

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

I am a Professor of Law at the University of Utah College of Law, where next year I will teach a course devoted exclusively to the rights of crime victims. I have written and lectured on the subjects of crime victims rights, as explained at greater length in my attached biography. I serve on the executive board of the National Victim Constitutional Amendment Network, an organization devoted to bringing constitutional protection to crime victims across the country.

In my testimony today, I wish to touch on three points. In Part I, I will briefly explain why a federal constitutional amendment is widely regarded by those who have carefully studied the issue as the only way to fully protect victims' rights. In Part II, I will provide a legal analysis of the provisions of the Crime Victims' Rights Amendment, as currently elaborated in Senate Joint Resolution 44. This analysis will, I hope, dispel most of the objections that have been raised against the amendment — objections that all too often are based on a misunderstanding of what the amendment would actually do. Finally, in Part III, I provide a concrete illustration of the difference that the amendment would have made to victims of the Oklahoma City bombing, whom I have had the privilege of representing in various actions designed to protect their rights as victims of crime.

I. The Recognized Need for a Victims Rights Amendment

I have previously provided extensive testimony to this Committee supporting the Crime Victims' Rights Amendment. I will not reiterate all that I have said there, but did want to briefly note that a national consensus appears to be developing that the rights of crime victims deserve protection and that a federal constitutional amendment is the *only* way to fully guarantee that protection. More than half of the states have passed amendments to their own state

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

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

A number of legal commentators have reached similar conclusions. For example, Harvard Law Professor Laurence Tribe has explained that the existing statutes and state amendments "are likely, as experience to date sadly shows, to provide too little real protection whenever they come into conflict with bureaucratic habit, traditional indifference, sheer inertia, or any mention of an accused's rights regardless of whether those rights are genuinely threatened." Similarly, Texas Court of Appeals Justice Richard Barajas has explained that "[i]t is apparent . . . that state constitutional amendments alone cannot adequately address the needs of crime victims." Field-specific research produces the same conclusion. For example, a review of parole procedures found that "[m]ost laws which currently exist do not provide enough guidance to parole authorities on essential questions pertaining to the purposes and procedures attending the rights of victims to present impact statements."

A comprehensive study of the implementation of the existing victims rights regime in 1997 amply supports the conclusion that the current regime is not fully protecting victims. In the words of the study:

The *Victims Rights Study* revealed that, while strong state statutes and state constitutional amendments protecting crime victims' rights are important, they have been insufficient to guarantee the rights of crime victims. While this sub-report focused on reports by crime victims regarding their personal experiences, the responses of local criminal justice and victim service providers to similar questions in the *Victims Rights Study* corroborate the victim responses. Even in state with strong protection, large numbers of victims are being denied their legal rights.

As one example, the report found that laws requiring notification of plea negotiations were "simply not being followed in nearly half of all violent crime cases." A follow-on report of the same data base found that victims who are racial minorities were especially likely to be disadvantaged under the current system.

Given the problems that exist with the current "patchwork" of victims' safeguards, it is apparent that federal constitutional protection is necessary. Such protections would be entirely consistent with the general structure of our federal constitution. As Harvard Law Professor Laurence Tribe, a supporter of a federal victims' right amendment, has explained:

Pursuing and punishing criminals makes little sense unless society does so in a manner that fully respects the rights of their victims to be accorded dignity and respect, to be treated fairly in all relevant proceedings, and to be assured a meaningful opportunity to observe, and take part in, all such proceedings. These are the very kinds of rights with which our Constitution is typically and properly concerned. Specifically, our Constitution's central concerns involve protecting the rights of individuals to participate in all those government processes that directly and immediately involve those individuals and affect their lives in some particular way. Such rights include the . . . various rights of the criminally accused to a speedy and public trial, with the assistance of counsel, and with various other participatory safeguards including the right to compulsory process and to confrontation of adverse witnesses. The parallel rights of victims to participate in these proceedings are not less basic, even though they find no parallel recognition in the explicit text of the Constitution.

For these, and many other reasons that the Committee is aware of from its previous hearings, a federal constitutional amendment is urgently required to protect victims rights. Rather than continue to argue about that issue, I believe it is more important to consider precisely how a federal victims rights amendment should be drafted. It is to this issue that I

now turn.

II. A Legal Analysis of Senate Joint Resolution 44

The Victims' Rights Amendment, as drafted in Senate Joint Resolution 44, is a carefully crafted provision that provides vital rights to victims of crime while at the same time protecting all other legitimate interests. Because those who are unfamiliar with victims rights provisions may have questions about the language, it is useful to analyze the amendment section-by-section. Language of the resolution is italicized and then discussed in light of generally applicable legal principles and existing victims case law. What follows, then, is my understanding of what the Amendment would mean for crime victims in courts around the country.

Section 1

Each victim of a crime of violence

This clause extends rights to victims of violent crimes. As generally understood, a "victim" of a crime is one "against whom an offense has been committed," in the words of a current federal rule of criminal procedure dealing with victims. Because the phrase is limited to crimes of violence, determining who is a victim is relatively straightforward. The victim will be one against whom the violence was directed or intended. Although some of the state amendments are limited to natural persons, the Crime Victims' Rights Amendment would extend to corporate entities that were victims of crimes of violence.

The phrase "crime of violence" too has a readily understood meaning in the context of victims' rights.. For guidance, we can examine the definition of the term "crime of violence" found in the Federal Rules of Criminal Procedure dealing with victims' rights at sentencing. There, "crime of violence" is defined as

a crime that involved the use or attempted or threatened use of physical force against the person or property of another

Notice that this definition is not restricted to crimes that have as an element the use, or attempted or threatened use, of force against another person. That is because, in a victims' rights context, the crime should be analyzed with reference to whether it "involved" violence, as Congress recognized in drafting the Federal Rule of Criminal procedure quoted above. Even the narrower elements-of-the-offense definition of crimes of violence has been held to embrace a whole host of offenses, including attempted sexual abuse of a child, assisting or instigating escape or attempted escape of a prisoner, and burglary. No doubt the phrase "crime of violence" would be construed at least as broadly and would undoubtedly includes all offenses involving domestic *violence* or driving while intoxicated leading to any sort of damage or injury, areas of particular concern to crime victims advocates.

