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 here today as the Ronald N. Boyce Presidential Professor of Criminal Law from the S.J. Quinney College of Law at the University of Utah to testify in support of House Joint Resolution 106. Introduced by Representatives Trent Franks (R-AZ) and Jim Costa (D-CA), House Joint Resolution 106 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* symposium regarding the VRA.[2] There, I argued that the Constitution should be 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

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[1] *Compare, e.g.*, Steven J. Twist & Daniel Seiden, *The Proposed Victims' Rights Amendment: A Brief Point/Counterpoint*, 5 PHOENIX L. REV. (forthcoming 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.

[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.

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 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 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]

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

[5] This section draws upon the following articles: 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.

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 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

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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.

[11] *Id.* at 63.

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' 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

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[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).
[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).

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.

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

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[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).
[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)).

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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> 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

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[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.
[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.).

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 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,

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[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).
[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).

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 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

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[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.
[59] *Id.*

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 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

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[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).
[65] § 3771.
[66] *Id.* § 3771(c).

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.

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

[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).

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 Justice Department's files in the district court.[79] So they did—only to lose again in the district

[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).
[79] *Id.* at 1316-17.

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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[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.

III. THE PROVISIONS OF THE VICTIMS' RIGHTS AMENDMENT

[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.*

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.[95] 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 March 2012, Representatives Trent Franks (R-AZ) and Jim Costa (D-CA) introduced the VRA as H.R.J. Res. 106.[96] 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 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 harmed by the commission of an act, which, if committed by a competent adult, would constitute a crime.
>
> SECTION 3. . . . This article shall take effect on the 180th day after the date of its ratification.[97]

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

[95] NAT'L VICTIMS' CONST. AMENDMENT PASSAGE, http://www.nvcap.org/ (last visited Mar. 22, 2012). This organization is a sister organization to NVCAN and supports the passage of a Victims' Rights Amendment. *Id.*
[96] H.R.J. Res. 106, 112th Cong. (2012).
[97] *Id.*

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."[98] While the Constitution does draw lines in some situations,[99] ideally crime victims' rights would extend to victims of both violent and property offenses. The previous limitation appeared to be a political compromise.[100] There appears to be no principled reason why victims of economic crimes should not have the same rights as victims of violent crimes.[101]

The VRA defines the crime victims who receive rights in Section 2 of the amendment. This definition is discussed below.[102]

The VRA also extends *rights* to these crime victims. The enforceable nature of the rights is discussed below as well.[103]

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[98] 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).

[99] 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.

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

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

[102] *See infra* Part III.B.

. . . 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"[104] and that "justice, though due to the accused, is due to the accuser also."[105] 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.[106] 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."[107] 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."[108]

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 the victim, or the release of personal identifying or locating information about the victim."[109] 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

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[103] *See infra* notes 212-16 and accompanying text.
[104] Morris v. Slappy, 461 U.S. 1, 14 (1983).
[105] Snyder v. Massachusetts, 291 U.S. 97, 122 (1934).
[106] *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).
[107] ARIZ. CONST. art. II, § 2.1(A)(1).
[108] 18 U.S.C. § 3771(a)(8) (2006).
[109] Kyl et al., *supra* note 39, at 614.

crime victim's motion for three months raised fairness issues.[110] 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.[111] 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.[112] 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.[113]

The CVRA rights of victims to be treated with respect for their dignity and privacy have also been applied in various settings.[114] Trial courts have used the rights to prevent disclosure of sensitive materials to defense counsel[115] and to the public,[116] particularly in extortion cases where disclosure of the material would subject the victim to precisely the harm threatened by the defendant.[117] 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.[118] Still another district court used 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.[119]

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

[110] *In re* Simons, 567 F.3d 800, 801 (6th Cir. 2009).
[111] 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).
[112] United States v. Mitchell, No. 2:08CR125DAK, 2009 WL 3181938, at *8 n.3 (D. Utah Sept. 28, 2009).
[113] United States v. Heaton, 458 F. Supp. 2d 1271, 1272-73 (D. Utah 2006).
[114] *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).
[115] United States v. Darcy, No. 1:09CR12, 2009 WL 1470495, at *1 (W.D.N.C. May 26, 2009).
[116] 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).
[117] United States v. Robinson, Cr. No. 08-10309-MLW, 2009 WL 137319, at *1-3 (D. Mass. Jan. 20, 2009).
[118] United States v. Spensley, No. 09-CV-20082, 2011 WL 165835, at *1-2 (C.D. Ill. Jan. 19, 2011).
[119] 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).

