STATEMENT

OF

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BEFORE

THE HOUSE JUDICIARY COMMITTEE

SUBCOMMITTEE ON THE CONSTITUTION

ON

THE VICTIM'S RIGHTS AMENDMENT

ON

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I. INTRODUCTION

Mr. Chairman and Distinguished Members of the Subcommittee:

I am pleased to submit testimony in support of House Joint Resolution 40. I am the Ronald N. Boyce Presidential Professor of Criminal Law from the S.J. Quinney College of Law at the University of Utah and a former U.S. District Court Judge from the District of Utah (2002 to 2007).

Introduced by Representatives Trent Franks (R-AZ) and Jim Costa (D-CA), House Joint Resolution 40 is a proposed amendment to the United States Constitution that would protect crime victims' rights throughout the criminal justice process. The Victims' Rights Amendment ("VRA") would extend to crime victims a series of rights, including the right to be notified of court hearings, the right to attend those hearings, and the right to speak at particular court hearings (such as hearings regarding bail, plea bargains, and sentencing). Similar proposed amendments have been introduced in Congress since 1996.

The normative issues regarding the justification for such a constitutional amendment have been discussed at length elsewhere.[1] For example, in 1999 I helped organize a *Utah Law Review s*ymposium regarding the VRA.[2] There, I argued that the Constitution should be

[1] *Compare, e.g.*, Steven J. Twist & Daniel Seiden, *The Proposed Victims' Rights Amendment: A Brief Point/Counterpoint*, 5 PHOENIX L. REV. 341 (Apr. 2012), *and* Steven J. Twist, *The Crime Victims' Rights Amendment and Two Good and Perfect Things*, 1999 UTAH L. REV. 369, *with* Robert P. Mosteller, *The Unnecessary Victims' Rights Amendment*, 1999 UTAH L. REV. 443. *See generally* DOUGLAS E. BELOOF, PAUL G. CASSELL & STEVEN J. TWIST, VICTIMS IN CRIMINAL PROCEDURE 713-28 (3d ed. 2010); Sue Anna Moss Cellini, *The Proposed Victims' Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, 14 ARIZ. J. INT'L & COMP. L. 839, 856-58 (1997); Victoria Schwartz, Recent Development, *The Victims' Rights Amendment*, 42 HARV. J. ON LEGIS. 525 (2005); Rachelle K. Hong, *Nothing to Fear: Establishing an Equality of Rights for Crime Victims Through the Victims' Rights Amendment*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 207, 219-20 (2002).

[2] *See* Symposium, *Crime Victims' Rights in the Twenty-First Century*, 1999 UTAH L. REV. 285. This testimony, too, is drawn for a symposium – recently organized by the capable editors of the *Phoenix Law Review*. My testimony tracks my article published there.

amended to enshrine crime victims' rights.[3] I reviewed the various objections leveled against the VRA, finding them all wanting.[4] I concluded that a fair-minded look at the Amendment confirmed that the VRA would build upon and improve our nation's criminal justice system — retaining protection for the legitimate interests of prosecutors and defendants, while adding recognition of equally powerful interests of crime victims.

The objections to the Victims' Rights Amendment conveniently fell into three categories, which my 1999 Article analyzed in turn. The first part reviewed normative objections to the Amendment—that is, objections to the desirability of the rights. The part began by reviewing the defendant-oriented objections leveled against a few of the rights, specifically the victim's right to be heard at sentencing, the victim's right to be present at trial, and the victim's right to a trial free from unreasonable delay. These objections all lack merit. I concluded by refuting the prosecution-oriented objections to victims' rights, which revolve primarily around alleged excessive consumption of scarce criminal justice resources. These claims, however, are inconsistent with the available empirical evidence on the limited cost of victims' rights regimes in the states.

The next part considered what might be styled as justification challenges—challenges that a victims' amendment is unjustified because victims already receive rights under the existing amalgam of state constitutional and statutory provisions. This claim of an "unnecessary" amendment misconceives the undeniable practical problems that victims face in attempting to secure their rights without federal constitutional protection.

The final part then turned to structural objections to the Amendment—claims that victims' rights are not properly constitutionalized. Contrary to this view, protection of the rights

[3] Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479.
[4] *Id.* at 533.

of citizens to participate in governmental processes is a subject long recognized as an appropriate one for a constitutional amendment. Moreover, constitutional protection for victims also can be crafted in ways that are sufficiently flexible to accommodate varying circumstances and varying criminal justice systems from state to state.

For the convenience of the Subcommittee, a copy of my law review article is attached to this testimony as Exhibit "A" – and I will be happy to expand on any of the issues discussed there. My goal in this written testimony is to move beyond the policy debates surrounding the VRA. In the remainder of my written testimony I provide a clause-by-clause analysis of the current version of the Victims' Rights Amendment, explaining how it would operate in practice. In doing so, it is possible to draw upon an ever-expanding body of case law from the federal and state courts interpreting state victims' enactments. The fact that these enactments have been put in place without significant interpretational issues in the criminal justice systems to which they apply suggests that a federal amendment could likewise be smoothly implemented.

Part II of this testimony briefly reviews the path leading up to the current version of the Victims' Rights Amendment. Part III then reviews the version clause-by-clause, explaining how the provisions would operate in light of interpretations of similar language in the federal and state provisions. Part IV gives an illustration of a recent case in which the Amendment would have made a difference for crime victims. Part V draws some brief conclusions about the project of enacting a federal constitutional amendment protecting crime victims' rights.

II. A BRIEF HISTORY OF THE EFFORTS TO PASS A VICTIMS' RIGHTS AMENDMENT[5]

[5] This section draws upon the following articles: Paul G. Cassell, *The Victims' Rights Amendment: A Sympathetic, Clause-by-Clause Analysis*, 5 PHOENIX L. REV. 301 (2012); Paul G. Cassell, *Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Act's Mandamus Provision*, 87 DENV. U.L. REV. 599 (2010); Paul G. Cassell & Steven Joffee, *The Crime Victim's Expanding Role in a System of Public Prosecution: A Response to the Critics of the Crime Victims' Rights Act*, 105 NW. U. L. REV. COLLOQUY 164 (2010); Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861.

A. The Crime Victims' Rights Movement

The Crime Victims' Rights Movement developed in the 1970s because of a perceived imbalance in the criminal justice system. The victims' absence from criminal processes conflicted with "a public sense of justice keen enough that it has found voice in a nationwide 'victims' rights' movement."[6] Victims' advocates argued that the criminal justice system had become preoccupied with defendants' rights to the exclusion of considering the legitimate interests of crime victims.[7] These advocates urged reforms to give more attention to victims' concerns, including protecting victims' rights to be notified of court hearings, to attend those hearings, and to be heard at appropriate points in the process.[8]

The victims' movement received considerable impetus in 1982 with the publication of the Report of the President's Task Force on Victims of Crime ("Task Force").[9] The Task Force concluded that the criminal justice system "has lost an essential balance . . . . [T]he system has deprived the innocent, the honest, and the helpless of its protection. . . . The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed."[10] The Task Force advocated multiple reforms, such as prosecutors assuming the responsibility for keeping victims notified of all court proceedings and

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[6] Payne v. Tennessee, 501 U.S. 808, 834 (1991) (Scalia, J., concurring) (internal quotations omitted). *See generally* BELOOF, CASSELL & TWIST, *supra* note 1, at 3-35; Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517; Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289 [hereinafter Beloof, *Third Model*]; Paul G. Cassell, *Balancing the Scales of Justice: The Case for and Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373 [hereinafter Cassell, *Balancing the Scales*]; Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 514 (1982); William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37 (1996); Collene Campbell et al., *Appendix: The Victims' Voice*, 5 PHOENIX L. REV. (forthcoming Apr. 2012).

[7] *See generally* BELOOF, CASSELL & TWIST, *supra* note 1, at 29-38; Douglas E. Beloof, *The Third Wave of Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 255 [hereinafter Beloof, *Standing, Remedy, and Review*]; Cassell, *Balancing the Scales*, *supra* note 6, at 1380-82.

[8] *See* sources cited *supra* note 7.

[9] LOIS HAIGHT HERRINGTON ET AL., PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME: FINAL REPORT (1982), *available at* http://www.ojp.usdoj.gov/ovc/publications/presdntstskforcrprt/87299.pdf.

[10] *Id.* at 114.

bringing to the court's attention the victim's view on such subjects as bail, plea bargains, sentences, and restitution.[11] The Task Force also urged that courts should receive victim impact evidence at sentencing, order restitution in most cases, and allow victims and their families to attend trials even if they would be called as witnesses.[12] In its most sweeping recommendation, the Task Force proposed a federal constitutional amendment to protect crime victims' rights "to be present and to be heard at all critical stages of judicial proceedings."[13]

In the wake of the recommendation for a constitutional amendment, crime victims' advocates considered how best to pursue that goal. Realizing the difficulty of achieving the consensus required to amend the United States Constitution, advocates decided to try and first enact state victims' amendments. They have had considerable success with this "states-first" strategy.[14] To date, more than thirty states have adopted victims' rights amendments to their own state constitutions,[15] which protect a wide range of victims' rights.

The victims' rights movement was also able to prod the federal system to recognize victims' rights. In 1982, Congress passed the first specific federal victims' rights legislation, the Victim and Witness Protection Act, which gave victims the right to make an impact statement at sentencing and expanded restitution.[16] Since then, Congress has passed several acts which gave further protection to victims' rights, including the Victims of Crime Act of 1984,[17] the Victims'

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[11] *Id.* at 63.
[12] *Id.* at 72-73.
[13] *Id.* at 114 (emphasis omitted).
[14] *See* S. REP. NO. 108-191 (2003).
[15] *See* ALA. CONST. of 1901, amend. 557; ALASKA CONST. art. I, § 24; ARIZ. CONST. art. II, § 2.1; CAL. CONST. art. I, § 28; COLO. CONST. art. II, § 16a; CONN. CONST. art. XXIX, § b; FLA. CONST. art. I, § 16(b); IDAHO CONST. art. I, § 22; ILL. CONST. art. I, § 8.1; IND. CONST. art. 1, § 13(b); KAN. CONST. art. 15, § 15; LA. CONST. art. I, § 25; MD. DECLARATION OF RIGHTS, art. 47; MICH. CONST. of 1963, art. I, § 24; MISS. CONST. art. 3, § 26A; MO. CONST. art. I, § 32; MONT. CONST. art. 2, § 28; NEB. CONST. art. 1, § CI-28; NEV. CONST. art. 1, § 8(2); N.J. CONST. art. I, para. 22; N.M. CONST. art. II, § 24; N.C. CONST. art. I, § 37; OHIO CONST. art. I, § 10a; OKLA. CONST. art. II, § 34; OR. CONST. art. I, §§ 42-43; R.I. CONST. art. I, § 23; S.C. CONST. art. I, § 24; TENN. CONST. art. I, § 35; TEX. CONST. art. 1, § 30; UTAH CONST. art. I, § 28; VA. CONST. art. I, § 8-A; WASH. CONST. art. I, § 35; WIS. CONST. art. I, § 9m.
[16] Pub. L. No. 97-291, 96 Stat. 1248 (1982).
[17] Pub. L. No. 98-473, 98 Stat. 1837 (1984).

Rights and Restitution Act of 1990,[18] the Violent Crime Control and Law Enforcement Act of 1994,[19] the Antiterrorism and Effective Death Penalty Act of 1996,[20] the Victim Rights Clarification Act of 1997,[21] and, most recently, the Crime Victims' Rights Act ("CVRA").[22] Other federal statutes have been passed to deal with specialized victim situations, such as child victims and witnesses.[23]

Among these statutes, the Victims' Rights and Restitution Act of 1990 ("Victims' Rights Act") is worth discussing. This Act purported to create a comprehensive set of victims' rights in the federal criminal justice process.[24] The Act commanded that "a crime victim has the following rights."[25] Among the listed rights were the right to "be treated with fairness and with respect for the victim's dignity and privacy,"[26] to "be notified of court proceedings,"[27] to "confer with [the] attorney for the Government in the case,"[28] and to attend court proceedings even if called as a witness unless the victim's testimony "would be materially affected" by hearing other testimony at trial.[29] The Victims' Rights Act also directed the Justice Department to make "its best efforts" to ensure that victims received their rights.[30] Yet this Act never successfully integrated victims into the federal criminal justice process and was generally regarded as something of a dead letter. Because Congress passed the CVRA in 2004 to remedy the problems with this law, it is worth briefly reviewing why it was largely unsuccessful.

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[18] Pub. L. No. 101-647, 104 Stat. 4789 (1990).
[19] Pub. L. No. 103-322, 108 Stat. 1796 (1994).
[20] Pub. L. No. 104-132, 110 Stat. 1214 (1996).
[21] Pub. L. No. 105-6, 111 Stat. 12 (1997).
[22] Pub. L. No. 108-405, 118 Stat. 2260 (2004).
[23] *See, e.g.*,18 U.S.C. § 3509 (2009) (protecting rights of child victim-witnesses).
[24] Pub. L. No. 101-647, § 502, 104 Stat. 4789 (1990).
[25] *Id.* § 502(b).
[26] *Id.* § 502(b)(1).
[27] *Id.* § 502(b)(3).
[28] *Id.* § 502(b)(5).
[29] *Id.* § 502(b)(4).
[30] *Id.* § 502(a).

Curiously, the Victims' Rights Act was codified in Title 42 of the United States Code—the title dealing with "Public Health and Welfare."[31] As a result, the statute was generally unknown to federal judges and criminal law practitioners. Federal practitioners reflexively consult Title 18 for guidance on criminal law issues.[32] More prosaically, federal criminal enactments are bound together in a single publication—the *Federal Criminal Code and Rules*.[33] This book is carried to court by prosecutors and defense attorneys and is on the desk of most federal judges. Because the Victims' Rights Act was not included in this book, the statute was essentially unknown even to many experienced judges and attorneys. The prime illustration of the ineffectiveness of the Victims' Rights Act comes from no less than the Oklahoma City bombing case, where victims were denied rights protected by statute in large part because the rights were not listed in the criminal rules.[34]

Because of problems like these with statutory protection of victims' rights, in 1995 crime victims' advocates decided the time was right to press for a federal constitutional amendment. They argued that statutory protections could not sufficiently guarantee victims' rights. In their view, such statutes "frequently fail to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indifference, [or] sheer inertia."[35] As the Justice Department reported:

> [E]fforts to secure victims' rights through means other than a constitutional amendment have proved less than fully adequate. Victims [sic] rights advocates have sought reforms at the State level for the past 20 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.

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[31] Pub. L. No. 101-647, 104 Stat. 4820 (1990); *see* 42 U.S.C. § 10606 (repealed by Pub. L. No. 108-405, tit. 1, § 102(c), 118 Stat. 2260 (2004)).
[32] *See generally* U.S.C. tit. 18.
[33] THOMSON WEST, FEDERAL CRIMINAL CODE AND RULES (2012 ed. 2012).
[34] *See generally* Cassell, *supra* note 3, at 515-22 (discussing this case in greater detail).
[35] Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B5.