Although the Amendment does not cover victims of all crimes, victims of crimes of violence have been far and away the predominant members of the crime victims movement. One objective indicator of their relatively stronger interest is the litigated cases involving the rights of crime victims. Of the cases that have been litigated involving victims rights, I estimate that well over 95% involved crime of violence that would be covered by the proposed language.

In drawing lines between victims of crimes of violence and other victims, the Amendment follows in a long-standing constitutional tradition. A whole host of constitutional provisions, as written or interpreted, draw such distinctions between individuals and between crimes, often for no reason other than administrative convenience. For instance, the right to a jury trial extends only to cases "where the value in controversy shall exceed twenty dollars." Even narrowing our view to criminal cases, frequent line-drawing exists. For instance, the Fifth Amendment extends to defendants in federal cases the right not to stand trial "unless on a presentment or indictment of a Grand Jury" — however, this right is limited to a "capital or otherwise infamous crime," and, in any event, it is not extended to any state prosecutions. Similarly, the right to a jury trial in criminal cases depends in part on the penalty a state legislature decides to set for any particular crime.

Many, if not most, of the state victims amendments protect crime victims "as defined by law." The definitions of victims under the law have typically not included all victims for all purposes, and in some cases have been restricted to

victims of crimes of violence. The Illinois Constitutional Amendment, widely endorsed by victims' advocates, illustrates this point. After the amendment was passed, victims as "defined by law" included "any person against whom a violent crime has been committed." Similarly, the Arizona amendment, often regarded as among the best state amendments, defined "victim" in the constitution as "a person against whom the criminal offense has been committed." The legislature was given the power to "define" these terms, which it did by limiting the phrase "criminal offense" to mean "conduct that gives a peace officer or prosecutor probable cause to believe that a felony or that a misdemeanor involving physical injury, the threat of physical injury or a sexual offense has occurred." At least one state amendment has been limited to victims of felony crimes. At least one state amendment has been further restricted to victims of crimes of violence. Federal statutes also extend rights to victims of crimes of violence.

The Crime Victims' Rights Amendment would do considerable good in the cases in which it does not directly apply. For example, a major concern of victims of non-violent crime is restitution. The passage of the constitutional amendment will spur adoption of implementing language in Congress and all fifty states. No doubt the implementing language will cover, among other issues, restitution. In all likelihood the implementing language will establish superior mechanisms for collecting restitution that will be of benefit to all victims. Moreover, even apart from specific implementing language, a Crime Victims' Rights Amendment will create a judicial "mindset" that is quite favorable to all victims, not just victims of violent crimes. Judges will become used to ordering full restitution and it will no longer be the exceptional or unusual event that it too often is today. Nor would defendants be able to argue that ordering restitution somehow deprived them of constitutional rights. Judges would know that ordering restitution was the routine, not the exception. Most of the victims rights advocates I have spoken to report that this is exactly the experience they have had in their states after a less-than-all-encompassing amendment was adopted.

One issue that Congress and the states might want to address in implementing language to the Amendment is whether victims of "related" crimes are covered. A typical example is this: a rapist commits five rapes, but the prosecutor charges one, planning to call the other four victims only as witnesses. While the four are not "victims" of the charged offense, fairness would suggest that they should be afforded victims rights as well. In my state of Utah, we addressed this issue by allowing the court in its discretion to extend rights to victims of these related crimes. An approach like this would make good sense in the implementing statutes to the Amendment.

Each victim . . . shall have the rights to reasonable notice of . . . all public proceedings relating to the crime

The right of the victim to reasonable notice is a critical right. Because victims and their families are directly and often irreparably harmed by crime, they have a vital interest in knowing about the subsequent prosecution. Yet frequently crime victims are the last to know about court proceedings. For example, the mother of a five-year-old girl who was kidnaped and murdered commented, "I was the last to know a lot of the decisions made." One can only imagine the effect on her of one incident she described: "There was a time, April 13th, that I happened to be home ... and we were tuned into a program and all of a sudden over the news they ... came over with something concerning my daughter and it was news to me." As another example, a woman's husband was killed by a drunk driver. Despite repeated requests, she was not notified of court proceedings and missed several hearings as a result. This problem has been observed by others besides crime victims. A reporter for the *Salt Lake Tribune* noted that crime victims frequently tell him that the only notice they receive of events in their cases is through the paper. Information regarding the offender's sentence or release from custody can alleviate the victim's anxiety and legitimate fear of reprisal. For all these reasons, it is important that victims receive notice of court hearings.

The Crime Victims' Rights Amendment guarantees victims a right to "reasonable notice." No doubt, Congress and the states in implementing language will provide additional details about how notice is to be provided. I will again draw on my own state of Utah to provide but one example of how notice could be structured. The Utah Rights of Crime Victims Act provides that "[w]ithin seven days of the filing of felony criminal charges against a defendant, the prosecuting agency shall provide an initial notice to reasonably identifiable and locatable victims of the crime contained in the charges, except as otherwise provided in this chapter." The initial notice must contain information about "electing to receive notice of subsequent important criminal justice hearings." In practice, Utah prosecuting agencies have provided these notices with a detachable postcard or computer generated letter that victims simply return to the prosecutor's office to receive subsequent notices about proceedings. The return postcard serves as the victims' "request" for further notices. In the absence of such a request, a prosecutor need not send any further notices.

The statute could also spell out situations where notice could not be "reasonably" provided, such as emergency hearings necessitated by unanticipated events. In Utah, for instance, in the event of an unforeseen hearing for which notice is required, a good faith attempt to contact the victim by telephone meets the notice requirement.

Each victim . . . shall have the rights . . . not to be excluded from . . . all public proceedings relating to the crime

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

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

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."

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.

Without a right to attend trials, "the criminal justice system merely intensifies the loss of control that victims feel after the crime." 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." One crime victim put it more directly: "All we ask is that we be treated just like a criminal." 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.

The equity concern is particularly acute in cases of violent crime, such as rape cases. 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." 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.

To ensure that victims can attend court proceedings, the Crime Victims' Rights Amendment extends them this right. Many state amendments have similar provisions. The Amendment gives victims a right "not to be excluded from"

public proceedings. The right is phrased in the negative — a right *not* to be excluded —, thus avoiding any possible suggestion that a right "to attend" carried with it a victim's right to demand payment from the public fisc to travel to court. The right is limited to "public" proceedings. While the great bulk of court proceedings are public, occasionally they must be closed for various compelling reasons. The Crime Victims' Rights Amendment makes no change in court closure policies, but simply indicates that when a proceeding is closed, the victim may be excluded as well. An illustration is the procedures that court's may employ to prevent disclosure of confidential national security information. When court proceedings are closed to the public pursuant to these provisions, a victim will have no right to attend. Finally, the victims right to attend also limited to proceedings "relating to the crime," rather than leaving the right to open-endedly apply to various sorts of proceedings.

