

STATEMENT  
OF  
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BEFORE

THE

SUBCOMMITTEE ON THE CONSTITUTION, FEDERALISM, AND PROPERTY RIGHTS  
COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

IN SUPPORT OF

S. J. RES. 35  
THE CRIME VICTIMS' RIGHTS AMENDMENT

JULY 17, 2002

Mr. Chairman and Distinguished Members:

Thank you for holding this hearing today. I am grateful for the invitation to present the views of the National Victims Constitutional Amendment Network, a national coalition of America's leading crime victims' rights and services organizations. My background in this area is more fully set forth in earlier testimony.<sup>1</sup>

We meet once again to discuss great injustice, but injustice which remains seemingly invisible to all too many. Were it otherwise, the resolution before you would have already passed. Indeed the law and the culture are hard to change, and so they should be; critics are always heard to counsel delay, to trade on doubts and fears, to make the perfect the enemy of the good. Perhaps some would prefer it if crime victims just remained invisible. Perhaps we are so numbed by decades of crime and violence we simply choose to look away, to pass by on the other side of the road. But in America, when confronted with great injustice, great hope abides.

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<sup>1</sup> *Rights of Crime Victims Constitutional Amendment: Hearing on H. J. Res. 64, Before the Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives*, 106<sup>th</sup> Cong., 2nd Sess. 121 (Feb. 10, 2000). Since my last appearance before the subcommittee, I have begun to serve as an Adjunct Professor of Law at the College of Law at Arizona State University where I teach a course on the rights of crime victims in criminal procedure. I also have founded the Victims Legal Assistance Project, which is a free legal clinic for crime victims operating at the law school. The project, a partnership between ASU and Arizona Voice for Crime Victims, a statewide coalition of victims rights and services organizations in my state, provides free legal representation for crime victims helping them to assert their state constitutional and statutory rights in criminal cases. I currently serve as Vice President for Public Policy for the National Organization for Victim Assistance, the nation's oldest and largest victims rights organization, I serve on the Board of Trustees of the National Organization of Parent's of Murdered Children, and I serve as General Counsel, and a member of the executive committee, of the National Victims Constitutional Amendment Network. I am honored to represent these organizations here today.

Our cause today is a cause in the tradition of the great struggles for civil rights.<sup>2</sup> When a woman who was raped is not given notice of the proceedings in her case, when the parents of a murdered child are excluded from court proceedings that others may attend, when the voice of a battered woman or child is silenced on matters of great importance to them and their safety – on matters of early releases and plea bargains and sentencing – it is the government and its courts that are the engines of these injustices.

For crime victims, the struggle for justice has gone on long enough. Too many, for too long, have been denied basic rights to fairness and human dignity. Today, you hold it within your power to begin to renew the cause of justice for America's crime victims. We earnestly hope you will do so.

I would like to address two principal areas: A brief history of the amendment, its bi-partisan support, and the history of the language of the resolution before you; and second, a review of the rights proposed. In two appendices to my testimony I have attached excerpts from earlier testimony on why these rights, to be meaningful, must be in the United States Constitution; and a more general response to the arguments of those who oppose crime victims' rights.

## **I. A Brief History Of The Movement For Constitutional Rights For Crime Victims, Their Broad Bi-Partisan Support, And The History Of The Proposed Language**

### **A Brief History of the Movement for Constitutional Rights for Crime Victims**

Two decades ago, in 1982, the President's Task Force on Victims of Crime, which had been convened by President Reagan to study the role of the victim in the criminal justice system, issued its Final Report. After extensive hearings around the country, the Task Force proposed, a federal constitutional amendment to protect the rights of crime

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<sup>2</sup> “As majestic bells of bolts struck shadows in the sounds  
Seeming to be the chimes of freedom flashing ...  
Tolling for the tongues with no place to bring their thoughts...  
Tolling for the aching ones whose wounds cannot be nursed ...  
An' we gazed upon the chimes of freedom flashing.”

Bob Dylan, *Chimes of Freedom*, 1964.

victims. The Task Force explained the need for a constitutional amendment in these terms:

In applying and interpreting the vital guarantees that protect all citizens, the criminal justice system has lost an essential balance. It should be clearly understood that this Task Force wishes in no way to vitiate the safeguards that shelter anyone accused of crime; but it must be urged with equal vigor that the system has deprived the innocent, the honest, and the helpless of its protection.

The guiding principle that provides the focus for constitutional liberties is that government must be restrained from trampling the rights of the individual citizen. The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed. To that end it is the recommendation of this Task Force that the sixth amendment to the Constitution be augmented.<sup>3</sup>

In April 1985, a national conference of citizen activists and mutual assistance groups organized by the National Organization for Victim Assistance (NOVA) and Mothers Against Drunk Driving (MADD) considered the Task Force proposal.<sup>4</sup>

Following a series of meetings, and the formation of the National Victims Constitutional Amendment Network (NVCAN), proponents of crime victims' rights decided initially to focus their attention on passage of constitutional amendments in the States , before undertaking an effort to obtain a federal constitutional amendment.<sup>5</sup> As explained in testimony before the Senate Judiciary Committee, “[t]he ‘states-first’ approach drew the support of many victim advocates. Adopting state amendments for victim rights would make good use of the ‘great laboratory of the states,’ that is, it would test whether such constitutional provisions could truly reduce victims' alienation from

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<sup>3</sup> *President's Task Force on Victims of Crime, 'Final Report,'* 114 (1982).

<sup>4</sup> See LeRoy L. Lamborn, *Victim Participation in the Criminal Justice Process: The Proposals for a Constitutional Amendment*, 34 Wayne L. Rev. 125, 129 (1987).

<sup>5</sup> See Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, Utah L. Rev. 1373, 1381-83 (1994) (recounting the history of crime victims' rights).

their justice system while producing no negative, unintended consequences.”<sup>6</sup>

The results of this conscious decision by the victims’ rights movement to seek state reforms have been dramatic, and yet disappointing. A total of 32 States now have State victims’ rights amendments,<sup>7</sup> and every state and the federal government have victims’ rights statutes’ in varying versions. And yet, the results have been disappointing as well, because the body of reform, on the whole, has proven inadequate to establish meaningful and enforceable rights for crime victims.<sup>8</sup>

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<sup>6</sup> Senate Judiciary Committee hearing, April 23, 1996, statement of Robert E. Preston, at 40.

<sup>7</sup> See Ala. Const. amend. 557; Alaska Const. art. I, Sec. 24; Ariz. Const. art. II, 2.1; Cal. Const. art. I, 12, 28; Colo. Const. art. II, 16a; Conn. Const. art. I, 8(b); Fla. Const. art. I, 16(b); Idaho Const. Art. I, 22; Ill. Const. art. I, 8.1; Ind. Const. art. I, 13(b); Kan. Const. art. 15, 15; La. Const. art. 1, 25; Md. Decl. of Rights art. 47; Mich. Const. art. I, 24; Miss. Const. art. 3, 26A; Mo. Const. art. I, 32; Neb. Const. art. I, 28; Nev. Const. art. I, 8; N.J. Const. art. I, 22; New Mex. Const. art. 2, 24; N.C. Const. art. I, 37; Ohio Const. art. I, 10a; Okla. Const. art. II, 34; R.I. Const. art. I, 23; S.C. Const. art. I, S 24; Tenn. Const. art. 1, 35; Tex. Const. art. 1, 30; Utah Const. art. I, 28; Va. Const. art. I, 8-A; Wash. Const. art. 2, 33; Wis. Const. art. I, 9m. These amendments passed with overwhelming popular support.]

<sup>8</sup> Paul G. Cassell, Professor of Law, University of Utah College of Law, *Statement Before the Committee on the Judiciary, United States Senate, Responding to the Critics of the Victims' Rights Amendment*, (March 24, 1999):

Unfortunately, however, the state amendments and related federal and state legislation are generally recognized by those who have carefully studied the issue to have been insufficient to fully protect the rights of crime victims. The United States Department of Justice has concluded that current protection of victims is inadequate, and will remain inadequate until a federal constitutional amendment is in place. As the (former) Attorney General (Reno) explained:

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

In 1995 the leaders of NVCAN met to discuss whether, in light of the failure of state reforms to bring about meaningful and enforceable rights for crime victims, the time had come to press the case for a federal constitutional amendment. It was decided to begin.<sup>9</sup>

Senator Kyl of Arizona was approached in the Fall of 1995 and asked to consider introducing an amendment for crime victims rights. He worked with NVCAN on the draft language and also reached across the aisle, asking Senator Dianne Feinstein to work with him. In a spirit of true bi-partisanship the two senators worked in earnest to transcend any differences and, together with NVCAN, reached agreement on the language.

In the 104th Congress, S. J. Res. 52, the first Federal constitutional amendment to protect the rights of crime victims, was introduced by Senators Jon Kyl and Dianne Feinstein on April 22, 1996. Twenty-seven other Senators cosponsored the resolution. A similar resolution (H. J. Res. 174) was introduced in the House by Representative Henry Hyde. On April 23, 1996, the Senate Committee on the Judiciary held a hearing on S. J. Res. 52. Later that year the House Committee on the Judiciary, under the leadership of then Chairmen Henry Hyde held hearings on companion proposals in the House.<sup>10</sup>

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

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safeguard victims' rights. (Citation in original).

<sup>9</sup> Committee on the Judiciary, 79-010, Calendar No. 299, 106<sup>th</sup> Congress Report, Senate 2d Session 106, 254, *S. J. Res. 3: Crime Victims' Rights Constitutional Amendment*, April 4, 2000 (hereinafter “Senate Judiciary Report”). (“With the passage of and experience with these State constitutional amendments came increasing recognition of both the national consensus supporting victims’ rights and the difficulties of protecting these rights with anything other than a Federal amendment. As a result, the victims’ advocates – including most prominently the National Victims Constitutional Amendment Network (NVCAN) – decided in 1995 to shift its focus toward passage of a Federal amendment.”)

<sup>10</sup> Committee on the Judiciary, *Legislative Hearing on Proposals for Constitutional Amendment to Provide Rights for Victims of Crime*, H. J. Res 173 and H. J. Res. 174, July 11, 1996

independent standing to assert these rights. In the 105th Congress, Senators Kyl and Feinstein introduced S. J. Res. 6 on January 21, 1997, the opening day of the Congress. Thirty-two Senators became cosponsors of the resolution. On April 16, 1997, the Senate Committee on the Judiciary held a hearing on S. J. Res. 6.<sup>11</sup>

On June 25, 1997 the House Committee on the Judiciary held hearings on H. J. Res. 71 which had been introduced by then Chairman Henry Hyde and others on April 15, 1997.

Work continued with all parties interested in the language of the proposal and many changes were made to the original draft, responding to concerns expressed in hearings, by the Department of Justice, and others. S. J. Res. 44 was introduced by Senators Kyl and Feinstein on April 1, 1998. Thirty-nine Senators joined Senators Kyl and Feinstein as original cosponsors.<sup>12</sup> On April 28, 1998, the Senate Committee on the Judiciary held a hearing on S. J. Res. 44. On July 7, after debate at three executive business meetings, the Committee approved S. J. Res. 44, with a substitute amendment by the authors, by a vote of 11 to 6.

