revealed

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

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

<sup>471</sup> 18 U.S.C. § 3771(a)(2) & (4).

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

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

<sup>474</sup> See 18 U.S.C. § 3771(c)(1).

<sup>475</sup> 18 U.S.C. § 3771(a)(5) & (6).

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

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

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

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

during sentencing that “in many cases . . . the cooperation is never publicly revealed and *some sentencing proceedings and even some complete dockets remain under seal.*”<sup>480</sup> Perhaps in these cases, as well, victims are being deprived of their statutory rights. Given the Government’s apparent belief that it can ignore federal statutes, one way to insure compliance with victims’ rights enactments is to elevate them to the status of constitutional rights.

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

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

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

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

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

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

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

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

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

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

1. You indicate that you are unable to "comment further" about the underlying criminal case because it is under seal. Are you able to at least indicate whether the Government believes that it complied with all provisions of the Crime Victims' Rights Act, 18 U.S.C. § 3771, and with all provisions of any applicable restitution statute, *e.g.*, 18 U.S.C. § 3663 and 3663A – in other words, are you able to indicate whether the Government fully complied with the law?
2. You sent me a copy of the Second Circuit's June 29, 2011, decision, remanding to the district court for (inter alia) a ruling on the government's unsealing motion filed March 17, 2011. Can you advise as to whether a ruling has been reached on that unsealing motion, which has been pending for more than a year?
3. Would any of my testimony be permissible if the Government's unsealing motion were granted?
4. If parts of my testimony would not be permissible even if the Government's unsealing motion were granted, is the Government willing to file an additional motion allowing unsealing to the very limited extent necessary to permit me to deliver my testimony?
5. If my testimony is not currently permissible under the sealing motion and the Government is not willing to file an additional unsealing motion, is the Government willing to advise me how to comply with its view of the sealing orders it has obtained, by me either making my testimony more general or redacting a part of my current testimony? In other words, is there a way for Congress to have the substance of my concern without jeopardizing your need for secrecy about the name of the informant? I thought I had struck this balance already, but apparently you disagree. Can you help me strike that balance?
6. Is there some way for the Government to assist me to make my testimony more accurate. You assert that it is inaccurate, but then refuse to provide any further information. Can you, for example, at least identify which sentence in my proposed testimony is inaccurate?

On April 24, 2012, the U.S. Attorney's Office sent a letter to Mr. Morris indicating that it "was appropriate under the circumstances" for me to have inquired of Judge Cogan, through

counsel, about whether his proposed testimony would violate any sealing orders. The Office further stated that “we believe the best course at this juncture is to await further guidance from Judge Cogan” on the request. The Office also indicated that it preferred to deal through legal counsel on the subject of any additional questions.

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

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

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

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

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

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

On April 18, 2013, the Office sent back a short (two-sentence) letter to Mr. Morris, indicating that it could not give any advice on my testimony. This response was at odds with the response that the Office had sent the previous year (in the April 19, 2012 letter), in which at that

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

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

time the Office claimed that delivering my testimony would have been (at that time) in violation of the Second Circuit's sealing order and was inaccurate. Now the Office claimed that it could not provide advice on these same subjects. As a result, in 2013 I made my own determination that I could relay this information to the Subcommittee because it all relied on public record information, as indicated by the extensive footnotes attached to the testimony. I also believed that it was accurate, in view of the U.S. Attorney's Office's unwillingness to contest any of the facts discussed. I provided detailed written testimony on the case to this Subcommittee.<sup>484</sup>

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

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

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

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

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

mandatory restitution obligation and profit from his crimes – by keeping money from his victims.<sup>486</sup>

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

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

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

The Subcommittee should, however, have not merely my thoughts on this case but rather full information about it in reaching its own conclusions. Accordingly, the Subcommittee may wish to send an inquiry to the U.S. Attorney’s Office asking it to provide information on how it

<sup>486</sup> While not central to the purposes of this hearing, it is also noteworthy that Ms. Lynch’s answer is problematic in another way. According to *The Observer*, Ms. Lynch was inaccurate in stating (as quoted above) that the initial sealing of records “pre-dated” her tenure as the U.S. Attorney. According to *The Observer*, “Loretta Lynch signed the criminal racketeering, money-laundering, and securities fraud charges originally filed against Mr. Sater in December 1998. Her name and signature appear on the Information as Acting United States Attorney. And there being no motion or order on the docket to seal the case back in 1998, one can surmise only that it was all hidden for a decade at her request.” <http://observer.com/2015/03/breaking-loretta-lynch-caught-in-deceptive-disclaimer/#ixzz3XlgJsSRc>. *The Observer* goes on to note that “Ms. Lynch claims the issue of Mr. Sater’s restitution remains sealed to this day, but if he was ordered to pay any, it should have appeared on the docket along with his meager fine. It’s hard to imagine a reason for concealing an order of restitution—and it would certainly be a newsworthy flash to his victims, who haven’t received any.” *Id.*

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

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

has handled crime victims' rights in this case – information that could then form part of the Subcommittee's record. The Subcommittee may also wish to ask attorneys Oberlander and Lerner about their assessment of the case. They are far more familiar with the details about these subjects than I am and could assist the Subcommittee in determining how congressional statutes protecting victims' rights have been so cavalierly ignored by the Government – and how the facts regarding these violations are continuing to be concealed.

#### VIII. CONCLUSION

In my testimony, I have attempted to review thoroughly the various objections leveled against the Victims' Rights Amendment, finding them all wanting. While a few normative objections have been raised to the Amendment, the values undergirding it are widely shared in our country, reflecting a strong consensus that victims' rights should receive protection. Contrary to the claims that a constitutional amendment is somehow unnecessary, practical experience demonstrates that only federal constitutional protection will overcome the institutional resistance to recognizing victims' interests. And while some have argued that victims' rights do not belong in the Constitution, in fact the Victims' Rights Amendment addresses subjects that have long been considered entirely appropriate for constitutional treatment.

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

In light of all these facts, we need to draw crime victims move heavily into the criminal justice system. Fortunately, there is a way to require our criminal justice process to recognize the interests of victims of crime. As Thomas Jefferson once explained,

Happily for us, . . . when we find our constitutions defective and insufficient to secure the happiness of our people, we can assemble with all the coolness of philosophers, and set them to rights, while every other nation on earth must have recourse to arms to amend or to restore their constitutions.<sup>489</sup>

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

<sup>489</sup> Thomas Jefferson to C. W. F. Dumas, 1787, Papers 12:113.

Amendment is an indispensable step in that direction, extending protection for the rights of victims while doing no harm to the rights of defendants and of the public. The Amendment will not plunge the criminal justice system into the dark ages, but will instead herald a new age of enlightenment. It is time for the defenders of the old order to recognize these facts, to help swing open the gates, and welcome victims to their rightful place in our nation's criminal justice system.

Mr. FRANKS. And thank you, Mr. Cassell.

Now I would recognize our second witness, Mrs. Campbell. And, without objection, Mr. Campbell will assist Mrs. Campbell in reading her testimony. Mrs. Campbell will be available to answer Members' questions.

And, Mr. Campbell, if you will pull that microphone close to you and turn it on, sir, that'd be great. And so we'll recognize you now, sir.

**TESTIMONY OF COLLENE CAMPBELL,  
VICTIMS' RIGHTS ADVOCATE**

Mr. GARY CAMPBELL. Thank you, Mr. Chairman, and honorable Subcommittee Members.

I'm going to try to relate our family's life as victims of crime. Our experience, education, on-the-job training confirm the need for victims' rights in the Constitution. Our family has endured more than 33 years of murders, delays, exclusions from court, death threats, and lack of notice from hearings and appeals.

In 1982, our lives were turned upside down when our only son Scott was murdered followed only 6 years later by the unrelated assassination murders of Collene's auto racing legend brother and my best man at our wedding, Mickey Thompson, and his wife, Trudy. Yes, sadly, we have a real life education in crime.

We received our first lesson in 1982, the same year President Reagan's task force on crime recommended the Constitution be amended to establish rights for victims. Our son Scott went missing. We searched for him for 11 months before we learned the horrible truth. He had been strangled and thrown out of an airplane into the Pacific Ocean to steal his car.

We're just a small example of thousands of Americans who become victims of repeat predators that should have been in prison. Instead, they were released early and committed murder. One of our son's killers had previously been given three indeterminate life sentences, but was released early after only 4 years.

The other was out on a work furlough a year after killing his passenger in an auto crash while he was under the influence of drugs and alcohol. Like so many, our son is dead because of a weak and forgiving justice system. Had his killers remained in prison, he'd be alive today.

And in 1988, while we were still in trial from our son's killers, Mickey and Trudy Thompson were also murdered. Their deaths were arranged to avoid paying back court-ordered money that his killer had stolen from Mickey.

We've endured this system for 33 years. So we know it all too well. Please consider our family's experience and grasp this fact. What happened to our family continues to occur to good people all across the country and will until the victims have rights in our Constitution. Example: In the trials of our son's killers, we were excluded from the courtroom at all three trials. We were not allowed to be heard. We were not notified of the convicted killer's appeal hearing. His family was. The guilty verdict of one of the killers was overturned. We were not notified. We had no rights. This killer was released, and again we were not notified.

No, we did not have the right to be notified or heard or to protect ourselves. We did not have the right to a speedy trial. The trials took nearly 8 years before 20 judges with dozens of hearings. None of these did we have the right to be heard.

In the trial of the killer of Mickey and Trudy, it took 18 years after the murders just to get it started. That trial included 65 hearings with the defense delaying with every tactic possible. Again, we had no rights to a speedy trial. And this is only a small part of the list. It is tremendously important that you recognize what can be lost when justice is denied.

If our justice system worked properly, Mickey and Trudy and Scott and thousands of others would be alive today. If Mickey were here with us today, he'd be telling you, "Stand on the gas. Get this job done, and get to the finish line."

Well, it's time you do the right thing. Make certain our Nation has justice for all citizens, including victims of crime. Please move this amendment forward now. Thousands of lives depend on you.

It's really amazing. I don't know if you're aware, but in the last 50 years, more people were murdered right here in our country than have been killed in all of our wars. Please, we need you to bring balance to our justice system.

Thank you.

[The prepared statement of Mrs. Collene Campbell follows:]

**STATEMENT OF THE HONORABLE COLLENE  
(THOMPSON) CAMPBELL PRESENTED BY HER  
HUSBAND OF 63 YEARS, GARY, BEFORE THE  
“CONSTITUTION AND CIVIL RIGHTS SUBCOMMITTEE”  
OF THE COMMITTEE ON THE JUDICIARY, U.S. HOUSE  
OF REPRESENTATIVES IN SUPPORT OF H.J. Res. 45**

**MAY 1, 2015**

**Mr. Chairman and Honorable Subcommittee Members:**

**I’m going to try to relate a bit of our family’s life as victims of crime; Our experience, education, and on-the-job-training. . . confirm the need for victims’ rights.**

**Our family has endured more than 33 years of murders, delays, exclusions from trials, death threats and lack of notice for hearings.**

**In 1982, our lives were drastically changed as our only son, Scott, was murdered. . . followed six years later by the unrelated assassination murders of Collene’s auto racing legend brother (and my Best Man in our wedding), Mickey Thompson and his wife Trudy.**

**Yes, sadly, we have a “real life education” into crime.**



**Scott Campbell  
A very proud Uncle  
Holding his niece, just  
a short time prior to being  
murdered.**

**Our first lesson came in 1982, the same year that President Reagan’s Task Force recommended that our Constitution be amended to establish rights for victims.**

**When our son Scott went missing, we searched for him for eleven months before**

we learned the horrible truth. He'd been strangled and thrown from an airplane into the Pacific Ocean. . . to steal his sports car.

We're just two of thousands of Americans who have become victims of repeat predators who should have been in prison. Instead, they were released early and they committed murder.

One of the killers had previously been given three indeterminate life sentences but was released in only four years.

The other was out of prison on work furlough, a year after killing his passenger in a auto crash, while under the influence of drugs and alcohol.

Our son is dead because of a weak and forgiving justice system that does not respect victims safety. Had his killers remained incarcerated, as they should have, Scott would be alive today.

In 1988, while we were still in trial for our son's murder, our brother Mickey and Trudy Thompson were also murdered.



Mickey and Trudy Thompson  
With their rescued dog, Punky  
just prior to their murder a few yards  
from where this photo was taken.

Their deaths were arranged to avoid paying-back court ordered money he stole from Mickey.

So. . .We have endured the system, for 33 years. . .We know it all too well !

Please consider our family's experience and grasp this fact: What happened to our

family, unfortunately, continues to occur to good people all across our country, and will, until victims have rights in our Constitution.

As an example: In the trials of our son's murderers:

- We were excluded from the courtroom during all three trials.

We were not allowed to be heard.

We were not notified of the convicted killer's appeal hearing. (But the killer's family was)

The guilty verdict of one of the convicted killers was overturned. We were not notified because we had no rights.

This killer was released and again, we were not notified. NO, we did not have the right to be notified. . . or heard regarding the effect of his release. . . or, to protect ourselves.

We did not have a right to a speedy trial. The trials took nearly eight years, appearing before more than twenty judges, with dozens of hearings. At none of these did we have the right to be heard.

The trial of the killer of Mickey and Trudy (our brother and his wife) began 18 years after their murders and included sixty-five court appearances, with the defense delaying with every tactic possible. Again, we did not have a right to a speedy trial. . . . .and this is only a small part of the list.

It is tremendously important that you recognize what can be lost when justice is denied. If our justice system worked properly, Mickey, Trudy, and Scott would all be alive.

If Mickey could be here today to help us, he'd be saying "Stand on the gas, get to the finish line, get this job done." Do the **RIGHT** thing. Make certain our nation has justice for ALL citizens, including crime victims." Please move this amendment forward. . .NOW!

Thousands of lives depend on YOU. It's amazing! Are you aware. . .in the last 50 years, more people were killed by murder in our country, than have been killed in all the horrible wars?

Please, we need to bring balance to our justice system.

Thank you.

Mr. FRANKS. And thank you both for being here.

I would now recognize Ms. Baron-Evans.

And, Ms. Evans, if you would, turn on your microphone there, too. I'm sorry.

Ms. BARON-EVANS. I've got it.

Mr. FRANKS. We have people always forget that. So we say that just as a matter of course.

**TESTIMONY OF AMY BARON-EVANS, NATIONAL SENTENCING RESOURCE COUNSEL, FEDERAL PUBLIC AND COMMUNITY DEFENDERS**

Ms. BARON-EVANS. I thank you for the opportunity to comment on the Victims' Rights Amendment on behalf of the Federal Public and Community Defenders. We serve 91 of 94 Federal judicial districts. Over 80 percent of Federal defendants are indigent, and we represent most of them.

