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CRIME VICTIMS' RIGHTS CONSTITUTIONAL AMENDMENT

APRIL 4, 2000.—Ordered to be printed

Mr. HATCH, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S.J. Res. 3]

The Committee on the Judiciary, to which was referred the joint resolution (S.J. Res. 3) to propose an amendment to the Constitution of the United States to protect the rights of crime victims, having considered the same, reports favorably thereon, with an amendment, and recommends that the joint resolution, as amended, do pass.

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I. PURPOSE

The Crime Victims' Rights Constitutional Amendment is intended to restore and preserve, as a matter of right for the victims of violent crimes, the practice of victim participation in the admin-

istration of criminal justice that was the birthright of every American at the founding of our Nation.

At the birth of this Republic, victims could participate in the criminal justice process by initiating their own private prosecutions. It was decades after the ratification of the Constitution and the Bill of Rights that the offices of the public police and the public prosecutor would be instituted, and decades beyond that before the victim's role was fully reduced from that of the moving party in every criminal prosecution, to that of a party of interest in the proceedings, to that of mere witness, stripped even of membership in "the public" under the constitutional meaning of "a public trial."

Much, of course, was gained in the transformation of criminal justice from one of private investigation and prosecution to an enterprise of government. The overall community's stake in how the system operated was recognized; the policies governing the system, the public servants hired by the system, and the resources needed by the system all became accountable to the democratic institutions of government. In many ways, crime victims themselves benefited from the change. They had the aid of public law enforcement, which was more skilled than the average victim in investigating the crime, and the aid of public prosecutors, who were more skilled than the average victim in pleading their case in court. No longer would the wealth of the violated party be a significant determinant as to whether justice was done.

However, in the evolution of the Nation's justice system, something ineffable has been lost, evidenced in this plea of a witness speaking to the 1982 President's Task Force on Victims of Crime: "Why didn't anyone consult me? I was the one who was kidnaped—not the state of Virginia."

One of the most extraordinary aspects of the several hearings the Committee has held on this issue is the broad consensus among proponents and opponents alike that violent crime victims have a deep, innate, and wholly legitimate interest in the cases that victims bring to the justice system for resolution. It is beyond serious question that for many or most crime victims the prosecution and punishment of their violators are the most important public proceedings of their lifetimes.

This, then, is the purpose of the Crime Victims' Rights Amendment: That we make it part of our highest law to honor the humanity and dignity of crime victims within our borders who entrust the Government to seek justice for them. In pursuit of this purpose, the Committee seeks to strengthen the great theme of the Bill of Rights—to ensure the rights of citizens against the deprecations and intrusions of government—and to advance the great theme of the later amendments, extending the participatory rights of American citizens in the affairs of government.

II. Background and Legislative History

For more than 15 years, a Federal Crime Victims' Rights Amendment has been under consideration in this country. The idea dates back to at least 1982, when the Presidential Task Force on Victims of Crime convened by President Reagan recommended, after hearings held around the country and careful consideration of the issue, that the only way to fully protect crime victims' rights was by add-

ing such rights to the Constitution. The President's task force explained the need for a constitutional amendment in these terms:

> In applying and interpreting the vital guarantees that protect all citizens, the criminal justice system has lost an essential balance. It should be clearly understood that this Task Force wishes in no way to vitiate the safeguards that shelter anyone accused of crime; but it must be urged with equal vigor that the system has deprived the innocent, the honest, and the helpless of its protection.
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> The guiding principle that provides the focus for constitutional liberties is that government must be restrained from trampling the rights of the individual citizen. The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed. To that end it is the recommendation of this Task Force that the sixth amendment to the Constitution be augmented.

President's Task Force on Victims of Crime, "Final Report," 114 (1982).

Following that recommendation, proponents of crime victims' rights decided to seek constitutional protection in the States initially before undertaking an effort to obtain a Federal constitutional amendment. See Paul G. Cassell, "Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment," Utah L. Rev. 1373, 1381–83 (1994) (recounting the history of crime victims' rights). As explained in testimony before the Committee, "[t]he 'states-first' approach drew the support of many victim advocates. Adopting state amendments for victim rights would make good use of the 'great laboratory of the states,' that is, it would test whether such constitutional provisions could truly reduce victims' alienation from their justice system while producing no negative, unintended consequences." Senate Judiciary Committee hearing, April 23, 1996, statement of Robert E. Preston, at 40. A total of 32 States, in widely differing versions, now have State victims' rights amendments.[1]

With the passage of and experience with these State constitutional amendments came increasing recognition of both the national consensus supporting victims' rights and the difficulties of protecting these rights with anything other than a Federal amendment. As a result, the victims' advocates—including most prominently the National Victim Constitutional Amendment Network (NVCAN)—decided in 1995 to shift its focus toward passage of a Federal amendment. In 1997, the National Governors Association passed a resolution supporting a Federal constitutional amendment: "The rights of victims have always received secondary consideration within the U.S. judicial process, even though States and

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

the American people by a wide plurality consider victims' rights to be fundamental. Protection of these basic rights is essential and can only come from a fundamental change in our basic law: the U.S. Constitution." National Governors Association, Policy 23.1.

In the 104th Congress, S.J. Res. 52, the first Federal constitutional amendment to protect the rights of crime victims, was introduced by Senators Jon Kyl and Dianne Feinstein on April 22, 1996. Twenty-seven other Senators cosponsored the resolution. A similar resolution (H.J. Res. 174) was introduced in the House by Representative Henry Hyde. On April 23, 1996, the Senate Committee on the Judiciary held a hearing on S.J. Res. 52. Representative Hyde testified in support of the amendment. Victims and representatives of victims' rights organizations also spoke in favor of the amendment: Katherine Prescott, the president of Mothers Against Drunk Driving (MADD); Ralph Hubbard, board member and State coordinator of Parents of Murdered Children of New York State; John Walsh, the host of "America's Most Wanted"; Collene Campbell, a leader in the victims" rights movement in California; Rita Goldsmith, the national spokesperson for Parents of Murdered Children; and Robert E. Preston, cochairman of the National Constitutional Amendment Network. Two legal experts testified in support of the amendment: Prof. Paul Cassell of the University of Utah College of Law and Steve Twist, a member of the board of the National Organization for Victim Assistance and the former chief assistant attorney general of Arizona. Two legal experts testified against the amendment: Prof. Jamin Raskin of Washington College of Law at American University and noted commentator Bruce Fein, former member of the Department of Justice.

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

In the 105th Congress, Senators Kyl and Feinstein introduced S.J. Res. 6 on January 21, 1997, the opening day of the Congress. Thirty-two Senators became cosponsors of the resolution. On April 16, 1997, the Senate Committee on the Judiciary held a hearing on S.J. Res. 6. Representative Robert C. Scott testified in opposition to the amendment and Representative Deborah Pryce testified in support of the amendment. U.S. Attorney General Janet Reno testified that "[b]ased on our personal experiences and the extensive review and analysis that has been conducted at our direction, the President and I have concluded that an amendment to the U.S. Constitution to protect victims' rights is warranted." Senate Judiciary Committee hearing, April 16, 1997, statement of Attorney General Reno, at 40–41.

Others testifying in support of the amendment included John Walsh, the host of "America's Most Wanted"; Marsha Kight of Oklahoma City; Wisconsin Attorney General Jim Doyle; Kansas Attorney General Carla Stovall; Pima County, AZ, Attorney Barbara LaWall; and Prof. Paul Cassell of the University of Utah College of Law. The following people testified in opposition to the amend-

ment: Lynne Henderson of Bloomington, IN; Donna F. Edwards, the executive director of the National Network to End Domestic Violence; and Virginia Beach Commonwealth Attorney Robert J. Humphreys.

Over the course of 2 years, many changes were made to the original draft, many responding to concerns expressed in hearings and by the Department of Justice. S.J. Res. 44 was introduced by Senators Kyl and Feinstein on April 1, 1998. Thirty-nine Senators joined Senators Kyl and Feinstein as original cosponsors: Senators Biden, Lott, Thurmond, Torricelli, Breaux, Grassley, DeWine, Ford, Reid, Gramm, Mack, Landrieu, Cleland, Coverdell, Craig, Inouye, Bryan, Snowe, Thomas, Warner, Lieberman, Allard, Hutchison, D'Amato, Shelby, Campbell, Coats, Faircloth, Frist, Robert Smith, Gregg, Hagel, Helms, Gordon Smith, Hutchinson, Inhofe, Murkowski, Bond, and Grams. Senator Wyden subsequently joined as a cosponsor. The amendment included the core principles contained in the earlier versions. The scope of the amendment as originally proposed reached to crimes of violence and other crimes that may have been added by law. In the present text, the amendment is limited to crimes of violence.

On April 28, 1998, the Senate Committee on the Judiciary held a hearing on S.J. Res. 44. Raymond C. Fisher, the U.S. Associate Attorney General testified in support of an amendment. Additionally, the following witnesses testified in support of S.J. Res. 44: Prof. Paul Cassell; Steve Twist, a member of the National Victims' Constitutional Amendment Network and the former chief assistant attorney general of Arizona; Norm Early, a former Denver district attorney and a board member of the National Organization for Victim Assistance; and Marlene Young, the executive director of the National Organization for Victim Assistance. The following witnesses testified in opposition to the amendment: Prof. Robert Mosteller of Duke Law School and Kathleen Kreneck, the executive director of the Wisconsin Coalition Against Domestic Violence.

On July 7, after debate at three executive business meetings, the Senate Committee on the Judiciary approved S.J. Res. 44, with a substitute amendment by the authors, by a vote of 11 to 6. The following Senators voted in favor of the amendment: Hatch, Thurmond, Grassley, Kyl, DeWine, Ashcroft, Abraham, Sessions, Biden, Feinstein, and Torricelli. The following Senators voted against the amendment: Thompson, Leahy, Kennedy, Kohl, Feingold, and Durbin. Senator Specter did not vote.

In the 106th Congress, Seantors Kyl and Feinstein introduced S.J. Res. 3 on January 19, 1999, the opening day of the Congress. Thirty-three Senators became cosponsors of the resolution. On March 24, 1999, the Senate Committee on the Judiciary held a hearing on S.J. Res. 3. Prof. Paul Cassell and Steve Twist, a member of the National Victims' Constitutional Amendment Network and the former chief assistant attorney general of Arizona, testified in support of S.J. Res. 3. Beth Wilkinson, a partner at Latham & Watkins and a former federal prosecutor and Department of Justice official, testified in opposition.

On May 26, 1999, the Subcommittee on the Constitution, Federalism, and Property Rights approved S.J. Res. 3, with an amendment, to the full Committee by a vote of 4 to 3. On September 30,

1999, the Senate Committee on the Judiciary approved S.J. Res. 3 with a sponsors' substitute amendment, with a substitute amendment, by a vote of 12 to 5. The following Senators voted in favor of the amendment: Hatch, Thurmond, Grassley, Kyl, DeWine, Ashcroft, Abraham, Sessions, Smith, Biden, Feinstein, and Torricelli. The following Senators voted against the amendment: Leahy, Kennedy, Kohl, Feingold, and Schumer. Senator Specter did not vote.

III. The Need for Constitutional Protection

After extensive testimony in hearings held over 4 different years, the Committee concludes that a Federal constitutional amendment is needed to protect victims' rights in the Nation's criminal justice system. While a wide range of State constitutional amendments and other State and Federal statutory protections exist to extend rights to victims, that patchwork has not fully succeeded in ensuring comprehensive protection of victims' rights within the criminal justice system. A Federal amendment can better ensure that victims' rights are respected in the Nation's State and Federal courts.

The U.S. Supreme Court has held that "in the administration of criminal justice, courts may not ignore the concerns of victims." *Morris* v. *Slappy,* 461 U.S. 1, 14 (1983). Yet in today's world, without protection in our Nation's basic charter, crime victims are in fact often ignored. As one former prosecutor told the Committee, "the process of detecting, prosecuting, and punishing criminals continues, in too many places in America, to ignore the rights of victims to fundamental justice." Senate Judiciary Committee hearing, April 23, 1996, statement of Steve Twist, at 88. In some cases victims are forced to view the process from literally outside the courtroom. Too often victims are left uninformed about critical proceedings, such as bail hearings, plea hearings, and sentencings. Too often their safety is not considered by courts and parole boards determining whether to release dangerous offenders. Too often they are left with financial losses that should be repaid by criminal offenders. Too often they are denied any opportunity to make a statement that might provide vital information for a judge. Time and again victims testified before the Committee that being left out of the process of justice was extremely painful for them. One victim even found the process worse than the crime: "I will never forget being raped, kidnaped, and robbed at gunpoint. However my disillusionment [with] the judicial system is many times more painful." President's Task Force on Victims of Crime, "Final Report," 5 (1982).

It should be noted at the outset that a Federal amendment for victims' rights is intended to provide benefits to society as a whole, and not just individual victims. As Attorney General Reno has testified:

> [T]he President and I have concluded that a victims' rights amendment would benefit not only crime victims but also law enforcement. To operate effectively, the criminal justice system relies on victims to report crimes committed against them, to cooperate with law enforcement authorities investigating those crimes, and to provide evi-

> dence at trial. Victims will be that much more willing to participate in this process if they perceive that we are striving to treat them with respect and to recognize their central place in any prosecution.

Senate Judiciary Committee hearing, April 16, 1997, statement of Attorney General Reno, at 41.

THE CONSTITUTION TYPICALLY PROTECTS PARTICIPATORY RIGHTS

The Committee has concluded that it is appropriate that victims' rights reform take the form of a Federal Constitutional amendment. A common thread among many of the previous amendments to the Federal Constitution is a desire to expand participatory rights in our democratic institutions. Indeed, the 15th amendment was added to ensure African-Americans could participate in the electoral process, the 19th amendment to do the same for women, and the 26th amendment expanded such rights to young citizens. Other provisions of the Constitution guarantee the openness of civil institutions and proceedings, including the rights of free speech and assembly, the right to petition the Government for redress of grievances, and perhaps most relevant in this context, the right to a public trial. It is appropriate for this country to act to guarantee rights for victims to participate in proceedings of vital concern to them. These participatory rights serve an important function in a democracy. Open governmental institutions, and the participation of the public, help ensure public confidence in those institutions. In the case of trials, a public trial is intended to preserve confidence in the judicial system, that no defendant is denied a fair and just trial. However, it is no less vital that the public—and victims themselves—have confidence that victims receive a fair trial.

In a Rose Garden ceremony on June 25, 1996, endorsing a constitutional amendment, President Clinton explained the need to constitutionally guarantee a right for victims to participate in the criminal justice process:

> Participation in all forms of government is the essence of democracy. Victims should be guaranteed the right to participate in proceedings related to crimes committed against them. People accused of crimes have explicit constitutional rights. Ordinary citizens have a constitutional right to participate in criminal trials by serving on a jury. The press has a constitutional right to attend trials. All of this is as it should be. It is only the victims of crime who have no constitutional right to participate, and that is not the way it should be.

Two leading constitutional law scholars reached similar conclusions:

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

> very kinds of rights with which our Constitution is typically and properly concerned—rights of individuals to participate in all those government process that strongly affect their lives.

Laurence H. Tribe and Paul G. Cassell, "Embed the Rights of Victims in the Constitution," L.A. Times, July 6, 1998, at B7.

Participation of victims is not only a value consistent with our constitutional structure but something that can have valuable benefits in its own right. As experts on the psychological effects of victimization have explained, there are valuable therapeutic reasons to ensure victim participation in the criminal justice process:

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

Dean G. Kilpatrick and Randy K. Otto, "Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning," 34 Wayne L. Rev. 7, 19 (1987).

For all these reasons, it is the view of the Committee that it is vital that victims be guaranteed an appropriate opportunity to participate in our criminal justice process.

LESS THAN FEDERAL CONSTITUTIONAL PROTECTION HAS BEEN INADEQUATE

Most of the witnesses testifying before the Committee shared the view that victims' rights were inadequately protected today and that, without a Federal amendment, they would so remain. Attorney General Reno, for example, reported after careful study that:

> 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 twenty years, and many States have responded with State statutes and constitutional provisions that seek to guarantee victims' rights. 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.

Senate Judiciary Committee hearing, April 16, 1997, statement of Attorney General Reno, at 64.

Similarly, a comprehensive report from those active in the field concluded that "[a] victims' rights constitutional amendment is the only legal measure strong enough to rectify the current inconsistencies in victims' rights laws that vary significantly from jurisdic-

tion to jurisdiction on the state and federal level." U.S. Department of Justice, Office for Victims of Crime, "New Directions From the Field: Victims' Rights and Services for the 21st Century," 10 (1998). Indeed, Professors Tribe and Cassell have reached a similar conclusion: "Congress and the states already have passed a variety of measures to protect the rights of victims. Yet the reports from the field are that they have all too often been ineffective." Laurence H. Tribe and Paul G. Cassell, "Embed the Rights of Victims in the Constitution," L.A. Times, July 6, 1998, at B7.

EXAMPLES OF VICTIMS DENIED THE OPPORTUNITY TO PARTICIPATE

It is the view of the Committee that a Federal amendment is the only way to ensure that victims' opportunity to participate in the criminal justice process is fully respected. The Committee heard significant testimony about how the existing patchwork fails to transform paper promises to victims into effective protections in the criminal justice system. At the Committee's 1998 hearing, Marlene Young, a representative of the National Organization for Victim Assistance (NOVA), gave some powerful examples to the Committee:

- Roberta Roper, who testified eloquently before the Committee in her capacity as the cochair of the National Victims Constitutional Amendment Network, was denied the opportunity to sit in the courtroom at the trial of her daughter's murderer because it was thought she might, by her presence, influence the outcome.
- Sharon Christian, 20 years old, a young victim of rape reported the crime. After the offender was arrested, she was victimized by the system when, 2 weeks later she was walking down the street in her neighborhood and saw the young man hanging out on the corner. He had been released on personal recognizance with no notice to her and no opportunity to ask for a restraining order or for the court to consider the possibility of bond.
- Virginia Bell, a retired civil servant, was accosted and robbed in Washington, DC, some five blocks from the Committee's hearing room, suffering a broken hip. Her medical expenses were over $11,000, and the resulting debilitation required her to live with her daughter in Texas. While her assailant pled guilty, Ms. Bell was not informed, and the impact of her victimization was never heard by the court. The court ultimately ordered restitution in the entirely arbitrary and utterly inadequate amount of $387.
- Ross and Betty Parks, whose daughter Betsy was murdered, waited 7 years for a murder trial. The delay was caused, in part, by repeated motions that resulted in delay—31 motions at one point.

The unfortunate and unfair treatment of these individuals was brought to the attention of the Committee by just one witness. But the reports from the field are that there are countless other victims that have been mistreated in similar ways. Yet sadly and all too often, the plight of crime victims will never come to the attention of the public or the appellate courts or this Committee. Few victims

have the energy or resources to challenge violations of even clearly established rights. In those rare cases when they do so, they face a daunting array of obstacles, including barriers to their even obtaining "standing" to be heard to raise their claims. No doubt today many frustrated victims simply give up in despair, unable to participate meaningfully in the process.

STATISTICAL QUANTIFICATION OF VIOLATIONS OF VICTIMS' RIGHTS

The statistical evidence presented to the Committee revealed that the current regime falls well short of giving universal respect to victims' rights. In the mid–1990's, the National Victim Center, under a grant from the National Institute of Justice, reviewed the implementation of victims' rights laws in four States. Two States were chosen because they had strong State statutory and State constitutional protection of victims' rights, and two were chosen because they had weaker protection. The study surveyed more than 1,300 crime victims and was the largest of its kind ever conducted. It found that many victims were still being denied their rights, even in States with what appeared to be strong legal protection. The study concluded that State protections alone are insufficient to guarantee victims' rights:

> 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 states with strong protection large numbers of victims are being denied their legal rights.

National Victim Center, "Statutory and Constitutional Protection of Victims' Rights: Implementation and Impact on Crime Victims-Sub-Report: Crime Victim Responses Regarding Victims' Rights," 7 (Apr. 15, 1997).

Important findings of the study included:

- Nearly half of the victims (44 percent) in States with strong protections for victims and more than half of the victims (70 percent) in States with weak protections did not receive notice of the sentencing hearing—notice that is essential for victims to exercise their right to make a statement at sentencing.
- While both of the States with strong statutes had laws requiring that victims be notified of plea negotiations, and neither of the weak protection States had such statutes, victims in both groups of States were equally unlikely to be informed of such negotiations. Laws requiring notification of plea negotiations were not enforced in nearly half of the violent crime cases included in the study.
- Substantial numbers of victims in States with both strong and weak protection were not notified of various stages in the process, including bail hearings (37 percent not notified in strong protection States, 57 percent not notified in weak protection

States); the pretrial release of perpetrators (62 percent not notified in strong protection States, 74 percent not notified in weak protection States); and sentencing hearings (45 percent not notified in strong protection States, 70 percent not notified in weak protection States).

A later report based on the same large data base found that racial minorities are most severely affected under the existing patchwork of victims' protections. National Victim Center, "Statutory and Constitutional Protection of Victims' Rights: Implementation and Impact on Crime Victims-Sub-Report: Comparison of White and Non-White Crime Victim Responses Regarding Victims' Rights," 5 (June 5, 1997). Echoing these findings of disparate impact, another witness reported to the Committee, "There being no constitutional mandate to treat all of America's victims, white and non-white, with dignity and compassion * * * minority victims will continue to feel the sting of their victimization much longer than their white counterparts. Because of the large percentage of minority victims in the system, their neglect * * * continues to create disrespect for a process in the communities where such disrespect can be least afforded." Senate Judiciary Committee hearing, April 28, 1998, statement of Norm S. Early, at 96. A recent report concluded, after reviewing all of the evidence from the field, that "[w]hile victims' rights have been enacted in states and at the federal level, they are by no means consistent nationwide. All too often they are not enforced because they have not been incorporated into the daily functioning of all justice systems and are not practiced by all justice professionals." U.S. Department of Justice, Office for Victims of Crime, "New Directions from the Field: Victims' Rights and Services for the 21st Century," 9 (1998).

In sum, as Harvard Law Professor Laurence H. Tribe has concluded, rules enacted to protect victims' rights "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." Laurence H. Tribe, "Statement on Victims' Rights," April 15, 1997, p. 3.

The Committee also rejects the view, offered by some opponents of the amendment, that the Nation should simply leave victims to fare as best they can under the current patchwork quilt of victims provisions and see how things sort themselves out. For example, one constitutional scholar opposing the amendment took the position that "if you have struggled with a problem for 10, 11, 15 years at the State level and the statutes just don't seem to be working, fine, I understand the need [for a Federal constitutional amendment]." Senate Judiciary Committee hearing, April 23, 1996, statement of Bruce Fein, at 108. However, as victims' advocates aptly pointed out in response, problems with the treatment of victims in the criminal justice system were widely recognized by at least 1982. At that time, a Presidential task force concluded after comprehensive study that "the innocent victims of crime have been overlooked, their pleas for justice have gone unheeded, and their wounds—personal, emotional, and financial—have gone unattended." President's Task Force on Victims of Crime, "Final Report"

(1982). In the more than 15 years since that report, the country has attempted to find ways to protect victims through less than constitutional means. Yet while hundreds of statutes and more than two dozen statement constitutional amendments have been passed in the intervening years, full justice for victims remains a distant goal. During those years, literally millions of victims have participated—or attempted to participate—in a criminal justice system without full protection of their interests. Each year of delay is a year in which countless victims are denied their rights. Rather than take a wait-and-hope-things-improve approach, the Committee is of the view that prompt, decisive, and comprehensive action is needed to protect victims' basic rights. In that respect, the Committee simply adopts the long expressed view that "Justice, though due to the accused, is due to the accuser also." *Payne* v. *Tenneessee*, 501 U.S. 808, 827 (1991) (quoting *Snyder* v. *Massachusetts,* 291 U.S. 987, 1222 (1934) (Cardozo, J.)). The time for justice is now, not later.

A FEDERAL AMENDMENT IS COMPATIBLE WITH IMPORTANT FEDERALISM PRINCIPLES

The proposed victims' rights constitutional amendment is fully compatible with the principles of federalism on which our Republic is based. First, of course, the constitutionally specified process for amending the Constitution fully involves the States, requiring approval of three-quarters of them before any amendment will take effect. There is, moreover, substantial evidence that the States would like to see the Congress act and give them, through their State legislatures, the opportunity to approve an amendment. For example, a number of Governors have endorsed the constitutional amendment and voters in the States have endorsed victims' rights whenever they have had the chance.

The important values of federalism provide no good reason for avoiding action on the amendment. Already many aspects of State criminal justice systems are governed by Federal constitutional principles. For example, every State is required under the sixth amendment to the Federal Constitution as applied to the States to provide legal counsel to indigent defendants and a trial by jury for serious offenses. Victims' advocates simply seek equal respect for victims' rights, to give the similar permanence to victims' rights. Constitutional protection for victims' rights is in no sense an "unfunded mandate" or "arrogation of power" by the Federal Government. Constitutional protection is instead the placing of a birthright into the Constitution—a line across which no government, be it Federal, State, or local, can cross. Adding protections into the U.S. Constitution, our fundamental law, will thus serve to ensure that the protection of victims rights will be a part of our political architecture and therefore fully protected. This same point was recognized by James Madison in considering whether to add a Bill of Rights to the Constitution. He concluded the Bill of Rights would acquire, by degrees, "the character of fundamental maxims." James Madison, "The Complete Madison," ed. Saul K. Padover, p. 254 (1953).