Occasionally the claim is advanced that the Victims' Rights Amendment would somehow allow victims to "act[] in an excessively emotion manner in front of the jury or convey their opinions about the proceedings to that jury." Such suggestions, in my view, misunderstand the effect of the victims provisions. In this connection, it is interesting that no specific illustrations of a victims' right provision actually being interpreted in this fashion have, to my knowledge, been offered. The reason for this dearth of illustrations is that court undoubtedly understanding that a victims' right to be present does not confer any right to engage in conduct that would disrupt court proceedings or act in ways the impugn the integrity of the court. Here, courts are simply treating victims' rights in the same fashion as defendants' rights. Defendants have a right to be present during criminal proceedings, which stems from both the Confrontation and Due Process Clauses of the Constitution. Courts have consistently held that these constitutional rights do not confer on defendants any right to engage in disruptive behavior.

Each victim . . . shall have the rights . . . to be heard, if present, and to submit a statement at all public proceedings to determine a release from custody, an acceptance of a negotiated plea, or a sentence

Victims deserve the right to be heard at appropriate points in the criminal justice process and thus to participate directly in the criminal justice process. A number of states have added provisions to their state constitutions allowing some form of victim participation.

The Amendment identifies three specific junctures in the process where a victim statement is permitted. First, the Amendment extends the right to be heard to "public proceedings to determine a release from custody." This will allow, for example, a victim of domestic violence to warn about possible violence if the defendant is released on bail. At the same time, however, it must be emphasized that nothing in the Amendment gives victims the ability to veto the release of any defendant. The ultimate decision to hold or release a defendant remains with judge or other decisionmaker. The Amendment will simply provide the judge with more information on which to base that decision. Proceedings that will "determine a release from custody" include not only bail hearings but other hearings involving release decisions, such as parole hearing and any other hearing that will determine a release. Victim statements to parole boards are particularly important because they "can enable the board to appreciate fully the nature of the offense and the degree to which the particular inmate may threaten the victim or others upon release."

The right to be heard also extends to any proceeding involving the acceptance of a negotiated plea. Under the present rules of procedure in most states, every agreement between a defendant and the state to resolve a case before trial must be submitted to the trial court for approval. If the court believes that the agreement is not in the interest of justice, the court may reject it. Unfortunately, victims do not also have the opportunity to present to the judge information about the propriety of the plea agreements. Indeed, it may be that in some cases "keeping the victim away from the judge ... is one of the prime motivations for plea bargaining." Yet victims have compelling reasons for some role in the plea bargaining process. As one of the nation's leading experts on crime victims' rights has recently explained,

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

It should be noted that nothing in the Crime Victims' Rights Amendment requires a prosecutor to consult with a victim before agreeing to a plea bargain. The language is specifically limited to a victim's right to be heard at "*proceedings* to determine . . . an *acceptance* of a negotiated plea." A meeting between a prosecutor and a defense attorney to negotiate a plea is not a "proceeding" involving the "acceptance" of a plea, and therefore victims are conferred no right to attend the meeting. In light of the victim's right to be heard regarding any deal, however, it may well be the prosecutors would undertake such consultation at a mutually convenient time as a matter of prosecutorial discretion. This has been the experience of my state of Utah. While prosecutors are not required to consult with victims before entering plea agreements, many of them do. In serious cases such as homicides and rapes, Utah courts have also contributed to this trend by not infrequently asking prosecutors whether victims have been consulted about plea bargains. Again, it should be noted that victims are only given a voice in the plea bargaining process, not a veto. The judge is not required to follow the victims suggested course of action on the plea, but simply has more information on which to base such a determination.

The Crime Victims' Rights Amendment also extends the right to be heard to proceedings to determine a sentence. Defendants have the right to directly address the sentencing authority before sentence is imposed. The Crime Victims' Rights Amendment extends the same basic right to victims. Victims have found that making statements at sentencing brings a sense of healing and closure. For example, *America's Most Wanted* brought three sisters to Salt Lake City to speak in favor of Utah's Victims' Rights Amendment. They had all been abused by their step-father, who had been captured after his picture was aired on *America's Most Wanted*. At his sentencing, the sisters were able to make victim impact statements under the Illinois Victims' Rights Amendment. One of the daughter's explained that "when I read [the victim impact statement], it healed a part of me—to speak to [the defendant] and tell him how much he hurt me." Another daughter explained, "I believe that I was helped by the victim impact statement. I got to tell my step-father what he did to me. Now I can get on with my life. I don't understand why victims don't have the same rights as criminals, to say the one thing that might help heal them."

Victims can exercise their right to be heard in any appropriate fashion, including making an oral statement at court proceedings or submitting written information for the court's consideration.

The victims right to be heard under the Amendment is subject to limitations. A victim does not have the right to speak at proceedings other than those identified in the amendment. For example, the victims has no right to speak at the trial. Given the present construction of these proceedings, there is no realistic design for giving a victim an unqualified right to speak. At trial, however, victims will often be called as witnesses by the prosecution and, if so, they will testify as any other witness would. The victim has a right to be heard "if present." The victim is not given a right to force the government to make him present at the sentencing hearing (although, if present, the victim cannot be excluded, as explained in the previous section). This point has some salience in prison litigation. A victim who has been assaulted in prison may exercise his right to be heard by submitting a written statement to the court, but cannot demand to be released from custody so that he may be present. This avoids security problems and the cost of transportation to and from court proceedings while protecting prisoners' rights as crime victims.

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

Each victim . . . shall have the rights . . . to the foregoing rights at a parole proceeding that is not public to the extent those rights are afforded to the convicted offender

This provision extends rights to victims in parole hearings that are not open to the public. For all public parole hearings, victims will have the right to be notified, not excluded, and heard if present, as guaranteed in the previously discussed provisions of the Amendment. In those jurisdictions in which parole hearings that are not open to public, the Amendment simply adopts an equality model. The Amendment provides that, at such non-public hearings, the victim can attend and be heard if the convicted offender is afforded such rights. Phrased in this fashion, the Amendment avoids any complication to procedures in some jurisdictions that determine parole without ever holding any sort of "hearing." These jurisdictions are not required to modify their procedures, but simply to extend to victims whatever existing procedural rights (such as the right to submit a written statement) are currently extended to defendants.