> These significant State efforts simply are not sufficiently consistent, comprehensive, or authoritative to safeguard victims' rights.[36]

To place victims' rights in the Constitution, victims advocates (led most prominently by the National Victims Constitutional Amendment Network[37]) approached the President and Congress about a federal amendment.[38] In April 22, 1996, Senators Kyl and Feinstein introduced a federal victims' rights amendment with the backing of President Clinton.[39] The intent of the amendment was "to restore, preserve, and protect, as a matter of right for the victims of violent crimes, the practice of victim participation in the administration of criminal justice that was the birthright of every American at the founding of our Nation."[40] A companion resolution was introduced in the House of Representatives.[41] The proposed amendment embodied seven core principles: (1) the right to notice of proceedings; (2) the right to be present; (3) the right to be heard; (4) the right to notice of the defendant's release or escape; (5) the right to restitution; (6) the right to a speedy trial; and (7) the right to reasonable protection. In a later resolution, an eighth principle was added: standing.[42]

The amendment was not passed in the 104th Congress. On the opening day of the first session of the 105th Congress on January 21, 1997, Senators Kyl and Feinstein reintroduced the amendment.[43] A series of hearings were held that year in both the House and the Senate.[44] Responding to some of the concerns raised in these hearings, the amendment was reintroduced

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[36] *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearing on S.J. Res. 6 Before the S. Comm. on the Judiciary*, 105th Cong. 64 (1997) (statement of Janet Reno, U.S. Att'y Gen.).
[37] *See* NAT'L VICTIMS' CONST. AMENDMENT PASSAGE, http://www.nvcap.org/ (last visited Mar. 22, 2012).
[38] *See* Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581 (2005) (providing a comprehensive history of victims' efforts to pass a constitutional amendment).
[39] S.J. Res. 52, 104th Cong. (1996).
[40] S. REP. NO. 108-191, at 1-2 (2003); *see also* S. REP. NO. 106-254, at 1-2 (2000).
[41] H.R.J. Res. 174, 104th Cong. (1996).
[42] S.J. Res. 65, 104th Cong. (1996).
[43] S.J. Res. 6, 105th Cong. (1997).
[44] *See, e.g.*, *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearing on S.J. Res. 6 Before the S. Comm. on the Judiciary*, 105th Cong. (1997).

the following year.[45] The Senate Judiciary Committee held hearings[46] and passed the proposed amendment out of committee.[47] The full Senate did not consider the amendment. In 1999, Senators Kyl and Feinstein again proposed the amendment.[48] On September 30, 1999, the Judiciary Committee again voted to send the amendment to the full Senate.[49] But on April 27, 2000, after three days of floor debate, the amendment was shelved when it became clear that its opponents had the votes to sustain a filibuster.[50] At the same time, hearings were held in the House on the companion measure there.[51]

Discussions about the amendment began again after the 2000 presidential elections. On April 15, 2002, Senators Kyl and Feinstein again introduced the amendment.[52] The following day, President Bush announced his support.[53] On May 2, 2002, a companion measure was proposed in the House.[54] On January 7, 2003, Senators Kyl and Feinstein proposed the amendment as S.J. Res. 1.[55] The Senate Judiciary Committee held hearings in April of that year,[56] followed by a written report supporting the proposed amendment.[57] On April 20, 2004, a motion to proceed to consideration of the amendment was filed in the Senate.[58] Shortly thereafter, the motion to proceed was withdrawn when proponents determined they did not have

[45] S.J. Res. 44, 105th Cong. (1998).
[46] *A Proposed Constitutional Amendment to Protect Crime Victims: Hearing on S.J. Res. 44 Before the S. Comm. on the Judiciary*, 105th Cong. (1998).
[47] *See* 144 CONG. REC. 22496 (1998).
[48] S.J. Res. 3, 106th Cong. (1999).
[49] *See* 146 CONG. REC. 6020 (2000).
[50] *Id.*
[51] H.R.J. Res. 64, 106th Cong. (1999).
[52] S.J. Res. 35, 107th Cong. (2002).
[53] Press Release, Office of the Press Sec'y, President Calls for Crime Victims' Rights Amendment (Apr. 16, 2002) (on file with author).
[54] H.R.J. Res. 91, 107th Cong. (2002).
[55] S. REP. NO. 108-191, at 6 (2003).
[56] *Proposed Constitutional Amendment to Protect Crime Victims: Hearing on S.J. Res. 1 Before the S. Comm. on the Judiciary*, 108th Cong. (2003).
[57] S. REP. NO. 108-191.
[58] Kyl et al., *supra* note 38, at 591.

the sixty-seven votes necessary to pass the measure.[59] After it became clear that the necessary super-majority was not available to amend the Constitution, victims' advocates turned their attention to enactment of a comprehensive victims' rights statute.

B. The Crime Victims' Rights Act

The CVRA ultimately resulted from a decision by the victims' movement to seek a more comprehensive and enforceable federal statute rather than pursuing the dream of a federal constitutional amendment. In April of 2004, victims' advocates met with Senators Kyl and Feinstein to decide whether to again push for a federal constitutional amendment. Concluding that the amendment lacked the required super-majority, the advocates decided to press for a far-reaching federal statute protecting victims' rights in the federal criminal justice system.[60] In exchange for backing off from the constitutional amendment in the short term, victims' advocates received near universal congressional support for a "broad and encompassing" statutory victims' bill of rights.[61] This "new and bolder" approach not only created a bill of rights for victims, but also provided funding for victims' legal services and created remedies when victims' rights were violated.[62] The victims' movement would then see how this statute worked in future years before deciding whether to continue to push for a federal amendment.[63]

The legislation that ultimately passed—the Crime Victims' Rights Act—gives victims "the right to participate in the system."[64] It lists various rights for crime victims in the process, including the right to be notified of court hearings, the right to attend those hearings, the right to

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[59] *Id.*
[60] *Id.* at 591-92.
[61] 150 CONG. REC. 7295 (2004) (statement of Sen. Feinstein).
[62] *Id.* at 7296 (statement of Sen. Feinstein).
[63] *Id.* at 7300 (statement of Sen. Kyl); *see also* Prepared Remarks of Attorney Gen. Alberto R. Gonzales, Hoover Inst. Bd. of Overseers Conference (Feb. 28, 2005) (indicating a federal victim's rights amendment remains a priority for President Bush).
[64] 18 U.S.C. § 3771 (2006); 150 CONG. REC. 7297 (2004) (statement of Sen. Feinstein); *see* Beloof, *Third Model*, *supra* note 7 (providing a description of victim participation).

be heard at appropriate points in the process, and the right to be treated with fairness.[65] Rather than relying merely on best efforts of prosecutors to vindicate the rights, the CVRA also contains specific enforcement mechanisms.[66] Most important, the CVRA directly confers standing on victims to assert their rights, a flaw in the earlier enactment.[67] The Act provides that rights can be "assert[ed]" by "[t]he crime victim or the crime victim's lawful representative, and the attorney for the Government."[68] The victim (or the government) may appeal any denial of a victim's right through a writ of mandamus on an expedited basis.[69] The courts are also required to "ensure that the crime victim is afforded" the rights in the new law.[70] These changes were intended to make victims "an independent participant in the proceedings."[71]

C. The Less-than-Perfect Implementation of the CVRA

Since the CVRA's enactment, its effectiveness in protecting crime victims has left much to be desired. The General Accountability Office ("GAO") reviewed the CVRA four years after its enactment in 2008, and concluded that "[p]erceptions are mixed regarding the effect and efficacy of the implementation of the CVRA, based on factors such as awareness of CVRA rights, victim satisfaction, participation, and treatment."[72]

Crime victims' advocates have tested some of the CVRA's provisions in federal court cases. The cases have produced uneven results for crime victims, with some of them producing crushing defeats for seemingly valid claims.

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[65] § 3771.
[66] *Id.* § 3771(c).
[67] *Cf.* Beloof, *Standing, Remedy, and Review, supra* note 8, at 283 (identifying this as a pervasive flaw in victims' rights enactments).
[68] § 3771(d).
[69] *Id.* § 3771(d)(3).
[70] *Id.* § 3771(b)(1).
[71] 150 CONG. REC. 7302 (2004) (statement of Sen. Kyl).
[72] U.S. GOV'T ACCOUNTABILITY OFFICE, CRIME VICTIMS' RIGHTS ACT: INCREASING AWARENESS, MODIFYING THE COMPLAINT PROCESS, AND ENHANCING COMPLIANCE MONITORING WILL IMPROVE IMPLEMENTATION OF THE ACT 12 (Dec. 2008).

Among the most disappointing losses for crime victims has to be litigation involving Ken and Sue Antrobus's efforts to deliver a victim impact statement at the sentencing of the defendant who had illegally sold the murder weapon used to kill their daughter.[73] After the district court denied their motion to have their daughter recognized as a crime victim under the CVRA, the Antrobuses made four separate trips to the Tenth Circuit in an effort to have that ruling reviewed on its merits—all without success. In the first trip, the Tenth Circuit rejected the holdings of at least two other circuit courts to erect a demanding, clear, and indisputable error standard of review. Having imposed that barrier, the court then stated that the case was a close one, but that relief would not be granted—with one concurring judge noting that sufficient proof of the Antrobuses' claim might rest in the Justice Department's files.[74]

The Antrobuses then returned to the district court, where the Justice Department refused to clarify the district court's claim regarding what information rested in its files.[75] The Antrobuses sought mandamus review to clarify and discover whether this information might prove their claim, which the Justice Department "mooted" by agreeing to file that information with the district court and not oppose any release to the Antrobuses.[76] But the district court again stymied the Antrobuses' attempt by refusing to grant their unopposed motion for release of the documents.[77]

The Antrobuses then sought appellate review of the district court's initial "victim" ruling, only to have the Tenth Circuit conclude that they were barred from an appeal.[78] However, the Tenth Circuit said the Antrobuses "should" pursue the issue of release of the material in the

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[73] *See generally* Paul G. Cassell, *Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Act's Mandamus Provision*, 87 DENV. U.L. REV. 599 (2010). In the interest of full disclosure, I represented the Antrobuses' in some of the litigation on a pro bono basis.
[74] *In re* Antrobus, 519 F.3d 1123, 1126-27 (10th Cir. 2008) (Tymkovich, J., concurring).
[75] *In re* Antrobus, 563 F.3d 1092 (10th Cir. 2009).
[76] *Id.* at 1095.
[77] United States v. Hunter, No. 2:07CR307DAK, 2008 U.S. Dist. LEXIS 108582, at *1-2 (D. Utah Mar. 17, 2008).
[78] United States v. Hunter, 548 F.3d 1308, 1317 (10th Cir. 2008).

Justice Department's files in the district court.[79] So they did—only to lose again in the district court.[80] On a final mandamus petition to the Tenth Circuit, the court ruled—among other things—that the Antrobuses had not been diligent enough in seeking the release of the information.[81] With the Antrobuses' appeals at an end, the Justice Department chose to release discovery information about the case—not to the Antrobuses, but to the *media*.[82]

Another case in which victims' rights advocates were disappointed arose in the Fifth Circuit's decision *In re Dean*.[83] In *Dean*, the defendant—the American subsidiary of well-known petroleum company BP—and the prosecution arranged a secret plea bargain to resolve the company's criminal liability for violations of environmental laws.[84] These violations resulted in the release of dangerous gas into the environment, leading to a catastrophic explosion in Texas City, Texas, which killed fifteen workers and injured scores more.[85] Because the Government did not notify or confer with the victims before reaching a plea bargain with BP, the victims sued to secure protection of their guaranteed right under the CVRA "to confer with the attorney for the Government."[86]

Unfortunately, despite the strength of the victims' claim, the district court did not grant the victims of the explosion any relief, leading them to file a CVRA mandamus petition with the Fifth Circuit.[87] After reviewing the record, the Fifth Circuit agreed with the crime victims that the district court had "misapplied the law and failed to accord the victims the rights conferred by

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[79] *Id.* at 1316-17.
[80] United States v. Hunter, 2009 U.S. Dist. LEXIS 90822, at *2–4 (D. Utah Feb. 10, 2009).
[81] *In re Antrobus*, 563 F.3d at 1099.
[82] Nate Carlisle, *Notes Confirm Suspicions of Trolley Square Victim's Family*, SALT LAKE TRIB., June 25, 2009, http://www.sltrib.com/news/ci_12380112.
[83] *In re* Dean, 527 F.3d 391 (5th Cir. 2008). In the interest of full disclosure, I served as pro bono legal counsel for the victims in the *Dean* criminal case. *See generally* Paul G. Cassell & Steven Joffee, *The Crime Victim's Expanding Role in a System of Public Prosecution: A Response to the Critics of the Crime Victims' Rights Act*, 105 NW. U. L. REV. COLLOQUY 164 (2010).
[84] *See* United States v. BP Prods. N. Am. Inc., No. H-07-434, 2008 WL 501321 (S.D. Tex. Feb. 21, 2008).
[85] *See In re* Dean, 527 F.3d at 392.
[86] *Id.* at 394.
[87] *See id.* at 392.

the CVRA."[88] Nonetheless, the court declined to award the victims any relief because it viewed the CVRA's mandamus petition as providing only discretionary relief.[89] Instead, the court of appeals remanded to the district court. The court of appeals noted that "[t]he victims do have reason to believe that their impact on the eventual sentence is substantially less where, as here, their input is received after the parties have reached a tentative deal."[90] Nonetheless, the court of appeals thought that all the victims were entitled to was another hearing in the district court.[91] After a hearing, the district court declined to grant the victims any further relief.[92]

One other disappointment of the victims' rights movement is worth mentioning. When the CVRA was enacted, part of the law included funding for legal representation of crime victims.[93] And immediately after the law was enacted, Congress provided funding for this purpose. The National Crime Victim Law Institute proceeded to help create a network of clinics around the country for the purpose of providing pro bono representation for crime victims' rights.[94]

Sadly, in recent months, the congressional funding for the clinics has diminished. As a result, six clinics have had to stop providing rights enforcement legal representation. As of this writing, the only clinics that remain open for rights enforcement are in Colorado, Maryland, New Jersey, Arizona, Utah, and Oregon. The CVRA vision of an extensive network of clinics supporting crime victims' rights clearly has not been achieved.

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[88] *Id.* at 394.
[89] *Id.* at 396.
[90] *Id.* at 396.
[91] *Id.*
[92] United States v. BP Prods. N. Am. Inc., 610 F. Supp. 2d 655, 730 (S.D. Tex. 2009).
[93] *See National Clinic Network*, NAT'L CRIME VICTIM L. INST., http://law.lclark.edu/centers/national_crime_victim_law_institute/projects/clinical_network/ (last visited Mar. 23, 2012).
[94] *See id.*

III. THE PROVISIONS OF THE VICTIMS' RIGHTS AMENDMENT[95]

Because of the problems with implementing the CVRA, in early 2012 the National Victim Constitutional Amendment Network ("NVCAN") decided it was time to re-approach Congress about the need for constitutional protection for crime victims' rights.[96] Citing the continuing problems with implementing other-than-federal constitutional protections for crime victims, NVCAN proposed to Congress a new version of the Victims' Rights Amendment. In April 2013, Representatives Trent Franks (R-AZ) and Jim Costa (D-CA) introduced the VRA as H.R.J. Res. 40.[97] As introduced, the amendment would extend crime victims constitutional protections as follows:

> Section 1. The rights of a crime victim to fairness, respect, and dignity, being capable of protection without denying the constitutional rights of the accused, shall not be denied or abridged by the United States or any State. The crime victim shall, moreover, have the rights to reasonable notice of, and shall not be excluded from, public proceedings relating to the offense, to be heard at any release, plea, sentencing, or other such proceeding involving any right established by this article, to proceedings free from unreasonable delay, to reasonable notice of the release or escape of the accused, to due consideration of the crime victim's safety and privacy, and to restitution. The crime victim or the crime victim's lawful representative has standing to fully assert and enforce these rights in any court. Nothing in this article provides grounds for a new trial or any claim for damages and no person accused of the conduct described in section 2 of this article may obtain any form of relief.
>
> Section 2. For purposes of this article, a crime victim includes any person against whom the criminal offense is committed or who is directly and proximately harmed by the commission of an act, which, if committed by a competent adult, would constitute a crime.
>
> Section 3. This article shall be inoperative unless it has been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within 14 years after the date of its submission to the States by the Congress. This article shall take effect on the 180th day after the date of its ratification.[98]

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[95] This section draws heavily on Paul G. Cassell, *The Victims' Rights Amendment: A Sympathetic, Clause-By-Clause Analysis*, 5 PHOENIX L. REV. 301 (2012).

