

STATEMENT
OF
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BEFORE
THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
CONCERNING
THE VICTIMS' BILL OF RIGHTS AMENDMENT
ON
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Mr. Chairman and Distinguished Members of the Committee, I am pleased to be here today to discuss the

pressing need to approve the Victims Bill of Rights Constitutional Amendment.

My background in this area is as follows. I am an Associate Professor of Law at the University of Utah College of Law, where I teach criminal procedure among other subjects. I have written and lectured on the subjects of crime victims rights. The National Victim Constitutional Amendment Network, an organization devoted to bringing constitutional protection to crime victims across the country, has asked me to serve on their Executive Board.

I also a member of the Utah Council on Victims, the statewide organization in Utah responsible for monitoring the treatment of crime victims in the courts of our state. In 1994, I was chair of the Constitutional Amendment Subcommittee of the Council, where I helped to draft the Utah Victims Rights Amendment. The Amendment passed the Legislature unanimously and was approved by Utah voters in November with an overwhelming 69% vote.

Since the passage of the Amendment, I have been involved in efforts to insure that the rights it confers are enforced. I have represented the Utah Council on Victims and other organizations as *amicus curiae* in two cases before the Utah courts that involved the Utah Victims Rights Amendment. In *State v. Pledger*, No. 9306238 (Utah 1994), I argued that a young boy who was the victim of sexual abuse should not be forced to testify at a preliminary hearing. The Utah Supreme Court later agreed with our position. In *State v. Felix*, No. 950341-CA (Utah Ct. Apps. 1996), I represent a rape victim who is defending her right to attend the trial of her accused (and later convicted) rapists. The case will be argued before the court this summer.

By way of further background, from 1988 to 1991, I served as an Assistant United States Attorney in the Eastern District of Virginia, where I was responsible for prosecuting federal criminal cases and working with the victims in those cases. From 1986 to 1988, I served as an Associate Deputy Attorney General at the United States Department of Justice, handling various matters relating to criminal justice. I have also served as a law clerk to then-Judge Antonin Scalia and Chief Justice Warren E. Burger, writing memoranda on numerous criminal cases. I graduated from Stanford Law School in 1984, where I served as President of the *Stanford Law Review*.

In my testimony today, I will discuss six issues: First, I will provide a brief background about the extent of crime victimization in this country. Second, I will give a short history of the treatment of crime victims in our federal and state constitutions. Third, I will discuss the failure of statutory, as opposed to constitutional, protection for crime victims. Fourth, I will explain why a federal constitutional amendment is required. Fifth, I will review several issues surrounding the mechanics of the Victims Bill of Rights Amendment, specifically its application to the states, to violent and other crimes as well as to juvenile proceedings, and methods of enforcement. Finally, I will discuss a few objections that have occasionally been raised against giving victims constitutional protections.

I. Crime Victims in the United States

It is hard to understand the Victims Bill of Rights Amendment without some background about the effects of crime on the citizens of this country. The absolute number of crime victims are staggering. According to the latest figures available from the Federal Bureau of Investigation's *Uniform Crime Reports*, in 1994 more than 1,860,000 citizens were the victims of violent crimes and more than 12,100,000 were the victims of property crimes.¹ Many crimes go unreported², so that the actual number of victims is substantially higher. Although crime rates have fluctuated slightly up or down in recent years, there is no question that the number of crime victims in general, and violent crime victims in particular, is substantial higher than in past decades.

One way of grasping the magnitude of these numbers is the "Crime Clock," prepared in recent years by the Federal Bureau of Investigation. The FBI calculates that every 23 minutes someone is murdered. Every 5 minutes, a person is raped. Every 51 seconds, a citizen of this country will be robbed. Every 28 seconds, someone is assaulted. And every 17 seconds, someone will suffer a violent crime.³

The Crime Clock may help to demonstrate the risk that Americans face from crime. But perhaps even more threatening than some quantification of risk is the chilling realization that we are all vulnerable to crime. As the President's Task Force on Victims of Crime put it, "Violent crime honors no sanctuary. It strikes when least expected, often when the victim is doing the most commonplace things."⁴ Recently in my home state of Utah we have witnessed such crimes as:

- A five-year-old girl is kidnaped while taking out the garbage. Later she is stripped, bound, gagged with tape, sexually abused, and then stuffed into a cardboard box.⁵
- A high school girl is shot to death in her great grandmother's home while waiting to testify against a gang member who had killed her nephew.⁶
- A 7-Eleven clerk is shot in the face after two robbers took \$18.87 from him and were leaving the store. The senseless shooting left the clerk in serious condition after the bullet barely missed his spinal cord and an artery in his neck.⁷

Newspaper local newspaper columnist Paul Rolly recently tried to describe his feelings as a violent crime victim, but concluded that "[a] victim feels a helplessness in trying to communicate to others the gamut of emotions that follows."⁸

Given the large number of crime victims and the serious effects of crime on them, one might assume that the criminal justice system would be responsive to their concerns. Indeed, the criminal justice system depends largely on victims to report crimes and testify against criminals.⁹ Yet the system far too often appears to overlook or disregard victim concerns. As Utah Attorney General Jan Graham has recently written, "Over the years our criminal justice system has strayed from its original goal of providing justice and fairness to the victims of crime."¹⁰ The President's Task Force has reached the same conclusion:

Victims who survive their attack, and are brave enough to come forward, turn to their government expecting it to protect the innocent. . . . Without the cooperation of victims and witnesses in reporting and testifying about crime, it is impossible in a free society to hold criminals accountable for their acts. When victims come forward to perform this vital service, however, they find little protection. They discover instead that they will be treated as appendages of a criminal justice system in which the scales of justice are out of balance. They learn that somewhere along the way the system apparently lost track of the simple truth that it is supposed to be fair and to protect those who obey the law while punishing those who break it. Somewhere along the way, the system began to serve lawyers and defendants, treating victims with institutionalized disinterest.

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An explanation for this surprising lack of interest in crime victims requires a brief historical discussion. [\[Contents\]](#)

II. A Brief History of Victims Rights and Constitutions

The drafters of the Bill of Rights of the United States Constitution did not include rights for crime victims. The Founding Fathers were schooled in the English legal traditions of the time, which including the criminal law process of private prosecutions.¹² Special mention of victims rights was unnecessary, because victims retained rights to act on their own as prosecutors.

Over time, victims gradually were excluded from meaningful participation in the criminal justice process. Their primary roles were to report crimes to police and serve as witnesses.¹³ However, state constitutions

that were adopted after the Bill of Rights, such as Utah's in 1896, took no notice of the new circumstances for crime victims and simply followed the federal approach to defining the rights applicable in the criminal justice system.¹⁴ As a result, like the Bill of Rights, state constitutions made no mention of crime victims rights (at least until quite recently).

More recently, as defendants' rights have expanded considerably (particularly under the Warren Court¹⁵), the failure of the federal and state constitutions to protect victims rights has come under increasing criticism. In response to these concerns, on April 23, 1982, President Reagan established the President's Task Force on the Victims of Crime. Later that year the Task Force proposed a number of changes to protect the rights of crimes victims, include a constitutional amendment to the federal constitution to protect victims rights.¹⁶ The Task Force concluded that: "[T]he criminal justice system has lost an essential balance. . . . [T]he system has deprived the innocent, the honest, and the helpless of its protection. . . . The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed."¹⁷ The Task Force found that a constitutional amendment was required because "[t]he combined experience brought to this inquiry and everything learned during its progress affirm that an essential change must be undertaken; the fundamental rights of innocent citizens cannot adequately be preserved by any less decisive action."¹⁸ The proposed amendment, to be added to the Sixth Amendment, would read: "Likewise, the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings."¹⁹

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.²⁰ The proposal received more attention in January 1986, when NOVA organized a meeting on the proposed constitutional amendment.²¹ The meeting concluded with a resolution recommending the adoption of a constitutional amendment.

After that meeting, the Victims Constitutional Amendment Network (Victims CAN) was organized, with support from NOVA, MADD, and the Sunny von Bulow National Victim Advocacy Center. Noting the overwhelming nature of the task of obtaining a federal constitutional amendment,²² the Victims CAN decided to organize in each state to promote a constitutional amendment. After succeeding on a state-by-state basis, the victims group planned to continue the effort for a federal constitutional amendment.²³

Since 1986, Victims CAN and other groups have been increasingly successful in passing state constitutional amendments. To date, approximately twenty states have adopted amendments to their state constitutions to protect the rights of crime victims.²⁴ The movement to pass constitutional amendments appears to be gaining strength. In the 1992 general election, the voters approved state constitutional amendments by large margins in Colorado, Illinois, Kansas, Missouri, and New Mexico.²⁵ In 1994, voters in Alabama, Alaska, Idaho, Maryland, and Ohio joined my state of Utah in adding victims' rights amendments to their state constitutions.²⁶ Many other states have amendments under active consideration. A 1991 national public opinion poll found that nine of ten Americans (89 percent) say that they would probably or definitely support an amendment to their state's constitution which would increase victims' rights protection.²⁷

In view of this success, in 1995 VCAN decided that the time was ripe to finally bring victims' protection into the federal constitution. A new group, the National Victim Constitutional Amendment Network (NVCAN) was formed with is goal in mind. Why is it so important that victims protection be in the Constitution? We turn to this issue next.