Each victim . . . shall have the rights . . . to reasonable notice of a release or escape from custody relating to the crime

Defendants and convicted offenders who are released pose a special danger to their victims. An unconvicted defendant may threaten, or indeed carry out, violence to permanently silence the victim and prevent subsequent testimony. A convicted offender may attack the victim in a quest for revenge. Such dangers are particularly pronounced for victims of domestic violence and rape. For instance, Colleen McHugh obtained a restraining order against her former boyfriend Eric Boettcher on January 12, 1994. Authorities soon placed him in jail for violating that order. He later posted bail and tracked McHugh to a relative's apartment, where on January 20, 1994, he fatally shoot both Colleen McHugh and himself. No one had notified McHugh of Boettcher's release from custody.

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

Each victim . . . shall have the rights . . . to consideration for the interest of the victim in a trial free from unreasonable delay

This provision is designed to be the victims' analogue to the defendant's right to a "speedy trial" found in the Sixth Amendment. The defendant's right is designed, *inter alia*, "to minimize anxiety and concern accompanying public accusation" and "to limit the possibilities that long delay will impair the ability of an accused to defend himself." The interests underlying a speedy trial, however, are not confined to defendant. Indeed, the Supreme Court has acknowledged that "there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interest of the accused. The inability of courts to provide a prompt trial has contributed to a large backlog of cases in urban courts which, among other things, enable defendants to negotiate more effectively for pleas of guilty to lesser offenses and otherwise manipulate the system." The ironic result is that in many criminal courts today the defendant is the only person without an interest in a speedy trial. Delay often works unfairly to the defendant's advantage. Witnesses may become unavailable, their memories may fade, evidence may be lost, or the case may simply grow "stale" and receive a lower priority with the passage of time.

While victims and society as a whole have an interest in a speedy trial, the current constitutional structure provides no means for vindication of that right. Although the Supreme Court has acknowledged the "societal interest" in a speedy trial, it is widely accepted that "it is rather misleading to say . . . that this 'societal interest' is somehow part of the right. The fact of the matter is that the Bill of Rights does not speak of the rights and interest of the government." As a result, victims frequently face delays that by any measure must be regarded as unjustified and unreasonable, yet have no constitutional ability to challenge them. It is not a coincidence that these delays are found most commonly in cases of child sex assault. Children have the most difficulty in coping with extended delays. As an experienced victim-witness coordinator in my home state described the effects protracted litigation in a recent case, "The delays were a nightmare. Every time the counselors for the children would call and say we are back to step one. The frustration level was unbelievable." Victims cannot heal from the trauma of the crime until the trial is over and the matter has been concluded.

To avoid such unwarranted delays, the Crime Victims' Rights Amendment requires that courts give "consideration" to the victims' interest "in a trial free from unreasonable delay." A number of states have already established similar protections for victims. As the wording of the federal provision makes clear, the courts are not required to follow victims demands for scheduling trial, but rather to give fair consideration to the victims' views. Moreover, the courts are directed to insure not against all delay, but rather against "unreasonable" delay. In interpreting this provision, the court can look to the body of case law that already exists for resolving defendants' speedy trial claims. For example, in *Barker v. Wingo*, the United States Supreme Court set forth various factors that could be used to evaluate defendant's speedy trial challenges in the wake of a delay. As generally understood today, those factors are: (1) the length of the delay; (2) the reason for the delay; (3) whether and when the defendant asserted his speedy trial right; and (4) whether

the defendant was prejudiced by the delay. These kinds of factors could also be applied victims' claims. For example, the length of the delay and the reason to the delay (factors (1) and (2)) would remain relevant in assessing victims claims. Whether and when a victim asserted the right (factor (3)) would also be relevant, although due regard should be given to the difficulty that frequently unrepresented victims have in asserting their legal claims. Defendants are not deemed to have "waived" their right to a speedy trial simply through failing to assert it. Rather, the circumstances of the defendants' assertion of the right is given "strong evidentiary weight" in evaluating his claims. A similar approach would work for trial courts considering victims' motions. Finally, while victims are not "prejudiced" in precisely the same fashion as defendants (factor (4)), the Supreme Court has instructed that "prejudice" must be "assessed in the light of the interests of defendants which the speedy trial right was designed to protect," including the interest "to minimize anxiety and concern of the accused" and "to limit the possibility that the [defendant's presentation of his case] will be impair." The same sorts of considerations apply to victims and could be evaluated in assessing victims claims.

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

Each victim . . . shall have the rights . . . to an order of restitution from the convicted offender

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

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

While restitution is critically important, the Committee found that restitution orders were only sometimes entered and, in general, "much progress remains to be made in the area of victim restitution." Accordingly, restitution was made mandatory for crimes of violence in federal cases. Many states are moving in that direction.

The Crime Victims' Rights Amendment would operate in the same fashion as the MVRA. Courts would be required to enter "an order of restitution" against the "convicted offender." Thus, the offender would be legally obligated to make full restitution to the victim. However, it is of course not infrequently the case that offenders lack the means to make full restitution payments. Accordingly, the courts can establish an appropriate repayment schedule and enforce it during the period of time in which the offender is under the Court's jurisdiction. Moreover, the courts and

implementing statutes could provide that restitution orders be enforceable as any other civil judgment.

In further determining the contours of the victims' restitution right, there are well-established bodies of law that can be examined. Moreover, details can be further explicated in implementing legislation accompanying the amendment. For instance, in determining the compensable losses, an implementing statute might rely on the current federal statute, which includes among the compensable losses medical and psychiatric services, physical and occupational therapy and rehabilitation, lost income, funeral expenses in the case of homicide, and the costs of attending the trial.

Each victim . . . shall have the rights . . . to consideration for the safety of the victim in determining a release from custody

This provision guarantees that victims' safety will be considered by courts, parole boards, and other authorities in determining a discretionary release of an offender from custody. For example, in considering whether to release a suspect on bail, a court will be required to consider the victims' safety. This dovetails with the earlier-discussed provision giving victims a right to speak at proceedings to determine a "release from custody." Once again, it is important to emphasize that nothing in the provision gives the victim any sort of a veto over the release of a defendant (or, alternatively, any sort of prerogative to *require* the release of a defendant). To the contrary, to the provision establishes a requirement that fair "consideration" be given to such concerns in the process of determining release.