[96] NAT'L VICTIMS' CONST. AMENDMENT PASSAGE, http://www.nvcap.org/ (last visited Apr. 4, 2013). This organization is a sister organization to NVCAN and supports the passage of a Victims' Rights Amendment. *Id.*

[97] H.R.J. Res. 40, 113th Cong. (2013).

[98] *Id.*

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

A. Section 1

The rights of a crime victim . . .

This clause extends rights to victims of both violent and property offenses. This is a significant improvement over the previous version of the VRA—S.J. Res. 1—which only extended rights to "victims of violent crimes."[99] While the Constitution does draw lines in some situations,[100] ideally crime victims' rights would extend to victims of both violent and property offenses. The previous limitation appeared to be a political compromise.[101] There appears to be no principled reason why victims of economic crimes should not have the same rights as victims of violent crimes.[102]

[99] S.J. Res. 1, 108th Cong. (2003). The previous version of the amendment likewise did not automatically extend rights to victims of non-violent crimes, but did allow extension of rights to victims of "other crimes that Congress may define by law." *Compare id. with* S.J. Res. 6, 105th Cong. (1997). This language was deleted from S.J. Res. 1. S.J. Res. 1, 108th Cong. (2003).

[100] Various constitutional provisions draw distinctions between individuals and between crimes, often for no reason other than administrative convenience. For instance, the right to a jury trial extends only to cases "where the value in controversy shall exceed twenty dollars." U.S. CONST. amend. VII. Even narrowing our view to criminal cases, frequent line-drawing exists. For instance, the Fifth Amendment extends to defendants in federal cases the right not to stand trial "unless on a presentment or indictment of a Grand Jury"; however, this right is limited to a "capital, or otherwise infamous crime." U.S. CONST. amend. V. Similarly, the right to a jury trial in criminal cases depends in part on the penalty a state legislature decides to set for any particular crime.

[101] S. REP. NO. 106-254, at 45 (2000).

[102] *See* Jayne W. Barnard, *Allocution for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39 (2001).

The VRA defines the crime victims who receive rights in Section 2 of the amendment. This definition is discussed below.[103]

The VRA also extends *rights* to these crime victims. The enforceable nature of the rights is discussed below as well.[104]

. . . to fairness, respect, and dignity . . .

The VRA extends victims' rights to *fairness, respect, and dignity*. The Supreme Court has already made clear that crime victims' interests must be considered by courts, stating that "in the administration of criminal justice, courts may not ignore the concerns of victims"[105] and that "justice, though due to the accused, is due to the accuser also."[106] This provision would provide clear constitutional grounding for these widely-shared sentiments.

The rights to fairness, respect, and dignity are not novel concepts. Similar provisions have long been found in state constitutional amendments.[107] The Arizona Constitution, for instance, was amended in 1990 to extend to victims exactly the same rights: to be treated "with fairness, respect, and dignity."[108] Likewise, the CVRA specifically extends to crime victims the right "to be treated with fairness and with respect for the victim's dignity and privacy."[109]

The caselaw developing under the CVRA provides an understanding of the kinds of victims' interests these rights protect. Senator Kyl offered these examples of how these rights might apply under the CVRA: "For example, a victim should be allowed to oppose a defense discovery request for the reproduction of child pornography, the release of personal records of

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[103] *See infra* Part III.B.
[104] *See infra* notes 212-16 and accompanying text.
[105] Morris v. Slappy, 461 U.S. 1, 14 (1983).
[106] Snyder v. Massachusetts, 291 U.S. 97, 122 (1934).
[107] *See, e.g.*, ARIZ. CONST. art. II, § 2.1(A)(1); IDAHO CONST. art. I, § 22(1); ILL. CONST. art. I, § 8.1(a)(1); MD. DECLARATION OF RIGHTS, art. 47(a); N.J. CONST. art. I, para. 22; TEX. CONST. art. 1, § 30(a)(1); WIS. CONST. art. I, § 9m; UTAH CONST., art. I, § 28(1)(a).
[108] ARIZ. CONST. art. II, § 2.1(A)(1).
[109] 18 U.S.C. § 3771(a)(8) (2006).

the victim, or the release of personal identifying or locating information about the victim."[110] Since the enactment of the CVRA, courts have applied the CVRA's rights to fair treatment in various contexts. For example, the Sixth Circuit concluded that unexplained delay in ruling on a crime victim's motion for three months raised fairness issues.[111] Other district courts have ruled that a victim's right to fairness (and to attend court proceedings) is implicated in any motion for a change of venue.[112] Another district court has ruled that the victim's right to fairness gives the court the right to hear from a victim during a competency hearing.[113] And another district court has stated that the victim's right to be treated with fairness is implicated in a court's decision of whether to dismiss an indictment.[114]

The CVRA rights of victims to be treated with respect for their dignity and privacy have also been applied in various settings.[115] Trial courts have used the rights to prevent disclosure of sensitive materials to defense counsel[116] and to the public,[117] particularly in extortion cases where disclosure of the material would subject the victim to precisely the harm threatened by the defendant.[118] Another court has ruled that the right to be treated with dignity means that the prosecution could refer to the victim as a "victim" in a case.[119] Still another district court used

[110] Kyl et al., *supra* note 39, at 614.
[111] *In re* Simons, 567 F.3d 800, 801 (6th Cir. 2009).
[112] United States v. Agriprocessors, Inc., No. 08-CR-1324-LRR, 2009 WL 721715, at *2 n.2 (N.D. Iowa Mar. 18, 2009); United States v. Kanner, No. 07-CR-1023-LRR, 2008 WL 2663414, at *8 (N.D. Iowa June 27, 2008).
[113] United States v. Mitchell, No. 2:08CR125DAK, 2009 WL 3181938, at *8 n.3 (D. Utah Sept. 28, 2009).
[114] United States v. Heaton, 458 F. Supp. 2d 1271, 1272-73 (D. Utah 2006).
[115] *See generally* Fern L. Kletter, Annotation, *Validity, Construction and Application of Crime Victim's Rights Act (CVRA), 18 U.S.C.A. § 3771*, 26 A.L.R. FED. 2D 451 (2008).
[116] United States v. Darcy, No. 1:09CR12, 2009 WL 1470495, at *1 (W.D.N.C. May 26, 2009).
[117] Gueits v. Kirkpatrick, 618 F. Supp. 2d 193, 198 n.1 (E.D.N.Y. 2009) *rev'd on other grounds*, 612 F.3d 118 (2d Cir. 2010); United States v. Madoff, 626 F. Supp. 2d 420, 425-28 (S.D.N.Y. 2009); *United States v. Patkar*, No. 06-00250 JMS, 2008 WL 233062, at *3-5 (D. Haw. Jan. 28, 2008).
[118] United States v. Robinson, Cr. No. 08-10309-MLW, 2009 WL 137319, at *1-3 (D. Mass. Jan. 20, 2009).
[119] United States v. Spensley, No. 09-CV-20082, 2011 WL 165835, at *1-2 (C.D. Ill. Jan. 19, 2011).

the rights to dignity and privacy to prohibit the display of graphic videos to persons other than the jury and restrict a sketch artist's activities, particularly because the victim was mentally-ill.[120]

> *. . . being capable of protection without denying the constitutional rights of the accused . . .*

This preamble was authored by Professor Laurence Tribe of Harvard Law School.[121] It makes clear that the amendment is not intended to, nor does it have the effect of, denying the constitutional rights of the accused. Crime victims' rights do not stand in opposition to defendants' rights but rather parallel to them.[122] For example, just as a defendant possesses a right to speedy trial,[123] the VRA would extend to crime victims a corresponding right to proceedings free from unreasonable delay.

If any seeming conflicts were to emerge between defendants' rights and victims' rights, courts would retain the ultimate responsibility for harmonizing the rights at stake. The concept of harmonizing rights is not a new one.[124] Courts have harmonized rights in the past; for example, accommodating the rights of the press and the public to attend criminal trials with the rights of criminal defendants to a fair trial.[125] Courts can be expected to do the same with the VRA.

At the same time, the VRA will eliminate a common reason for failing to protect victims' rights: the misguided view that the mere assertion of a defendant's constitutional right automatically *trumps* a victim's right. In some of the litigated cases, victims' rights have not

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[120] United States v. Kaufman, Nos. CRIM.A. 04-40141-01, CRIM.A. 04-40141-02, 2005 WL 2648070, at *1-4 (D. Kan. Oct. 17, 2005).
[121] *Proposed Constitutional Amendment to Protect Crime Victims: Hearing on S.J. Res. 1 Before the S. Comm. on the Judiciary*, 108th Cong. 230 (2003) (statement of Steven J. Twist).
[122] *See generally* Richard Barajas & Scott Alexander Nelson, *The Proposed Crime Victims' Federal Constitutional Amendment: Working Toward a Proper Balance*, 49 BAYLOR L. REV. 1, 16-19 (1997).
[123] U.S. CONST. amend. VI.
[124] *See* Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B5.
[125] *See, e.g.*, Press-Enter. Co. v. Superior Court, 478 U.S. 1, 9 (1986) (balancing the "qualified First Amendment right of public access" against the "right of the accused to a fair trial").

been enforced because defendants have made vague, imprecise, and inaccurate claims about their federal constitutional due process rights being violated. Those claims would be unavailing after the passage of a federal amendment. For this reason, the mere fact of passing a Victims' Rights Amendment can be expected to bring a dramatic improvement to the way in which victims' rights are enforced, even were no enforcement actions to be brought by victims or their advocates.

. . . shall not be denied or abridged by the United States or any State.

This provision would ensure that the rights extended by Section 1 actually have content—specifically, that they cannot be denied in either the federal or state criminal justice systems. The VRA follows well-plowed ground in creating criminal justice rights that apply to both the federal and state cases. Earlier in the nation's history, the Bill of Rights was applicable only against the federal government and not against state governments.[126] Since the passage of the Fourteenth Amendment,[127] however, the great bulk of criminal procedure rights have been "incorporated" into the Due Process Clause and thereby made applicable in state proceedings.[128]

It is true that plausible arguments could be made for trimming the reach of incorporation doctrine.[129] But it is unlikely that we will ever retreat from our current commitment to afford criminal defendants a basic set of rights, such as the right to counsel. Victims are not asking for any retreat, but for an extension—for a national commitment to provide basic rights in the

[126] *See* Barron *ex rel.* Tiernan v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).
[127] U.S. CONST. amend. XIV.
[128] U.S. CONST. amend. V.; *see, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968); Malloy v. Hogan, 378 U.S. 1 (1964).
[129] *See, e.g.*, Donald A. Dripps, *Foreword: Against Police Interrogation—And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 701–02 (1988) (arguing for reduction of federal involvement in *Miranda* rights); Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965) (criticizing interpretation that would become so extensive as to produce, in effect, a constitutional code of criminal procedure); Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Disincorporation*, 87 J. CRIM. L. & CRIMINOLOGY 63, 63–70 (1996) (arguing that state constitutional development has reduced need for federal protections).

process to criminal defendants *and* to their victims. This parallel treatment works no new damage to federalist principles.

Indeed, precisely because of the constitutionalization and nationalization of criminal procedure, victims now find themselves needing constitutional protection. In an earlier era, it may have been possible for judges to informally accommodate victims' interests on an ad hoc basis. But the coin of the criminal justice realm has now become constitutional rights. Without such rights, victims have all too often not been taken seriously in the system. Thus, it is not a victims' rights amendment that poses a danger to state power, but the *lack* of an amendment. Without an amendment, states cannot give full effect to their policy decisions to protect the rights of victims. Only elevating these rights to the Federal Constitution will solve this problem. This is why the National Governor's Association—a long-standing friend of federalism—endorsed an earlier version of the amendment, explaining:

> The rights of victims have always received secondary consideration within the U.S. judicial process, even though states and 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.[130]

It should be noted that the States and the federal government, within their respective jurisdictions, retain authority to define, in the first instance, conduct that is criminal.[131] The power to define victim is simply a corollary of the power to define criminal offenses and, for state crimes, the power would remain with state legislatures.

[130] NAT'L GOVERNORS ASS'N, POLICY 23.1 (1997).
[131] *See, e.g.*, United States v. L. Cohen Grocery Co., 255 U.S. 81, 87 (1921) ("Congress alone has power to define crimes against the United States.").

It is important to emphasize that the amendment would establish a floor—not a ceiling—for crime victims' rights[132] and States will remain free to enact (or continue, as indeed many have already enacted) more expansive rights than are established in this amendment. Rights established in a state's constitution would be subject to the independent construction of the state's courts.[133]

> *The crime victim shall, moreover, have the rights to reasonable notice of . . . public proceedings relating to the offense . . .*

The victims' right to reasonable notice about proceedings is a critical right. Because victims and their families are directly and often irreparably harmed by crime, they have a vital interest in knowing about any subsequent prosecution. Yet in spite of statutes extending a right to notice to crime victims, some victims continue to be unaware of that right. The recent GAO Report, for example, found that approximately twenty-five percent of the responding federal crime victims were unaware of their right to notice of court hearings under the CVRA.[134] Even larger percentages of failure to provide required notices were found in a survey of various state criminal justice systems.[135] Distressingly, the same survey found that racial minority victims were less likely to have been notified than their white counterparts.[136]

The Victims' Rights Amendment would guarantee crime victims a right to *reasonable notice*. This formulation tracks the CVRA, which extends to crime victims the right "to reasonable . . . notice" of court proceedings.[137] Similar formulations are found in state

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[132] *See* S. REP. NO. 105–409, at 24 (1998) ("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.").
[133] *See* Michigan v. Long, 463 U.S. 1032, 1041 (1983).
[134] U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 73, at 82.
[135] National Victim Center, *Comparison of White and Non-White Crime Victim Responses Regarding Victims' Rights*, *in* BELOOF, CASSELL & TWIST, *supra* note 1, at 631.
[136] *Id.*
[137] 18 U.S.C. § 3771(a)(2) (2006).

constitutional amendments. For instance, the California State Constitution promises crime victims "reasonable notice" of all public proceedings.[138]

No doubt, in implementing language Congress and the states will provide additional details about how reasonable notice is to be provided. I will again draw on my own state of Utah to provide an example of how notice could be structured. The Utah Rights of Crime Victims Act provides that "[w]ithin seven days of the filing of felony criminal charges against a defendant, the prosecuting agency shall provide an initial notice to reasonably identifiable and locatable victims of the crime contained in the charges, except as otherwise provided in this chapter."[139] The initial notice must contain information about "electing to receive notice of subsequent important criminal justice hearings."[140] In practice, Utah prosecuting agencies have provided these notices with a detachable postcard or computer generated letter that victims simply return to the prosecutor's office to receive subsequent notices about proceedings. The return postcard serves as the victims' request for further notices. In the absence of such a request, a prosecutor need not send any further notices.[141] The statute could also spell out situations where notice could not be reasonably provided, such as emergency hearings necessitated by unanticipated events. In Utah, for instance, in the event of an unforeseen hearing for which notice is required, "a good faith attempt to contact the victim by telephone" meets the notice requirement.[142]

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[138] CAL. CONST. art. I, § 28(b)(7).