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III. The Need for Constitutional, Rather than Statutory, Protection

In many states where victims rights have been discussed, a question frequently asked is: Why is *constitutional* protection needed? The answer -- which appears to be the same all over the country -- is that victims' rights have gained respect only when a constitutional amendment is put in place to protect victims rights. The experience of crime victims throughout the country suggests that the criminal justice system needs fundamental reform that can only be brought about by changes in fundamental law. For victims, it appears that, far too often, "the system" treats them just like any other pieces of evidence. The system responds to the interests of judges, prosecutors, and defendants, but it often treats victims with neglect or even hostility.²⁸

As a member of the Utah's Council on Victims, I am familiar with the experience in our state. In 1987, the Utah legislature passed a bill of rights for victims and witnesses²⁹ and a list of additional rights for child victims and witnesses.³⁰ Admirably the legislation sought to protect the rights of victims in various ways, such as insuring that crime victims received notices of hearings and explanations regarding the criminal justice process. In 1994, with more than six years of experience to draw upon, it was clear that the statutory bill of rights has not brought about the changes for which its sponsors hoped.

Utah's Council on Victims heard that the statutory bill of rights was often ignored by courts and other actors in the criminal justice system.³¹ For example, the statutory bill of rights provides that victims shall be informed of their rights in the process and of assistance that is available.³² Yet a 1993 survey of twenty-nine victim families of sexual abuse in Davis County found that 66 percent of the families were not advised of any such rights by the investigator of their cases. As a result, 48 percent of the families were in crisis for six months or longer.³³

Virtually everyone with any experience in victims issues in Utah agreed that Utah's statutory victims bill of rights was unable to overcome the "business as usual" inertia in the criminal justice system. The opinion of Washington County Attorney Eric A. Ludlow is typical of the consensus that emerged: "The Victim's Bill of Rights as passed by the Utah Legislature is a marvelous statement of intent; however, to guarantee that those rights are available and enforceable to every victim, they should become a part of the Constitution."³⁴

Unfortunately the experience in Utah is consistent with that in other states. For example, Washington Attorney General Ken Eikenberry pushed for a constitutional amendment in his state after finding that "victims' statutory rights have thus been subordinated to the defendants' constitutional rights and to the concerns of some prosecutors, judges, and law enforcement officials processing large volumes of cases."³⁵ Similarly in Michigan, which was the first in the country to pass "model" laws protecting victims rights, the voters eventually found it necessary to add the additional protection of a constitutional amendment protecting victims rights.³⁶ [Editor's Note: Wisconsin enacted the first comprehensive "Bill of Rights for Crime Victims in 1980.]

The changes in Arizona, which recently passed a constitutional amendment protecting crime victims, demonstrate what can be expected with constitutional protection. T.W. Shumway, who until recently was the City Attorney of St. George, Utah, practices in both Utah and Arizona. Mr. Shumway found little if any effect from Utah's statutory bill of rights for crimes victims. Yet at the same time in Arizona courts, it was his observation that "after the voters put a victim's bill of rights into the Arizona Constitution, it became increasingly effective, and courts and lawyers alike now do more than pay it lip service."³⁷

We now have about a year-and-a-half of experience with the Utah Victims Rights Amendment. While implementation is not perfect, it is the view of the Utah Council on Victims that the amendment has made a dramatic difference in the way that crime victims are treated in the Utah criminal justice system. Victims now receive notices of court hearings. They are given the right to attend hearings,³⁸ and they have been able to speak at sentencing and other hearings. Victims interests are now given consideration in setting trial dates and ruling on continuances, as required by the implementing statute to the constitutional amendment. A victims are no longer routinely forced to testify at preliminary hearings. In short, the Utah Victims Rights

Amendment has worked a sea change in the treatment of crime victims in Utah.

With the state amendment in place in Utah (and other states), some might wonder whether a federal amendment is still needed. This is the next issue to consider.

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IV. The Imperative of *Federal Constitutional Protection*

With a state amendment in place to protect the rights of crime victims in Utah, why is a *federal* amendment also needed?

Before answering that question specifically, it is worth noting its odd nature in light of the extensive protections for defendants in our nation's charter. Few would argue that a defendant's right to a jury trial³⁹ or right to a speedy and public trial⁴⁰ should be relegated to a statute or state constitutional protection, where it would be subject to legislative or state override.⁴⁰ Yet that is precisely the kind of analysis that must be used to reject a constitutional amendment for victims' rights. A constitutional amendment protecting victims also offers a sense of permanence to victims' rights, the same permanence that we accept without hesitation for defendant's rights.

Today in Utah, however, it is clear that a state constitutional amendment alone can not give crime victims the full protection that they deserve. Without a federal constitutional amendment, defendants rights will always be more strongly protected than victims' rights.

A case that I am currently litigating before the Utah Court of Appeals will illustrate the need for federal protection. In *State v. Felix*,⁴² I represent a woman who has been married almost 27 years and is the mother of three and the grandmother of five. Two years ago, Laura⁴³ was sodomized and raped during the armed robbery of a store where she worked. Her co-workers, who had been bound by her attackers, were just a few feet away during the assaults. During the trial of the men who attacked her, Laura asked permission of the judge to sit in the courtroom, a right guaranteed to her under the recently-passed Utah Victims Rights Amendment.⁴⁴ This concrete context provides a useful setting for considering the importance of protecting victims rights in the federal constitution.

A. The Compelling Justifications for Victims Attending Trials.

It is important to understand how important a right to attend trials is to crime victims. The President's Task Force on Victims of Crime held hearings around the country in 1982 and concluded:

The crime is often one of the most significant events in the lives of victims and their families. They, no less than the defendant, have a legitimate interest in the fair adjudication of the case, and should therefore, as an exception to the general rule providing for the exclusion of witnesses, be permitted to be present for the entire trial.⁴⁵

Several strong reasons support this recommendation. To begin with, the right to attend the trial may be critical in allowing the victim to recover from the psychological damage of a crime. "The victim's presence during the trial may also facilitate healing of the debilitating psychological wounds suffered by a crime victim."⁴⁶

Concern about psychological trauma becomes even more pronounced when coupled with findings that defense attorneys have, in some cases, used broad witness exclusion rules to harm victims. As President's Task Force found,

[T]his procedure can be abused by advocates and can impose an improper hardship on victims and their relatives. Time and again, we heard from victims and their families that they were

unreasonably excluded from the trial at which responsibility for their victimization was assigned. This is especially difficult for the families of murder victims and for witnesses who are denied the supportive presence of parents or spouses during their testimony. . . .

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

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The need to allow victims to attend a trial also stems from the fact that the defendant will attend. Excluding a crime victim perpetuates the subordinate position that the crime itself placed in her, as two psychiatric experts have explained:

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

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Without a right to attend trials, "the criminal justice system merely intensifies the loss of control that victims feel after the crime."[49](#) It should come as no surprise that "[v]ictims are often appalled to learn that they may not be allowed to sit in the courtroom during hearings or the trial. They are unable to understand why they cannot simply observe the proceedings in a supposedly public forum."[50](#) One crime victim put it more directly: "All we ask is that we be treated just like a criminal."[51](#) In this connection, it is worth remembering that defendants never suggest that *they* could be validly excluded from the trial if the prosecution requests *their* sequestration. Defendants frequently take full advantage of their right to be in the courtroom.[52](#)

The equity concern is particularly acute in cases, such as the one I am involved with, where the victim was forcibly raped by one defendant and forced to perform sodomy at gunpoint by another, all in front of her co-workers. Drs. Lee Madigan and Nancy C. Gamble have aptly described the feelings of rape victims on discovering that the rule on witnesses has been invoked: "The defendant is entitled to hear everyone's testimony so as to rebut it later. The [rape] survivor is a witness and is allowed in the courtroom only while she is testifying. Many survivors remarked that this was when they first realized that it was not their trial, that the attacker's rights were the ones being protected, and that they had no control over what happened to their bodies. The structure of the system often results in a second rape."[53](#) This "second rape" can be devastating for rape recovery efforts, an essential component of which is the need for a victim to feel that she has taken back control over events in her life.[54](#)

A basic concern for justice suggests the need for equity between the victim and the defendant, at least as to the issue of attendance at a trial. As the Supreme Court recently explained, "'Justice, though due to the accused, is due to the accuser also. . . . We are to keep the balance true.'" [55](#) To do otherwise is a recipe for alienation of victims from the criminal justice process[56](#) and is, finally, at odds with fundamental justice.[57](#)

B The Uncertainties Created Without a Federal Amendment.

In view of the compelling reasons supporting a crime victims' rights to attend trial, one would think that such rights would have long been secured. Indeed, in the *Felix* case I have been describing, the trial judge agreed to the victims' request to attend the trial and permitted her to watch the trial, a right that any member of the public would have.⁵⁸ Laura testified as a witness at trial, along with her co-workers, all of whom identified the defendants. The defendants, by the way, were apprehended with stolen property from the robbery. The defendants were convicted.