You know, I have read the Campbells' and Steve's testimony. And, you know, it's heartbreaking what happened to them, and I in no way mean to say it isn't. But the system that they describe is not the system in Federal court. It is not that system.

There's no way that there would ever be an 8-year or an 18-year delay, not today, anyway, or that victims would not be notified or not allowed to be heard. I can only speak for the Federal system, but, you know, that's what I'm going to do.

Federal Defenders do have lots of experience under the Crime Victims' Rights Act, which is similar to, you know, the proposed constitutional amendment, except that it has certain procedures and limitations.

And it also—you know, if there's a conflict between the defendant's rights and the victim's rights, the judge can resolve the conflict in the proper way, which is in favor of the defendant's rights.

Because, you know, if you've got both of them with constitutional rights, it's going to be impossible for judges to resolve things fairly or, you know—we don't even have a way of knowing what the correct way would be. This is a whole new sort of—you know, this would be a whole new animal that has never been used in the United States.

So we have experience with victim rights under the CVRA, the act, in fraud cases, child pornography possession cases, Indian reservation cases, and a few other kinds of cases, and it is being implemented in Federal court.

When judges—you know, not in every case, but when judges hear from a victim at sentencing, if they want to speak, they are allowed to speak, and it is increase—you know, it can increase the sentence. It can result in a higher sentence if the defendant is truly a bad actor. It has an impact on judges.

Professor Cassell has said that there really is no conflict between defendants' and victims' rights or there wouldn't be if they both had constitutional rights. There have been numerous conflicts under the—you know, right now under the existing structure where defendants have constitutional rights and victims have statutory rights. And judges are able to resolve them, you know. If it's one or the other, they have to go with the constitutional right of the defendant.

There are many examples. I'll just give a couple right here. But a defendant has a due process right to be sentenced on the basis of accurate information. And to that end, the defendant also has a right to notice if a witness is going to testify against him at his sentencing hearing and to be able to—to challenge anything that that—that the witness says through cross-examination or contrary information.

So there is a case—in the Endsley case in my written testimony, this is a case where the Government and the prosecutor—Government and the probation officer told the—argued to—well, the victim had a victim impact statement in the PSR, and he said that his behavioral problems were caused by the 19-year-old defendant's assault on him.

And when the defendant tried to put in evidence that the behavioral problems of the victim started long before he ever met the defendant, the Government and the probation officer said, "No. No. You can't—defendant has no right to challenge this under the new statute because it would violate his dignity and privacy."

The judge knew exactly what to do. "No. The defendant's constitutional right trumps. So he will be able to put in that evidence, and he will be able to cross-examine." Doesn't always go this way, but that's the proper way.

And what would happen in that same case if the victim had a constitutional right to dignity and privacy against—you know, versus the defendant's right to basically offer information that offends his dignity and privacy? Very difficult for judges.

I think I am already way over time, but there are other examples in my written testimony. I want to point out a few other things.

The burden of us having to defend against two adversaries would be astoundingly heavy. We would have to hire more people. The courts would have to hire more people. We are already short-handed. You may know our position or not. I don't know. It would be chaotic. I think Judge Posner is correct that there would be sort of this three-pronged thing going on in the courtroom and, you know, it would be confusing, at best.

I want to make clear that the way this—where this is going is also to a constitutional right to counsel for victims. You can't really give somebody constitutional rights and then say, "But you can't have a lawyer to enforce them." That's the way it goes.

So if Congress—or if this amendment were adopted, you know, Congress, of course, can choose to, you know, pay that cost or—but, you know, to, you know, impose that cost on the States would be an entirely different thing.

As I said, we don't—we don't believe there is a need for this. The Rules Committee just added eight rules to buttress the Crime Victims' Rights Act. The attorney general issued now guidelines to his employees in 2011.

And I'll leave it at that. Thanks.

[The prepared statement of Ms. Baron-Evans follows:]

**Written Statement of Amy Baron-Evans  
National Sentencing Resource Counsel and Assistant Federal Public Defender  
Federal Public and Community Defenders**

**Before the Subcommittee on the Constitution and Civil Justice  
of the Judiciary Committee of the United States House of Representatives**

**Hearing: H.J. Res. 45, Victims' Rights Amendment  
May 1, 2015**

Chairman Franks, Ranking Member Cohen, and Members of the Subcommittee:

Thank you for giving me the opportunity to speak this morning on proposed H.J. Res. 45, the "Victims' Rights Amendment," on behalf of the Federal Public and Community Defenders. Our offices serve 91 of the 94 federal judicial districts. Over 80 percent of federal defendants require appointed counsel, and we represent the majority of these defendants. By my rough estimate, about 20 percent of federal criminal cases could involve one or more victims. And many of our clients have been or are victims.

Judge Posner recently observed that the allowing victims to intervene in criminal cases in the district court "would be a recipe for chaos. Imagine plea bargaining in which intervening crime victims argue for a different bargain from that struck between the government and the defendant, or trials at which victims' lawyers present witnesses and cross-examine the defendant's witnesses or participate in the sentencing hearing in order to persuade the judge to impose a harsher sentence than suggested by the prosecutor."<sup>1</sup> This scenario approaches reality in some cases that have already occurred, but which the courts have been able to address. It would be the reality in all cases involving a victim under a constitutional amendment.

I want to focus primarily on the difficult if not impossible task courts would face if required to simultaneously protect the constitutional rights of both defendants and victims. At a previous hearing, it was said that no one had given any real world examples of any conflict between the two. I will give you many real world examples.

I'd like to first say a few words about the burden the proposed amendment would impose, the lack of necessity for it, and why Congress enacted the Crime Victims Rights Act (CVRA) rather than a constitutional amendment.

The burden of such a system on the Federal Defender program would be devastating. We are short-staffed as is without having to defend against a second adversary. The proposed amendment would impose burdens and costs on federal and state criminal justice systems as a whole. For example, as explained below, the proposed amendment would ultimately result in a constitutional right to counsel at government expense. In addition, counsel would likely have to be appointed for people defending against victims who do not have a right to counsel now. It would require additional judges, probation officers, and other court personnel.

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<sup>1</sup> *United States v. Laraneta*, 700 F.3d 983, 985-86 (7th Cir. 2013).

At the same time, a constitutional amendment is not necessary. The Government Accountability Office (GAO) released a report on the CVRA in December 2008, just four years after it was enacted. The GAO reported that most victims who responded to its survey questions were satisfied with the provision of the CVRA rights.<sup>2</sup> The perception among criminal justice participants was that the treatment of victims had improved under the CVRA, though many believed that victims were already treated well before the CVRA,<sup>3</sup> and both Federal Defenders and judges expressed concerns that certain provisions of the CVRA, or certain interpretations of it, conflict with defendants' rights.<sup>4</sup> The vast majority of victim-witness professionals reported that judicial attentiveness to victim rights had increased and a large minority (40%) reported that it had greatly or very greatly increased.<sup>5</sup>

The number of people in DOJ's Victim Notification System increased from 600,000 in 2004 to 2.2 million in 2010.<sup>6</sup> The Attorney General issued new guidelines for its employees in 2011.<sup>7</sup> In 2008 and 2010, the Federal Rules Committee issued eight new or revised rules of criminal procedure to account for victims' CVRA rights while attempting not to violate defendants' constitutional rights.<sup>8</sup>

Nor does there appear to be a need to impose a constitutional amendment upon the states. According to Professor Cassell's statement from 2012, many states have victim rights statutes or constitutional provisions. The states should be free to adopt a victim rights constitutional amendment or not, given their policies and budgetary constraints.

Finally, Congress passed the CVRA in 2004 instead of adopting a victim rights constitutional amendment for good reasons. The fundamental objection to the proposed amendment was that it would replace the two-party adversary system the Framers created with a three-party system in which criminal defendants would face both the public prosecutor and private prosecutors with rights equal to or greater than the rights of the accused. The opposition explained that the "colonies shifted to a system of public prosecutions because they viewed the system of private prosecutions as 'inefficient, elitist, and sometimes vindictive,'" and that the "Framers believed victims and defendants alike were best protected by the system of public

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<sup>2</sup> See GAO Report at 83-84.

<sup>3</sup> *Id.* at 13, 86.

<sup>4</sup> *Id.* at 13, 87-88.

<sup>5</sup> *Id.* at 85.

<sup>6</sup> U.S. Department of Justice, Fact and Figures: U.S. Attorneys' Offices' Victim-Witness Programs, <http://www.justice.gov/usao/priority-areas/victims-rights-services/fact-and-figures>.

<sup>7</sup> U.S. Department of Justice, Victims' Rights and Services, <http://www.justice.gov/usao/priority-areas/victims-rights-services>.

<sup>8</sup> See Fed. R. Crim. P. 1(b)(11), 12.1, 12.3, 17(c), 18, 21, 32, 60.

prosecutions that was then, and remains, the American standard for achieving justice.”<sup>9</sup> Further, “we have historically and proudly eschewed private criminal prosecutions based on our common sense of democracy,”<sup>10</sup> and “[n]ever 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,” or “to guarantee rights that intrude so technically into such a wide area of law, and with such serious implications for the Bill of Rights.”<sup>11</sup>

Thus, Congress intended to preserve the system the Framers created – a two-party system with a public prosecutor acting in the public interest, a criminal defendant with constitutional rights to protect his life, liberty and property, and a neutral judge. The proposed amendment, like its failed predecessor, would replace this system with a system in which the defendant would face not only the public prosecutor acting on behalf of victims to extent consistent with the public interest, but victims acting as private prosecutors, and a judge whose neutrality would be compromised.

**The Proposed Amendment Would Create Unresolvable Constitutional Conflicts and Practical Problems, as Well as High Costs.**

The proposed amendment begins by stating that “the following rights of a crime victim, being capable of protection without denying the constitutional rights of the accused, shall not be denied or abridged by the United States or any State.” It seems obvious, as Congressman Scott previously noted, that this language is “trying to be a statement of fact that there is, in fact, no conflict, and that the crime victims’ rights will be respected notwithstanding any denial of constitutional rights to the accused.”<sup>12</sup>

Professor Cassell responded that “both rights can coexist,” and “nobody has provided a real-world example of how the rights are going to interfere with the defendant’s rights.”<sup>13</sup> Professor Cassell also said that defendants’ “claims about their federal constitutional due process rights being violated . . . would be unavailing after passage of a federal amendment.”<sup>14</sup>

Below are many real-world examples of victims’ statutory rights conflicting with defendants’ constitutional rights, and how the courts resolved these conflicts because they could. A constitutional amendment, however, would make victims third parties to the litigation, with victim rights directly competing with defendant rights and no way to resolve the conflict. In fact,

<sup>9</sup> See S. Rcp. No. 108-191 at 68-69, 70 (2003) (minority view).

<sup>10</sup> *Id.* at 70.

<sup>11</sup> *Id.* at 56.

<sup>12</sup> Proposing an Amendment to the Constitution of the United States to Protect the Rights of Crime Victims: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 112th Cong. 200 (2012) [hereinafter “2012 Hearing”].

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 99 (statement of Paul G. Cassell).

the victim would have the upper hand because, unlike the defendant, the victim could file an interlocutory appeal. If constitutionalized, the rights of a person who is or claims to be a crime victim would not be “capable of protection without denying the constitutional rights of the accused.”

#### A. Definition of Crime Victim

The CVRA defines “crime victim” as “a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia.”<sup>15</sup> While this definition unfortunately presumes guilt at time when the defendant must be presumed innocent (*i.e.*, at the time of notice and public proceedings involving pretrial release), the courts have confined the term “victim” to mean a person directly and proximately harmed by an offense with which the defendant has been *charged* and is being prosecuted (if before verdict or plea), or of which the defendant has been *convicted* (if after a guilty verdict or guilty plea).

This interpretation derives from the statute, its legislative history, and the Constitution. Congress recognized in enacting the VWPA that “[t]o order a defendant to make restitution to a victim of an offense for which the defendant was not convicted would be to deprive the defendant of due process of law.”<sup>16</sup> The Supreme Court then interpreted the definition of “victim” in the VWPA, 18 U.S.C. § 3663(a)(2), as authorizing restitution only for “loss caused by the conduct underlying the offense of conviction,”<sup>17</sup> and not by alleged conduct underlying dismissed counts.<sup>18</sup> Congress then passed the CVRA, defining “crime victim” in 18 U.S.C. § 3771(e) the same as “victim” is defined in 18 U.S.C. § 3663(a)(2) in relevant part. When Congress incorporates a term into a statute that the Supreme Court has previously interpreted, Congress is assumed to have incorporated that interpretation,<sup>19</sup> and Congress is presumed not to have intended an unconstitutional meaning.<sup>20</sup>

Moreover, the CVRA does not by its terms accord free floating rights. It requires courts to “ensure” victim rights only “[i]n any court proceeding involving an offense against a crime victim.”<sup>21</sup> Since this presupposes that “a prosecution is pending,”<sup>22</sup> the rules of procedure

<sup>15</sup> 18 U.S.C. § 3771(e).

<sup>16</sup> H.R. Rep. No. 99-334, p. 7 (1985) and H.R. Rep. No. 98-1017, p. 83, n. 43 (1984) (quoted in *Hughey v. United States*, 495 U.S. 411, 421 n.5 (1990)).

<sup>17</sup> *Hughey*, 495 U.S. at 420.

<sup>18</sup> *Id.* at 422.

<sup>19</sup> *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990).

<sup>20</sup> See *Clark v. Martinez*, 543 U.S. 371, 381 (2005); *Rust v. Sullivan*, 500 U.S. 173, 191 (1991).

<sup>21</sup> 18 U.S.C. § 3771(b)(1).

<sup>22</sup> Report of the Advisory Committee on Criminal Rules to Standing Committee on Rules of Practice and Procedure at 3, May 19, 2007 (revised July 2007).

provide that a “victim’s rights described in these rules must be asserted in the district where a defendant is being prosecuted for the crime.”<sup>23</sup> Under current law, alleged victims have no right under the Constitution or the CVRA to insist that a prosecution be brought.<sup>24</sup>

Accordingly, the courts have rejected attempts to use the CVRA to intervene in existing or non-existing criminal cases, or to assert rights or bring mandamus actions: (1) before a criminal prosecution has begun,<sup>25</sup> (2) before a habeas corpus petition has yet been filed,<sup>26</sup> (3) in criminal proceedings against persons who were not charged with any offense, persons who were not charged or convicted of the offense alleged to have directly and proximately caused harm, or persons who were acquitted,<sup>27</sup> (4) in criminal proceedings involving a charged federal offense

<sup>23</sup> Fed. R. Crim. P. 60(b)(4).