[139] UTAH CODE ANN. § 77-38-3(1) (West, Westlaw through 2011 Legis. Sess.). The "except as otherwise provided" provision refers to limitations for good faith attempts by prosecutors to provide notice and situations involving more than ten victims. *Id.* § 77-38-3(4)(b), (10). *See generally* Cassell, *Balancing the Scales*, *supra* note 7 (providing information about the implementation of Utah's Rights of Crime Victims Act and utilized throughout this paragraph).

[140] § 77-38-3(2). The notice will also contain information about other rights under the victims' statute. *Id.*

[141] *Id.* § 77-38-3(8). Furthermore, victims must keep their address and telephone number current with the prosecuting agency to maintain their right to notice. *Id.*

[142] *Id.* § 77-38-3(4)(b). However, after the hearing for which notice was impractical, the prosecutor must inform the victim of that proceeding's result. *Id.*

In some cases, i.e., terrorist bombings or massive financial frauds, the large number of victims may render individual notifications impracticable. In such circumstances, notice by means of a press release to daily newspapers in the area would be a reasonable alternative to actual notice sent to each victim at his or her residential address.[143] New technologies may also provide a way of affording reasonable notice. For example, under the CVRA, courts have approved notice by publication, where the publication directs crime victims to a website maintained by the government with hyperlinks to updates on the case.[144]

> *The crime victim shall, moreover, . . . not be excluded from, public proceedings relating to the offense . . .*

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

> The crime is often one of the most significant events in the lives of victims and their families. They, no less than the defendant, have a legitimate interest in the fair adjudication of the case, and should therefore, as an exception to the general rule providing for the exclusion of witnesses, be permitted to be present for the entire trial.[145]

Several strong reasons support this right, as Professor Doug Beloof and I have argued at length elsewhere.[146] To begin with, the right to attend the trial may be critical in allowing the victim to recover from the psychological damage of a crime. "The victim's presence during the trial may also facilitate healing of the debilitating psychological wounds suffered by a crime victim."[147]

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[143] United States v. Peralta, No. 3:08cr233, 2009 WL 2998050, at *1-2 (W.D.N.C. Sept. 15, 2009).
[144] United States v. Skilling, No. H-04-025-SS, 2009 WL 806757, at *1-2 (S.D. Tex. Mar. 26, 2009); United States v. Saltsman, No. 07-CR-641 (NGG), 2007 WL 4232985, at *1-2 (E.D.N.Y. Nov. 27, 2007); United States v. Croteau, No. 05-CR-30104-DRH, 2006 U.S. Dist. LEXIS 23684, at *2-3 (S.D. Ill. 2006).
[145] HERRINGTON ET AL., *supra* note 10, at 80.
[146] *See* Douglas E. Beloof & Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481 (2005).
[147] Ken Eikenberry, *Victims of Crimes/Victims of Justice*, 34 WAYNE L. REV. 29, 41 (1987).

Concern about psychological trauma becomes even more pronounced when coupled with findings that defense attorneys have, in some cases, used broad witness exclusion rules to harm victims.[148] As the Task Force found:

> [T]his procedure can be abused by [a defendant's] advocates and can impose an improper hardship on victims and their relatives. Time and again, we heard from victims or their families that they were unreasonably excluded from the trial at which responsibility for their victimization was assigned. This is especially difficult for the families of murder victims and for witnesses who are denied the supportive presence of parents or spouses during their testimony.
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> . . . .
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> Testifying can be a harrowing experience, especially for children, those subjected to violent or terrifying ordeals, or those whose loved ones have been murdered. These witnesses often need the support provided by the presence of a family member or loved one, but these persons are often excluded if the defense has designated them as witnesses. Sometimes those designations are legitimate; on other occasions they are only made to confuse or disturb the opposition. We suggest that the fairest balance between the need to support both witnesses and defendants and the need to prevent the undue influence of testimony lies in allowing a designated individual to be present regardless of his status as a witness.[149]

Without a right to attend trials, "the criminal justice system merely intensifies the loss of control that victims feel after the crime."[150] It should come as no surprise that "[v]ictims are often appalled to learn that they may not be allowed to sit in the courtroom during hearings or the trial. They are unable to understand why they cannot simply observe the proceedings in a supposedly public forum."[151] One crime victim put it more directly: "All we ask is that we be treated just like a criminal."[152] In this connection, it is worth remembering that defendants never

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[148] *See generally* OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, THE CRIME VICTIM'S RIGHT TO BE PRESENT 2 (2001) (showing how defense counsel can successfully argue to have victims excluded as witnesses).
[149] HERRINGTON ET AL., *supra* note 10, at 80.
[150] Deborah P. Kelly, *Victims*, 34 WAYNE L. REV. 69, 72 (1987).
[151] Marlene A. Young, *A Constitutional Amendment for Victims of Crime: The Victims' Perspective*, 34 WAYNE L. REV. 51, 58 (1987).
[152] *Id.* at 59 (quoting Edmund Newton, *Criminals Have All the Rights*, LADIES' HOME J., Sept. 1986).

suggest that *they* could be validly excluded from the trial if the prosecution requests *their* sequestration. Defendants frequently take full advantage of their right to be in the courtroom.[153]

To ensure that victims can attend court proceedings, the Victims' Rights Amendment extends them this unqualified right. Many state amendments have similar provisions.[154] Such an unqualified right does not interfere with a defendant's right for the simple reason that defendants have no constitutional right to exclude victims from the courtroom.[155]

The amendment will give victims a right not to be excluded from public proceedings. The right is phrased in the negative—a right *not* to be excluded—thus avoiding the possible suggestion that a right "to attend" carried with it a victim's right to demand payment from the public fisc for travel to court.[156]

The right is limited to *public* proceedings. While the great bulk of court proceedings are public, occasionally they must be closed for various compelling reasons. The Victims' Rights Amendment makes no change in court closure policies, but simply indicates that when a proceeding is closed, the victim may be excluded as well. An illustration is the procedures that courts may employ to prevent disclosure of confidential national security information.[157] When court proceedings are closed to the public pursuant to these provisions, a victim will have no

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

[154] *See, e.g.*, ALASKA CONST. art. I, § 24 (right "to be present at all criminal . . . proceedings where the accused has the right to be present"); MICH. CONST., art. I, § 24(1) (right "to attend the trial and all other court proceedings the accused has the right to attend"); OR. R. EVID. 615 (witness exclusion rule does not apply to "victim in a criminal case"). *See* Beloof & Cassell, *supra* note 146**,** at 504-19 (providing a comprehensive discussion of state law on this subject).

[155] *See* Beloof & Cassell, *supra* note 145, at 520-34. *See, e.g.*, United States v. Edwards, 526 F.3d 747, 757-58 (11th Cir. 2008).

[156] *Cf*. ALA. CODE § 15-14-54 (Westlaw through 2012 Legis. Sess.) (right "not [to] be excluded from court . . . during the trial or hearing or any portion thereof . . . which in any way pertains to such offense").

[157] *See generally* WAYNE R. LAFAVE ET. AL., CRIMINAL PROCEDURE § 23.1(b) (3d ed. 2007) (discussing court closure cases).

right to attend. Finally, the victims right to attend is limited to proceedings relating to the offense, rather than open-endedly creating a right to attend any sort of proceedings.

Occasionally the claim is advanced that a Victims' Rights Amendment would somehow allow victims to "act[] in an excessively emotional manner in front of the jury or convey their opinions about the proceedings to that jury."[158] Such suggestions misunderstand the effect of the right-not-to-be-excluded provision. In this connection, it is interesting that no specific illustrations of a victims' right provision actually being interpreted in this fashion have, to my knowledge, been offered. The reason for this dearth of illustrations is that courts undoubtedly understand that a victims' right to be present does not confer any right to disrupt court proceedings. Here, courts are simply treating victims' rights in the same fashion as defendants' rights. Defendants have a right to be present during criminal proceedings, which stems from both the Confrontation and Due Process Clauses of the Constitution.[159] Courts have consistently held that these constitutional rights do not confer on defendants any right to engage in disruptive behavior.[160]

> *The crime victim shall, moreover, have the rights . . . to be heard at any release, plea, sentencing, or other such proceeding involving any right established by this article . . .*

Victims deserve the right to be heard at appropriate points in the criminal justice process, and thus deserve to participate directly in the criminal justice process. The CVRA promises crime victims "[t]he right to be reasonably heard at any public proceeding in the district court

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[158] Robert P. Mosteller, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691, 1702 (1997).

[159] *See* Diaz v. United States, 223 U.S. 442, 454-555 (1912); Kentucky v. Stincer, 482 U.S. 730, 740-44 (1987).

[160] *See, e.g.*, Illinois v. Allen, 397 U.S. 337 (1970) (defendant waived right to be present by continued disruptive behavior after warning from court); Saccomanno v. Scully, 758 F.2d 62, 64-65 (2d Cir. 1985) (concluding that defendant's obstreperous behavior justified his exclusion from courtroom); Foster v. Wainwright, 686 F.2d 1382, 1387 (11th Cir. 1982) (defendant forfeited right to be present at trial by interrupting proceeding after warning by judge, even though his behavior was neither abusive nor violent).

involving release, plea, or sentencing."[161] A number of states have likewise added provisions to their state constitutions allowing similar victim participation.[162]

The VRA identifies three specific and one general points in the process where a victim statement is permitted. First, the VRA would extend the right to be heard regarding any *release* proceeding—i.e., bail hearings. This will allow, for example, a victim of domestic violence to warn the court about possible violence should the defendant be granted bail. At the same time, however, it must be emphasized that nothing in the VRA gives victims the ability to veto the release of any defendant. The ultimate decision to hold or release a defendant remains with the judge or other decision-maker. The amendment will simply provide the judge with more information on which to base that decision. Release proceedings would include not only bail hearings but other hearings involving the release of accused or convicted offenders, such as parole hearings and any other hearing that might result in a release from custody. Victim statements to parole boards are particularly important because they "can enable the board to fully appreciate the nature of the offense and the degree to which the particular inmate may present risks to the victim or community upon release."[163]

The right to be heard also extends to any proceeding involving a plea. Under the present rules of procedure in most states, every plea bargain between a defendant and the state to resolve

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[161] 18 U.S.C. § 3771(a)(4) (2006).

[162] *See, e.g.*, ARIZ. CONST. art II, § 2.1(A)(4) (right to be heard at proceedings involving post-arrest release, negotiated pleas, and sentencing); COLO. CONST. art. II, § 16a (right to be heard at critical stages); FLA. CONST. art. I, § 16(b) (right to be heard when relevant at all stages); ILL. CONST. art. I, § 8.1(4) (right to make statement at sentencing); KAN. CONST. art. 15, § 15(a) (right to be heard at sentencing or any other appropriate time); MICH. CONST. of 1963, art. I, § 24(1) (right to make statement at sentencing); MO. CONST. art. I, § 32(1)(2) (right to be heard at guilty pleas, bail hearings, sentencings, probation revocation hearings, and parole hearings, unless interests of justice require otherwise); N.M. CONST. art. II, § 24(A)(7) (right to make statement at sentencing and post-sentencing hearings); R.I. CONST. art. I, § 23 (right to address court at sentencing); WASH. CONST. art. I, § 35 (right to make statement at sentencing or release proceeding); WIS. CONST. art. I, § 9m (opportunity to make statement to court at disposition); UTAH CONST. art. I, § 28(1)(b) (right to be heard at important proceedings).

[163] Frances P. Bernat et al., *Victim Impact Laws and the Parole Process in the United States: Balancing Victim and Inmate Rights and Interests*, 3 INT'L REV. VICTIMOLOGY 121, 134 (1994).

a case before trial must be submitted to the trial court for approval.[164] If the court believes that the bargain is not in the interest of justice, it may reject it.[165] Unfortunately in some states, victims do not always have the opportunity to present to the judge information about the propriety of the plea agreements. Indeed, it may be that in some cases "keeping the victim away from the judge . . . is one of the prime motivations for plea bargaining."[166] Yet victims have compelling reasons for some role in the plea bargaining process:

> The victim's interests in participating in the plea bargaining process are many. The fact that they are consulted and listened to provide them with respect and an acknowledgment that they are the harmed individual. This in turn may contribute to the psychological healing of the victim. The victim may have financial interests in the form of restitution or compensatory fine . . . . [B]ecause judges act in the public interest when they decide to accept or reject a plea bargain, the victim is an additional source of information for the court.[167]

It should be noted that nothing in the Victims' Rights Amendment requires a prosecutor to obtain a victim's approval before agreeing to a plea bargain. The language is specifically limited to a victim's right to be heard regarding a plea proceeding. A meeting between a prosecutor and a defense attorney to negotiate a plea is not a *proceeding* involving the plea, and therefore victims are conferred no right to attend the meeting. In light of the victim's right to be heard regarding any deal, however, it may well be the prosecutors would undertake such consultation at a mutually convenient time as a matter of prosecutorial discretion. This has been the experience in my state of Utah. While prosecutors are not required to consult with victims before entering plea agreements, many of them do. In serious cases such as homicides and rapes,

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[164] *See generally* BELOOF, CASSELL & TWIST, *supra* note 1, at 422 (discussing this issue).
[165] *See, e.g.*, UTAH R. CRIM. P. 11(e) ("The court may refuse to accept a plea of guilty . . . ."); State v. Mane, 783 P.2d 61, 66 (Utah Ct. App. 1989) (following Rule 11(e) and holding "[n]othing in the statute requires a court to accept a guilty plea").
[166] HERBERT S. MILLER ET AL., PLEA BARGAINING IN THE UNITED STATES 70 (1978).
[167] BELOOF, CASSELL & TWIST, *supra* note 1, at 423.

Utah courts have also contributed to this trend by not infrequently asking prosecutors whether victims have been consulted about plea bargains.

As with the right to be heard regarding bail, it should be noted that victims are only given a voice in the plea bargaining process, not a veto. The judge is not required to follow the victim's suggested course of action on the plea, but simply has more information on which to base such a determination.

The Victims' Rights Amendment also would extend the right to be heard to proceedings determining a sentence. Defendants have the right to directly address the sentencing authority before sentence is imposed.[168] The Victims' Rights Amendment extends the same basic right to victims, allowing them to present a victim impact statement.