Amending the Constitution is, of course, a significant step—one which the Committee does not recommend lightly. But to protect

victims, it is an appropriate one. As Thomas Jefferson once said: "I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times." Thomas Jefferson, letter to Samuel Kercheval, July 12, 1816, "The Writings of Thomas Jefferson," ed. Paul L. Ford, vol. 10, pp. 42–43 (1899). Throughout the country, there is a strong consensus that victims' rights deserve to be protected. But at the same time, as a country, we have failed to find a way to fully guarantee rights for victims in criminal justice processes of vital interest to them. It is time to extend Federal constitutional recognition to those who are too often forgotten by our criminal justice system—the innocent victims of crime.

IV. The Need for Specific Rights in the Process

With this need for Federal constitutional protection of victims' rights in mind, the Committee finds that rights under nine general headings should be protected in an amendment to the Federal Constitution. Each of these nine rights is discussed in turn.

1. Right to notice of proceedings

Rights for victims in the criminal justice process are of little use if victims are not aware of when criminal justice proceedings will be held. The Committee heard testimony about the devastating effects on crime victims when hearings about the crime are held without prior notice to them. For example, a witness from Parents of Murdered Children (POMC) testified:

> Each week at our national office, we receive more than 1,000 murder-related calls. Of these calls, about half involve homicide survivors who believe that they have been treated unfairly by some part of the criminal justice system. Some of our members even have as much anger about their unfair treatment by the criminal justice system as they do about the murder. * * *
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> Many of the concerns 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. * * * [I]n many cases, the failure to provide information arises simply from indifference to the plight of the surviving family members or a feeling that they have no right to the information.
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> Because they do not know what is going on, victims frequently must take it upon themselves to call * * * the prosecutor, or the courts for information about their case. All too often, such calls have to be made when victims' families are in a state of shock or are grieving from the loss of their loved ones. Victims' family should not have to bear the added burden of trying to obtain information. It should be their automatic right.

Senate Judiciary Committee hearing, April 23, 1996, prepared statement of Rita Goldsmith, at 35–36.

No witness testified before the Committee that victims should not receive notice of important proceedings. The Committee concludes that victims deserve notice of important criminal justice proceedings relating to the crimes committed against them.

Based on a demonstrated need for victims to receive notice, as long ago as 1982 the President's Task Force on Victims of Crime recommended that legislation and policies to guarantee that victims receive case status information, prompt notice of scheduling changes of court proceedings, and prompt notice of a defendant's arrest and bond status. Reviewing this status of these recommendations, a recent Department of Justice report found:

> Fifteen years later, many states, but not all, have adopted laws requiring such notice. 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. * * *
>
> Many states do not require notification to victims of the filing of an appeal, the date of an appellate proceeding, or the results of the appeal. Also, most do not require notification of release from a mental facility or of temporary or conditional releases such as furloughs or work programs.
>
> Some state laws require that notice be made "promptly" or within a specified period of time. * * * 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.

U.S. Department of Justice, Office for Victims of Crime, "New Directions from the Field: Victims' Rights and Services for the 21st Century", 13 (1998).

This recent report confirms the testimony that the Committee received that victims are too often not notified of important criminal justice proceedings. It is time to protect in the Constitution this fundamental interest of victims.

2. Right to attend

The Committee concludes that victims deserve the right to attend important criminal justice proceedings related to crimes perpetrated against them. This is no new insight. In 1982, the President's Task Force on Victims of Crime 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 provided for the exclusion of witnesses, be permitted to be present for the entire trial.

President's Task Force on Victims of Crime, "Final Report", 80 (1982).

Allowing victims to attend court proceedings may have important psychological benefits for victims. "The victim's presence during the trial may * * * facilitate healing of the debilitating psychological wounds suffered by a crime victim." Ken Eikenberry, "The Elevation of Victims' Rights in Washington State: Constitutional Status," 17 Pepperdine L. Rev. 19, 41 (1989). In addition, without a right to attend trials, victims suffer a further loss of dignity and control of their own lives. Applying witness sequestration rules in rape cases, for example, has proven harmful. See Lee Madigan and Nancy C. Gamble, "The Second Rape: Society's Continued Betrayal of the Victim", 97 (1989).

The primary barrier to victims attending trial is witness sequestration rules that are unthinkingly extended to victims. Not infrequently defense attorneys manipulate these rules to exclude victims from courtrooms simply because the defendant would like the victim excluded. The Committee heard no convincing evidence that a general policy excluding victims from courtrooms is necessary to ensure a fair trial. As a Department of Justice report recently explained:

> There can be no meaningful attendance rights for victims unless they are generally exempt from [witness sequestration rules]. Just as defendants have a right to be present throughout the court proceedings whether or not they testify, so too should victims of crime. Moreover, the presence of victims in the courtroom can be a positive force in furthering the truth-finding process by alerting prosecutors to misrepresentations in the testimony of other witnesses.

U.S. Department of Justice, Office for Victims of Crime, "New Directions from the Field: Victims' Rights and Services for the 21st Century", 15 (1998).

Some defense attorneys suggests that allowing victims to attend trial might somehow lead to victims "tailoring" their testimony to match that of other witnesses. Such claims were not documented with any real world examples, and they seem implausible. As one witness reminded the Committee:

> And what of the fear of perjury? Consider the civil justice system. If a lawsuit arises from a drunk driving crash, both the plaintiff (the victim of the drunk driver) and the defendant (the drunk driver) are witnesses. Yet both have an absolute right, as parties in the case, to remain in the courtroom throughout the trial. Do we value truth any less in civil cases? Of course not. But we recognize important societal and individual interests in the need to participate in the process of justice.
>
> This need is also present in criminal cases involving victims. How can we justify saying to the parents of a murdered child that they may not enter the courtroom because the defense attorney has listed them as witnesses. This was a routine practice in my state, before our constitutional amendment. And today, it still occurs throughout the country. How can we say to the woman raped or beaten that she has no interest sufficient to allow her the same

> rights to presence as the defendant? Closing the doors of our courthouses to America's crime victims is one of the shames of justice today and it must be stopped.

Senate Judiciary Committee hearing, April 28, 1998, statement of Steve Twist, at 90–91.

For these reasons, the Committee finds persuasive the experience of the growing number of States that have guaranteed victims an unequivocal right to attend a trial. See, e.g., Ariz. Const. art. 2, § 2.1(A)(3) (victim right "[t]o be present * * * at all criminal proceedings where the defendant has the right to be present"); Mo. Const. art. I, § 32(1) (victim has "[t]he right to be present at all criminal justice proceedings at which the defendant has such right"); Idaho Const. art. I, § 22(4) (victim has the right "[t]o be present at all criminal justice proceedings"). The Committee concludes that an alternative approach—giving victims a right to attend a trial unless their testimony would be "materially affected" by their attendance—would be inadequate. Congress has previously adopted such a standard, see 42 U.S.C. 10606(b)(4), but the results have proven to be unfortunate. In the Oklahoma City bombing case, for example, a district court concluded that testimony about the impact of their loss from family members of deceased victims of the bombing would be materially affected if the victims attended the trial. This perplexing ruling was the subject of unsuccessful emergency appeals (see Cassell 1997 testimony) and ultimately Congress was forced to act. See Victim Rights Clarification Act of 1997 (Public Law 105–6, codified at 18 U.S.C. 3510, 3481, 3593). Even this action did not fully vindicate the victims' right to attend that trial. The Committee heard testimony from a mother who lost her daughter in the bombing that even this act of Congress did not resolve the legal issues sufficiently to give the victims the legal assurances they need to attend all the proceedings. Senate Judiciary Committee hearing, April 16, 1997, statement of Marsha Kight, at 73–74. Rather than create a possible pretext for denying victims the right to attend a trial or extended litigation about the speculative circumstances in victim testimony might somehow be affected, the Committee believes that such a victim's right to attend trial should be unequivocally recognized.

While a victim's right to attend is currently protected in some statutes or State constitutional amendments, only a Federal constitutional amendment will fully ensure such a right. The Committee was presented with a detailed legal analysis that convincingly demonstrated that there is no general Federal constitutional right of criminal defendants to exclude victims from trials. See Senate Judiciary Committee hearing, April 23, 1996, statement of Paul Cassell, at 48–57. While this appears to be an accurate assessment of constitutional legal principles, the fact remains that the law has not been authoritatively settled. In the wake of this uncertainty, State rights for victims to attend trials are not fully effective.

Confirmation of this point came when the Committee heard testimony that "even in some States which supposedly protect a victims' right to attend a trial, victims are often 'strongly advised' not to go in because of the possibility that it might create an issue for the defendant to appeal." Senate Judiciary Committee hearing, April

23, 1996, statement of Rita Goldsmith, at 36. Federal prosecutors in the Oklahoma City bombing case, for example, were forced to give victims less-than-clear-cut instructions on whether victims could attend proceedings. See Senate Judiciary Committee hearing, April 16, 1997, statement of Marsh Kight, at 73–74.

Moreover, efforts to obtain clear-cut legal rulings have been unsuccessful. In Utah, for example, despite a strongly written amicus brief on behalf of a number of crime victims organizations requesting a clear statement upholding the right of victims to attend, the Utah Court of Appeals has left unsettled the precise standards for exclusion of crime victims. See Senate Judiciary Committee hearing, April 16, 1997, statement of Paul Cassell, at 114–15 (discussing *State* v. *Beltran-Felix,* No. 95–341–CA). The result has been that, in Utah and presumably many other States, crime victims must struggle with the issue of whether to attend trials of those accused perpetrating crimes against them at the expense of creating a possible basis for the defendant to overturn his conviction. The issue of a victim's right to attend a trial should be authoritatively settled by Federal constitutional protection.

3. Right to be heard

The Committee concludes that victims deserve the right to be heard at five points in the criminal justice process: plea bargains, bail or release hearings, sentencing, parole hearings, and pardon or commutation decisions. Giving victims a voice not only improves the quality of the process but can also be expected to often provide important benefits to victims.

Victims have vital interests at stake when a court decides whether to accept a plea. One leading expert on victims' rights recently explained that:

> 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 * * * [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.

Douglas E. Beloof, "Victims in Criminal Procedure", 464 (1999).

Victim participation in bail hearings can also serve valuable functions, particularly in alerting courts to the dangers that defendants might present if released unconditionally. Without victim participation, courts may not be fully informed about the consequences of releasing a defendant. "It is difficult for a judge to evaluate the danger that a defendant presents to the community if the judge hears only from the defendant's counsel, who will present him in the best possible light, and from a prosecutor who does not know of the basis for the victim's fear. * * * The person best able to inform the court of [threatening] statements that may have been made by the defendant and the threat he poses is often the person

he victimized." President's Task Force on Victims of Crime, "Final Report," 65 (1982).

The Committee heard chilling testimony about the consequences of failing to provide victims with this opportunity from Katherine Prescott, the president of Mothers Against Drunk Driving (MADD):

> I sat with a victim of domestic violence in court one day and she was terrified. She told me she knew her ex-husband was going to kill her. The lawyers and the judge went into chambers and had some discussions and they came out and continued the case. The victim never had the opportunity to speak to the judge, so he didn't know how frightened she was. He might have tried to put some restrictions on the defendant if he had known more about her situation, but it was handled in chambers out of the presence of the victim.
>
> That night, as she was going to her car after her shift was over at the hospital where she was a registered nurse, she was murdered by her ex-husband, leaving four young children, and then he took his own life—four children left orphans. I will always believe that if the judge could have heard her and seen her as I did, maybe he could have done something to prevent her death.

Senate Judiciary Committee hearing, April 23, 1996, statement of Katherine Prescott, at 25–26.

Victim statements at sentencing also serve valuable purposes. As the President's Task Force on Victims of Crime concluded:

> Victims of violent crime should be allowed to provide information at two levels. One, the victim should be permitted to inform the person preparing the presentence report of the circumstances and consequences of the crime. Any recommendation on sentencing that does not consider such information is simply one-sided and inadequate. Two, every victim must be allowed to speak at the time of sentencing. The victim, no less than the defendant, comes to court seeking justice. When 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.

President's Task Force on Victims of Crime, "Final Report," 77 (1982).

Courts have found victim information helpful in crafting an appropriate sentence. For instance, in *United States* v. *Martinez,* the District Court for the District of New Mexico stated that it "has welcomed such [allocution] statements and finds them helpful in fashioning an appropriate sentence." 978 F. Supp. 1442, 1452 (D.N.M. 1997). Likewise in *United States* v. *Smith,* 893 F. Supp. 187, 188 (E.D.N.Y. 1995), Judge Weinstein explained that the "sensible process [of victim allocution] helps the court gauge the effects of the defendant's crime not only on the victim but on relevant communities." Victim statements can also have important cathartic effects. For example, a daughter who spoke at the sentencing of her

stepfather for abusing her and her sister: "When I read [the impact statement], it healed a part of me—to speak to [the defendant] and tell him how much he hurt me." Senate Judiciary Committee hearing, April 28, 1998, statement of Paul Cassell, at 36 (quoting statement of victim). The sister also 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." Id.

Victims deserve the right to be heard by parole boards deciding whether to release prisoners. Without victim testimony, the boards may be unaware of the true danger presented by an inmate seeking parole. An eloquent example of this point can be found that was provided by Patricia Pollard, who testified before the Committee in 1996. She was abducted, raped, brutally beaten, and had her throat slashed with the jagged edge of a beer can, and left to die in the Arizona desert. Miraculously she survived. In moving testimony, she described for the Committee what happened next:

> Eric Mageary, the man who attacked me, was caught and convicted. He was sentenced to 25 years to life in the Arizona State Prison. While he was still 10 years short of his minimum sentence he was released on parole, but no one ever told me or gave me a chance to say what I thought about it. The system had silenced me, just like Mageary did that night outside of Flagstaff * * *
>
> But my story does not end with Eric Mageary's first parole. Within less than a year he was back in prison, his parole [r]evoked for drug crimes. Then in 1990, the people of Arizona voted State constitutional rights for crime victims. In 1993, Mageary again applied for release from prison and, incredibly, he was again released without any notice to me. I was again denied any opportunity to tell the parole board about the horrible crime or the need to protect others in that community. They ignored my rights, but this time, I had a remedy.
>
> The county attorney in Flagstaff filed an action to stop the release and the court of appeals in Arizona forced the board, because they had denied me my constitutional rights, to hold another hearing and to hear from me. This time, after they heard from me directly and heard firsthand the horrible nature of the offense, they voted for public safety and Mageary's release was denied.

Senate Judiciary Committee hearing, April 23, 1996, statement of Patricia Pollard, at 31–32.

Voices such as Patricia Pollard's must not be silenced by the system. Victims deserve the right to be heard at appropriate times in the process.

Finally, victims deserve the right to be heard when the President, governors, or clemency boards consider whether to pardon or commute the sentence of a prisoner. Here again, victims can provide vital information that is useful in making such decisions. As the President's Task Force on Victims of Crime concluded, "No one knows better than the victim how dangerous and ruthless the can-

didate was before" the clemency application. President's Task Force on Victims of Crime, "Final Report," 84 (1982). Moreover, as a simple matter of fairness, victims deserve the opportunity to be heard, if they so desire. The prisoner seeking clemency, of course, has an opportunity to make his case. Equity demands that victims, too, be heard on this issue. A subcommittee of this Committee heard moving testimony from Anita Lawrence, whose son was murdered. The murderer's death sentence was later commuted without any notice to her. Ms. Lawrence eloquently explained why she should have had an opportunity to be heard: "the decision of the Governor may not be changed; at least, we would be able to say that we tried to have justice done, rather than having to say we were left completely out of the process." Senate Judiciary Committee hearing, Subcommittee on Constitution, Federalism, and Property Rights, St. Louis field hearing, May 1, 1999. It may be noted that the commuting Governor in this instance later apologized to the family, agreeing that they should have been consulted.

The Committee agrees with Ms. Lawrence that victims like her, Patricia Pollard, and others who have suffered greatly at the hands of criminals must not be left completely out of the process. At the appropriate time, victims deserve the right to heard.

4. Right to notice of and an opportunity to submit a statement concerning a proposed pardon or commutation of sentence

Victims deserve rights throughout the criminal justice process. The last step in that process is the decision by the President, a governor, or a clemency board on whether to grant executive clemency. Here too victims, deserve notice of any such action, and an opportunity to be heard before action is taken.

Failure to provide notice to victims of a commutation of a sentence can have devastating psychological effects. A subcommittee of this Committee heard stark testimony about what it is like for a victim to be surprised to learn about a previously granted commutation. Anita Lawrence's son Willie Lawrence was murdered in 1988, along with two of his grandparents. Ms. Lawrence learned from watching television in January 1999 that the death sentence of her son's murderer had been commuted:

> We were visiting friends, and we sat down to watch the evening news with our friends. * * * And then when the news came on, the first thing on the news was Mease [the convicted triple murderer] walking through in his orange suit with a smile on his face. And then, they showed a picture of my mother-in-law and father-in-law and my son on their four-wheelers at the scene. We had never seen this picture. I had never seen Willie in that condition, and it was a nightmare.
>
> I had nightmares for a week afterwards. I would actually get up and have to go to the bathroom and throw up. I had to see a doctor, and take tranquilizers just to get me through it. I'd walk the floor. My emotions were just—I don't know how to explain it.

Senate Judiciary Committee hearing, Subcommittee on Constitution, Federalism, and Property Rights, St. Louis field hearing, May 1, 1999.

Ms. Lawrence concluded her tearful appearance before the Subcommittee with a plea that something be done so that "the next family" would not have to suffer through the same horrors as hers. The Committee agrees that no family should have to suffer the anguish of learning for the first time about a pardon or commutation on a television news program. Victims deserve advance notice before such a decision is made.

It has long been the practice in many States that the sentencing judge and prosecutor are given notice and asked to comment before executive clemency is granted. There is a trend toward greater public involvement in the process, with the Federal system and a number of States now providing notice to victims. The Federal victims bill of rights, for example, guarantees victims the "right to information about the * * * release of the offender." 42 U.S.C. 10606(b)(7). In Alaska, the Governor may refer applications for executive clemency to the board of parole. If the case involves a crime of violence, "the board shall send notice of an application for executive clemency submitted by the state prisoner who was convicted of that crime. The victim may comment in writing to the board on the application for executive clemency." Alaska stat. § 33.20.080. In Ohio, 3 weeks before any pardon or commutation can be granted, the adult parole authority sends notice to the prosecuting attorney, presiding judge in the county of conviction, *and* "the victim or the victim's representative." Ohio Rev. Code Ann. § 2967.12.

While the trend toward notice is encouraging, problems remain both in the breadth of these provisions and, particularly, in their implementation. Recently, the Committee heard testimony that the Federal provision had not been effectively implemented. The surviving family members of victims of the FALN bombing were not notified that the President had granted clemency to 16 FALN prisoners, apparently learning about the clemency for the first time through the media. Their treatment, unfortunately, appears to be typical. Roger Adams, the U.S. Pardon Attorney for the Department of Justice, reported that consulting with victims during the Federal process "will cause a big change in the way we operate." E-mail from Roger Adams to Jamie Orenstein, August 23, 1999 (exhibit in the FALN hearings). If victims do not receive their statutorily mandated notice even in high-profile Federal cases, it is hard to imagine that their treatment in other situations is any better.

Victims deserve this notice so that they gain the opportunity to provide information about the proposed clemency. Victims, of course, do not demand a veto over any decision—nor would they be accorded one in the amendment. They simply seek a voice in that process, to be heard before an executive clemency decision is made. As has been explained, victims can provide unique information about the seriousness of the crime.

A constitutional amendment would unequivocally ensure that victims are notified and given the opportunity to be heard, improving disparate and haphazard treatment that victims currently suffer in the clemency process. Only a constitutional amendment can ensure this treatment. The Committee heard suggestions that any

statutory effort to provide such protections at the Federal level would interfere with the President's pardon power, conferred by U.S. Const., art. II, § 2. The Committee is skeptical of those suggestions. While the President has the constitutional power to pardon, it would seem that Congress has the power to specify reasonable procedures before the President makes the decision. In any event, the Committee agrees that a Federal constitutional amendment is the best way to definitively answer any such constitutional concerns.

5. Right to notice of release or escape

The Committee heard testimony about Sharon Christian, 20 years old, a young victim of rape who reported the crime and whose offender was arrested. She was doubly victimized when 2 weeks later she was walking down the street in her neighborhood and saw the young man hanging out on the corner. He had been released on personal recognizance with no notice to her and no opportunity to ask for a restraining order or for the court to consider the possibility of a bond. Senate Judiciary Committee hearing, April 28, 1998, statement of Marlene Young, at 105.

Defendants who are released from confinement often pose grave dangers to those against whom they have committed crimes. In a number of cases, notice of release has been literally a matter of life and death. As the Justice Department 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 of these cases, the victims were unable to take precautions to save their lives because they had not been notified of the release.

U.S. Department of Justice, Office for Victims of Crime, "New Directions From the Field: Victims' Rights and Services for the 21st Century," 14 (1998).

The problem of lack of notice has been particularly pronounced in domestic violence and other acquaintance cases, in which the dynamics of the cycle of violence lead to tragic consequences. For example, on December 6, 1993, Mary Byron was shot to death as she left work. Authorities soon apprehended Donovan Harris, her former boyfriend, for the murder. Harris had been arrested 3 weeks earlier on charges of kidnaping Byron and raping her at gunpoint. A relative's payment of bond money allowed Harris to regain his freedom temporarily. No one thought to notify Byron or the police of her release. See Jeffrey A. Cross, Note, "The Repeated Sufferings of Domestic Violence Victims Not Notified of Their Assailant's Pre-Trial Release from Custody: A Call for Mandatory Domestic Violence Victim Notification Legislation," 34 J. Family L. 915 (1996) (collecting this and other examples). The Committee concludes that victims deserve notice before violent offenders are released.

Recent technological changes have also simplified the ability to provide notice to crime victims. Today some jurisdictions use automated voice response technology to notify victims of when offenders are released. New York City, for example, recently implemented a system in which any victim with access to a telephone can register

for notification simply by calling a number and providing an inmate's name, date of birth, and date of arrest. If an inmate is released, the victim receives periodic telephone calls for 4 days or until the victim confirms receiving the message by entering a personal code. Victim assistance providers and police have been trained to explain the system to victims. Other jurisdictions have developed other means of notification, including websites that allow victims to track the location of inmates at all times. While recent developments in these innovative jurisdictions are encouraging, notification needs to be made uniformly available for crime victims around the country.

6. Right to consideration of the victim's interest in a trial free from unreasonable delay

Today in the United States, criminal defendants enjoy a constitutionally protected right in the sixth amendment to a "speedy trial." This is as it should be, for criminal charges should be resolved as quickly as is reasonably possible. Defendants, however, are not the only ones interested in a speedy disposition of the case. Victims, too, as well as society as a whole, have an interest in the prompt resolution of criminal cases. "Repeated continuances cause serious hardships and trauma for victims as they review and relive their victimization in preparation for trial, only to find the case has been postponed." U.S. Department of Justice, Office for Victims of Crime, "New Directions From the Field: Victims' Rights and Services for the 21st Century," 21 (1998). For victims, "[t]he healing process cannot truly begin until the case can be put behind them. This is especially so for children and victims of sexual assault or any other case involving violence." President's Task Force on Victims of Crime, "Final Report," 75 (1982).

The Supreme Court has generally recognized such interests in explaining 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." *Barker* v. *Wingo,* 407 U.S. 514, 519 (1972). However, as two leading scholars have explained, while the Supreme Court has acknowledged the "societal interest" in a speedy trial, "[i]t is rather misleading to say * * * that this 'societal interest' is somehow part of the [sixth amendment] right. The fact of the matter is that the Bill of Rights does not speak of the rights and interests of the government." Wayne R. LaFave and Jerold H. Israel, "Criminal Procedure," § 18.1(b), at 787–88 (2d ed. 1992). Nor does the Bill of Rights currently speak, as it should, to the rights and interests of crime victims. Of course, a victim's right to consideration of his or her interest to avoid unreasonable delay will not overcome a criminal defendant's due process right to a reasonable opportunity to prepare a defense. But the interests of a crime victim in a trial free from unreasonable delay must be protected.

The Committee heard ample testimony about the problem of delay that victims face. In one case, for example, a case of child abuse involving a 5-year-old child spanned more than 15 months from the arraignment to the trial. Many of the delays appeared to be for no good reason. For example, during the preliminary hearing the defense attorney asked for a recess at 4:00 p.m. one day because he anticipated 2 more hours of questioning of the child's

mother. Continuance of the cross-examination was set for 10 days later. The victim's family then canceled a long-planned trip out of State. The day before the resumption of the cross-examination was to take place, the defense attorney reported that he now had a scheduling conflict. Resumption of the cross-examination was not set for 7 weeks later. Seven weeks later, the cross-examination was resumed. Contrary to previous claims, the defense attorney had less than 10 minutes of perfunctory questions. Senate Judiciary Committee Hearing, April 16, 1997, statement of Paul Cassell, at 115–16. Victims should not be forced to endure extensive delays for no apparent good reason.

