

## **The Crime Victims' Rights Amendment and Two Good and Perfect Things**

**by Steven J. Twist**

Every good and perfect thing carries within it the seeds of its own destruction through an excess of its virtue.  
Seneca

At the soul of America's justice system lie two "good and perfect" things: the principle that procedural and substantive rights of the accused must be preserved and protected as a proper restraint on the power of the state to infringe individual rights to life and liberty; and the practice of public prosecution, based on the sense that when a crime occurs, while it surely involves harm to a victim, it also represents an offense against the state, the body politic, that tears at the fabric of our peace and community and hence creates a harm that is greater than simply the harm to the victim involved.

These two "good and perfect things" have served America well. The first respects each individual as an end, as "created equal, [and] endowed by their Creator with certain unalienable Rights [to] Life, Liberty and the pursuit of Happiness."<sup>1</sup> Rights of habeas corpus<sup>2</sup>, a speedy and public<sup>3</sup> jury<sup>4</sup> trial, to know the nature and cause of the accusation<sup>5</sup>, to confront adverse witnesses<sup>6</sup> and have compulsory process<sup>7</sup>, to counsel<sup>8</sup>, due process<sup>9</sup> and equal protection<sup>10</sup>, and rights against unreasonable searches and seizures<sup>11</sup>, double jeopardy<sup>12</sup>, self incrimination,<sup>13</sup> excessive bail or fines<sup>14</sup>, cruel and unusual punishments<sup>15</sup>, bills of attainder<sup>16</sup> and ex post facto laws<sup>17</sup>, these rights form a zone of protection around the law abiding, as well as the lawless, and serve to deter the abuses of government power with which the history of the world is all too familiar.

These fundamental rights<sup>18</sup> formed the core of the essential fairness shown to accused and convicted criminals that became, and rightly so, a hallmark of our civilization. And through the course of history, while certainly not always faithful to them, we have seen their inexorable expansion even as we have seen repeated sacrifices at their altar. And so Justice Cardozo could write in 1934:

The law, as we have seen, is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend. Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof.<sup>19</sup>

And indeed there have been many times in the history of our country when the "pressure of incriminating proof" has been "crushing," yet the criminal has been freed so that the "fundamental privileges" of the law-abiding could be preserved.<sup>20</sup>

The second "good and perfect thing" springs not from the rights of the individual so much as from the rights of the community. Private prosecutions, whereby the victim or the victim's relatives or friends, brought and prosecuted criminal charges against the accused wrongdoer, were the norm in the American justice system at the time of the colonial revolution and the drafting of the Constitution.<sup>21</sup> The origin of private prosecution has been traced to early English common law, but even today the civilized British retain the right privately to bring criminal charges.<sup>22</sup>

In America, however, while some vestiges of private prosecutions continue to this day<sup>23</sup> there was a "meteoric rise of public prosecutions"<sup>24</sup> and the office of public prosecutor grew in stature. The origin of the office remains an "historical enigma,"<sup>25</sup> but it certainly is consistent with the views that we often express about the nature of crime and its assault on the social compact. Former Chief Justice Weintraub, of the New Jersey Supreme Court, expressed a classic formulation of these views in 1971:

The first right of the individual is to be protected from attack. That is why we have government, as the preamble to the Federal Constitution plainly says. In the words of *Chicago v. Sturges*, 222 U. S. 313, 322, 32 S. Ct. 92, 93, 56 L. Ed. 215, 220 (1911):

Primarily, governments exist for the maintenance of social order. Hence it is that the obligation of the government to protect life, liberty, and property against the conduct of the indifferent, the careless, and the evil-minded, may be regarded as lying at the very foundation of the social compact.<sup>26</sup>

To protect the social compact, government assumed the burden of maintaining the social order and marshaled for itself the powers of state to achieve its end. A virtuous goal. A “good and perfect thing.”

But are there in these two good and perfect things “seeds of destruction”? I suspect so, and to preserve the essential goodness of them, I believe we must seek ways to temper the excesses of that virtue.