Elsewhere I have argued at length in favor of such statements.[169] The essential rationales are that victim impact statements provide information to the sentencer, have therapeutic and other benefits for victims, explain the crime's harm to the defendant, and improve the perceived fairness of sentencing.[170] The arguments in favor of victim impact statements have been universally persuasive in this country, as the federal system and all fifty states generally provide victims the opportunity to deliver a victim impact statement.[171]

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

[168] *See, e.g.*, FED. R. EVID. 32(i)(4)(A); UTAH R. CRIM. P. 22(a).
[169] Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611 (2009).
[170] *Id.* at 619-25.
[171] *Id.* at 615; *see also* Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282, 299-305 (2003).

consideration.[172] Defendants can respond to the information that victims provide in appropriate ways, such as providing counter-evidence.[173]

The victim also would have the general right to be heard at a proceeding involving any right established by this article. This allows victims to present information in support of a claim of right under the amendment, consistent with normal due process principles.[174]

The victim's right to be heard under the VRA is subject to limitations. A victim would not have the right to speak at proceedings other than those identified in the amendment. For example, the victims gain no right to speak at the trial. Given the present construction of these proceedings, there is no realistic design for giving a victim an unqualified right to speak. At trial, however, victims will often be called as witnesses by the prosecution and if so, they will testify as any other witness would.

In all proceedings, victims must exercise their right to be heard in a way that is not disruptive. This is consistent with the fact that a defendant's constitutional right to be heard carries with it no power to disrupt the court's proceedings.[175]

. . . to proceedings free from unreasonable delay . . .

This provision is designed to be the victims' analogue to the defendant's right to a speedy trial found in the Sixth Amendment.[176] The defendant's right is designed, *inter alia*, "to minimize anxiety and concern accompanying public accusation" and "to limit the possibilities

[172] A previous version of the amendment allowed a victim to make an oral statement or submit a "written" statement. S.J. Res. 6, 105th Cong. (1997). This version has stricken the artificial limitation to written statements and would thus accommodate other media (such as videotapes or Internet communications).

[173] *See generally* Paul G. Cassell & Edna Erez, *Victim Impact Statements and Ancillary Harm: The American Perspective*, 15 CAN. CRIM. L. REV. 149, 175-96 (2011) (providing a fifty state survey on procedures concerning victim impact statements).

[174] Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) ("For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard." (internal quotation omitted)).

[175] *See* FED. R. CRIM. P. 43(b)(3) (noting circumstances in which disruptive conduct can lead to defendant's exclusion from the courtroom).

[176] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . . .").

that long delay will impair the ability of an accused to defend himself."[177] The interests underlying a speedy trial, however, are not confined to defendant. Indeed, the Supreme Court has acknowledged that:

> [T]here is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused. The inability of courts to provide a prompt trial has contributed to a large backlog of cases in urban courts which, among other things, enables defendants to negotiate more effectively for pleas of guilty to lesser offenses and otherwise manipulate the system.[178]

The ironic result is that in many criminal courts today the defendant is the only person without an interest in a speedy trial. Delay often works unfairly to the defendant's advantage. Witnesses may become unavailable, their memories may fade, evidence may be lost, or the case may simply grow stale and receive a lower priority with the passage of time.

While victims and society as a whole have an interest in a speedy trial, the current constitutional structure provides no means for vindication of that right. Although the Supreme Court has acknowledged the "societal interest" in a speedy trial, it is widely accepted that "it is rather misleading to say . . . that this 'societal interest' is somehow part of the right. The fact of the matter is that the 'Bill of Rights, of course, does not speak of the rights and interests of the government.'"[179] As a result, victims frequently face delays that by any measure must be regarded as unjustified and unreasonable, yet have no constitutional ability to challenge them.

It is not a coincidence that these delays are found most commonly in cases of child sex assault.[180] Children have the most difficulty in coping with extended delays. An experienced victim-witness coordinator in my home state described the effects of protracted litigation in a

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[177] Smith v. Hooey, 393 U.S. 374, 378 (1969) (citing United States v. Ewell, 383 U.S. 116, 120 (1966)).
[178] Barker v. Wingo, 407 U.S. 514, 519 (1972).
[179] LAFAVE ET. AL., *supra* note 157, at § 18.1(b) (footnote omitted).
[180] *See A Proposed Constitutional Amendment to Establish A Bill of Rights for Crime Victims: Hearing on S.J. Res. 52 Before the S. Comm. on the Judiciary*, 104th Cong. 29 (1996) (statement of John Walsh).

recent case: "The delays were a nightmare. Every time the counselors for the children would call and say we are back to step one. The frustration level was unbelievable."[181] Victims cannot heal from the trauma of the crime until the trial is over and the matter has been concluded.[182]

To avoid such unwarranted delays, the Victims' Rights Amendment will give crime victims the right to proceedings free from unreasonable delay. This formulation tracks the language from the CVRA.[183] A number of states have already established similar protections for victims.[184]

As the wording of the federal provision makes clear, the courts are not required to follow victims demands for scheduling trial or prevent all delay, but rather to insure against "unreasonable" delay.[185] In interpreting this provision, the court can look to the body of case law that already exists for resolving defendants' speedy trial claims. For example, in *Barker v. Wingo*, the United States Supreme Court set forth various factors that could be used to evaluate a defendant's speedy trial challenge in the wake of a delay.[186] As generally understood today, those factors are: (1) the length of the delay; (2) the reason for the delay; (3) whether and when the defendant asserted his speedy trial right; and (4) whether the defendant was prejudiced by the delay.[187] These kinds of factors could also be applied to victims' claims. For example, the length of the delay and the reason for the delay (factors (1) and (2)) would remain relevant in assessing victims' claims. Whether and when a victim asserted the right (factor (3)) would also be

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[181] Telephone Interview with Betty Mueller, Victim/Witness Coordinator, Weber Cnty. Attorney's Office (Oct. 6, 1993).
[182] *See* HERRINGTON ET AL., *supra* note 10, at 75; *Utah This Morning* (KSL television broadcast Jan. 6, 1994) (statement of Corrie, rape victim) ("Once the trial was over, both my husband and I felt we had lost a year and a half of our lives.").
[183] 18 U.S.C. § 3771(a)(7) (2006).
[184] *See* ARIZ. CONST. art. II, § 2.1(A)(10); CAL. CONST. art. I, § 29; ILL. CONST. art. I, § 8.1(a)(6); MICH. CONST. art. I, § 24(1); MO. CONST. art. I, § 32(1)(5); WIS. CONST. art I, § 9m.
[185] *See, e.g.*, United States v. Wilson, 350 F. Supp. 2d 910, 931 (D. Utah 2005) (interpreting CVRA's right to proceedings free from unreasonable delay to preclude delay in sentencing).
[186] Barker v. Wingo, 407 U.S. 514, 530-33 (1972).
[187] *See id. See generally* LAFAVE ET AL., *supra* note 157, at § 18.2.

relevant, although due regard should be given to the frequent difficulty that unrepresented victims have in asserting their legal claims. Defendants are not deemed to have *waived* their right to a speedy trial simply through failing to assert it.[188] Rather, the circumstances of the defendant's assertion of the right is given "strong evidentiary weight" in evaluating his claims.[189] A similar approach would work for trial courts considering victims' motions. Finally, while victims are not *prejudiced* in precisely the same fashion as defendants (factor (4)), the Supreme Court has instructed that "prejudice" should be "assessed in the light of the interests of defendants which the speedy trial right was designed to protect," including the interest "to minimize anxiety and concern of the accused" and "to limit the possibility that the [defendant's presentation of his case] will be impaired."[190] The same sorts of considerations apply to victims and could be evaluated in assessing victims' claims.

It is also noteworthy that statutes in federal courts and in most states explicate a defendant's right to a speedy trial. For example, the Speedy Trial Act of 1974 specifically implements a defendant's Sixth Amendment right to a speedy trial by providing a specific time line (seventy days) for starting a trial in the absence of good reasons for delay.[191] In the wake of the passage of a Victims' Rights Amendment, Congress could revise the Speedy Trial Act to include not only defendants' interests but also victims' interests, thereby answering any detailed implementation questions that might remain. For instance, one desirable amplification would be a requirement that courts record reasons for granting any continuance. As the Task Force on Victims of Crime noted, "the inherent human tendency [is] to postpone matters, often for

[188] *See Barker*, 407 U.S. at 528 ("We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right.").
[189] *Id.* at 531-32.
[190] *Id.* at 532.
[191] Pub. L. No. 96-43, 93 Stat. 327 (codified as amended at 18 U.S.C. §§ 3161-74) (2008).

insufficient reason," and accordingly the Task Force recommended that the "reasons for any granted continuance . . . be clearly stated on the record."[192]

. . . to reasonable notice of the release or escape of the accused . . .

Defendants and convicted offenders who are released pose a special danger to their victims. An unconvicted defendant may threaten, or indeed carry out, violence to permanently silence the victim and prevent subsequent testimony. A convicted offender may attack the victim in a quest for revenge.

Such dangers are particularly pronounced for victims of domestic violence and rape. For instance, Colleen McHugh obtained a restraining order against her former boyfriend Eric Boettcher on January 12, 1994.[193] Authorities soon placed him in jail for violating that order.[194] He later posted bail and tracked McHugh to a relative's apartment, where on January 20, 1994, he fatally shot both Colleen McHugh and himself.[195] No one had notified McHugh of Boettcher's release from custody.[196]

The VRA would ensure that victims are not suddenly surprised to discover that an offender is back on the streets. The notice is provided in either of two circumstances: either a *release*, which could include a post-arrest release or the post-conviction paroling of a defendant, or an *escape*. Several states have comparable requirements.[197] The administrative burdens associated with such notification requirements have recently been minimized by technological

[192] HERRINGTON ET AL., *supra* note 10, at 76; *see* ARIZ. REV. STAT. ANN. §13-4435(F) (Westlaw through 2012 Legis. Sess.) (requiring courts to "state on the record the specific reason for [any] continuance"); UTAH CODE ANN. § 77-38-7(3)(b) (Lexis Nexis, LEXIS through 2011 Legis. Sess.) (requiring courts, in the event of granting continuance, to "enter in the record the specific reason for the continuance and the procedures that have been taken to avoid further delays").

[193] 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 U. LOUISVILLE J. FAM. L. 915, 915-16 (1996).

[194] *See id.*

[195] *Id.*

[196] *See id.* (providing this and other helpful examples).

[197] *See, e.g.*, ARIZ. CONST. art. II, § 2.1 (victim's right to "be informed, upon request, when the accused or convicted person is released from custody or has escaped").

advances. Many states have developed computer-operated programs that can place a telephone call to a programmed number when a prisoner is moved from one prison to another or released.[198]

. . . to due consideration of the crime victim's safety . . .

This provision builds on language in the CVRA guaranteeing victims "[t]he right to be reasonably protected from the accused."[199] State amendments contain similar language, such as the California Constitution extending a right to victims to "be reasonably protected from the defendant and persons acting on behalf of the defendant" and to "have the safety of the victim and the victim's family considered in fixing the amount of bail and release conditions for the defendant."[200]

This provision guarantees that victims' safety will be considered by courts, parole boards, and other government actors in making discretionary decisions that could harm a crime victim.[201] For example, in considering whether to release a suspect on bail, a court will be required to consider the victim's safety. This dovetails with the earlier-discussed provision giving victims a right to speak at proceedings involving bail. Once again, it is important to emphasize that nothing in the provision gives the victim any sort of a veto over the release of a defendant; alternatively, the provision does not grant any sort of prerogative to *require* the release of a defendant. To the contrary, the provision merely establishes a requirement that *due consideration* be given to such concerns in the process of determining release.

Part of that consideration will undoubtedly be whether the defendant should be released subject to certain conditions. One often-used condition of release is a criminal protective

[198] *See About VINELink*, VINELINK, https://www.vinelink.com/ (last visited on Mar. 23, 2012).
[199] 18 U.S.C. § 3771(a)(1) (2006).
[200] CAL. CONST. art. I, § 28(b)(2)-(3).
[201] In the case of a mandatory release of an offender (*e.g.*, releasing a defendant who has served the statutory maximum term of imprisonment), there is no such discretionary consideration to be made of a victim's safety.

order.[202] For instance, in many domestic violence cases, courts may release a suspected offender on the condition that he[203] refrain from contacting the victim. In many cases, *consideration* of the safety of the victim will lead to courts crafting appropriate *no contact* orders and then enforcing them through the ordinary judicial processes currently in place.

. . . to due consideration of the crime victim's . . . privacy . . .

The VRA would also require courts to give "due consideration" to the crime victim's privacy. This provision building on a provision in the CVRA, which guarantees crime victims "[t]he right to be treated with fairness and with respect for the victim's dignity and privacy."[204] Various states have similar provisions. Arizona, for example, promises crime victims the right "[t]o be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process."[205] Similarly, California extends to victims the right "[t]o be treated with fairness and respect for his or her privacy and dignity . . . ."[206] The federal constitution appropriately should include such rights as well.

. . . to restitution . . .

This right would essentially constitutionalize a procedure that Congress has mandated for some crimes in the federal courts. In the Mandatory Victims Restitution Act ("MVRA"),[207] Congress required federal courts to enter a restitution order in favor of victims for crimes of violence. Section 3663A states that "[n]otwithstanding any other provision of law, when sentencing a defendant convicted of [a crime of violence as defined in 18 U.S.C. § 16] . . . the

[202] *See generally* BELOOF, CASSELL & TWIST, *supra* note 1, at 310-23.
[203] Serious domestic violence defendants are predominantly, although not exclusively, male.
[204] 18 U.S.C. § 3771(a)(8).
[205] ARIZ. CONST., art. II, § 2.1.
[206] Cal. Const., art. I, § 28(b)(1).
[207] 18 U.S.C. §§ 3663A, 3664 (2006).

court *shall* order . . . that the defendant make restitution to the victim of the offense."[208] In justifying this approach, the Judiciary Committee explained:

> The principle of restitution is an integral part of virtually every formal system of criminal justice, of every culture and every time. It holds that, whatever else the sanctioning power of society does to punish its wrongdoers, it should also ensure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being.[209]

While restitution is critically important, the Committee found that restitution orders were only sometimes entered and, in general, "much progress remains to be made in the area of victim restitution."[210] Accordingly, restitution was made mandatory for crimes of violence in federal cases. State constitutions contain similar provisions. For instance, the California Constitution provides crime victims a right to restitution and broadly provides:

> (A) It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer.
> (B) Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss.
> (C) All monetary payments, monies, and property collected from any person who has been ordered to make restitution shall be first applied to pay the amounts ordered as restitution to the victim.[211]

The Victims' Rights Amendment would effectively operate in much the same fashion as the MVRA, although it would elevate the importance of restitution.[212] Courts would be required to enter an order of restitution against the convicted offender. Thus, the offender would be legally obligated to make full restitution to the victim. However, not infrequently offenders lack

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[208] § 3663A(a)(1) (emphasis added).
[209] S. REP. NO. 104-179, at 12-13 (1995) (*quoting* S. REP. NO. 97-532, at 30 (1982)). This report was later adopted as the legislative history of the MVRA. *See* H.R. CONF. REP. NO. 104-518, at 111-12 (1996).
[210] S. Rep. 104-179, at 13.
[211] CAL. CONST. art. I, § 28(b)(13).
[212] A constitutional amendment protecting crime victims' rights would also help to more effectively ensure enforcement of existing restitution statutes. For example, the federal statutes do not appear to be working properly, at least in some cases. I discuss this issue at greater length in Part IV, *infra*.

the means to make full restitution payments. Accordingly, the courts can establish an appropriate repayment schedule and enforce it during the period of time in which the offender is under the court's jurisdiction.[213] Moreover, the courts and implementing statutes could provide that restitution orders be enforceable as any other civil judgment.