<sup>24</sup> See, e.g., *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005); *In re Rodriguez*, slip op., 2008 WL 5273515 (3d Cir. Dec. 10, 2008); *In re Walsh*, slip op., 2007 WL 1156999 (3d Cir. Apr. 19, 2007); *In re Siyi Zhou*, 198 Fed. Appx. 177 (3d Cir. 2006); *Estate of Musayelova v. Kataja*, slip op., 2006 WL 3246779 (D. Conn. Nov. 7, 2006).

<sup>25</sup> CVRA “does not confer any rights upon a victim until a prosecution is already begun.” *United States v. Merkosky*, 2008 WL 1744762 at \*2 (N.D. Ohio Apr. 11, 2008). In a case where persons claiming to have been defrauded asserted that the government was required to freeze defendant’s assets and prevent him from conducting fraudulent securities activities before he was charged, the court held that the “right to be reasonably protected from the accused” cannot have ripened before” the defendant was “accused by criminal complaint, information or indictment of conduct victimizing the complainant.” *United States v. Rubin*, 558 F. Supp. 2d 411, 420 (E.D.N.Y. 2008)

<sup>26</sup> *Habeas Corpus Resource Center v. U.S. Department of Justice*, 2013 WL 6157321 \*1 (N.D. Cal. 2013).

<sup>27</sup> See *In re W.R. Huff Asset Management Co., LLC*, 409 F.3d 555, 564 (2d Cir. 2005) (rejecting petition for mandamus seeking to vacate settlement agreement approved by district court between United States and convicted, acquitted and uncharged persons; “the CVRA does not grant victims any rights against individuals who have not been convicted of a crime.”); *United States v. Sharp*, 463 F.Supp.2d 556 (E.D. Va. 2006) (woman who wished to speak at sentencing based on her claim that her boyfriend had mistreated her as a result of smoking marijuana he purchased from the defendant was not a victim within the meaning of the CVRA; “the CVRA only applies to [putative victim] if she was ‘directly and proximately harmed’ as a result of the commission of the Defendant’s federal offense.”); *United States v. Turner*, 367 F.Supp.2d 319, 326-27 (E.D.N.Y. 2005) (concluding CVRA does not mandate rights for victims of uncharged conduct); *United States v. Hunter*, 2008 WL 53125 \*4 (D. Utah Jan. 3, 2008) (woman shot by gunman on a rampage at a shopping mall and her parents were not “directly and proximately harmed” by the defendant’s offense of conviction of selling the gun to the gunman with reason to believe he was a minor, where there was no evidence defendant was aware of his intentions), *aff’d*, *In re Antrobus*, 519 F.3d 1123 (10th Cir. 2008); *United States v. Merkosky*, 2008 WL 1744762 (N.D. Ohio Apr. 11, 2008) (defendant cannot be deemed victim of uncharged crimes of government agents against him in his own criminal case); see also *United States v. Saferstein*, slip op., 2008 WL 4925016 \*3 (E.D. Pa. Nov. 18, 2008) (no notice was required of tax or perjury charges because there were no victims).

with state predicates by which persons claim to have been harmed,<sup>28</sup> (5) in criminal proceedings where the harm alleged to have been directly and proximately caused is too attenuated from the elements of the charged offense,<sup>29</sup> (6) by civil plaintiffs seeking to intervene in criminal proceedings to seek restitution, damages, discovery, or other relief,<sup>30</sup> and (7) in lawsuits or mandamus actions requesting arrest, restraining orders, prosecution, sentencing, damages or injunctive relief.<sup>31</sup>

It appears that all or most of these actions would be allowed under the proposed constitutional amendment. First, the definition of “victim” is not limited to persons harmed by charged or convicted conduct. It would include any person (1) “against whom the criminal offense is committed,” or (2) “who is directly and proximately harmed by the commission of an act, which, if committed by a competent adult, would constitute a crime.” As Professor Cassell

<sup>28</sup> *United States v. Guevera-Toloso*, 2005 WL 1210982 (E.D.N.Y. 2005) (where defendant was charged with “illegally re-entering the United States after being convicted of a felony and subsequently deported,” victims of predicate offenses, if any, were not entitled to notice because the predicates were state offenses, and expressing doubt that a victim of a state predicate would be entitled to notice).

<sup>29</sup> *United States v. Atlantic States Cast Iron Pipe Co.*, 612 F. Supp. 2d 453, 545 (D.N.J. 2009) (“The conduct that allegedly harmed one or more of the six named workers may have been in violation of OSHA workplace standards ... Such conduct, however, was not conduct proscribed by the obstruction and false statement substantive offenses and conspiracy objectives of which each of these defendants was convicted, and we perceive no ‘direct and proximate’ causal link between those offenses of conviction and the injuries sustained by the six named workers.”).

<sup>30</sup> For example, in *United States v. Moussaoui*, 483 F.3d 220 (4th Cir. 2007), lawyers representing plaintiffs in a tort action in the Southern District of New York against various third parties as a result of the 9/11 attacks moved to intervene in the capital case against Moussaoui in the Eastern District of Virginia in order to be “heard” with respect to a motion to obtain for use in the civil litigation non-public discovery (some of it classified) the government had provided under protective orders to Moussaoui’s lawyers. The Fourth Circuit reversed, in part because the CVRA is “limited to the criminal justice process” and “unconcerned with victims’ rights to file civil claims against their assailants,” *id.* at 234-35, and in part because allowing victims to intervene in criminal cases to obtain discovery for use in civil litigation would burden courts, criminal defendants, the government and the public, *id.* at 237-38. See also *United States v. McNulty*, 597 F.3d 344, 352 (6th Cir. 2010) (McNulty was not a victim under CVRA for purposes of receiving restitution from former employer for firing and blackballing him because those acts are not criminal in nature, and are not inherent in the antitrust crime to which employer pled guilty: “[c]ivil, not criminal, remedies are available to address these actions”); *In re Searcy*, 202 Fed. Appx. 625 (4th Cir. Oct. 6, 2006) (CVRA has “no application . . . to these [civil] proceedings”); *In re Nabaya*, 481 Fed. Appx. 64 (4th Cir. 2012) (“Petitioners are not crime victims under the CVRA. . . . Their mandamus petition attacks a sanction order entered in civil litigation and upheld on appeal.”).

<sup>31</sup> See *In re Bond*, 547 Fed. Appx. 348 (4th Cir. 2013) (mandamus petitioner is “not a crime victim” under the CVRA because he “was not the victim in the underlying criminal matter,” his “failed attempts to intervene in the criminal case do not make him a crime victim,” and “there is no prosecution . . . as yet underway”); *In re Rodriguez*, slip op., 2008 WL 5273515 (3d Cir. Dec. 10, 2008); *In re Walsh*, slip op., 2007 WL 1156999 (3d Cir. Apr. 19, 2007); *In re Siyi Zhou*, 198 Fed. Appx. 177 (3d Cir. 2006); *Estate of Musayelova v. Kataja*, slip op., 2006 WL 3246779 (D. Conn. Nov. 7, 2006).

has explained, the first definition is “unlimited,” and the second definition should be read to include victims of uncharged crimes.<sup>32</sup>

Second, a victim would have a “right to be heard at any . . . proceeding involving any right established by this article,” which apparently includes a proceeding for the sole purpose of allowing a person to “present information in support of a claim of right under the amendment.”<sup>33</sup> Thus, unlike under the CVRA, persons claiming to be victims could initiate proceedings before any criminal prosecution is pending for the purpose of claiming a right to be heard to insist upon arrest, prosecution, sentencing, restitution, or other relief. Lawyers would then have to be appointed to represent people not charged by the government but accused by private parties.

### B. Standing

The CVRA provides that the victim, his lawful representative, or the attorney for the government “may assert” the rights described in subsection (a), and that the prosecutor shall advise the victim that he “can seek the advice of an attorney.”<sup>34</sup>

The proposed amendment would provide that the “crime victim or the crime victim’s lawful representative has standing to assert these [constitutional] rights.”

Professor Cassell previously asserted that this provision is necessary to “overrule[] derelict court decisions,”<sup>35</sup> citing only a 1997 case in which the Tenth Circuit correctly held that sequestered victim-witnesses had no standing to complain because the statute at the time provided that victims had a right “to be present at all public court proceedings related to the offense, *unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial,*” which it did.<sup>36</sup> The court was not “derelict” but following the law. Professor Cassell cited no case in which a court did not permit a person who met the definition of a “victim” in the CVRA to “assert” his or her rights under the statute.

The standing provision is not only unnecessary, but dangerous and costly. It would undeniably make victims third parties to the litigation, with constitutional rights unavoidably in conflict with the constitutional rights of defendants. And it would soon be read to create a victims’ right to counsel. Although the defendant’s right to counsel is grounded in the Due Process Clause and the Sixth Amendment, crime victims would now have constitutional rights too. As the Supreme Court has often said, it is through counsel that the accused secures his other

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<sup>32</sup> 2012 Hearing at 123-125.

<sup>33</sup> *Id.* at 110.

<sup>34</sup> 18 U.S.C. § 3771(d)(1), (c)(2).

<sup>35</sup> 2012 Hearing at 118-19.

<sup>36</sup> *United States v. McVeigh*, 106 F.3d 325, 334-35 (10th Cir. 1997) (citing 42 U.S.C. § 10606(b)(4)).

rights.<sup>37</sup> Professor Cassell describes the “standing” provision in similar terms.<sup>38</sup> It seems likely that it would soon be invoked to require a constitutional right to counsel at the expense of state and federal governments.

Professor Cassell also explained that the crime victim would have standing to “enforce these rights in any court,”<sup>39</sup> including by filing a petition for federal habeas corpus claiming a constitutional violation by state authorities after first exhausting state remedies.<sup>40</sup>

### C. Right to be Heard

The proposed amendment would grant an unqualified right “to be heard at any release, plea, sentencing, or other proceeding involving any right established by this article.” It would not be limited by reasonableness, and it is not explicitly limited to public proceedings or proceedings in the district court. As noted above, the phrase “or other proceeding involving any right established by this article” would likely be read to mean that persons could initiate a freestanding proceeding claiming rights as victims independent of any pending criminal case. As shown above, people have tried but failed to do this under the CVRA. It is unclear on what basis the courts could stop it under the proposed constitutional amendment.

The CVRA, in contrast, provides a right to be “*reasonably* heard at any *public* proceeding *in the district court* involving release, plea, [or] sentencing.” One objection to the constitutional amendment that failed before the CVRA was enacted was that it would have created an absolute right to be heard and would have prohibited judges from responding flexibly if, for example, there were multiple victims, the victim was involved in the criminal activity, the victim provoked the crime, or the victim’s statement would violate the defendant’s right to due process.<sup>41</sup> By not including language that would have prohibited judges from restricting the right to be heard,<sup>42</sup> and adding the modifier “reasonably,” the CVRA gives the courts flexibility to permit victims to be

<sup>37</sup> See *Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986) (“[I]t is through counsel that the accused secures his other rights.”) (internal citations omitted); *United States v. Cronk*, 466 U.S. 648, 653-54 (1984) (“Lawyers . . . are the means through which the other rights of the person on trial are secured.”); *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”).

<sup>38</sup> “Standing is a critically important provision that must be read in connection with all of the other provisions,” for it “ensures that [victims] will be able to *fully* enforce those rights,” will “eliminate” the “difficulty of being heard” by “conferring standing on the victim,” and permitting “a lawyer to be heard on behalf of a victim-client.” 2012 Hearing at 118-19.

<sup>39</sup> *Id.* at 118.

<sup>40</sup> *Id.* at 198-99.

<sup>41</sup> See S. Rep. No. 108-191 at 76, 85, 106-107 & n.133 (Nov. 7, 2003) (minority views).

<sup>42</sup> It stated that the right to be heard “shall not be denied . . . and may be restricted only as provided in this article.” S.J. Res. 1, § 1 (108th Cong.).

heard in a manner that does not infringe on the rights of the defendant or the orderly administration of justice.<sup>43</sup>

The right to be reasonably heard under the CVRA “does not empower victims to [have] veto power over any prosecutorial decision, strategy or tactic regarding bail, release, plea, sentencing or parole,” or any other agreement of the parties or decision of the court<sup>44</sup>. They have “a voice, not a veto.”<sup>45</sup> But under the proposed amendment, the victim would have constitutional rights equal to the defendant’s and a right to appeal a defendant’s guilty plea or sentence.

There are a variety of ways in which courts are now able to reasonably implement, limit, or in some cases reasonably deny, a victim’s claimed statutory right to be heard which would be difficult or impossible under a constitutional amendment.

First, courts have rejected claims that the “right to be reasonably heard” includes a right to litigate the sentence, to make a specific sentencing recommendation, and to appeal the defendant’s sentence.<sup>46</sup> If a constitutional amendment were adopted, the unqualified right to be heard would clearly include the right to litigate and appeal the sentence.

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<sup>43</sup> The “CVRA strikes a different balance, and it is fair to assume that it does so to accommodate the concerns of such legislators. . . . In particular, it lacks the language that prohibits all exceptions and most restrictions on victims’ rights, and it includes in several places the term ‘reasonable’ as a limitation on those rights.” *United States v. Turner*, 367 F.Supp.2d 319, 333 n.13 (E.D.N.Y. 2005).

<sup>44</sup> *Id.* at 424.

<sup>45</sup> *Id.* at 417. “[T]here is absolutely no suggestion in the statutory language that victims have a right independent of the government to prosecute a crime, set strategy, or object to or appeal pretrial or in limine orders entered by the Court whether they be upon consent of or over the objection of the government. Quite to the contrary, the statute itself provides that ‘[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.’ 18 U.S.C. § 3771(d)(6).” *Id.* See also *In re Huff Asset Management Co.*, 409 F.3d 555, 564 (2d Cir. 2005) (“Nothing in the CVRA requires the Government to seek approval from crime victims before negotiating or entering into a settlement agreement.”); *United States v. Thetford*, 935 F. Supp.2d 1280, 1282-83 (N.D. Al. 2013) (same).

<sup>46</sup> See *In re Kenna*, 453 F.3d 1136 (9th Cir. 2006) (affirming district court’s rejection of victim’s claimed right to litigate guidelines as basis for disclosure of PSR); *In re Brock*, 262 Fed. Appx. 510, 512-13 (4th Cir. 2008) (no right to present argument regarding, or to appeal, guideline calculations); *United States v. Hunter*, 548 F.3d 1308, 1311-12 (10th Cir. 2008) (no right to appeal a defendant’s sentence because a victim is not a party, and finding “no precedent for allowing a non-party appeal that would reopen a criminal case following sentencing”).

