Testimony of Professor Robert P. Mosteller[(1)] before the Subcommittee on the Constitution, United States House of Representatives, February 10, 2000

Chairman Hyde, Representative Canady, and Members of the House Judiciary Subcommittee on the Constitution: I appreciate this opportunity to testify today on House Joint Resolution 64. I am here to urge you not to support this proposed Amendment, and certainly not to support it unless the proposed amendment is significantly revised.

The proposed amendment should not be adopted for a number of reasons.[(2)] First, it is, quite simply, unnecessary.[(3)] The Constitution of the United States is a document that has only been amended twenty-seven times in the long history of this nation. It is different from legislation, which can be relatively easily fine-tuned and changed, in that it is difficult to alter and any amendment should be expected to operate unchanged for an extended period. In addition, its provisions should be reserved for those purposes that can be accomplished in no other way. Finally, the principal purpose of an amendment is to protect the despised, the politically unpopular, and insular minorities from the whims of the political majority. The Constitution should only be amended when such action is necessary, when the goal sought cannot be accomplished by other means, and when the goal of the provision is consistent with its noble purpose. These requirements are not met by the proposed victims' rights amendment.

Victims of crime as a group and the rights of victims do not fall within any of these categories where constitutional protection is required. Their rights and interests are quite important. However, those rights and interests can be effectively protected and advanced through the democratic process. Legislative action and provision of resources by popularly elected bodies can most effectively provide protection.

Indeed, the cause of victims is clearly politically popular as we begin the Twenty-First Century. Victims command majority support in state legislatures and Congress. Their cause is supported with real enthusiasm by large segments of the public.

Proponents claim that a constitutional amendment is indeed necessary to prevent the rights of victims from being trumped by those of defendants. However, when these specific assertions and other claims of necessity are scrutinized, they cannot be supported. In the fall of 1998, I challenged the leading proponents of the proposed victims' rights amendment to produce cases from any jurisdiction in the United States where victims' rights had been trampled by the rights of defendants and where a federal constitutional cure was needed.[(4)]

Cases might fall into either of two categories: cases where some provision of a state statute, state constitution, or a federal statute protecting victims' rights has been declared unconstitutional because it was held to violate the federal constitutional rights of defendants and cases where defendants' convictions were overturned on federal constitutional grounds because of adherence to some victims' rights provision. The search would look back in time for cases decided in the past several decades as victims' rights have developed and look forward from the point of the challenge to the present as courts daily handle a huge volume of criminal litigation. Thus, the number of potential cases is enormous. Nevertheless, the proponents could not come up with hundreds, or dozens, or even hand fulls. Indeed, to this point, I been shown not a single case in either category.[(5)] This record is a remarkably concrete demonstration of lack of necessity.

Assuredly, an argument requiring an amendment to the United States Constitution can be constructed if the goal of the endeavor is to take from defendants rights guaranteed to them by the Bill of Rights. To eliminate protections currently afforded by the Federal Constitution would in fact require an amendment to the United States Constitution rather than legislation. If taking away federal constitutional rights of defendants is a major goal of this proposed amendment, and for some it may be, I believe that purpose is illegitimate. The potential use of an amendment, labeled as a supporting victims' rights, to eliminate rights guaranteed to by the Bill of Rights is my second reason that the proposed amendment should not be adopted.

While superficially appealing to some, taking protections from defendants that guarantee basic fairness is not an appropriate purpose of a constitutional amendment. Protecting basic procedural fairness is one of the most appropriate purposes achieved by the Bill of Rights. The label of victims' rights should not be so misused. Instead, victims' rights should principally serve the purposes of increasing particpatory rights in criminal litigation and in providing aid and benefits to victims of crime to help restore normalcy in their lives.[(6)]

Let me give you an example where the proposed amendment could violate basic fairness and help convict the innocent. Take a police brutality case, like the Rodney King case, but one without the fortuity of a videotape documenting the actual events. While law enforcement officials generally perform their duties lawfully, police brutality cases do in fact occur, and they are a particular challenge to our system of criminal justice. Those who have examined the area have demonstrated that the true victim, the citizen, is sometimes charged with assault on the officer to cover the officers' illegality, as in fact the officers tried to do in the King case before they were thwarted by several factors, including the images on the videotape.

Under the provision of the amendment, which guarantees victims the right not to be excluded from trial, all the police officers who successfully claim to be victims would be allowed to sit in the courtroom during the testimony of all other witnesses as a matter of federal constitutional right. This provision would permit the true perpetrators of the crime to coordinate their false version of the facts and would aid them in compounding their crime by convicting an innocent and brutalized citizen. The officers could not be excluded even to aid fairness. This result is quite simply wrong.