This preamble was authored by Professor Laurence Tribe of Harvard Law School.[120] 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.[121] For example, just as a defendant possesses a right to speedy trial,[122] 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.[123] 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.[124] 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 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'

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[120] *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).
[121] *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).
[122] U.S. CONST. amend. VI.
[123] *See* Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B5.
[124] *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").

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.[125] Since the passage of the Fourteenth Amendment,[126] however, the great bulk of criminal procedure rights have been "incorporated" into the Due Process Clause and thereby made applicable in state proceedings.[127]

It is true that plausible arguments could be made for trimming the reach of incorporation doctrine.[128] 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 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

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[125] *See* Barron *ex rel.* Tiernan v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).
[126] U.S. CONST. amend. XIV.
[127] U.S. CONST. amend. V.; *see, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968); Malloy v. Hogan, 378 U.S. 1 (1964).
[128] *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).

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.[129]

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.[130] 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.

It is important to emphasize that the amendment would establish a floor—not a ceiling—for crime victims' rights[131] 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.[132]

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[129] NAT'L GOVERNORS ASS'N, POLICY 23.1 (1997).
[130] *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.").
[131] *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.").
[132] *See* Michigan v. Long, 463 U.S. 1032, 1041 (1983).

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.[133] Even larger percentages of failure to provide required notices were found in a survey of various state criminal justice systems.[134] Distressingly, the same survey found that racial minority victims were less likely to have been notified than their white counterparts.[135]

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.[136] Similar formulations are found in state constitutional amendments. For instance, the California State Constitution promises crime victims "reasonable notice" of all public proceedings.[137]

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

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[133] U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 73, at 82.
[134] National Victim Center, *Comparison of White and Non-White Crime Victim Responses Regarding Victims' Rights*, *in* BELOOF, CASSELL & TWIST, *supra* note 1, at 631.
[135] *Id.*
[136] 18 U.S.C. § 3771(a)(2) (2006).
[137] CAL. CONST. art. I, § 28(b)(7).

victims of the crime contained in the charges, except as otherwise provided in this chapter."[138] The initial notice must contain information about "electing to receive notice of subsequent important criminal justice hearings."[139] 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.[140] 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.[141]

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.[142] 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.[143]

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[138] 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).

[139] § 77-38-3(2). The notice will also contain information about other rights under the victims' statute. *Id.*

[140] *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.*

[141] *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.*

[142] United States v. Peralta, No. 3:08cr233, 2009 WL 2998050, at *1-2 (W.D.N.C. Sept. 15, 2009).

[143] 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).

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.[144]

Several strong reasons support this right, as Professor Doug Beloof and I have argued at length elsewhere.[145] 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."[146]

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.[147] 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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> Testifying can be a harrowing experience, especially for children, those subjected to violent or terrifying ordeals, or those whose loved ones have been

[144] HERRINGTON ET AL., *supra* note 10, at 80.
[145] *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).
[146] Ken Eikenberry, *Victims of Crimes/Victims of Justice*, 34 WAYNE L. REV. 29, 41 (1987).
[147] *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).

> 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.[148]

Without a right to attend trials, "the criminal justice system merely intensifies the loss of control that victims feel after the crime."[149] 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."[150] One crime victim put it more directly: "All we ask is that we be treated just like a criminal."[151] In this connection, it is worth remembering that defendants never suggest that *they* could be validly excluded from the trial if the prosecution requests *their* sequestration. Defendants frequently take full advantage of their right to be in the courtroom.[152]

To ensure that victims can attend court proceedings, the Victims' Rights Amendment extends them this unqualified right. Many state amendments have similar provisions.[153] 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.[154]

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[148] HERRINGTON ET AL., *supra* note 10, at 80.
[149] Deborah P. Kelly, *Victims*, 34 WAYNE L. REV. 69, 72 (1987).
[150] Marlene A. Young, *A Constitutional Amendment for Victims of Crime: The Victims' Perspective*, 34 WAYNE L. REV. 51, 58 (1987).
[151] *Id.* at 59 (quoting Edmund Newton, *Criminals Have All the Rights*, LADIES' HOME J., Sept. 1986).
[152] *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.").
[153] *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).
[154] *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).

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.[155]

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.[156] When court proceedings are closed to the public pursuant to these provisions, a victim will have no right to attend. Finally, the victims right to attend 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."[157] 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'

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[155] *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").