Defendants have ample tactical reasons for seeking delays of criminal proceedings. Witnesses may forget details of the crime or move away, or the case may simply seem less important given the passage of time. Delays can also be used to place considerable pressure on victims to ask prosecutors to drop charges, particularly in cases where parents of children who have been sexually abused want to put matters behind them. Given natural human tendencies, efforts by defendants to unreasonably delay proceedings are frequently granted, even in the face of State constitutional amendments and statutes requiring otherwise. The Committee concludes that this problem can be solved only by unequivocally creating a Federal constitutional right of victims to have a court consider their speedy trial interests.

7. Right to order of restitution

Crime imposes tremendous financial burdens on victims of crime. The Bureau of Justice Statistics reports that each year approximately 2 million people in America are injured as the result of violent crime. Approximately 51 percent of the injured will require some medical attention, with 23 percent requiring treatment at a hospital with an average stay of 9 days. While the true cost of crime to the victims is incalculable, the direct costs are simply staggering. In 1991, the direct economic costs of personal and household crime was estimated to be $19.1 billion, a figure that did not include costs associated with homicides.

The perpetrators of these crimes need to be held accountable to repay such costs to the extent possible. Victims deserve restitution from offenders who have been convicted of committing crimes against them. The Committee has twice previously explained that:

> The principle of restitution is an integral part of virtually every formal system of criminal justice, or 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.

S. Rep. 104–179 at 12, Senate Judiciary Committee, Victim Restitution Act of 1995, 104th Cong., 1st sess. 12 (1995), quoting S. Rept. 97–532 at 30 (Judiciary Committee), August 19, 1982 (to accompany S. 2420).

Consistent with this principle, Federal and State courts have long had power to order restitution against criminal offenders. In

practice, however, restitution orders are not entered as frequently as they should be. At the Federal level, for example, this Committee recently investigated Federal restitution procedures and found that restitution orders were often entered haphazardly and that "much progress remains to be made in the area of victim restitution." S. Rep. 104–179, at 13. Similarly, a recent report from the U.S. Department of Justice concluded that "[w]hile restitution has always been available via statute or common law, it remains one of the most underutilized means of providing crime victims with a measurable degree of justice. Evidence of this is apparent both in decisions to order restitution and in efforts to monitor, collect, and disperse restitution payment to victims." U.S. Department of Justice, Office for Victims of Crime, "New Directions From the Field: Rights and Services for the 21st Century," 357 (1998).

The President's Task Force on Victims of Crime long ago recommended that "[a] restitution order should be imposed in every case in which a financial loss is suffered, whether or not the defendant is incarcerated." President's Task Force on Victims of Crime, "Final Report," 79 (1982). As a step in this direction, in 1982 Congress passed the Victims Witness Protection Act (Public Law 97–291, codified at 18 U.S.C. 1501, 1503, 1505, 1510, 1512–1515, 3146, 3579, 3580). More recently, to respond to the problem of inadequate restitution at the Federal level, this Committee recently recommended, and Congress approved, the Mandatory Victim Restitution Act, codified at 18 U.S.C. 3663A and 3664. Valuable though this legislation may turn out to be, it applies only in Federal cases. To require restitution orders throughout the country, Federal constitutional protection of the victims' right to restitution is appropriate. Victims advocates in the field recently recommended that "restitution orders should be mandatory and consistent nationwide." U.S. Department of Justice, Office for Victims of Crime, "New Directions From the Field: Victims' Rights and Services for the 21st Century," 364 (1998). Of course, there will be many cases in which a convicted offender will not be able to pay a full order of restitution. In such cases, realistic payment schedules should be established and victims appraised of how much restitution can realistically be expected to be collected. But even nominal restitution payments can have important benefits for victims. And by having a full restitution order in place, the offender can be held fully accountable for his crime should his financial circumstances unexpectedly improve.

8. Right to have safety considered

Victims are often placed at risk whenever an accused or convicted offender is released from custody. The offender may retaliate against or harass the victim for vindictive reasons or to eliminate the victim as a possible witness in future proceedings. Not only are victims threatened by offenders, but recent reports from across the country suggest that the intimidation of victims and other witnesses is a serious impediment to effective criminal prosecution.

Under current law, the safety of victims is not always appropriately considered by courts and parole boards making decisions about releasing offenders. Laws concerning whether victim safety is a factor in such decisions varies widely. The result,

unsurprisingly, is that in too many cases offenders are released without due regard for victims. From witness after witness, the Committee heard testimony about the danger in which crime victims are placed when their attackers are released without any regard for their safety. Patricia Pollard, Dr. Marlene Young, and others each confirmed the real-life daily failures of the justice system.

The Committee concludes that, in considering whether to release an accused or convicted offender, courts and parole boards should give appropriate consideration to the safety of victims. Of course, victim safety is not the only interest that these entities will need to consider in making these important decisions. But the safety of victims can be literally a life and death matter that should be evaluated along with other relevant factors. In evaluating the safety of victims, decisionmakers should also take into account the full range of measures that might be employed to protect the safety of victims. For example, a defendant in a domestic violence case might be released, but subject to a "no contact" order with the victim. Or a prisoner might be paroled, on the condition that he remain within a certain specified area. If directed to consider victim safety, our Nation's courts and parole boards are up to the task of implementing appropriate means to protect that safety.

9. Notice of these rights

Victims' rights are of little use if victims remain unaware of them. Since victims deserve the eight basic rights just enumerated, they should be informed about those rights. Not only does this serve to ensure that victims can exercise their rights, but it can even improve the functioning of the criminal justice process. Victims who have been informed about their role in the process are in a better position to cooperate with police, prosecutors, and courts to bring about a proper resolution of the case. Victims deserve appropriate notice of their rights in the process. As a recent analysis concluded:

> Justice system and allied professions who come into contact with victims should provide an explanation of their rights and provide written information describing victims' rights and the services available to them. Furthermore, rights and services should be explained again at a later time if the victim initially is too traumatized to focus on the details of the information being provided. Explanations of rights and services should be reiterated by all justice personnel and victim service providers who interact with the victim.

U.S. Department of Justice, Office for Victims of Crime, "New Directions From the Field: Victims' Rights and Services for the 21st Century," 14 (1998).

In Patricia Pollard's case in Arizona, the State Court of Appeals found that her State constitutional right to notice was the lynchpin for her right to notice and for her right to be heard. Victims deserve appropriate notice of their rights in the process.

V. SECTION-BY-SECTION ANALYSIS

The Committee intends that the amendment be construed to effectuate its remedial purposes: to guarantee the protection of and appropriate participation by crime victims in the criminal justice process. Courts have long experience in applying Federal constitutional rights for defendants in the criminal justice system, and the Committee believes that this experience can be used to effectively apply victims' rights as well.

Before turning to specific language, one general issue deserves brief discussion. The Committee heard testimony that the proposed constitutional rights for victims would clash with, and triumph over, the preexisting constitutional rights of accused and convicted offenders. Typically these claims were advanced without specific examples. No convincing evidence was offered to support such a contention. This is unsurprising because, as the chief justice of the Texas Court of Criminal Appeals has written, "[v]ictims' rights versus offenders" rights is not a "zero-sum-game." The adoption of rights for the victim need not come at the expense of the accused's rights. Chief Justice Richard Barajas and Scott Alexander Nelson, "The Proposed Crime Victims' Federal Constitutional Amendment: Working Toward a Proper Balance," 49 Baylor L. Rev. 1, 17 (1997) (internal citation omitted).

The Committee accordingly rejected an amendment that would have required the courts to resolve any conflict between the constitutional rights of defendants and those of victims, in favor of defendants' rights. The Crime Victims' Rights Amendment creates rights, not in opposition to those of defendants, but in parallel to them. The parallel goal in both instances is to erect protections from abuse by State actors. Thus, just as defendants have a sixth amendment right to a "speedy trial," the Crime Victims' Rights Amendment extends to victims the right to consideration of their interest "in a trial free from unreasonable delay." "[I]f any conflict were to emerge, courts would retain ultimate responsibility for harmonizing the rights at stake." Laurence H. Tribe and Paul G. Cassell, "Embed the Rights of Victims in the Constitution," L.A. Times, July 6, 1998, at B7.

In this respect, the Committee found unpersuasive the contention that the courts will woodenly interpret the later adopted Crime Victims' Rights Amendment as superceding provisions in previously adopted ones. Such a canon of construction can be useful when two measures address precisely the same subject. See Laurence H. Tribe, "Statement on Victims' Rights," April 15, 1997; cf. Laurence H. Tribe and Paul G. Cassell, "Embed the Rights of Victims in the Constitution," L.A. Times, July 6, 1998, at B7. But no rigid rule of constitutional interpretation requires giving unblinking precedence to later enactments on separate subjects.

Instead, the Committee intends that courts harmonize the rights of victims and defendants to ensure that both are appropriately protected. The courts have, for example, long experience in accommodating the rights of the press and the public to attend a trial with the rights of a defendant to a fair trial. The same sort of accommodations can be arrived at to dissipate any tension between victims' and defendants' rights.

*Section 1. "A victim of a crime of violence, as these terms may be defined by law. * * *"*

The core provision of Senate Joint Resolution 3, as amended in Committee, is contained in section 1, which extends various enumerated rights to "a victim of a crime of violence, as these terms may be defined by law." The "law" which will define a "victim" (as well as "crime of violence") will come from the courts interpreting the elements of criminal statutes until definitional statutes are passed explicating the term. In this sense, the amendment should be regarded as "self executing"—that is, it will take effect even without a specific legislative definition. The Committee anticipates that Congress will quickly pass an implementing statute defining "victim" for Federal proceedings. Moreover, nothing removes from the States their plenary authority to enact definitional laws for purposes of their own criminal system. Such legislative definition is appropriate because criminal conduct depends on State and Federal law. Since the legislatures define what is criminal conduct, it makes equal sense for them to also have the ability to further refine the definition of "victim."

In determining how to structure a "victim" definition, ample precedents are available. To cite but one example, Congress has previously defined a "victim" of a crime for sentencing purposes as "any individual against whom an offense has been committed for which a sentence is to be imposed." Fed. R. Crim. Pro. 32(f). The Committee anticipates that a similar definition focusing on the criminal charges that have been filed in court will be added to the Federal implementing legislation and, in all likelihood, in State legislation as well.

In most cases, determining who is the victim of a crime will be straightforward. The victims of robbery, and sexual assault are, for example, not in doubt. The victim of a homicide is also not in doubt, but the victim's rights in such cases will be exercised by a surviving family member or other appropriate representative, as will be defined by law. Similarly, in the case of a minor or incapacitated victim, an appropriate representative (not accused of the crime or otherwise implicated in its commission) will exercise the rights of victims.

The amendment extends broadly to all victims of a "crime of violence." The phrase "crime of violence" should be considered in the context of an amendment extending rights to crime victims, not in other possibly narrower contexts. The most analogous Federal definition is Federal Rule of Criminal Procedure 32(f), which extends a right of allocution to victims of a "crime of violence" and defines the phrase as one that "*involved* the use or attempted or threatened use of physical force against the person or property of another * * *." (emphasis added). The Committee anticipates that the phrase "crime of violence" will be defined in these terms of "involving" violence, not a narrower "elements of the offense" approach employed in other settings. See, e.g., 18 U.S.C. 16. Only this broad construction will serve to protect fully the interests of all those affected by criminal violence.

"Crimes of violence" will include all forms of homicide (including voluntary and involuntary manslaughter and vehicular homicide), sexual assault, kidnaping, robbery, assault, mayhem, battery, ex-

tortion accompanied by threats of violence, carjacking, vehicular offenses (including driving while intoxicated) which result in personal injury, domestic violence, and other similar crimes. A "crime of violence" can arise without regard to technical classification of the offense as a felony or a misdemeanor. It should also be obvious that a "crime of violence" can include not only acts of consummated violence but also of intended, threatened, or implied violence. The unlawful displaying of a firearm or firing of a bullet at a victim constitutes a "crime of violence" regardless of whether the victim is actually injured. Along the same lines, conspiracies, attempts, solicitations and other comparable crimes to commit a crime of violence should be considered "crimes of violence" for purposes of the amendment, if identifiable victims exist. Similarly, some crimes are so inherently threatening of physical violence that they could be "crimes of violence" for purposes of the amendment. Burglary, for example, is frequently understood to be a "crime of violence" because of the potential for armed or other dangerous confrontation. See *United States* v. *Guadardo,* 40 F.3d 102 (5th Cir. 1994); *United States* v. *Flores,* 875 F.2d 1110 (5th Cir. 1989). Similarly, sexual offenses against a child, such as child molestation, can be "crimes of violence" because of the fear of the potential for force which is inherent in the disparate status of the perpetrator and victim and also because evidence of severe and persistent emotional trauma in its victims gives testament to the molestation being unwanted and coercive. See *United States* v. *Reyes-Castro,* 13 F.3d 377 (10th Cir. 1993). Sexual offenses against other vulnerable persons would similarly be treated as "crimes of violence," as would, for example, forcible sex offenses against adults and sex offenses against incapacitated adults. Finally, an act of violence exists where the victim is physically injured, is threatened with physical injury, or reasonably believes he or she is being physically threatened by criminal activity of the defendant. For example, a victim who is killed or injured by a driver who is under the influence of alcohol or drugs is the victim of a crime of violence, as is a victim of stalking or other threats who is reasonably put in fear of his or her safety. Also, crimes of arson involving threats to the safety of persons could be "crimes of violence."

Of course, not all crimes will be "violent" crimes covered by the amendment. For example, the amendment does not confer rights on victims of larceny, fraud, and other similar offenses. At the same time, many States have already extended rights to victims of such offenses and the amendment in no way restricts such rights. In other words, the amendment sets a national "floor" for the protecting of victims rights, not any sort of "ceiling." Legislatures, including Congress, are certainly free to give statutory rights to all victims of crime, and the amendment will in all likelihood be an occasion for victims' statutes to be re-examined and, in some cases, expanded.

Because of the formulation used in the amendment—"a victim of a crime of violence"—it is presumed that there must be an identifiable victim. Some crimes, such as drug or espionage offenses, do not ordinarily have such an identifiable victim and therefore would not ordinarily be covered by the amendment. However, in some unusual cases, a court or legislature might conclude that these of-

fenses in fact "involved" violence against an identifiable victim. For example, treason or espionage against the United States resulting in death or injury to an American Government official would produce an identifiable victim protected by the amendment.

*"To reasonable notice of * * * any public proceedings relating to the crime"*

To make victims aware of the proceedings at which their rights can be exercised, this provision requires that victims be notified of public proceedings relating to a crime. "Notice" can be provided in a variety of fashions. For example, the Committee was informed that some States have developed computer programs for mailing form notices to victims while other States have developed automated telephone notification systems. Any means that provides reasonable notice to victims is acceptable. "Reasonable" notice is any means likely to provide actual notice to a victim. Heroic measures need not be taken to inform victims, but due diligence is required by government actors. It would, of course, be reasonable to require victims to provide an address and keep that address updated in order to receive notices. "Reasonable" notice is notice that permits a meaningful opportunity for victims to exercise their rights. In rare mass victim cases (i.e., those involving hundreds of victims), reasonable notice could be provided to means tailored to those unusual circumstances, such as notification by newspaper or television announcement.

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

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

The public proceedings are those "relating to the crime." Typically these would be the criminal proceedings arising from the filed criminal charges, although other proceedings might also relate to

the crime. Thus, the right applies not only to initial hearings on a case, but also rehearings, hearing at an appellate level, and any case on a subsequent remand. It also applies to multiple hearings, such as multiple bail hearings. In cases involving multiple defendants, notice would be given as to proceedings involving each defendant.

" * * not to be excluded from * * * any public proceedings relating to the crime"*

Victims are given the right "not to be excluded" from public proceedings. This builds on the 1982 recommendation from the President's Task Force on Victims of Crime that victims "no less than the defendant, have a legitimate interest in the fair adjudication of the case, and should therefore, as an exception to the general rule providing for the exclusion of witnesses, be permitted to be present for the entire trial." President's Task Force on Victims of Crime, "Final Report," 80 (1982).

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

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

*Right "to be heard, if present, and to submit a statement at all public proceedings to determine a conditional release from custody, an acceptance of a negotiated plea, or a sentence. * * *"*

The amendment confers on crime victims a right to be heard by the relevant decisionmakers at three critical points in the criminal justice process before the final decisions are made.

First, crime victims will have the right to be heard at proceedings "to determine a conditional release from custody." Under this provision, for example, a victim of domestic violence will have the opportunity to warn the court about possible violence if the defendant is released on bail, probation, or parole. A victim of gang violence will have the opportunity to warn about the possibility of witness intimidation. The court will then evaluate this information in the normal fashion in determining whether to release a defendant and, if so, under what conditions. Victims have no right to "veto" any release decision by a court, simply to provide relevant information that the court can consider in making *its* determination about release.

The amendment extends the right to be heard to proceedings determining a "*conditional* release" from custody. This phrase encompasses, for example, hearings to determine any pretrial or posttrial release (including comparable releases during or after an appeal) on bail, personal recognizance, to the custody of a third person, or under any other conditions, including pretrial diversion programs. Other examples of conditional release include work release and home detention. It also includes parole hearings or their functional equivalent, both because parole hearings have some discretion in releasing offenders and because releases from prison are typically subject to various conditions such as continued good behavior. It would also include a release from a secure mental facility for a criminal defendant or one acquitted on the grounds of insanity. A victim would not have a right to speak, by virtue of this amendment, at a hearing to determine "unconditional" release. For example, a victim could not claim a right to be heard at a hearing to determine the jurisdiction of the court or compliance with the governing statute of limitations, even though a finding in favor of the defendant on these points might indirectly and ultimately lead to the "release" of the defendant. Similarly, there is no right to be heard when a prisoner is released after serving the statutory maximum penalty, or the full term of his sentence. There would be no proceeding to "determine" a release in such situations and the release would also be without condition if the court's authority over the prisoner had expired. The victim would, however, be notified of such a release, as explained in connection with the victims' right to notice of a release.

Second, crime victims have the right to be heard at any proceedings to determine "an acceptance of a negotiated plea." This gives victims the right to be heard before the court accepts a plea bargain entered into by the prosecution and the defense before it becomes final. The Committee expects that each State will determine for itself at what stage this right attaches. It may be that a State decides the right does not attach until sentencing if the plea can still be rejected by the court after the presentence investigation is completed. As the language makes clear, the right involves being

heard when the court holds its hearing on whether to accept a plea. Thus, victims do not have the right to be heard by prosecutors and defense attorneys negotiating a deal. Nonetheless, the Committee anticipates that prosecutors may decide, in their discretion, to consult with victims before arriving at a plea. Such an approach is already a legal requirement in many States, see "National Victim Center, 1996 Victims' Rights Sourcebook," 127–31 (1996), is followed by many prosecuting agencies, see, e.g., Senate Judiciary Committee hearing, April 28, 1998, statement of Paul Cassell, at 35–36, and has been encouraged as sound prosecutorial practice. See U.S. Department of Justice, Office for Victims of Crime, "New Directions from the Field: Victims' Rights and Services for the 21st Century," 15–16 (1998). This trend has also been encouraged by the interest of some courts in whether prosecutors have consulted with the victim before arriving at a plea. Once again, the victim is given no right of veto over any plea. No doubt, some victims may wish to see nothing less than the maximum possible penalty (or minimum possible penalty) for a defendant. Under the amendment, the court will receive this information, along with that provided by prosecutors and defendants, and give it the weight it believes is appropriate deciding whether to accept a plea. The decision to accept a plea is typically vested in the court and, therefore, the victims' right extends to these proceedings. See, e.g., Fed. R. Crim. Pro. 11(d)(3); see generally Douglas E. Beloof, "Victims in Criminal Procedure," 462–88 (1999).

Third, crime victims have the right to be heard at any proceeding to determine a "sentence." This provision guarantees that victims will have the right to "allocute" at sentencing. Defendants have a constitutionally protected interest in personally addressing the court. See *Green* v. *United States,* 365 U.S. 301 (1961). This provision would give the same rights to victims, for two independent reasons. First, such a right guarantees that the sentencing court or jury will have full information about the impact of a crime, along with other information, in crafting an appropriate sentence. The victim would be able to provide information about the nature of the offense, the harm inflicted, and the attitude of the offender. Second, the opportunity for victims to speak at sentencing can sometimes provide a powerful catharsis. See *United States* v. *Smith,* 893 F. Supp. 187, 188 (E.D.N.Y. 1995), *United States* v. *Hollman Cheung,* 952 F. Supp. 148, 151 (E.D.N.Y. 1997). Because the right to speak is based on both of these grounds, a victim will have the right to be heard even when the judge has no discretion in imposing a mandatory prison sentence.

State and Federal statutes already frequently provide allocution rights to victims. See, e.g., Fed. R. Evid. 32(c), Ill. Const. art. 1, § 8.1(a)(4). The Federal amendment would help to ensure that these rights are fully protected. The result is to enshrine in the Constitution the Supreme Court's decision in *Payne* v. *Tennessee,* 501 U.S. 808 (1991), recognizing the propriety of victim testimony in capital proceedings. This provision will extend to victims the right to be heard on issues relating to the sentence, including restitution (and modification of restitution) issues. At the same time, the victim's right to be heard at sentencing will not be unlimited, just as the defendant's right to be heard at sentencing is not unlim-

ited today. Congress and the States remain free to set certain limits on what is relevant victim impact testimony. For example, a jurisdiction might determine that a victims' views on the desirability or undesirability of a capital sentence is not relevant in a capital proceeding. Cf. *Robison* v. *Maynard,* 943 F.2d 1216 (10th Cir. 1991) (concluding that victim opinion on death penalty not admissible). The Committee does not intend to alter or comment on laws existing in some States allowing for victim opinion as to the proper sentence. Also, a right to have victim impact testimony heard at sentencing does not confer any right to have such testimony heard by a jury at trial. See *Sager* v. *Maass,* 907 F. Supp. 1412, 1420 (D. Or. 1995) (citing cases). The victim's right to be heard does not extend to the guilt determination phase of trials, although victims may, of course, be called as a witness by either party. Cf. George P. Fletcher, "With Justice for Some: Victims' Rights in Criminal Trials," 248–50 (1995). The Committee, however, intends no modification of the current law, with deep historical roots, allowing a crime victim's attorney to participate in the prosecution, to whatever extent presently allowed.

The victim's right is one to "be heard, if present, and to submit a statement." The right to make an oral statement is conditioned on the victim's presence in the courtroom. As discussed above, it does not confer on victims a right to have the Government transport them to the relevant proceeding. Nor does it give victims any right to "filibuster" any hearing. As with defendants" existing rights to be heard, a court may set reasonable limits on the length and content of statements. At the same time, victims should always be given the power to determine the form of the statement. Simply because a decisionmaking body, such as the court or parole board, has a prior statement of some sort on file does not mean that the victim should not again be offered the opportunity to make a further statement.

Even if not present, the victim is entitled to submit a "statement" at the specified hearings for the consideration of the court. The Committee has not limited the word statement to "written" statements, because the victim may wish to communicate in other appropriate ways. For example, a victim might desire to present an impact statement through a videotape or via an Internet message over a system established by the courts. The term "statement" is sufficiently flexible to encompass such communications.

The right to be heard is also limited to "such proceedings," that is, to "such [public] proceedings." As discussed previously at greater length, a victim has no right to be heard at a proceeding that the court has properly closed under the existing standards governing court closures.

Right to "the foregoing rights at a parole proceeding that is not public, to the extent those rights are afforded to the convicted offender"

The right to be heard at public proceedings to determine a conditional release confers on victims the right to be heard at public parole proceedings. In some jurisdictions, however, parole decisions are not made in public proceedings, but rather in other ways. For such jurisdictions, the amendment places victims on equal footing

with defendants. If defendants have the right to provide communications with the paroling or releasing authority, then victims do as well. For example, in some jurisdictions the parole board might review various folders on prisoners in making a parole decision. If the defendant is given an opportunity to provide information for inclusion in those folders, so will the victim. The phrase "the foregoing rights" encompasses all of the previously listed rights in the amendment, including the right to notice, to not be excluded, and to be heard, if present, and to submit a statement.

The term "parole" is intended to be interpreted broadly. Many jurisdictions are moving away from "parole" but still have a form of conditional release. The term also encompasses comparable hearings on conditional release from secure mental facilities.

Right to "reasonable notice of and an opportunity to submit a statement concerning any proposed pardon or commutation of a sentence"

This provision has twin aims: to ensure that a victim is not surprised by a pardon or commutation or a sentence and to allow that victim to provide information about that pardon or commutation. These terms are used broadly, so that a victim would receive notice of any alteration of a sentence by the executive branch, including pardons or commutations along with reprieves, remissions of fines or forfeitures, or other similar forms of executive clemency.