All of this is as it should be under the new state constitutional amendment. Yet one of the defendants in the case has appealed to the Utah Court of Appeals, raising as his lead argument the contention that admitting the victim to trial under the Utah Victims Rights Amendment "violated the Appellant's right to Due Process under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution."⁵⁹ On behalf of Laura, the Utah Council on Victims, and a number of other law enforcement, social service, and rape victim support organizations, I have filed an *amicus curiae* brief arguing that the appellant's contention is without merit.⁶⁰ We fully hope -- and expect -- our position to prevail. But the fact remains that, without a federal constitutional amendment, there is some risk that the court of appeals will find some vaguely-defined federal constitutionality infirmity with a state amendment. Such concerns are not imaginary. *Felix* is the third case before the Utah Court of Appeals in the last three years raising the question of a defendant's federal constitutional claim to exclude victims from trials.⁶¹

Even if we prevail in the Utah Court of Appeals, the defendant will have the right to seek review in the Utah Supreme Court. We will not have a final ruling on defendant's constitutional claim, even within Utah, until the Utah Supreme Court decides that matter. Such a ruling could be as long as three years from today. And even with a Utah Supreme Court ruling in hand, the possibility of review in the federal courts remains.⁶² A single federal district judge could always conclude, even many years down the road, that the defendant's federal constitutional argument was valid and invalidate the provisions of the Utah Victims Rights Amendment. The lower federal courts could uphold such federal claims at any time until there was a binding United States Supreme Court ruling on point. Of course, obtaining Supreme Court review of any issue is a difficult and time consuming proposition.

Even if crime victims obtain Supreme Court review of the issue, a Supreme Court ruling could go against the position of crime victims and conclude that a defendant had a constitutional right to exclude victims from trials. And even a Supreme Court victory would not grant permanence to victims' rights. A later majority of the Court would always remain free to overrule the earlier decision.

In recent years, the treatment of victims in the Supreme Court has been less than perfectly consistent. A good illustration of the uncertainties comes from the Court's treatment of "victim impact" evidence in capital cases. One would think, as a matter of simple fair treatment of victims and their surviving family members, victim impact evidence would be allowed. After all, the Court has given defendants the broadest possible latitude to introduce mitigating evidence in capital cases. Yet in *Booth v. Maryland*⁶³, the Court by a 5-4 margin held that victim impact evidence was inadmissible at the sentencing phase of a capital trial unless it directly related to the circumstances of the crime. Two years later, in *South Carolina v. Gathers*⁶⁴, the Court (again by a 5-4 margin) refused to allow evidence about victims in the sentencing phase of a capital case. Fortunately, two years later, the Court (this time by a 6-3 margin) overruled both *Gathers* and *Booth*. In *Payne v. Tennessee*,⁶⁵ the Court simply stated: "Reconsidering these decisions now, we conclude, for the reasons heretofore stated, that they were wrongly decided and should be, and now are, overruled."⁶⁶ Today, *Payne* is the law of the land and protects the rights of crime victims; but tomorrow, the Court could simply decide that *Payne* was wrongly decided and revert to the earlier rule of *Gathers* and *Booth*. Only a federal constitutional right will leave victims' rights free from the vagaries of shifting majorities on the Supreme Court.

In view of all of these uncertainties, a victim wishing to exercise a state constitutional right, for example, to attend a trial is faced with an intolerable dilemma. Many victims wish to observe the trial of their victimizer. Yet if they attend the trial, they create a federal constitutional appellate issue for the defendant with the small possibility that the criminal conviction might be overturned on that ground at some point down the road. Only a federal constitutional amendment can end this uncertainty and free victims from this Hobson's choice.

The possibility of a defendant raising a federal constitutional challenge creates another problem for crime victims. Trial judges dread, perhaps more than anything else, the possibility of retrying a case at some point down the road. As a result, some trial judges may simply deny victims their rights to avoid giving a defendant an even arguable issue to raise on appeal. In Utah, we have received reports that a few trial judges have adopted this approach.

If a judge denies a crime victim her state constitutional rights, it is quite difficult for the victim to obtain redress. Crime victims have great difficulty litigating claims concerning their rights, particularly their right to remain inside the courtroom. In contrast to criminal defendants who are guaranteed counsel at state expense, crime victims often lack the resources to pursue appellate actions. Crime disproportionately victimizes the poorest members of our society. Victimization rates for teenagers and young adults, for households with less than \$7,500 annual income, and for persons living in inner cities are among the highest for any demographic groups.⁶⁷ Moreover, litigating claims concerning exclusion from the courtroom promises to be quite difficult. A victim may not be told she will be excluded until the day the trial starts. In the *Felix* case I described earlier, for example, the motion to exclude was not raised until the start of trial.⁶⁸ Filing timely appellate actions in such circumstances promises to be practically impossible. As a consequence, a federal amendment is needed to signal to trial judges in Utah and around the country that victims rights can and will be respected.

C. Limitations in Existing Amendments.

An additional reason for a federal amendment protecting crime victims rights is that the existing state amendments vary greatly in scope and effect. Of course, none of the state amendments applies to federal criminal proceedings. Even in state criminal proceedings, with respect to such a basic right as a victims' right to attend trial, the state amendments fail to offer consistent protection. Some of the state amendments simply fail to grant a victim any such right to attend trial.⁶⁹ Others appears to grant victims such a right, but then qualify it in ways that make the right almost meaningless.⁷⁰

A federal amendment would establish a basic package of victims' rights, a floor below which states could not go. It would also extend victims' rights to states that currently do not have state constitutional or statutory protection. While the number of states that have constitutional protection for victims will undoubtedly grow in future years, there is no guarantee that it will do so quickly or completely. Moreover, there is no guarantee that future amendments will avoid the defects that have been found in some existing state constitutional amendments.

The only way to fully and complete protect crime victims' basic rights in this country is with a federal constitutional amendment.

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V. The Mechanics of a Federal Constitutional Amendment

Having discussed the desirability of a federal constitutional amendment, it may be useful next to consider the mechanics of how the federal Victims' Bill of Rights Constitutional Amendment would operate.

A. Application to the States.

The first point to consider about the operation of the federal amendment is its application to the states. Of course, a federal constitutional amendment would have direct application to federal criminal proceedings. But, as currently drafted, the amendment would also apply in all state criminal proceedings. Victims' rights, no less than defendants' rights, would be "incorporated" through the Fourteenth Amendment and applied to the states under current constitutional doctrine. The Supreme Court has generally held that most of the provisions of the federal constitution dealing with criminal defendants rights are "incorporated" into the nationally- applicable guarantee of "due process of law" found in the Fourteenth Amendment.⁷¹ For example, in *Gideon v. Wainwright*,⁷² the Court held that the Sixth Amendment's guarantee of a right to counsel applied to the states. The Court explained that a right to counsel was one of the "fundamental rights" that applied to the states by virtue of the operation of the Fourteenth Amendment. The Court's decisions extending federal constitutional rights to criminal suspects in state proceedings are not free from controversy. But they have been established for many years.

The Victims' Bill of Rights Constitutional Amendment would operate in the same fashion. To remove any doubt on this point, the drafters of the amendment have characterized the rights conferred therein as "fundamental rights to liberty, justice, and due process." As a consequence, just as a defendant's fundamental right to counsel extends to the states, a victims' fundamental rights will extend there as well.

It is important to understand the amendment works no new violence to the important value of federalism. Rightly or wrongly, the Supreme Court has already federalized many aspects of criminal procedure and extended substantial rights for defendants throughout country. The proposed amendment simply adopts the view that victims' rights deserve equal treatment. If, at some point down the road, the Supreme Court's decides to "disincorporate" defendants' rights and let states structure their criminal justice systems in ways that they see fit, victims' rights will be disincorporated as well. But so long as defendants are guaranteed federal rights in the process, victims will be too.

On the federalism issue, it must also be remembered that the states will have the opportunity to review the wisdom of the amendment. Thirty-eight states must ratify the amendment before it becomes effective.

B. Scope and Effect

1. Crimes of Violence and Other Crimes.

As currently drafted, the federal Victims Bill of Rights Amendment applies after the "occurrence of a crime of violence and other crimes as may be defined by law" The application to crimes of violence seems straightforward. Congress and the state legislatures are given the power to determine which property crime victims will be protected. This tracks the practice under existing state amendments, which frequently apply to victims of crimes "as defined by law."⁷³ The justification for such an approach was explained by Michigan Representative William Van Regenmorter, who drafted the Michigan Victims' Rights Amendment and its accompanying implementing statute: "The constitution provides the statute appropriate recognition and stature, while the statute provides the necessary legal detail."⁷⁴ In view of the large number of property crimes, Congress and the state legislatures can determine the appropriate thresholds of application.

2. Criminal, Military, and Juvenile Proceedings.

As currently drafted, the federal Victims Bill of Rights Amendment applies to "the criminal, military, and juvenile justice process" It would thus protect victims not only during criminal proceedings in state and federal courts (as discussed in the preceding section) but also in military courts or in juvenile courts. The specification of "juvenile" process in addition to "criminal" process is required by the fact that juvenile proceedings are, in some contexts, not considered to be criminal in nature.