It has been suggested that *Payne v. Tennessee*, 501 U.S. 808 (1991) provides support for a right of victims to recommend a sentence, but this is incorrect. The Court held in *Payne* that the Eighth Amendment does not bar the admission of “‘victim impact’ evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim’s family” during the penalty phase of a capital trial, *id.* at 817, though such evidence may be so prejudicial that it violates the Due Process Clause. *Id.* at 825. In *Payne*, a family member testified to the emotional impact on the victim’s family, but did not recommend a sentence. *Id.* at 814-15. The Court explicitly limited its holding to “the impact of the

Second, courts have rejected victims' claimed right to the presentence report as part of the right to be heard.<sup>47</sup> By statute and rule, the pre-sentence report is disclosed only to the parties.<sup>48</sup> The report contains, among other things, information about the offense; the defendant's cooperation with the government; the defendant's history and characteristics including family background, health, medical and psychological information, educational background, financial condition, uncharged conduct, prior arrests and convictions; information about the financial, social, psychological and medical impact on all victims of the offense; and information sufficient for a restitution order.<sup>49</sup> The information comes from a variety of sources, including the defendant, the defendant's family, employers and friends, medical, psychiatric and social services providers, cooperating witnesses, grand jury minutes, law enforcement reports, and victims of the offense. The defendant and others provide information with the assurance that it will be kept confidential, and would not provide it otherwise. The report is presumed confidential in order to protect the privacy interests of the defendant, the defendant's family, and crime victims, the court's interest in receiving full disclosure of information relevant to sentencing, and the interest of the government in the secrecy of information related to ongoing criminal investigations and grand jury proceedings.<sup>50</sup> The defendant's right of access to the pre-sentence report is of fairly recent vintage and is based on the defendant's right to due process of law.<sup>51</sup>

Courts are also able to deny victims' requests to review the pre-sentence report to learn about the defendant's assets or ability to pay restitution.<sup>52</sup> To do otherwise would conflict with the restitution statute. Under that statute, victims have the opportunity to provide information to

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victim's death on the victim's family" and explicitly left standing its previous holding prohibiting "a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence." *Id.* at 830 n.2 (emphasis supplied). See also *Welch v. Simons*, 451 F.3d 675, 703 (10th Cir. 2006) (collecting cases).

<sup>47</sup> See *In re Brock*, slip op., 2008 WL 268923 (4<sup>th</sup> Cir. Jan. 31, 2008); *In re Kenna*, 453 F.3d 1136 (9<sup>th</sup> Cir. 2006); *United States v. Coxton*, 598 F. Supp. 2d 737 (W.D.N.C. 2009); *United States v. BP Products*, 2008 WL 501321 \*9 (S.D. Tex. Feb. 21, 2008); *United States v. Hunter*, 2008 WL 53125 \*7 (D. Utah Jan. 3, 2008) (Kimball, J.); *United States v. Citgo Petroleum Corp.*, 2007 WL 2274393 \*2 (S.D. Tex. Aug. 8, 2007); *United States v. Sacane*, 2007 WL 951666 \*1 (D. Conn. Mar. 28, 2007); *United States v. Ingrassia*, 2005 WL 2875220 \*17 (E.D.N.Y. 2005).

<sup>48</sup> See 18 U.S.C. § 3552(d); 18 U.S.C. § 3664(b); Fed. R. Crim. P. 32(c)(2).

<sup>49</sup> See Fed. R. Crim. P. 32(d); 18 U.S.C. § 3664(a), (d)(3).

<sup>50</sup> See, e.g., *United States v. Corbitt*, 879 F.2d 224, 229-30 (7th Cir. 1989).

<sup>51</sup> See *United States Dept. of Justice v. Julian*, 486 U.S. 1, 9-10, 12 (1988); *Corbitt*, 879 F.2d at 229, 235-36; *United States v. Charmer Industries, Inc.*, 711 F.2d 1164, 1171-72 (2d Cir. 1983); *Hancock Bros. v. Jones*, 293 F. Supp. 1229, 1234 (N.D. Cal. 1968).

<sup>52</sup> *United States v. Rubin*, 558 F. Supp. 2d 411, 426 (E.D.N.Y. 2008).

the court regarding restitution,<sup>53</sup> but the “privacy of any records filed, or testimony heard” on the subject of restitution, whether from the defendant, other victims, or anyone else, “shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.”<sup>54</sup>

If victims had constitutional standing as parties, they could obtain the presentence report.

Third, the CVRA did not alter existing law under which the court may order closed proceedings closed,<sup>55</sup> in order to protect the defendant’s right to a fair trial, the safety of any person, or sensitive information.<sup>56</sup> Accordingly, courts have held that victims may not be heard at a closed juvenile transfer proceeding in which the court considers highly sensitive information,<sup>57</sup> or on matters that are routinely handled without a court appearance.<sup>58</sup> It may be that the proceedings to which the amendment refers are intended to be “public” and in the “district court,” but it does not say so, and courts must follow plain language.

Fourth, courts are able to protect the defendant’s due process rights to notice, a fair opportunity to challenge whether a person who wishes to be heard is a “victim,” and a fair opportunity to investigate and challenge statements and testimony by victims by introducing contrary information or through cross-examination. The defendant’s right to notice and an opportunity to be heard at sentencing is rooted in the Due Process Clause,<sup>59</sup> and is protected through various provisions of Rule 32 and Rule 26.2.<sup>60</sup> These protections apply to victim impact information and restitution. See *United States v. Rakes*, 510 F.3d 1280, 1285-86 & n.3 (10th Cir. 2007); Fed. R. Crim. P. 32(d)(2)(B), (D); 18 U.S.C. § 3664(a), (b), (e); see also *United States v.*

<sup>53</sup> See 18 U.S.C. § 3664(d)(1), (2), (5).

<sup>54</sup> 18 U.S.C. § 3664(d)(4).

<sup>55</sup> See 150 Cong. Rec. S10910 (Oct. 9, 2004) (statement of Senator Kyl); 150 Cong. Rec. S4268 (April 22, 2004) (statement of Senator Kyl).

<sup>56</sup> See, e.g., *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564, 581 (1980); *Estes v. Texas*, 381 U.S. 532 (1965); 28 C.F.R. § 50.9.

<sup>57</sup> *United States v. L.M.*, 425 F.Supp.2d 948, 951-56 (N.D. Iowa 2006).

<sup>58</sup> *United States v. Rubin*, 558 F. Supp. 2d 411, 423, 424 (E.D.N.Y. 2008).

<sup>59</sup> See *Gardner v. Florida*, 430 U.S. 349, 351, 358 (1977); *United States v. Tucker*, 404 U.S. 443, 447 (1972); *Townsend v. Burke*, 334 U.S. 736, 741 (1948).

<sup>60</sup> The rules require notice in the presentence report; the opportunity to investigate, object and present contrary evidence and argument to the Probation Officer; the opportunity to file a sentencing memorandum and argue orally to the court; the opportunity for a hearing; the right to obtain witness’ statements, to have witnesses placed under oath and to question witnesses at any such hearing; and the right to have the court resolve any disputed matter. See Rule 32(e)(2), (f), (g), (h), (i); Fed. R. Crim. P. 26.2(a)-(d), (f).

*Forsyth*, slip op., 2008 WL 2229268 (W.D. Pa. May 27, 2008) (excluding “victim impact” letter because author was not a “victim” under CVRA, and although “relevant” for sentencing purposes, it did not have sufficient reliability under the Due Process Clause).

For example, in *United States v. Endsley*, slip op., 2009 WL 385864 (D. Kan. Feb. 17, 2009), the presentence report contained victim impact statements blaming the victim’s behavioral problems on the assault with which the 19-year-old defendant was charged. The government argued that “the victim has a right to make a statement about how he feels the crime impacted him,” but “the defendant has no parallel right to counter the information provided by the victim,”<sup>61</sup> and the probation officer asserted that “it would be inappropriate for the Court to obtain additional background information on the victim.”<sup>62</sup> The judge rejected these contentions, holding that the defendant had a right to full adversary testing, to be sentenced based on accurate information, and “certainly has the right to challenge the reliability of that causation opinion by argument or evidence.”<sup>63</sup> The court held that the victim’s right to “dignity and privacy” does “not impinge on a defendant’s right to refute by argument and relevant information any matter offered for the court’s consideration at sentencing,” or the court’s duty to “evaluate the victim impact statements against the same standards of reliability and reasonableness applied to all matters introduced at sentencing hearings.”<sup>64</sup>

It would at least be difficult for a judge to simultaneously protect a victim’s constitutional rights to be heard and to dignity and privacy, and the defendant’s constitutional right to challenge the victim’s statements with embarrassing information.

Fifth, the district court “may place reasonable constraints on the duration and content of victims’ speech, such as avoiding undue delay, repetition or the use of profanity,” and relevance.<sup>65</sup> Thus, for example, a judge disregarded the testimony of a victim’s son at a bail hearing because it was “not material to the decision at hand.”<sup>66</sup> The son had no personal knowledge regarding the strength of the case against the defendant, and there was no claim that anyone would be endangered by the defendant’s release.<sup>67</sup> The judge was able to avoid a potential conflict with the defendant’s rights, noting that “to consider the likelihood of guilt

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<sup>61</sup> *Id.* at \*1.

<sup>62</sup> *Id.* at \*2.

<sup>63</sup> *Id.* at \*2 & nn.1-2.

<sup>64</sup> *Id.* at \*2.

<sup>65</sup> *Kenna v. United States District Court*, 435 F.3d 1011, 1014 (9th Cir. 2006); *id.* at 1018-19 (Friedman, J., dubitante).

<sup>66</sup> *United States v. Marcello*, 370 F.Supp.2d 745, 745 (N.D. Ill. 2005).

<sup>67</sup> *Id.* at 747.

based solely on a witness's faith in the prosecution would violate the law that an indictment is merely an accusation.<sup>68</sup>

In a case involving so many victims that permitting them all to give an oral presentation at sentencing would be impracticable, courts may fashion a "reasonable procedure" that "does not unduly complicate or prolong the proceedings."<sup>69</sup> Courts have done so, for example by allowing a limited number of victims to speak and others to submit written impact statements.<sup>70</sup>

Again, it would be difficult for a judge to place reasonable limitations on a victim who had an absolute constitutional right to be heard.

#### D. Right Not to Be Excluded

The proposed amendment states that a victim "shall not be excluded from public proceedings related to the offense," without exception. The CVRA gives victims the same right *unless* the court finds by "clear and convincing evidence" that a victim's "testimony would be materially altered if the victim heard other testimony at that proceeding."<sup>71</sup>

The right of a testifying victim-witness not to be excluded is a significant incursion on defendants' rights. "[A]s a means of discouraging and exposing fabrication, inaccuracy, and collusion,"<sup>72</sup> Rule 615 of the Federal Rules of Evidence requires the court to order any other witness to be sequestered upon request. But the rule contains an exception for "a person authorized by statute to be present." This exception was added in response to an earlier statute providing that victims may not be excluded from *trial* on the basis that they may make a victim impact statement at *sentencing*.<sup>73</sup> Unlike that statute, the proposed amendment would permit tainted *factual testimony* at *trial*, without even the possibility provided by the CVRA that the defendant might prove in advance that the testimony would be altered.<sup>74</sup>

<sup>68</sup> *Id.* at 747 n.5.

<sup>69</sup> *Id.* at 1014 n.1; 18 U.S.C. § 3771(d)(2).

<sup>70</sup> See *United States v. CITGO Petroleum Corp.*, 893 F.Supp.2d 848, 854 (S.D.Tex.2012) (fifteen of over 100 potential victims could speak at sentencing and the others could provide written impact statements).

<sup>71</sup> 18 U.S.C. § 3771(a)(3).

<sup>72</sup> Fed. R. Evid. 615, 1972 advisory committee note.

<sup>73</sup> Fed. R. Evid. 615, 1998 advisory committee note.

<sup>74</sup> The showing required by the CVRA is difficult if not impossible to make. See United States Government Accountability Office, *Crime Victims' Rights Act* at 87 (Dec. 2008) (hereinafter "GAO Report"); *United States v. Edwards*, 526 F.3d 747, 758 & n.28 (11th Cir. 2008); *In re Mikhel*, 453 F.3d 1137, 1139 & n.3 (9th Cir. 2006) ("[T]here is always a *possibility* that one witness will alter his testimony based on the testimony of another," but "[a] mere *possibility* that a victim-witness may alter his or her testimony as a result of hearing others testify is ... insufficient to justify excluding him or her from trial.").

An absolute constitutional right not to be excluded would present other problems as well. For example, victims would have to be notified of and attend plea hearings for cooperating defendants. As DOJ reported to the GAO, “public knowledge of the defendant’s cooperation could compromise the investigation, as well as bring harm to the defendant and others.”<sup>75</sup> Currently, the government asks the court to close the proceedings, but this does not appear to be an option under the proposed constitutional amendment.

#### **E. Right to Due Consideration of Dignity and Privacy**

Under the CVRA, a victim has a statutory “right to be treated ... with respect for the victim’s dignity and privacy.” Under the proposed amendment, a victim would have a constitutional “right[] ... to due consideration of the crime victim’s ... dignity[] and privacy.”

Under current law, courts need not apply these amorphous concepts to up-end the adversary system and infringe on defendants’ constitutional rights. One court held that the right to be treated “with respect for dignity and privacy” does not “impinge[] on a defendant’s right to refute by argument and relevant information any matter offered for the court’s consideration at sentencing.”<sup>76</sup> Another declined to adopt the putative victims’ interpretation “that prohibits the government from raising legitimate arguments in support of its opposition to a motion simply because the arguments may hurt a victim’s feelings or reputation,” and cautioned that this was “precisely the kind of dispute a court should not involve itself in since it cannot do so without potentially compromising its ability to be impartial to . . . the only true parties to the trial of the indictment.”<sup>77</sup>

It was suggested that this provision would allow victims to oppose a defense request for reproduction of child pornography.<sup>78</sup> Congress enacted a law in 2009 directing courts to deny any request by a defendant to reproduce any material constituting child pornography, so long as the government made the material reasonably available to the defendant, to be satisfied by defense inspection at a government facility.<sup>79</sup> Courts across the country ruled the statute unconstitutional as it interfered with defendants’ rights to prepare to defend themselves. The issue is now dealt with in most cases through protective orders or agreements confining examination of the material to the defense expert and counsel. For the same reason that statute is

<sup>75</sup> GAO, Testimony Before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, House of Representatives, *Crime Victims’ Rights Act: Increasing Victim Awareness and Clarifying Applicability to the District of Columbia Will Improve Implementation of the Act* 9 (Sept. 29, 2009) [hereinafter “GAO Testimony”].