In further determining the contours of the victims' restitution right, there are well-established bodies of law that can be examined.[214] Moreover, details can be further explicated in implementing legislation accompanying the amendment. For instance, in determining the compensable losses, an implementing statute might rely on the current federal statute, which includes among the compensable losses medical and psychiatric services, physical and occupational therapy and rehabilitation, lost income, the costs of attending the trial, and in the case of homicide, funeral expenses.[215]

> *The crime victim or the crime victim's lawful representative has standing to fully assert and enforce these rights in any court.*

This language will confer standing on victims to assert their rights. It tracks language in the CVRA, which provides that "[t]he crime victim or the crime victim's lawful representative . . . may assert the rights described [in the CVRA]."[216]

Standing is a critically important provision that must be read in connection with all of the other provisions in the amendment. After extending rights to crime victims, this sentence ensures that they will be able to *fully* enforce those rights. In doing so, this sentence effectively

[213] *Cf.* 18 U.S.C. § 3664 (2006) (establishing restitution procedures).
[214] *See generally* Alan T. Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of Criminal Courts*, 30 UCLA L. REV. 52 (1982). *Cf.* RESTATEMENT (FIRST) OF RESTITUTION (2011) (setting forth established restitution principles in civil cases).
[215] *See* § 3663A.
[216] § 3771(d)(1).

overrules derelict court decisions that have occasionally held that crime victims lack standing or the full ability to enforce victims' rights enactments.[217]

The Victims' Rights Amendment would eliminate once and for all the difficulty that crime victims have in being heard in court to protect their interests by conferring standing on the victim. A victim's lawful representative can also be heard, permitting, for example, a parent to be heard on behalf of a child, a family member on behalf of a murder victim, or a lawyer to be heard on behalf of a victim-client.[218] The VRA extends standing only to victims or their representatives to avoid the possibility that a defendant might somehow seek to take advantage of victims' rights. This limitation prevents criminals from clothing themselves in the garb of a victim and claiming a victim's rights.[219] In Arizona, for example, the courts have allowed an unindicted co-conspirator to take advantage of a victim's provision.[220] Such a result would not be permitted under the Victims' Rights Amendment.

> *Nothing in this article provides grounds for a new trial or any claim for damages . . .*

This language restricts the remedies that victims may employ to enforce their rights by forbidding them from obtaining a new trial or money damages. It leaves open, however, all other possible remedies.

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[217] *See, e.g.*, United States v. McVeigh, 106 F.3d 325 (10th Cir. 1997); Cassell, *supra* note 3, at 515-22 (discussing the *McVeigh* case). The CVRA's standing provisions specifically overruled *McVeigh*, as is made clear in the CVRA's legislative history:

> This legislation is meant to correct, not continue, the legacy of the poor treatment of crime victims in the criminal process. This legislation is meant to ensure that cases like the McVeigh case, where victims of the Oklahoma City bombing were effectively denied the right to attend the trial [do not recur] and to avoid federal appeals courts from determining, as the Tenth Circuit Court of Appeals did [in *McVeigh*], that victims had no standing to seek review of their right to attend the trial under the former victims' law that this bill replaces.

150 CONG. REC. 7303 (2004) (statement of Sen. Feinstein).

[218] *See* BELOOF, CASSELL & TWIST, *supra* note 1, at 61-64 (discussing representatives of victims).

[219] *E.g.*, KAN. CONST. art. 15, § 15(c).

[220] *See* Knapp v. Martone, 823 P.2d 685, 686-87 (Ariz. 1992) (en banc).

A dilemma posed by enforcement of victims' rights is whether victims are allowed to appeal a previously-entered court judgment or seek money damages for non-compliance with victims' rights. If victims are given such power, the ability to enforce victims' rights increases; on the other hand, the finality of court judgments is concomitantly reduced and governmental actors may have to set aside financial resources to pay damages. Depending on the weight one assigns to the competing concerns, different approaches seem desirable. For example, it has been argued that allowing the possibility of victim appeals of plea bargains could even redound to the detriment of crime victims generally by making plea bargains less desirable to criminal defendants and forcing crime victims to undergo more trials.[221]

The Victims' Rights Amendment strikes a compromise on the enforcement issue. It provides that *nothing in this article* shall provide a victim with grounds for overturning a trial or for money damages. These limitations restrict some of the avenues for crime victims to enforce their rights, while leaving many others open. In providing that nothing creates those remedies, the VRA makes clear that it—by itself—does not automatically create a right to a new jury trial or money damages. In other words, the language simply removes this aspect of the remedies question for the judicial branch and assigns it to the legislative branches in Congress and the states.[222] Of course, it is in the legislative branch where the appropriate facts can be gathered and compromises struck to resolve which challenges, if any, are appropriate in that particular jurisdiction.

It is true that one powerful way of enforcing victims' rights is through a lawsuit for money damages. Such actions would create clear financial incentives for criminal justice agencies to comply with victims' rights requirements. Some states have authorized damages

[221] *See* Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301, 350 (1987).
[222] Awarding a new trial might also raise double jeopardy issues. Because the VRA does not eliminate defendant's rights, the VRA would not change any double jeopardy protections.

actions in limited circumstances.[223] On the other hand, civil suits filed by victims against the state suffer from several disadvantages. First and foremost, in a time of limited state resources and pressing demands for state funds, the prospect of expensive awards to crime victims might reduce the prospects of ever passing a Victims' Rights Amendment. A related point is that such suits might give the impression that crime victims seek financial gain rather than fundamental justice. Because of such concerns, a number of states have explicitly provided that their victims' rights amendments create no right to sue for damages.[224] Other states have reached the same destination by providing explicitly that the remedies for violations of the victims' amendment will be provided by the legislature, and in turn by limiting the legislatively-authorized remedies to other-than-monetary damages.[225]

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

Because money damages are not allowed, what will enforce victims' rights? Initially, victims' groups hope that such enforcement issues will be relatively rare in the wake of the passage of a federal constitutional amendment. Were such an amendment to be adopted, every judge, prosecutor, defense attorney, court clerk, and crime victim in the country would know about victims' rights and that they were constitutionally protected in our nation's fundamental

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[223] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-4437(B) (Westlaw through 2012 Legis. Sess.) ("A victim has the right to recover damages from a governmental entity responsible for the intentional, knowing or grossly negligent violation of the victim's rights . . . ."); *see also* Davya B. Gewurz & Maria A. Mercurio, Note, *The Victims' Bill of Rights: Are Victims All Dressed Up with No Place to Go?*, 8 ST. JOHN'S J. LEGAL COMMENT. 251, 262-65 (1992) (discussing lack of available redress for violations of victims' rights).

[224] *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. I, § 32(3) (same); TEX. CONST. art. 1, § 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.").

[225] *See, e.g.*, ILL. CONST. art. I, § 8.1(b) ("The General Assembly may provide by law for the enforcement of this Section."); 725 ILL. COMP. STAT. ANN. 120/9 (West, Westlaw through 2011 Legis. Sess.) ("This Act does not . . . grant any person a cause of action for damages [which does not otherwise exist].").

charter. This is an *enforcement* power that, even by itself, goes far beyond anything found in existing victims' provisions. The mere fact that rights are found in the United States Constitution gives great reason to expect that they will be followed. Confirming this view is the fact that the provisions of our Constitution—freedom of speech, freedom of the press, freedom of religion—are all generally honored without specific enforcement provisions. The Victims' Rights Amendment will eliminate what is a common reason for failing to protect victims' rights—simple ignorance about victims and their rights.

Beyond mere hope, victims will be able to bring court actions to secure enforcement of their rights. Just as litigants seeking to enforce other constitutional rights are able to pursue litigation to protect their interests, crime victims can do the same. For instance, criminal defendants routinely assert constitutional claims, such as Fourth Amendment rights,[226] Fifth Amendment rights,[227] and Sixth Amendment rights.[228] Under the VRA, crime victims could do the same.

No doubt, some of the means for victims to enforce their rights will be spelled out through implementing legislation. The CVRA, for example, contains a specific enforcement provision designed to provide accelerated review of crime victims' rights issues in both the trial and appellate courts.[229] Similarly, state enactments have spelled out enforcement techniques.

One obvious concern with the enforcement scheme is whether attorneys will be available for victims to assert their rights. No language in the Victims' Rights Amendment provides a basis for arguing that victims are entitled to counsel at state expense.[230] To help provide legal

[226] Mapp v. Ohio, 367 U.S. 643 (1961).
[227] Arizona v. Fulminante, 499 U.S. 279 (1991).
[228] Gideon v. Wainwright, 372 U.S. 335 (1963).
[229] 18 U.S.C. § 3771(d)(3) (2006).
[230] *Cf. Gideon*, 372 U.S. 335 (defendant's right to state-paid counsel).

representation to victims, implementing statutes might authorize prosecutors to assert rights on behalf of victims, as has been done in both federal and state enactments.[231]

> *. . . and no person accused of the conduct described in section 2 of this article may obtain any form of relief.*

This provision simply insures that the VRA is used by those who need protection – victims of crime, rather than those who commit crimes. Similarly provisions are found in state amendments. For example, Arizona has provided that a representative of a "victim" of a crime cannot include a person "in custody for an offense" or "the accused."[232] A comparable provision appears appropriate for the VRA.

B. Section 2

> *For purposes of this article, a crime victim includes any person against whom the criminal offense is committed or who is directly and proximately harmed by the commission of an act, which, if committed by a competent adult, would constitute a crime.*

Obviously an important issue regarding a *Victims'* Rights Amendment is who qualifies as a victim. The VRA broadly defines the victim, by offering two different definitions—either of which is sufficient to confer victim status.

The first of the two approaches is defining a victim as including any person against whom the criminal offense is committed. This language tracks language in the Arizona Constitution, which defines a "victim" as a "person against whom the criminal offense has been committed."[233] This language was also long used in the Federal Rules of Criminal Procedure, which until the passage of the CVRA defined a "victim" of a crime as one "against whom an

[231] *See, e.g.,* § 3771(d)(1); UTAH CODE ANN. § 77-38-9(6) (West, Westlaw through 2011 Legis. Sess.).
[232] Ariz. Const., art. II, § 12.1(12)(C).
[233] ARIZ. CONST. art. II, § 2.1(C).

offense has been committed."[234] Litigation under these provisions about the breadth of the term *victim* has been rare. Presumably this is because there is an intuitive notion surrounding who had been victimized by an offense that resolves most questions.

Under the Arizona amendment, the legislature was given the power to define these terms, which it did by limiting the phrase "criminal offense" to mean "conduct that gives a peace officer or prosecutor probable cause to believe that . . . [a] felony . . . [or that a] misdemeanor involving physical injury, the threat of physical injury or a sexual offense [has occurred]."[235] A ruling by the Arizona Court of Appeals, however, invalidated that definition, concluding that the legislature had no power to restrict the scope of the rights.[236] Since then, Arizona has operated under an unlimited definition—without apparent difficulty.

The second part of the two-pronged definition of victim is a person who is directly and proximately harmed by the commission of a crime. This definition follows the definition of victim found in the CVRA, which defines "victim" as a person "directly and proximately harmed" by a federal crime.[237]

The proximate limitation has occasionally lead to cases denying victim status to persons who clearly seemed to deserve such recognition. A prime example is the Antrobus case, discussed earlier in this testimony.[238] In that case, the district court concluded that a woman who had been gunned down by a murderer had not been "proximately" harmed by the illegal sale of the murder weapon.[239] Whatever the merits of this conclusion as a matter of interpreting the

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[234] *See* FED. R. CRIM. P. 32(f)(1) (2000) (amended 2008); *see also* FED. R. CRIM. P. 32 advisory committee's note discussing 2008 amendments).
[235] ARIZ. REV. STAT. ANN. § 13-4401(6)(a)-(b) (West, Westlaw through 2012 Legis. Sess.), *held unconstitutional by* State *ex. rel.* Thomas v. Klein, 214 Ariz. 205 (2007).
[236] State *ex rel.* Thomas v. Klein, 150 P.3d 778, 782 (Ariz. Ct. App. 2007) ("[T]he Legislature does not have the authority to restrict rights created by the people through constitutional amendment.").
[237] 18 U.S.C. § 3771(e) (2006) (emphasis added).
[238] *See supra* notes 73-82 and accompanying text.
[239] United States v. Hunter, No. 2:07CR307DAK, 2008 WL 53125, at *5 (D. Utah 2008).

CVRA, it makes little sense as a matter of public policy. The district judge should have heard the Antrobuses before imposing sentence.[240] And hopefully other courts will broadly interpret the term "proximately" to extend rights to those who most need them. It is interesting in this connection to note that a federal statute that has been in effect for many years, the Crime Control Act of 1990, has broadly defined "victim" as "a person that has suffered *direct* physical, emotional, or pecuniary *harm* as a result of the commission of a crime."[241]

One issue that Congress and the states might want to address in implementing language to the VRA is whether victims of *related* crimes are covered. A typical example is this: a rapist commits five rapes, but the prosecutor charges one, planning to call the other four victims only as witnesses. While the four are not *victims* of the charged offense, fairness would suggest that they should be afforded victims' rights as well. In my state of Utah, we addressed this issue by allowing the court, in its discretion, to extend rights to victims of these related crimes.[242] An approach like this would make good sense in the implementing statutes to the VRA.

Although some of the state amendments are specifically limited to natural persons,[243] the Victims' Rights Amendment would—like other constitutional protections—extend to corporate entities that were crime victims.[244] The term person in the VRA is broad enough to include corporate entities.

The Victims' Rights Amendment would also extend rights to victims in juvenile proceedings. The VRA extends rights to those directly harmed by the commission of an act, which, if committed by a competent adult, would constitute a crime. The need for such language

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[240] *See* Cassell, *supra* note 169, at 616-19.
[241] 42 U.S.C.A. § 10607(e)(2) (Westlaw through 2012 P.L. 112-89) (emphasis added).
[242] *See, e.g.*, UTAH CODE ANN. § 77-38-2(1)(a) (West, Westlaw through 2011 Legis. Sess.) (implementing UTAH CONST. art. I, § 28).
[243] *See id.*
[244] *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010) (First Amendment rights extend to corporate entities).

stems from the fact that juveniles are not typically prosecuted for crimes but for delinquencies—in other words, they are not handled in the normal criminal justice process.[245] From a victim's perspective, however, it makes little difference whether the robber was a nineteen-year-old committing a crime or a fifteen-year-old committing a delinquency. The VRA recognizes this fact by extending rights to victims in both adult criminal proceedings and juvenile delinquency proceedings. Many other victims' enactments have done the same thing.[246]

IV. AN ILLUSTRATION OF A CASE WHERE THE AMENDMENT WOULD MAKE A DIFFERENCE.

I know that others will be providing important testimony to the Subcommittee about how the VRA would make an real world difference for crime victims across the country. But I wanted to offer one illustration of how, even in the federal system under the CVRA, statutory crime victims' rights are being subverted. I attempted to provide this testimony to the Subcommittee last year, but was unable to do so because I was unable to determine whether judicial sealing orders precluded me from informing the Subcommittee what has happened.[247] Since then, a number of the documents involved in the case have been unsealed and entered into the public record. Sadly these documents and other public record information show that the U.S. Attorney's Office for the Eastern District of New York has not complied with important provisions in the MVRA and CVRA. The fact that the Office believes that it can ignore even a federal statute commanding that crime victims' receive rights provides one clear illustration of the need to elevate crime victims' protections to the constitutional level.