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

[157] 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).

rights. Defendants have a right to be present during criminal proceedings, which stems from both the Confrontation and Due Process Clauses of the Constitution.[158] Courts have consistently held that these constitutional rights do not confer on defendants any right to engage in disruptive behavior.[159]

> *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 involving release, plea, or sentencing."[160] A number of states have likewise added provisions to their state constitutions allowing similar victim participation.[161]

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

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

[159] *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).

[160] 18 U.S.C. § 3771(a)(4) (2006).

[161] *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).

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."[162]

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 a case before trial must be submitted to the trial court for approval.[163] If the court believes that the bargain is not in the interest of justice, it may reject it.[164] 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."[165] 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.[166]

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[162] 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).
[163] *See generally* BELOOF, CASSELL & TWIST, *supra* note 1, at 422 (discussing this issue).
[164] *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").
[165] HERBERT S. MILLER ET AL., PLEA BARGAINING IN THE UNITED STATES 70 (1978).
[166] BELOOF, CASSELL & TWIST, *supra* note 1, at 423.

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, 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.[167] 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.[168] 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

[167] *See, e.g.*, FED. R. EVID. 32(i)(4)(A); UTAH R. CRIM. P. 22(a).
[168] Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611 (2009).

fairness of sentencing.[169] 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.[170]

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 consideration.[171] Defendants can respond to the information that victims provide in appropriate ways, such as providing counter-evidence.[172]

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.[173]

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.

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[169] *Id.* at 619-25.

[170] *Id.* at 615; *see also* Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282, 299-305 (2003).

[171] 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).

[172] *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).

[173] 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)).

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.[174]

. . . 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.[175] The defendant's right is designed, *inter alia*, "to minimize anxiety and concern accompanying public accusation" and "to limit the possibilities that long delay will impair the ability of an accused to defend himself."[176] 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.[177]

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

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[174] *See* FED. R. CRIM. P. 43(b)(3) (noting circumstances in which disruptive conduct can lead to defendant's exclusion from the courtroom).
[175] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . . .").
[176] Smith v. Hooey, 393 U.S. 374, 378 (1969) (citing United States v. Ewell, 383 U.S. 116, 120 (1966)).
[177] Barker v. Wingo, 407 U.S. 514, 519 (1972).

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.'"[178] 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.[179] 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 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."[180] Victims cannot heal from the trauma of the crime until the trial is over and the matter has been concluded.[181]

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.[182] A number of states have already established similar protections for victims.[183]

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.[184] 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.*

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[178] LAFAVE ET. AL., *supra* note 157, at § 18.1(b) (footnote omitted).
[179] *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).
[180] Telephone Interview with Betty Mueller, Victim/Witness Coordinator, Weber Cnty. Attorney's Office (Oct. 6, 1993).
[181] *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.").
[182] 18 U.S.C. § 3771(a)(7) (2006).
[183] *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.
[184] *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).

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.[185] 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.[186] 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 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.[187] Rather, the circumstances of the defendant's assertion of the right is given "strong evidentiary weight" in evaluating his claims.[188] 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."[189] 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

[185] Barker v. Wingo, 407 U.S. 514, 530-33 (1972).
[186] *See id. See generally* LAFAVE ET AL., *supra* note 157, at § 18.2.
[187] *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.").
[188] *Id.* at 531-32.
[189] *Id.* at 532.

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.[190] 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 insufficient reason," and accordingly the Task Force recommended that the "reasons for any granted continuance . . . be clearly stated on the record."[191]

. . . 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.[192] Authorities soon placed him in jail for violating that order.[193] He later posted bail and tracked McHugh to a relative's apartment, where on January 20, 1994,

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[190] Pub. L. No. 96-43, 93 Stat. 327 (codified as amended at 18 U.S.C. §§ 3161-74) (2008).

[191] 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").

[192] 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).

[193] *See id.*

he fatally shot both Colleen McHugh and himself.[194] No one had notified McHugh of Boettcher's release from custody.[195]

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.[196] The administrative burdens associated with such notification requirements have recently been minimized by technological 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.[197]

. . . 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."[198] 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."[199]

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.[200]

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[194] *Id.*
[195] *See id.* (providing this and other helpful examples).
[196] *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").
[197] *See About VINELink*, VINELINK, https://www.vinelink.com/ (last visited on Mar. 23, 2012).
[198] 18 U.S.C. § 3771(a)(1) (2006).
[199] CAL. CONST. art. I, § 28(b)(2)-(3).
[200] 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.