The only point worth extended discussion here is application to juvenile proceedings. In this country, juvenile court proceedings have been regarded traditionally as confidential.⁷⁵ All fifty states provide, in

some way, for some confidentiality of juvenile proceedings. As explained by then- Justice Rehnquist, "This insistence on confidentiality is born of a tender concern for the welfare of the child, to hide his youthful errors and bury them in the graveyard of forgotten past."⁷⁷

Little justification has ever been provided for why -- even assuming that confidentiality is justified in general⁷⁸ -- a shroud of secrecy should operate to exclude victims from juvenile proceedings. Shouldn't someone who has been sexually assaulted by a juvenile have a right to attend the proceedings that will determine what happens to the juvenile?

The historical practice in Utah illustrates this lack of justification for keeping crime victims in the dark. In Utah, by statute the juvenile court judge was historically been instructed to "exclude the general public and admit only those persons who have a direct interest in the case or in the work of the court or who have been requested by the parent or legal guardian to be present."⁷⁹ Practice apparently varied on whether crime victims were deemed to have a "direct interest" in the case. In many counties, it appeared that juvenile judges, upon request, allowed victims to attend juvenile proceedings.⁸⁰ In other areas, however, it appeared that victims were excluded from juvenile proceedings, in some cases through the mechanism of denying them information about the case scheduling.⁸¹

Excluding victims from serious juvenile proceedings seems hard to justify. The effect of crime on a victim does not depend on the age of the criminal. Moreover, while one can understand the need to allow juveniles to hide their errors from the general public, concealment from the victim is impossible.

The Utah Victims Rights Amendment, as implemented by statute, simply adopts the view that victims should have access to juvenile proceedings. The amendment makes juvenile proceedings clearly accessible to crime victims and gives crime victims the indisputable right to speak at such proceedings. The Act adds to the juvenile chapter of the criminal code the provision that: "The victim of any act charged in a [juvenile] petition shall, upon request, be admitted by the judge to the same extent and under the same conditions as would apply to a crime subject to" the Rights of Crime Victims Act.⁸² In other words, for juvenile charges comparable to adult criminal charges to which the Utah Amendment applies (generally felonies), victims have the same right to attend court proceedings as they would in adult court.

I can report that this provisions has been implemented without any apparent ill effects on the operation of Utah's juvenile courts. Victims are now generally admitted to see the proceedings in juvenile cases. I have not heard any reports that the new change is regarded as undesirable by the juvenile court judges. To the contrary, it appears that the new change has improved satisfaction with the juvenile court system by allowing victims to be more informed about the process. The federal amendment would bring these benefits that have been achieved in Utah to juvenile proceedings across the country.

C. Enforcement

The question of enforcing a victims amendment is a vexing one. While a criminal defendant has a ready-made remedy for violations of his rights (reversal of a conviction and a new trial), it is not so clear how victims rights should be enforced. Some existing statutory victims rights scheme has foundered, at least in part, because of inadequate enforcement.

One possible way of enforcing victims rights is through a suit for money damages. Suits would create clear financial incentives for criminal justice agencies to comply with victims' requirements. Some states have authorized suits for such damages in limited circumstances.⁸³ On the other hand, such civil suits by victims against the state suffer from several disadvantages. First and foremost, in a time of limited state resources and pressing demands on government funds, the prospect of expensive awards to crime victims might reduce the chances of protecting victims rights. A related concern is that such suits might give the impression that crime victims seek financial gain rather than fundamental justice.

Because of such concerns, some states that have explicitly provided that their victims rights amendments create no right to sue for money damages.⁸⁴ Other states have reached the same destination by providing explicitly that the remedies for violations of the victims amendment will be provided by the legislature and, in turn, limiting the legislatively-authorized remedies to other than money damages.⁸⁵

Reasonable minds can defer on whether the federal amendment should permit civil actions for damages for violations of rights. Again, it is interesting to remember that defendants already have such rights to bring civil actions in certain circumstances under section 1983.⁸⁶ However, even for those who oppose expanding civil damage actions for crime victims,⁸⁷ there are other approaches.

To illustrate an enforcement approach that does not rely on money damages, I will describe what Utah does in some detail. The Utah Victims Rights Amendment provides: "Nothing in this Section shall be construed as creating a cause of action for money damages, costs, or attorney's fees"⁸⁸ A parallel provision blocking suits for money damages is contained in the Rights of Crime Victims Act.⁸⁹ The provisions thus make clear that the rights of crime victims are to be enforced by means other than suits for damages, costs, or attorney's fees.

Since money damages are not allowed, what enforces victims rights in Utah? Of course, it must always be hoped that the need for lawsuits to enforce victims constitutional rights will be unnecessary. The actors in the criminal justice system are under an obligation to follow the law in spite of the fact that damages are not a possibility. With the heightened awareness that comes from placing victims rights in the constitution, the need for enforcement may be reduced.

Beyond that hope, the enforcement mechanism chosen for Utah's victims provisions is an action for a court order requiring a criminal justice agency to comply with the rights contained in the Victims Rights Amendment and the Rights of Crime Victims. The Act provides for two kinds of suits. First, in situations where a state actor wilfully or wantonly fails to perform duties covered by the Amendment or the implementing statute, "an action for injunctive relief, including prospective injunctive relief, may be brought against the individual and the governmental entity that employs the individual."⁹⁰ For example, if a county attorney's office refuses to send required notices to crime victims, a victim or victims' group may bring an action seeking to enjoin the office to provide such notices.

Second, an action for a declaratory judgement defining the rights of crime victims and obligations of governmental entities may also be brought.⁹¹ For example, if a court denies a victim her right to be heard at a sentencing hearing, she could file a motion for a declaratory judgment that she is entitled to speak. If the judge persists in denying the right to speak, an appeal may be taken from the adverse ruling⁹² under the rules governing appellate actions.⁹³ The rules for appellate actions make provision for emergency or extraordinary writs,⁹⁴ which could be employed in situations where time is of the essence. However, pendency of a victims' appeal is not grounds for delaying a criminal proceedings.⁹⁵ Because there may be circumstances in which a victims' appeal could not be heard before the conclusion of the criminal trial, appellate courts are directed to consider such claims where they "are capable of repetition but would otherwise evade review."⁹⁶

One obvious concern with this enforcement scheme is whether attorneys will be available for victims to assert their rights. Both the Utah Victims Rights Amendment and the Utah Rights of Crime Victims Act preclude appointment of counsel at state expense for victims.⁹⁷ To ameliorate these concerns, the Act authorizes prosecutors to assert victim rights on behalf of victims.⁹⁸ Similarly, the Act authorizes statutorily-created Victims' Rights Committees⁹⁹ to act for victims.¹⁰⁰

Under both the Utah Victims Rights Amendment and the Utah Rights of Crime Victims Act, a defendant has no right to dismiss pending criminal charges or reverse an otherwise valid criminal conviction.¹⁰¹ This

limitation is designed to insure that the enactments are used only by their beneficiaries -- crime victims -- not the perpetrators of criminal offenses. Other states have placed similar language in their victims' amendments.^{[102](#)}

So far, the experience in Utah has been that resort to explicit enforcement mechanisms is largely unnecessary. In cases of disputed compliance with the Victims Rights Amendments, victims representatives have simply discussed the matter with representatives from the affected agency and reached an agreement as how to proceed. There have been a few cases where disputes have not been resolved and, no doubt, in such circumstances, a right to bring civil damage actions would be useful to crime victims. To date, however, no lawsuits of any kind have been filed by victims over the implementation of the Utah Victims Rights Amendment.

I have explained the procedures for implementing Utah's Victims Rights Amendment in some detail because it might serve as a starting point for drafting implementing language to the federal amendment in either the states or in Congress. Some alterations would be necessary. In particular, it makes sense to have challenges to the implementation of victims rights in the states be filed in state court while challenges to federal implementation be filed in federal courts. The implementing statutes should be able to handle such details.
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VI. Objections to a Federal Victims' Amendment.

While the reception to victims rights amendments has been generally positive around the country, a few objections are occasionally raised. It may therefore be useful to consider why those objections are without force.

A. Victims Rights Will Not Eliminate Defendants' Rights.

Some opponents of victims rights have argued that a federal Victims Rights Amendment would infringe on the constitutional rights of the accused. Often such claims are made in the most general terms without any explanation as to what rights would be infringed. Nor as there much explanation as to why the courts cannot protect *both* victims and defendants' rights.

1. An Illustration: The Victims' Right to Attend Trials.

A good illustration of the illusory nature of the conflict between victims' and defendants rights is provided by the victims' right to attend a trial. Frequently it is claimed that such a right would infringe on the defendants' rights. Yet these claims have no substance. I will discuss this situation at some length because it makes the more general point that victim-versus-offender rights is not necessarily a "zero-sum game" -- that is, that the adoption of victims' rights does not have to come at the expense of the offenders' recognized constitutional rights.

While compelling policy reasons support the victims' right to attend trials, defendants and defense attorneys sometimes make generalized allusions to a superseding federal "constitutional right" to have the victim excluded. They rarely define with any precision from whence this constitutional right derives nor explains how it invalidates a constitutional provision giving victims' a right to attend trials. Instead, one finds that defendants simply argue that they have a right to exclude victims under the Fifth and Sixth Amendments.^{[103](#)}

I have scoured those provisions carefully in search of language that would support the far- reaching argument that it is positively unconstitutional for a state to allow a victim to remain in the courtroom during a criminal trial. I have discovered no specific language, or even a penumbra of a specific language, that appears to support that claim. Instead, there are three provisions that support, if anything, the opposite view that a victim of a crime should remain in the courtroom: the Sixth Amendment's guarantee of a "public" trial, not a private one; the Sixth Amendment's guarantee of a right to "confront" witnesses, not to exclude them; and the Fifth and Fourteenth Amendment's guarantee of "due process of law," which construed in

light of historical and contemporary standards suggests victims can attend trials.¹⁰⁴

a. The Right to a Public Trial.