The victim is entitled to notice before a pardon or commutation is granted, since otherwise the opportunity to submit a statement concerning the "proposed" pardon or commutation would be meaningless. At the same time, however, it is not necessary that the victim receive notice whenever a prisoner files an application for a pardon or commutation. Many such applications are filed every year, but only a relatively few reach the final stages of the process where favorable action is possible. If they so choose, the President, Governors, and clemency boards are free to winnow the applications first, giving notice only to those victims involved in cases in which an application has a substantial prospect of being granted. As with other parts of the amendment, the requirement is for "reasonable" notice, which can be provided in various ways.

The President, Governors, and clemency boards are also free to determine the appropriate way in a victim's statement will be considered as part of the process. The fact that a victim objects to (or supports) a clemency application is not dispositive. Instead, the information provided by the victim will be considered along with other relevant information to aid the decisionmaker in making the difficult clemency decision.

Right to "reasonable notice of a release or escape from custody relating to the crime"

To ensure that the victim is not surprised or threatened by an escaped or released prisoner, the amendment gives victims a right to reasonable notice of such escape or release. As with other notice rights in the amendment, the requirement is not one of extraordinary measures, but instead of "reasonable" notice. As with the phrase used earlier in the amendment, "reasonable" notice is one likely to provide actual notice. New technologies are becoming more

widely available that will simplify the process of providing this notice. For example, automated voice response technology exists that can be programmed to place repeated telephone calls to victims whenever a prisoner is released, which would be reasonable notice of the release. As technology improves in this area, what is "reasonable" may change as well. "Reasonable" notice would also need to be considered in light of the circumstances surrounding the case. While mailing a letter would be "reasonable" notice of an upcoming parole release date, it would not be reasonable notice of the escape of a dangerous prisoner bent on taking revenge on his accuser.

The requirement of notice is limited to a "release from custody." Thus, victims are not entitled to notice under this amendment if, for example, a prisoner is simply moved from one custodial facility to another, reclassified in terms of his security level, or allowed to participate for an afternoon in a supervised work detail outside the prison walls. Victims are, however, entitled to notice of any government decision to finally or conditionally release a prisoner, such as allowing a prisoner to enter a noncustodial work release program or to take a weekend furlough in his old hometown.

The release must be one "relating to the crime." This includes not only a release after a criminal conviction but also, for example, a release of a defendant found not guilty of a crime by reason of insanity and then hospitalized in custody for further treatment, or a release pursuant to a habitual sex offender statute.

Right to "consideration of the interest of the victim that any trial be free from unreasonable delay"

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

In determining what delay is "unreasonable," the courts can look to the precedents that exist interpreting a defendant's right to a speedy trial. These cases focus on such issues as the length of the delay, the reason for the delay, any assertion of a right to a speedy trial, and any prejudice to the defendant. See *Barker* v. *Wingo*, 407 U.S. 514, 530–33 (1972). Courts will no doubt develop a similar ap-

proach for evaluating victims' claims. In developing such an approach, courts will undoubtably recognize the purposes that the victim's right is designed to serve. Cf. *Barker* v. *Wingo*, 407 U.S. 514, 532 (1972) (defendant's right to a speedy trial must be "assessed in the light of the interest of defendant which the speedy trial right was designed to protect"). The Committee intends for this right to allow victims to have the trial of the accused completed as quickly as is reasonable under all of the circumstances of the case, giving both the prosecution and the defense a reasonable period of time to prepare. The right would not require or permit a judge to proceed to trial if a criminal defendant is not adequately represented by counsel.

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

Right to "an order of restitution from the convicted offender"

This provision recognizes that an offender should be held responsible for the harm his crime caused, through an order of restitution at sentencing. The Committee has previously explained this philosophy in some detail in connection with the Mandatory Victim Restitution Act, codified at 18 U.S.C. 3663A and 3664, and intends that this right operate in a similar fashion. The relevant details will be spelled out under the resulting case law or, more likely, statutes to implement the amendment. However, this amendment does not confer on victims any rights to a specific amount of restitution, leaving the court free to order nominal restitution if there is no hope of satisfying the order, nor any rights with regard to a particular payment schedule.

The right conferred on victims is one to an "order" of restitution. With the order in hand, questions of enforcement of the order and its priority as against other judgments are left to the applicable Federal or State law. No doubt in a number of cases the defendant will lack the resources to satisfy the full order. In others, however, the defendant may have sufficient assets to do so and this right will place such an order in the victim's hands. The right is, of course, limited to "convicted" defendants, that is, those who pled guilty, are found guilty, or enter a plea of no contest. Even before a conviction, however, courts remain free to take appropriate steps to prevent a defendant's deliberate dissipation of his assets for the purpose of defeating a restitution order, as prescribed by current law.

Right to "consideration for the safety of the victim in determining any conditional release from custody relating to the crime"

This right requires judges, magistrates, parole boards, and other such officials to consider the safety of the victim in determining any conditional release. As with the right to be heard on conditional releases, this right will extend to hearings to determine any pretrial or posttrial release on bail, personal recognizance, to the custody of a third person, on work release, to home detention, or

under any other conditions as well as parole hearings or their functional equivalent. At such hearings, the decisionmaker must give consideration to the safety of the victim in determining whether to release a defendant and, if so, whether to impose various conditions on that release to help protect the victims' safety, such as requiring the posting of higher bail or forbidding the defendant to have contact with the victim. These conditions can then be enforced through the judicial processes currently in place.

This right does not require the decisionmaker to agree with any conditions that the victim might propose (or, for that matter, to agree with a victim that defendant should be released unconditionally). Nor does this right alter the eight amendment's prohibition of "excessive bail" or any other due process guarantees to which a defendant or prisoner is entitled in having his release considered. The Supreme Court, however, has already rejected constitutional challenges to pretrial detention, in appropriate circumstances, to protect community safety, including the safety of victims. See *United States* v. *Salerno*, 481 U.S. 739 (1987). This right simply guarantees victim input into a process that has been constitutionally validated.

Custody here includes mental health facilities. This is especially important as sex offenders are frequently placed in treatment facilities, following or in lieu of prison.

Right to "reasonable notice of the rights established by this article"

In the special context of the criminal justice system, victims particularly need knowledge of their rights. Victims are thrust into the vortex of complicated legal proceedings. Accordingly, the final right guaranteed by the amendment is the right to notice of victims rights. Various means have been devised for providing such notice in the States, and the Committee trusts that these means can be applied to the Federal amendment with little difficulty.

Once again, "reasonable" notice is one likely to provide actual notice. In cases involving victims with special needs, such as those who are hearing impaired or illiterate, officials may have to make special efforts in order for notice to be reasonable. Notice, whether of rights, proceedings, or events, should be given as soon as practicable to allow victims the greatest opportunity to exercise their rights.

Section 2. Only the victim or the victim's lawful representative shall have standing to assert the rights established by this article

This provision confers on victims and their lawful representatives standing to assert their rights. The term "standing" is used here in its conventional legal sense as giving victims the opportunity to be heard about their treatment, that is, to have the merits of their claims considered. For example, under this provision victims have the right to challenge their exclusion from the trial of the accused perpetrators of the crime. This overrules the approach adopted by some courts of denying victims an opportunity to raise claims about their treatment. See, e.g., *United States* v. *McVeigh*, 106 F.3d 325, 334–35 (10th Cir. 1997) (finding victims of the Oklahoma City bombing lacked standing to challenge their exclusion from certain proceedings). The provision is phrased in exclusive terms—"Only

the victim or the victim's lawful representatives"—to avoid any suggestion that other, potentially intermeddling, persons have the right to be heard in criminal proceedings, and to avoid the suggestion that the accused or convicted offender has standing to assert the rights of the victim.

There will be circumstances in which victims find it desirable to have a representative assert their rights or make statements on their behalf. This provision recognizes the right of a competent victim to choose a representative to exercise his or her rights, as provided by law. Typically victims' rights statutes have provided a means through which victims can select their representatives without great difficulty.

Other "lawful representatives" will exist in the context of victims who are deceased, are children, or are otherwise incapacitated. In homicide cases, victim's rights can be asserted by surviving family members or other persons found to be appropriate by the court. This is the approach that has uniformly been adopted in victims' rights statutes applicable in homicide cases, thus ensuring that in this most serious of crimes a voice for a victim continues to be heard. Of course, in such cases the "lawful representative" would not necessarily be someone who was the executor of the estate, but rather someone involved in issues pertaining to the criminal justice process. In cases involving child victims, a parent, guardian or other appropriate representative can do the same. For victims who are physically or mentally unable to assert their rights, an appropriate representative can assert the rights.

In all circumstances involving a "representative," care must be taken to ensure that the "representative" truly reflects the interests—and only the interests—of the victim. In particular, in no circumstances should the representative be criminally involved in the crime against the victim. The mechanics for dealing with such issues and, more generally, for the designation of "lawful" representatives will be provided by law—that is, by statute in relevant jurisdiction, or in its absence by court rule or decision.

"Nothing in this article shall provide grounds to stay or continue any trial, reopen any proceeding or invalidate any ruling, except with respect to conditional release or restitution or to provide rights guaranteed by this article in future proceedings, without staying or continuing a trial"

This provision is designed to protect completed criminal proceedings against judicially created remedies that might interfere with finality. At the same time, the provision leaves open appropriate avenues for victims to challenge violations of their rights as well as the ability of Congress and the States to provide additional remedies.

In drafting the amendment, the Committee was faced with balancing the competing concerns of giving victims an effective means of enforcing their rights and of ensuring that court decisions retain a reasonable degree of finality. The Committee was concerned that, if victims could challenge and overturn all criminal justice proceedings at which their rights were violated, the goal of finality, and conceivably other goals, could be seriously frustrated. On the other hand, the Committee recognized that if victims were never

given an opportunity to challenge previously taken judicial actions, victims rights might remain routinely ignored. The Committee's solution to the dilemma was to leave the issue of the most controversial remedies to the legislative branches. These branches have superior fact finding capabilities, as well as abilities to craft necessary exceptions and compromises. Thus, the provision provides that "Nothing in this article" shall provide grounds for victims to challenge and overturn certain previously taken judicial actions. It accordingly leaves open the possibility that Congress and the States, within their respective jurisdictions, could draft legislation providing such remedies in appropriate circumstances.

The provision prevents judicially created remedies "to stay or continue any trial" because of the concern that a broad judicial remedy might allow victims to inappropriately interfere with trials already underway. The provision also prevents judicially created remedies to "reopen any proceeding or invalidate any ruling" because of similar finality concerns. At the same time, however, the provision recognizes that victims can reopen earlier rulings "with respect to conditional release or restitution." In these particular areas, judicially created rules will allow victims to challenge, for example, a decision made to release a defendant on bail without consideration of the victim's safety. Similarly, victims are specifically allowed to challenge a ruling "to provide rights guaranteed by this article in future proceedings, without staying or continuing a trial." For example, in what will presumably be the rare case of a victim improperly excluded from a trial, a victim could seek an immediate expedited review of the decision under the existing rules allowing for expedited review, seeking admission to "future proceedings," that is, to upcoming days of the trial. Similarly, a victim who wishes to challenge a ruling that he or she is not entitled to notice of a release or escape of a prisoner can challenge that ruling until the release or escape takes place. Of course, limits on the ability of victims to "invalidate" a court ruling do not forbid a victim from asking a court to reconsider its own ruling or restrict a court from changing its own ruling.

"Nothing in this article shall give rise to or authorize the creation of a claim for damages against the United States, a State, a political subdivision, or a public officer or employee"

This provision imposes the conventional limitations on victims' rights, providing that the amendment does not give rise to any claim for money damages against governmental entities or their employees or agents. While some existing victims' rights provisions provide for the possibility of damage actions or fines as an enforcement mechanism in limited circumstances, see, e.g., Ariz. Rev. Stat. Ann. § 13–4437(B) (authorizing suit for "intentional, knowing, or grossly negligent violation" of victims rights), the Committee does not believe that consensus exists in support of such a provision in a Federal amendment. Similar limiting language barring damages actions is found in many state victims' rights amendments. See, e.g., Kan. Const. art. 15, § 15(b) ("Nothing in this section shall be construed as creating a cause of action for money damages against the state. * * *"); Mo. Const. art. 1, § 32(3), (5) (similar); Tex. Const. art. I, § 30(e) ("The legislature may enact

laws to provide that a judge, attorney for the State, peace officer, or law enforcement agency is not liable for a failure or inability to provide a right enumerated in this section"). The limiting language in the provision also prevents the possibility that the amendment might be construed by courts as requiring the appointment of counsel at State expense to assist victims. Cf. *Gideon* v. *Wainwright,* 372 U.S. 335 (1963) (requiring counsel for indigent criminal defendants).

This provision in no way affects—by way of enlargement or contraction—any existing rights that may exist now or be created in the future independent of the amendment, at either the State or Federal level.

The Congress shall have the power to enforce this article by appropriate legislation

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

Exceptions to the rights established by this article may be created only when necessary to achieve a compelling interest

Constitutional rights are not absolute. There is no first amendment right, for example, to yell "Fire!" in a crowded theater. Courts interpreting the Crime Victims' Rights Amendment will no doubt give a similar, commonsense construction to its provisions.

The amendment does not impose a straightjacket that would prevent the proper handling of unusual situations. The exceptions language in the amendment explicitly recognizes that in certain rare circumstances exceptions may need to be created to victims' rights. By way of example, the Committee expects the language will encompass the following situations.

First, in mass victim cases, there may be a need to provide certain limited exceptions to victims' rights. For instance, for a crime perpetrated against hundreds of victims, it may be impractical or even impossible to give all victims the right to be physically present in the courtroom. In such circumstances, an exception to the right to be present may be made, while at the same time providing reasonable accommodation for the interest of victims. Congress, for example, has specified a close-circuit broadcasting arrangement that may be applicable to some such cases. Similar restrictions on the number of persons allowed to present oral statements might be appropriate in rare cases involving large numbers of victims.

Second, in some cases of domestic violence, the dynamics of victim-offender relationships may require some modification of otherwise typical victims' rights provisions. This provision offers the ability to do just that.

Third, situations may arise involving intergang violence, where notifying the member of a rival gang of an offenders' impending release may spawn retaliatory violence. Again, this provision provides a basis for dealing with such situations.

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

This article shall take effect on the 180th day after the ratification of this article. The right to an order of restitution established by this article shall not apply to crimes committed before the effective date of this article.

The Committee has included a 180-day "grace period" for the amendment to allow all affected jurisdictions ample opportunity to prepare to implement the amendment. After the period has elapsed, the amendment will apply to all crimes and proceedings thereafter. The one exception that the Committee made was for orders of restitution. A few courts have held that retroactive application of changes in standards governing restitution violates the Constitution's prohibition of ex post facto laws. See, e.g., *United States* v. *Williams,* 128 F.3d 1239 (8th Cir. 1997). The Committee agrees with those courts that have taken the contrary view that, because restitution is not intended to punish offenders but to compensate victims, ex post facto considerations are misplaced. See, e.g., *United States* v. *Newman,* 144 F. 3d 531 (7th Cir. 1998). However, to avoid slowing down the conclusion of cases pending at the time of the amendment's ratification, the language on restitution orders was added.

The rights and immunities established by this article shall apply in Federal and State proceedings, including military proceedings to the extent that the Congress may provide by law, juvenile justice proceedings, and proceedings in the District of Columbia and any commonwealth, territory, or possession of the United States

This provision extends the amendment to all State and Federal criminal justice proceedings. Because of the complicated nature of military justice proceedings, including proceedings held in times of war, the extension of victims rights to the military was left to Congress. The Committee intends to protect victims' rights in military justice proceedings while not adversely affecting military operations. This provision also extends victims' rights to all juvenile justice proceedings that are comparable to criminal proceedings, even though these proceedings might be given a noncriminal label. On this point, the Committee believes that "[t]he rights of victims of juvenile offenders should mirror the rights of victims of adult offenders." U.S. Department of Justice, Office for Victims of Crime, "New Directions From the Field: Victims' Rights and Services for the 21st Century," 22 (1998).

VI. VOTE OF THE COMMITTEE

The Committee considered on S.J. Res. 3 on September 30, 1999. Senator Kyl offered a substitute amendment, which was agreed to by unanimous consent. Senator Feingold offered an amendment that was defeated. The Committee agreed to favorably report S.J. Res. 3 to the full Senate, with an amendment in the nature of a substitute, on September 30, 1999.

1. Senator Feingold offered an amendment. The amendment to insert the following: "Section 3. Nothing in this article shall limit any right of the accused which may be provided by this Constitution." The following sections would have been accordingly renumbered. The amendment was defeated by a rollcall vote of 5 yeas to 11 nays.

YEAS	NAYS
Leahy	Thurmond
Kennedy (proxy)	Grassley (proxy)
Kohl (proxy)	Kyl
Feingold	DeWine (proxy)
Torricelli	Ashcroft
	Abraham
	Smith
	Biden (proxy)
	Feinstein
	Schumer
	Hatch

2. The Committee voted on final passage. The resolution was ordered favorably reported, as amended, by a rollcall vote of 12 to 5.

YEAS	NAYS
Thurmond	Leahy
Grassley (proxy)	Kennedy (proxy)
Kyl	Kohl (proxy)
DeWine (proxy)	Feingold
Ashcroft	Schumer
Abraham	
Sessions (proxy)	
Smith	
Biden (proxy)	
Feinstein	
Torricelli	
Hatch	

VII. COST ESTIMATE

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

S.J. Res. 3—Proposing an amendment to the Constitution of the United States to protect the rights of crime victims

S.J. Res. 3 would propose amending the Constitution to protect the rights of crime victims. The legislatures of three-fourths of the states would be required to ratify the proposed amendment within seven years for the amendment to become effective. By itself, this resolution would have no impact on the federal budget. If the proposed amendment to the Constitution is approved by the states,

this could result in additional costs for the federal court system. CBO does not expect any additional costs would be significant because the amendment would apply to crimes of violence, which are rarely federally prosecuted. Because enactment of S.J. Res. 3 would not affect direct spending or receipts, pay-as-you-go procedures would not apply.

S.J. Res. 3 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments. In order for the amendment to become part of the Constitution, three-fourths of the state legislatures would have to ratify the resolution within seven years of its submission to the states by the Congress. However, no state is required to take action on the resolution, either to reject it or to approve it.

The CBO staff contacts for this estimate are Lanette Keith (for federal costs) and Lisa Cash Driskill (for the state and local impact). This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

VIII. Regulatory Impact Statement

Pursuant to paragraph 11(b), rule XXVI of the Standing Rules of the Senate, the Committee, after due consideration, concludes that S.J. Res. 3 will not have direct regulatory impact.

IX. ADDITIONAL VIEWS OF SENATORS KYL AND FEINSTEIN

We would like to thank Chairman Hatch for his support of the Crime Victims' Rights Amendment (S.J. Res. 3) and comment, quite briefly, on points he has raised.

SCOPE OF THE AMENDMENT

Chairman Hatch has expressed his disappointment that the amendment has focused on victims of crimes of violence. No one was more disappointed than we were to conclude that we lacked sufficient support for an amendment extending rights more broadly. Yet at this juncture, our practical political choices are apparently between an amendment protecting some victims or no amendment at all. We agree with the great bulk of crime victims organizations that we must avoid the temptation to let the "perfect" become the enemy of the "good," and should move forward to achieve what is possible. Indeed, it seems quite likely that an amendment protecting the rights of victims of violent crime will quickly spill over and protect victims of many other crimes. This has been the experience with other enactments in the past. For example, several years ago Congress amended the Federal Rules of Criminal Procedure to extend allocution rights at sentencing to victims of "crimes of violence." See Fed. R. Crim. P. 32(c)(3)(E). It appears that this limitation has not caused other rights to be withdrawn but, to the contrary, has served to promote greater awareness of victims' rights for all victims.

REQUIREMENT OF REASONABLE NOTICE

Chairman Hatch has also raised the question about whether notice of rights should be provided to victims of crime, suggesting that this might be novel. But providing notice of rights is hardly novel. The sixth amendment's right to counsel, for example, has been conventionally understood as requiring that a criminal defendant be notified expressly of this right. See, e.g., *Faretta* v. *California*, 422 U.S. 806, 835 (1975). Similarly, criminal trials are, of course, scheduled with notice to defendants, since to do otherwise would violate basic constitutional due process principles. Since the Constitution provides such protections for defendants, it ought to provide similar protections for victims. The proposed amendment leaves ample flexibility by requiring only "reasonable" notice.

RIGHT TO REOPEN CERTAIN PROCEEDINGS AND INVALIDATE CERTAIN PROCEEDINGS

Chairman Hatch has pointed out that the amendment should not be construed as potentially implicating the "liberty" interest of criminal defendants by allowing victims to reopen bail or other proceedings after a defendant has been released. We agree with the

Chairman that defendants are entitled to due process before bail is revoked. For this reason, the proposed amendment is carefully drafted. The amendment does *not* give victims any unilateral right to revoke bail, for example, but, rather, simply extends to victims the right "to *consideration* for the safety of the victim in determining any conditional release from custody." That consideration, of course, will be give consistently with due process for the defendant. Today, of course, due process permits a prosecutor to ask a court to reconsider a bail decision. The amendment simply follows that well-trodden path in affording victims a similar right.

ENFORCEMENT POWER

We agree with Chairman Hatch that federalism is an important value that must be respected. For this reason, the amendment that we initially introduced explicitly extended enforcement power to both Congress and the States. This language, however, did not garner the broad consensus necessary to survive in the current draft.

Even without enforcement language that explicitly includes the States, however, there will be considerable room for State experimentation and flexibility. The amendment extends rights to "[a] victim of a crime of violence, as these terms may be defined by law." Of course, the "law" that will serve to define these terms will typically be State law. Thus, perhaps to an even greater degree than defendants' rights recognized in the Bill of Rights, this language in the Crime Victims' Rights Amendment will allow flexible application adaptable to unique local circumstances. Flexibility is also recognized in other provisions for the amendment. For example, the requirement of notice of hearings is limited to "reasonable" notice. Victims are given a right to "consideration" of their interest in trials free from "unreasonable" delay, which will give state courts ample room to incorporate local interests.

The bigger danger to federalism is passing no amendment. As our hearings on this subject have revealed, States have had difficulty extending rights to victims of crime through State statutes and constitutional amendments precisely because courts are used to considering, first and foremost, Federal constitutional rights. By extending Federal rights to victims throughout the States, it will then become easier for State criminal justice systems to protect the rights of victims. Perhaps for this reason the National Governor's Association, whose members include some of the fiercest defenders of federalism, endorsed the proposed amendment as long ago as 1997.

"COMPELLING INTEREST" STANDARD

Chairman Hatch has raised the possible concern that the standard of a "compelling interest" for an exceptions clause "may be too high a burden." The choice of standard here was very deliberate and is critical to the proper functioning of the amendment. The standard should not allow exceptions to constitutional rights be easily enacted by the legislature—otherwise the exceptions will swallow the rule. Therefore, for an exceptions clause, the "compelling interest" standard is appropriate.

At the same time, yet this burden is not "too high" to prevent the recognition of legitimate State interests. A number of State reg-

ulations have survived this scrutiny. The example of yelling "Fire!" in a crowded theater is widely cited, *Schenck* v. *U.S.*, 249 U.S. 47, 52 (1919) (Holmes, J.), but recent cases specifically allow first amendment exceptions to be made for compelling reasons in a variety of circumstances. See, e.g., *Burson* v. *Freeman*, 504 U.S. 191 (1992) (prohibition of pamphleteering close to voting booth); *Osborn* v. *Ohio*, 495 U.S. 103 (1990) (child pornography); *Board of Directors of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U.S. 537 (1987) (prohibition of discrimination against women). In short, the "compelling interest" standard is not the "fatal in fact" standard, but one that appropriately accommodates the competing concerns.

The alternative—simply leaving the amendment silent on the standard of review—would be quite problematic. Doing so would be an unwarranted invitation to judicial activism, as courts would then be free to concoct a standard. It is far better that we spell out how the issue should be handled than to leave courts adrift in a sea of their own personal predilections. Again, the point of a high (but hardly impossible) standard is that, after the Congress and the people have added rights to the U.S. Constitution, it *should* be difficult to eliminate those rights by less than constitutional action.

"IMMUNITIES"

The final point Chairman Hatch has raised concerns the provision extending "rights and *immunities*" to all criminal proceedings. The term "immunities" was simply intended to extend the police, prosecutors, judges and other actors the immunity from damage actions found in section 2. This language was added at the specific suggestion of Department of Justice lawyers, and should not create difficulties in administering the amendment.

CONCLUSION

The Crime Victims' Rights Amendment will bring balance to the system by giving victims of violent crime the rights to be informed, present, and heard at critical stages throughout their ordeal—the *least* the system owes to those it failed to protect. After more than 15 years of being tested in the States and more than 4 years of careful revisions, this amendment is a finely tuned product ready to be passed by the Congress and sent to the States as soon as possible.

JON KYL.
DIANNE FEINSTEIN.

X. ADDITIONAL VIEWS OF SENATORS LEAHY AND KENNEDY

When it comes to recognizing the rights of victims of crime, there is no majority, no minority and no middle ground. As Americans, we share the common desire to ensure that crime victims are given the strong and enforceable rights to which they should be entitled. Similarly, respect for the Constitution has no middle ground. We view the Constitution as the foundation of our Government, embodying not only the authority of the Government but restraints upon that authority. It is our fundamental charter, that is to be amended only after careful consideration of the necessity and the long-term implications of the proposed change.