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 order.[201] For instance, in many domestic violence cases, courts may release a suspected offender on the condition that he[202] 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 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"),[203] Congress required federal courts to enter a restitution order in favor of victims for crimes of violence. Section 3663A states that "[n]otwithstanding any other provision of law, when sentencing a defendant convicted of [a crime of violence as defined in 18 U.S.C. § 16] . . . the court *shall* order . . . that the defendant make restitution to the victim of the offense."[204] In justifying this approach, the Judiciary Committee explained:

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[201] *See generally* BELOOF, CASSELL & TWIST, *supra* note 1, at 310-23.
[202] Serious domestic violence defendants are predominantly, although not exclusively, male.
[203] 18 U.S.C. §§ 3663A, 3664 (2006).
[204] § 3663A(a)(1) (emphasis added).

> 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.[205]

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."[206] 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.[207]

The Victims' Rights Amendment would effectively operate in much the same fashion as the MVRA, although it would elevate the importance of restitution.[208] 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 the means to make full restitution payments. Accordingly, the courts can establish an appropriate

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[205] 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).
[206] S. Rep. 104-179, at 13.
[207] CAL. CONST. art. I, § 28(b)(13).
[208] 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 have received information about what I believe to be failure of the restitution statutes in a federal case and will supplement my testimony to the Committee with this information if I am able to confirm that its release does not violate any judicial sealing orders.

repayment schedule and enforce it during the period of time in which the offender is under the court's jurisdiction.[209] 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.[210] 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.[211]

> *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]."[212]

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

[209] *Cf.* 18 U.S.C. § 3664 (2006) (establishing restitution procedures).
[210] *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).
[211] *See* § 3663A.
[212] § 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.[213]

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.[214] 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.[215] In Arizona, for example, the courts have allowed an unindicted co-conspirator to take advantage of a victim's provision.[216] 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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[213] *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).

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

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

[216] *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.[217]

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.[218] 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

[217] *See* Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301, 350 (1987).
[218] 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.[219] 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.[220] 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.[221]

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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[219] *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).

[220] *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.").

[221] *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,[222] Fifth Amendment rights,[223] and Sixth Amendment rights.[224] 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.[225] 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.[226] To help provide legal

[222] Mapp v. Ohio, 367 U.S. 643 (1961).
[223] Arizona v. Fulminante, 499 U.S. 279 (1991).
[224] Gideon v. Wainwright, 372 U.S. 335 (1963).
[225] 18 U.S.C. § 3771(d)(3) (2006).
[226] *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.[227]

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 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."[228] 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 offense has been committed."[229] 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]."[230] A ruling by

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[227] *See, e.g.*, § 3771(d)(1); UTAH CODE ANN. § 77-38-9(6) (West, Westlaw through 2011 Legis. Sess.).
[228] ARIZ. CONST. art. II, § 2.1(C).
[229] *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).
[230] 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).

the Arizona Court of Appeals, however, invalidated that definition, concluding that the legislature had no power to restrict the scope of the rights.[231] 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 harmed by the commission of a crime. This definition is somewhat broader than the definition of victim found in the CVRA, which defines "victim" as a person "directly *and proximately* harmed" by a federal crime.[232]

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.[233] 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.[234] Whatever the merits of this conclusion as a matter of interpreting the CVRA, it makes little sense as a matter of public policy. The district judge should have heard the Antrobuses before imposing sentence.[235] The Victims' Rights Amendment adopts a broader approach in requiring the victim to establish only direct harm.

In defining a victim as a person suffering direct harm, the VRA follows a federal statute that has been in effect for many years. The Crime Control Act of 1990 defined "victim" as "a person that has suffered *direct* physical, emotional, or pecuniary *harm* as a result of the commission of a crime."[236]

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[231] 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.").
[232] 18 U.S.C. § 3771(e) (2006) (emphasis added).
[233] *See supra* notes 73-82 and accompanying text.
[234] United States v. Hunter, No. 2:07CR307DAK, 2008 WL 53125, at *5 (D. Utah 2008).
[235] *See* Cassell, *supra* note 169, at 616-19.
[236] 42 U.S.C.A. § 10607(e)(2) (Westlaw through 2012 P.L. 112-89) (emphasis added).