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

Each victim . . . shall have the rights . . . to reasonable notice of the rights established by this article

Rights for victims are of little value if victims remain unaware of them. This provision establishes that victims will receive "reasonable" notice of the rights. In many states, notice of crime victims' rights is accomplished by providing information in a computer generated form letter advising a victim that charges have been filed. That is, for example, the procedure followed in many prosecutors' offices in Utah. The letter will also often notify the victim about who may be called to obtain additional information or services.

As with other provisions in the amendment, the requirement here not an absolute one, requiring notice in all circumstances. Instead, the requirement is for "reasonable" notice, a term that will give appropriate latitude to those within the criminal justice system to respond to unforeseen or unforeseeable circumstances. It is instructive in this regard that the Fourth Amendment to the Constitution contains similar reasonableness standard in forbidding "unreasonable" searches and seizures. This flexible language has served the country well in allowing the courts to interpret the kinds of searches and seizures that are impermissible. As a leading constitutional scholar has recently explained, "The core of the Fourth Amendment . . . [is] reasonableness." This reasonableness approach is also appropriately employed in defining victims' rights.

Section 2

Only the victim or the victim's representative shall have standing to assert the rights established by this Article.

This language confers standing on victims to assert their rights. Standing is a critically important provision that must be read in connection with all of the other provisions in the amendment. Under Section 1, victims will have extensive constitutional rights; under Section 2, they will have "standing" to enforce those rights.

This provision rests at the heart of the Crime Victims' Rights Amendment. With the Amendment in place, no longer could court's conclude that victims lack standing to even be heard about their rights. In previous testimony, I have explained in some detail how standing has proven to be a barrier to enforcement of congressional conferred victims' rights in the Oklahoma City bombing case, so I will only briefly elaborate the point here. After victims of the bombing were denied their right under federal statute to attend a trial (because they would be "witnesses" at the death penalty impact phase of the proceedings), they sought review of the issue before the Tenth Circuit. The Court, however, concluded that they lacked standing under Article III of the United States Constitution to seek review of their claims. This forced Congress to respond by attempting to overrule the decision, which it did in the Crime Victims' Rights Clarification Act of 1997. Even that prompt response did not secure the right to attend the proceedings for all of the victims.

The Crime Victims' Rights Amendment would eliminate once and for all the difficulty that crime victims have in

being heard in court to protect *their* interests by conferring standing on the victim. Victim's "representative" can also be heard, permitting, for example, a parent to be heard on behalf of a child or a family member on behalf of a murder victim or a lawyer to be heard on behalf of a victim-client. The right is formulated in restrictive terms ("Only the victim . . . shall have standing . . .") to avoid the possibility that a defendant might somehow seek to take advantage of victims rights. This limitation prevents criminals from clothing themselves in the garb of a victim and claiming victims' rights. In Arizona, for example, the courts have allowed an unindicted co-conspirator to take advantage of a victims provision. Such a result is not permitted under the Crime Victims' Rights Amendment.

Nothing in this article shall provide grounds for the victim to challenge a charging decision or a conviction; to overturn a sentence or negotiated plea; to obtain a stay of trial; or to compel a new trial.

This language restricts the remedies that victims may employ to enforce their rights. At the outset, I must give my own personal view that I do not support such a restriction in these terms. At the same time, however, I understand how reasonable minds can differ on such questions.

The basic dilemma posed by enforcement of victims' rights is whether victims are allowed to appeal a previously entered court judgment and reverse it for non-compliance with victims' rights. If victims are given such power, the ability to enforce victims' rights increases while the finality of court judgments is concomitantly reduced. Depending on the weight one assigns to the competing concerns, different approaches seem desirable. Indeed, allowing the possibility of victim appeals of plea bargain could, it has been argued, even redound to the detriment of crime victims generally by making plea bargains less desirable to criminal defendants and forcing crime victims to undergo more trials.

The Crime Victims' Rights Amendment strikes a compromise approach to this problem. It provides that "Nothing in this article" shall provide a victim with grounds for overturning a sentence or a plea, to stay a trial, or compel a new trial. Before turning to the precise parameters of this language, it is important to note that such enforcement issues will hopefully be relatively rare in the wake of the passage of a federal constitutional amendment. After the passage of such an amendment, virtually every judge, prosecutor, defense attorney, court clerk, and crime victim in the country would know about victims rights and that they were constitutionally protected in our nation's fundamental charter. This is an "enforcement" power that, even by itself, goes far beyond anything found in existing victims provisions. The mere fact that rights are found in the United States Constitution gives great reason to expect that they will be followed. Confirming this view is the fact that the provisions of our Constitution — freedom of speech, freedom of the press, freedom of religion — are all generally honored even without a specific "enforcement" provision. The Crime Victims' Rights Amendment will eliminate what is perhaps the most common reason for failing to protect victims rights — simple ignorance about victims and their rights.

Similarly, the Crime Victims' Rights Amendment will eliminate the next most common reason for failing to protect victims rights: the misguided view that defendant's constitutional rights "trump" a victim's assertion of a right. In many of the litigated cases, victims rights have not been enforced because defendants have made vague, imprecise, and inaccurate claims about their federal constitutional "due process" rights being violated. Those claims would be unavailing after the passage of a federal amendment. For these reasons, the mere fact of passing a Crime Victims' Rights Amendment can be expected to bring a dramatic change to the way in which victims rights are enforced even were no enforcement actions to be brought by victims and their advocates. The remaining enforcement problems will be limited to the narrow subset of cases involving truly malevolent or badly misinformed actors in the criminal justice system

Turning now to the specific language in the Amendment, it does not bar all possibility of, for example, victims overturning a sentence or a plea as a means of enforcing the amendment. The provision is found in a section that reads "nothing *in this article* shall provide grounds . . . to overturn a sentence or negotiated plea." The phrase "in this article" means that the Crime Victims' Rights Amendment — the "article" in constitutional terms — by itself does not automatically create a right to overturn a sentence or a plea. This is a limitation on the power of the Supreme Court to craft, on its own authority, judicial remedies for overturning sentences and pleas. Congress and the states would remain free to pass implementing statutes allowing such overturning in the appropriate circumstances, because these statutes would not be found "in this article." In other words, the "no overturning" language simply removes this aspect of the

remedies question for the judicial branch and assigns it to the legislative branches in Congress and the states. Of course, it is in the legislative branch where the appropriate facts can be gathered and compromises struck to resolve which challenges, if any, are appropriate in that particular jurisdiction. Similarly, it should be noted that the language proscribes only certain victims' remedies, such as "overturning" a sentence. Accordingly, it would not bar remedies that fall such of overturning a sentence, such as merely modifying a sentence or remanding for a sentencing proceeding at which the victim would have an opportunity to make an impact statement. Similarly, the "no overturning" language is limited to pleas and sentences, not to other decisions such as parole.