The effort to discover a federal constitutional right to exclude crime victim's founders on the very amendment often cited for support. The Sixth Amendment guarantees a defendant the right to a "public trial."¹⁰⁵ These words suggest that the admission of persons to a trial -- not their exclusion -- is the constitutionally-protected value.

Nor do these words contain any implicit right to closure. As the Supreme Court's leading opinion on this provision explains, "While the Sixth Amendment guarantees to a defendant in a criminal case the right to a public trial, it does not guarantee the right to compel a private trial. The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right."¹⁰⁶ In short, "[t]he right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness."¹⁰⁷

The application of the public trial right has obvious implications for victims of crime. "[P]ublic proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct" ¹⁰⁸ "Public judicial proceedings have an important educative role The victim of the crime, the family of the victim, [and] others who have suffered similarly . . . have an interest in observing the course of a prosecution." ¹⁰⁹ Victim concern about the course of a criminal prosecution stems from the fact that society has withdrawn "both from the victim and the vigilante the enforcement of criminal laws, but [it] cannot erase from people's consciousness the fundamental, natural yearning to see justice done " or even the urge for retribution." ¹¹⁰

Of course, the right to a public trial can be overcome by competing interests.¹¹¹ Indeed, crime victims are often beneficiaries of narrowly-drawn court closure orders.¹¹² And the Sixth Amendment does not, by itself, confer rights on anyone other than the defendant.¹¹³ But the limited claim here is not that the Sixth Amendment *requires* Congress and the states to admit crime victims -- only that it *permits* them to do so.¹¹⁴ If the Sixth Amendment suggests, if anything, a right to have a crime victim admitted to a trial, surely the opposite reading is completely untenable.

b. The Right to Confront Witnesses.

The only other language in the Constitution that appears to have direct application to the claim that defendants can exclude crime victims suggests -- once again -- the opposite conclusion. The Sixth Amendment guarantees that in all criminal prosecutions that "the accused shall enjoy the right . . . to be confronted with the witnesses against him." ¹¹⁵ The provision guarantees, "[s]imply as a matter of English," that the defendant has "a right to meet face to face all those who appear and give evidence at trial." ¹¹⁶ In interpreting the right to confront, the Court recited a passage from Shakespeare concerning a face-to-face meeting between the defendant and victim: "Shakespeare was thus describing the root meaning of confrontation when he had Richard the Second say: 'Then call them to our presence -- face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak'" ¹¹⁷ The suggestion that the victim should have been excluded from the courtroom, at least while not testifying, hardly finds support in this vision of confrontation.

Naturally, the right to confront witnesses is not absolute. Crime victims are often the beneficiaries of this fact.¹¹⁸ But, again, the point here is a limited one, specifically that the Constitution surely cannot be read as forbidding the presence of a victim at trial when the only relevant language suggests that, at least at some point in most cases, the victim's presence is required.

Confrontation contains a second component: the right to cross-examine opposing witnesses. Plainly that component of confrontation is satisfied even when victims remain in the courtroom for trial. Defendants sometimes suggest that their right of confrontation is somehow infringed because their cross-examination of the victim conceivably might have been more effective if she had not heard other witnesses testify. Even if such proof were made (and it seems unlikely in all but the most bizarre kinds of cases), that would not establish a constitutional violation. "The Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent the defense might wish."¹¹⁹ Thus, in the *United States v. Owens*, the Supreme Court held that the right of confrontation was not denied by testimony from a witness who could not longer remember why he had accused the defendant. The Court explained, "The weapons available to impugn the witness' statement when memory loss is asserted will of course not always achieve success, but successful cross-examination is not the constitutional guarantee."¹²⁰

c. The Due Process Clause.

Because the only specific provisions of the Bill of Rights with an arguable connection to this issue suggest a defendant may not eject a victim from the courtroom during trial, the only remaining possibility is to somehow read such a right into the general provision guaranteeing that no person shall be deprived of "life, liberty, or property, without due process of law."¹²¹ To ascertain the meaning of this general phrase, one could look either to historical understanding or contemporary societal norms. On either approach, there is no support for a defendant's right to exclude a victim from a trial.

The original meaning of the Bill of Rights does not embrace excluding a victim from the courtroom. While a limited right to sequester witnesses has historical roots,¹²² courts have long recognized that a motion for sequestration is a request addressed to the trial court's discretion, not a demand to invoke a right. As explained in what appears to be the first Utah case to address the exclusion of witnesses, "The modification of the order [excluding witnesses] was a matter of discretion, as was also the making of it at first."¹²³ This is consistent with the early English doctrine.¹²⁴

Tracking the English practice, many state courts had ruled that a motion to exclude witnesses is grantable only in the trial court's discretion.¹²⁵ To be sure, even under an abuse of discretion standard, some courts had occasionally found that denial of a sequestration order was an abuse.¹²⁶ But the fundamental point remains that generally in this country a request for witness sequestration has been viewed not as an entitlement of a defendant, but rather as a "matter of discretion."¹²⁷ Thus, "whether and to what extent witnesses should be excluded is generally within the prerogative of the trial judge, and he should be allowed considerable latitude of discretion in making such orders."¹²⁸ This is not the material from which an nontextual, due process "right" can be manufactured.

Even more devastating to the notion that due process creates a constitutional right to exclude a crime victim is that "[i]t seems to be universally conceded that the trial court may authorize individual omissions" to a sequestration order.¹²⁹ Historically, a number of cases upheld exclusions from sequestration orders for a crime victim or a family member of a crime victim.¹³⁰

A related argument stems from the principle that a party to a lawsuit generally may not be excluded under a sequestration order.¹³¹ This principle has venerable roots.¹³² The rationale supporting such an approach is apparent. "[A] party's presence at the proceeding may be essential in assisting in the presentation of its case and otherwise protecting its interests by observing the conduct of the trial."¹³³ Accordingly, as the Advisory Committee to the Federal Rules of Evidence has explained, "Exclusion of persons who are parties would raise serious problems of confrontation and due process."¹³⁴ Criminal defendants are, of course, excepted from the operation of the rule because "[a] sequestration order affects a defendant in quite a different way from the way it affects a nonparty witness who presumably has no stake in the outcome of the trial."¹³⁵

Given that a party -- a witness with a "stake in the outcome of the trial" -- has historically not been subject to exclusion, the fallacy of the argument for excluding victims becomes clear. If the victim in a criminal case brought a civil suit against the defendant for the same conduct, she would be a party with a "stake in the trial" and the defendant could not exclude her from the trial. Yet if she could remain in the courtroom in a civil suit, then the Due Process Clause cannot require a different result in a criminal trial over the same facts. The Due Process Clause applies to civil and criminal cases alike.¹³⁶ It would be strange reading of this clause to say that while due process probably requires the victim's presence in a civil action for a crime, it positively prohibits her presence in a criminal case for the same conduct.¹³⁷

Further supporting this conclusion is the fact that, at the time the Bill of Rights was drafted, crime victims could very well have been parties (or, at least, quasi-parties) to criminal lawsuits with a "stake in the trial." Before the American Revolution, "[v]ictims themselves investigated, arrested, and prosecuted individuals who committed crimes against them."¹³⁸ As a result, "[a]t trial, generally, there were no lawyers for either the prosecution or the defense. Victims of crime simply acted as their own counsel, although wealthier crime victims often hired a prosecutor."¹³⁹

Gradually over time the office of public prosecutor began to generally displace private prosecutions. The reasons for this change remain obscure.¹⁴⁰ However, even today there is statutory or case law retaining some vestige of "private prosecution" in many states. One scholar notes some 34 states gives victims the right to seek private prosecution as an alternative to public prosecution in certain cases.¹⁴¹ Thus, when the Framers of the Constitution drafted the Due Process Clause to the Bill of Rights, they would have envisioned at least some criminal actions brought by crime victims and a sequestration rule with an exceptions for parties. Accordingly, it seems unlikely that the Framers unexpressed and hitherto undiscovered intent was to exclude crime victims generally.

While the historical understanding of the Due Process Clause is enough to dispose the claim that there is a constitutional right to exclude victims,¹⁴² the same conclusion is reached if one looks to contemporary practices. In particular, over the last decade there has been an explosion of interest in insuring that a crime victim can remain in the courtroom during a criminal trial. These actions stem from "[a]n outpouring of popular concern for what has come to be known as victims' rights"¹⁴³

A related problem is that the argument for excluding crime victims, taken to its logical conclusion, would invalidate provisions in the Federal Rules of Evidence and parallel rules in the majority of the states. Defendants often argue broadly that admitting crime victims to trial is unconstitutional because, if a victim remains in the courtroom during trial, she can tailor her testimony to bolster the other witness' testimony. Of course, that principle would exclude from trials not only victims but also police officers. Yet under federal and many state rules, police officers who are "case agents" are almost invariably allowed to observe trials.¹⁴⁴ The widely-accepted principle that a police officer can remain at trial, even when he is a witness, disproves the position that the Constitution enshrines a right to exclude victims who might "tailor" their testimony to others.