In the 106th Congress, Senators Kyl and Feinstein introduced S. J. Res. 3 on January 19, 1999, the opening day of the Congress. Thirty-three Senators became cosponsors of the resolution. On March 24, 1999, the Senate Committee on the Judiciary held a hearing on S. J. Res. 3.

Rep Steve Chabot (R-OH) introduced H. J. Res. 64 on August 4, 1999.

On May 26, 1999, the Senate Subcommittee on the Constitution, Federalism, and Property Rights approved S. J. Res. 3, with an amendment, and reported it to the full Committee by a vote of 4 to 3. On September 30, 1999, the Senate Committee on the Judiciary approved S. J. Res. 3 with a sponsors' substitute amendment, by a vote of 12 to 5.

Hearings on H. J. Res 64 were held on February 10, 2000 before the Constitution Subcommittee of the Committee on the Judiciary.

On April 27, 2000, after three days of debate on the floor of the United States

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<sup>11</sup> See Senate Judiciary Report.

<sup>12</sup> *Id.*

Senate, Senators Kyl and Feinstein decided to ask that further consideration of the amendment be halted when it became likely that opponents would sustain a filibuster.<sup>13</sup>

### A History of the Proposed Language

After S. J. Res. 3 was withdrawn by its sponsors, an active effort was undertaken to review all the issues that had been raised by the critics. I was asked by Senator Feinstein to work with Professor Larry Tribe, the pre-eminent Harvard constitutional law scholar, on re-drafting the amendment to meet the objections of the critics. I traveled to Cambridge, Mass with my colleague John Stein, the Deputy Director of the National Organization for Victim Assistance (NOVA) and together with Prof. Tribe, we wrote a new draft for consideration by the senators and their counsel. Together with Stephen Higgins, Chief Counsel to Senator Kyl, and Matt Lamberti, Counsel to Senator Dianne Feinstein, Prof. Paul Cassell (University of Utah College of Law) and Prof. Doug Beloof (Lewis and Clark College of Law), we reached consensus on a new draft in the Fall of 2000.

With the advent of the new Administration, the revised draft was presented to representatives of the White House and the Department of Justice soon after Attorney General Ashcroft was confirmed. We began to have a series of meetings with Administration officials directed at reaching consensus on language.<sup>14</sup>

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<sup>13</sup> “Ultimately, in the face of a threatened filibuster, Senator Kyl and I decided to withdraw the amendment.” *Congressional Record Statement by Senator Dianne Feinstein on Introduction of S.J. Res. 35*, April 15, 2002.

<sup>14</sup> Such a consensus had always eluded proponents in discussion with the prior Administration. See National Organization for Victim Assistance, *Newsletter*, Volume 19, Numbers 2 and 3 (of 12 issues), 2000 which reported the following history:

#### Administration Reservations

For at least two years before the full Senate took up the proposal, the Justice Department had been expressing reservations about certain provisions of the Kyl-Feinstein proposal. Organizations like the National Victims Constitutional Amendment Network (NVCAN) and NOVA had written letters to Attorney General Janet Reno expressing disagreement with the Department’s positions and requesting meetings to seek resolution. Those letters went unanswered.

Justice formalized its objections in a February 10, 2000, hearing before the Constitution Subcommittee of the House Judiciary Committee, considering a counterpart proposal. There, Assistant Attorney General Eleanor D. Acheson submitted a statement for the Department specifying four

The discussions toward consensus were interrupted by the September 11, 2001 attacks on our nation. However, those tragic events and their resulting victimizations focused our attention on the importance of our work and strengthened our resolve to complete it as soon as the Administration was again able to rejoin the discussion. Our talks resumed earlier this year and just before the advent of Crime Victims Rights Week this year (April 21 - 27, 2002) we reached agreement.

Let me say on behalf of our national movement how grateful we are to the President and the Attorney General for committing to this lengthy process and always remaining steadfast in pursuit of the goal of constitutional rights for crime victims. We

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objections to the Kyl-Feinstein resolution (and an additional one pertaining just to the House bill, introduced by Ohio Republican Steve Chabot).

That statement became the focus of the discussions between the Administration and the sponsors. These began Tuesday afternoon, necessitating the sponsors to leave the floor as opponents held forth.

The Justice position and the proponents' response can be found in a rejoinder that NVCAN Chief Counsel Steven Twist filed to the Acheson statement. Italicized excerpts from the statement, with the Twist rejoinder afterward, follow:

*"... [w]e urge that the following language be added: 'Nothing in this article shall be construed to deny or diminish the rights of the accused as guaranteed by the Constitution.' "*

"The likely, although perhaps unintended, consequence of the proposed language would be to always subordinate the rights of the victim to those of an accused or convicted offender. To constitutionalize such a 'trump card' would be directly contrary to the views President Clinton expressed on June 25, 1996 ..."

...  
The issue that seemed the thorniest was the first, concerning defendants' rights. The proponents' negotiators reported that the Administration had rejected alternative language that Professor Cassell had publicly suggested over a year before: "*Nothing in this article shall be construed to deny or diminish the rights of the accused as guaranteed by the Constitution. In cases of conflict, the rights of the accused or convicted offender and the victim shall be reasonably balanced.*"

Finding a new way to express protection of both defendants' and victims' rights proved an intellectual challenge, but in the end, the lawyers and the sponsors were satisfied with their draft.

At the second meeting on Wednesday, the Administration team reviewed the sponsors' counteroffers, and accepted all but the defendant's rights language. Nor would they suggest an alternative to their own formulation.

are also grateful to Viet Dinh, who led the Administration discussion team, and his many fine colleagues within DOJ and the White House.

These efforts have produced the proposed amendment which is now before you. It is the product of quite literally six years of debate and reflection. It speaks in the language of the Constitution; it has been revised to address concerns of critics on both the Left and the Right, while not abandoning the core values of the cause we serve. The proposed language threatens no constitutional right of an accused or convicted offender, while at the same time securing fundamentally meaningful and enforceable rights for crime victims.

Senators Feinstein and Kyl introduced S. J. Res. 35 on April 15, 2002 and the following day President Bush announced his support for the amendment. On May 1, 2002, Law Day, Rep. Chabot introduced the companion resolution which is before you today.

#### *The Bi-Partisan Consensus for Constitutional Rights for Crime Victims*

That there is a strong bi-partisan consensus that crime victims should be given rights is now beyond dispute, as is the consensus that those rights *can only* be secured by an amendment to the United States Constitution.

Support for a constitutional amendment for victims' rights is found in the platforms of both the Democratic National Committee<sup>15</sup> and the Republican National

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<sup>15</sup> Democratic National Committee, *The 2000 Democratic National Platform: Prosperity, Progress, and Peace* (2000):

*Victims' Rights.* We need a criminal justice system that both upholds our Constitution and reflects our values. Too often, we bend over backward to protect the right of criminals, but pay no attention to those who are hurt the most. Al Gore believes in a Victims' Rights Amendment to the United States Constitution - one that is consistent with fundamental Constitutional protections. Victims must have a voice in trial and other proceedings, their safety must be a factor in the sentencing and release of their attackers, they must be notified when an offender is released back into their community, they must have a right to compensation from their attacker. Our justice system should place victims ... in their rightful place.

Committee.<sup>16</sup> Former President Clinton understood the need for a constitutional amendment for crime victims rights<sup>17</sup> and President Bush has recently issued a strong endorsement of the proposal before you.<sup>18</sup> Former Attorney General Janet Reno supported

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<sup>16</sup>Republican National Committee, *Republican Platform 2000: Renewing America's Purpose. Together.* (2000) (supporting "A constitutional amendment to protect victims' rights at every stage of the criminal justice system.")

<sup>17</sup>Statement of President Bill Clinton, June 25, 1996 from the White House:

Having carefully studied all of the alternatives, I am now convinced that the only way to fully safeguard the rights of victims in America is to amend our Constitution and guarantee these basic rights -- to be told about public court proceedings and to attend them; to make a statement to the court about bail, about sentencing, about accepting a plea if the victim is present, to be told about parole hearings to attend and to speak; notice when the defendant or convict escapes or is released, restitution from the defendant, reasonable protection from the defendant and notice of these rights.

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But this is different. This is not an attempt to put legislative responsibilities in the Constitution or to guarantee a right that is already guaranteed. Amending the Constitution here is simply the only way to guarantee the victims' rights are weighted equally with defendants' rights in every courtroom in America.

Until these rights are also enshrined in our Constitution, the people who have been hurt most by crime will continue to be denied equal justice under law. That's what this country is really all about -- equal justice under law. And crime victims deserve that as much as any group of citizens in the United States ever will.

<sup>18</sup>Statement of President George W. Bush from the Department of Justice, April 16, 2002

The victims' rights movement has touched the conscience of this country, and our criminal justice system has begun to respond, treating victims with greater respect. The states, as well as the federal government, have passed legal protections for victims. However, those laws are insufficient to fully recognize the rights of crime victims.

Victims of violent crime have important rights that deserve protection in our Constitution. And so today, I announce my support for the bipartisan Crime Victims' Rights amendment to the Constitution of the United States.

As I mentioned, this amendment is sponsored by Senator Feinstein of California, Senator Kyl of Arizona -- one a Democrat, one a Republican.

a constitutional amendment for victims rights<sup>19</sup> and Attorney General John Ashcroft

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Both great Americans.

This amendment makes some basic pledges to Americans. Victims of violent crime deserve the right to be notified of public proceedings involving the crime. They deserve to be heard at public proceedings regarding the criminal's sentence or potential release. They deserve to have their safety considered. They deserve consideration of their claims of restitution. We must guarantee these rights for all the victims of violent crime in America.

The Feinstein-Kyl Amendment was written with care, and strikes a proper balance. Our legal system properly protects the rights of the accused in the Constitution. But it does not provide similar protection for the rights of victims, and that must change.

The protection of victims' rights is one of those rare instances when amending the Constitution is the right thing to do. And the Feinstein-Kyl Crime Victims' Rights Amendment is the right way to do it.

<sup>19</sup>Statement of Attorney General Janet Reno, House Committee on the Judiciary, *Supporting House Joint Resolution 71* (June 25, 1997):

Based on our personal experiences and the extensive review and analysis that has been conducted at our direction, the President and I have concluded that an amendment to the Constitution to protect victims' rights is warranted. We have come to that conclusion for a number of important reasons.

First, unless the Constitution is amended to ensure basic rights to crime victims, we will never correct the existing imbalance in this country between defendants' constitutional rights and the current haphazard patchwork of victims' rights. While a person arrested or convicted for a crime anywhere in the United States knows that he is guaranteed certain basic minimum protection under our nation's most fundamental law, the victim of that crime has no guarantee of rights beyond those that happen to be provided and enforced in the particular jurisdiction where the crime occurred.

A victims' rights amendment would ensure that courts will give weight to the interests of victims. When confronted with the need to reconcile the constitutional rights of a defendant with the statutory rights of a victim, many courts often find it easiest simply to ignore the legitimate interests of the victim. A constitutional amendment would require courts to engage in a careful and conscientious analysis to determine whether a particular victim's participation would adversely affect the defendant's rights. The result will be a more sophisticated and responsive criminal justice system that both protects the rights of the accused and the interests of victims.