Nothing in this article shall give rise to a claim for damages against the United States, a State, a political subdivision, or a public official.

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' rights requirements. Some states have authorized suits for such damages in limited circumstances. On the other hand, civil suits filed by victims against the state suffer from several disadvantages. First and foremost, in a time of limited state resources and pressing demands for state funds, the prospect of expensive awards to crime victims might reduce the prospects of ever passing a Crime Victims' Rights Amendment. A related point is that such suits might give the impression that crime victims seek financial gain rather than fundamental justice. Because of such concerns, a number of states have explicitly provided that their victims' rights amendments create no right to sue for damages. 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 by limiting the legislatively-authorized remedies to other-than-monetary damages.

The Crime Victims' Rights Amendment breaks no new ground but simply follows the prevailing view in denying the possibility of a claim for "damages" under the Amendment. For example, no claim could be filed for money damages under 18 U.S.C. § 1983 under the Amendment.

Because money damages are not allowed, what will enforce victims' rights? Of course, preliminarily it must be hoped that the need for lawsuits to enforce victims' 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 passing the federal constitutional amendment, the need for enforcement may be reduced considerably.

Beyond that hope, victims will be able to bring court actions to secure enforcement of their rights. For example, in the Oklahoma City bombing litigation, our procedural vehicle was a "writ of mandamus." Other possible relief might include injunctive relief. No doubt, some of these issues will be spelled out in implementing legislation. In my state of Utah, for example, the implementing statute to our state amendment provides for two kinds of suits. First, in situations where a state actor "willfully or wantonly fails to perform duties" covered by the Amendment or the Act, "an action for injunctive relief, including prospective injunctive relief, may be brought against the individual and the governmental entity that employs the individual." 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, victims may also bring an action for declaratory relief "defining the rights of victims and the obligations of government entities." For example, if a court denies a victim her right to be heard at a sentencing hearing, she can 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 ruling under the rules governing appellate actions. The rules for appellate actions make provision for emergency or extraordinary writs, which could be employed in situations where time is of the essence.

One obvious concern with the enforcement scheme is whether attorneys will be available for victims to assert their rights. No language in the Crime Victims' Rights Amendment provides a basis for arguing that victims are entitled to counsel at state expense. To help provide legal representation to victims, implementing statutes might authorize prosecutors to assert rights on behalf of victims. In Utah, for example, our statutes provides for such assertion, which has allowed prosecutors schooled in the nuances of criminal procedure to assist victims in protecting their rights.

Section 3

The Congress and the States shall have the power to implement and enforce this article within their respective jurisdictions by appropriate legislation, including the power to enact exceptions when necessary to achieve a compelling interest.

This language confers on Congress and the States the power to enforce the Crime Victims' Rights Amendment. Similar language is found in Section 5 of the Fourteenth Amendment, which provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." The Supreme Court has described Section 5 as "a positive grant of legislative power" to Congress. Similarly, the Court has defined Congress' section 5 power in the broad terms: "What legislation is appropriate, that is, adapted to carry out the objects the amendment[] . . . is brought within the domain of congressional power." The enforcement provision of the Crime Victims' Rights Amendment should be interpreted in a similar fashion to Section 5, with two distinctions.

First, the Crime Victims' Rights Amendment enforcement power rests not exclusively in the Congress, but rather in "[t]he Congress and the States . . . within their respective jurisdictions" This is a recognition that the criminal justice "system" around the country is in fact composed of various systems, both state and federal. The enforcement provision recognizes this federalist system by allowing Congress and the States the enforcement power within their respective jurisdictions.

Second, the "enforcement" power in the Crime Victims' Rights Amendment is somewhat broader than the power in Section 5, since the enforcement power includes not only the power to "enforce" but also the power to "implement." This language is necessitated by the Supreme Court's recent decision in *City of Boerne v. Flores*, which struck down the Religious Freedom Restoration Act of 1993. In that decision the Court described Congressional power to enforce the Fourteenth Amendment in rather crabbed terms. To avoid the possibility that the Court could strike down victims implementing legislation as beyond the power of Congress or the Courts, the Crime Victims' Rights Amendment specifically authorizes implementation. While this broadens Congressional and State power under the Amendment, it does not create power to establish constitutional rights. Congress and the states cannot use this power to modify *substantive* constitutional law. For example, Congress and the states could not, under the Crime Victims' Rights Amendment, claim to be "implementing" the Amendment by modifying any of the constitutional rights of criminal defendants.

The provision also gives Congress and the states the ability "enact exceptions when necessary to achieve a compelling interest." This provision is designed to respond to suggestions that have occasionally been made that, in some rare cases, it would be impossible to provide rights to crime victims. Those suggestions are rarely fleshed out in any tangible way; nor are they based on real world examples of difficulties in implementing state constitutional provisions protecting victims rights. Accordingly, my sense is that the ability to enact exceptions will prove to be a safeguard against purely imaginary dangers. Should such dangers materialize, however, the Amendment empowers Congress and the states to respond by enacting exceptions. Exceptions must serve a "compelling interest," a standard with which the courts are familiar.

Section 4

The rights established by this article shall apply to all proceedings that begin on or after the 180th day after ratification of this article.

This straightforward provision gives federal and state courts ample time to prepare to administer the new rights. The provision applies to "proceedings" that apply after 180 days, not crimes that are committed after 180 days. This raises no ex post facto concerns because the Crime Victims' Rights Amendment does not enlarge the criminal penalties to which defendants are subject. It is well established that "to fall within the ex post facto prohibition, a law must be retrospective -- that is 'it must apply to events occurring before its enactment' -- and it 'must disadvantage the offender affected by it' by altering the definition of criminal conduct or increasing the punishment for the crime." The only possible argument that ex post facto concerns are implicated is that the Crime Victims' Rights Amendment might increase the restitution orders to which defendants are subject. However, the restitution envisioned by the Amendment is not "punishment" of defendants, but rather compensation for victims, and thus raises no ex post facto issues.