In sum, there is no constitutional footing for concluding that, under contemporary constitutional principles, a criminal defendant has a federal constitutional right to exclude crime victims from trials.

2. Other Conflicts With Defendants Rights.

Having spent perhaps too much time on one alleged conflict with defendants' rights, I won't belabor disproving other claims that defendants rights will be adversely affected by a federal victims' amendment. Nowhere does the United States Constitution confer on defendants a monopoly on such rights as the right to notice of court hearings or the right to speak at such proceedings as sentencing hearings, bail hearings, plea hearings, or parole hearings. Nor does the Constitution envision that the defendant will always remain the only person with a constitutional right to a speedy trial. Victims can be given this right as well. Indeed, it

appears that all too often victims are the only ones with an interest in a speedy trial. Those who argue that victims rights amendments will diminish the rights of criminal defendants have not made -- and can not make -- their case.

B. A Victims' Amendment is Not Unduly Vague.

Sometimes the claim is made that victims statutes are unduly vague so that those subject to them will have to guess about their application. Here again, it is instructive to compare those claims about victims rights with the already-existing constitutional rights for criminal defendants. It is doubtful that many would take seriously the contentions that defendants should have no right to a "speedy" trial¹⁴⁵ because we are not sure how speedy that must be or no right to a "jury" trial¹⁴⁶ because of questions about how juries are to be appropriately constituted.

It is likewise instructive to consider the experience of the state victims amendment on this point. There is now considerable experience with interpreting and applying state victims amendments that contain the same kinds of phrases at the same level of generality as appear in the proposed Federal Victims Bill of Rights Constitutional Amendment. Yet any vagueness problems with the state amendments have not been substantial.

A related objection is sometimes raised that the amendment will require too much judicial interpretation and thus lead to judicial activism -- displacing the will of the people and their elected representatives. Not everyone, of course, finds judicial activism troublesome. For those who do, the activism objection suffers from all of the problems with the vagueness argument related above. Moreover, the activism objection overlooks the role that Congress and the states will have in implementing the federal amendment "by appropriate legislation." The experience in the states reveals that implementing legislation will be the critical part of the amendment's interpretation, suggesting that legislative power may be augmented, not reduced, by a federal victims' amendment.¹⁴⁷ Finally, when considering a judicial activism objection, it must be remembered that this objection is often made by those who are opposed to expansive interpretations of the rights of criminal defendants in areas such as the exclusionary rule or procedures for taking confessions. To those of the view that the courts have traveled too far in protecting criminal defendants, extending protections for the victims of those defendants should hardly be regarded as undesirable.

C. Victims Rights Are Not Costly

A last objection that is occasionally raised is that victims rights are too costly, either in terms of direct costs (such as mailing of court notices) or indirect costs (consuming court room time). These objections likewise are without foundation. Many victims' rights are costless. The system spends nothing to allow victims to attend otherwise public criminal proceedings. The courtroom benches are already available. All that remains is to give victims the right to sit in them.

The only noticeable cost from victims rights is in the area of providing notice. Here again, the real world experience in the states has disprove speculative claims about undue costs. In Utah, for example, I can report that prosecutors now regularly provide notice to crime victims at nominal cost. Notice is provided by means of a computer-generated post card or form letter. Computer programs that produced subpoenaed for crime victims have been modified to produce notices as well. In a few large jurisdictions, some modest additional clerical support was required to accomplish this task, but there was no substantial fiscal burden imposed on the system. Indeed, in Utah, it appears that the net fiscal impact of the Utah Victims Rights Amendment may have been to save government funds by reducing the need for protracted preliminary hearings.¹⁴⁸

Finally, even if opponents could establish that the federal victims' amendment would require some noticeable outlay of public funds, it seems unlikely that they could make their case that this outlay is undesirable. The system already spends substantial sums to protect the rights of criminal defendants. A modest expenditure for victims seems quite appropriate.

Conclusion

The United States Supreme Court has recognized that "in the administration of criminal justice, courts may not ignore the concerns of victims."¹⁴⁹ Yet to crime victims, it has appeared in recent years that courts and others in the criminal justice system have been doing just that. Some level of victim frustration with the system is inevitable. But the examples of victims' problems reported to this Committee suggest substantial justification for that frustration. Common sense suggests that victims should not be kept in the dark about court proceedings, should not be summarily excluded from courtrooms during trial, should not be denied the right to speak at sentencing and other proceedings. Yet without the passage of the federal Victims' Bill of Rights Constitutional Amendment, victims around the country will continue to be subjected to all of these indignities.

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

ENDNOTES

1. Federal Bureau of Investigation, Uniform Crime Reports: Crime in the United States 1994, at 58 (1995) (table 1).
2. See U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION 1992 5 (1993) (39% of crimes measured by the National Crime Victimization Survey reported to law enforcement officials); MORGAN O. REYNOLDS, CRIME BY CHOICE 25-26 (1984).
3. Uniform Crime Reports, *supra* note 1, at 4.
4. PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 2 (1982).
5. Fidel, *West Valley Neighbors Share Disbelief and Warn Suspect Not to Return*, Deseret News, October 23, 1993, at p. B1.
6. Fidel & West, *Key Witness in Murder Case is Shot, Killed in Murray Home*, Deseret News, Nov. 2, 1993, at p. A1.
7. Clifton, *They Didn't Have to Shoot Him*, Salt Lake Tribune, Apr. 27, 1993, at p. B1.
8. Paul Rolly & JoAnn Jacobsen-Wells, *A Personal Story*, SALT LAKE TRIB., July 14, 1993, at B1. Rolly's powerful column is worth quoting at length:

I, Paul Rolly, now know about the frustration, anger and helplessness felt by the victims of crime.

I recently found myself in a personal financial bind. As a result, I took a temporary job moonlighting at a 7-Eleven store in Salt Lake City, working the graveyard shift on weekends -- one that would not interfere with my regular job. ...

Last weekend, around 3 a.m., three men came into the store and grabbed some burritos. While two were heating them in the microwave, the third -- who could play linebacker for the Pittsburgh Steelers -- approached me and asked the price. As I looked at the price tag, he hit me in the jaw, knocking me to the floor. He didn't stop. He kicked me several times in the head before taking off with a burrito. No money. Just a burrito. ...

Now I want society to become as angry as I am. I want society to become a little more concerned about a culture that tolerates unprovoked assault. But no one, including me, fully understands the emotional aftermath of victimization -- until personally experiencing it.

We have become desensitized to violence as a society. A person striking another for no reason has become so commonplace, it is a blip on a police report and forgotten. There is no thought about the consequences for the victim. In my case, the assault resulted in several trips to the dentist, personal humiliation about being attacked and the anguishing, everlasting question: Why?

This is not something I relish talking about, especially in a mass-circulation newspaper. But now I can personally identify with millions of other victims of violent crime -- many of whom have called me, as a reporter, because they wanted their story told.

A victim often pictures his or her assailant laughing and bragging to buddies about his conquest -- at the victim's expense. A victim feels a helplessness in trying to communicate to others the gamut of emotions that follow.

Even paranoia can set in. The idea that violence keeps growing because we keep tolerating it was once just a social commentary to me. Now it is a stark reality.

Id.

9. Paul S. Hudson, *The Crime Victim and the Criminal Justice System: Time for a Change*, 11 PEPPERDINE L. REV. 23, 28 (1984).

10. Letter from Attorney General Jan Graham to Governor's Council on Victims 1 (1993).

11. Task Force, *supra* note , at vi.

12. See Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 Pepperdine L. Rev. 117, 125-26 (1984)

13. See Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515, 519 (1982).

14. To provide but one example, like the Bill of Rights, the Utah Constitution forbids "unreasonable searches and seizures." See UTAH CONST. art. I, § 12. Similar language is used in most of the state constitutions in the western United States. See Paul G. Cassell, *The Mysterious Creation of Search and Seizure Exclusionary Rules Under State Constitutions: The Utah Example*, 1993 Utah L. Rev. 751, 802 n.319.

15. See Francis Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. Ill. L. Forum. 518.

16. PRESIDENT'S TASK FORCE, *supra* note , at 114.

17. *Id.* at 114.

18. *Id.* at 114-15.

19. *Id.*

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

21. *Id.* (citing 10 Nova Newsletter 1 (Mar. 1986)).

22. An amendment to the United States Constitution requires approval of two-thirds votes of both houses and ratification by three-quarters of the states. U.S. Const. Art. V.

23. Lamborn, *supra* note, at 132 (citing 2 Sunny von Bulow National Victim Advocacy Center, Networks 8 (May 1987)).

24. See ALA. CONST. amend. 55 PRESIDENT'S 7; ALASKA CONST. Art. I, §24; ARIZ. CONST. Art II, § 2.1; CAL. CONST. Art. I, §§ 12, 28; COLO. CONST. Art. II, § 16a; FLA. CONST. Art. I, < § 16(b); IDAHO CONST. Art. I, § 22; ILL. CONST. Art. I, § 8.1; KANS. CONST. Art. 15, § 15; MD. DECL. OF RIGHTS Art. 47; MICH. CONST. Art. I, § 24; MO. CONST. Art. I, § 32; N.J. CONST. Art. I, § 22; NEW MEX. CONST., Art 2. § 24; OHIO CONST. Art. I, § 10a; RHODE ISLAND CONST. Art. I, § 23; TEXAS CONST. Art. I, § 30; UTAH CONST. Art. I, § 28; WASH. CONST. Art. 2, § 33; WISC. CONST. Art. I, § 9m.