Second, efforts to secure victims' rights through means other than a constitutional amendment have proved less than fully adequate.

recently announced his support for the proposed amendment.<sup>20</sup> Each proposal for a constitutional amendment has received strong bi-partisan support in the United States Senate.<sup>21</sup> The National Governors' Association, by a vote of 49-1, passed a resolution strongly supporting the need for a constitutional amendment for crime victims.<sup>22</sup> In the last Congress, a bipartisan group of 39 State Attorneys General signed a letter expressing their "strong and unequivocal support for an amendment. Finally, among academic scholars, the amendment has garnered the support from both conservatives and liberals.<sup>23</sup>

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<sup>20</sup>Statement of Attorney General John Ashcroft, Department of Justice, April 16, 2002:

There were millions of victims of violent crime last year, but too often in the quest for justice, the rights of these victims were overlooked or ignored. It is time --it is past time -- to balance the scales of justice, to demand fairness and judicial integrity not just for the accused but for the aggrieved, as well.

I am grateful to members of the Congress who are here today, and I thank in particular Senators John Kyl and Dianne Feinstein for their work to protect the rights of victims.

Although government cannot offer the one thing that victims wish for most, and that's a return to the way life was before violence intruded, government can do more than it has done in the past. We can offer victims a new guarantee of inclusion in the process of justice. We can show our support with that of a bipartisan group of lawmakers for a constitutional amendment to ensure that the victims of crime have their rights, including the right to participate, the right to be heard, and the right to decisions that consider the safety of victims.

<sup>21</sup> Senators Kyl and Feinstein have co-sponsored their amendment with leading senators from both parties including Senate Minority Leader Trent Lott and Senator Joseph Biden, the distinguished former Chair of the Judiciary Committee..

<sup>22</sup> National Governors' Association, Policy 23.1 ("Despite widespread state initiatives, the rights of victims do not receive the same consideration or protection as the rights of the accused. These rights exist on different judicial levels. Victims are relegated to a position of secondary importance in the judicial process. ... Protection of these basic rights is essential and can only come from a fundamental change in our basic law: the U. S. Constitution.")

<sup>23</sup>"The proposed Crime Victims' Rights Amendment would protect basic rights of crime victims, including their rights to be notified of and present at all proceedings in their case and to be heard at appropriate stages in the process. These are rights not to be victimized again through the process by which government officials prosecute, punish, and release accused or convicted offenders. These are the very kinds of rights with which

## II. The Rights Proposed

*SECTION 1. The rights of victims of violent crime, being capable of protection without denying the constitutional rights of those accused of victimizing them, are hereby established and shall not be denied by any State or the United States and may be restricted only as provided in this article.*

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

This preamble, authored by Professor Tribe, establishes two important principles about the rights established in the amendment: First, they are not intended to deny the constitutional rights of the accused, and second, they do not. The task of balancing rights, in the case of alleged conflict, will fall, as it always does, to the courts, guided by the constitutional admonition not to *deny* constitutional rights to either the victim or the accused.<sup>24</sup>

*are hereby established*

For a fuller discussion of why true rights for crime victims can only be established through an Amendment to the U. S. Constitution, and why it is appropriate to do so, see Appendix A. The arguments presented are straightforward: *twenty years of experience with statutes and state constitutional amendments proves they don't work.* Defendants

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our Constitution is typically and properly concerned--rights of individuals to participate in all those government process that strongly affect their lives." Laurence H. Tribe and Paul G. Cassell, "Embed the Rights of Victims in the Constitution," L.A. Times, July 6, 1998, at B7.

<sup>24</sup> See Killian and Costello, *The Constitution of the United States of America: Analysis and Interpretation*, Senate Document 103-6, U. S. Gov't Printing Office, p. 1105 (1992). ("Conflict between constitutionally protected rights is not uncommon." The text continues discussing the Supreme's Court balancing of "a criminal defendant's Fifth and Sixth Amendment rights to a fair trial and the First Amendment's rights protection of the rights to obtain and publish information about defendants and trials.") *Id.*

trump them, and the prevailing legal culture does not respect them. They are *geldings*.<sup>25</sup>

The amendment provides that the rights of victims are “hereby established.” The phrase, which is followed by certain enumerated rights, is not intended to “deny or disparage”<sup>26</sup> rights that may be established by other federal or state laws. The amendment establishes a floor and not a ceiling of rights<sup>27</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>28</sup>

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

In this clause, and in Section 2 of the amendment, an important distinction between “denying” rights and “restricting” rights is established. As used here, “denied” means to

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<sup>25</sup> I pause here to note with some sadness and amusement that there are those who say they are all in favor of “victims’ rights” laws, they just don’t want them in the Constitution. Such laws, without constitutional authority or grounding, are like the “men without chests” referred to by C. S. Lewis:

And all the time – such is the tragic-comedy of our situation – we continue to clamour for those very qualities we are rendering impossible. ... In a sort of ghastly simplicity we remove the organ and demand the function. We make men without chests and expect of them virtue and enterprise. We laugh at honour and are shocked to find traitors in our midst. We castrate and bid the geldings be fruitful.

C. S. Lewis, *The Abolition of Man*, 26 (HarperCollins 2001).

<sup>26</sup> U. S. Constitution, Amend. IX.

<sup>27</sup> See Senate Judiciary Report (“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>28</sup> See *Michigan v. Long*, 463 U.S. 1032 (1983).

“refuse to grant;”<sup>29</sup> in other words, completely prohibit the exercise of the right. The amendment, by its terms, prohibits such a denial. At the same time, the language recognizes that no constitutional right is absolute and therefore permits “restrictions” on the rights but only, as provided in Section 2, in three narrow circumstances. This direction settles what might otherwise have been years of litigation to adopt the appropriate test for when, and the extent to which, restrictions will be allowed.

***SECTION 2. A victim of violent crime shall have the right to reasonable and timely notice of any public proceeding involving the crime and of any release or escape of the accused; the rights not to be excluded from such public proceeding and reasonably to be heard at public release, plea, sentencing, reprieve, and pardon proceedings; and the right to adjudicative decisions that duly consider the victim’s safety, interest in avoiding unreasonable delay, and just and timely claims to restitution from the offender. These rights shall not be restricted except when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity.***

*A victim of violent crime*

Concern has been expressed by some over the amendment’s limitation to victims of “violent crime.” In a perfect world the amendment would extend to victims of all crimes. Nonetheless, we have acceded to the insistence of others that the amendment be limited in this fashion because we believe strongly that the rights proposed, once adopted, will benefit all crime victims. The rights will usher in an era of cultural reform in the criminal justice system, moving it to a more victim-oriented model.<sup>30</sup>

Moreover, we are confident that the scope of the “violent crime” clause will be broadly applied to effectuate the purpose of extending rights to crime victims, and not be limited as it might in more narrow contexts. The Senate Report addressed this issue at some length and it is worth inserting those views for your consideration:

The most analogous Federal definition is Federal Rule of Criminal Procedure 32(f), which extends a right of allocution to victims of a “crime

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<sup>29</sup> Webster’s New Collegiate Dictionary, 304 (1977).

<sup>30</sup> Cite Beloof Article

of violence” and defines the phrase as one that “involved the use or attempted or threatened use of physical force against the person or property of another \* \* \*.” (emphasis added). The Committee anticipates that the phrase “crime of violence” will be defined in these terms of “involving” violence, not a narrower “elements of the offense” approach employed in other settings. See, e.g., 18 U.S.C. 16. Only this broad construction will serve to protect fully the interests of all those affected by criminal violence.

“Crimes of violence” will include all forms of homicide (including voluntary and involuntary manslaughter and vehicular homicide), sexual assault, kidnaping, robbery, assault, mayhem, battery, extortion accompanied by threats of violence, carjacking, vehicular offenses (including driving while intoxicated) which result in personal injury, domestic violence, and other similar crimes. A “crime of violence” can arise without regard to technical classification of the offense as a felony or a misdemeanor.

It should also be obvious that a “crime of violence” can include not only acts of consummated violence but also of intended, threatened, or implied violence. The unlawful displaying of a firearm or firing of a bullet at a victim constitutes a “crime of violence” regardless of whether the victim is actually injured. Along the same lines, conspiracies, attempts, solicitations and other comparable crimes to commit a crime of violence should be considered “crimes of violence” for purposes of the amendment, if identifiable victims exist.

Similarly, some crimes are so inherently threatening of physical violence that they could be “crimes of violence” for purposes of the amendment. Burglary, for example, is frequently understood to be a “crime of violence” because of the potential for armed or other dangerous confrontation. See United States v. Guadardo, 40 F.3d 102 (5th Cir. 1994); United States v. Flores, 875 F.2d 1110 (5th Cir. 1989).

Similarly, sexual offenses against a child, such as child molestation, can be “crimes of violence” because of the fear of the potential for force which is inherent in the disparate status of the perpetrator and victim and also because evidence of severe and persistent emotional trauma in its victims gives testament to the molestation being unwanted and coercive. See United States v. Reyes-Castro, 13 F.3d 377 (10th Cir. 1993). Sexual offenses against other vulnerable persons would similarly be treated as “crimes of violence,” as would, for example, forcible sex offenses against adults and sex offenses against incapacitated adults.

Finally, an act of violence exists where the victim is physically injured, is threatened with physical injury, or reasonably believes he or she

is being physically threatened by criminal activity of the defendant. For example, a victim who is killed or injured by a driver who is under the influence of alcohol or drugs is the victim of a crime of violence, as is a victim of stalking or other threats who is reasonably put in fear of his or her safety. Also, crimes of arson involving threats to the safety of persons could be “crimes of violence.”<sup>31</sup>

It should be noted that the States, and the Federal Government,<sup>32</sup> within their respective jurisdictions, retain authority to define, in the first instance, conduct that is criminal. The power to define “victim” is simply a corollary of the power to define the elements of criminal offenses and, for State crimes, the power would remain with State Legislatures.

*shall have the right to reasonable and timely notice of any public proceeding involving the crime*

Reasonable and timely notice is the irreducible component of fairness and due process. Each of the participatory rights established in the amendment depend first on the receipt of notice. Notice here must be “reasonable.” As was noted in the Senate Judiciary Report:

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

‘Reasonable’ notice is any means likely to provide actual notice to a victim. Heroic measures need not be taken to inform victims, but due

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<sup>31</sup> Senate Judiciary Report

<sup>32</sup> Killian and Costello, The Constitution of the United States of America: Analysis and Interpretation, Senate Document 103-6, U. S. Gov’t Printing Office, p. 341 (1992) (“[Congress’] power to create, define, and punish crimes and offenses whenever necessary to effectuate the objects of the Federal Government is universally conceded.” (Numerous citations omitted)).

diligence is required by government actors. It would, of course, be reasonable to require victims to provide an address and keep that address updated in order to receive notices. ‘Reasonable’ notice is notice that permits a meaningful opportunity for victims to exercise their rights. In rare mass victim cases (i.e., those involving hundreds of victims), reasonable notice could be provided to means tailored to those unusual circumstances, such as notification by newspaper or television announcement.