We do not view the Constitution as merely another legislative tool, interchangeable with statutes. The Constitution should not be amended when we have not exhausted efforts to achieve our national goal by statutory means. The goals of S.J. Res. 3 can be achieved by ordinary legislation, yet, its proponents would amend the Constitution despite the numerous objections of constitutional scholars, victims' rights groups, judges, prosecutors and even the Chief Justice of the U.S. Supreme Court. Before taking a red pen to our paramount charter, we should make every effort to achieve our common goals by all other means.

THE CRIME VICTIMS ASSISTANCE ACT, S. 934

We share with the majority the common desire "to honor the humanity and dignity of crime victims." Indeed, it was the Senator from Vermont who first used these words in hearings on the proposed constitutional amendment. We also recognize the associated duty to shoulder the thankless and unglamorous responsibility of creating the framework essential to giving these promises substance and these rights meaning. To do any less would not honor the dignity of crime victims. Rather, it would be worse than to do nothing at all, because to do less would be to make empty promises and create false hopes.

It is precisely because our strong commitment to protecting the rights of victims effectively that we introduced S. 934, the Crime Victims Assistance Act, on April 30, 1999, and its predecessor in the 105th Congress. Our proposed statute provides victims enhanced rights and protections, but does so without taking the drastic, unnecessary step of amending the Constitution, without interfering with the pardon power of the President, and without opening a Pandora's box of serious, long-term consequences. Our proposed statute clearly defines the protected class and the offenses implicated. By contrast, S.J. Res. 3 not only leaves the key terms undefined, inviting the same "patchwork" of laws that the supporters of the constitutional amendment say they deplore, but also creates an amorphous provision for exceptions which is devoid of focus or defi-

nition. Our proposed statute creates specific victims' services and authorizes funding to effect the rights and services created, accomplishing the core goals of S.J. Res. 3 without burdening State and local governments with unfunded mandates and without jeopardizing effective law enforcement by forcing the diversion of scarce resources from criminal prosecutions. Our proposed statute allows States to retain their plenary power to protect victims in ways appropriate to meet their local concerns and unique needs, while S.J. Res. 3 would supplant the programs already implemented by a majority of States according to their individual needs with a Federal mandate.

TITLE I

Title I of our bill reforms Federal law and the Federal Rules of Evidence to provide enhanced protections to victims of Federal crime, to assure victims a greater voice in the prosecution of the criminals who hurt them and their families. Title I gives victims certain rights, including the right to be notified and heard on the issue of detention, the right to a speedy trial and prompt disposition free from unreasonable delay, the right to be notified of escape or release from prison, the right to be notified of a plea agreement and to be heard on the merits of the plea agreement, and rights of notification and allocution at a probation revocation hearing. In addition, S. 934 enhances victims' rights to orders of restitution, to notification and an opportunity to be heard at sentencing, and to be present at trial. Title I also provides victims and witnesses additional protection by increasing the maximum penalties for witness tampering.

Furthermore, and perhaps most importantly, S. 934 establishes a mechanism for addressing violations of these rights.

The rights established by title I will fill existing gaps in Federal criminal law and will be a major step toward ensuring that the rights of victims of Federal crimes receive appropriate and sensitive treatment. Furthermore, unlike S.J. Res. 3, these rights will work in tandem with the myriad existing State laws. They will protect the rights of victims without trammeling on the efforts of the States to protect victims in ways appropriate to each States' unique needs.

TITLE II

Title II of our statutory proposal is designed to assist victims of crime and to ensure that they receive the counseling, information, and assistance they need to participate in the criminal justice process to the maximum extent possible. Title II authorizes appropriations for the Attorney General to hire 50 victim-witness advocate positions to assist victims of any Federal criminal offense investigation, and to fund grants for an additional 50 victim-witness advocates positions to assist victims of State crimes. It also provides funds for increased training for State and local law enforcement agencies, State court personnel and officers of the court to enable them to respond effectively to the needs of victims of crime. These offices also receive resources to enable them to develop state-of-the-art systems to notify crime victims of important dates and developments.

In addition to creating the mechanism to make victims' rights a reality, title II establishes ombudsman programs to ensure that victims are given unbiased information about navigating the criminal justice process and authorizes the use of funds to make grants to establish pilot programs that implement balanced and restorative justice models. It also provides measures to aid victims of terrorist acts or acts of mass violence occurring outside of the United States.

Finally, in order to make all of these improvements possible, the proposed statute also provides explicitly for increased Federal financial support for victim assistance and compensation. By creating specific services for victims and expressly authorizing funding to implement the legislation, S. 934 provides more than empty rhetoric.

CONCLUSION

Our statutory proposal is clear, comprehensive, and responsible. It secures the core rights contained in the proposed amendment, provides victims' services, and authorizes funding for these rights and services. We should not amend our Constitution unnecessarily, and S.J. Res. 3 is both unnecessary and unwise. Supporters of the constitutional amendment have constructed a veritable Potemkin Village, which is all show and very little substance. It promises victims' rights, but provides no meaningful remedy for violations of those rights. It imposes duties on State and local prosecutors' offices, but fails to provide funding and, as a result, threatens to overburden already tight budgets and to compromise diligent and efficient future prosecutions.

With a simple majority of both Houses of Congress, the Crime Victims Assistance Act could have been enacted 2 years ago. Its provisions could be making a difference in the lives of crime victims throughout the country. There would be no need to achieve supermajorities in both Houses of Congress, no need to wait ratification efforts among the States and no need to go through the ensuing process of enacting implementing legislation.

We remain hopeful that the Senate will turn its attention first to the Leahy-Kennedy Crime Victims Assistance Act before embarking down the path of constitutional amendment.

PATRICK J. LEAHY.
EDWARD M. KENNEDY.

XI. MINORITY VIEWS OF SENATORS LEAHY, KENNEDY, KOHL, AND FEINGOLD

CONTENTS

A. INTRODUCTION

Never before in the history of the Republic have we passed a constitutional amendment to guarantee rights to a politically popular group of citizens at the expense of a powerless minority. Never before in the history of the Republic have we passed a constitutional

amendment to guarantee rights that every State is already striving to protect. Never before in the history of the Republic have we passed a constitutional amendment to guarantee rights that intrude so technically into such a side area of law, and with such serious implications for the Bill of Rights.

The emotional engine feeding this amendment is not, however, without precedent. There has been one instance in our history in which we amended the Constitution without carefully thinking through the consequences. Andrew Volstead led the Congress to the passage of the 18th amendment, and opened a Pandora's Box of unintended consequences. The 18th amendment was appealing and entirely well meaning. It also was an utter failure that the American people were required to undo with the 21st amendment.

The disaster of Prohibition should remind us that constitutional amendments based on sentiment are a dangerous business. It would be well for Congress to heed the words of James Madison, when he urged that amendments be reserved for "certain great and extraordinary occasions," and to heed the text of article V, which reserves amendments for things that are "necessary."

The treatment of crime victims certainly is of central importance to a civilized society. The question is not *whether* we should help victims, but *how*. It long has been and is now open to Congress immediately to pass a statute that would provide full victims' right throughout the Federal system, and at the same time provide the resources necessary to assist the States in giving force to their own, locally-tailored statutes and constitutional provisions. Instead, the proponents of S.J. Res. 3 invite Congress to delay relief for victims with a complex and convoluted amendment to our fundamental law that is nearly as long as the ten amendments that comprise the Bill of Rights put together—an amendment that is less a remedy than another Pandora's Box which, like the 18th amendment, will loose a host of unintended consequences.

The majority appears to believe that it can control some of the inevitable damage through explications in the Committee report about how the amendment will operate. We doubt that the courts will care much for such efforts. They will look first to the plain meaning of the text of the amendment. They will seek guidance in Supreme Court precedents interpreting provisions using similar language. They will not resort to the majority report to interpret wording that is clearly understood in current legal and political circles.[1]

Any interpretative value of the majority report is further undermined by the inconsistency of the document, which is some situations narrows the impact of the amendment (*e.g.,* by construing away the unpopular consequences for battered women and incarcerated victims) and in other circumstances expands the impact of the amendment (*e.g.,* by devising a role for States in implementing the amendment). Such inconsistency may be politically expedient, but it leaves the final product unreliable as an interpretive tool. Weaknesses in the text of the amendment cannot with any confidence be cured by the majority's views, especially not when the

[1] See generally Robert P. Mosteller & H. Jefferson Powell, *With Disdain for the Constitutional Craft: The Proposed Victims' Rights Amendment,* 78 N.C.L. Rev. 371, 378 (Jan. 2000).

majority's analysis is so directly at odds with the amendment's plain language and with settled constitutional doctrine.

B. IT IS NOT NECESSARY TO AMEND THE CONSTITUTION TO PROTECT VICTIMS' RIGHTS

Every proposal to amend our Federal Constitution bears a very heavy burden. Amendment is appropriate only when there is a pressing need that cannot be addressed by other means. No such need exists in order to protect the rights of crime victims. The proposed amendment therefore fails the standard contained in article V of the Constitution: it is not "necessary."

1. Congress and the States have the power to protect victims' rights without a Federal constitutional amendment

Nothing in our current Constitution inhibits the enactment of State or Federal laws that protect crime victims. On the contrary, the Constitution is generally supportive of efforts to give victims a greater voice in the criminal justice system.[2] No Victims' Rights Amendment was necessary, for example, to secure a role for victims at pretrial detention and capital sentencing hearings.[3] Nor do we need a constitutional provision to entitle victims to notice of public proceedings.

A letter sent to Chairman Hatch by over 450 professors of constitutional and criminal law states that "[v]irtually every right contained in the proposed victims rights amendment can be safeguarded in Federal and State laws."[4] Even Professor Laurence Tribe, an outspoken supporter of a Victims' Rights Amendment, has acknowledged that "the States and Congress, within their respective jurisdictions, already have ample affirmative authority to enact rules protecting these rights."[5]

We asked Professor Paul Cassell, another leading proponent of S.J. Res. 3, to identify all judicial decisions that were not eventually reversed in which victims' rights laws or State constitutional amendments were not given effect because of defendants' rights in the Federal Constitution. He failed to identify any. We also asked Professor Cassell to name any cases in which a defendant's conviction was reversed because of victims' rights legislation or a State constitutional amendment. Again, he was aware of none.[6] Where, then, is the objectionable body of law that might justify the extraordinary step of amending the United States Constitution?

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[2] After listing the State constitutional amendments in footnote 1, the majority report concedes that "[t]hese amendments passed with overwhelming popular support." Most of the examples sprinkled throughout the majority report demonstrate that change toward better implementation of victims' rights is occurring in the States. The majority admits (in Part IV. 4) that "[t]here is a trend toward greater public involvement in the process, with the federal system and a number of States now providing notice to victims."

[3] *United States* v. *Salerno,* 481 U.S. 739 (1987) (due process and excessive bail clauses do not prohibit courts from considering safety of victims in making pretrial detention decision); *Payne* v. *Tennessee,* 501 U.S. 808 (1991) (eighth amendment does not prohibit jury from considering victim impact statement at sentencing phase of capital trial).

[4] *A Proposed Constitutional Amendment to Protect Victims of Crime,* Hearing on S.J. Res. 6 before the Senate Comm. on the Judiciary, 105th Cong., 1st Sess., at 140 (Apr. 16, 1997) [hereinafter "Hearing of Apr. 16, 1997"].

[5] *A Proposed Constitutional Amendment to Protect Crime Victims,* Hearing on S.J. Res. 3 before the Senate Comm. on the Judiciary, 106th Cong., 1st Sess., at 216, 218 (Mar. 24, 1999) [hereinafter "Hearing of Mar. 24, 1999"].

[6] See Hearing of Mar. 24, 1999, at 99–100.

There is none. The Senate will search the pages of the majority report in vain for any such basis for this extraordinary proposal.

Given our ability to proceed without amending the Constitution, one might reasonably wonder why so much time and effort has been expended on the project. The majority report offers one explanation. Quoting Professor Tribe, the majority tells us (in Part III) that statutes and State constitutional amendments "'are likely * * * 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.'"[7]

Have we so lost confidence in our ability to govern and to regulate the conduct of public officials sworn to follow the law that we now insist on amending our basic charter of government in the hope of sending a signal that might overcome habit, indifference and inertia? Do we really believe that a constitutional amendment will accomplish this objective? Habit, indifference, inertia—none is automatically extinguished by the existence of a constitutional amendment. We are especially unlikely to overcome such real-world influences with a constitutional amendment like S.J. Res. 3, which creates rights riddled with qualifications and exceptions and prohibits the award of damages for their violation.

In a 1998 commentary, conservative constitutional scholar Bruce Fein discussed the problem of official indifference to victims' rights, noting that a Federal constitutional right would provide no guarantee of effectiveness:

> It is said by amendment proponents * * * that state judges and prosecutors often short-change the scores of existing victims' rights statutes. If so, they would equally be inclined to flout the amendment. The judicial oath is no less violated in the first case as in the second.[8]

Professor Lynne Henderson, herself a victim of a violent crime, told the Committee that what is needed are good training programs with adequate funding, not more empty promises.[9] We agree that the only way to change entrenched attitudes toward victims' rights is through systematic training and education of everyone who works with victims—prosecutors and law enforcement officers, judges and court personnel, victim's rights advocates, trauma psychologists and social workers. Why then undertake a massive effort to amend our Constitution if what we really need to do is spend time and money on training and education?

2. Statutes are preferable to amending the Federal Constitution

We believe that ordinary legislation not only is sufficient to correct any deficiencies in the provision of victims' rights that currently exist, but also is vastly preferable to amending the Constitution. Indeed, the statutory approach is favored by a broad cross-section of the participants in the criminal justice system.

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[7] The amendment's principal sponsors offered the same remarkable rationale during the Committee markup. Transcript of Markup, Senate Comm. on the Judiciary, Sept. 30, 1999, at 37 (Sen. Jon L. Kyl); *id.* at 59 (Sen. Dianne Feinstein).

[8] Bruce Fein, *Deforming the Constitution,* Wash. Times, July 6, 1998, at A14.

[9] Hearing of Apr. 16, 1997, at 75–77.

The United States Judicial Conference favors the statutory approach because it "would have the virtue of making any provisions in the bill which appeared mistaken by hindsight to be amended by a simple act of Congress."[10] The Conference's Committee on Criminal Law has identified "a number of distinct advantages" that the statutory approach has over a constitutional amendment:

> Of critical importance, such an approach is significantly more flexible. It would more easily accommodate a measured approach, and allow for the 'fine tuning' if deemed necessary or desirable by Congress after the various concepts in the Act are applied in actual cases across the country. At that point, Congress would have a much clearer picture of which concepts are effective, which are not, and which might actually be counterproductive.[11]

The State courts also favor a statutory approach to protecting victims' rights. The Conference of Chief justices has underscored "[t]he inherent prudence of a statutory approach," which could be refined as appropriate and "holds a more immediate advantage to victims who, under the proposed amendment approach, may wait years for relief during the lengthy and uncertain ratification process."[12]

Other major organizations, including several victims groups, concur.

• The National Clearinghouse for the Defense of Battered Women "strongly opposes" this amendment and argues that statutory alternatives are "more suitable":

> The Federal constitution is the wrong place to try to "fix" the complex problems facing victims of crime; statutory alternatives and state remedies are more suitable. Our nation's constitution should not be amended unless there is a compelling need to do so and there are no remedies available at the state level. *Instead of altering the US Constitution, we urge policy makers to consider statutory alternatives and statewide initiatives that would include the enforcement of already existing statutes, and practices that can truly assist victims of crimes, as well as increased direct services to victims.*[13]

• Victim Services, the nation's largest victim assistance agency, also opposes S.J. Res. 3. It wrote to the Committee last year that the proposed amendment "may be well intentioned, but good intentions do not guarantee just results":

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[10] Letter from William H. Rehnquist, Chief Justice, U.S. Supreme Court, to Judy Clarke, President, National Assn. of Criminal Defense Lawyers, Apr. 23, 1997. See also Report of the proceedings of the Judicial Conference of the United States, Sept. 23, 1997, at 66–67 (expressing "a strong preference for a statutory approach to victims' rights over a constitutional amendment").

[11] Letter from George P. Kazen, Chief U.S. District Judge, Chair, Committee on Criminal Law of the Judicial Conference of the U.S., to Sen. Edward M. Kennedy, Senate Comm. on the Judiciary, Apr. 17, 1997, at 2.

[12] Statement of the Conference of Chief Justices regarding H.J. Res. 71 and H.R. 1322, prepared for the House Comm. on the Judiciary (June 25, 1997). See also Hearing of Mar. 24, 1999, at 251 (The [Conference of Chief Justices] concurs with the recommendations of the U.S. Judicial conference regarding a statutory alternative to this issue.").

[13] Hearing of Mar. 24, 1999, at 227–28 (emphasis added).

> We believe much progress has been made in New York and other states, and that information about the implementation of victims' rights has only recently begun to emerge. Federal intervention is usually reserved for situations where the states need to be pulled along—but almost everywhere legislative frameworks of rights now exist and 33 states have passed state constitutional amendments. We have difficulty justifying the extensive resources needed to pass a Constitutional amendment when so much remains to be done in terms of enforcing existing victims' rights and providing the vital support services victims deserve. *We believe that the amendment would at best be merely symbolic, at worst harmful to some of the most vulnerable victims, and meaningless for the majority of victims whose cases are not prosecuted.*[14]

The National Network to End Domestic Violence concludes that "a constitutional amendment is not the most effective or appropriate legislative vehicle by which the government may eradicate the real problems that victims experience when seeking justice," and urges policymakers to explore less drastic alternatives.[15]

- The National Organization for Women Legal Defense and Education Fund writes that the proposed constitutional amendment "raises concerns that outweigh its benefits," but "fully endorse[s] * * * enactment and enforcement of additional statutory reform that provide important protections for [victims]".[16]
- Murder Victims' Families for Reconciliation, a national organization of family members of murder victims, also opposes this joint resolution. It urges Congress to "proceed carefully and cautiously when considering amending the U.S. Constitution," and adds:

> We believe the proposed amendment has flaws that would create new problems and additional delay for crime victims and their survivors, and that it is based on a flawed understanding of the needs of crime victims and their survivors * * *. Granting special rights to victims—especially when these diminish other constitutional rights we all share—will not prevent crime, will not protect victims, and will not heal the damage caused by crime.[17]

- The Cato Institute, the National Sheriff's Association, the National Association of Criminal Defense Attorneys, the National Legal Aid and Defenders Association, the NAACP, the ACLU, the Justice Policy Institute, the Center on Juvenile and Criminal Justice, the Youth Law Center, the National Center on Institutions and Alternatives, the American Friends Service Committee, the Friends Committee on National Legislation, and over 450 law professors—all believe that the treatment and role of victims in the criminal justice process can and should be enhanced, but not by amending the Federal Constitution.

The widespread support for enacting victims' rights by statute arises in part from evidence that statutes work—they can ensure

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[14] *Id.* at 232 (emphasis added).
[15] Hearing of Apr. 16, 1997, at 165. See also Hearing of Mar. 24, 1999, at 232–33.
[16] Hearing of Apr. 16, 1997, at 168.
[17] *Id.* at 161.

that victims of crimes are accorded important rights in the criminal justice process. When ordinary legislation is more easily enacted, more easily corrected or clarified, more directly applied and implemented, and more able to provide specific, effective remedies, the Senate should not propose to amend the Constitution. That is an extraordinary action of last restore, not undertaken as a first option.[18]

3. An extensive framework of victims' rights has already been created

In the past two decades, the victims' movement has made historic gains in addressing the needs of crime victims, on both the national and local level. An extensive framework of victims' rights has already been created through Federal and State legislation and amendments to State constitutions. Moreover, given the extraordinary political popularity of the victims' movement, there is every reason to believe that the legislative process will continue to be responsive to enhancing victims' interests, so that there is simply no need to amend the Constitution to accomplish this.

Federal crime victims initiatives

At the Federal level, Congress has enacted several major laws to grant broader protections and provide more extensive services for victims of crime. Among the first such legislation was the Victim and Witness Protection Act of 1982,[19] which provided for victim restitution and the use of victim impact statements at sentencing in Federal cases, and the Victims of Crime Act of 1984,[20] which encouraged the States to maintain programs that serve victims of crime. The Victims of Crime Act also established a Crime Victims' Fund, which matches up to 40 percent of the money paid by States for victim compensation awards.

In 1990, Congress enacted the Victims' Rights and Restitution Act.[21] This Act increased funding for victim compensation and assistance, and codified a victims' Bill of Rights in the Federal justice system. Federal law enforcement agencies must make their best efforts to accord crime victims with the following rights: (1) to be treated with fairness and respect; (2) to be protected from their accused offenders; (3) to be notified of court proceedings; (4) to be present at public court proceedings related to the offense under certain conditions; (5) to confer with the government attorney assigned to the case; (6) to receive restitution; and (7) to receive information about the conviction, sentencing, imprisonment, and release of the offender.

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[18] Senator Robert C. Byrd made this point with characteristic eloquence and strength on March 29, 2000, when, in the course of debate on another proposed constitutional amendment, he said: "[Constitutional amendments] should be reserved, as Madison said, for compelling circumstances when alternatives are unavailable . . . It set a dangerous precedent, one that I have come to appreciate fully in recent years, to tinker with the careful checks and balances established by the Constitution. When it comes to our founding charter, history demands our utmost prudence." 146 Cong. Rec. S1859–61 (daily ed., Mar. 29, 2000). See also The Federalist No. 49 (J. Madison).

[19] P.L. 97–291, Oct. 12, 1982, 96 Stat. 1248.

[20] P.L. 98–473, Title I, ch. XIV, Oct. 12, 1984, 99 Stat. 1837.

[21] P.L. 101–647, Title V, Nov. 29, 1990, 104 Stat. 4789.

The Violence Against Women Act of 1994 (VAWA)[22] authorized over $1.6 billion over six years to assist victims of violence and prevent violence against women and children. Programs authorized under VAWA include the National Domestic Violence Hotline, S.T.O.P. grants for training police and prosecutors to respond more effectively to violent crimes against women, and funding for battered women's shelters and rape crisis centers, as well as other crucial services for victims of domestic and sexual violence. That Act has produced dramatic results: hundreds of thousands of women have been provided shelter to protect themselves and their children; a new national domestic violence hotline has answered hundreds of thousands of calls for help; and there has been a fundamental change in the way victims of violence are treated by the legal system.[23]

The Mandatory Victims Restitution Act of 1996[24] required courts to order restitution when sentencing defendants for certain offenses. As part of the same crime bill, the Justice for Victims of Terrorism Act of 1996[25] appropriated funds to assist and compensate victims of terrorism and mass violence. The Act also filled a gap in our law for residents of the United States who are victims of terrorism and mass violence that occur outside the borders of the United States. In addition, Congress provided greater flexibility to our State and local victims' assistance programs and some greater certainty so they can know that our commitment to victims' programs will not wax and wane with current events. And we were able to raise the assessments on those convicted of Federal crimes in order to fund the needs of crime victims.

The Victim Rights Clarification Act of 1997[26] reversed a presumption against crime victims observing any part of the trial proceedings if they were likely to testify during the sentencing hearing. Specifically, this legislation prohibited courts from excluding victims from the trial on the ground that they might be called to provide a victim impact statement at the sentencing, and from excluding a victim impact statement on the ground that the victim had observed the trial. As a result of this legislation, victims of the Oklahoma City bombing were allowed both to observe the trials of Timothy McVeigh and Terry Nichols and to provide victim impact testimony.

In October 1998, Congress passed the Crime Victims With Disabilities Awareness Act[27] which focused attention on the too-often overlooked needs of crime victims with disabilities. It directed the National Academy of Sciences to conduct research so as to increase public awareness of victims of crimes with disabilities to understand the nature and extent of such crimes, and to develop strategies to address the safety and needs of these peculiarly vulnerable victims.

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[22] P.L. 103–322, Title IV, Sept. 13, 1994, 108 Stat. 1796.

[23] VAWA's authority runs out this year. If we are serious about helping victims, our efforts and attention would be better spent in reauthorizing this vital legislation without delay.

[24] P.L. 104–132, Title IIA, Apr. 24, 1996, 110 Stat. 1214.

[25] P.L. 104–132, Title IIC, Apr. 24, 1996, 110 Stat. 1214.

[26] P.L. 105–6, § 2(a), Mar. 19, 1997, 111 Stat. 12.

[27] P.L. 105–301, Oct. 17, 1998, 112 Stat. 2838.

The same month, Congress passed the Identity Theft and Assumption Deterrence Act,[28] which (among other things) created a centralized complaint and consumer education service for victims of identity theft. Under the Act, the Federal Trade Commission is responsible for establishing procedures to (1) log and acknowledge the receipt of complaints by victims of identity theft; (2) provide informational materials to victims; and (3) refer victim complaints to the appropriate entities, including national consumer reporting agencies and law enforcement agencies.