Section 5

The rights established by this article shall apply in all Federal and State proceedings, including military proceedings to the extent that Congress may provide by law, juvenile justice proceedings, and proceedings in any district or territory of the United States not within a state.

This provision is a straightforward statement, which establishes the scope of the Amendment. Congress is given the power to apply the Amendment in the peculiar context of the military. The Amendment extends to all federal and state proceedings, including "territory of the United States not within a state," such as proceedings in territories.

Possible Additional Balancing Language

One issue that has been raised in connection with victims' rights is how they would affect defendants' rights. In previous testimony, I gave my view that real conflicts between victims and defendants' constitutional rights were largely imaginary. A recently published article supports this view, collecting the available research on this subject:

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

Given this real world experience, the claim that victims rights come at the expense of defendant's rights is empirically unsupported. Sometimes, however, the additional claim is made that a new federal victims' rights Amendment would somehow "trump" the rights of criminal defendants. The argument runs that, because the Crime Victims' Rights Amendment will be adopted more recently than provisions in the Bill of Rights, it will in essence "supersede" any conflicting provisions in the Bill of Rights.

This interpretation seems stained to me. But because this does seem to be a concern of some fair minded persons, it might be useful to put the matter to rest entirely. Accomplishing this goal poses no insurmountable problem. As Harvard Law Professor Laurence Tribe has written in supporting a victims' rights amendment:

Any constitutional amendment in this field must be written so that courts will retain ultimate responsibility for harmonizing, or balancing, the potentially conflicting rights of all participants in any given case. But assuring that this fine-tuning of conflicting rights remains a task for the judiciary should not be too difficult. What is difficult, and perhaps impossible, is assuring that, under the existing system of rights and rules, the constitutional rights of victims — rights that the Framers of the Constitution undoubtedly assumed would receive fuller protection than has proven to be the case -- will not instead receive short shrift.

Language ensuring that rights would be appropriately balance could something along the following lines:

"In cases of conflict, the rights of the accused or convicted offender and the victim shall be reasonably balanced."

This would simply codify what I assume would be the outcome without any such language. Courts today are used to balancing constitutional rights. For instance, courts have developed approaches to resolving conflicts between a defendant's right to a fair trial and the public's right to freedom of the press in ways that appropriately handle all legitimate concerns. Codified balancing language would continue this venerable tradition.

III. An Illustration of the Crime Victims' Rights Amendment in Action:

The Oklahoma City Bombing Case

Having described the various provisions of the Crime Victims' Rights amendment, I would like to give one concrete example of how the Amendment would make a difference to crime victims and how even federal statutes are insufficient to protect the rights of crime victims. I have recently had opportunity to represent several victims of the Oklahoma City bombing to secure their rights. In one action, I represented them in an effort to protect their rights to make a statement at the sentencing of convicted defendant Timothy McVeigh and Terry Nichols. In 1994, Congress gave victims of crimes of violence the right to participate in the sentencing of defendants. Rule 32(c)(3)(E) provides that the district court *must* allow victims of crimes of violence to speak -- or, as it is more formally known, "allocute" — at sentencing and present information in relation to the sentence. Other provisions of Rule 32 and federal law also affirm the right of victims to participate in sentencing-related matters.

When Timothy McVeigh was sentenced, the district court afforded him and his counsel an opportunity to speak at sentencing, but neglected to ask if any victims were present and wished to speak, as required by Rule 32(c)(3)(E). The same violation of the victims' rights appeared to also be about to unfold in the Nichols sentencing. At a hearing regarding the procedures for defendant Nichols' sentencing, however, the Court tentatively determined that it would not hear from Nichols' victims at all, stating:

Now, there has been a procedure followed in this district for presentence reports, *but I'm going to modify it with respect to it as to that part of the report that deals with victim impact statements*, and so forth. *I believe that that's been satisfied. I've been in the courtroom during the testimony here.* But, of course, all of this is subject to interpretation by counsel and their views of it.

* * *

[U]ltimately, there will be a sentence hearing, of course.

* * *

And the sentence hearing will undoubtedly consist of the legal issues that are involved, perhaps some factual questions that may be involved in the application of the guideline, *[and] will also involve the right of allocation, the opportunity for exercising the right of allocation by the defendant personally, and, of course, statements from counsel.* So it can be, you know, a hearing that could be in multiple parts. I don't know. It may be something where we want to do . . . it in segments, even, and consider the legal issues separate than from whatever may be necessary for the other aspects of it.

What is astonishing about this transcript is that it reveals that, even in the most highly watched federal criminal case in the country, the court felt free to dispense with Congressionally required victims procedures that guarantee victims the right to speak.

On behalf of two of the victims of the Oklahoma City bombing, my co-counsel and I filed a motion asking the court to reconsider its tentative ruling and recognize the right of victims to speak. On April 19, 1995, Marsha Kight lost her twenty-three year old daughter, Franki Ann Merrell, as the result of Terry Nichols' conspiring to use a weapon of mass destruction at the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma. Ms. Kight learned of the bombing when she turned on her television after hearing a thunderous explosion. Although Ms. Kight knew that her daughter was in the Murrah Building at the time of the bombing, nearly five days passed before she learned for certain that Franki Ann had died, leaving Ms. Kight's two year old granddaughter motherless. Martin Cash was on the fifth floor of the Murrah Building at the time of the bombing. The bomb explosion destroyed Mr. Cash's left eye, opened a large hole in his cranium, severed ligaments in his left wrist, and lacerated many parts of his body. Mr. Cash is scheduled to undergo surgery in April 1998 to have more Murrah Building shrapnel removed from his body.

The motion we filed on behalf of Ms. Kight and Mr. Cash was joined by the government in a later pleading and opposed by Terry Nichols. Judge Matsch convened a hearing and ultimately agreed with our position, allowing the victims to speak.