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

Victims' rights under this provision are also limited to ‘public’ proceedings. Some proceedings, such as grand jury investigations, are not open to the public and accordingly would not be open to the victim. Other proceedings, while generally open, may be closed in some circumstances. For example, while plea proceedings are generally open to the public, a court might decide to close a proceeding in which an organized crime underling would plead guilty and agree to testify against his bosses. Another example is provided by certain national security cases in which access to some proceedings can be restricted. See ‘The Classified Information Procedures Act,’ 18 U.S.C. app. 3. A victim would have no special right to attend. The amendment works no change in the standards for closing hearings, but rather simply recognizes that such nonpublic hearings take place. Of course, nothing in the amendment would forbid the court, in its discretion, to allow a victim to attend even such a nonpublic hearing.<sup>33</sup>

“Timely” notice would require that the victim be informed enough in advance of a public proceeding to be able reasonably to organize his or her affairs to attend. Oftentimes the practice in the criminal courts across the country is to schedule proceedings, whether last minute or well in advance, without any notice to the victim. Even in those jurisdictions which purport to extend to victims the right to not be excluded

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<sup>33</sup> See Senate Judiciary Report

or the right to be heard, these proceedings without notice to the victim render meaningless any participatory right. Of course, it goes without saying, the defendant, the state, and the court always have notice; failure to provide notice to any of the three would render the ensuing action void. Victims seek no less consideration; indeed, principles of fairness and decency demand no less.

Witnesses before both the full House and Senate Judiciary Committees have given compelling testimony about the devastating effects on crime victims who learn that proceedings in their case were held without any notice to them. What is most striking about this testimony is that it comes on the heels of a concerted efforts by the victims' movement to obtain notice of hearings. In 1982, the Task Force Report recommended that victims be kept apprised of criminal justice proceedings. Since then many state provisions have been passed requiring that victims be notified of court hearings. But those efforts have not been fully successful. The *New Directions* Report found that not all states had adopted laws requiring notice for victims, and even in the ones that had, many had not implemented mechanisms to make such notice a reality.<sup>34</sup>

To fail to provide simple notice of proceedings to criminal defendants would be unthinkable; why do we tolerate it for crime victims?

The right to notice of public proceedings is fundamental to the notions of fairness and due process that ought to be at the center of any criminal justice process. Victims have a legitimate interest in knowing what is happening in "their" case. Surely it is time to protect this fundamental interest of crime victims by securing an enduring right to notice in the Constitution.

*of any release or escape of the accused*

Reasonable and timely notice of releases or escapes is a matter of profound importance to the safety of victims of violent crime. Twenty years after the President's Task Force report victims are still learning "by accident"<sup>35</sup> of the release of the person

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<sup>34</sup> *New Directions*, 13.

<sup>35</sup> *President's Task Force on Victims of Crime, 'Final Report,'* 4-5 (1982). ("One morning I woke up, looked out my bedroom window and saw the man who had assaulted me standing across the street staring at me. I thought he was in jail.' – a victim")

accused or convicted of attacking them.<sup>36</sup> This continuing threat to safety must be brought to an end.<sup>37</sup>

Because of technological advances, automatic phone systems, web-based systems, and other modern notification systems are all widely and reasonably available. As the Senate Judiciary Report noted, “New technologies are becoming more widely available that will simplify the process of providing this notice. For example, automated voice response technology exists that can be programmed to place repeated telephone calls to victims whenever a prisoner is released, which would be reasonable notice of the release. As technology improves in this area, what is ‘reasonable’ may change as well.”<sup>38</sup>

*not to be excluded from such public proceeding*

This right parallels the language that had been reported out of the Senate Judiciary Committee in April, 2000. The comments from the Senate Judiciary Report remain instructive:

Victims are given the right ‘not to be excluded’ from public proceedings. This builds on the 1982 recommendation from the President’s Task Force on Victims of Crime that victims ‘no less than the defendant, have a legitimate interest in the fair adjudication of the case, and should therefore, as an exception to the general rule providing for the exclusion of

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<sup>36</sup> See National Institute of Justice, Research in Brief, *The Rights of Crime Victims – Does Legal Protection Make a Difference?*, 4 (Dec. 1998), finding that even in states that gave “strong protection” to victims’ rights, fewer than 60 percent of the victims were notified of the sentencing hearing and fewer than 40 percent were notified of the pretrial release of the defendant.,

<sup>37</sup> U. S. Dep’t of Justice, Office for Victims of Crime, New Directions from the Field: Victims’ Rights and Services for the 21<sup>st</sup> Century 13 (1998). (“Notification of victims when the defendants or offenders are released can be a matter of life and death. Around the country there are a large number of documented cases of women and children being killed by defendants and convicted offenders recently released from jail or prison. In many cases, the victims were unable to take precautions to save their lives because they had not been notified of the release.”)

<sup>38</sup> Senate Judiciary Report.

witnesses, be permitted to be present for the entire trial.' President's Task Force on Victims of Crime, 'Final Report,' 80 (1982).

The right conferred is a negative one--a right '*not* to be excluded'--to avoid the suggestion that an alternative formulation--a right 'to attend'--might carry with it some government obligation to provide funding, to schedule the timing of a particular proceeding according to the victim's wishes, or otherwise assert affirmative efforts to make it possible for a victim to attend proceedings. 'Accord,' Ala. Code Sec. 15-14-54 (right 'not [to] be excluded from court or counsel table during the trial or hearing or any portion thereof \* \* \* which in any way pertains to such offense'). The amendment, for example, would not entitle a prisoner who was attacked in prison to a release from prison and plane ticket to enable him to attend the trial of his attacker. This example is important because there have been occasional suggestions that transporting prisoners who are the victims of prison violence to courthouses to exercise their rights as victims might create security risks. These suggestions are misplaced, because the Crime Victims' Rights Amendment does not confer on prisoners any such rights to travel outside prison gates. Of course, as discussed below, prisoners no less than other victims will have a right to be 'heard, if present, and to submit a statement' at various points in the criminal justice process. Because prisoners ordinarily will not be 'present,' they will exercise their rights by submitting a 'statement.' This approach has been followed in the States. See, e.g., Utah Code Ann. 77-38-5(8); Ariz. Const. art. II, 2.1.

In some important respects, a victim's right not to be excluded will parallel the right of a defendant to be present during criminal proceedings. See *Diaz v. United States*, 223 U.S. 442, 454-55 (1912). It is understood that defendants have no license to engage in disruptive behavior during proceedings. See, e.g., *Illinois v. Allen*, 397 U.S. 337, 343 (1977); *Foster v. Wainwright*, 686 F.2d 1382, 1387 (11th Cir. 1982). Likewise, crime victims will have no right to engage in disruptive behavior and, like defendants, will have to follow proper court rules, such as those forbidding excessive displays of emotion or visibly reacting to testimony of witnesses during a jury trial.<sup>39</sup>

Few experiences in the justice system are more devastating than an order to a

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<sup>39</sup> Senate Judiciary Report

victim that he or she may not enter the courtroom during otherwise public proceedings in the case involving their own victimization.

Collene and Gary Campbell of San Juan Capistrano, California still remember the pain and injustice of being forced to sit, literally, on a hard bench outside the courtroom during the trial of their son’s murderer, while the murderers’ family members were allowed entry and preferential seating in the courtroom. Collene and Gary were excluded as a tactical ploy by the defense, who listed them as witnesses, never intending to call them, but rather intending only to invoke “the rule” excluding witnesses. Such exclusion happens every day in courtrooms across the country. And yet exceptions are made to the rule of exclusion. Of course, it does not apply to defendants, who may take the stand to testify in their own defense, nor does the rule apply, in most jurisdictions, to the government’s chief investigator, who although a witness, often sits at counsel table throughout the trial, assisting the prosecutor. Simple principles of fairness demand that we do no less for victims. This will ensure that Collene and Gary’s wait will not have been in vain.

*reasonably to be heard at public release, plea, sentencing, reprieve, and pardon proceedings*

The right to be “heard,” along with “notice,” and the right “not to be excluded” form the bedrock of any system of fair treatment for victims. The right established here is to be heard before the relevant decision-maker at five critical public proceedings, first at “public release proceedings.” The language extends its reach to both post-arrest and post-conviction public release proceedings. Thus the victim of domestic violence would have the right to tell a releasing authority, for example before an Initial Appearance Court, about the circumstances of the assault and the need for any special conditions of release that may be necessary to protect the victim’s safety. The right would also extend to post-conviction public release proceedings, for example parole or conditional release hearings. In jurisdictions that have abolished parole in favor of “truth in sentencing” regimes, many still have conditional release. Only if the jurisdiction also has a “public proceeding” prior to such a conditional release would the right attach. The language would extend however, to any post-conviction public proceeding that could lead to the release of the convicted offender.

When a case is resolved through a plea bargain that the victim never knows about, until after the fact, there is a deeply impactful wound caused the justice system itself. One of the more famous quotes reported by the President’s Task Force was from a woman in Virginia. “Why didn’t anyone consult me? I was the one who was kidnapped, not the

State of Virginia.”<sup>40</sup> This cry for justice, for a voice not a veto, is heard throughout the country still.

The Senate Judiciary Report provides further background in understanding the meaning and intent of the language:

This gives victims the right to be heard before the court accepts a plea bargain entered into by the prosecution and the defense before it becomes final. The Committee expects that each State will determine for itself at what stage this right attaches. It may be that a State decides the right does not attach until sentencing if the plea can still be rejected by the court after the presentence investigation is completed. As the language makes clear, the right involves being heard when the court holds its hearing on whether to accept a plea. Thus, victims do not have the right to be heard by prosecutors and defense attorneys negotiating a deal. Nonetheless, the Committee anticipates that prosecutors may decide, in their discretion, to consult with victims before arriving at a plea. Such an approach is already a legal requirement in many States, see ‘National Victim Center, 1996 Victims’ Rights Sourcebook,’ 127-31 (1996), is followed by many prosecuting agencies, see, e.g., Senate Judiciary Committee hearing, April 28, 1998, statement of Paul Cassell, at 35-36, and has been encouraged as sound prosecutorial practice. See U.S. Department of Justice, Office for Victims of Crime, ‘New Directions from the Field: Victims’ Rights and Services for the 21st Century,’ 15-16 (1998). This trend has also been encouraged by the interest of some courts in whether prosecutors have consulted with the victim before arriving at a plea. Once again, the victim is given no right of veto over any plea. No doubt, some victims may wish to see nothing less than the maximum possible penalty (or minimum possible penalty) for a defendant. Under the amendment, the court will receive this information, along with that provided by prosecutors and defendants, and give it the weight it believes is appropriate deciding whether to accept a plea. The decision to accept a plea is typically vested in the court and, therefore, the victims’ right extends to these proceedings. See, e.g., Fed. R. Crim. Pro. 11(d)(3); see generally Douglas E. Beloof, ‘Victims in Criminal Procedure,’ 462-88 (1999).<sup>41</sup>

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<sup>40</sup> Task Force Report at 9.

<sup>41</sup> Senate Judiciary Report.