<sup>76</sup> *United States v. Endsley*, slip op., 2009 WL 385864 \*2 (D. Kan. Feb. 17, 2009).

<sup>77</sup> *United States v. Rubin*, 558 F. Supp. 2d 411, 427-28 (E.D.N.Y. 2008).

<sup>78</sup> 2012 Hearing at 97 (statement of Paul G. Cassell).

<sup>79</sup> 18 U.S.C. § 3509(m).

unconstitutional, application of the proposed amendment in the manner suggested would violate the defendant's rights. But if a victim with a constitutional right to privacy objected to the defense obtaining and examining the evidence, there would be no way to resolve the conflict.

In December 2008, the Rules Committee revised Fed. R. Crim. P. 17(c)(3), which governs issuance of subpoenas compelling production of documents, witnesses or objects for use in federal proceedings, to account for victim privacy without infringing on defendants' right to prepare for trial. If the subpoena seeks "confidential information about a victim," the court must require advance notice to the victim so that s/he can move to quash or modify it, *except* that such notice may not be required if the defense would be "unfairly prejudiced by premature disclosure of a sensitive defense strategy," which the court may determine *ex parte*.

In some cases, the government has cited the victim's statutory right to privacy in this context, seeking to bar the defense from moving for a subpoena *ex parte* and the judge from issuing a subpoena *ex parte*. In *United States v. Vaughn*, slip op., 2008 WL 4615030 (E.D. Cal. Oct. 17, 2008), decided before the rule change, the judge reasoned that § 3771(a)(8) "point[s] to the need to protect victims from their assailants," but that "a defendant has the right to test the government's evidence," and ordered disclosure of the witnesses' names and contact information under a protective order. In *United States v. McClure*, the judge rejected the government's request and followed the rule.<sup>80</sup> See also *United States v. Crutchfield*, 2014 WL 2569058 (N.D. Cal. 2014) (ordering defense counsel to file an *ex parte* brief outlining how unfairly prejudiced by premature disclosure of a sensitive defense strategy, which the court would decide *in camera*). In *United States v. K.K.*, 756 F.3d 1169 (9th Cir. 2014), the court of appeals denied a victim's petition for mandamus because the district court "appropriately balanced the victim's privacy interests against the defendant's right to investigate the case and prepare a defense for trial," but ordered the court to review the documents *in camera* to ensure that they were relevant and whether any limits should be placed on use of the documents.

If a victim with a constitutional right to privacy asserted that the defendant could not obtain or use such information at all, it is difficult to see how the court could protect both the victim's and the defendant's constitutional rights.

#### **F. Right to Proceedings Free of Unreasonable Delay**

The CVRA provides a statutory right to proceedings "free of unreasonable delay." This is "not intended to infringe on the defendant's due process right to prepare a defense." 150 Cong. Rec. S4260-01 at S4268 (Apr. 22, 2004) (statement of Senator Kyl). In *United States v. Tobin*, 2005 WL 1868682 (D.N.H. July 22, 2005), the judge granted a joint motion for a continuance over the alleged victim's objection, noting that Congress did not intend the CVRA to deprive defendants or the government of a full and adequate opportunity to prepare for trial, that the defendant's right to adequate preparation is of "constitutional significance," and that allowing the victim's "discrete interests" to control "runs the unacceptable risk of [the] wheels [of justice] running over the rights of both the accused and the government, and in the end, the people

<sup>80</sup> See Memorandum and Order re: Motion to Preclude Ex Parte Rule 17(c) Subpoenas, April 7, 2009, *United States v. McClure*, S-08-100 and S-08-270 WBS (E.D. Cal.).

themselves.” *Id.* at \*1; *cf. United States v. Hunter*, 2008 WL 53125 \*1 n.1 (D. Utah Jan. 3, 2008) (victims did not have a right under the CVRA to unilaterally set a schedule that deprived the parties of the right to participate and the court of adequate time to review and decide the issues).

The amendment, however, would constitutionalize a speedy trial right for victims, which would in many cases collide head on with the constitutional right of the defendant to investigate the case and prepare a defense,<sup>81</sup> and the court would have no way to resolve it. Further, the defendant and the government would have to respond to a victim’s claim that the delay was unreasonable by revealing trial strategy to each other and the victim in order to justify the time needed, which would also violate the defendant’s rights unless the proceeding was *ex parte*.

### G. Right of Due Consideration of Victim’s Safety

The proposed constitutional right to “due consideration of the crime victim’s safety” is similar to the statutory right “to be reasonably protected from the accused.”

A constitutional amendment is not necessary for this purpose, and would create the same kinds of unresolvable conflicts as the other proposed constitutional rights. The Bail Reform Act requires the court to consider whether release of the person with or without conditions “will endanger the safety of any other person,” and specifies that if the court determines that conditions will assure the appearance of the person and the safety of any other person and the community, it may order the person to “avoid all contact with an alleged victim of the crime,” subject to pretrial release being revoked.<sup>82</sup>

The Supreme Court upheld the preventive detention provisions of the Bail Reform Act<sup>83</sup> against a facial substantive due process challenge because, under “these narrow circumstances” - - where detention may be sought only for “individuals who have been arrested for a specific category of extremely serious offenses,” and may be imposed only when the government “proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community” -- the government’s interest in preventing future crime is “compelling.”<sup>84</sup>

The courts have held that the CVRA right “to be reasonably protected from the accused” does not add to or change the bases upon which a defendant may be released or detained under the Bail Reform Act.<sup>85</sup> The right to be “reasonably protected from the accused” also does not

<sup>81</sup> *Michigan v. Harvey*, 494 U.S. 344, 348 (1990).

<sup>82</sup> 18 U.S.C. § 3142(c)(1), (c)(1)(B)(v), (d)(2), (e)-(g).

<sup>83</sup> *See* 18 U.S.C. § 3142(c) and (f).

<sup>84</sup> *United States v. Salerno*, 481 U.S. 739, 750-51 (1987).

<sup>85</sup> *See United States v. Turner*, 367 F.Supp.2d 319, 332 (E.D.N.Y. 2005), *United States v. Rubin*, 558 F. Supp. 2d 411, 420 (E.D.N.Y. 2008).

permit a victim to dictate a defendant's financial affairs or restrict travel. In *United States v. Rubin*, 558 F. Supp. 2d 411 (E.D.N.Y. 2008), the court found that the government had not violated this provision of the CVRA when it chose not to freeze assets of the defendant or prevent him from engaging in securities activities, and that the court did not violate it by permitting the defendant to visit sick relatives in Israel after his arrest. *Id.* at 420.

#### H. Right to Restitution

The CVRA provides a right to “full and timely restitution as provided in law.”<sup>86</sup> Federal law makes restitution mandatory in some cases,<sup>87</sup> and discretionary in others.<sup>88</sup> Orderly procedures for the issuance and enforcement of restitution orders are provided by statute,<sup>89</sup> and a well-developed body of caselaw interprets the statutes.<sup>90</sup> The legislative history of the CVRA states that it “makes no changes in the law with respect to victims’ ability to get restitution.”<sup>91</sup> Thus, courts have appropriately rejected efforts to use the CVRA to displace the restitution statutes.<sup>92</sup>

The amendment, however, would require a “right ... to restitution.” As Professor Cassell’s previous testimony makes clear, this provision “would constitutionalize” mandatory restitution in every case, whether or not required by statute and apparently whether or not the crime of conviction caused any loss (since a person would be a victim based on unconvicted “acts”), “[c]ourts would be required to enter an order of restitution against the convicted offender.”<sup>93</sup> This would require Congress to re-write the restitution statutes, and it would likely violate the Eighth Amendment excessive fines clause in some cases.

#### I. No Limit on Rights with Respect to Defendants’ Habeas Proceedings

The CVRA provides that in a federal habeas corpus proceeding arising from a state conviction only, the court shall ensure that a victim is afforded some of the rights under

<sup>86</sup> 18 U.S.C. § 3771(a)(6).

<sup>87</sup> 18 U.S.C. § 3663A; 18 U.S.C. § 2259.

<sup>88</sup> 18 U.S.C. § 3663.

<sup>89</sup> 18 U.S.C. § 3664.

<sup>90</sup> See, e.g., *Hughey v. United States*, 495 U.S. 411, 420 (1990) (holding that 18 U.S.C. § 3663 authorizes restitution only for “loss caused by the conduct underlying the offense of conviction”).

<sup>91</sup> See H.R. Rep. No. 108-711, 2005 U.S.C.C.A.N. 2274, 2283 (Sept. 30, 2004).

<sup>92</sup> See *United States v. Rubin*, 558 F. Supp. 2d 411, 421, 425-27 (E.D.N.Y. 2008); *United States v. Hunter*, 548 F.3d 1308, 1312-13 (10th Cir. 2008).

<sup>93</sup> 2012 Hearing at 117-18.

subsection (a). This provision does not give rise to any obligation or requirement on the part of personnel of the Executive Branch of the Federal Government.<sup>94</sup>

The proposed amendment does not contain such a limit. Hence, victims or persons claiming to be victims could exercise all of their constitutional rights in federal habeas corpus proceedings arising from either state or federal convictions. Not only would this add complexity to an already difficult area, but it should require appointed counsel for habeas petitioners in whose cases victims exercise their rights. Currently, habeas petitioners do not have a right to counsel, but they would be in a different posture under the proposed amendment. In addition to attacking their convictions or sentences, they would be defending themselves against an adverse party asserting its own affirmative rights to freedom from unreasonable delay, to be heard, to dignity and privacy.

#### J. Remedies

Like the CVRA,<sup>95</sup> the proposed amendment would provide no grounds for a victim to insist on a new trial or money damages. But any other remedy would be available, and the victim would have a right to appeal and thus could seek to overturn a guilty plea or sentence on any grounds. The CVRA's more limited remedies have proved difficult enough. A constitutional amendment would create unresolvable conflicts.

The CVRA attempts to avoid conflicts with defendants' rights. It sets forth a procedure entitled "Limitation on relief," which allows a victim to "make a motion to re-open a plea or sentence only if -- (A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied; (B) the victim petitions the court of appeals for a writ of mandamus within 10 days; and (C) in the case of a plea, the accused has not pleaded to the highest offense charged."<sup>96</sup> If the judge "denies the relief sought" in a "motion asserting a victim's right," "the movant may petition the court of appeals for a writ of mandamus." The court of appeals must decide the petition "within 72 hours after the petition has been filed." The district court may, but need not, stay the proceedings or grant a continuance of no more than 5 days "for purposes of enforcing this chapter."<sup>97</sup>

There have been problems in some cases in which the court of appeals failed to provide notice of or allow a defendant to respond to a mandamus action, in violation of Fed. R. App. 21 and the Due Process Clause,<sup>98</sup> and courts have rightly complained that 72 hours is not enough.<sup>99</sup>

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<sup>94</sup> 18 U.S.C. § 3771(b)(2).

<sup>95</sup> 18 U.S.C. § 3771(d)(5), (6).

<sup>96</sup> 18 U.S.C. § 3771(d)(5).

<sup>97</sup> 18 U.S.C. § 3771(d)(3).

<sup>98</sup> In *Kenna v. United States District Court*, 435 F.3d 1011 (9th Cir. 2006), the Ninth Circuit inexplicably stated that the defendant "is not a party to this mandamus action," although it did correctly note that

But there are potentially bigger problems, which fortunately appear to have been avoided. If “re-open” means “vacate the sentence with the possibility of imposing a higher sentence,” or “vacate the plea and re-instate greater charges,” it creates a serious potential conflict with defendants’ constitutional rights.

First, a defendant has due process rights to be accurately apprised of the consequences of a plea,<sup>100</sup> and to specific enforcement of a promise made in a plea bargain.<sup>101</sup> These expectations are protected by the CVRA, which provides that “[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.”<sup>102</sup> Courts have held that although victims have a right to be reasonably heard at public proceedings, this “does not empower victims to [have] veto power over any prosecutorial decision, strategy or tactic regarding bail, release, plea, sentencing or parole.”<sup>103</sup> “Nothing in the CVRA requires the Government to seek approval from crime victims before negotiating or entering into a settlement agreement.”<sup>104</sup>

Second, the CVRA procedure has the potential to violate defendants’ constitutional rights under the Double Jeopardy Clause. A defendant has a right not to be sentenced to a higher sentence once the sentence has become final,<sup>105</sup> and not to have a plea to a lesser offense vacated and a greater charge reinstated.<sup>106</sup> A judgment is final when direct appeal is concluded and certiorari is denied or the 90-day period for filing a petition for certiorari has run.<sup>107</sup>

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“reopening his sentence in a proceeding where he did not participate may well violate his right to due process.” *Id.* 1017. In both *Kenna* cases, the Ninth Circuit issued orders only to the trial judge and the government, but no order to the defendant, and actually prohibited the defendant from responding in *Kenna II*. *Kenna v. United States District Court*, No. 05-73467 (9th Cir.), Order docketed August 8, 2005. Yet in *In re Mikhel*, 453 F.3d 1137 (9th Cir. 2006), decided two days later, the Ninth Circuit correctly treated the defendant as a respondent.

<sup>99</sup> See *United States v. McNulty*, 597 F.3d 344, 348 n.4 (6th Cir. 2010).

<sup>100</sup> *Mabry v. Johnson*, 467 U.S. 504, 509 (1984).

<sup>101</sup> *Santobello v. New York*, 404 U.S. 257, 262 (1971).

<sup>102</sup> 18 U.S.C. § 3771(d)(6).

<sup>103</sup> *United States v. Rubin*, 558 F. Supp. 2d 411, 424 (E.D.N.Y. 2008).

<sup>104</sup> *In re Huff Asset Management Co.*, 409 F.3d 555, 564 (2d Cir. 2005).

<sup>105</sup> *United States v. DiFrancesco*, 449 U.S. 117, 136 (1980).

<sup>106</sup> *Ricketts v. Adamson*, 483 U.S. 1, 8 (1987).

<sup>107</sup> *Clay v. United States*, 537 U.S. 522 (2003).