In combination, these two ideas, the centrality of both defendants’ rights and state power, have been responsible for diminishing the role of the victim to that of just another witness for the state; just another piece of the evidence. In focusing on the centrality of the rights of the accused we have forgotten about the rights of the accuser. In stressing the centrality of the state, we have neglected the pain of the injured. We do these things at our own peril. For a justice system that abandons the innocent loses moral authority and will soon lose the confidence of those it is meant to serve.

Chief Justice Weintraub’s opinion in *Bisaccia* was highly critical of *Mapp*’s exclusionary rule,<sup>27</sup> but in expressing his criticism, he had an insight that stretched beyond merely the Fourth Amendment to the core of the principle of state centrality when, after noting the passage from the U.S. Supreme Court about the primary function of government, he wrote, “When the truth is suppressed and the criminal set free, the pain of suppression is felt, not by the inanimate state or by some penitent policeman, but by the offender’s next victims for whose protection we hold office.”<sup>28</sup> Here, in a few short words, is the sum of the “excess virtue” of the principle of state centrality. It goes too far when it ignores the pain of its victims.

Justice Cardozo saw the dark horizon of the principle of the centrality of defendants’ rights almost 65 years ago when he continued after the passage just quoted above: “But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep a true balance.”<sup>29</sup>

Here also, stated succinctly, is the sum of the “excess virtue” of the principle of the centrality of defendants’ rights. A justice system which affords its only rights to accused and convicted offenders, but preserves and protects none for its crime victims, has lost its essential balance. It is a system which continues to lose the confidence of the public and its claim to respect.

The idea of a federal Constitutional Amendment for Victims’ Rights has a pedigree born of these same considerations. In 1982, the President’s Task Force on Victims of Crime identified the need for a constitutional amendment in similar terms:

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

The guiding principles that provide the focus for constitutional liberties is that government must be restrained from trampling the rights of the individual citizen. The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed. To that end it is the recommendation of this Task Force that the Sixth Amendment to the Constitution be augmented.<sup>30</sup>

The Crime Victims’ Rights Amendment, as passed by the Senate Judiciary Committee,<sup>31</sup> is a modest

proposal that embodies these goals and will preserve for victims a reasonable, but not intrusive, role in the matter of their case, and protect minimal rights to fair treatment. The rights it proposes may be grouped into two general categories: procedural and substantive.

In the procedural category, the Amendment includes the rights:

1. to reasonable notice of any public proceedings relating to the crime;
2. to not be excluded from any public proceedings relating to the crime;
3. to be heard, if present, at all public proceedings to determine a conditional release from custody;
4. to submit a statement at all public proceedings to determine a release from custody;
5. to be heard, if present, at all public proceedings to determine an acceptance of a negotiated plea;
6. to submit a statement at all public proceedings to determine an acceptance of a negotiated plea;
7. to be heard, if present at all public proceedings to determine a sentence;
8. to submit a statement at all public proceedings to determine a sentence;
9. to reasonable notice of a parole proceeding that is not public, to the extent those rights are afforded to the convicted offender;
10. to not be excluded from a parole proceeding that is not public, to the extent those rights are afforded to the convicted offender;
11. to be heard, if present at a parole proceeding that is not public, to the extent those rights are afforded to the convicted offender;
12. to submit a statement at a parole proceeding that is not public, to the extent those rights are afforded to the convicted offender;
13. to reasonable notice of a release from custody relating to the crime;
14. to reasonable notice of escape from custody relating to the crime;
15. to reasonable notice of the rights established by this article; and
16. to standing to assert the rights established by this article.

In the substantive category, the Amendment includes the rights:

17. to consideration for the interest of the victim in a trial free from unreasonable delay;
18. to an order of restitution from the convicted offender; and
19. to consideration for the safety of the victim in determining any release from custody.