Also in October 1998, the Torture Victims Relief Act[29] amended the Foreign Assistance Act of 1961, authorizing the President to provide grants to programs in foreign countries that are carrying out projects or activities specifically designed to treat victims of torture. In addition, this legislation provided grants for U.S. rehabilitation programs, social and legal services for victims, and training of foreign service officers with respect to torture victims, including gender-specific training on the subject of interacting with women and men who are victims of torture by rape or any other form of sexual violence.

Most recently, on March 10, 2000, the Child Abuse Prevention and Enforcement Act[30] was signed into law amending the Victims of Crime Act of 1984 to provide for a conditional adjustment in the set aside for child abuse victims. This bill directs that such adjustment be implemented so that any increase in funding provided shall operate notwithstanding any dollar limitation on the availability of the Crime Victims Fund.

Despite the gains that have been made through Federal statutes, some members of Congress and some constitutional amendment advocates continue to assert that statutes do not work to provide victims with participatory rights. For instance, the two principal sponsors of this proposed amendment and its chief academic supporter, Professor Paul Cassell, have cited the Victim Rights Clarification Act of 1997 as evidence that statutes cannot adequately protect a victim's rights.[31] The majority report echoes this view, stating (in Part IV.2) that the Act "did not fully vindicate the victims' right to attend the trial."

Given such assertions, we believe it important to look at how the Victim Rights Clarification Act was actually applied in the Oklahoma City case. On June 26, 1996, Judge Matsch held that potential witnesses at any penalty hearing were excluded from pretrial proceedings and the trial to avoid any influence from that experience on their testimony. Congress proceeded to pass the Victim

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[28] P.L. 105–318, § 5 Oct. 30, 1998, 112 Stat. 3007.

[29] P.L. 105–320, Oct. 30, 1998, 112 Stat. 3016.

[30] P.L. 106–177, § 104, Mar. 10, 2000, 114 Stat. 35.

[31] In particular, Senator Feinstein has stated that the trial judge in the Oklahoma City bombing case "chose to ignore [the Act], just ignored it. * * * If the victim was present, the victim didn't have the right to make a statement." Transcript of Markup, Senate Comm. on the Judiciary, June 25, 1998, at 16. Senator Kyl has made similar statements suggesting that Judge Matsch had refused to enforce the Act. *Id.* at 25. In April 1997—less than one month after President Clinton signed the Victim Rights Clarification Act into law—Professor Cassell told the Committee at its hearing on the proposed constitutional amendment that "the promises in [that Act] * * * have been broken." Hearing of Apr. 16, 1997, at 112. When later asked to explain what the proposed amendment would provide that the Victim Rights Clarification Act did not, Professor Cassell's response was that the amendment would give victims "standing." Hearing of Mar. 24, 1999, at 69. Of course, issues of standing are readily addressed through ordinary legislation.

Rights Clarification Act, which the President signed into law on March 19, 1997. One week later, Judge Matsch reversed his exclusionary order and permitted observation of the trial proceedings by potential penalty phase victim impact witnesses.[32] In other words, Judge Matsch did what the statute told him to do. In fact, not one victim was prevented from testifying at Timothy McVeigh's sentencing hearing on the ground that he or she had observed part of the trial.

Beth Wilkinson, a member of the Government team that successfully prosecuted Timothy McVeigh and Terry Nichols for the Oklahoma City bombing, discussed the efficacy of the Victim Rights Clarification Act in her testimony before the Committee:

> What happened in [the McVeigh] case was once you all passed the statute, the judge said that the victims could sit in, but they may have to undergo a voir dire process to determine under rule 402 [of the Federal Rules of Evidence] whether their testimony would have been impacted and could be more prejudicial. * * * I am proud to report to you that every single one of the those witnesses who decided to sit through the trial * * * survived the voir dire, and not only survived, but I think changed the judge's opinion on the idea that any victim impact testimony would be changed by sitting through the trial. * * * [T]he witnesses underwent the voir dire and testified during the penalty phase for Mr. McVeigh.
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> It worked in that case, but it worked even better in the next case. Just 3 months later when we tried the case against Terry Nichols, every single victim who wanted to watch the trial either in Denver or through closed-circuit television proceedings that were provided also by statute by this Congress, were permitted to sit and watch the trial and testify against Mr. Nichols in the penalty phase.[33]

Ms. Wilkinson's testimony on this point was uncontested.

It is not accurate to assert that the Victim Rights Clarification Act did not work, or that statutes in general cannot adequately protect victims' rights. In fact, the victim Rights Clarification Act is a paradigmatic example of how statutes, when properly crafted, can and do work.[34] We are certain that additional clarifications would find judges equally receptive and willing to grant victims the rights Congress intends.

State crime victims initiatives

The individual States have also done their part in enhancing the role and protection of crime victims. Every State and the District of Columbia has some type of statutory provision providing for increased victims' rights, including some or all of the rights enumerated in S.J. Res. 3, as well as others. In addition, some 32 States

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[32] *United States* v. *McVeigh,* 958 F. Supp. 512, 515 (1997).

[33] Hearing of Mar. 24, 1999, at 65.

[34] Although he now chooses to disavow the bill, Professor Paul Cassell was an advisor to interested Senators in connection with its formulation. Accordingly, we again acknowledge his contribution to that measure, and regret his more recent efforts to criticize the good results it achieved.

have amended their State constitutions to provide a variety of protections and rights for crime victims.

While there may be room for improvement in the States' administration of their existing victims' rights laws, in general, victims and criminal justice personnel believe that these laws are sufficient to ensure victims' rights. For example, in 1989, the American Bar Association's Victim Witness Project analyzed the impact of State victims' rights laws on criminal justice practitioners and victims. The researchers found that prosecutors, judges, probation officers, and victim/witness advocates were almost universally satisfied with the State laws. They also found that those practitioners who had concerns about existing victims' rights provisions were generally dissatisfied with levels of funding for victims' services. With regard to victim satisfaction, the researchers concluded that "many victims in States with victims rights legislation believe the criminal justice system is doing a satisfactory job of keeping them informed, providing them an opportunity to have a say in certain decisions and notifying them about case outcomes." [35]

Since 1989, States have continued to strengthen their victims' rights provisions and services. According to a 1997 report prepared by the National Criminal Justice Association with support from the Justice Department's Office for Victims of Crime ("OVC"): "It appears evident that the trend to expand the statutory rights of victims on the state level is continuing." [36] A 1995 report by the State of Arizona's Auditor General found that in the four counties studied, "many agencies are offering victim services above and beyond those mandated by the [Arizona Victims' Rights Implementation] Act, primarily at their own expense." [37]

The majority relies heavily on two reports that found past protections for victims to be inadequate.[38] The first report was conducted by the National Victim Center ("NVC"), now known as the National Center for Victims of Crime—a member of the National Victims Constitutional Amendment Network and a leading advocate for a Victims' Rights Amendment. The remarkable point about this report is that it provides so little support for a Federal constitutional amendment. Instead, it suggests that it is money and additional State law provisions that are needed, not a Federal constitutional amendment. The "violations" discussed in the study are failures of enforcement, not instances of defendants' rights trumping the rights of victims. When local officials were surveyed and asked for suggestions to improve treatment of victims of crime, the leading proposal was for increased funding.

Another unsurprising conclusion of the NVC report: States with stronger legal protections for victims provide stronger enforcement of victims' rights. It should be obvious to all that a State that does

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[35] Susan W. Hillenbrand & Barbara E. Smith, *Victims Rights Legislation: An Assessment of its Impact on Criminal Justice Practitioners and Victims* 26 (May 1989).

[36] *Victims Rights Compliance Efforts: Experiences in Three States* (1997). This publication is available on the Internet at <http://www.ojp.usdoj.gov/ovc/infores/vrs.htm>.

[37] *Victims' Rights Compensation and Victim-Witness Programs in Maricopa, Pima, Coconino, and Cochise Counties,* Report to the Arizona State Legislature by the Auditor General (Dec. 1994).

[38] See National Victim Center, Statutory and Constitutional Protection of Victims' Rights: Implementation and Impact on Crime Victims—Subreport: Crime Victim Responses Regarding Victims' Rights (Apr. 15, 1997); Office for Victims of Crime, New Directions from the Field: Victims' Rights and Services for the 21st Century vii (May 1998).

not mandate the provision of a particular right will not enforce that right. Moreover, as the NVC researchers themselves acknowledged, "it is reasonable to assume that States with stronger legal mandates for the provisions of victims' rights tend to provide more funds for implementation than States with weaker mandates."[39] Before we conclude that State laws are inadequate to protect victims, there should at least be such laws, and be sustained efforts to fund adequately, implement and enforce such laws. The NVC report suggests that we should do more to encourage States to adopt and enforce victims' rights, not that we should amend the Constitution.

The NVC report also fails to provide a clear picture of the impact of State victims' rights laws because its methodology was so seriously flawed. Indeed, manifest flaws in the NVC's methodology led the OVC to conclude that "more research would be needed before any policy recommendations could be made based on the data."[40]

The second report cited by the majority was compiled by the OVC based on anecdotal information from "the field"—that is, "crime victims themselves and representatives of the agencies and organizations that serve them."[41] Once again, however, the deficiencies identified in the report—deficiencies in the implementation of State victims' rights laws and in the scope of some States' provisions—can be corrected without a Federal constitutional amendment.

There has been no impartial, comprehensive analysis done to indicate that victims' rights cannot adequately be protected by State and Federal laws. Certainly, not a single appellate decision supports such a conclusion. Before we take the fundamental step of amending the Constitution, we should know precisely how the Constitution fails to protect victims' rights. We should be certain that Federal statutes are not working and can not work, no matter how carefully crafted. We should have evidence that State statutes and constitutional provisions are not doing the job, and that they cannot. Further study, we believe, will show that solutions short of a Federal constitutional amendment can provide effective and meaningful relief to crime victims.

4. The Bill of Rights does not need to be rebalanced

Proponents of a Federal constitutional amendment for crime victims contend that it is necessary to correct an "imbalance" in our constitutional structure. According to this argument, the criminal justice system is improperly tilted in favor of criminal defendants and against victims' interests, as evidenced by the fact that the Constitution enumerates several rights for the accused and none, specifically, of the victim. The argument is wide of the mark, both

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[39] Hearing of Mar. 24, 1999, at 160 (Dec. 1998 summary of NVC report).

[40] Letter from Kathryn M. Turman, Acting Director, OVC, to Robert P. Monsteller, Professor, Duke University School of Law, Sept. 18, 1998. An earlier intra-office memorandum memorializes the Justice Department's wish that the complete report not be published at all. Memorandum from Sam McQuade, Program Manager, National Institute of Justice, to Jeremy Travis, Director, National Institute of Justice, May 16 1997 ("OVC has requested that the complete report NOT be published because, in its view, the report contains contradictory information . . ."; emphasis in original). For a detailed critique of the NVC report and its flawed methodology, see Robert P. Mosteller, *The Unnecessary Victims' Rights Amendment,* 1999 Utah L. Rev. 443, 447–49 n. 13.

[41] New Directions from the Field, *supra* note 38, at vii.

in its conception of the criminal justice system, and in its notion of what warrants constitutional change.

The paramount purpose of a criminal trial is to determine the guilt or innocence of the accused, not to make victims whole. The interests of the victim are directly served by the right to bring a civil suit against the accused, by court-ordered restitution if the accused is convicted, and by victim compensation programs. In contemporary prosecutions, however, we follow the well-considered tradition of the public prosecutor.[42]

Of course, the public prosecutors of the United States represent "The People," not just the individual crime victim. They are required to seek justice for all, not justice based on wealth or social status or the communication skills of victims or their survivors. We have historically and proudly eschewed private criminal prosecutions based on our common sense of democracy.

If this amendment were adopted, what would happen in cases where the victim either does not support—or is not effective at articulating—prosecution strategy? What about cases where victims of the same offender disagree on sentencing or release issues? The principle that the prosecutor's duty is to do justice for all and not individual justice is fundamentally sound. The interests of "The People" and the interests of the victim are often identical, but when they diverge, it is appropriate for the public prosecutor to pursue what is in the broader public interest.

The majority report itself recognizes (in Part III) that "a public trial is intended to preserve confidence in the judicial system, that no defendant is denied a fair and just trial." This is as it should be. Victims' voices should be heard, but they should not be able to make judgments that would take from the public our sense that justice is being served.

Moreover, while rhetorically pleasing, the concept of "balance" often makes little sense in the context of a criminal proceeding. It assumes that we can identify the "victim" at the outset of every case, but this may not be possible. In some cases—as where the defendant claims that she acted in self-defense—identifying the "victim" is what the trial is all about.

Beyond this, the "balance" argument mistakes the fundamental reason for elevating rights to the constitutional level. The rights enshrined in the United States Constitution are designed to protect politically weak and insular minorities against governmental overreaching or abuse, not to protect individuals from each other.[43] When the government unleashes its prosecutorial power against an accused, the accused faces the specter of losing his liberty, property, or even his life. The few and limited rights of the accused in the Constitution are there precisely because it will often be unpopular to enforce them—so that even when we are afraid of a rising tide of crime, we will be protected against our own impulse to take shortcuts that could sacrifice a fair trial of the accused and

[42] The majority report is premised on "restoring" the victim to the prosecutor role as it was in colonial times, before the creation of governmental prosecutors and permanent prosecutors' offices. See *supra* Part I. By contrast, when the majority report returns to this issue, it asserts that it "intends no modification of the current law, with deep historical roots, allowing a crime victim's attorney to participate in the prosecution, *to whatever extent presently allowed.*" See *supra* Part V (emphasis added).

[43] *Cf. United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

increase the risk of wrongful conviction. In contrast, there is no need to grant constitutional protections to a class of citizens that commands virtually universal sympathy and substantial political power.

In the words of Bruce Fein, Deputy Attorney General during the Reagan Administration:

> [C]rime victims have no difficulty in making their voices heard in the corridors of power; they do not need protection from the majoritarian political process, in contrast to criminal defendants whose popularity characteristically ranks with that of General William Tecumseh Sherman in Atlanta, Georgia.[44]

Similarly, Professor Lynne Henderson wrote the Committee:

> Victims of crime are hardly an insular minority, nor are they the victims of prejudice and hostility. Rather, it is those charged with or convicted of crimes who are disliked and denied access to the political process. They have no organized lobbying group, felons in a number of states have no right to vote, and so on. Special treatment of victims under the constitution is not necessary to insure that their interests be preserved or recognized.[45]

The Bill of Rights is not askew. We do not need to double the length of the Bill of Rights in order to set it straight.

5. A constitutional amendment is unnecessary to provide for victim participation in the clemency process

According to the majority report (in Part IV.4), only a Federal constitutional amendment can insure that victims are notified and given an opportunity to be heard before any action is taken concerning a pardon or commutation of sentence. While we agree that the views of victims should be considered in clemency reviews at both the State and Federal levels, a constitutional amendment is unnecessary to accomplish this goal.

The Pardon Attorney Reform and Integrity Act, S. 2042, which was voted out of this Committee on February 24, 2000 would create a detailed framework under which the Office of the Pardon Attorney of the Department of Justice would be required, *inter alia*, to notify victims about applications for clemency and solicit their written opinions for presentation to the President. Despite concerns raised by the Justice Department, the majority has maintained that this bill passes constitutional muster.

Furthermore, in an effort to supplement current statutory requirements and internal guidelines, the Justice Department is in the process of crafting amended regulations, for approval by the President, that would enhance victim consultation and notification in clemency reviews. These efforts are ongoing and should be encouraged.

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[44] *A Proposed Constitutional Amendment to Establish a Bill of Rights for Crime Victims*, Hearing on S.J. Res. 52 before the Senate Comm. on the Judiciary, 104th Cong., 2d Sess. 100 (Apr 23, 1996). See also Bruce Fein, *Deforming the Constitution*, Wash. Times, July 6, 1998, at A14 (Crime victims "command virtual universal sympathy, a fail-safe formula for legislative success" and "need no constitutional protection from political overreaching").

[45] Hearing of Mar. 24, 1999, at 248.

Given this posture, it is hard to conceive why a constitutional amendment is necessary to secure victim participation at the Federal level. Moreover, the majority itself recognizes (in Part IV.4), a "trend" at both the Federal and State levels "toward greater public involvement in the process," and that "a number of States now provid[e] notice to victims." We should permit States to continue weighing the manner in which to include victims in their own clemency procedures and process and refrain from infringing on their right to do so.

C. THE PROPOSED AMENDMENT COULD HAVE DANGEROUS AND UNCERTAIN CONSEQUENCES FOR THE NATION'S CRIMINAL JUSTICE SYSTEM

While the proposed amendment is at best unnecessary, at worst, it could help criminals more than it helps victims and cause the conviction of some who are innocent and wrongly accused. Passage of S.J. Res. 3 would enshrine new rights in the Constitution that would fundamentally realign this Nation's criminal justice system, opening a Pandora's Box of dangerous unintended consequences.

1. The amendment could impair the ability of prosecutors to convict violent criminals

Since we first began holding hearings on a Victims' Rights Amendment, prosecutors and other law enforcement authorities all across the country have cautioned that creating special constitutional rights for crime victims would have the perverse effect of impeding the effective prosecution of crime.

Restricting prosecutorial discretion

Most egregiously, the proposed amendment could compromise prosecutorial discretion and independence by allowing crime victims to second-guess and effectively dictate policy decisions made by prosecutors accountable to the public. As the National District Attorneys Association cautioned, it could afford victims the ability to place unknowing, and unacceptable, restrictions on prosecutors while strategic and tactical decisions are being made about how to proceed with a case.[46] A constitutionally-empowered crime victim could override the professional judgment of the prosecutor concerning the investigation of the case, the timing of the proceedings, the disposition of the charges, and the recommendation as to sentence.

Prosecutorial discretion over plea bargaining is particularly at risk if S.J. Res. 3 passes, for it is here that the interests of the victim and the broader interests of the public most often diverge. Prosecutors enter into plea agreements for many reasons. A prosecutor may need to obtain the cooperation of a defendant who can bring down an entire organized crime ring; may need to protect the identity of an informant-witness; may think that the evidence against the defendant will not convince a jury beyond a reasonable doubt; may just want to speed the processes of adjudication. In each instance, the prosecutor may be acting contrary to the wishes of the victim, or causing resentment on the part of one set of vic-

[46] Letter from William L. Murphy, President, National District Attorneys Assn., to Sen. Patrick J. Leahy, Ranking Member, Senate Comm. on the Judiciary, May 27, 1998.

tims in order to do basic justice or provide immediate security to another set of victims.

How will this play out in the courts? A Miami defense lawyer tells of representing a murder defendant who accepted a plea offer from the prosecution. The judge refused to accept the offer after the victim's mother spoke out against it. His client went to trial and was acquitted.[47] In California, relatives of a homicide victim complained to a judge that a plea bargain struck with the accused shooter was too lenient. They got what they wanted: withdrawal of the plea and prosecution of the man on murder charges. But at the close of the trial, the defendant was acquitted.[48]

Under the proposed amendment, well-meaning victims could obstruct plea proceedings, scuttling plea bargains, as in the Florida and California cases, or forcing prosecutors to disclose investigative strategies or weaknesses in their cases in order to persuade courts to accept victim-contested pleas. In this and other stages of the criminal process, prosecutors could be induced to make bad choices, or even to disregard their professional and ethical obligations, rather than risk violating the constitutional rights that this amendment would create for victims.

The Committee heard the thoughtful testimony of Beth Wilkinson, a member of the prosecution team on the Oklahoma City bombing case. With insight and compassion, Ms. Wilkinson shared with us her experience in dealing with the victims and family members who suffered losses as a result of that tragedy. She came to understand firsthand their grief and frustration during the two and a half years she worked as part of the Federal Government team that successfully prosecuted Timothy McVeigh and Terry Nichols. She is a true victims' advocate. And she opposes S.J. Res. 3.

Ms. Wilkinson cautioned this Committee that S.J. Res. 3 has the dangerous potential to undermine prosecutorial strategy in criminal cases. She described how the prosecution of McVeigh and Nichols could have been substantially impaired if the proposed constitutional amendment had been in place:

> [J]ust months after the bombing, the prosecution team, which was responsible for determining the most effective strategy for convicting those most culpable, McVeigh and Nichols, determined that it would be in the best interest of the case to accept a guilty plea from Michael Fortier. While not a participant in the conspiracy to bomb the building and the people inside of it, Fortier knew of McVeigh and Nichols' plans and he failed to prevent the bombing.
>
> If the victims had had a constitutional right to address the Court at the time of the plea, I have no doubt that many would have vigorously and emotionally opposed any plea bargain between the Government and Fortier. From

[47] Robert Fichenberg, *The Controversial Victims' Rights Amendment,* 30-OCT Prosecutor 38 (1996).

[48] See Wayne Wilson, *Man acquitted in killing after protest by victim's kin torpedoed plea deal,* The Sacramento Bee (July 2, 1997). Defendant Loren Joost originally pleased no contest to voluntary manslaughter, with the understanding that he would be sentenced to no more than six years in prison. The victim's family opposed the plea agreement by gathering more than 200 signatures denouncing the proposed settlement as too lenient.

> their perspective, their opposition would have been reasonable. Due to the secrecy rules of the grand jury, we could not explain to the victims why Fortier's plea and cooperation was important to the prosecution of Timothy McVeigh and Terry Nichols.
>
> What if the judge had rejected the plea based on the victims' opposition or at least forced the government to detail why Fortier's testimony was essential to the Government's case? Timothy McVeigh's trial could have turned out differently. Significant prosecutorial resources would have been diverted from the investigation and prosecution of McVeigh and Nichols to pursue the case against Fortier and we would have risked losing the evidence against McVeigh and Nichols that only Fortier could have provided. In the end, the victims would have been much more disappointed if Timothy McVeigh had been acquitted than they were when Michael Fortier was permitted to plead guilty.[49]

Ms. Wilkinson also described how another major terrorism case that she handled could have been put at risk if the proposed constitutional amendment were adopted. That case involved a Colombian narco-terrorist who sabotaged a civilian airliner which exploded over Bogota, Colombia, in 1989, killing more than 100 people.[50]

The rights of victims must be recognized and respected throughout the criminal process, but as Ms. Wilkinson emphasized, the victim's most important right—the right to the fair and just conviction of the guilty—must remain paramount. This right is far too important to jeopardize by adopting this unnecessary proposal to amend the Constitution.

Prosecutors make difficult decisions during the course of any criminal case. But those decisions are made with an eye toward justice and consideration of victims' needs. A Victims' Rights Amendment could tie the hands of dedicated prosecutors and prevent them from using their valuable discretion as experts in the law.

There can be no doubt that prosecutors would feel personally constrained by the proposed amendment. The proposed amendment's express prohibition on claims for damages only increases the likelihood that courts would find other ways to vindicate its newly-minted rights. In 1997, the United States Supreme Court confirmed that the Federal civil rights laws permit criminal prosecutions in Federal court of any State official who willfully and under color of law deprived any person of any rights secured or protected under the Federal Constitution.[51] At a minimum, prosecutors who made choices unpopular with victims would expose themselves to disciplinary action. Meanwhile, prosecutors who became adversaries to victims because of judicially-contested conflicts over a case could be required to recuse themselves from the case

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[49] Hearing of Mar. 24, 1999, at 21. See also Beth A. Wilkinson, *Victims' Rights: A Better Way: The proposed constitutional amendment could have let McVeigh go free,* Washington Post (Aug. 6, 1999).

[50] Hearing of Mar. 24, 1999, at 97.

[51] *United States* v. *Lanier,* 520 U.S. 259 (1997).

in order to defend themselves in the ancillary proceeding—another unintended consequence that could have significant adverse effects on the Nation's criminal justice system.

The Department of Justice, which supports amendment the Constitution to provide for enhanced victims' rights, has acknowledged that in at least some situations, affording special constitutional rights to victims will "impact on the prosecutor's discretion and judgment" and "adversely affect the administration of justice."[52] We must not create entitlements for victims that will tie prosecutors' hands and cripple law enforcement.

Other adverse consequences

Creating an absolute right for crime victims to attend and participate in criminal proceedings could raise other serious problems for law enforcement. Consider the problem of the victim-witness. In many cases, the victim is the government's key witness. If she insists on exercising her constitutional right to sit through the entire trial, there is a substantial danger that her testimony will be influenced by hearing and seeing other evidence concerning the same set of facts. Whether consciously or unconsciously, she could tailor her testimony to fit the other evidence.

According to the majority report (in Part IV.2), it seems "implausible" that a victim-witness, having heard other witnesses testify, would modify her testimony to comport with that of the earlier witnesses. Just last month, however, the Supreme Court found it "natural and irresistible"—and permissible—for a jury to infer that a defendant tailored his testimony from the fact that he heard the testimony of all those who preceded him.[53]

If the tailoring of testimony is so 'implausible," then we are at a loss to explain the sequestration rules that are in effect in every jurisdiction in the country. The commentary to the Federal sequestration rule, Fed. R. Evid. 615, explains that "[t]he efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion." Indeed, witness sequestration has been described as "one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice."[54]

Apart from the obvious fairness concerns implicated by a procedure that facilitates and even encourages collusive and inaccurate testimony, there is also the danger that the victim's presence in the courtroom during the presentation of other evidence will cast doubt on her credibility as a witness. Defense attorneys will cross-examine victims at length on this point and argue, credibly, that the victims' testimony was irretrievably tainted. Inevitably, in some cases,

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[52] Hearing of Apr. 16, 1997, at 48, 132.