One of the reasons a victims' constitutional amendment previously failed was that giving victims constitutional rights could result in a sentence being vacated and the defendant being re-sentenced, which, if the new sentence was more severe, would create a double jeopardy problem.<sup>108</sup> The CVRA does not contemplate a double jeopardy violation.<sup>109</sup> It contemplates a maximum of 21 days between the district court's denial of a motion asserting a victim's right to be heard at a public proceeding involving plea or sentence and the court of appeals' decision on a petition for mandamus: 10 days to file the petition; any intermediate Saturdays, Sundays and holiday; no more than 5 days for stay or continuance; and 3 days for decision.<sup>110</sup>

Courts have nonetheless had great difficulty in some cases balancing defendants' constitutional rights, the government's interests, and victims' statutory rights, as demonstrated by the following cases, one in which a victim sought to upset a sentence, and the other a plea agreement after the defendant had pled guilty.

In *Kenna v. United States District Court*,<sup>111</sup> a fraud case involving father and son defendants, the victims had submitted written impact statements and spoken in court at the more culpable father's sentencing hearing.<sup>112</sup> The judge declined Mr. Kenna's request to speak again at the son's hearing because the judge was well aware of the harm caused.<sup>113</sup> The Ninth Circuit granted his petition for mandamus based on the understanding that he did not seek to "present evidence," but would speak about the effects of the crime, his feelings, and any effect on his family or job.<sup>114</sup> Later, Mr. Kenna and his advocates sought to obtain the presentence report and litigate the defendant's sentence, a request that was denied by the district court and affirmed by the Ninth Circuit.<sup>115</sup> In any event, the Ninth Circuit did not issue its first opinion until over six months after the petition for mandamus was filed. In the interim, the judgment became final. The panel posed this task for the district court: "In ruling on the motion [to re-open], the district court must avoid upsetting constitutionally protected rights, but it must also be cognizant that the only way to give effect to Kenna's right to speak as guaranteed to him by the CVRA is to vacate

<sup>108</sup> See S. Rep. 108-191 at 103 (Nov. 7, 2003) (minority views).

<sup>109</sup> See 150 Cong. Rec. S4275 (April 22, 2004) (CVRA "addresses my concerns regarding the rights of the accused," including "the Fifth Amendment protection against double jeopardy") (statement of Senator Durbin).

<sup>110</sup> 18 U.S.C. § 3771(d)(3), (5).

<sup>111</sup> 435 F.3d 1011 (9th Cir. 2006) (*Kenna I*).

<sup>112</sup> Transcript of Sentencing Hearing, *United States v. Moshe Leichner*, No. CR 03-00568-JFW (C.D. Cal. Feb. 28, 2005).

<sup>113</sup> Transcript of Sentencing Hearing, *United States v. Zvi Leichner*, No. CR 03-00568-JFW (C.D. Cal. May 23, 2005).

<sup>114</sup> *Kenna I*, 435 F.3d at 1014 n.2.

<sup>115</sup> *In re Kenna*, 453 F.3d 1136 (9th Cir. 2006) (*Kenna II*).

the sentence and hold a new sentencing hearing.”<sup>116</sup> The district court held a new sentencing hearing, permitting Kenna and other victims to speak. Having received further information from defense counsel and the government, the court considered imposing a lower sentence, but ultimately imposed the same sentence.<sup>117</sup> If the district court had imposed a higher sentence, the defendant’s Double Jeopardy rights would have been violated.

In *United States v. BP Products North America Inc.*,<sup>118</sup> a case involving an explosion at a refinery that killed fifteen people and injured over 170 others, twelve of the victims and their lawyers (also representing them in the related civil case) sought, among many other things, to have a binding plea agreement rejected after the defendant had already pled guilty. The government had engaged in extensive efforts to notify the victims of the plea hearing. The victims and their lawyers were present at the hearing, the victims who wished to speak at the hearing did so, and their lawyers filed briefs and made oral argument to the court.

The victims’ complaint under the CVRA was that they were not consulted about the terms of the plea agreement before it was signed. The government had moved *ex parte* for an order allowing it to delay notice to the victims until the agreement was signed based on the large number of victims, the extensive media coverage, the potential damage to plea negotiations, and the prejudice to the defendants’ right to a fair trial if negotiations broke down. The order was granted.

Counsel for the victims argued that “the government had no constitutional obligation to protect [the defendant’s] right to a fair trial in the event plea negotiations failed” because “there is no constitutional right to plea bargain,” and that “if there was a choice between protecting the rights of the crime victims or the rights of [the defendant], the CVRA required the government to side with the victims.”<sup>119</sup>

The district court rejected these and other arguments on statutory and constitutional grounds, and declined to reject the agreement. Among other things, the court found that there is no statutory right to notice of plea negotiations as they are not “public proceedings”,<sup>120</sup> that the legislative history was clear that the “right to confer does not give the crime victim any right to direct the prosecution,” and that “victims are able to confer with the Government’s attorney about proceedings *after* charging”,<sup>121</sup> that the CVRA provides that “[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer

<sup>116</sup> *Kenna I*, 435 F.3d at 1017.

<sup>117</sup> Transcript of Sentencing Hearing 32-96, *United States v. Zvi Leichner*, No. CR 03-00568-JFW (C.D. Cal. July 17, 2006).

<sup>118</sup> 2008 WL 501321 (W.D. Tex. Feb 21, 2008).

<sup>119</sup> *Id.* at \*17.

<sup>120</sup> *Id.* at \*10.

<sup>121</sup> *Id.* at \*11-12 (quoting 150 Cong. Rec. S10910, S10911 (Oct. 9, 2004) (Senator Kyl)).

under his direction";<sup>122</sup> that the defendants had a Sixth Amendment right to a fair trial and it was the court's obligation to protect it by keeping the plea negotiations confidential,<sup>123</sup> and that the victims and their lawyers had a full opportunity to express their views on the plea agreement through victim impact statements, briefing and oral argument.<sup>124</sup>

In ruling on the petition for mandamus, the Fifth Circuit found that the district court had violated the CVRA by not ensuring that the victims could confer with the government before the plea agreement was signed. Perhaps in its haste to issue a decision within 72 hours, the court missed the provisions of the CVRA and the statements of its sponsors making clear that victims are not entitled to confer with the prosecutor until after charges are filed, and did not address the defendants' right to a fair trial if negotiations had failed.<sup>125</sup> Nonetheless, the panel denied the petition because the victims were allowed to be heard at the plea hearing, and could be heard further still.<sup>126</sup> The district court then considered voluminous additional information from the victims, and issued a 75-page opinion explaining why it accepted the plea agreement. Among other things, the \$50 million fine was the largest ever imposed against a single corporation under the Clean Air Act and the largest fine imposed for a fatal industrial accident, the company paid another \$1.6 billion to the victims to settle the civil cases, \$21.7 million in fines to OSHA, and over \$265 million to do the work required by the OSHA settlement agreement.<sup>127</sup>

In this case, the plea agreement was binding under Fed. R. Crim. P. 11(c)(1)(C), and for that reason the company could have withdrawn its guilty plea if the court had rejected the agreement as the victims requested. But it is difficult to see how this would have benefited anyone. The company could not have gotten a fair trial. A new agreement with an even larger fine might have been negotiated, but the fine would not go to the victims in any event. Massive resources would have been wasted by the court, the parties and the victims.

In these cases, the violation of defendants' constitutional rights was avoided, but would likely have occurred under the proposed constitutional amendment.

Thank you for this opportunity to testify. Do not hesitate to contact me if further information is needed.

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<sup>122</sup> *Id.* at \*14-15 (quoting 18 U.S.C. § 3771(d)(6)).

<sup>123</sup> *Id.* at \*18-19.

<sup>124</sup> *Id.* at \*21.

<sup>125</sup> *In re Dean*, 527 F.3d 391, 394-95 (5th Cir. 2008).

<sup>126</sup> *Id.* at 395-96.

<sup>127</sup> *United States v. BP Products*, 610 F. Supp. 2d 655 (S.D. Tex. 2009).

Mr. FRANKS. Thank you.  
 And I would now recognize Mr. Kelly.  
 Mr. Kelly, you've got that microphone. Yes, sir.

**TESTIMONY OF STEVEN J. KELLY, MEMBER, SILVERMAN,  
 THOMPSON, SLUTKIN & WHITE, LLC**

Mr. KELLY. Thank you, Mr. Chairman.

Mr. Chairman, Members of the Committee, on April 22, 1988, my older sister, Mary, walked out of her home after putting her 4- and 5-year-old daughters to bed, went to the convenience store a mile from her home and not far from the place where my family has been for generations, and she never came back. She was missing for over 6 months. Her skeletal remains were recovered in a woods not far from the farm our family has owned for generations.

We later learned that the monster—and I call him that intentionally—who took her life pushed aside my nieces' car seats to rape and later kill my sister in the backseat of her family's car.

Police and prosecutors treated my family as outsiders. There were no victim services in 1988. We had no meaningful rights, no recourse. Another survivor, an angel, really—many people here know her—Roberta Roper, whose daughter was killed in the early 1980's in Prince George's County, Maryland, was a godsend to my family.

And, eventually, Roberta Roper convinced me to get involved in the movement for crime victim rights. And under Roberta's leadership in 1994, the Maryland legislature and then the Maryland people later passed overwhelmingly a constitutional amendment to the Maryland Constitution, very similar to the Constitution amendment that's being considered here.

I went to law school at the behest of Ms. Roper and inspired by Professor Cassell and others to fight for the rights that were guaranteed under that Constitution, and I'm sad to say I've been sadly disappointed.

Even though I've dedicated my practice to enforcing crime victim rights under the Maryland Constitution, what I found is that a constitutional amendment in the State is no match for the defendant's constitutional rights or even the whisper of the defendant's constitutional rights and for the bureaucratic ineptitude.

If any Member of this Committee walked into the circuit court of Baltimore City this morning, as I do on many mornings, and went into the criminal docket, you would see what I'm talking about. Prosecutors and defense attorneys in Baltimore City routinely reach plea deals at the arraignment stage where the victim is rarely present and where the—if the victim knows about it, the victim is told don't worry about it, don't come there.

These deals are made with no consent of the victim, no opportunity to contact the victim. The victim's critical interests are traded away without as much as a phone call on a regular basis. Maryland victims are routinely excluded from the life-or-death determination of pretrial release.

So you're talking about people who have gone to the trouble and put their life on the line to accuse somebody of a crime and they are not notified of the fact that that person is going to be released on bond. That puts their life in danger.

Prosecutors routinely in Maryland agree to release private victim information to defendants who may use that information to either humiliate them or, much worse, to harm or kill them.

Particularly infuriating to me is that victims are routinely shut out of the sentencing and offered no opportunity to address the court or ask for restitution. The contest there is between convicted criminals and innocent victims. And even in that context, victims mostly lose.

In my experience, the people who are treated the worst in the system are the ones who need the help the most. There's a saying in Baltimore City that the color of justice is green.

The same kind of classism, racism, sexism, homophobia that affects defendants applies more so to victims. Victims are more likely to be shut out of the process if they're marginalized. In one Maryland jurisdiction, prosecutors have a saying. They call cases NHBI, no human being involved, to refer to individuals that they don't want to fight for. Prosecutors shouldn't have that kind of discretion.

Treating victims this way helps foster the kind of distrust that produced the civil unrest in my City of Baltimore this week. Shutting victims out reinforces the wall between communities and criminal justice system and breeds the kind of frustration and cynicism that boiled over in Baltimore this week.

Including victims in the process leads to better outcomes. I've seen it. It's Trial Advocacy 101. When you have, as Mr. King said, on the one side a cold dead State and on the other side a real live human being, appropriately injecting that human being makes a difference for trial outcomes. Juries and judges respond better to flesh-and-blood human beings who actually bleed and who lose money and who suffer and who experience emotional distress. It's a matter of trial advocacy.

Treating victims with dignity also inspires confidence in the system and helps victims at the margins get back on their feet again and thereby prevents crime. We crime victims are an unusual constituency. We didn't ask to be in the situation that we're in, and most of us—I know I probably speak for the Campbells here—would trade the world not to be in this situation. Every day in every court throughout this country victims are pushed aside, marginalized and treated much worse than the criminals who made the choice to harm us.

This Congress cannot prevent criminals from harming their fellow citizens, nor can you erase the unbearable pain that has already been wrought on families like mine, but what you can certainly do is help us honor loved ones like my sister, Mary, by enshrining victims' rights in the U.S. Constitution.

As a lawyer, as a victim advocate for more than almost 30 years now, I can tell you to my core that this is never going to change. Victims are never going to be recognized absent what you're trying to do here today.

It's for these reasons, Mr. Chairman and Members of the Committee, I would urge you to vote to pass the victims' right constitutional amendment. Thank you so much.

[The prepared statement of Mr. Kelly follows:]

**Statement of Steven J. Kelly, Victim**  
**Supporting H.J. Res. 45, the “Victims’ Rights Amendment”**

**BEFORE THE COMMITTEE ON THE JUDICIARY’S SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE**

**FRIDAY, MAY 1, 2015, ROOM 2141, RAYBURN HOUSE OFFICE BUILDING**

Mister Chairman, and distinguished members of the Committee:

Such as many families you represent, my family has been thrust into the criminal justice system. My older sister, Mary, was raped and murdered in 1988. Mary was 28 years old and she had two daughters who were just 4 and 5 at the time. She was abducted from a convenience store 1 mile from our family home in Maryland. She was missing for six months. Her skeletal remains were found by construction workers just miles from the farm our family has owned and operated for generations. Police later informed us that the man who abducted Mary pushed her daughter’s car seats out of the way before raping her, killing her and throwing her body in the woods like a bag of garbage. The man who killed my sister was never brought to justice and my family had no legal recourse against the police and prosecutors, who treated us more like criminals than crime victims.

My family’s experience prompted me to get involved with the movement for crime victim rights. In 1994, under the leadership of Roberta Roper—a crime victim survivor and fierce advocate for victims—the people of Maryland overwhelmingly approved a constitutional victim rights amendment, with more than 92 percent in favor.

I became a lawyer, in large part, in the hopes of using Maryland’s robust laws to bring about real change in how victims are treated in the criminal-justice system. Sadly, I have been disappointed by the results. Even my state’s constitutional amendment has proved no match for

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a criminal-justice culture that sees victims as outsiders with no meaningful rights. Here are a few examples of cases I have handled that illustrate that point:

- I represent the mother who sat in court and, after giving a victim impact statement, watched a trial judge sentence her son’s killer to 30 years in prison. Three years later, she ran into the convicted criminal in her local grocery store. It was later learned that, after the initial sentencing, the court held a secret reconsideration hearing—for which my client was given no notice—and the sentence was reduced to three years.
- I represent the family of a 51-year-old single mother of two who was killed by a drunk driver. Even though the Defendant pleaded guilty, the prosecutor *refused* to make a request for restitution. When the victim requested restitution directly, the prosecutor opposed the victim’s request and the court denied restitution to the grieving children, both of whom were in college and were left with no means of financial support.
- I represent a 21-year-old waiter who was severely beaten, left with permanent injuries and unable to work for nearly one year. Even though I had entered my appearance as the victim’s attorney, the prosecutor engaged in plea negotiations and reached a deal that prevented my client from seeking restitution. Despite my objection, the court accepted the plea.
- I have similar experiences in other jurisdictions—including this one. I represent more than a dozen victims of voyeurism in a case in the District of Columbia where, despite explicit requirements in the Crime Victim Rights Act, the

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prosecutor entered a plea with the defendant and refused to disclose the terms of the plea to the victims.