These rights are hardly radical, and are reflected in state laws around the country.<sup>32</sup> Yet it is important to underscore why these rights are vital to victims. The right to be “informed” of proceedings is fundamental to the notions of fairness and due process that ought to be at the center of any criminal justice process. Victims have a legitimate interest in knowing what is happening to “their” case, and such information can sometimes allay a victim’s fears about the whereabouts of a suspect or defendant.<sup>33</sup> On the other hand, holding criminal justice hearings without notifying victims can have devastating effects. For example, the Director of Parents Against Murdered Children

recently testified at a Senate Hearing that many of the concerns of the family members she works with “arise from not being informed about the progress of the case. . . . [V]ictims are not informed about when a case is going to court or whether the defendant will receive a plea bargain.”<sup>34</sup> What is most striking about this testimony is that it comes on the heels of a concerted efforts by the victims’ movement to obtain notice of hearings. In 1982, the President’s Task Force on Victims of Crime recommended that victims be kept apprised of criminal justice proceedings.<sup>35</sup> Since then many state provisions have been passed requiring that victims be notified of court hearings.<sup>36</sup> But those efforts have not been fully successful. As the Department of Justice recently reported:

While the majority of states mandate advance notice to crime victims of criminal proceedings and pretrial release, many have not implemented mechanisms to make such notice a reality . . . . Victims also complain that prosecutors do not inform them of plea agreements, the method used for disposition in the overwhelming majority of cases in the United States criminal justice system.”<sup>37</sup>

The Victims Rights Amendment will also guarantee that victims have the right to attend court proceedings. This also builds on the recommendations for the President’s Task on Victims of Crime, which concluded that victims “no less than the defendant, have a legitimate interest in the fair adjudication of the case, and should therefore, as an exception to the general rule provided for the exclusion of witnesses, be permitted to be present for the entire trial.”<sup>38</sup> Allowing victims to attend trials has a variety of benefits for victims.<sup>39</sup> The victim’s presence may help to heal the psychological wounds from the crime.<sup>40</sup> Giving victims the right to be present also helps them to reassert control over their own lives, a dignity that criminals have often impaired by the criminal act.<sup>41</sup> Victims can even further the truth-finding process “by alerting prosecutors to misrepresentations in the testimony of other witnesses.”<sup>42</sup> While some have argued that a victim’s exclusion is needed to avoid the possibility of tailored testimony,<sup>43</sup> this concern can be addressed in other ways such as having the victim testify first or relying on pre-trial statements to police officers or the grand jury. After several hearings on the Victims Rights Amendment, the Senate Judiciary Committee recently concluded that there is “no convincing evidence that a general policy [of] excluding victims from courtrooms is necessary to ensure a fair trial.”<sup>44</sup>

Victims also should be given the right to be heard at appropriate points in the criminal justice process. The Victims Rights Amendment does not propose to make victims “co-equal parties in the criminal justice process”<sup>45</sup> free to speak whenever they wish. Instead, the proposed Amendment extends victims the right to be heard where they have useful information to provide. One such point is a hearing to determine whether to accept plea bargains. As Professor Beloof has explained in his excellent casebook on victims’ rights:

The victim’s interest in participating in the plea bargaining process are many. The fact that they are consulted and listened to provides 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 which need to be discussed with the prosecutor. . . . The victim may have a particular view of what . . . sentence [is] appropriate under the circumstances. . . . Similarly, because judges act in the public interest when they decide to accept or reject a plea bargain, the victim is an additional source of information for the court.<sup>46</sup>

Victims also deserve to be heard at bail hearings. By informing courts of the risks posed by criminal defendant, victims allow judges to reach appropriate decisions on pretrial release. This is not to say that victims should be able to dictate to judges whether and on what terms a defendant should be release. But it is to say that victims should have, while not a veto, at least a voice in the process. The failure of the system to hear from victims of crime at this stage has sometimes lead to tragic consequences from release decisions, consequences that might well have been averted if the judge had heard from the affected victims.<sup>47</sup> Finally, victims should be heard before a judge imposes sentence. This furthers fundamental due process, for “[w]hen the court hears, as it may, from the defendant, his lawyer, his family and friends, his minister, and others, simple fairness dictates that the person who has borne the brunt of the defendant’s crime be allowed to speak.”<sup>48</sup> While all states now recognize some form of a victim’s right to be heard at sentencing, shortfalls remain.<sup>49</sup> A federal constitutional amendment would clearly vindicate a victim’s right to be heard in all these areas.