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.[237] 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,[238] the Victims' Rights Amendment would—like other constitutional protections—extend to corporate entities that were crime victims.[239] 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 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.[240] 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

[237] *See, e.g.*, UTAH CODE ANN. § 77-38-2(1)(a) (West, Westlaw through 2011 Legis. Sess.) (implementing UTAH CONST. art. I, § 28).
[238] *See id.*
[239] *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010) (First Amendment rights extend to corporate entities).
[240] *See, e.g.*, Brian J. Willett, *Juvenile Law vs. Criminal Law: An Overview*, 75 TEX. B.J. 116 (2012).

fact by extending rights to victims in both adult criminal proceedings and juvenile delinquency proceedings. Many other victims' enactments have done the same thing.[241]

IV. CONCLUSION

As explained in this testimony, 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 attempts to demonstrate how this law provides a sound basis for interpreting the scope and meaning of the Victims' Rights Amendment.

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."[242] 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

[241] *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).

[242] 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."[243]

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). 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.

[243] 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).

Exhibit A

Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment

Paul G. Cassell[*]

INTRODUCTION

The Victims' Rights Amendment will likely be the next amendment to our Constitution. Currently pending before Congress, the Amendment establishes a bill of rights for crime victims, protecting their basic interests in the criminal justice process. Under the Amendment, victims of violent crimes would have the rights to receive notice about court hearings, to attend those hearings, to speak at appropriate points in the process, to receive notification if an offender is released or escapes, to obtain an order of restitution from a convicted offender, and to require the court's consideration of their interest in a trial free from unreasonable delay.[1] The Amendment has attracted considerable bipartisan support, as evidenced by its endorsement by the President[2] and strong approval in the Senate Judiciary Committee at the end of the 104th Congress.[3] Based on this vote, the widely respected *Congressional Quarterly* has identified the Amendment as perhaps the

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[1]*See* S.J. Res. 3, 106th Cong. (1999); *see also* S.J. Res. 44, 105th Cong. (1998) (adopting same list of rights one year earlier). The current text of the Amendment is reprinted as Appendix A to this Article.

[2]*See Announcement by President Bill Clinton with Introductions by Vice President Albert Gore and Remarks by Attorney General Janet Reno and Other Speakers on Victims' Rights*, June 25, 1996, *available in* LEXIS, Federal News Service: *see also* Paul G. Cassell, *Make Amends to Crime Victims*, WALL ST. J., July 20, 1999, at A22 (noting recent endorsement by Vice President Gore).

[3]*See* S. REP. NO. 105-409, at 37 (1998) (approving Amendment by 11-to-6 vote). As of this writing, in the 105th Congress the Amendment has been approved by the Subcommittee on the Constitution, Federalism, and Property Rights of the Senate Judiciary Committee.

"pending constitutional amendment with the best chance of being approved by Congress in the foreseeable future."[4]

As the Victims' Rights Amendment has moved closer to passage, defenders of the old order have manned[5] the barricades against its adoption. In Congress, the popular press, and the law reviews, they have raised a series of philosophical and practical objections to protecting victims' rights in the Constitution. These objections run the gamut, from the structural (the Amendment will change "basic principles that have been followed throughout American history"[6]), to the pragmatic ("it will lay waste to the criminal justice system"[7]), to the aesthetic (it will "trivialize" the Constitution[8]). In some sense, such objections are predictable. The prosecutors, defense attorneys, and judges who labor daily in the criminal justice vineyards have long struggled to hold the balance true between the State and the defendant. To suddenly find third parties—rather, third persons who are not even parties—threatening to storm the courthouse gates provokes, at least from some, an understandable defensiveness. If nothing else, victims promise to complicate life in the criminal justice system. But more fundamentally, if these victims' pleas for recognition are legitimate, what does that say about how the system has treated them for so many years?

Others in this Symposium have touched on overarching questions presented by the victims' challenge to the structure of our criminal justice

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[4]Dan Carney, *Crime Victims' Amendment Has Steadfast Support, But Little Chance of Floor Time*, CONG. QUART., July 30, 1998, at 1883.

[5]I use the term "man" provocatively because certain aspects of the defense resist efforts by feminists to provide justice to victims of rape and domestic violence, who are disproportionately women. *See, e.g.*, Beverly Harris Elliott, President of the National Coalition Against Sexual Assault, *Balancing Justice: How the Amendment Will Help All Victims of Sexual Assault* (visited March 6, 1999) <http://www.nvc.org/newsltr/sexass2.htm> (arguing that Amendment would encourage victims to report and assist in prosecution of acts of sexual violence); Joan Zorza, *Victims' Rights Amendment Empowers All Battered Women* (visited March 6, 1999) <http://www.nvc.org/newsltr/battwom.htm> (stating that constitutional amendment will help battered women by rebalancing criminal justice system); *see also infra* note 258 and accompanying text (discussing women and children who have died from lack of notice of offender's release).