[53] *Portuondo* v. *Agard,* 120 S. Ct. 1119, 1121 (2000). The Court concluded: "Allowing [prosecutors to] comment upon the fact that a defendant's presence in the courtroom provides him a unique opportunity to tailor his testimony is appropriate—and indeed, given the inability to sequester the defendant, sometimes essential—to the central function of the trial, which is to discover the truth." *Id.* at 1127.

[54] *Opus 3 Ltd.* v. *Heritage Park, Inc.,* 91 F.3d 625, 628–29 (4th Cir. 1996) (quoting 6 John H. Wigmore, Wigmore on Evidence § 1838, at 463 (James H. Chadbourn ed., 1976). The same court observed that the practice of sequestering witnesses has been recognized since at least biblical times. The Apocrypha relates how Daniel vindicated Susanna of adultery by sequestering the two elders who had accused her and asking each of them under which tree her alleged adulterous act took place. When they gave different answers, they were convicted of falsely testifying. *Id.* at 628.

this tactic will succeed: the jury will discredit or discount the victim's testimony. Whole cases, or important counts, may be lost in this way. At least one proponent of the amendment, formerly a public defender, has acknowledged that the proposed amendment could inure to the benefit of defendants.[55]

As a practical matter, prosecutors may be able to shield victim testimony from the appearance of taint by putting the victim on the stand first. But what happens in the event that the victim is recalled for additional testimony? What happens in cases involving more than one victim-witness? A forced reshuffling of the witness list might not help, and could well compromise the coherence and effectiveness of the prosecution's presentation to the jury.

Constitutionalizing the right not to be excluded from public criminal proceedings could also give rise to actions by victims against decisions to conduct certain proceedings under seal. This could compromise courtroom closure laws designed to protect child witnesses.[56] Similarly, it could cause disruption in the context of juvenile justice proceedings, which are often closed to the public, and to which the proposed amendment expressly applies. A no-exclusion rule could also make it more difficult for prosecutors to do their jobs when, for example, they need secrecy at some stage of a proceeding in order to assure the safety of a witness.[57]

Finally, S.J. Res. 3's creation of a victim's right to trial "free from unreasonable delay" raises another set of concerns for prosecutors. The majority report ignores the fact that defendants are not the only parties who seek continuances in criminal cases. Prosecutors, too, often seek additional time to prepare for trial. The proposed constitutional amendment would appear to give victims standing to demand immediate commencement of trial. But forcing prosecutors to try cases before they are fully prepared plays into the hands of the defense and would undoubtedly result in many cases being dropped or lost.

2. The amendment could impose tremendous new costs on the system

The proposed constitutional amendment could impose a tremendous new administrative burden on State and Federal law enforcement agencies. These agencies would be constitutionally required to make reasonable efforts to identify, locate and notify crime victims in advance of any public proceeding relating to the crime, as well as most non-public parole proceedings and clemency determinations. As the majority report confirms (in Part V), the amendment's broadly-worded mandate covers court proceedings of all types, even the most insignificant scheduling conferences (of which there may be dozen sin the course of a single case). It extends to parole hearings, appellate arguments, and habeas corpus proceedings held long after the trial is concluded, generating additional expenses in re-locating all the victims. The Attorney General

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[55] Transcript of Markup, Senate Comm. on the Judiciary, July 7, 1998, at 58 (Sen. Joseph R. Biden, Jr.).

[56] See, *e.g.*, 18 U.S.C. § 3509(e).

[57] Far from "settling" the matter authoritatively (majority report, Part IV.2), a generally worded constitutional amendment is likely to lead to more litigation activity—not less—on the issue whether the victim-witness has a right to attend each stage of the criminal process. Nor will such general language make advising victim-witnesses any easier or more certain.

has acknowledged that instituting a system that would integrate the necessary investigative information, prosecutive information, court information, and corrections information would be a complex undertaking, and costly.[58]

The Congressional Budget Office ("CBO") estimates that ratification of S.J. Res. 3 would not result in significant costs for the federal court system because "the amendment would apply to crimes of violence, which are rarely federally prosecuted." In fact, thousands of violent offenses are prosecuted federally each year,[59] and the number continues to rise with every indiscriminate passage of new Federal crimes that duplicate existing State crimes. More importantly, the CBO's estimate does not include any of the costs that would be borne by State and local law enforcement and prosecutors, State and local court systems, and the providers of legal services to indigent defendants. Noting these costs, the Attorney General urged the Committee in 1997 to "reach out to all interested parties to explore the serious resource implications of a constitutional amendment."[60] Three years later, the Committee still has not done this.

The potential costs of S.J. Res. 3's constitutionally-mandated notice requirements alone are staggering, without regard to the many hidden costs that may flow from the vague promises that this amendment proposes. Consider as an example the right of crime victims "to be heard * * * and to submit a statement * * * to determine * * * an acceptance of a negotiated plea." The vast majority of all criminal cases are now resolved by plea bargaining. Although it is unclear how much weight judges would be required to give to a victim's objection to a plea bargain, even a small increase in the number of cases going to trial would seriously burden prosecutors' offices.

The proliferation of victim participatory rights at all accusatory and trial stages could give rise to even greater hidden costs. Most significantly, the right to be heard and to submit written statements could be read to entitle indigent victims to court-appointed counsel (and, if necessary, a translator or interpreter) so that they can exercise the right fully and equally. Indeed, some States that have provided victims' rights in their constitutions have employed advocates to represent victims and also created special offices of oversight. If S.J. Res. 3 were interpreted to provide this sort of protection to indigent victims—as the sixth amendment has been interpreted with respect to indigent defedants—then we would be confronted with a funding problem of enormous proportion.

Cognizant of this problem, the majority report (in Part V) purports to find a solution in the amendments' prohibition on claims for damages. Section 2 of the amendment states in part,

> Noting in this article shall give rise to or authorize the creation of a claim for damages against the United States, a State, a political subdivision, or a public officer or employee.

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[58] Hearing of Apr. 16, 1997, at 131–32.
[59] See Bureau of Justice *Statistics, Federal Criminal Case Processing*, 1998 (Sept. 1999).
[60] Hearing of Apr. 16, 1997, at 132.

According to the majority report (in Part V), this language "prevents the possibility" that courts might construe the amendment as requiring the appointment of counsel at State expense to assist victims. We disagree. In particular, we fail to see how a limitation on the remedies available for government violations of victims' rights could even remotely affect a court's determination regarding the government's duty to assist indigent victims in exercising those rights. This is especially so in light of the majority report's acknowledgment (in Part III) that "every State is required under the sixth amendment * * * to provide legal counsel to indigent defendants" and that victims are entitled to equal treatment.

Incarcerated victims are another cause for concern. What happens when one inmate commits a crime of violence against another inmate? With a constitutional guarantee, as opposed to a more flexible statutory approach, prison authorities could be required to transport the victim inmate to all relevant proceedings. The majority report contradicts itself on this point. It promises (in Part V) that the proposed amendment "does not confer on prisoners any * * * rights to travel outside prison gates," yet asserts, in the very next paragraph: [A] victim's right not to be excluded will parallel the right of a defendant to be present during criminal proceedings."

Regardless, courts will pay little attention to the majority's commentary when interpreting the comparatively clear language of S.J. Res. 3. Under established principles of constitutional law, a court could easily conclude that the costs involved in transporting prisoners to court to exercise their constitutional rights as victims are not sufficiently "compelling" to justify an exception under Section 3 of the amendment. The National Sheriffs' Association has told us that such costs would be difficult to bear:

> Under a Constitutional Amendment, a sheriff would be required to provide access to all court proceedings and hearings for the victim inmate. Additionally, the sheriff would be responsible for the significant costs of personnel, transportation and security for the victim inmate. Sheriffs would find it difficult to meet the mandates of a Victims' Rights Amendment to the Constitution involving incarcerated victim inmates.[61]

The amendment would also impose a costly, time-consuming drain on the Nation's courts. In addition to giving an unspecified class of "victims" a right to be heard at virtually every stage of the criminal process, the amendment is so vague and rife with ambiguity that it is certain to generate a host of knotty legal questions requiring decades of litigation to resolve. Moreover, these questions will be litigated at every stage of every proceeding, causing the time for processing what would otherwise be a simple case to skyrocket. The potential cost to taxpayers is beyond estimation.

How would all these new costs be funded? Unless funding adequate to implement the amendment on a nationwide basis accompanies its passage, resources would, of necessity, be diverted from other law enforcement and judicial efforts. There would be less money spent fighting crime and prosecuting criminals. There would

[61] Letter from National Sheriffs' Assn. to Sen. Orrin G. Hatch, Chairman, Senate Comm. on the Judiciary, June 17, 1998.

be less court time available for individual and business users of the courts, including crime victims. In the Federal system, the increased litigation would exacerbate the case overload and judicial vacancies that already significantly impair the efficacy of civil and criminal justice in America.

3. The new constitutional rights for victims could undermine Bedrock constitutional protections afforded to the accused by the Bill of Rights

The Department of Justice, the National District Attorneys Association, and the American Bar Association, among others, have underscored the urgent need to preserve the fundamental protections of those accused of crimes while giving appropriate protection to victims.[62] Eleanor Acheson, Assistant Attorney General for the Office of Policy Development, recently reminded a House Subcommittee of the Administration's position:

> *We believe that to ensure the protection of existing constitutional guarantees, the Victims' Rights Amendment should contain language that expressly preserves the rights of the accused.* By this, we do not mean to suggest that defendants will always prevail if they challenge the victims' right to participate in the process. * * * However, on those rare occasions where, after a serious and searching analysis of the claim, it is clear that the vindication of a victim's rights will indeed violate a defendant's right to a fair trial, the Attorney General has stated that "we must as a society ensure that [the right to a] fair trial is not jeopardized."[63]

During the markup, the Committee considered an amendment to S.J. Res. 3, proposed by Senator Feingold, that stated: "Nothing in this article shall limit any right of the accused which may be provided by this Constitution." The Committee rejected this amendment by a vote of 11 to 5.[64] Courts might therefore conclude that S.J. Res. 3 was intended to override earlier-ratified provisions securing the accused's right to a fair trial. This could make it more likely that innocent people are convicted.

The sponsors of S.J. Res. 3 have never cogently explained their opposition to the Feingold amendment. On the one hand, they maintain that the Feingold amendment "effectively guts" and "would eviscerate" the proposed constitutional amendment.[65] On the other hand—sometimes in the same breath—they assure us that "No actual constitutional rights of the accused, or of anyone

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[62] See, *e.g.*, Letter from L. Anthony Sutin, Acting Assistant Attorney General, to Sen. Orrin G. Hatch, Chairman, Senate Comm. on the Judiciary, June 2, 1998; National District Attorneys Association, Resolution: Federal Constitutional Victim Rights Amendment, Mar. 9, 1997; Letter from Michael T. Johnson on behalf of the American Bar Assn. to Sen. Orrin G. Hatch, Chairman, Senate Comm. on the Judiciary, June 24, 1998 (attaching resolution approved by ABA House of Delegates, Aug. 1997). See also Robert P. Mosteller, *Victims' Rights and the Constitution: Moving from Guaranteeing Participatory Rights to Benefiting the Prosecution*, 29 St. Mary's L.J. 1053, 1064–65 (1998) (concluding that a constitutional amendment supporting victims' rights should expressly guarantee that it will not diminish existing rights of the accused).

[63] Statement of Eleanor D. Acheson, Assistant Attorney General, before the House Subcomm. on the Constitution, concerning H.J. Res. 64, Feb. 10, 2000, at 4 (emphasis added).

[64] Transcript of Markup, Senate Comm. on the Judiciary, Sept. 30, 1999, at 92–93.

[65] *Id.* at 88 (Sen. Dianne Feinstein); Transcript of Markup, Senate Subcomm. on the Constitution, Federalism, and Property Rights, May 26, 1999, at 21 (Sen. Jon L. Kyl).

else, would be violated by respecting the rights of victims in the manner requested [by the proposed constitutional amendment]."[66] They cannot have it both ways. If, as the majority report states (in Part V), "The adoption of rights for the victim need not come at the expense of the accused's rights," then why does the majority so strongly oppose the incorporation of this precept in the proposed constitutional amendment?

Conflicts between the victims' rights created by S.J. Res. 3 and the protections accorded defendants by the Bill of Rights likely would be infrequent, but they could occur. Indeed, as currently drafted, S.J. Res. 3 practically invites conflict in several important areas.

Giving victims rights at the accusatory stage of criminal proceedings undercuts the presumption of innocence

Not all who claim to be victims are indeed victims and, more significantly, not all those charged are the actual perpetrators of the injuries that victims have suffered. By naming and protecting the victim as such before the accused's guilt or the facts have been determined, the proposed amendment would undercut one of the most basic components of a fair trial, the presumption of innocence.

Consider a simple assault case in which the accused claims that she was acting in self-defense. Absent some sort of corroborating evidence, the jury's verdict will likely turn on who it believes, the accused or her accuser. The amendment treats the accuser as a "victim," granting him broad participatory and other rights, before a criminal or even a crime has been established. Once charges have been brought—and the charges may be based on little more than the accuser's allegations—the accuser is entitled to attend all public proceedings and to have a say as to whether the accused should be released on bond, making it more likely that the accused will be imprisoned until the conclusion of the trial. While society certainly has an interest in preserving the safety of the victim, this fact alone cannot be said to overcome a defendant's liberty interest as afforded to him under the due process and excessive bail clauses.

A victim's right not to be excluded could undermine the accused's right to a fair trial

The proposed amendment gives victims a constitutional right not to be excluded from *public* proceedings. Establishing such a preference for victims does not require a constitutional amendment, unless it is intended to create an absolute right that would be used to overcome a right currently afforded defendants. That is precisely what this provision would accomplish—the majority report (in Part IV.2.) confirms the intention of giving victims an "unequivocal" right to attend proceedings. But while crime victims have a legitimate interest in attending public proceedings involving matters that impacted their lives, this is not a limitless interest. At the point where the victims' presence threatens or interferes with the accuracy and fairness of the trial, restrictions, should be imposed.

[66] Transcript of Markup, Senate Subcomm. on the Constitution, Federalism, and Property Rights, May 26, 1999, at 21 (Sen. Jon L. Kyl, quoting Professor Laurence Tribe).

Accuracy and fairness concerns may arise, as we have already discussed,[67] where the victim is a fact witness whose testimony may be influenced by the testimony of others. Another example is the case in which the victim or her family acts emotionally or disruptively in front of the jury. Whether done purposefully, or, more likely, unintentionally, a victim exhibiting such behavior may unfairly prejudice the defendant.

Indeed, by making the right of victims to be present very difficult, if not impossible, to forfeit, this amendment may unintentionally encourage disruptive displays by victims.[68] Our nation's jurisprudence explicitly warns against determinations of guilt and punishment based upon passion, prejudice or emotion, rather than reason or evidence.[69]

Proponents of S.J. Res. 3 dismiss such concerns out-of-hand. The majority report declares (in Part V) that crime victims would have "no right" to engage in either disruptive behavior or excessive displays of emotion. The Attorney General has claimed that "common sense flexibility" would preserve judges' authority to keep courtrooms free from disruptive observers, even when those observers are victims.[70] But it is not at all clear how "common sense flexibility" could prevail over an "unequivocal" constitutional right not to be excluded. So either the amendment will amount to nothing in this context that could not be achieved by statute or rule, or it may provide too much, and undercut the courts' ability to protect the fairness of criminal trials.

A victim's right to be heard could undermine the accused's right to due process

The proposed amendment gives victims a constitutional right to be heard, if present, and to submit a statement at many stages in the criminal proceeding, including guilty pleas and sentencing. What happens when a victim's testimony is irrelevant, unduly or unnecessarily prolongs the proceedings, or is so inflammatory that justice would be undermind? For instance, passage of the proposed amendment could make it more difficult for judges to limit testimony by victims at capital sentencing proceedings.[71]

This point was poignantly made by Bud Welch, who lost his daughter in the Oklahoma City bombing. Mr. Welch wrote to the Committee that after the bombing, he was so angry that he "wanted McVeigh and Nichols killed without a trial":

> I consider that I was in a state of temporary insanity immediately after [my daughter's] death. It is because I was so crazy with grief that I oppose the Victims' Rights Amendment. It would give victims the right to give input at each public hearing. I do not think crime victims should be involved in every stage of a criminal trial. I think they

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[67] See *supra* notes 53–54 and accompanying text.

[68] See Robert P. Mosteller, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation,* 85 Geo. L.J. 1691, 1703–04 (1997).

[69] See, *e.g., Sheppard* v. *Maxwell,* 384 U.S. 333, 350 (1966).

[70] Hearing of Apr. 16, 1997, at 133.

[71] See Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials,* 41 Ariz. L. Rev. 143 (Spring 1999) (discussing need for meaningful controls in the areas of what impact evidence should be admitted, what form it should take, and what uses can and should be made of it by capital jurors).

> are too emotionally involved in the case and will not make the best decisions about how to handle the case.[72]

We share Mr. Welch's concern that injecting too much emotion into criminal proceedings will increase the chance of unfair and wrongful results.

A victim's right to expedite trial proceedings could undermine the accused's sixth amendment rights

The proposed amendment gives victims of violent crimes a right to "trial free from unreasonably delay." Just as this provision risks forcing prosecutors to trial before they are fully prepared, it risks forcing defendants to do the same. Defendants may also seek to postpone the trial to let prejudicial publicity about the case dissipate. Under the proposed amendment, the defendant's need for more time could be outweighed by the victim's assertion of his right to have the matter expedited, seriously compromising the defendant's right to effective assistance of counsel and his ability to receive a fair trial.

The majority report (in Part IV.6) is characteristically muddled on this point. On the one hand, it asserts that "the interests of a crime victim in a trial free from unreasonable delay must be protected." On the other hand, it assures us that, "[o]f course, a victim's right to consideration of his or her interest to avoid unreasonable delay will not overcome a criminal defendant's due process right to a reasonable opportunity to prepare a defense." Is rights language proposed to be added to the Constitution only to be reduced to hortatory sentiment?[73]

Constitutionalizing victims' rights raises equal protection concerns

We should consider the question of equal protection and equality of treatment of our defendants. During one hearing, Representative Robert C. ("Bobby") Scott of Virginia asked what happens when a prosecutor routinely recommends a one-year sentence for first-offense burglary, but the victim is unusually emotional or articulate: should that defendant get more time than a defendant whose victim is inarticulate or even absent?[74] By the same token, should the amount of time that a defendant spends in jail turn on the effectiveness of the victim's attorney?

The United States is world renowned and admired for its system of public prosecutions. It bespeaks our leadership in the precepts of democracy that justice is mandated for all citizens. No individual or group should be favored. Wealth should not determine whose case gets prosecuted, or how well. Crime victims themselves benefit form this system, as the majority report acknowledges. We should think long and hard before we accept the majority's invitation to create a system in which the dangers of private prosecutions might resurface.

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[72] Letter from Bud Welch to Sen. Orrin Hatch, Chairman, Senate Comm. on the Judiciary, Sept. 22, 1999.

[73] See *infra* notes 75–78 and accompanying text.

[74] Hearing of Apr. 1b, 1997, at 34, 35.

Construed to avoid any conflicts with defendants rights, the proposed amendment becomes purely hortatory

Attempting to divert attention from the foreseeable consequences of this proposal, some supporters of S.J. Res. 3 maintain that it would not, and was never intended to, denigrate the rights of the accused in any way. Indeed, one cosponsor has flatly asserted:

> There is no consistency between the rights of the accused and recognizing in a formal sense the victim's rights. * * * there is not even a hypothetical case that has been put forward where there is a conflict between the rights guaranteed to the accused under our Constitution and the rights we are proposing * * * be enshrined in the Constitution for victims. There is no denigration, there is no choice required. This is not a matter of requiring anyone to say, in order to give a victim a right, we have to take away any right of the accused. If that were the case * * * I would not support this amendment.[75]

Other sponsors have taken a similar position when resisting the proposal to include in S.J. Res. 3 an explicit guarantee against any diminishment of the rights of the accused.[76]

The problem with this position, however, is that it proves too much. For if it were always possible to accommodate the victim's interests without diminishing the constitutional rights of the accused in the same proceeding—a prospect that we, like the Department of Justice, find unlikely—then the proposed amendment would become purely hortatory. Professor Philip Heymann, a former Associate Deputy Attorney General, stated the matter succinctly:

> If it is not intended to free the States and Federal Government from restrictions found in the Bill of Rights—which would be a reckless tampering with provisions that have served us very well for more than 200 years—it is unclear what purpose the amendment serves.[77]

The Constitution of the United States is no place for symbolic ornaments that fail to define real rights or to give real remedies.[78]

4. Passage of the Proposed Amendment Could Actually Hurt Victims

For all the reasons discussed above, passage of this well-meaning amendment could well prove counter-productive, accomplishing little while making the lives of crime victims more difficult. Attorney General Reno correctly emphasized that "the very best way that [we] * * * can serve victims of crime is to bring those responsible for crime to justice."[79] The National District Attorneys Association has also observed that a Federal Victims' Rights Amendment "can-

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[75] Transcript of Markup, Senate Comm. on the Judiciary, June 25, 1998, at 19–20 (Sen. Joseph R. Biden, Jr.).

[76] See *supra* note 66 and accompanying text.

[77] Philip B. Heymann, *A Proposed Victims' Rights Constitutional Amendment: Against an Amendment*, State-Federal Judicial Observer, No. 14, at 1 (Apr. 1997).

[78] See 146 Cong. Rec. S1859–61 (daily ed. Mar. 29, 2000) (Sen. Robert C. Byrd).

[79] Hearing of Apr. 16, 1997, at 42. See also Hearing of Mar. 24, 1999, at 18, 20 (statement of Beth A. Wilkinson) ("most important right" of crime victim is "the fair and just conviction of the guilty").

not truly be of help to a victim if it, in any way, assists a criminal defendant in escaping justice."[80] Crime victims would be the first to suffer—and criminals the first to benefit—from a constitutional amendment that hindered prosecutors, forced law enforcement agencies to divert scarce resources from actual crime-fighting efforts, and clogged the courts with time-consuming, justice-delaying litigation. Moreover, few benefit if, in the end, the proposed amendment undermines core constitutional guarantees designed to protect all of us from wrongful convictions.

D. THE PROPOSED AMENDMENT INFRINGES UNDULY ON STATES' RIGHTS

The proposed amendment constitutes a significant intrusion of Federal authority into a province traditionally left to State and local authorities. Many of our colleagues, in making their arguments in support of the proposed constitutional amendment, point out that nearly 95 percent of all crimes are prosecuted by the States. It is precisely that rationale that leads us to conclude that grants of rights to crime victims are—whenever possible—best left to the States to provide.

If the Federal Government had the general police power, then mandating a companion power to protect the rights of victims of crime would at least be consistent. The Federal Government does not have the general police power. As the Supreme Court reminded us in *United States* v. *Lopez*, "Under our federal system, the States posses primary authority for defining and enforcing the criminal law."[81] The proposed amendment would dramatically alter this framework by locking States into an absolutist national pattern regarding the participation of victims in the criminal justice system.

The majority report attempts to deflect the federalism concerns raised by S.J. Res. 3 by declaring (in Part V) that the States will retain "plenary authority" to implement the amendment within their own criminal systems. "For example," we are told, "the States will, subject to Supreme Court review, flesh out the contours of the amendment by providing definitions of 'victims' of crime and 'crimes of violence.'" If this interpretation were correct, it would undermine the majority's own rationale for the amendment (in Part III), which is to repair the existing "patchwork" of victims' protections and establish a uniform national baseline. That is, it would simply replace one patchwork with another.[82]

More likely, however, is that the majority's interpretation, while politically expedient, is legally untenable. The notion that S.J. Res. 3 empowers States to pass implementing legislation is flatly inconsistent with the plain language of the proposed amendment. It states, "*The Congress* shall have the power to enforce this article by appropriate legislation" (emphasis added). Identical language in

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[80] Letter from William L. Murphy, President, National District Attorneys Assn., to Sen. Patrick J. Leahy, Ranking Member, Senate Comm. on the Judiciary, May 27, 1998.

[81] 514 U.S. 549, 561 n.3 (1995) (internal quotation marks omitted; emphasis added). See also *Screws* v. *United States*, 325 U.S. 91, 109 (1945) (plurality opinion) ("Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States.")

[82] Robert P. Mosteller & H. Jefferson Powell, *With Disdain for the Constitutional Craft, supra* note 1, at 378.

earlier constitutional amendments has been read to vest enforcement authority exclusively in the Congress.