Victims also should be given the right to be notified whenever a defendant or a convicted offender is

released or escapes. Without such notice, victims are placed at grave risk of harm. As the Department of Justice recently explained, “Around the country, there are a large number of documented cases of women and children being killed by defendants and convicted offenders recently released from jail or prison. In many cases, the victims were unable to take precautions to save their lives because they had not been notified of the release.”<sup>50</sup> The risk of attack is particularly serious in cases involving domestic violence.<sup>51</sup> By providing victims with a right to “reasonable notice,” the constitutional amendment would help alert such victims to potential dangers.

Victims should also be given a right to a trial “free from unreasonable delay.” In today’s criminal justice system, defendants are often able to prolong the start of trials for no good reason. Let me make plain that I am not speaking here of delays for legitimate reasons. But there can be no doubt that in a number of cases defendants have sought — and obtained — delay for delay’s sake. The Senate Judiciary Committee recently concluded that “efforts by defendants to unreasonably delay proceedings are frequently granted, even in the face of State constitutional amendments and statutes requiring otherwise.”<sup>52</sup> Such practices should be eliminated by plainly recognizing a victim’s interest in a trial brought to a conclusion without “unreasonable delay.” This right does not conflict with defendants’ rights; defendants have, of course, long enjoyed their own right to a “speedy trial.”<sup>53</sup>

Similar arguments could be offered in support of all of the other provisions of the Amendment, but I will not tarry any longer on the subject here. Indeed, it is interesting to observe that even the Amendment’s most ardent critics usually say they support most of the rights in principle. If there is one thing certain in the victims’ rights debate, it is that these words, “I’m all for victims’ rights but . . .,” are heard repeatedly.<sup>54</sup> But while supporting the rights “in principle,” opponents in practice end up supporting, if anything, mere statutory fixes that have proven inadequate to the task of vindicating the interests of victims. As Attorney General Reno testified before the House Committee on the Judiciary, “. . . efforts to secure victims’ rights through means other than a constitutional amendment have proved less than fully adequate.”<sup>55</sup> The best federal statutes have proven inadequate to the needs of even highly publicized victim injustices, as Professor Cassell’s writing about the plight of the Oklahoma City bombing victims has ably demonstrated.<sup>56</sup> In my state, the statutes were inadequate to change the justice system. And now, despite its successes, we realize that our state constitutional amendment will also prove inadequate to fully implement victims’ rights. While the amendment has improved the treatment of victims, it does not provide the unequivocal command that is needed to completely change old ways. In our state, as in others, the existing rights too often “fail to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indifference, sheer inertia or the mere mention of an accused’s rights -- even when those rights are not genuinely threatened.”<sup>57</sup> The experience in my state is, sadly, hardly unique. A recent study by the National Institute of Justice found that “even in States where victims’ rights were protected strongly by law, many victims were not notified about key hearings and proceedings, many were not given the opportunity to be heard, and few received restitution.”<sup>58</sup> The victims most likely to be affected by the current haphazard implementation are, perhaps not surprisingly, racial minorities.<sup>59</sup>