The right to be heard also extends to “public sentencing proceedings.” Professor Paul Cassell, in his March 24, 1999 testimony before the U. S. Senate Committee on the Judiciary wrote movingly of the importance of this right. In replying to the assumption that a judge or jury can comprehend the full harm caused by a murder without hearing testimony from the surviving family members, Prof. Cassell wrote:

That assumption is simply unsupportable. Any reader who disagrees with me should take a simple test. Read an actual victim impact statement from a homicide case all the way through and see if you truly learn nothing new about the enormity of the loss caused by a homicide. Sadly, the reader will have no shortage of such victim impact statements to choose from. Actual impact statements from court proceedings are accessible in various places.[42] 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*.[43] Kight's compelling book is not unique, as equally powerful accounts from the family of Ron Goldman,[44] children of Oklahoma City,[45] Alice Kaminsky,[46] George Lardner Jr.,[47] Dorris Porch and Rebeca Easley,[48] Mike Reynolds,[49] Deborah Spungen,[50] John Walsh,[51] and Marvin Weinstein[52] make all too painfully clear. Intimate third party accounts offer similar insights about the generally unrecognized yet far-ranging consequences of homicide.[53]

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 victim impact statement at issue in *Payne v. Tennessee*, 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.[54]

Bandes quite accurately observes that the statement is "heartbreaking" and "[o]n paper, it is nearly unbearable to read." [55] She goes on to argue that such statements are "prejudicial and inflammatory" and "overwhelm the

jury with feelings of outrage."<sup>[56]</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>[57]</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. What is "heartbreaking" and "nearly unbearable to read" about what it is like for a three-year-old to witness the murder of his mother and his two-year-old sister? The answer, judging from why my heart broke as I read the passage, is that we can no longer treat the crime as some abstract event. In other words, we begin to realize the nearly unbearable heartbreak - that is, the actual and total harm - that the murderer inflicted.<sup>[58]</sup> Such a realization may 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>[59]</sup> Victim impact statements are thus easily justified because they provide the jury with a full picture of the murder's consequences.<sup>[60]</sup>

Bandes also contends that impact statements "may completely block" the ability of the jury to consider mitigation evidence.<sup>[61]</sup> It is hard to assess this essentially empirical assertion, because Bandes does not present direct empirical support.<sup>[62]</sup> Clearly many juries decline to return death sentences even when presented with powerful victim impact testimony, with Terry Nichols' 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>[63]</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 in 1987<sup>[64]</sup> and then rose when the Court reversed itself a few years later.<sup>[65]</sup> This conclusion, however, is far from clear<sup>[66]</sup> and, in any event, the likelihood of a death sentence would be, at most, marginal. The empirical evidence in non-capital cases also finds little effect on sentence severity. For example, a study in California found that "[t]he right to allocution at sentence has had little net effect . . . on sentences in general."<sup>[67]</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>[68]</sup> A recent comprehensive review of all of the available evidence in this country and elsewhere by a careful scholar concludes "sentence severity has not increased following the passage of [victim impact] legislation."<sup>[69]</sup> It is thus unclear why we should credit Bandes' 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 information about the full horror of the murder or put in context mitigating evidence of the defendant. Professor David Friedman has suggested this conclusion, observing that "[i]f the legal rules present the defendant as a living, breathing human being with loving parents weeping on the witness stand, while presenting the victim as a shadowy abstraction, the result will be to overstate, in the minds of the jury, the cost of capital punishment relative to the benefit."<sup>[70]</sup> Correcting this misimpression is not distorting the decision-making process, but eliminating a distortion that would otherwise occur.<sup>[71]</sup> This interpretation meshes with empirical studies in non-capital 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>[72]</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>[73]</sup>

Finally, Bandes and other critics argue that victim impact statements result in unequal justice.<sup>[74]</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>[75]</sup> This kind of difference, however, is hardly unique to victim impact evidence.<sup>[76]</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 the 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>[77]</sup> In another case, a defendant introduced evidence of having won a dance choreography award while in prison.<sup>[78]</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>[79]</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 . . . the evidence and argument be reduced to the lowest common denominator."<sup>[80]</sup>

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>[81]</sup> Victims and the public generally perceive great unfairness in a sentencing system with "one side muted."<sup>[82]</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>[83]</sup> With simplicity but haunting eloquence, a father whose ten-year-old daughter Staci was murdered, made the same point. Before the sentencing phase began, Marvin Weinstein asked the prosecutor to speak to the jury because the defendant's mother would have the chance to do so. The prosecutor replied that Florida law did not permit this. 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 set there and let the jury see her cry for him while I was barred.<sup>[84]</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>[85]</sup>

There is no good answer to this question,<sup>[86]</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>[87]</sup> These prevailing views lend strong support to the conclusion that equal justice demands the inclusion of victim impact statements, not their exclusion.

These arguments sufficiently dispose of the critics' main contentions.<sup>[88]</sup> 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.[89] As Professor Doug 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.[90] 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>[91]</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>[92]</sup> On the other hand, there is mounting evidence that "having a voice may improve victims' mental condition and welfare."<sup>[93]</sup> For some victims, making a statement helps restore balance between themselves and the offenders. Others may consider it part of a just process or may want to communicate the impact of the offense to the offender.<sup>[94]</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>[95]</sup>

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.<sup>42</sup>

*the right to adjudicative decisions that duly consider the victim's safety*

As used in this clause, "adjudicative decisions" includes both court decisions and

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<sup>42</sup> Paul G. Cassell, Professor of Law, University of Utah College of Law, *Statement Before the Committee on the Judiciary, United States Senate, Responding to the Critics of the Victims' Rights Amendment*, pp.5-9 (March 24, 1999) (citations omitted).

decisions reached by adjudicative bodies, such as paroles boards. Any decision reached after a proceeding in which different sides of an issue would be presented would be an adjudicative decision. Again the clause should be interpreted to achieve the purposes inherent in an amendment that extends rights to crime victims.

The requirement to “duly consider” is a requirement to fully and fairly consider the interest at issue. The language would not require that the interest at issue always control a decision. Hence, decisions that implicate the victim’s safety, for example, release and sentencing decisions, would not be forced, by the language, to any particular result, (e.g., jail vs. no jail or high bond vs. no bond pending trial, or longer rather shorter prison sentences after conviction). Rather the constitutional mandate would simply be to hear and consider the victim’s interest and to demonstrate that the interest was factored into the final decision. It is expected that records of decisions would reflect consideration of the victim’s interest.

For women and children who are the victims of domestic violence, the right to have safety considered as a factor before any release decision is made, or before any sentence is imposed is a right of life and death importance.<sup>43</sup>

#### *interest in avoiding unreasonable delay*

Had this provision already been the law it would have been welcome news for Sally Goelzer and her brother Jim Bone from Phoenix, Arizona. Sally and Jim’s brother, Hal Bone was murdered on Thanksgiving Day, 1995. Hal had been the victim of an attempted robbery by a gang member in Phoenix, had summoned the courage to report the offense and help the police track down the suspect so that he could not hurt others. Hal was scheduled to testify against the defendant the following January, 1996. His good citizenship got him killed. The defendant and another member of the same gang murdered Hal so he could not testify.

Arizona is one of 32 states that have enacted a state constitutional amendment for victims rights.<sup>44</sup> Arizona’s is one of the stronger amendments. Three of the guarantees for victims are the “rights” to “due process” and to a “speedy trial,” and to “a prompt and

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<sup>43</sup> See note 32, *supra*.

<sup>44</sup> Art. II, § 2.1 Ariz. Const. was enacted and became effective November, 1990.

final conclusion of the case after conviction.”<sup>45</sup> Arizona victims even have standing to assert their rights in court.<sup>46</sup>

Unfortunately for Sally and Jim, these rights, on behalf of their murdered brother, were hollow promises. The murderers’ trial did not begin until January 1999, more than four years after the murderers had been arrested. Continuances were constantly granted without notice to Jim and Sally and without any consideration for their rights. The two murderers were convicted of First Degree Murder when the trial concluded the same month it had begun. By the late summer of 2000 the murderers had not yet been sentenced. Again, despite their state constitutional rights, continuances were granted without notice to them and without respecting their rights to be heard. Finally the ordeal came to an end when the two murderers were sentenced in July and August of 2001,<sup>47</sup> five and one-half years after Hal’s murder, and two and one-half years after the convictions.

Such is the state of victims’ rights in the States.<sup>48</sup> Sally and Jim were cloaked in all the majesty that the law of the State of Arizona could muster. Regrettably for those

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<sup>45</sup> Art. II; § 2.1 (A) (10), Ariz. Const. *But see State ex rel Napolitano v. Brown*, 982 P. 2d 815, 817 (Ariz. 1999) holding that the referenced sub-section and paragraph “creates no right” for the victim. The case is shocking in the length it goes to eviscerate the guarantee of the state constitution, in order to protect the monopoly rulemaking authority the Arizona Supreme Court has constructed for itself, only further demonstrating the need for a Federal amendment.

<sup>46</sup> A. R. S. § 13-4437 (A) (“The victim has standing to seek an order or to bring a special action mandating that the victim be afforded any right or to challenge an order denying any right... .”)

<sup>47</sup> *State of Arizona v. Richard Steven Rivas III*, CR 1995 - 011372 (Maricopa County) (Sentencing August 24, 2001); *State of Arizona v. James Anthony Sanchez*, CR 1995 - 011372 (Maricopa County) (Sentencing July 9, 2001).

<sup>48</sup> Senate Judiciary Committee Hearing, April 28, 1998, *Statement of Associate Attorney General Ray Fisher*, at 9: “... the state legislative route to change has proven less than adequate in according victims their rights.” Senate Judiciary Committee Hearing, March 24, 1999, *Statement of Laurence Tribe*, at 7: “...there appears to be a considerable body of evidence showing that, even where statutory or regulatory or judge-made rules exist to protect the participatory rights of victims, such rights often tend to be honored in the breach... .”

interested in fair play and balance for crime victims in the criminal justice system it was not enough. Month after month, for close to six years, they summoned the strength to go to court, schedule time off work, and re-live the murder of their brother, over and over again, while the defendants sought tactical advantage through endless delays. The years of delay exacted an enormous physical, emotional, and financial toll.

The Senate Judiciary Report provides more insight into the meaning of the victim's interest in avoiding unreasonable delay:

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

In determining what delay is 'unreasonable,' the courts can look to the precedents that exist interpreting a defendant's right to a speedy trial. These cases focus on such issues as the length of the delay, the reason for the delay, any assertion of a right to a speedy trial, and any prejudice to the defendant. See *Barker v. Wingo*, 407 U.S. 514, 530-33 (1972). Courts will no doubt develop a similar approach for evaluating victims' claims. In developing such an approach, courts will undoubtably recognize the purposes that the victim's right is designed to serve. Cf. *Barker v. Wingo*, 407 U.S. 514, 532 (1972) (defendant's right to a speedy trial must be 'assessed in the light of the interest of defendant which the speedy trial right was designed to protect').

The Committee intends for this right to allow victims to have the trial of the accused completed as quickly as is reasonable under all of the circumstances of the case, giving both the prosecution and the defense a reasonable period of time to prepare. The right would not require or permit a judge to proceed to trial if a criminal defendant is not adequately represented by counsel.