Why does the amendment produce such an erroneous outcome? The answer provides my third reason to urge rejection of this proposed amendment. The proposal begs the key question in the trial before the trial starts. It requires decision on the question of who is the victim and who is the actual perpetrator before the case is ever tried, and with that decision, it helps determine the outcome of the case.

To be accurate, the amendment should be called the "alleged" victims' rights amendment. It gives rights to someone labeled the victim, but this labeling is done before a trial is ever held. Before trial, we do know to an absolute certainty the identity of the defendant/accused. That label is conclusively established by the charging decision; the defendant is the person whom the prosecutors have charged with the crime.

By contrast, the victim is not established at the outset of the trial. Rather, that status is only determined after the verdict has been reached. Nevertheless, the proposed amendment does not confine itself to matters of sentencing and other proceedings that occur after the verdict is rendered. Instead, it applies to the trial and even to pre-trial decisions. Insofar as the proposal would change outcomes, the amendment figuratively puts its finger on the scales of justice and tips the balance, sometimes unjustly. It would produce a travesty of justice any time the alleged victim is not a true victim. Granting rights based on a prejudgment of the result of the trial is wrong as a matter of both theory and of basic fairness, and this flaw constitutes a fundamental reason to reject the proposed amendment.

Another very problematic type of cases, domestic violence cases, demonstrates unmistakably the potential for abuse and unfairness in this proposed amendment. Researchers have documented a large body of domestic violence cases where the wrong party is charged. These involve situations where one partner, often a less physically powerful female, reacts to long periods of abuse at the hands of her partner, compounded sometimes by a lack of assistance from law enforcement authorities, by the use of self-help violence.

Let me give you an example of such a case and an example of a state victims' rights amendment gone awry. The case is *State ex rel. Romley v. Superior Court*[(7)] from Arizona. In that case, violence occurred between a man and a woman in the home. The facts as recited by the appellate court are absolutely clear in showing that the woman in the relationship called 911 asking for police help because her husband was beating her and threatening her with a knife. When the police arrived, they found the man bleeding from a stomach wound that had apparently been inflicted by his wife. The record showed that the husband had been arrested three times for assaulting his wife in Arizona and that he had been convicted of assaulting her in another state. Nevertheless, the wife was the one

charged with the crime of assault.

In preparing for trial, the wife requested discovery of some of her husband's counseling and psychiatric records. The defense had information that the husband had been treated for psychiatric problems for a number of years and sought to obtain records concerning one of his multiple personalities, which was extremely violent. The state did not deny any of the facts alleged. Instead, it asserted that the wife could not receive the records because the victims' rights amendment in Arizona granted the victim a constitutional right against discovery.

Fortunately, the trial court and the Arizona Court of Appeals had the good judgment to declare that application of the victims' rights amendment in Arizona unconstitutional. They held that its operation would have constituted a violation of the wife's right to a fair trial under the Due Process Clause of the Federal Constitution. Critically, the due process right existed to protect fairness, and it had not been altered by the operation of any penumbra of a new federal victims' rights amendment or by state legislation that the proposed amendment might authorize to enforce and implement the constitutional rights in the proposed amendment.[(8)]

Under the provisions of the proposed amendment, victims have a federal constitutional right to have their safety considered in the decision whether to release the accused. This provision could be used in domestic violence cases such as *Romley* to keep a wrongfully accused spouse confined before trial. Pretrial confinement is widely recognized to impair the ability to prepare effectively for trial and to help coerce guilty pleas in hopes of early release.

Fairness should be protected for victims of police violence, for those (most frequently women) who use self-help violence to protect themselves in abusive domestic relationships, and generally for those who lawfully protected themselves from assault but are erroneously labeled as perpetrators. In addition, fairness should be jealously guarded in every uncertain identification case. Even when there is a high degree of confidence that the victim suffered at someone's hands, the identity of the guilty party is often unknown. The victims' rights amendment not only gives rights before trial to a person denominated a victim, but it gives rights against a particular defendant, who may not be the actual perpetrator. Indeed, our knowledge of the true victim and the real perpetrator are often more uncertain than we recognize. Our tradition of not prejudging guilt is sound; a constitutional amendment should not be used to deny rights to those accused of crime who have not yet been convicted.