25. VICTIMS CONSTITUTIONAL AMENDMENT NETWORK, CONSTITUTIONAL AMENDMENTS FOR CRIME VICTIMS' RIGHTS: UPDATE 2-3 (Apr. 1995).

26. For a description of the Utah effort, see Paul G. Cassell, Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims Rights Amendment, 1994 UTAH L. REV. 1373.

27. NATIONAL VICTIM CENTER, AMERICA SPEAKS OUT: CITIZENS ATTITUDES ABOUT VIOLENCE AND VICTIMIZATION (1991).

28. See generally PRESIDENT'S TASK FORCE, *supra* note

29. UTAH CODE ANN. § 77-37-3.

30. UTAH CODE ANN. § 77-37-4.

31. See, e.g., GOVERNOR'S COUNCIL ON VICTIMS MEETING MINUTES 3 (July 31, 1992).

32. UTAH CODE ANN. § 77-37-3(1)(b); § 77-37-4(4).

33. Letter from Karen Sire, Exec. Dir., Davis Family Support Center, to Governor's Council on Victims (Oct. 6, 1993). All the families believed that if the investigator had told them to contact a victim support program, they would have been able to cope with the terrifying experience a little more effectively. *Id.*

34. Letter from Eric A. Ludlow to the Governor's Council on Victim's (Aug. 15, 1993).

35. Ken Eikenberry, *The Elevation of Victims' Rights in Washington State: Constitutional Status*, 17 PEPPERDINE L. REV. 19, 26 (1989).

36. MICH. CONST. art. I, § 24.

37. Letter from T.W. Shumway to the Governor's Council on Victims (Aug. 1993).

38. With some exceptions, as discussed below.

39. U.S. CONST. Amend. VI.

40. *Id.*

41. John Walsh, Host of *America's Most Wanted*, Remarks to the Seventh Annual Governor's Conference on Victims, Salt Lake City, Utah (Apr. 28, 1994) (a victims amendment is needed because "statutes can change

overnight; it takes as act of God to change a constitutional amendment.").

42. No. 950341-CA (Utah Ct. Apps. 1996).

43. To protect her privacy, I will use a fictitious name.

44. See UTAH CONST. art. I, § 28(1)(b) (a victim of a crime shall have the right "to be present at" important criminal justice proceedings).

45. President's Task Force Report, *supra* note, at 80.

46. Eikenberry, *supra* note, at 41.

47. President's Task Force on Victims of Crime, *supra* note, at 80 (emphasis added).

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

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

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

51. *Id.* at 59 (quoting crime victim).

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

53. LEE MADIGAN & NANCY C. GAMBLE, *THE SECOND RAPE: SOCIETY'S CONTINUED BETRAYAL OF THE VICTIM* 97 (1989).

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

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

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

57. See Hudson, *supra* note, at 34 ("justice cannot be done without taking the victim's interest in account, and . . . far from being irrelevant, victim participation in and support of the criminal justice system is essential for the system to operate effectively.").

58. The Sixth Amendment guarantees a defendant the right to a "*public* trial." U.S. CONST. amend VI (emphasis added); see also UTAH CONST. art. I, § 11 ("All courts shall be open"); Utah Const. art. I, § 12 (the accused has a right to a "public trial"). The provision reflects the tradition of our system of criminal justice that a trial is a "public event" and that "[w]hat transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947).

59. Brief of Appellant at 15-18, *State v. Felix*, No 950341-CA (Utah Ct. Apps. 1996).

60. Brief of Utah Council on Victims *et al.* as *Amicus Curiae*, *State v. Felix*, No. 950341-CA (Utah Ct.

Apps. 1996). The brief is co-authored by Scott Daniels, with the law firm of Snow, Christensen & Martineau.

61. *Compare State v. Cosey*, 873 P.2d 1177, 1181 n.5 (Utah Ct. App. 1994) (reserving issue of constitutionality of allowing victim to remain in the courtroom where she is not the first person to testify), *cert. denied*, 883 P.2d 1359 (1994); *State v. Rangel*, 866 P.2d 607, 612 (Utah Ct. App. 1993) (concluding defendant had not properly presented facial challenge to constitutionality of rule permitting victim to remain in the courtroom).

62. *See* 28 U.S.C. § 2241.

63. 482 U.S. 496 (1987).

64. 490 U.S. 805 (1989).

65. 501 U.S. 808 (1991).

66. *Id.* at 830.

67. U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Violent Crime in the United States* 8 (March 1991).

68. *See State v. Felix*, No. 950341-CA, Record at 227.

69. *See, e.g.* R.I. CONST. art. I, § 24 (not mentioning victims' right to attend trial).

70. *See, e.g.*, N.J. CONST. art. I, ¶ 22 (conferring on victims "the right to be present at public judicial proceedings except when properly sequestered in according with law or Court Rule prior to completing his or her testimony").

71. U.S. CONST. amend. XIV. *See generally* WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 66-73 (2d ed. 1992).

72. 372 U.S. 335 (1963).

73. *See, e.g.*, MICH. CONST. art. I, § 24(1) (extending rights to "crime victims, as defined by law").

74. William Van Regenmorter, *Crime Victims' Rights "A Legislative Prospective*, 17 *PEPPERDINE L. REV.* 59, 79 (1989).

75. *See generally* W. VAUGHN STAPLETON & LEE E. TEITELBAUM, *IN DEFENSE OF YOUTH: A STUDY OF THE ROLE OF COUNSEL IN AMERICAN JUVENILE COURTS* 15-16 (1972).

76. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 105 (1979).

77. *Id.* at 107 (Rehnquist, J., concurring) (internal quotation omitted).

78. A number of states are moving away from the confidentiality of juvenile proceedings, at least for crimes of violence committed by those close to the age of maturity.

79. UTAH CODE ANN. § 78-3a-33(1). *See Matter of N.H.B.*, 769 P.2d 844 (Utah Ct. App. 1989).

80. Interview with Judge Scott Johansen, 7th Dist. Juvenile Court, Price, UT (May 10, 1994).

81. One woman was held hostage by a juvenile. She tried to obtain information about the course of the proceedings against him, but was told this information was confidential. One day she was horrified to

discover that the juvenile was no longer detained when he confronted her at her workplace. Interview with S.A. (Apr. 28, 1994).

82. UTAH CODE ANN. § 77-3a-33(1)(b).

83. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-4437(B). *See also* Davya B. Gewurz & Maria A. Mercurio, Note, *The Victims' Bill of Rights: Are Victims All Dressed Up With No Place to Go*, 8 ST. JOHN'S J. LEG. COMMENTARY 251, 262-65 (advocating money damages for violations of victims rights).

84. *See, e.g.*, KANS. CONST. ART. 15, § 15(B); MISSOURI CONST. ART. I, § 32(3), (5); TEX. CONST. Art. I, § 30(E).

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

86. 42. U.S.C. § 1983.

87. Crime victims can already bring § 1983 actions in certain very limited circumstances. *See, e.g.*, *Nishiyama v. Dickson County, Tenn.*, 814 F.2d 277 (6th Cir. 1987) (parents of daughter who was killed by inmate driving patrol car with authorization of sheriff who pulled daughter over with authority of the car prior to beating her to death could maintain action for deprivation of daughter's constitutionally protected interest in life).

88. UTAH CONST. art. I, § 28(2).

89. UTAH CODE ANN. § 77-38-11(3).

90. UTAH CODE ANN. § 77-38-11(1).

91. UTAH CODE ANN. § 77-38-11(2)(a). For declaratory judgment procedures, see Utah Code Ann. § 78-33-1 *et seq.*

92. Because the statute authorizes victim appeals from adverse "rulings" rather than adverse "final orders and judgments," UTAH R. APP. P., Rule 3, a victim need not wait to the conclusion of a criminal proceeding to take an appeal. In most circumstances, requiring a victim to wait to the conclusion of a criminal case before taking an appeal would effectively eliminate the possibility of any effective remedy. For example, the denial of a victim's right to be present or right to be heard on trial cannot be remedied after the trial is concluded.

93. UTAH CODE ANN. § 77-38-11(b); *see* Sen. Judiciary Comm. Debate, Statement of Sen. Craig A. Peterson, 50th Utah Leg., 2d Gen. Sess. (Feb. 11, 1994) (tape B) ("The appellate court becomes the court of victims rights enforcement. Where an issue has been identified as substantive, the appellate courts would have the oversight authority.").

94. UTAH R. APP. P., Rule 19.

95. UTAH CODE ANN. § 77-38-11(b).

96. UTAH CODE ANN. § 77-38-11(c). *Cf. Burkett v. Schwendiman*, 773 P.2d 42, 44 (Utah 1989) (discussing exception to mootness doctrine for issues that evade review).