The Committee also anticipates that more content may be given to this right in implementing legislation. For example, the Speedy Trial Act of 1974 (Public Law 93-619 (amended by Public Law 96-43), codified at 18 U.S.C. 3152, 3161) already helps to protect a defendant's speedy trial right. Similar legislative protection could be extended to the victims' new right.<sup>49</sup>

*just and timely claims to restitution from the offender*

The language requires the court to consider the victim's claim to restitution. The nature of the claim will be governed by State or Federal law, as appropriate to the jurisdiction.

*These rights shall not be restricted except when and to the degree dictated*

Clearly no one of the Bill of Rights is absolute; restrictions have been applied, in varying conditions, based on varying standards, throughout the history of the nation.<sup>50</sup> As noted above, the amendment sets up a distinction between "denying" a right, which may not be done, and "restricting" a right, which may only be done in three narrowly drawn circumstances. In order to justify a restriction there must be a finding ("except when ... dictated") of one of the three circumstances. If found, the restriction must be narrowly tailored ("to the degree dictated") to meet the needs of the circumstance.<sup>51</sup> The proposed restriction language settles what might otherwise be years of vexing litigation over what

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<sup>49</sup> Senate Judiciary Report

<sup>50</sup> See e.g., *Maryland v. Craig*, 497 U. S. 836 (1990) holding that the Confrontation Clause does not grant an absolute right to face-to face confrontation. *See also, note 22, supra.*

<sup>51</sup> See e.g., *Shelton v. Tucker*, 364 U. S. 479 (1960) adopting "least restrictive means" standard for restrictions on the right to association.

the proper standard would be for allowing restrictions.

*by a substantial interest*

The “substantial “interest” standard is known in constitutional jurisprudence<sup>52</sup> and is intended to be high enough so that only “essential”<sup>53</sup> interests in public safety and the administration of justice will qualify as justifications for restrictions of the enumerated rights.

*in public safety*

In discussing the “compelling interest” standard of S. J. Res. 3, the Senate Judiciary Report noted, “In cases of domestic violence, the dynamics of victim-offender relationships may require some modification of otherwise typical victims' rights provisions. This provision offers the ability to do just that.... [Moreover] situations may arise involving intergang violence, where notifying the member of a rival gang of an offenders' impending release may spawn retaliatory violence. Again, this provision provides a basis for dealing with such situations.”<sup>54</sup>

“Public safety” as used here includes the safety of the public generally, as well as the safety of identified individuals.<sup>55</sup>

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<sup>52</sup> See e.g., *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U. S. 557 (1980). (“The state must assert a *substantial interest* to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest.” *Id.* At 564. The interest must be clearly articulated and then closely examined to determine whether it is substantial. The Court’s analysis at 569 is instructive on this point.)

<sup>53</sup> Webster’s New Collegiate Dictionary, 1161 (1977). (“Substantial... 1 a : consisting of or relating to substance b : not imaginary or illusory : REAL, TRUE c : IMPORTANT, ESSENTIAL ... .”)

<sup>54</sup> Senate Judiciary Report

<sup>55</sup> See *Bartnicki v. Vopper*, 532 U. S. 514 (2001) where a “public safety” threat was to identified school board members.

*the administration of criminal justice*

It is intended that the language will address management issues within the courtroom or logistical issues arising when it would otherwise be impossible to provide a right otherwise guaranteed. In cases involving a massive number of victims notice of public proceedings may need to be given by other means, courtrooms may not be large enough to accommodate every victim's interest, and the right to be heard may have to be exercised through other forms. The phrase is not intended to address issues related to the protection of defendants' rights.

The term "administration of criminal justice," as used by the United States Supreme Court is a catch-all phrase that encompasses any aspect of criminal procedure. The term 'administration' includes two components: (1) the procedural functioning of the proceeding and (2) the substantive interest of parties in the proceeding. The term 'administration' in the Amendment is narrower than the broad usage of it in Supreme Court case-law and refers to the first description: the procedural functioning of the proceeding. Among the many definitions available for the term 'administration' in Webster's Third New International Dictionary of the English Language (1971), the most appropriate definition to describe the term as used in the Amendment is: "2b. Performance of executive [prosecutorial and judicial] duties: management, direction, superintendence." (Brackets added).

The potential for atypical circumstances necessitates giving courts and public prosecutors the flexibility to find alternative methods for complying with victims rights when there is a substantial necessity to do so. Thus, where compliance with the exact letter of the right is either impossible or places a very heavy burden on the judiciary or the public prosecutor, the amendment allows for limited flexibility. For example, in a case such as the Oklahoma City bombing, it may be impossible to comply with the right to attend the trial simply because all the victims will not fit in the courtroom. It may be necessary for victims to view the trial in some other fashion, such as by closed circuit television. Courts also may need to exclude a disruptive victim from the court in order to manage the courtroom appropriately, but only to restrict the right in this way until the victim again cooperates. It may also be that the prosecution cannot, due to unusual circumstances, comply with a particular mandate in the Amendment. For example, in an unusual case like the Twin Towers bombing there are so many victims it might be necessary to notify all the victims of their rights through the media, as tracking down every address might be impossible or places too heavy a burden on the public prosecutor.

*or compelling necessity.*

The Senate Judiciary Report noted, “The Committee-reported amendment provides that exceptions are permitted only for a ‘compelling’ interest. In choosing this standard, formulated by the U.S. Supreme Court, the Committee seeks to ensure that the exception does not swallow the rights. It is also important to note that the Constitution contains no other explicit ‘exceptions’ to rights. The ‘compelling interest’ standard is appropriate in a case such as this in which an exception to a constitutional right can be made by pure legislative action.”<sup>56</sup>

***SECTION 3. Nothing in this article shall be construed to provide grounds for a new trial or to authorize any claim for damages. Only the victim or the victim’s lawful representative may assert the rights established by this article, and no person accused of the crime may obtain any form of relief hereunder.***

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

The proposed language in no way limits the power to *enforce* the rights granted. Rather it provides two narrowly tailored exceptions to the *remedies* that might otherwise be available in an enforcement action. The language creates the limitations as a matter of constitutional interpretation.

*Only the victim or the victim’s lawful representative*

It is intended that both the word “victim” and the phrase “victim’s lawful representative” will be the subject of statutory definition, by the State Legislatures and the Congress, within their respective jurisdictions.<sup>57</sup> No single rule will govern these definitions, as no single rule governs what conduct must be criminal. In the absence of a statutory definition the courts would be free to look to the elements of an offense to determine who the victim is, and to use its power to appoint appropriate lawful representatives.

*may assert the rights established by this article*

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<sup>56</sup> Senate Judiciary Report

<sup>57</sup> See text at n. 29, *supra*.

With the adoption of this clause there will be no question that victims have standing to assert the rights established.

*no person accused of the crime may obtain any form of relief hereunder.*

This clause makes it clear, even as does the foregoing clause (“*Only the victim...*”), that the accused or convicted offender may obtain no relief in the event that a *victim’s* right is violated.

***SECTION 4. Congress shall have power to enforce by appropriate legislation the provisions of this article. Nothing in this article shall affect the President’s authority to grant reprieves or pardons.***

*Congress shall have power to enforce by appropriate legislation the provisions of this article.*

Congress’ power to “enforce” established by this section carries limitations that are important for principles of federalism. The power to enforce is not the power to define.<sup>58</sup> As the Senate Judiciary Report noted:

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

*Nothing in this article shall affect the President’s authority to grant reprieves or pardons.*

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<sup>58</sup> *City of Boerne v. Flores*, 521 U. S. 507 (1997)

The President's constitutional authority to grant reprieves and pardons<sup>59</sup> remains unaffected by the amendment. If the President were to establish, by executive order, a public proceeding that would be required before a reprieve or pardon were to be granted, the provisions of Section 2 arguably might require victim participation, but nothing in the amendment would obligate the President to do this.

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

The seven year ratification deadline is put into the body of the amendment to ensure that there will be a contemporaneous ratification requirement. Lawyers in the Justice Department have concluded that putting the 7 year limit in the body of the amendment, rather than the resolved clause is the only reliable way to ensure the contemporaneous ratification.<sup>60</sup>

### **III. Conclusion**

Doubtless there will be critics who come before the Congress and argue against establishing the rights enumerated in H. J. Res. 91. They are on the extreme margins. Most of the opponents will say they support the rights, just not in the Constitution. Indeed the rights themselves are so modest and so reasonable they are hard to argue with. Yet who among these critics would be heard to say, "I'm all for defendants' rights, but they don't need to be in the Constitution." The vast majority of Americans, when judged by the actual votes at state elections for amendments, are unequivocal in their support for constitutional rights for crime victims.<sup>61</sup> As my friend and colleague John Stein, Deputy Director of NOVA, has said often, they should be "the birthright of every American." And so they should – and to be meaningful and enforceable they must be in our one shared fundamental charter.

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<sup>59</sup> U. S. Const. Art. II, Sec. 2.

<sup>60</sup> See e.g., U. S. Const. Amendments XX, XXI, and XXII.

<sup>61</sup> In the 32 states with constitutional amendments for victims rights the measures passed by an average popular vote of almost 80 percent. See [www.nvcan.org](http://www.nvcan.org) (Index item: "state vra's) for a state by state review.

Mr. Chairman, Honorable Members, we urge you to join together, Republicans and Democrats, Conservatives and Liberals, even as your national parties have joined together, even as the former President and the sitting President have joined together, as the former Attorney General and the present Attorney General, as the Governors and the State Attorneys General have joined together, as Senators Kyl and Feinstein and so many of their colleagues, as Prof Tribe and Prof. Cassell have joined together, with the victims and the vanquished, all in a unanimous chorus that crime victims deserve fundamental rights and that only an amendment to the U. S. Constitution will guarantee them. Mr. Chairman, Honorable Members, do not rest until this great national consensus is ratified. Seek out your leadership, push for hearings and a mark-up, demand floor action, and send the resolution to the House before the end of October.

Every day that goes by injustice mounts upon injustice. The parents of a murdered child sit somewhere today on a hard bench in the hallway of an American courthouse, while the defendant's family is ushered to special seats inside. Today a woman and a child are being denied the right to speak at the bail hearing of their abuser. Somewhere today, in an American courtroom, a rape victim is shut out of a plea bargain proceeding involving the charges against her rapist. Somewhere, today, as we meet, a victim endures through an endless litany of continuances without voice in the matter of delay. Today another American victim is silenced at the sentencing of her attacker, today, in our country, restitution is being forgotten, and safety is being ignored because a parole board has not allowed the victim to speak. Today, in courtrooms across our beloved nation, injustice mounts upon injustice. And so we ask yet again, who will stand up now to speak against this injustice; who will give voice to the victim?

A watchful nation awaits your answer. And hope abides.

## **APPENDIX A**

### **Why The Rights Can Only Be Secured In The United States Constitution**

Even the Amendment's most ardent critics usually say they support most of the rights in principle. If there is one thing certain in the victims' rights debate, it is that these words, "I'm all for victims' rights but . . .," are heard repeatedly. But while supporting the rights "in principle," opponents in practice end up supporting, if anything, mere statutory fixes that have proven inadequate to the task of vindicating the interests of victims. As Attorney General Reno testified before the House Committee on the Judiciary, ". . . efforts to secure victims' rights through means other than a constitutional amendment have proved less than fully adequate." The best federal statutes have proven inadequate to the needs of even highly publicized victim injustices, as Professor Cassell's writing about the plight of the Oklahoma City bombing victims has ably demonstrated.