My experience demonstrates crime victim rights are viewed as a matter of discretion that can be discarded at the whim of prosecutors and judges. I have observed, first-hand, that the same "isms" about which criminal defendants complain—racism, sexism, classism, etc., affect victims equally if not more so. The average victim of crime in Baltimore City, for instance, plays *no* meaningful role in the process. Plea deals are routinely struck at the arraignment stage and entered with no attempt to seek input from the victim and with no opportunity for the victim to present victim impact testimony, to seek restitution or to offer any position on the terms of the plea. Victims are routinely excluded from proceedings at which commissioners or judges make decisions about whether an offender is released pending trial. Victims' privacy is routinely violated by prosecutors who agree to wide-ranging discovery requests by defense attorneys for medical, school-related and mental-health records.

As it stands, even the whisper of "defendants' rights" prompts courts and prosecutors to disregard victim rights altogether. Nowhere is this more evident than at sentencing—where the contest is between the rights of a *convicted* criminal and an *innocent* victim. Courts have wide discretion in the type of evidence that judges hear at sentencing and in fashioning the conditions of the sentence.

While courts are liberal in permitting defendants to present endless mitigating testimony, trial judges in the jurisdictions in which I practice severely limit the testimony of victims and are reticent to impose other conditions of sentencing that account for a victim's request. These same courts routinely deny reasonable requests for restitution—which ask the convicted criminal to pay the victim's medical bills and other out-of-pocket expenses—upon findings that the

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offenders, who often are able to hire expensive criminal-defense attorneys, purportedly lack “the ability to pay.” These rulings impose the costs the offender’s criminal choices on innocent victims.

The way victims are treated leads *directly* to the kinds of situations we have seen in Baltimore City this week. Treating victims as outsiders fosters distrust and creates a wall between the community and the criminal-justice system. Contrastingly, treating victims with dignity and respect and helping victims recover from the effects of the criminal act prevents crime and fosters trust between police, prosecutors and the communities they serve.

As a lawyer and advocate, I have had the great privilege to observe many instances where the system has worked—where a victim’s rights were respected. Based on my observations, I can say with confidence that victim inclusion leads to better outcomes. Prosecutors who take the time to explain the process to victims often find powerful allies who provide vital information that helps make the case against defendants. In addition, appropriately injecting the victim into the trial, and especially the sentencing, puts a human face on what is otherwise a contest between a real, live, defendant and an inanimate “state” or “government.”

Nearly 30 years ago, I made a promise to my nieces as we stood together at the graveside of their 28-year-old mother. I promised them I would always try to honor their mother’s memory. While I continue to honor Mary by standing up in courts nearly every day to fight for the rights of individual crime victims, I know to my core that real change requires this Congress to take the extraordinary step of enshrining crime victim’s rights in the U.S. Constitution.

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Mr. FRANKS. Thank you, Mr. Kelly.

Thank all of you very much for your very compelling testimony. And I will begin now under the 5-minute rule with questions and comments. And I'll begin by recognizing myself for 5 minutes. Indeed, I was touched by much of the testimony from all of you.

Mr. Cassell, I guess I'll start with you. You know, judges are oftentimes put in the position of having to weigh between constitutional rights. That's a reality all the time. Sometimes we have to subordinate one constitutional right to the more fundamental constitutional right. The right to freedom sometimes has to give way to the right to live. The right to property has to give way to the right to live in many cases. It's a balancing act.

So I was indeed struck by Ms. Baron-Evans' testimony where she said, you know, the defendant has constitutional rights whereas the victim has only statutory rights. And, of course, that's—you know, the victim indeed has constitutional rights, and judges are all the time having to choose between those.

What we're discussing today is to make sure that those items that, again, Ms. Baron-Evans suggested are a matter of course for Federal courts, which there is some question about that. But, I mean, if it's true, then, why do they not have the ability to enshrine those as constitutional rights as well?

I think that the notion that you have both of those, you know, two people, an accused and a victim, with constitutional rights, both of them certainly should have constitutional rights and certainly do as a matter of course.

In fact, I can't think of a circumstance where they wouldn't both have some constitutional rights in a circumstance like that. And, again, it's the judge's responsibility in justice and fairness and balance to find the right and just center point—or not center point—but the right and just place there.

So my question to you, sir. In your testimony, you provide a description about a Federal case in New York in which you suggest the U.S. Attorney's Office, under the direction of Loretta Lynch, violated Federal statutes protecting victims' rights.

Now, can you provide your assessment of what the U.S. Attorney's Office did wrong in that case and elaborate and help us understand it.

Mr. CASSELL. Yes. Thank you.

Mr. FRANKS. And would you turn that microphone on, sir.

Mr. CASSELL. All right. Yeah. We heard from Ms. Baron-Evans a few moments ago, "Well, these violations, that's just happening in the State system. It's not happening in the Federal system."

Well, here's a very concrete illustration. This is a case, *United States v. John Doe*. The case number is 98-CR-1101. And the victims weren't notified. They weren't given restitution. It's a very disturbing case that I hope the Committee will look into more.

In 2009, Felix Sater was sentenced for racketeering, for stealing more than \$40 million from a number of victims, along with his criminal associates. And, remarkably, the U.S. Attorney's Office there ignored two Federal statutes. The first is the mandatory Victim Restitution Act, which made restitution mandatory in these kinds of cases.

Well, the U.S. Attorney's Office figured a way around that. They didn't give the list of victims to the probation officer. So there was no way for the probation office to provide restitution. So this man who had stolen millions of dollars from victims was allowed to just keep the victims' money.

And on top of that, there was another violation of a Federal statute. Representative Conyers earlier this morning mentioned the 2004 Crime Victims' Rights Act. Well, that act requires notice to victims and a chance to confer with prosecutors, but the prosecutors kept this whole case secret. So the victims were never notified and were never told what was going on.

And the U.S. Attorney's Office has since contrived to keep this whole thing under wraps. And in my testimony I show you some questions I sent to the Justice Department that they have refused to answer about this case. So maybe you'll have more luck in getting answers and figuring out what's going on, and I certainly hope you'll look into it.

Mr. FRANKS. Well, I hope we do.

Mrs. Campbell, I have to tell you, you know, you have such a profoundly powerful story. In full disclosure, you've been in my office, and I've heard your story on a regular basis or several times, and I'm just always moved by it.

And you have used that story to reach out to untold numbers of people across the Nation who are struggling or have struggled with the criminal justice system as victims of crime, and I just wish you could share a little bit more about your experience as an advocate and any of the stories that you've come across personally.

And I know that you can deal with these directly. Mr. Campbell's helped with the testimony, but I'll direct the question to you personally.

Mrs. COLLENE CAMPBELL. I work with actually thousands of victims out of my home, and the story that we tell is not different. Sadly, it's hard to tell our story. And we're not here to tell our story. We're here to save lives. We pay our own way to be here because we don't want others to deal with what we've had to deal with.

Our family would be alive if there was constitutional rights and we had a system that worked. But all across the Nation there are so many people that are going through the same thing we are, and it's very hard to get up and fight and try to do something after you've had somebody murdered. And we need to fix the justice system to put the good people up front and stop putting the bad people in a good position.

And I thank you so much for giving us the opportunity to be here. My family in heaven I know really appreciates it because they're looking down and saying, "Go get them."

And my dad was a chief of detectives on the Alhambra Police Department, and I came up in a law enforcement family. And he always said, "Just get a bigger stick, but always do what's right. Never settle for what's wrong." And that's what we're trying to do.

Mr. FRANKS. Well, I appreciate that.

And I'm going to yield to my friend Mr. King here just momentarily. I wanted to let him know and the others know that we're going to do a second round of questions here. So I'll have a chance

to follow up with you more. So hang in here with us. I don't want to take advantage of you, but your testimony is so compelling.

Mr. King from Iowa.

Mr. KING. Thank you, Mr. Chairman.

Again, I thank the witnesses for your testimony.

I want to explore something here. And, you know, we have a criminal justice system that I referenced in my opening statement that's rooted at least back to Old English common law, perhaps to Roman law, perhaps to Mosaic law, and as this all flows through, cultures evolve in a way and we get settled into habits and practices and often don't stop and examine how did we get where we are.

I was listening to Mr. Kelly's testimony and your remarks about how the victim is routinely cut out of the process, and I would expect that the prosecutors and the defenders that are standing there doing plea bargaining and are lining up to do plea bargaining in Baltimore often will go through case after case or maybe even hours or days without consideration of the victim because there's not an advocate there for the victim.

And so let's take a look at this system that we have today that's been described here and just erase that out of our minds for a minute and say, "What if we were just put here on earth without prior experience, but had all the wisdom that we share? Would we create a criminal justice system like this? Would you start from scratch and decide that the victims aren't going to have a say and that they're not going to be heard and they're not going to have specific rights and that we're going to incarcerate people up to the limits of the room we have in our prisons and the budget we have to incarcerate them and the resources we have, as Ms. Baron-Evans said, to prosecute them and adjudicate and go through this process or would we look at this and say, "What would fix this problem? Could we design a system that would better fix the problem that we have and that we've heard about here this morning?"

And I'd suggest that, if we erased all the things that are out there now and started from a blank sheet of paper, that we would put victims into that equation and we would try to bring about an equation that was as fiscally responsible as possible, that would provide as much a deterrent as possible, that would protect victims as much as possible.

And so I would just pose this, that the equation that I used was old data, 20 years old or a little more, \$18,000 a year to incarcerate a typical criminal and 444,000 dollars' worth of damage committed to individual crime—against individual crime victims if you turn that same typical criminal loose. That's about a 25 multiplier a return on investment. One incarceration dollar saves 25 dollars' worth of damage to a criminal victim.

So you haven't said a lot. None of the witnesses have said very much about restitution of this. But I'd just ask, in theory—and I'm going to go first, I think, to Mr. Kelly because I suspect you may have thought about it in this fashion—that if we gave the crime victim or the family of the crime victim standing to go back and bring suit against the State if the State had turned loose a criminal that should have been incarcerated, that this exuberance of mercy, which has brought about so much crime in this country, I believe

referenced by Mr. Campbell, as a weak and forgiven criminal justice system.

What if we had it the other way? What if the crime victim had standing to go to court to recover their loss, their damage from the State for the State failing to protect the individual? How much would this change the system that we have today? And do you believe there's any merit to starting down that path perhaps incrementally?

Mr. KELLY. Mr. King, I think that's a brilliant suggestion, and I think that—you know, going back to your point about the way the criminal justice system has evolved, you know, from the ancient times, restitution is a critical building block.

But I can't tell you how many times I've been in court where a defendant has a privately retained lawyer that charges \$100,000 retainer and the judge makes a finding that the defendant lacks the ability to pay restitution. So what the courts are doing there is they are imposing the cost of crime on the innocent victim as opposed to the person who made the choice.

So I think it's, you know, absolutely critical that restitution, you know, be a cornerstone. And I think that giving crime victims recourse, you know, would wake a lot of people up because restitution—I call it, you know, the bastard stepchild of the criminal justice system. It's the most hated right. Prosecutors hate it. Defenders hate it. Judges hate it.

The only person that doesn't hate it is the victim because, you know, it may be onerous and it may be difficult to get money out of a defendant, but it's fundamentally fair. It's only fair that that victim should be repaid for their basic financial out-of-pocket losses. And it never ceases to amaze me, but it happens on a regular basis, once a week at least, where we make a reasonable request for restitution and it's denied.

So I think it's a great suggestion. I would be all for it.

Mr. KING. I would like to quickly go to Mr. Cassell for his response to that question. And I'm going to be out of time at the point.

Mr. CASSELL. Right. I think the real problem here is that the system—

Mr. KING. Mr. Cassell.

Mr. CASSELL. I'm sorry.

When you talk about the system historically, it's really interesting. In this country, originally, we had a system of private prosecution where a victim of crime, as you were describing about yourself, might have initially filed the criminal case to begin with and the real focus, as Mr. Kelly was suggesting, was on restitution, getting the victim back where they should be.

Over time, like many things in this country, we've moved to a more bureaucratic system where big government has kind of bumped out, I think, some of the other interests that really ought to be considered.

So, in some ways, this might take us back a little more to our roots and put private citizens involved in the process and get them the opportunity to overcome these financial effects of crime that can be so devastating.

Mr. KING. Thank you, Mr. Cassell.

I am out of time, but I want to encourage the Chairman to continue this dialogue. I think there's much to be gained from these types of hearings, and I appreciate it.

And I yield back.

Mr. FRANKS. And I thank the gentleman and invite him to stay 5 more minutes, if he'd like to, for a second round. I mean, if he has to go, I'll certainly understand. Thank you, Mr. King.

All right. Mr. Kelly, I'd like to direct a question to you. You know, the claim is often made that the VRA would create such burdensome duties for the prosecutors and, of course, it would be untenable, even though it's done on a State level, many times Federal.

Can you express how jurisdictions that apply strong victims' rights processes deal with the administrative burdens the law imposes on prosecutors in courts. I mean, what's been your experience?

Mr. KELLY. Well, the short answer is they use the money that you give them, as Congress, for what it's supposed to be used for. And this Congress is already giving out millions of dollars both Federally and for States under the Victims of Crime Act for, you know, the purpose of creating robust systems of victim notification, for providing for victim witness coordinators within the prosecutors' offices.

Almost every prosecutors' office, I think, in the country has them. The Federal Government certainly has them. And the problem is that the money doesn't always get used for that purpose, and I think using the money for what it's meant to do would allow prosecutors to beef up these systems.

The systems already exist at the Federal level and the State level. The difference between a robust application and a non-robust application is priorities and how the policymakers in a given jurisdiction are going to prioritize victims' rights and victim notification and the like or not. And so the answer is just use the money that you are providing with for the right purpose.

Mr. FRANKS. Well, thank you, sir.

Mrs. Campbell, I would like to return to you, then, for a moment. You know, I've heard on a number of occasions you say that, if victims' rights legislation had been in place prior to the loss that your family incurred, that your family might still be alive.