97. *See* UTAH CONST. art. I, § 28(2) (no right to attorney's fees); UTAH CODE ANN. § 77-77-38-12(3) (nothing to be construed as creating a right "of a victim to appointed counsel at state expense").

98. UTAH CODE ANN. § 77-38-9(6).

99. See UTAH CODE ANN. § 77-37-5.
100. UTAH CODE ANN. § 77-38-11(2)(a).
101. UTAH CONST. art. I, § 28(2); UTAH CODE ANN. § 77-38-12(2).
102. See, e.g., KANSAS CONST. Art. 15(c).
103. See, e.g., Br. of Appellant at 18, *State v. Felix*, No. 950341-CA (Utah Ct. Apps. 1996).
104. *Accord Stephens v. State*, 720 S.W.2d 301, 303 (Ark. 1986) ("Nothing in the constitution touches on the exclusion of witnesses during criminal trials. The Sixth Amendment to the United States Constitution . . . guarantee[s] an accused a speedy and public trial and to be confronted with witnesses against him. Otherwise [the] document contains [nothing] that might be seen as a right to limit those who may want to attend the trial.").
105. U.S. Const. amend VI (emphasis added).
106. *Gannett Co. v. DePasquale*, 443 U.S. 368, 382 (1979) (quoting *Singer v. United States*, 380 U.S. 24, 34-35 (1965)).
107. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7 (1986).
108. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 510, 509 (1984).
109. *Gannett Co. v. DePasquale*, 443 U.S. at 428 (Blackmun, J., concurring in part and dissenting in part).
110. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980) (plurality opinion).
111. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982).
112. See, e.g., *Douglas v. Wainwright*, 739 F.2d 531, 532-33 (11th Cir. 1984) ((per curiam) (partial closure of trial to public other than press and defendant's family justified for substantial reason of protecting rape victim from insult and embarrassment during testimony), cert. denied, 469 U.S. 1208 (1985)).
113. *Gannett Co. v. DePasquale*, 443 U.S. 368, 391 (1979).
114. See *id.* at 385 ("it is important to distinguish between what the Constitution permits and what it requires").
115. U.S. Const., amend. VI.
116. *California v. Green*, 399 U.S. 149, 175 (1970) (Harlan, J., concurring).
117. *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) (quoting Richard II, Act I, sc. 1).
118. See, e.g., *Maryland v. Craig*, 497 U.S. 836, 844 (1990) (permitting child victim of sex offense to testify via closed-circuit television).
119. *United States v. Owens*, 484 U.S. 554, 559 (1988) (emphasis in original) (internal quotation omitted); see also *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) ("trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of issues, the witness' safety").
120. 484 U.S. at 560.

121. U.S. Const. amend. XIV.

122. See generally 6 J. Wigmore on Evidence § 1837, at 455-60 (Chadbourn rev. ed. 1974 & 1990 Supp.)

123. *People v. O'Loughlin*, 3 Utah 133, 1 P. 653, 657 (Utah 188

124. See, e.g., Cook's Trial, 13 How. St. Tr. 322, 348 (1696) (L.C.J. Treby: "It is not necessary to be granted for the asking; for we are not to discourage or cast any suspicion upon the witnesses, when there is nothing made out against them; but it is a favour that the Court may grant, and does grant sometimes, and now does it to you; though it be not of necessity"); Vaughan's Trial, 13 How. St. Tr. 485, 494 (1696) (L.C.J. Holt: "You cannot insist upon it as you right, but only a favour that we may grant").

125. See, e.g., *Jones v. State*, 45 A.2d 350, 353 (Md. 1946) (allowing witnesses to stay in courtroom in discretion of trial court); *State v. Barts*, 38 A.2d 838, 844 (N.J. 1944) (same); *State v. Quirk*, 112 N.W. 409, 411 (Minn. 1907) (allowing rape victim to stay in courtroom); *Barnes v. State*, 7 So. 38, 39 (Ala. 1890) (same); *Parker v. State*, 10 A. 219, 219 (Md. 1887); *McLean v. State*, 16 Ala. 672 (1849); *Bellamack v. State*, 294 P. 622 (1930). But cf. WIGMORE, *supra* note, at section 1839 (arguing that the sequestration should be demandable as of right but recognizing that all but a "few courts" hold it "grantable only in the trial court's discretion"). 126. See, e.g., *Jones v. State*, 45 A.2d 350, 354 (Md. 1946).

127. *People v. O'Laughlin*, 3 Utah 133, 1 P. 653, 657 (1882).

128. *State v. Rangel*, 866 P.2d 607, 613 (Utah Ct. App. 1993) (quoting *Terry's Sales, Inc. v. Vander Veur*, 618 P.2d 29, 32 (Utah 1980)).

129. J. WIGMORE, *supra* note, at § 1841, at 472-73.

130. See, e.g., *Trammell v. State*, 97 S.W.2d 902, 905 (Ark. 1936) (murder victim's mother); *Norman v. State*, 175 S.E.2d 119, 120 (Ga. App.) (allowing victim to stay in courtroom if specified in indictment), cert. denied, 401 U.S. 956 (1972); *Coolman v. State*, 72 N.E. 568 (Ind. 1904) (prosecuting witness allowed to remain to aid the state's attorney); *Butler v. State*, 97 N.E.2d 492, 495 (Ind. 1951) (seven-year-old rape victim allowed to remain with her mother in the courtroom during trial); *State v. Pell*, 119 N.W. 154, 158 (Iowa 1909) (family of murdered man); *State v. Smith*, 180 N.W. 4, 7 (Iowa 1920) (rape victim's father allowed to remain); *Druin v. Commonwealth*, 124 S.W. 856, 858 (Ky. 1910) (father of underage rape victim allowed to remain); *McKinnon v. State*, 299 P.2d 535, 538 (Okla. Ct. App. 1956) (no error in allowing rape victim to remain "in the courtroom during the entire trial"); *State v. Whitworth*, 29 S.W. 595, 596 (Mo. 1895) (father of rape victim); *Milo v. State*, 214 S.W.2d 618, 618 (Tex. Ct. Crim. App. 1948) (rape victim allowed to remain in court after she testified); *State v. Bonza*, 72 Utah 177, 269 P. 480, 482 (Utah 1928) (sister of rape victim); *Burford v. Commonwealth*, 20 S.E.2d 509, 512 (Va. 1942) (victim of shooting exempted from operation of exclusionary rule).

131. See, e.g., *State v. Utah Merit System Council*, 614 P.2d 1259, 1262 (Utah 1980) ("Statutes in a number of jurisdictions establish the right of a party to an action to remain in attendance during the entire trial.").

132. See SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 432 at 474 n.3 (12th ed. 1866) ("in those states in which parties are made competent witnesses, it would seem that the order of exclusion should not include them; and it is the better practice as general rule in these states, so far as it is known to be established, when the witnesses in a case are ordered to withdraw, to except parties from the order") (quoting *Pomeroy v. Badderley*, Ry. & M. 430).

133. *State v. Utah Merit System Council*, 614 P.2d 1259, 1262 (Utah 1980).

134. Advisory Comm. Note to Rule 615 of the Fed. Rules of Evidence.

135. *Geders v. United States*, 425 U.S. 80, 88 (1976).

136. See U.S. Const. amends. V, XIV (no person shall be deprived of "liberty" or "property" without "due process of law").
137. Cf. S. GREENLEAF, *supra* note, §432 at 474 (noting that the rule on exclusion of witnesses "in criminal and civil cases is [generally] the same").
138. Eikenberry, *supra* note, at 34.
139. Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POLICY 357, 367 (1986).
140. See Cassell, *supra* note, at 1380 & n.35 (reasons for transformation to system of public prosecutors unclear).
141. See William MacDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 648, 665 n.78 (1976) (collecting authorities allowing privately employed attorneys to assist the public prosecutor); *People v. Tidwell*, 4 Utah 506, 12 P. 61, 64 (1886) (concluding that the weight of authority allows relatives of the victim of a homicide to employ an attorney to assist in the prosecution).
142. See, e.g., *United States v. Watson*, 423 U.S. 411 (1976) (rejecting defendant's claim for warrant to arrest based on historical understanding).
143. *Booth v. Maryland*, 482 U.S. 496, 520 (1987) (Scalia, J., dissenting), *overruled on grounds advocated in the dissent*, *Payne v. Tennessee*, 501 U.S. 808 (1991).
144. See generally FED. R. EVID. 615; 2 Gregory P. Joseph & Stephen A. Saltzburg, *Evidence in America: The Federal Rules in the States* 49.3 at 2 (1987 & 1994 Supp.) ("The second category, a non-natural party's designee, is most frequently applied in criminal cases to permit the government's chief investigating agent to assist the prosecution at trial.").
145. U.S. CONST. amend. VI.
146. *Id.*
147. See, e.g., Van Regenmorter, *supra* note, at 79 (describing Michigan amendment and concluding "[t]he flexibility achieved by virtue of the legislature's ability to define and implement the constitutional rights has generated a close relationship between the constitutional amendment and the statute.").
148. See Cassell, *supra* note, at 1461-69 (quantifying cost savings of \$849,000/year in Utah from modification of preliminary hearing procedures).
149. *Morris v. Slappy*, 461 U.S. 1, 14 (1983).