In my state, statutes were inadequate to change the justice system. And now, despite its successes, we realize that our state constitutional amendment will also prove inadequate to fully implement victims' rights. While the amendment has improved the treatment of victims, it does not provide the unequivocal command that is needed to completely change old ways. In our state, as in others, the existing rights too often "fail to provide meaningful protection 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." The experience in my state is, sadly, hardly unique. A recent study by the National Institute of Justice found that "even in States where victims' rights were protected strongly by law, many victims were not notified about key hearings and proceedings, many were not given the opportunity to be heard, and few received restitution." The victims most likely to be affected by the current haphazard implementation are, perhaps not surprisingly, racial minorities.

A group calling itself "Citizens for the Constitution"[hereinafter "Citizens"] has organized under the auspices of The Century Foundation's Constitution Project. Their purpose is to call for restraint in the consideration of Amendments to the U. S. Constitution. In their recent pamphlet, "*Great and Extraordinary Occasions*": *Developing Guidelines for Constitutional Change*, the group propounds eight guidelines which, they argue, should be satisfied before any constitutional amendment would be justified. The "Citizens" raise some questions, in the commentary following their guidelines, about the Crime Victims' Rights Amendment. Applying these rigorous Guidelines, however, despite the reservations of the "Citizens" themselves, demonstrates unequivocal support for case for the Amendment. I would like to direct the Subcommittee's attention to these eight guidelines, which the "citizens" offer in the form of eight questions.

#### ***1. Does the proposed amendment address matters that are of more than immediate***

*concern and that are likely to be recognized as of abiding importance by subsequent generations?*

Yes.

Even as the Constitutional rights of persons accused or convicted of crimes address issues of "abiding importance," so to do the proposed rights of crime victims. The legitimate rights of the accused to notice, to the right to be present and the right to be heard or remain silent, the right to a speedy and public trial, or any of the other rights are surely no more enduring than the legitimate interests of the victim to notice, presence, or the right to be heard, or any of the other rights proposed by the amendment. Surely no one could persuasively argue that the rights of the innocent victim were less important or enduring.

Indeed, it is precisely because these values for victims are of enduring, or "abiding" importance that they must be protected against erosion by any branch or majoritarian will. That they do not exist today broadly across the country is evidence that they are not adequately protected despite general acceptance of their merit.

***2. Does the proposed amendment make our system more politically responsive or protect individual rights?***

Yes.

Clearly the proposed amendment is offered to "protect individual rights." *That is its sole purpose.*

The "Citizens" however, suggest that Congress should ask "whether crime victims are a 'discreet and insular minority' requiring constitutional protection against overreaching majorities or whether they can be protected through ordinary political means. Congress should also ask whether it is appropriate to create rights for them that are virtually immune from future revision. Let's review these two questions.

"[O]rdinary political means" have proven wholly inadequate to establish and protect the rights reviewed above. If this were not so they would exist and be respected in every state and throughout the federal government. The evidence that they are not is as compelling as it is overwhelming. Why is this so? Are crime victims unpopular? No, but as a class they are ignored; their interests subordinated to the interests of the defendant and the professionals in the system. And those interests are entrenched as deeply as any in this society. Crime victims become "discreet and insular" by virtue of their transparency. If this were not so we would not be here for our rights would be secure.

***3. Are there significant practical or legal obstacles to the achievement of the objectives of the proposed amendment by other means?***

Yes.

The "Citizens" write, 'The proposed victims' rights amendment raises troubling questions under this Guideline. Witnesses testifying in Congress on behalf of the amendment point to the success of state amendments as reason to enact a federal counterpart. But the passage of the state amendments arguably cuts just the other way; for the most part, states are capable of changing their own law of criminal procedure in order to accommodate crime victims, without the necessity of federal constitutional intervention. While state amendments cannot affect victims' rights in federal courts, Congress has considerable power to furnish such protections through ordinary legislation. Indeed, it did so in March 1997 with Public Law 105-6 . . . which allowed the victims of the Oklahoma City bombing to attend trial proceedings."

I was one of those witnesses the "Citizens" referred to. They should have read all my testimony. Let me repeat again one of my statements, "In my state, the statutes were inadequate to change the justice system. And now, despite its successes, we realize that our state constitutional amendment will also prove inadequate to fully implement victims' rights. While the amendment has improved the treatment of victims, it does not provide the unequivocal command that is needed to completely change old ways. In our state, as in others, the existing rights too often "fail to provide meaningful protection 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." (Quoting Prof. Lawrence Tribe on the proposed amendment).

Moreover our courts have now made explicit in a series of cases (cited in Hearing Report on S. J. Res. 6, April 16, 1997, Senate Judiciary Committee) what was always understood: namely that the U. S. Constitutional rights of the defendant will always trump any right of the victim without any fair attempt to balance the rights of both.

On the Oklahoma City bombing point that the "Citizens" make they should have read the whole testimony of Prof. Paul Cassell who convincingly demonstrates how the statute cited by the citizens was inadequate to the task of fully protecting even these high profile and compelling victims. The law didn't work for them. How much less must it work for victims who don't have the clout to get an act of Congress passed? That "other means," to use the "Citizens" phrase, have simply proven inadequate is concurred in by a broad consensus that includes the Justice Department, constitutional scholars of the highest regard from both ends of the political spectrum, the President, the Vice President, the platforms of both major political parties, and bi-partisan coalition of Members and Senators, and crime victim advocates throughout our country.

***4. Is the proposed amendment consistent with related constitutional doctrine that the amendment leaves in tact?***

Yes.

The proposed rights are perfectly consistent with the constitutional doctrine that fundamental rights for citizens in our justice system need the protection of our fundamental law.

***5. Does the proposed amendment embody enforceable, and not purely aspirational, standards?***

Yes.

The text of the proposed amendment grants to crime victims constitutional standing to stand before any judge in the country and seek orders protected the established rights. This is the essence of enforceability.

***6. Have the proponents of the proposed amendment attempted to think through and articulate the consequences of their proposal, including the ways in which the amendment would interact with other constitutional provisions and principles?***

Yes.

More than simply "think through" the proposal, proponents of the CVRA have taken roughly two decades of experience with state statutes and constitutional provisions to develop a very refined understanding of the limits of state and federal law, the need for a federal amendment, and how that amendment would work in actual practice and be interpreted. No other constitutional amendment has had this degree of vetting.

***7. Has there been full and fair debate on the merits of the proposed amendment?***

Yes.

The Congress has had the amendment under consideration since 1996. There have been major hearings in both bodies on multiple occasions. The record of debate and discussion throughout the country is extensive.

***8. Has congress provided for a non-extendable deadline for ratification by the states so as to ensure that there is a contemporaneous consensus by Congress and the states that the proposed amendment is desirable?***

Yes.

See the "Resolved" Clause which introduces H. J. Res. 44. (*Note: The 7 year limit is now in section 5 of H. J. res. 91*).

The proposed amendment passes the test of the "Citizens" Guidelines. More importantly, it is fully faithful to the spirit and design of James Madison.

The "Citizens'" pamphlet, *Great and Extraordinary Occasions*, takes its name from a line in *The Federalist* No. 49, authored by James Madison. There Madison rightly argued for restraint in the use of the amendment process. But of course he rose above rightful restraint to propose the first twelve amendments.

When James Madison took to the floor and proposed the Bill of Rights during the first session of the First Congress, on June 8, 1789, "his primary objective was to keep the Constitution intact, to save it from the radical amendments others had proposed . . ." In doing so he acknowledged that many Americans did not yet support the Constitution.

"Prudence dictates that advocates of the Constitution take steps now to make it as acceptable to the whole people of the United States, as it has been found acceptable to a majority of them."

The fact is, Madison said, there is still "a great number" of the American people who are dissatisfied and insecure under the new Constitution. So, "if there are amendments desired of such a nature as will not injure the constitution, and they can be ingrafted so as to give satisfaction to the doubting part of our fellow-citizens," why not, in the spirit of "deference and concession," adopt such amendments?

Madison adopted this tone of "deference and concession" because he realized that the Constitution must be the "will of all of us, not just a majority of us." By adopting a bill of rights, Madison thought, the Constitution would live up to this purpose. He also recognized how the Constitution was the only document which could likely command this kind of influence over the culture of the country.

Our goals are perfectly consistent with the goals that animated James Madison. There is substantial evidence in the land that the Constitution today does not serve the interests of the "whole people" in matters relating to criminal justice. And the way to restore balance to the system, in ways that become part of our culture, is to amend our fundamental law.

"[The Bill of Rights will] have a tendency to impress some degree of respect for [the rights], to establish the public opinion in their favor, and rouse the attention of the whole community . . . [they] acquire, by degrees, the character of fundamental maxims. . . as they become incorporated with the national sentiment . . ."

Critics of Madison's proposed amendments claimed they were unnecessary, especially so in the United States, because states had bills of rights. Madison responded with the observation that "not all states have bills of rights, and some of those that do have inadequate and even 'absolutely improper' ones." Our experience in the victims' rights movement is no different. Not all states have constitutional rights, nor even adequate statutory rights. There are 32 state constitutional amendments and they are of varying degrees of value.

Harvard Professor Lawrence Tribe has observed this failure : " . . . there appears to be a considerable body of evidence showing that, even where statutory or regulatory or judge-made rules exist to protect the participatory rights of victims, such rights often tend to be honored in the breach . . ." As a consequence he has concluded that crime victims' rights "are the very kinds of rights with which our Constitution is typically concerned."

After years of struggle, we now know that the only way to make respect for the rights of crime victims "incorporated with the national sentiment," is to make them a part of "the sovereign instrument of the whole people," the Constitution. Just as James Madison would have done it.

**APPENDIX B**  
**Responses To Points Made In Opposition**

***"I'm all for victims' rights, but the proposed amendment is 'an assault on federalism as it has been defined for more than two centuries.'"***

The full quote from Prof. Raskin continues, "No aspect of public policy, with the possible exception of education, has been more jealously guarded by the states and localities than the investigation and prosecution of common law crimes and the structuring of the accompanying criminal justice process." The federalism concern also has been expressed by others.

The criminal justice system which Prof. Raskin describes does not exist. In many important matters the Constitution of the United States has come to dictate to the states the "structuring" of their "criminal justice process." Certainly Prof. Raskin knows this and indeed supports it. Through the Fourteenth Amendment, the courts have structured the criminal justice process in each state to be respectful and protective of the rights established in the Bill of Rights for persons accused and convicted of crimes. The incorporation of these rights through the Fourteenth Amendment, and their applicability to the states, has been accepted within our federal system in order to secure a national threshold of fair treatment. Why should not the same deference be given to the rights of crime victims as is given to the rights of accused or convicted offenders?