In the case of S.J. Res. 3, moreover, the text is illuminated by the legislative history. Earlier drafts of the amendment expressly extended enforcement authority to the States.[83] These drafts drew fire from constitutional scholars, who expressed doubt that constitutionally-authorized State laws could be supreme over State constitutions or even over Federal laws, and concern that, for the first time, rights secured by the Federal Constitution would mean different things in different parts of the country. The Committee then amended the text to its current formulation. Faced with this history and text, courts will surely conclude that S.J. Res. 3 deprives States of authority to legislate in the area of victims' rights. Indeed, both Chairman Hatch and the States' Chief Justices have already interpreted the proposed amendment in precisely this way.[84]

This is troubling in three regards. First, S.J. Res. 3 would have an adverse effect on the many State and local governments that already are experimenting with a variety of innovative victims' rights initiatives. Second, it would create an enormous unfunded burden for State courts, prosecutors, law enforcement personnel and corrections officials. Third, it would lead inevitably to Federal court supervision and micro-management of noncomplying State and local authorities.

1. The amendment would end constructive experimentation by the States

In the words of Supreme Court Justice Louis D. Brandeis, writing in *New State Ice Co.* v. *Liebmann:* "It is one of the happy incidents of the Federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[85] The victims' movement has induced all 50 States to serve as laboratories. Through statutes and State constitutional amendments, the States are experimenting with varied approaches to blending the competing interests of victims, prosecutors, and defendants.

State experimentation with victims' rights initiatives is relatively new and untested; the laboratory evidence is as yet inconclusive. Indeed, in the short time since the Committee last reported out a Victims' Rights Amendment, three more States have amended their Constitutions to protect victims. The proposed amendment creates a national standard for victims' rights and gives Congress exclusive power to enforce that standard by appropriate legislation. It thus forecloses the States from experimenting and exercising their judg-

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[83] For example, S.J. Res. 52, introduced in the second session of the 104th Congress, provided: "The several States, with respect to a proceeding in a State forum, and the Congress, with respect to a proceeding in a United States forum, shall have the power to implement further this article by appropriate legislation." Similarly, S.J. Res. 6, introduced in the first session of the 105th Congress, provided: "The Congress and the States shall have the power to enforce this article within their respective jurisdictions by appropriate legislation, including the power to enact exceptions."

[84] See S. Rep. 409, 105th Cong., 2d Sess., at 44 (Additional Views of Sen. Hatch); Hearing of Mar. 24, 1999, at 252 (Letter from Conference of State Justices to Sen. John Ashcroft, urging amendment to S.J. Res. 3 that would allow State legislatures to implement it with respect to State proceedings).

[85] 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

ment in an area to which the States lay claim by right of history and expertise.

That is why the States' top jurists oppose it. The Conference of Chief Justices has expressed serious concerns with the federalism issues presented by the amendment:

> Preempting each State's existing laws in favor of a broad Federal law will create additional complexities and unpredictability for litigation in both State and Federal courts for years to come. We believe that the existing extensive state efforts provide a significantly more prudent and flexible approach for testing and refining the evolving legal concepts concerning victims rights.[86]

Senator Fred Thompson, a former member of this Committee, echoed these same concerns in 1998:

> Our federalist system is not only faster and more effective than amending the Constitution, but it also offers the great benefit of flexibility. The victims' rights movement is challenging us to fundamentally rethink our approach to criminal justice. Traditionally, our criminal system has focused on the State's interest in punishment versus the rights of the accused. Now we are being asked to graft into this adversarial system constitutional rights of crime victims. It may well be time to rethink our criminal justice system. But, if so, the experimentation and flexibility that the States offer are all the more important. If the current balance between the interests of the State and the accused is compex—and it surely is—then our adversarial system will be vastly complicated by a three-way relationship among the State, the accused, and victims. Each crime is different, and balancing these three interests on a case-by-case basis would be no small task. *It is critical we learn from the experience of the States before deciding to add new victims' rights to the Constitution*.[87]

The National Network to Domestic Violence, a membership organization of State domestic violence coalitions from around the country, told the Committee last year:

> [T]he majority of existing * * * state statutes and constitutional amendments have been on the books fewer than 10 years. Thus, giving our very limited experience with their implementation, it will be many years before we have sufficient knowledge to craft a federal amendment that will maintain the delicate balance of constitutional rights that ensure fairness in our judicial process. *Without benefiting from the state experience, we run the risk of harming victims.* We must explore adequately the effectiveness of such laws and the nuances of the various provisions before changing the federal constitution. State constitutions are different—they are more fluid, more amendable to adjustments if we need to "fix" things. *A change in the federal*

[86] Hearing of Mar. 24, 1999, at 251.

[87] S. Rep. 409, 105th Cong., 2d Sess., at 48 (Minority Views of Sen. Thompson; emphasis added.)

constitution would allow no such flexibility, thus potentially harming victims by leaving no way to turn back.[88]

The majority report urges us (in Part III) to dispense with further experimentation on the ground that "Each year of delay is a year in which countless victims are denied their rights." But the process of amending the United States Constitution is not a sprint to a popular goal. It should be reserved for fundamental changes in that charter that are necessary to achieve goals unachievable by other means. The proponents of constitutional change must first establish that there is no alternative path to that goal by less drastic means. With the experimentation that is ongoing in the States, they have not come close.

At a minimum, we should explore the effectiveness of the State efforts and the nuances of their various approaches before grafting a rigid, untested standard onto the United States Constitution. We should have more information about what the States are failing to do before the Federal Government shuts down their research.

Example: The States' experimentation has not yet led to a consensus on the appropriate scope of the victim's right to trial proceedings at which they are going to be called as witnesses. A few States, including Alabama, Arkansas, and Louisiana, have specifically provided that the rule regarding exclusion of witnesses does not apply to victims.[89] Other States have taken a hybrid approach, whereby the victim has the right to attend only after the victim has testified, as in Michigan, New Jersey, and Washington.[90] Washington's law also specifies that while a victim may be excluded until after testifying, the victim has the right to be scheduled as early in the proceedings as possible. Overall, a majority of States give the trial judge discretion to exclude the victim either as a witness or to preserve the defendant's right to a fair trial generally. A categorical Federal constitutional rule that victims must never be excluded would nullify these State judgments about the appropriate way to balance the competing interests involved.

The argument that we need to achieve "uniformity" in protecting the rights of crime victims is unconvincing.[91] First, as Professor Robert Mosteller has pointed out, "specific aid and guidance in implementing victims' rights is likely more important to their full enjoyment than is uniform national recognition of a minimal set of rights."[92] Second, it assumes that there is one and only one way to do this, and that only the Federal Government can discern the best approach, even though most of the experience has been in the States.

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[88] Hearing of Mar. 24, 1999, at 233 (emphasis added).

[89] Ala. Stat. § 15–14–55; Ark. R. Evid. 616; La. Code Evid. Art. 615(A)(4).

[90] Mich. Comp. Laws Ann. § 780.761(11); N.J. Const. Art. 1, ¶ 22; Wash. Rev. Code Ann. § 7.69.030(11). Louisiana took this approach until 1999, when it amended its sequestration rule to follow the Alabama/Arkansas model.

[91] The Department of Justice has suggested that the reason to adopt a constitutional amendment as opposed to a statute is to provide a uniform national rule rather than allow States to adopt provisions that the State legislatures and voters think will best suit their local needs. See *A Proposed Constitutional Amendment to Protect Crime Victims, Hearing on S.J. Res. 44 before the Senate Comm. on the Judiciary,* 105th Cong., 2d Sess., at 119 (Apr. 28, 1998) [hereinafter "Hearing of Apr. 28, 1998"]; New Directions from the Field, *supra* note 38, at 10 (victims' constitutional amendment is necessary "to rectify the current inconsistencies in victims' rights laws that vary significantly from jurisdiction"; quoted in Part III of the majority report).

[92] Robert P. Mosteller, *The Unnecessary Victims' Rights Amendment, supra* note 40, at 445.

Victim Services said it best: "Before undertaking the momentous step of amending the U.S. Constitution, the right course is surely to examine the existing legislative and regulatory schemes and ascertain what is working best in practice."[93]

2. The amendment would impose an unfunded mandate on the States

We have already discussed the potentially staggering costs that S.J. Res. 3 could impose on the 50 States.[94] Congress has a responsibility to investigate these costs thoroughly and to explore the shift in resources that could result if the amendment were ratified. Congress has not yet undertaken this important task. We need more information from the States about how much it costs to implement these programs, and what sort of resources are needed to be successful before we rush to validate a series of rights that could overwhelm the Nation's criminal justice system.

Largely for this reason there is growing opposition to the proposed amendment among some of the very people who most strongly support victims' rights—prosecutors and law enforcement officers. They are sympathetic to victims, and would welcome the resources to enable them to provide victims with notice and other assistance. They do not, however, want another unfunded mandate that will have the Federal courts and special masters directing the activities of their underfunded offices. Instead of unfunded mandates, we need to encourage States to provide the support and services that many victims of crimes need and deserve.

3. The amendment would lead to extensive Federal Court Supervision of State Law Enforcement Operations

Under S.J. Res. 3, a victim does not have the ability to sue for damages. A victim may, however, ask a Federal court for injunctive or declaratory relief against State officials, and possibly a writ of mandamus. The resulting interference with State criminal proceedings would be unprecedented and ill-advised.

Even more alarming is the specter of Federal class actions against noncomplying State authorities. When local prosecutors' offices fail, as some now are failing, to provide full notice for victims, the only effective relief would be court orders like those in prison reform litigation. There is the potential for big costs to States, enormous expenditure of judicial resources, and undignified hauling into court of local prosecutors, judges, and corrections officers.

The States' Chief Justices have expressed grave concerns that the proposed constitutional amendment would lead to "extensive lower Federal court surveillance of the day to day operations of State law enforcement operations."[95] Senator Fred Thompson has characterized the proposal as "a dramatic arrogation of Federal power" that would "effectively * * * amend the 10th amendment and carve away State sovereignty."[96] We share these concerns. The laudable goal of making State and local law enforcement personnel more responsive to victims should not be achieved by establishing

[93] Hearing of Apr. 28, 1998, at 172.
[94] See *supra* notes 58–61 and accompanying text.
[95] Hearing of Mar. 24, 1999, at 251.
[96] S. Rep. 409, 105th Cong., 2d Sess., at 49 (Minority Views of Sen. Thompson).

Federal court oversight of the criminal justice and correctional systems of the 50 States.

"[F]ederalism was the unique contribution of the Framers to political science and political theory," [97] and it has served this country well for over 200 years. We do not need a constitutional amendment to turn this system on its head. We have no pressing reason to thwart the States' experimentation with innovative victims' rights initiatives and to displace State laws in an area of traditional State concern. We have no compelling evidence pointing to the need for another unfunded mandate. And we certainly do not need more Federal court supervision and micromanagement of State and local affairs, when every State is working hard to address the issue in ways that are best suited to its own citizens and its own criminal justice system.

E. THE WORDING OF THE PROPOSED AMENDMENT IS PROBLEMATIC

As the preceding analysis has shown, any amendment to the Constitution to provide for victims' rights would be fraught with problems, ranging from resource and training issues to a plethora of unintended consequences. But in addition to the general problems associated with a constitutional amendment, the specific language of S.J. Res. 3 is problematic.

There have been some 63 drafts of this proposed amendment,[98] but it remains both excessively detailed and decidedly vague. We continue to believe that the level of detail provided in this amendment is inconsistent with the structure and style of our country's great governing document. Indeed, S.J. Res. 3, and the majority report, read like a statute, which suggests that is, in fact, how the problem of protecting the rights of crime victims should be addressed. The kind of legislative fine-tuning that this important subject requires simply cannot be done in the context of a constitutional amendment that can only be modified, once it is ratified, through another constitutional amendment.

Nevertheless, leaving that more general objection aside for the moment and taking the amendment on its own terms, we have grave concern about the lack of specificity in some key areas. In particular, many of the amendment's key words remain undefined. We do not even know whether these words would have one meaning (if Congress alone could define them) or more than 50 (if, as the majority claims in Part V, the States also enjoyed "plenary authority to enact definitional laws for purposes of their own criminal system."). Years of litigation would be necessary to flesh out the amendment's actual scope, enforcement mechanisms, and remedial nature.

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[97] *Lopez,* 514 U.S. at 575 (Kennedy, J., concurring).

[98] The text has changed—another 20 words have been added—since the Committee last reported the proposed amendment, in October 1998. The fact that this proposal continues to evolve does not inspire confidence that we have discerned the correct formulation, nor does the fact that some of our colleagues who voted to report S.J. Res. 3—including the Committee and Subcommittee Chairmen—have indicated dissatisfaction with the current text. See Transcript of Markup, Senate Subcomm. on the Constitution, Federalism, and Property Rights, May 26, 1999, at 3 (Sen. John Ashcroft: "I have two concerns about S.J. Res. 3 in its current form"); *id.* at 14 (Sen. Orrin G. Hatch: "I continue * * * to have some concerns with the text of the proposed amendment").

1. The term "Victim" is undefined

Most conspicuous in its absence from S.J. Res. 3 is any definition or explanation of the critical term "victim." Is the proposed amendment intended to give victim status only to those individuals who suffer personal injury as the result of a crime? Or is the intent to ensure that members of the immediate family are given victim status? What about cousins, close friends, neighbors? The list of potential victims is lengthy. In cases like the Oklahoma City bombing, where 168 people were killed and hundreds more were injured, would the State and Federal courts be required to hear statements from possibly thousands of people claiming victim status?

The failure to define "victim" raises another set of problems with respect to crimes committed, or allegedly committed, in self defense. For example, victims of domestic violence may respond to repeated attacks by striking back at their abusive spouses. In these cases, the victim of repeated abuse becomes the defendant, and the abusive spouse becomes the victim. If the proposed amendment is enacted, the abusive spouse might have a constitutional guarantee of access to information that includes when the defendant is released from custody, which might leave her vulnerable to violent retaliation. The National Clearinghouse for the Defense of Battered Women, the National Network to End Domestic Violence, and several State and local domestic violence support organizations—including organizations from Louisiana, Iowa, North Dakota, Wisconsin, Pennsylvania, and Wyoming—all oppose S.J. Res. 3 for this reason.

Illustrative of the peculiar problems raised by domestic violence cases is *State ex rel. Romley* v. *Superior Court*.[99] Defendant Ann Roper was charged with stabbing her husband. She claimed that she had been the victim of horrendous emotional and physical abuse by her husband during their marriage; that the husband was a violent and psychotic individual who had been treated for multiple personality disorder for over a decade; that he was manifesting one of his violent personalities at the time of the assault; and that she had acted in self-defense. It was undisputed that the husband was mentally ill; that he had three prior arrests and one conviction for domestic violence toward the defendant; and that the defendant, not the husband, made the 911 call to the police, asking for help because her husband was beating her and threatening her with a knife. Under these circumstances, the Arizona Court of Appeals came to the sensible conclusion that the defendant's due process rights superseded the State law right of the husband/"victim" to refuse to disclose his medical records.

While nothing in S.J. Res. 3 would directly compromise the holding in *Romley*, the case does expose the risk in creating blanket constitutional protections for "victims" without first considering and resolving who these "victims" may be. In a world where the rights of the accused must yield to the rights of the accuser, we must define our terms carefully. The sponsors of S.J. Res. 3 want to shelve the difficult definitional debate until such time as Con-

[99] 836 P.2d 445 (Ariz. Ct. App. 1992).

gress is called upon to implement the amendment.[100] But it is premature to pass this proposal on to the States for ratification without providing clear guidance on this basic issue.[101]

2. The term "Crime of Violence" is undefined

The scope of the proposed amendment also turns on a second undefined term, "crime of violence." Ordinarily, crimes of violence are those involving some use of physical force against a person. Thus, the term may be limited to crimes that produce physical injury (*e.g.*, murder, assault, and rape). In some contexts, however, the term "crime of violence" has been defined or interpreted to include crimes involving some use of force against another's property (*e.g.*, arson) and crimes that merely threaten physical injury or property damage (*e.g.*, extortion, robbery, and burglary). Existing Federal law already provides several different definitions of "crime of violence," including one that covers statutory rape, abusive sexual contact, and sexual exploitation of minors.[102]

Again, the sponsors of this bill promise to define the term "crime of violence" in the implementing legislation and leave it to the courts to sort out while suggesting (in Part V) that "implied violence" might suffice. Again, we believe it is imprudent to ask States to ratify a constitutional amendment before they know the full scope and scale of its effects.

3. The term "Reasonable Notice" is undefined

The proposed amendment requires that victims be given "reasonable notice" of developments in their cases. But, again, the term is undefined within the text of the proposed amendment. Just what constitutes "reasonable notice?" For example, in cases where an inmate is released from custody, what is a reasonable amount of time to wait before notifying the crime victim? Is it thirty minutes? Two hours? Twenty-four hours? Does it depend on where the inmate was imprisoned, or the distance of the inmate from the victim at the time of release?

Besides the ambiguity of the timing requirement, the term "reasonable notice" gives no indication as to what manner of notice a victim is entitled. Must the government invariably provide direct written notice to victims? May the government simply publish notice in a local newspaper, as it may sometimes do to perfect the forfeiture of a person's property? Is it enough that the court publishes its calendar? Until we have some idea what notice is "reasonable," we cannot begin to assess what the proposed amendment will actually mean in terms of administrative time and cost.

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[100] The swifter process to providing victims' rights is, of course, by statute rather than implementing legislation delayed while a constitutional amendment is debated in Congress and ratification is debated in the States. Years, even decades, could ensue before real change is seen by means of such a top-down path.

[101] The American Bar Association has urged that any measure to recognize victims' rights in the criminal justice system do so consistent with various principles, including the sixth principle, "The class of protected 'victims' should be defined." Letter from Michael T. Johnson on behalf of the American Bar Assn. to Sen. Orrin G. Hatch, Chairman, Senate Comm. on the Judiciary, June 24, 1998 (attaching resolution approved by ABA House of Delegates, Aug. 1997).

[102] See, *e.g.*, 18 U.S.C. §§ 16, 924(c)(3), 3156(a)(4); 28 U.S.C. § 2901. Section 3156(a)(4)(C) incorporates felonies under chapter 109A and chapter 110, relating to sexual abuse and sexual exploitation of children.

4. The remedial scheme is uncertain

The proposed amendment appears to offer a rather limited scope of possible remedies for those victims who believe their rights were violated. Section 2 provides, in part: "Nothing in this article shall provide grounds to stay or continue any trial, reopen any proceeding or invalidate any ruling, except with respect to conditional release or restitution or to provide rights guaranteed by this article in future proceedings, without staying or continuing a trial." If a remedy is contemplated by this provision, its lack of definition will lead to more costly and time consuming litigation. In particular, courts will struggle to give meaning to the exception for "future proceedings." The Justice Department has also expressed concern that Section 2 would "unduly disrupt the finality of sentences" by inviting victims to reopen completed criminal cases to revisit the issue of restitution.[103]

The next clause of Section 2 prohibits claims for damages against governmental entities. It states: "Nothing in this article shall give rise to or authorize the creation of a claim for damages against the United States, a State, a political subdivision, or a public officer or employee." The majority report attempts to assuage victims' groups by suggesting that this prohibition may not be as absolute as it sounds. According to the report (in Part V), while Section 2 does not itself "give rise to" a cause of action against the government, nor does it *preclude* such a cause of action under other legislation. This strained reading of the phrase "give rise to" ignores the separate proviso that nothing in the amendment shall "authorize the creation of" claims for damages against the government. If the amendment were meant to authorize such claims, it would not use the language of prohibition.

Roger Pilon, director of the Cato Institute's Center for Constitutional Studies, has compared the proposed amendment to the generous legacy in a pauper's will: it promises much but delivers little.[104] To the extent that the proposed amendment creates rights without remedies, it is worse than useless. Rights without remedies are empty promises that in time undermine confidence in the very document that contains them—in this case, the United States Constitution.

5. The "Exceptions" clause is overly restrictive

In an attempt to address some of the concerns by the potential sweep of the proposed amendment, its sponsors have included an exceptions clause (in Section 3) to allow for exceptions to be created "when necessary to achieve a compelling interest." However, a "compelling interest" standard may be too strict to deal appropriately and effectively with the variety of difficult circumstances that arise in the course of criminal proceedings.

The term "compelling interest" has a relatively settled meaning. Indeed, there is hardly a term in contemporary legal usage that is clearer or more restrictive. Interpreting this term, the Justice Department has told us that this "most rigorous test of government

[103] Statement of Eleanor D. Acheson, Assistant Attorney General, before the House Subcomm. on the Constitution, concerning H.J. Res. 64, Feb. 10, 2000, at 8.
[104] Hearing of Apr. 16, 1997, at 47.

action under the Constitution" may not afford the appropriate degree of flexibility for law enforcement purposes, including flexibility to deal with circumstances involving culpable victims, potentially violent victims, cooperating defendants, and incarcerated victims.[105] To make matters worse, we have no way of knowing in advance, before it is too later, whether courts will consider any particular problem sufficiently compelling to justify an exception.

The majority's discussion of the exceptions clause is yet another exercise in political expediency. As we previously discussed,[106] one of the major problems with the amendment is how it will affect the treatment of battered women who may be either victim or defendant depending upon whether they are being beaten or whether they react to their beatings by self-help violence that may be legally justified but nonetheless prosecuted. The majority report maintains (in Part V) that in such cases, the exceptions clause "offers the ability" to modify victims' rights provisions.[107] It is not so easy. Ample legal precedent supports the Justice Department's conclusion that the "compelling interest" test is not sufficiently flexible. Without a more flexible exceptions clause, the amendment will have unintended consequences, both for victims and for law enforcement.

At the same time, more flexibility is not the answer. If we really need a constitutional amendment, it should be to bind the hands of government. The fact that this amendment, unlike any other, requires a built-in exceptions clause, and the majority's efforts to infuse this clause with flexibility, proves that a constitutional amendment is not the device that is needed.

The exceptions clause is also problematic because it does not identify *who* may create exceptions to the amendment's requirements. Does the power to create exceptions, like the general enforcement power, fall exclusively to Congress? This would further weaken State and local control over law enforcement operations and criminal proceedings. Could exceptions be crafted by State judges in individual cases? This runs the risk that Federal constitutional rights would, for the first time, mean different things in different States.

Victim Services has expressed serious concerns about the exceptions clause and, in particular, whether it would protect the victims of domestic violence:

> [I]t remains totally unclear how * * * exceptions would be made, by whom, and according to what criteria. Numerous questions arise. Does the provision allow or require the creation of exceptions? At what point in the trial process would there be a ruling about this? How and when would domestic violence victims assert their status? Would they

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[105] See, *e.g.,* Statement of Eleanor D. Acheson, Assistant Attorney General, before the House Subcomm. on the Constitution, concerning H.J. Res. 64, Feb. 10, 2000, at 6–7. The Justice Department urges that the authority to create exceptions should exist where necessary to promote a "significant" government interest, rather than the "compelling" interest required by the current resolution. *Id.* at 6.

[106] See *supra* notes 99–101 and accompanying text.

[107] The majority has retreated from its earlier assertion that the very same exceptions clause provides "flexibility" for handling such cases. S. Rep. 409, 105th Cong., 2d Sess., 35–36. To say that the restrictive "compelling interest" test provides "flexibility" is a ridiculous statement obviously meant to manipulate words beyond any recognizable meaning. The majority's current formulation, however, is not much better.

> be able to do so without compromising their Fifth Amendment rights? What evidence would be sufficient to persuade a court that the defendant is a victim of domestic violence—particularly if there are no police records or orders of protection, as is often the case. These unanswered questions illustrate the difficulty of knowing, from the brief, general wording of S.J. Res. 3, whether the proposed rights would be meaningful and practicable or whether they would result in harm to some victims.[108]

These concerns are just a sampling of the possible problems that will be confronted by law enforcement officers, prosecutors, and judges as they grapple with the implementation and enforcement of the provisions of the proposed amendment. As the Federal Public Defenders aptly concluded, "the proposed amendment is a litigator's dream and a victim's nightmare." [109]

F. CONCLUSION

We who oppose this constitutional amendment are supporters of victims' rights. We have no less concern for the pain of victims of violent crime, or any crime, than those who support this amendment, and no less desire to promote their participation in the criminal justice system.

We regret that the time and energy that could have led to increased improvements in the implementation of real protections for victims, better training for courts and prosecutors, better notification systems, and more consistent recognition of victims' rightful place in the criminal justice system, have, instead, been focused on this constitutional amendment process. That focus has been to the detriment of efforts toward Federal statutory change, both comprehensive and incremental. Much to our regret, victim assistance programs have suffered, the Crime Victims Fund has been capped, and the pace of victims' rights legislation has slowed over the last four years. Fortunately, the States are continuing to move ahead.

It is not victims' rights but this well-intentioned yet controversial constitutional amendment that we oppose. We must not hamstring our prosecutors and sacrifice core protections guaranteed by the Bill of Rights to enact this unnecessary and problematic constitutional amendment, which promises much, but may deliver very little. For all these reasons—it is not necessary to amend the Constitution to protect victims' rights; the proposed amendment could have dangerous and uncertain consequences for the Nation's criminal justice system; the proposed amendment infringes unduly on States' rights; and the wording of the proposed amendment is problematic—the proposed constitutional amendment should not pass.

PATRICK J. LEAHY.
EDWARD M. KENNEDY.
HERB H. KOHL.
RUSS FEINGOLD.

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[108] Hearing of Mar. 24, 1999, at 232.
[109] Hearing of Apr. 28, 1998, at 170.

XII. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee finds no changes in existing law caused by passage of S.J. Res. 3.

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