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[245] *See, e.g.*, Brian J. Willett, *Juvenile Law vs. Criminal Law: An Overview*, 75 TEX. B.J. 116 (2012).
[246] *See, e.g.*, United States v. L.M., 425 F. Supp. 2d 948 (N.D. Iowa 2006) (construing the CVRA as extending to juvenile cases, although only *public* proceedings in such cases).
[247] *See* Letter from Paul G. Cassell to Hon. Lamar Smith, Chairman, Comm. on the Judiciary (May 10, 2012), *reprinted in* PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES TO PROTECT THE RIGHTS OF CRIME VICTIMS: HRNG BEFORE THE SUBCOMM. ON THE CONSTITUTION OF THE HOUSE JUDICIARY COMM., Serial No. 112-113 (Apr. 26, 2012), at p. 202. I discuss these circumstances at greater length below.

Factual Background of the Doe *Case*[248]

The case involves a defendant who I will call "John Doe."[249] Doe pled guilty in 1998 to racketeering for running a stock fraud that stole more than forty million dollars from victims.[250] Doe then provided unspecified cooperation to the Government. In 2004, he came up for sentencing. The U.S. Attorney's Office declined to provide the list of Doe's victims to the probation office, preventing the probation office from contacting the victims.[251] As a result, the pre-sentence report did not include any restitution, even though a restitution order was "mandatory" under the Mandatory Victim Restitution Act. [252] In any event, when he was ultimately sentenced five years later in 2009, Doe escaped paying to his victims any restitution for the more than forty million dollars that he pilfered.[253] Doe's victims received no notice of the sentencing, even though the Crime Victims' Rights Act requires notice to victims of all public court hearings.[254]

Of course, Doe's 1999 conviction should have signaled the end of Doe's business career and created the possibility of restitution for the victims of his crimes. Unfortunately, the

[248] All of the information recounted in this testimony comes from public sources. For a general overview of the proceedings in the case, see the recently-unsealed docket sheet for U.S. v. Doe, No. 98-CR-1101-01 (E.D.N.Y.) (docket entries from Dec. 3, 1998, to Mar. 27, 2013).

[249] The name of "Doe" is now public record, as the judge presiding over the matter recently unsealed it and the press has widely discussed it. *See, e.g.,* Andrew Keshner, *Judge Orders Unsealing in U.S. Cooperation Case*, N.Y.L.J., Mar. 14, 2013; *see also* United States v. John Doe, No. 98-CR-1101-01, doc. #101, at 1 (government motion to put Doe's name into the public record in the case). Out of an abundance of caution, however, I do not recount the name in this testimony.

[250] Petn. for Writ of Certiorari at 4-6, Roe v. United States, No. 12-112 (U.S. Supreme Court May 10, 2012).

[251] *Id.* at 7.

[252] *Id.*

[253] *Id.* at 22. *See* United States v. John Doe, No. 98-CR-1101-01, doc. 35, at 4 (available on PACER); Petition for Rehearing at 5-6, Roe v. United States, No. 12-112 (U.S. Supreme Court Apr. 19, 2013). Cf. United States v. John Doe, No. 98-CR-1101-01, doc. 137 at 23-24 n.5 (Doe agrees that MVRA applied at his sentencing but contends that identification of victims was impractical).

[254] Petition for Rehearing at 1-6, Roe v. United States, No. 12-112 (Apr. 19, 2013) (public record pleading awaiting docketing in the Supreme Court).

Government concealed what it was doing by keeping the entire case under unlawful seal.[255] And Doe wasted little time in resuming his old tricks and defrauding new victims.[256] By 2002, he had infiltrated a real estate venture and used it to launder tens of millions of dollars, skim millions more in cash, and once again defraud his investors and partners.[257] An attorney, who I will call "Richard Roe," represents many of Doe's victims. While preparing a civil RICO complaint against Doe, Roe received – unsolicited – documents from a whistleblower at Doe's company that provided extensive information about Doe's earlier crimes.[258] Those documents included a presentence report ("PSR") from the 1998 case, which revealed that Doe was hiding his previous conviction from his partners in the new firm.[259] In May 2010, Roe filed the RICO complaint on behalf of Doe's victims in U.S. District Court for the Southern District of New York, with portions of the PSR attached as an exhibit.[260] Instead of taking steps to help Doe's victims recover for their losses, two district courts quickly swung into action to squelch any public reference to the earlier criminal proceedings and to punish Roe for disclosing evidence of Doe's crimes.[261] The S.D.N.Y. court sealed the civil RICO complaint four days after Roe filed it.[262] And the E.D.N.Y. court in which Doe was secretly prosecuted issued a temporary restraining order barring Roe from disseminating the PSR and other documents – even though Roe was not a party to that case, and even though the court could not identify any actual sealing or other order

[255] As to whether the case was ever actually sealed, it remains unclear whether the district judge ever actually entered a formal sealing order. Thus, without a sealing order, it is more accurate to say not that the case has been "under seal" but rather that it has been "hidden." Petn. for Writ of Certiorari at 1, Roe v. United States, No. 12-112 (Mar. 5, 2013); *see also* Petition for Rehearing at 1-6, Roe v. United States, No. 12-112 (Apr. 19, 2013) (discussing uncertainty about sealed nature of the case)..

[256] Reply in Support of Petn. for Writ of Certiorari at 1, Roe v. United States, No. 12-112 (Mar. 5, 2013).

[257] *Id*.

[258] *Id.*

[259] *Id.*

[260] *Id.*

[261] *Id.*; *see also* Petition for Rehearing at 1-6, Roe v. United States, No. 12-112 (Apr. 19, 2013).

[262] Reply in Support of Petn. for Writ of Certiorari at 2, Roe v. United States, No. 12-112 (Mar. 5, 2013); *see also* John Doe's Memo. of Law in Support of Order Directing Return of Sealed and Confidential Materials, U.S. v. Doe, No. 11-CR-1101-ILG (May 18, 2010) (doc. #51).

that applied to Roe.[263] The court subsequently converted the TRO into a permanent injunction, and the Second Circuit affirmed.[264]

Roe sought review in the U.S. Supreme Court by filing a petition for a writ of certiorari, raising both First Amendment argues and crime victims' rights arguments.[265] The National Organization for Victim Assistance (NOVA) filed an amicus brief, highlighting the fact the petition presented important issues about crime victims' rights – specifically the fact that the Government believed it could avoid compliance with crime victims' rights statutes through the simply expedient of hiding the case from the victims and other members of the public.[266] The Solicitor General filed an opposition to the certiorari petition, studiously avoiding any discussion of whether the Government had complied with the crime victims' rights statute.[267] The Supreme Court recently denied review. The net result is that victims of Doe's crimes, including a number of Holocaust survivors, have yet to recover any of their lost funds.[268] And Doe continues to live well off of money that he stole from his victims.[269]

Violation of the Mandatory Victim Restitution Act.

The Doe case illustrates how, without constitutional protection, even a federal statute can be insufficient to full assure that crime victims receive their rights. In 1996, Congress enacted a statute – the Mandatory Victim Restitution Act (MVRA) -- to guarantee that victims of certain

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[263] Reply in Support of Petn. for Writ of Certiorari at 2, Roe v. United States, No. 12-112 (Mar. 5, 2013).
[264] Roe v. U.S., 428 Fed.Appx.60, 2011 WL 2559016 (2d Cir. 2011). I assisted Mr. Oberlander as legal counsel for part of the proceedings before the Second Circuit.
[265] Roe was represented by two very capable appellate attorneys, Richard E. Lerner, Esq., and Paul Clement, former Solicitor General of the United States.
[266] Brief *Amicus Curiae* of the National Organization for Victim Asst., Roe v. U.S., No. 12-112 (Aug. 27, 2012). Along with Professor Douglas Beloof of Lewis & Clark Law School and Professor Amy Wildermuth of the University of Utah College of Law, I served as counsel on the brief.
[267] (Redacted) Brief for the U.S. in Opposition, Roe v. U.S., No. 12-112 (Feb. 2013). The only comment that the Solicitor General made on this question was that the Second Circuit had not reached the issues below and therefore, in the view of the Solicitor General, the Supreme Court should not reach the issue. *Id.* at 17.
[268] Reply in Support of Petn. for Writ of Certiorari at 12, Roe v. United States, No. 12-112 (Mar. 5, 2013); Petition for Rehearing at 5-6, Roe v. United States, No. 12-112 (Apr. 19, 2013).
[269] Reply in Support of Petn. for Writ of Certiorari at 24 (*citing* Petn. for Writ of Certiorari at 8).

crimes would always receive restitution.[270] As the title indicates, the specific purpose of the MVRA was to make restitution "mandatory."

Congress enacted the MVRA specifically to eliminate any judicial discretion to decline to award restitution. The MVRA amended the Victim and Witness Protection Act of 1982 (VWPA), which had provided for restitution to be ordered in the court's discretion. Congress was concerned that leaving restitution to the good graces of prosecutors and judges resulted in few victims recovering their losses. As the legislative history explains, "Unfortunately, . . . while significant strides have been made since 1982 toward a more victim-centered justice system, much progress remains to be made in the area of victim restitution."[271] Congress noted that despite the VWPA, "federal courts ordered restitution in only 20.2 percent of criminal cases.[272]

To fix the problem of inadequate restitution to victims, Congress made restitution for certain offenses – including the racketeering crime at issue in *Doe*[273] – mandatory. As the Supreme Court recently explained:

> Amending an older provision that left restitution to the sentencing judge's discretion, the statute before us (entitled "The Mandatory Victims Restitution Act of 1996") says " *[n]otwithstanding any other provision of law,* when sentencing a defendant convicted of [a specified] offense . . . , the court *shall* order ... that the defendant make restitution to the victim of the offense." § 3663A(a)(1) (emphasis added); cf. § 3663(a)(1) (stating that a court "may" order restitution when sentencing defendants convicted of other specified crimes). The Act goes on to provide that restitution shall be ordered in the "full amount of each victim's losses" and "without consideration of the economic circumstances of the defendant." § 3664(f)(1)(A).[274]

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[270] Pub. L. 104-132, Title II, § 204(a), Apr. 4, 1996, 110 Stat. 1227, codified at18 U.S.C. § 3663A.
[271] S. Rep. 104-179 at 13, 104th Cong., 1st Sess. (Dec. 6,1995).
[272] *Id.* (*citing* United States Sentencing Commission Annual Report 1994, table 22).
[273] The MVRA covers crimes of violence and any offense against property under Title 18, including crimes of fraud and deceit. 18 U.S.C. § 3663A(c)(1)(A). The Second Circuit (along with many other courts) has held that RICO offenses, including "pump and dump" stock frauds, are covered by the MVRA. *See, e.g., United States v. Reifler*, 446 F.3d 64 (2d Cir. 2006) (noting that MVRA applies to "pump and dump" stock frauds and collecting supporting cases).
[274] *Dolan v. United States*, 130 S.Ct. 2533, 2539 (2010) (emphasis in original). Congress did allow courts to dispense with restitution in cases where it would be impracticable to order, due either to the large number of victims or the difficulty of calculating restitution. 18 U.S.C. § 3663A(c)(3). Nothing in the certiorari petition suggests any

To help implement restitution for crime victims, the federal judiciary has also acted. The Federal Rules of Criminal Procedure provide that the pre-sentence report "must" contain "information that assesses any *financial*, social, psychological, and medical impact on any victim."[275] And specifically with regard to cases where the law provides for restitution, the pre-sentence report "must" contain "information sufficient for a restitution order."[276]

It is ancient law that Congress has the power to fix the sentence for federal crimes.[277] Indeed, it is well settled that "Congress has the power to define criminal punishments without giving the courts any sentencing discretion."[278] In the *Doe* case, the U.S. Attorney's Office for the Eastern District of New York decided that it can override the Congress' command that restitution is mandatory in the name of securing cooperation from Doe – and then conceal what it is doing from public scrutiny. It did this first by refusing to provide victim information to the probation office, in contravention of the Federal Rules of Criminal Procedure. And then it asked for – and received from the district court – a sentence without restitution. In doing so, the U.S. Attorney's Office violated the MVRA.

While the MVRA mandates restitution in cases such as *Doe*, it is important to understand that the MVRA does not require disclosure of the names of confidential informants. Rather, the MVRA only requires that convicted defendants pay full restitution. Any legitimate Government interest in keeping the defendant's name confidential does not interfere with requiring that defendant to pay restitution to his victims. Restitution payments can, of course, made through intermediaries, such as the U.S. Attorney's Office or the Probation Office, which could screen

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such findings were made here. Nor does it seem plausible that such findings could have been made, since Doe's co-defendants were apparently ordered to pay restitution without difficulty. *See* Cert. Petn. at 5-6.

[275] Fed. R. Crim. P. 32(d)(2)(B) (emphasis added).

[276] Fed. R. Crim. P. 32(d)(2)(D).

[277] *United States v. Wiltberger,* 18 U.S. (5 Wheat.) 76 (1820).

[278] *Chapman v. United States*, 500 U.S. 453, 467 (1991) (*citing Ex Parte United States*, 242 U.S. 27 (1916)).

out any locating information about a defendant. The Government is also free to pursue its interests through other means, such as placing an informant into the witness protection program,[279] or by limiting disclosure of only the fact of his cooperation.

The one thing the MVRA clearly precludes, however, is the Government buying cooperation with crime victims' money. The Government is not free to tell a bank robber, for example, that he can keep his loot bag if he will testify in other cases. And in the *Doe* case, the U.S. Attorney's Office was not free to tell Doe that he could keep millions of dollars that he had fraudulently obtained from crime victims rather than requiring him to pay the money back.[280]

Violation of the Crime Victim's Rights Act.

The U.S. Attorney's Office's violations of victims' rights in the *Doe* case are not confined to the MVRA. Unfortunately, the Office also disregarded another important crime victims' rights statute: The Crime Victim's Rights Act (CVRA).[281]

As discussed earlier,[282] in 2004 Congress passed the CVRA because it found that, in case after case, "victims, and their families, were ignored, cast aside, and treated as non-participants in a critical event in their lives. They were kept in the dark by prosecutors too busy to care enough, by judges focused on defendant's rights, and by a court system that simply did not have

[279] *See* 18 U.S.C. § 3521 *et seq.* The Witness Protection Program statutes provide ways in which civil judgment creditors can pursue actions against persons in the witness protection program. *See* 18 U.S.C. § 3523.
[280] The Government actions not only violated the MVRA, but also another important provision of law: 18 U.S.C. § 1963(a)(3). This provision requires a court to order a convicted RICO defendant to forfeit "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly from racketeering activity."
[281] 18 U.S.C. § 3771.
[282] *See* Part II.B., *supra*.

a place for them."[283] To avoid having crime victims "kept in the dark," Congress enacted a bill of rights for crime victims extending them rights throughout the criminal justice process.[284]

In *Doe*, the U.S. Attorney's Office violated the CVRA at the 2009 sentencing of John Doe, if not much earlier in the process, by keeping crime victims in the dark.[285] It is not clear from the record whether Doe was sentenced in public or not. It appears to be the position of the U.S. Attorney's Office is that "Doe was sentenced in public, though under the name Doe . . . ."[286] If Doe truly was sentenced in public, then his sentencing was a "public court proceeding" and Doe's crime victims were entitled to (among other rights) accurate and timely notice of that proceeding, as well as notice of their right to make a statement at sentencing.[287] So far as appears in the record, the U.S. Attorney's Office never gave the victims that notice of any public hearing.[288]

On the other hand, even assuming for sake of argument that Doe was properly sentenced in secret,[289] then other provisions of the CVRA would have been in play. At a minimum, the U.S. Attorney's Office would have been obligated to notify the victims in this case of the rights that they possessed under the CVRA.[290] Moreover, the U.S. Attorney's Office would have been obligated to provide crime victims' rights that were not connected to public proceedings, such as

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[283] 150 CONG. REC. 4262 (Apr. 22, 2004) (statement of Sen. Kyl). *See generally* Hon. Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights* Act, 9 LEWIS & CLARK L. REV. 581 (2005).