The fourth reason not to enact this amendment is that it is very badly drafted.[(9)] When one compares the complexity and detail of this amendment against others in the United States Constitution, one finds in the proposed amendment something that much more resembles a statute or even an administrative regulation than the basic statement of principles typical of the other amendments. The complex, convoluted, and conflicting explanation of the amendment offered by the Senate Judiciary Committee in its Report on a similarly worded amendment[(10)] makes the matter even worse. However, such a problematic explanatory document is almost necessary given both the complexity of the proposed amendment itself and the conflicting agendas that are obviously being played out in its provisions. With appropriate respect for those who drafted the amendment, it shows disdain for the Constitution and the careful craft of its drafters over the past two hundred years. These extraordinarily fundamental flaws in construction should by themselves require rejection of the proposed amendment.

Fifth and finally, the amendment should be rejected in its present form because it omits, apparently consciously, an obvious provision that would disavow a potential ignoble purpose that some of its proponents apparently warmly embrace. The provision, which was offered and rejected in the Senate Judiciary Committee in both 1998 and 1999, would provide that "[n]othing in this article shall be construed to deny or diminish the rights of the accused as guaranteed by this Constitution."[(11)] This provision is essential to constructing the amendment so as to benefit victims rather than damage fairness to defendants. Without it, the proposed amendment is unworthy to be part of the United States Constitution. No showing whatsoever has been made that the legitimate interests and rights cannot be protected without undercutting the basic wisdom of our Bill of Rights to protect the procedural rights of those accused of crime.

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purposes only.

2. I shall be brief in this prepared testimony principally because I have set out in some detail in a set of short essays reasons I believe should compel rejection of the amendment. The essays are: Robert P. Mosteller & H. Jefferson Powell, *With Disdain for the Constitutional Craft: The Proposed Victims' Rights Amendment,* 78 N.C. L. Rev. 371 (2000) [hereinafter *With Disdain for the Constitutional Craft*]; Robert P. Mosteller, *The Unnecessary Victims' Rights Amendment*, 1999 Utah L. Rev. 443 [hereinafter *The Unnecessary Amendment*]; Robert P. Mosteller, *Victims' Rights and the Constitution: Moving from Guaranteeing Participatory Rights to Benefiting the Prosecution*, 29 St. Mary's L. Rev. 1053 (1998) [hereinafter *Moving to Benefit Prosecution*]; Robert P. Mosteller, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 Geo. L.J. 1691 (1997) [hereinafter *Recasting the Battle*]. The two most recent of these essays are attached.

3. I have developed in more detail the case that the amendment is not necessary in Mosteller, *The Unnecessary Amendment*, 1999 Utah L. Rev. 443.

4. I issued this challenge in connection with a symposium held at the Utah Law School. Professors Paul Cassell, Douglas Beloof, and William Pizzi, and Mr. Steve Twist, who are among the leading advocates of the victims' rights amendment, received the challenge directly. The question was also posed to Professor Cassell in 1999 during his testimony before the Senate Judiciary Committee.

5. No case was produced at the symposium itself or in the year between it and the publication of papers or on any other occasion to the best of my knowledge. *See generally* Mosteller, *The Unnecessary Amendment,*1999 Utah L. Rev. at 451-72.

6. *See generally* Mosteller, *Moving to Benefit the Prosecution*.

7. 836 P.2d 445 (Ariz. Ct. App. 1992).

8. The dangers of earlier versions of the proposed amendment to enable states to enact legislation that might damage defendants' federal constitutional rights were more clear because those earlier versions explicitly gave states the power to enact enforcement legislation. *See* Mosteller, *Recasting the Battle*, 85 Geo. L.J. at 1794-09. That danger was apparently reduced by a change in language in the proposed amendment, which gives only Congress the explicit right to enact enforcement legislation. *See* H.J. Res. 64, § 3. However, the danger has not passed as demonstrated by the Majority Report to S.J. Res. 44 (1998), which attempts through legislative history explaining similar language to authorize states not only to enact enforcement legislation but to enact a new class of legislation "implementing" the amendment. The effort appears both to circumvent the restriction of *City of Boerne v. Flores*, 521 U.S. 505 (1997), which prohibits the creation of new constitutional rights through enforcement legislation, and to give state legislatures a power to define and shape the nature of *federal* constitutional rights. *See* Mosteller & Powell, *With Disdain for the Constitutional Craft*, 78 N.C. L. Rev. at 382-85.

9. These arguments are developed more fully in Mosteller & Powell, *With Disdain for the Constitutional Craft*, 78 N.C. L. Rev. 371.

10. S.J.Res 44 105th Cong. (1998).

11. Mosteller, *Moving to Benefit the Prosecution*, 29 St. Mary's L. Rev. at 1065.