Although Judge Matsch ultimately granted our motion, the lesson to be drawn from this episode is not that statutes work. To the contrary, the lesson is clearly that statutes are unsuccessful. Judge Matsch's ruling did nothing to remedy the fact that the victims were denied the right to allocute at Timothy McVeigh's sentencing. Moreover, Judge Matsch's ruling was prompted by the aggressive legal response, involving five attorneys in three states filing a court challenge. If the violation of the victims' right had occurred in a day-to-day criminal case, it is highly unlikely that such a response would have been possible. On the other hand, if the Crime Victims' Rights Amendment had been in place, then there can be little doubt that the court would have been aware of the victims right "to be heard" and certainly the likelihood that their rights would have been respected would have been much greater.

One other lesson to be drawn from the Oklahoma City bombing case is that victims rights are not unduly burdensome on the system. While 168 persons were killed in the bombing, not all of their families wished to exercise their rights to allocute. Instead, about 50 family members were called as death penalty impact witnesses during the two trials and another dozen or so plan to speak at the Nichols sentencing. If victims rights do not overwhelm the system in the largest mass murder in the nation's history, then they would not overwhelm the system in other more routine cases.

One other statute that appears to have been violated in the Oklahoma City case is the recently-passed Mandatory Victims' Rights Act. This statute has been discussed earlier and requires courts to enter an order of restitution in all cases of violent crime. Yet no such order was entered against Timothy McVeigh. This is a matter of concern, not because McVeigh has any tremendous current assets, but rather because it is possible that he could obtain assets in the future by selling his story. Unfortunate though it may be, however, recent history teaches that the celebrity status of notorious criminals has significant commercial value. Tabloids, television programs, movie makers and publishing houses have paid criminals millions of dollars for interviews, movie rights and book contracts.

Perhaps the best known recent example of a criminal profiting from his celebrity is Salvatore "Sammy the Bull" Gravano, a senior deputy in the Gambino mob syndicate who acknowledged responsibility for 19 killings and served five years in prison as part of a plea agreement. Mr. Gravano testified under oath in court that he received a \$250,000 advance for his bestselling book about his crimes and expects to earn \$1 million or more from a movie deal. Indeed, so great is the American public's fascination with the celebrated criminal, that even the artwork of notorious criminals may have considerable commercial value. Mass murderer John Wayne Gacy reportedly received approximately \$141,000 for his paintings of clowns, and voodoo dolls woven by mass murderer Charles Manson are sold for \$2,000 or more. One art dealer reportedly specializes in the work of serial killers. Simply stated, notorious criminals stand to make money after their conviction merely by trading on their notoriety.

Co-conspirators Timothy McVeigh and Terry Nichols are perhaps the most notorious American criminals of the decade. Their names and faces are in the newspapers and on television on a routine basis. America continues to be fascinated by the Oklahoma City bombing, the most deadly terrorist act in American history. It is by no means farfetched to believe that these defendants could thus profit from their crimes by cashing in on their celebrity status. In fact, defendant Nichols' counsel recognized during the Nichols trial that those involved even at the fringes of the bombing conspiracy have the potential to earn multi-million dollar windfalls. In cross-examining Michael Fortier, who pled guilty to offenses in connection with the bombing, Mr. Tigar asked:

Q. Mr. Fortier, you have had an opportunity, have you not, to review the tape recordings that were made of the microphones that were placed in your home and the tap on your phone?

A. Yes, I have.

Q. And would you agree with me, sir, that beginning on the 25th of April, you began to talk about the possibilities that might exist to you to sell your story to the media?

A. Yes.

...

Q. You thought your story was worth something, didn't you, sir?

A. I imagine it was to the -- the media.

MR. TIGAR: Could we have B1, please.

(Defendant's Exhibit B1 played.)

BY MR. TIGAR:

Q. That's you saying, "I was thinking one cool one"; is that right?

A. Yes, sir. That's me.

Q. And that meant you were thinking of a million?

A. Yes. That's what I was referring to.

Q. And then did you also think about after the trial, doing book and movie rights?

A. That is something that was discussed.

MR. TIGAR: May we have B2, please, April 30, 1995.

(Defendant's Exhibit B2 played.)

BY MR. TIGAR:

Q. Talking about something that's worth The Enquirer? Is that what we heard?

A. I believe that's what I said.

...

Q. Now, you also talked in May with your friend Lonnie Hubbard about the possibility of a made-for-TV movie; is that correct?

A. That is possible. I don't recall that.

McVeigh, of course, has far more potential to profit from his crime than Michael Fortier. Yet in spite of that potential, no restitution order was entered against him at his sentencing. We have recently filed a motion seeking compliance with the Mandatory Victims Restitution Act in the Nichols case, urging a court to enter a restitution order because of Nichols' income potential. While our motion is currently pending, once again the lesson to be drawn is the federal statutes protecting victims, even though crafted in "mandatory" terms, will not guarantee the full vindication of victims' rights. Far better would be the Crime Victims' Rights Amendment, guaranteeing victims the entry of an "order of restitution."

Conclusion

These two illustrations from the Oklahoma City bombing case are in no sense intended to be the worst examples or comprehensive examples. Instead, they are designed to serve as some small illustrations of the problems that victims face in seeking vindication of their rights under the current patchwork regime. This illustrates a more general point about the difficulty of protecting rights for victims in ways short of a federal constitutional amendment, as I discussed at the beginning of my testimony.

The United States Supreme Court has recognized that "in the administration of criminal justice, courts may not ignore the concerns of victims." 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, both here and in other testimony, suggest substantial justification for frustration with the current patchwork of protections outside the Constitution.

Something more simply must be done. Congress should approve the carefully crafted current version of the Victims' Rights Amendment and send it on its way to the states for ratification. Our criminal justice system already provides ample rights for the accused and the guilty; it can — and should — do the same for the innocent.

Attachment A - Biography

I am a Professor of Law at the University of Utah College of Law, where I teach criminal procedure among other subjects. Next year, I will teach a course devoted exclusively to the rights of crime victims. I have written and lectured on the subjects of crime victims rights. *See, e.g.,* 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. I serve on the executive board of the National Victim Constitutional Amendment Network, an organization devoted to bringing constitutional protection to crime victims across the country.

I am 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 and obtain passage of the Utah Victims Rights Amendment. I have also represented crime victims in legal actions to enforce their rights, including several actions on behalf of the victims of the Oklahoma City bombing, as discussed in more detail in my testimony.

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. I graduated from Stanford Law School in 1984, after serving as President of the *Stanford Law Review*.