Can you elaborate a little bit and tell me the rationale.

Mrs. COLLENE CAMPBELL. Sure. I can go on both of them.

Scotty, our son, was murdered by somebody that just 1 year before had killed somebody in a drunk driving accident. He was out on bail. He has a long history of crime. And I might add he came from a very good family. This was not somebody that was destitute or anything. If he would have been in prison where he should have been, our son would be alive.

And with Mickey's and Trudy's case, the fellow that killed Mickey and Trudy, if he would have been in Federal prison for bank fraud like he should have been, Mickey and Trudy would be alive.

By giving the criminals, the bad people, too many rights, many of us are losing good family members. And I hear this all the time, all the people I talk to, all the victims.

You know, a good person doesn't go out and just commit a murder. A person works up to it, it seems to me, and—

Mr. FRANKS. And you're suggesting that, if their victims had had the right to be heard in some of these circumstances, that they might not have been let out as early as they were?

Mrs. COLLENE CAMPBELL. Well, in our particular cases, the people were let out from being victims of other people's crimes, yes.

And if you will give me just one moment to tell you how being excluded from the courtroom—we were excluded from the courtroom during three trials of our son's murder. We happen to know more about our son than anybody else. You know, they used the excuse we were going to be used as a witness. We were not being used as a witness.

When the defendant was going to come up on the witness stand, I went to a telephone and called the widow of another person he had killed and asked if she would come and sit in the courtroom so she could see what lies were being told. And she said, "You're doggone right I will be there. He should be in prison."

She came and sat in the courtroom, and when he got up on the witness stand, she immediately caught him lying. She went to the prosecutor and said, "I've got the paperwork at home. He's lying on the witness stand." So the next day the prosecutor went up and said, "Well, Mr. Cowell, were you lying the last time you were before a jury or were you lying yesterday before this jury?"

Long story short, the jury said, had they not caught all that information, they would have not been able to convict him. So the small things like taking somebody out of the courtroom doesn't sound huge to somebody else, but it could be huge in a trial and a conviction, and people would be alive if victims had rights.

And for crying out loud, we go back to a great President that said, "Let's give victims rights in our Constitution," and we've done nothing. And, yet, here we sit with all of us having people killed. And with the thousands of people I work with, it's just sad that it's not moving forward.

I just wish so much that people could really get into the real truth of what's going on and not having somebody come and, you know, make it strange. It is so important that we have rights so we can save lives.

I can't bring my family back. But, by God, I sure hope that the Lord is looking down and saying, "Let's save other people. Let's not let this continue on. Let's let this Administration move forward and start saving lives." It needs to be done.

Mr. FRANKS. Well, thank you. And I appreciate so much, again, your testimony. And certainly that is one of the deepest commitments of this Committee and certainly myself, that we want to try to do everything that we can to give everyone a chance to live and be free and pursue their dreams.

And, to that end, Mr. Cassell, I would offer my last question. If a Federal constitutional amendment were enacted, can you give us some sense of the protection of crime victims' rights and how that would improve. Give us some idea of what would actually change if we were able to do that.

Mr. CASSELL. Well, I think what would happen if this amendment passed is immediately all over the country, in State court-

rooms, Federal courtrooms, city courtrooms, wherever it is, judges would know that victims have rights.

And let's be clear. This isn't about taking away rights from defendants. The amendment itself says right in its first sentence that both victims and defendants can have rights together.

And so now judges, judges that are confirmed by the Congress, by the Senate, in the Federal system, judges that come through the State system, are going to find those solutions that protect both defendants' rights and victims' rights.

And some of the terrible situations that your Committee has heard described today would no longer occur. Victims would be notified of court hearings. They would have the right to attend those hearings. They would have the right to speak at appropriate points in the process. That's the difference that this amendment would make.

Mr. FRANKS. Yeah. Well, this concludes today's hearing.

And I want to thank all of the witnesses here. Mr. Cassell, Mr. and Mrs. Campbell, Ms. Baron-Evans, and Mr. Kelly, thank you all very, very much. I am grateful to you for taking the time to be here.

And we continue down this path. As you know, we've actually had some pretty profound success in the last year and a half in the area of victims' rights, and we are going to continue to go forward there.

So, without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

And, again, I want to thank the witnesses again, thank the Members, and, of course, anyone in the audience.

And this hearing is adjourned.

[Whereupon, at 12:17 p.m., the Subcommittee was adjourned.]



A P P E N D I X

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May 18, 2015

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 DAVID PETERSON, Florida  
 SCOTT HEDRICK, Louisiana

Amy Baron-Evans  
 51 Sleeper Street  
 5th floor  
 Boston, MA 02210

Dear Ms. Baron-Evans,

The Committee on the Judiciary's Subcommittee on the Constitution and Civil Justice held a hearing on H. J. Res. 45, the "Victims' Rights Amendment" on Friday, May 1, 2015 at 9:00 a.m. in room 2141 of the Rayburn House Office Building. Thank you for your testimony.

Questions for the record have been submitted to the Committee within five legislative days of the hearing. The questions addressed to you are attached. We will appreciate a full and complete response as they will be included in the official hearing record.

Please submit your written answers by Monday, June 29, 2015 to Tricia White at [tricia.white@mail.house.gov](mailto:tricia.white@mail.house.gov) or 362 Ford House Office Building, Washington, DC, 20002. If you have any further questions or concerns, please contact John Coleman on my staff at 202-225-2825.

Thank you again for your participation in the hearing.

Sincerely,

  
 Bob Goodlatte  
 Chairman

Enclosure

**Note:** The Subcommittee did not receive a response from this witness at the time this hearing record was finalized on August 18, 2015.

Ms. Amy Baron-Evans  
May 18, 2015  
Page 2

Questions for the record from Representative Steve Cohen:

1. If there is anything that was said by any of your fellow witnesses that you would like to respond to, or anything else that you would like to add to your testimony, please do so here.

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Stephen E. Nevas  
*Also admitted  
Massachusetts  
District of Columbia*

April 30, 2015

Hon. Trent Franks, Chairman  
House Judiciary Committee  
Subcommittee on the Constitution and Civil Justice  
Ford House Office Building, Room 362  
Washington, D. C. 20515

Mr. Chairman and Members of the Committee,

I am an attorney and academic with extensive experience in First Amendment matters including the public's right to access courts and court records and matters concerning prior restraint, particularly in the form of gag orders.<sup>1</sup> Nothing in my professional life has prepared me for what I am about to tell you. It involves matters in which the government and certain of our courts:

- Have looked the other way while death threats and witness tampering are perpetrated against litigants and counsel in federal court proceedings.
- Have covertly allowed a convicted felon to convert millions of dollars of restitution to which victims of crime are entitled while at the same time knowingly facilitating his commission of hundreds of millions of dollars of financial institution fraud.
- Have sanctioned and, in one instance, ordered the destruction of evidence.
- Ordered an attorney and his clients for a time not to tell Congress what is taking place, going so far as to order them not to tell Congress that that gag order even existed.

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<sup>1</sup> I have served as First Amendment Counsel to the National Association of Broadcasters, as General Counsel to National Public Radio and as the Executive Director of the Knight Law and Media Program at Yale Law School. I am Co-Chairman of the Law and Media Section of the Connecticut Bar Association.

What country, I have asked myself over and over again, do I live in? How can revered constitutional protections be so systematically violated while revelation of what has been done is forbidden, even criminalized during what have been years of secret proceedings conducted under threat of contempt power?

My experience with this case began four years ago when I started to advise an attorney, Frederick Oberlander, on First Amendment matters. Mr. Oberlander had been hired by a few young men to vindicate their interest in a New York real estate firm, Bayrock Group. Between them, they had been deprived of \$5 million to \$10 million in distributions. In the course of Mr. Oberlander's representation, he determined that the firm was heavily involved with organized crime and, not surprisingly, had arguably engaged in hundreds of millions of dollars of money laundering and financial and tax fraud.

In 2010, Attorney Oberlander was about to file a civil racketeering complaint on behalf of these young men and other victims of the firm when another young man, a former Bayrock employee, unexpectedly handed him the secret federal criminal record of one Felix Sater, who the records showed had covertly pled guilty to securities fraud in 1998. Sater, with others, had run a stock fraud racket which, together with Mafia and Russian organized crime, had bilked investors, many elderly, including Holocaust survivors, of some \$40 million.

This had Mr. Oberlander's attention for two reasons:

- First, Mr. Sater had for years been the Chief Operating Officer of Bayrock, and its largest equity owner, yet had hidden his federal racketeering conviction from most at the firm, including the clients Mr. Oberlander represented, rendering all of the firm's millions of dollars of transactions with unsuspecting third parties pure criminal fraud.
- Second, Mr. Sater, even after his conviction, had been able to get away with this concealment of his crime and assets because, for all intents and purposes, his criminal case simply did not exist. There was no public record of it since, as his probation officer actually admitted in one of the documents, the Justice Department and court acted together to help Mr. Sater pull off the concealment by helping him hide his conviction from Bayrock and his partners there, including Mr. Oberlander's clients.

Why had they gone to such lengths? Because Mr. Sater was a "cooperator" who had agreed to testify against his co-defendants. It was, as we learned in the ensuing years, part of an entrenched, covert process whereby the government – with the concealed approval of certain judges in the United States Second Circuit – have institutionalized

what is best described as a “cooperator exception” from the First and Fifth Amendments and an array of federal laws, importantly including mandatory sentencing and other provisions of the Mandatory Victim Rights Act and the Crime Victims Rights Act.

It’s now public record that, though the government knew who many of his victims were and what they lost, there is no record that Sater ever paid a penny of restitution or that the government ever told his victims of the case, which would have given them the right to exercise their CVRA and MVRA standing to assert, even sue for, restitution and other relief. The government had a legal obligation to inform them, for one reason because, as the government now says, Sater was sentenced in “open” court, triggering mandatory statutory requirements that the government inform the victims and the trial court ensure it does. But Sater was sentenced in what has been falsely characterized as “open” court – falsely because he was sentenced under a “John Doe” alias, with no court orders or findings recorded purporting to justify it; neither the public nor his victims were told that he’d be sentenced on that day (October 23, 2009); and no notice of his sentencing having been listed on any public docket.

Even after a fictional “open court” sentencing, his case remained hidden – clearly no longer with any justification until exposed by the Bayrock suit and subsequent efforts to obtain restitution and damages.

Sater has resorted to and has been allowed by the government and a judge of the Second Circuit to wage a campaign of vicious threats against the young men on whose behalf Attorney Oberlander has attempted to prosecute a civil racketeering case and, due to judicial indifference, as recently as yesterday against a 92-year-old rabbi and Holocaust survivor who had the temerity to sue Sater for damages for what he and his family had lost.

For example, Sater, using his own and a pseudonym, has posted dozens of web sites referring to one of Oberlander’s clients as an extortionist, and sent thousands of emails to their clients and their business associates, defaming the young man and warning he would destroy not only their lives but also the lives of all involved with them if they didn’t cause suits against him to be dropped and pay him \$2 million.

Despite motions for protective orders, court inquiry, and referrals to the FBI accompanied by metadata evidence that these sites and evidence trace back to Sater, the federal court hearing the case held that it had no obligation to protect Mr. Oberlander’s clients from witness tampering (i.e., threats against them if they don’t drop their suits) and obstruction of justice.

Mr. Oberlander has also been the target of multiple death threats, warning him to drop cases against Sater, but the SDNY FBI office has refused even to investigate.

Yesterday, on April 29, 2015, one of Mr. Oberlander's clients, Rabbi Ervin Tausky, a Holocaust survivor who now resides in Israel, received a threat from Mr. Sater's lawyers in Israel, threatening that if he does not cause Mr. Oberlander to withdraw the suits against Sater, Sater will sue him in 72 hours in Israel for 4,000,000 shekels (approximately \$1 million), claiming apparently that Rabbi Tausky's suits against Sater in the United States on account of frauds Sater perpetrated on the Rabbi and others were really part of a plot to have Sater killed to frighten others into paying \$1,000,000,000 in protection.

The original civil racketeering complaint against Sater, 168 pages of allegations of misconduct at Bayrock with the complicity of major law firms, has been ordered sealed for five years without a single finding that it contains anything improper.

In short, Mr. Oberlander's clients and others similarly situated who are past and present victims of Sater's crimes have been ignored, frustrated, and interfered with by the government merely because they seek to invoke federal laws entitling them to take back what was stolen from them, thereby victimized a second time. Beyond that, they're constant objects of retaliation and retribution seemingly engineered by the government and Sater who give every appearance of working collaboratively.

Even more troubling, if possible, is that Sater and his lawyers have repeatedly and accurately warned Oberlander's clients of adverse court decisions before they were issued, telling them with amazing clairvoyance they'll never get a hearing, or be allowed to introduce evidence against Sater, all of which came to pass. They boast, in effect, that they're protected. One federal judge placed on a secret docket (later inadvertently unsealed) entries documenting that the court had been conducting secret *ex parte* conferences with prosecutors and Sater's counsel, to coordinate legal arguments raised by Mr. Oberlander.

What Attorney Oberlander and his clients have unearthed is a court system seemingly intent on punishing them for revealing a separate, concealed set of rules and proceedings exempt from Congressional oversight, constitutional mandate, and statutory directives, instead allowed – indeed tailored – to benefit, protect and hide the records of the select few who agree to “cooperate.”

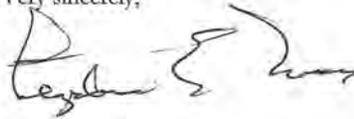
Matters have now reached a point that challenges credulity. A New York Federal Magistrate, the Honorable Frank Maas, without notice or evidentiary hearing, has ordered Attorney Oberlander to turn over to the court many of his records in this case, even including his own “work product,” and then destroy his own copies. Those thousands of pages arguably contain evidence of criminal, prosecutorial and perhaps judicial misconduct.

I am at a loss for words to describe all of the ways in which this offends and violates the Constitution and our laws, including not only First Amendment speech and petition rights but Fourth Amendment seizure and Fifth Amendment due process rights.

There is much more about how the government and courts have fashioned and apply an off-the-books "cooperator exception" to principles we have held dear since 1789. It poses a real and present danger to the integrity of our legal system. Attorney Oberlander and his colleague, Attorney Richard Lerner, possess detailed records and knowledge that will be invaluable to this Committee.

I hope you will invite them to share their knowledge and experience with you and your Subcommittee.

Very sincerely,

A handwritten signature in black ink, appearing to read "Stephen E. Nevas". The signature is written in a cursive style with some flourishes.

Stephen E. Nevas