The authors and supporters of the Crime Victims' Rights Amendment are sympathetic to the demands of federalism and deeply respect the role of the states. The proposal does not infringe these important values. Nothing in the proposed amendment denies to the states their rightful authority to define and implement the rights as they see fit, subject only to the unifying review of the U. S. Supreme Court. Moreover, the power of the Congress to enforce the provisions of the amendment are limited by the understanding given to the word "enforce" in recent Supreme Court decisions, *e.g. City of Boerne*. This jurisprudence is important to our understanding of the role of the states within their respective jurisdictions. For a fuller discussion of this point see the Senate Judiciary Report on S. J. Res. 44

As long as the Constitution establishes a floor of rights for defendants it will be proper for the same Constitution to establish a floor of rights for victims. As Attorney General Reno earlier testified in the House, "First, unless the Constitution is amended to ensure basic rights to crime victims, we will never correct the existing imbalance in this country between defendants' constitutional rights and the haphazard patchwork of victims' rights."

***"I'm all for victims' rights, but the costs of this amendment will be staggering and local criminal justice systems will be crippled as a consequence."***

This criticism is often made by those who have no direct knowledge of the costs of providing rights for crime victims and who have not thought through clearly enough the actual fiscal impact of the proposed amendment. Let them come to Arizona. Our state constitutional amendment has been in effect since November 1990 and the costs have been minimal and manageable. Consider the proposed rights themselves. H. J. Res 64 proposes that in cases of violent crimes each victim would have the rights to:

*•reasonable notice of . . . all public proceedings . . . •reasonable notice of a release or escape from custody*

Some costs are associated with these rights, but how and where they fall will be dependant on each state's decision. In some states the duty to provide notice of proceedings could fall on the prosecutor, as in my state, while in others the duty may fall to the courts. The costs will vary with the kind of notice provided. In some places victims may receive notice by mail, while in others notice may be provided by the victim calling a central phone number. In either case the costs are not staggering.

More importantly, it is right that victims be given these notices. No similar right of a defendant would be denied on the basis of cost. None should be for crime victims.

*\*be heard . . . at all public release, plea, sentencing, reprieve, or pardon proceedings;*

No costs are associated with allowing the victim the right to speak at proceedings that are already held. There are those who argue that this right to be heard regarding pleas will result in far fewer pleas and far more trials. There is no evidence of this happening anywhere. In Arizona the trial rate has remained unaffected.

*•Adjudicative decisions that duly consider the victim's interest in avoiding unreasonable delay;*

No costs are associated with requiring the court to take these matters into consideration. To the extent it helps avoid unreasonable delays in the trial it may save costs.

*•Just and timely claims to restitution;*

No significant costs are associated with the requirement to order restitution. Victims typically will submit proof of economic losses to the court and restitution orders are simply made a part of sentencing. If amounts are contested the issues are resolved during sentencing proceedings that are already held.

*•safety*

Requiring courts or parole authorities to consider the safety of the victim will not impose

significant costs. It may result in more carefully crafted release conditions for the accused or convicted offender, but so be it. It may save lives.

The cost argument is a red-herring. Costs are modest, and moreover, appropriate when viewed in light of the important interests at stake. Not one of these critics would dare suggest a cost litmus test for defendants' rights. None should be imposed on crime victims. Let the critics come to Arizona.

***"I'm all for victims' rights, but this proposal will undermine the rights of defendants."***

Nothing in H. J. Res. 44 will limit the fundamental rights of defendants.

Giving to the victim the right to certain notices infringes no right of a defendant. Allowing the victim the right to be present does not "substantially undermine" any constitutional right of a defendant. Allowing the victim the right to speak at release, plea, or sentencing proceedings does not deny a constitutional right to a defendant, but it does allow the court to make more informed and just decisions. Defendants do not have a constitutional right to refuse or avoid restitution for the economic losses they cause to their victims. Defendants have a right to effective counsel, but they have no right to *unreasonably* delay proceedings and requiring the court to consider the interests of the victim in a trial free from unreasonable delay does not deny any constitutional right to a defendant. Defendants have no right to prohibit the court or parole authority from considering the safety of the victim when making release decisions and requiring the safety of the victim to be considered does not infringe any right of the defendant.

When considered in the light of reason, and not emotion, vague assertions that "fundamental constitutional rights will be undermined," have little value other than to inflame the debate; the amendment is not an assault on the fundamental rights of the defendant. In the justice system throughout the country, rights for those involved are not "a zero-sum game." Rights of the nature proposed here do not subtract from those rights already established, they merely add to the body of rights that we all enjoy as Americans.

Professor Tribe concurs in this analysis when he writes, "no actual constitutional rights of the accused or of anyone else would be violated by respecting the rights of victims in the manner requested."

Crime victims seek balance -- that victims' rights will not automatically be trumped every time a defendant offers a vague and undefined "due process" objection to the victims' participatory and substantive rights. H. J. Res. 44 will achieve this fairness and balance.

***"I'm all for victims' rights, but giving the victim a right to be present in the courtroom will lead to perjured testimony by the victim."***

The imbalance of the present system is evident in this criticism. The argument goes that victims must be excluded during trial, and perhaps at some pre-trial stages, just like other witnesses, so they will not hear other testimony and conform their own to it. Defendants, of course, may be witnesses in their own trials, but they have a right to be present which overrides the rule of exclusion. The same rules should apply to the crime victim.

Typically those rules now make exception so that the prosecution is allowed to keep even the principal investigator in the trial without exclusion, but no exception is made for the victim.

And what of the fear of perjury? Consider the civil justice system. If a lawsuit arises from a drunk driving crash, both the plaintiff (the victim of the drunk driver) and the defendant (the drunk driver) are witnesses. Yet both have an absolute right, as parties in the case, to remain in the courtroom throughout the trial. Do we value truth any less in civil cases? Of course not. But we recognize important societal and individual interests in the need to participate in the process of justice.

This need is also present in criminal cases involving victims. How can we justify saying to the parents of a murdered child that they may not enter the courtroom because the defense attorney has listed them as witnesses. This was a routine practice in my state, before our constitutional amendment. And today, it still occurs throughout the country. How can we say to the woman raped or beaten that she has no interest sufficient to allow her the same rights to presence as the defendant? Closing the doors of our courthouses to America's crime victims is one of the shames of justice today and it must be stopped.

Victims in my state have had this unqualified right to be present since November 1990. Based on our actual experience the fears of the critics are unfounded.

***"I'm all for victims' rights, but the right to have the victim's interest in a trial free from unreasonable delay will force both prosecutors and defendants to trial too early."***

Nothing in the amendment will cause this result. The key phrase is "unreasonable delay." Giving the state an adequate time to prepare its case is not "unreasonable delay." The state is already under time deadlines by virtue of the defendant having a right to a speedy trial and the various acts which implement that right.

The defendant has a constitutional right to effective counsel and to be effective the defendant's counsel needs an adequate time to prepare, to review the evidence, the case file, and interview certain witnesses. Giving the defendant's counsel an adequate time to prepare is not an "unreasonable" delay.

The Arizona Constitution has given crime victims a right to both "a speedy trial or disposition" and a "prompt and final conclusion of the case after the conviction and sentence." It has been the law for the last nine years and I am aware of no case in which

either the state or the defendant has been forced to trial before they were ready. The fears of the critics are unfounded.

What the amendment in Arizona has done, albeit inadequately, and what the federal amendment will do, is allow, in the typical case, the court to have a constitutional context in which to balance the legitimate rights of the defendant to effective counsel and due process, with the rights of the victim to some reasonable finality.

Defendants often seek continuances, and then seek to exclude the time of those continuances from the speedy trial rules that would otherwise control the processing of the case. Because these speedy trial rules run to the benefit of the accused, when the accused asks that they be waived, courts are often loath to deny the requests. This is especially true when no countervailing interest in reasonable finality is preserved and protected.

And yet, unreasonable delay is not a mere scheduling problem. It is an all too often painful agony for the victim, who must continue to re-live the crime and confront the defendant. Allowing a reasonable balance between both of the legitimate interests of the defendant and the victim to be considered by the court is the goal of the amendment.

Nothing in the proposed amendment gives the crime victim the power to force any case to trial before it or the defense is ready.

***"I'm all for victims' rights, but the right of the victim to have safety considered when making release decisions will result in a constitutional right to imprisonment even after a sentence has been served."***

As certain objecting law professors phrased this objection, "The proposed Amendment . . . would . . . allow a victim of a crime to argue that it is unconstitutional to release a person from prison even though the sentence had been completely served."

An examination of the text of the proposed amendment quickly disposes this criticism. The amendment provides that "[e]ach . . . victim shall have the rights to . . . consideration for the safety of the victim in determining any conditional release from custody. . . ." When a sentence "has been completely served," as the law professors posit, there is no "determining" to be done in connection with the release. The release happens by operation of law and the expiration of the original sentence. No discretionary decision is permitted and hence no "consideration" would be given to the safety of the victim on the matter of the release itself. There may be discretion with respect to the conditions of a release and, of course, then the safety of the victim should always be considered. Sadly, it rarely is. The law professors have simply failed to understand the proposal.

Others have argued that the same safety consideration should not be given to pre-trial release decisions. For most of our recent history the only relevant standard for a court's

pre-trial release decision was whether or not the defendant would appear when required. Safety of the victim was not a factor, indeed not allowed to be considered. Recent changes in some states have allowed dangerousness to the victim or the community to be considered when making pre-trial release decisions. However, even these changes have proven inadequate to require consideration for the safety of the victim when fashioning conditions of pre-trial release because they are couched in terms of the defendants rights and not the victims. The time for this imbalance to end is now.

***"I'm all for victims' rights, but the terms of this amendment are too vague to have any meaning," or in the alternative, "I'm all for victims' rights, but this amendment is so specific it reads more like a statute than an amendment."***

Both criticisms, each contradicting the other, have been made. Neither is true. The amendment proposed is specific enough to make real change in the justice system and is still written to properly reflect the language and patterns of the Constitution.

If all the rights of the defendant were incorporated into one amendment, it would be longer and one could argue, both more specific in some cases and much more general in others, than this proposal. The rights there are as long and as specific as they need to be, as are these.

In this connection, some also argue that the proposed amendment is fatally flawed because it does not specifically define who the "victim" is. For some purposes the definition of the victim is self-evident and even without a statutory definition the court could determine who the victim was by resort to the elements of the charged offense. My testimony before the Senate Judiciary Committee in 1996 addresses this point in more detail.

***"I'm all for victims' rights, but this amendment reverses the presumption of innocence; a person is not a victim until there is a conviction."***

From NOW's Legal Defense and Education Fund comes: "A victims' rights amendment would undermine the presumption of innocence by naming and protecting the victim before a crime is proven."

That it was impossible for the Fund to complete that sentence without again referring to the person against whom the crime has been committed as "the victim" is evidence of the rhetorical problem here. But it is just that, merely a rhetorical problem having nothing to do with the presumption of innocence.

If a defendant's liberty can be taken away before trial and conviction without undermining the presumption of innocence, surely our justice system can provide the simple rights for crime victims enumerated in this proposal. The proposal has nothing to do with the burden of proof the government bears before a jury may convict an accused of an offense.

That is what the presumption of innocence is all about. Nothing in this proposal reverses or undermines it in any way.