[284] 18 U.S.C. § 3771.

[285] While John Doe was indicted before the CVRA's 2004 enactment, he was sentenced on October 23, 2009 – five years after the Act was in place. At his sentencing, the CVRA's procedures plainly applied. *See United States v. Eberhard*, 525 F.3d 175, 177 (2d Cir. 2008) (rejecting defendant's Ex Post Facto challenge to application of the CVRA to a sentencing for a crime committed before the Act's passage).

[286] Petn. for Writ of Certiorari at 9, Roe v. United States, No. 12-112 (Mar. 5, 2013); Petition for Rehearing at 5-6, Roe v. United States, No. 12-112 (Apr. 19, 2013).

[287] 18 U.S.C. § 3771(a)(2) & (4).

[288] Petition for Rehearing at 5-6, Roe v. United States, No. 12-112 (Apr. 19, 2013).

[289] This issue of closed sentencing proceedings is a complicated one that I do not address here.

[290] *See* 18 U.S.C. § 3771(c)(1).

the right to confer with prosecutors and the right to receive full restitution.[291] Here again, nothing in the record shows that the victims received any of these rights – or, indeed, that the U.S. Attorney's Office gave even a second's thought to crime victims' rights.[292]

To be clear, it is not the case that crime victims' rights require public disclosure of everything in the criminal justice process. In some situations, secrecy can serve important interests, including the interests of crime victims.[293] And strategies no doubt exist for accommodating both crime victims' interests in knowing what is happening in the criminal justice process and the Government's legitimate need for secrecy.[294] The limited point here is that federal prosecutors cannot use an interest in securing cooperation as a basis for disregarding the CVRA.

In the *Doe* case, the U.S. Attorney's Office's willingness to ignore the CVRA has a "business as usual" feel to it – suggesting that many other victims are having their rights violated by the Government though the simple expedient of hiding the case. Since the U.S. Attorney's Office apparently believes that it can ignore federal statutes, one way to insure compliance with victims' rights enactments is to elevate them to the status of constitutional rights.

This Subcommittee Should Ask the U.S. Attorney's Office to Explain Its Actions

This Committee may wish to consider sending an inquiry to the U.S. Attorney's Office for the Eastern District of New York to explain how it has handled crime victims' rights in the *Doe* case. Sadly it is my conclusion that the U.S. Attorney's Office is hindering the public and

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[291] 18 U.S.C. § 3771(a)(5) & (6).
[292] Petition for Rehearing at 5-6, Roe v. United States, No. 12-112 (Apr. 19, 2013).
[293] *See* Tim Reagan & George Cort, Fed. Judicial Ctr., Sealed Cases in Federal Courts 19-20 (2009) (discussing sealing of cases to protect victims of sexual offenses) (available at http://www.fjc.gov/public/pdf.nsf/lookup/sealcafc.pdf/$file/sealcafc). *See also Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 457 U.S. 596, 608 (1981) ("A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim" during a sex offense trial).
[294] *See* Brief Amicus Curiae of the National Organization for Victim Asst. at14-15, Roe v. U.S., No. 12-112 (Aug. 27, 2012).

this Subcommittee from learning how it treated crime victims in this case. I set out a chronology of what has happened so that the Subcommittee and other can reach their own conclusion on these issues.[295]

When I was preparing testimony for the Subcommittee last year, I was aware from public and other sources of the *Doe* case and the fact that the U.S. Attorney's Office had failed to obtain restitution for crime victims because it wanted cooperation from a defendant. I thought that this would be an important illustration of the need for a constitutional amendment. The case, however, had been subject to extensive litigation concerning the existence and scope of various sealing orders.

Because I wished to communicate my information to this Subcommittee while fully complying with court orders, I prepared draft testimony outlining my concerns about the *Doe* case. On April 9, 2012, I sent a full draft of my proposed testimony to the U.S. Attorney's Office for the Eastern District of New York, asking it to confirm that the testimony was accurate and in compliance with any applicable sealing orders. I further asked, if it did transgress a sealing order, for instruction on how the testimony could be redacted or made more general to avoid compromising any legitimate government interest reflected in the sealing order.

On April 19, 2012, the Office responded that, in its view, my testimony was not accurate and that "[w]e are unable to comment further because the case is sealed." The Office further responded that it believed my testimony would violate applicable sealing orders, particularly an order entered by the Second Circuit on March 28, 2011 in the *Roe* case. Specifically, the Office stated: "While it is unclear what the source of your proposed testimony regarding the *Roe* case is, to the extent that you rely on any of the documents that were or remain the subject of

[295] The following information comes from correspondence with the identified parties, copies of which I retain at my office at the University of Utah.

litigation in *Roe*, those documents are under seal. We believe it would violate the relevant sealing orders for you to reveal in any way, and in any forum, those documents or their contents." The Office also noted that the Second Circuit order had appointed Judge Cogan of the Eastern District of New York for the purpose of ensuring compliance with court sealing orders. The Office attached the Second Circuit order to its letter and offered to answer any further questions that I had.

I then received permission from the U.S. Attorney's Office to contact the General Counsel's Office for the University of Utah to receive legal advice on how to deliver the substance of my testimony.

On April 21, 2012, John Morris, the General Counsel for the University of Utah, sent a letter to Judge Cogan, writing on my behalf to determine whether my proposed testimony would violate any judicial sealing orders and, if a portion of his testimony violates any sealing order, whether the testimony could be made more general or redacted so that Congress is made aware of the legal issue that has arisen in this case without compromising the identity of any cooperating individual and thereby bringing it into compliance with the court's sealing orders.

In addition, two days later, on April 23, 2012, I took up the Office's offer to answer questions and sent six additional questions to the Office. Specifically, my questions were:

> 1. You indicate that you are unable to "comment further" about the underlying criminal case because it is under seal. Are you able to at least indicate whether the Government believes that it complied with all provisions of the Crime Victims' Rights Act, 18 U.S.C. § 3771, and with all provisions of any applicable restitution statute, *e.g.*, 18 U.S.C. § 3663 and 3663A – in other words, are you able to indicate whether the Government fully complied with the law?
>
> 2. You sent me a copy of the Second Circuit's June 29, 2011, decision, remanding to the district court for (inter alia) a ruling on the government's unsealing motion filed March 17, 2011. Can you advise as to whether a ruling has been reached on that unsealing motion, which has been pending for more than a year?

3. Would any of my testimony be permissible if the Government's unsealing motion were granted?

4. If parts of my testimony would not be permissible even if the Government's unsealing motion were granted, is the Government willing to file an additional motion allowing unsealing to the very limited extent necessary to permit me to deliver my testimony?

5. If my testimony is not currently permissible under the sealing motion and the Government is not willing to file an additional unsealing motion, is the Government willing to advise me how to comply with its view of the sealing orders it has obtained, by me either making my testimony more general or redacting a part of my current testimony? In other words, is there a way for Congress to have the substance of my concern without jeopardizing your need for secrecy about the name of the informant? I thought I had struck this balance already, but apparently you disagree. Can you help me strike that balance?

6. Is there some way for the Government to assist me to make my testimony more accurate. You assert that it is inaccurate, but then refuse to provide any further information. Can you, for example, at least identify which sentence in my proposed testimony is inaccurate?

On April 24, 2012, the U.S. Attorney's Office sent a letter to Mr. Morris indicating that it "was appropriate under the circumstances" for me to have inquired of Judge Cogan, through counsel, about whether his proposed testimony would violate any sealing orders. The Office further stated that "we believe the best course at this juncture is to await further guidance from Judge Cogan" on the request. The Office also indicated that it preferred to deal through legal counsel on the subject of any additional questions.

On April 25, 2012, Mr. Morris wrote on my behalf to repeat the six questions for me. On April 25, 2012, the Office sent an e-mail in which it stated that the previous letter would serve as the response to the questions for "the time being."

On May 7, 2012, Mr. Morris received a letter from Judge Cogan in which he stated "I do not believe it would be appropriate to furnish what would in effect be an advisory opinion as to the interpretation of the injunctive orders entered by Judge Glasser and the Second Circuit."

On May 9, 2012, Mr. Morris send a letter to the U.S. Attorney's Office, pointing out Judge Cogan's decision not to provide further clarification and seeking additional assistance

from the Office in answering the six questions I had asked and in helping me provide testimony that would not violate any judicial sealing orders but would communicate the substance of my concern to Congress.

On May 9, 2012, the U.S. Attorney's Office sent the following terse reply: "We have received your letter from earlier today. In connection with the matter to which your letter refers, the government complied in all aspects with the law. We are unable to answer your other questions as doing so would require us either to speculate or to comment on matters that have been sealed by the United States Court of Appeals for the Second Circuit and the United States District Court for the Eastern District of New York."

In light of all this was unable to provide testimony on the subject to the Subcommittee last year. On May 10, 2012, I sent a letter to the Subcommittee informing it what had happened.[296]

This year I was again invited to provide testimony to the subcommittee, including a specific request that I provide information (if possible) about the *Doe* case.[297] Accordingly, in light of this request, on April 11, 2013, Mr. Morris sent a letter on my behalf to the U.S. Attorney's Office. The letter included a full draft of my testimony and requested that the Office advise if the testimony was covered by any sealing order, particularly in light of the fact that many documents in the *Doe* case had recently been unsealed. The letter also requested the Office's assistance in confirming whether or not the recounting of the facts in the *Doe* case was accurate.

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[296] *See* Letter from Paul G. Cassell to Hon. Lamar Smith, Chairman, Comm. on the Judiciary (May 10, 2012), *reprinted in* PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES TO PROTECT THE RIGHTS OF CRIME VICTIMS: HRNG BEFORE THE SUBCOMM. ON THE CONSTITUTION OF THE HOUSE JUDICIARY COMM., Serial No. 112-113 (Apr. 26, 2012), at p. 202. I discuss these circumstances at greater length below.

[297] Letter from Trent Franks, United States Congress, to Professor Paul G. Cassell (Apr. 5, 2013).

On April 18, 2013, the Office sent back a short (two-sentence) letter to Mr. Morris, indicating that it could not give any advice on my testimony. This response was at odds with the response that the Office had sent the previous year (in the April 19, 2012 letter), in which at that time the Office claimed that delivering my testimony would have been (at that time) in violation of the Second Circuit's sealing order and was inaccurate. Now the Office claims that it cannot advise on these same subjects. As a result, I have made my own determination that I can provide this information to the Subcommittee because it all relies on public record information, as indicated by the extensive footnotes attached to the testimony. I also believe that it is accurate, in view of the U.S. Attorney's Office's unwillingness to contest any of the facts discussed.

For all the reasons outlined above, it continues to be my view that the U.S. Attorney's Office has not complied with crime victims' rights statutes in this case – specifically the CVRA and the MVRA. And more important given the subject on this hearing, based on this fact, it continues to be my view that it is more desirable now than ever to elevate the prominence of crime victims' rights by placing them into the Constitution.

The Subcommittee should, however, have not merely my thoughts on this case but rather full information about it in reaching its own conclusions. Accordingly, the Subcommittee may wish to send an inquiry to the U.S. Attorney's Office asking it to provide information on how it has handled crime victims' rights in this case – information that could then form part of the Subcommittee's record.

The urgency of the having the U.S. Attorney's Office explain itself only increases given the fact that the CVRA violations are not confined to earlier events, but are on-going. Every day that the Office withholds notice from the victims in this case about the continuing proceedings that are occurring in this case is a day in which the Office is violating the CVRA. The

Subcommittee should inquire into what appears to be on-going violations of important federal crime victims' statutes.

V. CONCLUSION

As explained in this testimony, H.J. Res. 40, the proposed Victims' Rights Amendment, draws upon a considerable body of crime victims' rights enactments, at both the state and federal levels. Many of the provisions in the VRA are drawn word-for-word from these earlier enactments, particularly the federal CVRA. In recent years, a body of case law has developed surrounding these provisions. This testimony has attempted to demonstrate how these precedents provide a sound basis for interpreting the scope and meaning of the Victims' Rights Amendment. This testimony has also tried to provide a real world example of how even crime victims' rights protected by federal statute can be ignored – and are continuing to be ignored.

The existence of precedents interpreting crime victims' provisions may prove important. In the past, some legal scholars have opposed a Victims' Rights Amendment, claiming that it would somehow be unworkable or lead to dire consequences. Such opposition tracks general opposition to victims' rights reforms, even though the real-world experience with the reforms is quite positive. For example, one careful scholar in the field of victim impact statements, Professor Edna Erez, comprehensively reviewed the relevant empirical literature and concluded that the actual experience with victim participatory rights "suggests that allowing victims' input into sentencing decisions does not raise practical problems or serious challenges from the defense. Yet there is a persistent belief to the contrary, particularly among legal scholars and professionals."[298] Erez attributed the differing views of the social scientists (who had actually collected data on the programs in action) and the legal scholars primarily to "the socialization of

[298] Edna Erez, *Victim Participation in Sentencing: And the Debate Goes On . . .* , 3 INT'L REV. OF VICTIMOLOGY 17, 28 (1994); *accord* Deborah P. Kelly & Edna Erez, *Victim Participation in the Criminal Justice System*, *in* VICTIMS OF CRIME 231, 241 (Robert C. Davis et al. eds., 2d ed. 1997).

the latter group in a legal culture and structure that do not recognize the victim as a legitimate party in criminal proceedings."[299]

The developing case law under federal and state victims' rights enactments may help change that socialization, leading legal scholars and criminal justice practitioners to generally accept a role for crime victims. Crime victims' rights are now clearly established throughout the country (even if the implementation of these rights is uneven and still leaves something to be desired, even in federal cases). In tracing the language used in the Victims' Rights Amendment to those earlier enactments, this testimony may help lay to rest an argument that is sometimes advanced against a crime victims' rights amendment: that courts will have to guess at the meaning of its provisions. Any such argument would be at odds with the experience in federal and state courts over the last several decades, in which sensible constructions have been given to victims' rights protections. If a Victims' Rights Amendment were to be adopted in this country, there is every reason to believe that courts would construe it in the same commonsensical way, avoiding undue burdens on the nation's criminal justice systems while helping to protect the varied and legitimate interests of crime victims.

[299] Erez, *supra* note 242, at 29; *see also* Cassell, *supra* note 3, at 533-34; Edna Erez & Leigh Roeger, *The Effect of Victim Impact Statements on Sentencing Patterns and Outcomes: The Australian Experience*, 23 J. CRIM. JUSTICE 363, 375 (1995).