The precise reasons that victims fail to be afforded all their rights today are complex. Some of the other participants in this symposium have ventured their attempts at explanations,<sup>60</sup> and others have offered their ideas elsewhere.<sup>61</sup> There is much wisdom in the problems they have identified, and I only want to add that part of the problem is due to perceived conflicts between victims’ rights and defendant’s rights. Our courts have already stated the obvious, that “the Supremacy Clause requires that the Due Process Clause of the U.S. Constitution prevail over state constitutional provisions.”<sup>62</sup> Of course victims’ rights advocates do not seek to diminish the constitutional rights of those accused of offenses, and nothing in the proposed Victims Rights Amendment would do so. Even a cursory review of the rights proposed must lead one to the conclusion, as Professor Tribe has concluded, that “no actual constitutional rights of the accused or of anyone else would be violated by respecting the rights of victims in the manner requested.”<sup>63</sup> But without parity in the Constitution, crime victims will always be second-class citizens and their rights will never be accorded the respect and protection they would and should otherwise receive. They will simply be left out of our “adversary” system.<sup>64</sup> Thus, it is the consensus view of victims’ advocates recently assembled by the Department of Justice that “[a] victims’ rights constitutional amendment is the only legal measure strong enough to rectify the current inconsistencies in victims’ rights law that vary significantly from jurisdiction to jurisdiction on the state and federal levels. Such an amendment would ensure that rights for victims are on the same level as the fundamental right of accused and convicted offenders. Most supporters believe that it is the only legal measure strong enough to ensure that the rights of victims are fully enforced across the country.”<sup>65</sup>

The criminal justice system we have evolved since our founding is now simply inadequate to meet the needs of the whole people. It has come to be respectful, perhaps more than ever, of the rights of those accused or convicted of crimes. It serves the interests of the professionals in the system fairly well: the judges, lawyers, and police, probation, and jail officers. But it does not serve the whole of the people well because it forgets the victim.

When James Madison took to the floor and proposed the Bill of Rights during the first session of the First Congress, on June 8, 1789, “his primary objective was to keep the Constitution intact, to save it from the radical amendments others had proposed . . . .”<sup>66</sup> In doing so he acknowledged that many Americans did not yet support the Constitution.

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

The fact is, Madison said, there is still “a great number” of the American people who are dissatisfied and insecure under the new Constitution. So, “if there are amendments desired of such a nature as will not injure the constitution, and they can be ingrafted so as to give satisfaction to the doubting part of our fellow-citizens,” why not, in the spirit of “deference and concession,” adopt such amendments?<sup>67</sup>

Madison adopted this tone of “deference and concession” because he realized that the Constitution must be the “will of all of us, not just a majority of us.”<sup>68</sup> By adopting a bill of rights, Madison thought, the Constitution would live up to this purpose. He also recognized how the Constitution was the only document which could likely command this kind of influence over the culture of the country. Our goals are perfectly consistent with the goals that animated James Madison. There is a view in the land that the Constitution today does not serve the interests of the whole people in matters relating to criminal justice. And the way to restore balance to the system, in ways that become part of our culture, is to amend our fundamental law.

[The Bill of Rights will] have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community . . . [they] acquire, by degrees, the character of fundamental maxims. . . as they become incorporated with the national sentiment . . . .<sup>69</sup>

Critics of Madison’s proposed amendments claimed they were unnecessary, especially so in the United States, because states had bills of rights. Madison responded with the observation that “not all states have bills of rights, and some of those that do have inadequate and even ‘absolutely improper’ ones.”<sup>70</sup> Our experience in the victims’ rights movement is no different.

Professor Tribe has observed this failure : “ . . . there appears to be a considerable body of evidence showing that, even where statutory or regulatory or judge-made rules exist to protect the participatory rights of victims, such rights often tend to be honored in the breach . . . .”<sup>71</sup> As a consequence he has concluded that crime victims’ rights “are the very kinds of rights with which our Constitution is typically concerned.”<sup>72</sup>

After years of struggle, we now know that the only way to make respect for the rights of crime victims “incorporated with the national sentiment,” is to make them a part of “the sovereign instrument of the whole people,” the Constitution. The moment for constitutional rights for crime victims, properly understood, is neither an attack on the rights of defendants, nor on the power of public prosecutors, but rather is a movement to save these two good and perfect things in the American justice system by tempering their excessive virtue with true balance. Indeed the amendment just might save the very things its critics fear it will destroy.