[6]*A Proposed Constitutional Amendment to Protect Victims of Crime: Hearings on S.J. Res. 6 Before the Senate Comm. on the Judiciary*, 105th Cong. 141 (1997) [hereinafter *1997 Senate Judiciary Comm. Hearings*] (letter from various law professors opposing Amendment).

[7]*Proposals for a Constitutional Amendment to Provide Rights for Victims of Crime: Hearings on H.J. Res. 173 & H.J. Res. 174 Before the House Comm. on the Judiciary*, 104th Cong. 143 (1996) [hereinafter *1996 House Judiciary Comm. Hearings*] (statement of Ellen Greenlee, President, National Legal Aid and Defender Association).

[8]*A Proposed Constitutional Amendment to Establish a Bill of Rights for Crime Victims: Hearings on S.J. Res. 52 Before the Senate Comm. on the Judiciary*, 104th Cong. 101 (1996) [hereinafter *1996 Senate Judiciary Comm. Hearings*] (statement of Bruce Fein).

system. Professor Douglas Beloof's memorable paper persuasively demonstrates that a full appreciation of the rights of crime victims requires a "third model" that does not fit comfortably with the existing prosecution- and defendant-oriented paradigms generally used to understand the criminal process.[9] Indeed, as Professor William Pizzi's thought-provoking essay suggests, the very notion of victims having some role to play in the system is mind-boggling to professionals in the system who cannot even envision where a victim might sit in the courtroom.[10] Similar themes come to mind in reading Professor Susan Bandes's article, which skillfully describes the panoply of standing barriers that have been raised to prevent victims from obtaining admission to criminal proceedings.[11] Furthermore, Stephen Twist's insightful essay identifies the ways in which the system's zeal in protecting defense and prosecution interests has, in some ways, sown the seeds of its own destruction.[12]

My aim here is not to visit such intriguing general issues about victims in the criminal justice process, but rather to focus on how victims' rights would operate under one concrete proposal—the Victims' Rights Amendment. In particular, this Article analyzes the objections that the Amendment's opponents have raised. It should come as no great surprise that claims the Amendment simultaneously would "change basic principles that have been followed throughout American history," "lay waste to the criminal justice system," and—for good measure—"trivialize" the Constitution are not all true. This Article attempts to demonstrate that, in fact, none of these contradictory assertions is supported. A fair-minded look at the Amendment confirms that it will not "lay waste" to the system, but instead will build upon and improve it—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 divide into three categories, which this Article analyzes in turn. Part I reviews normative objections to the Amendment—that is, objections to the desirability of the rights. The Part begins 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

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[9]*See* Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289 *passim*.

[10]*See* William T. Pizzi, *Victims' Rights: Rethinking Our "Adversary System,"* 1999 UTAH L. REV. 349 *passim*.

[11]*See* Susan Bandes, *Victim Standing*, 1999 UTAH L. REV. 331 *passim*.

[12]*See* Steven J. Twist, *The Crime Victims' Rights Amendment and Two Good and Perfect Things*. 1999 UTAH L. REV. 369 *passim*.

victim's right to a trial free from unreasonable delay. These objections lack merit. Part I concludes 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 cost of victims' rights regimes in the states.

Next, Part II considers 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, as advanced most prominently and capably in law review articles by Professor Robert Mosteller here and elsewhere,[13] misconceives the undeniable practical problems that victims face in attempting to secure their rights without federal constitutional protection.

Part III then turns to structural objections to the Amendment—claims that victims' rights are not properly constitutionalized, as advanced skillfully by Professor Henderson in this Symposium[14] and by others elsewhere. Contrary to this view, protection of the rights 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.

Finally, the Article concludes by examining the nature of the opposition to the Victims' Rights Amendment. Victims are not barbarians seeking to dismantle the pillars of wisdom from previous ages. Rather, they are citizens whose legitimate interests require recognition in any proper system of criminal justice. The Victims' Rights Amendment therefore deserves our full support.

I. NORMATIVE CHALLENGES

The most basic level at which the Victims' Rights Amendment could be disputed is the normative one: victims' rights are simply undesirable. Few of the objections to the Amendment, however, start from this premise. Instead,

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[13]*See, e.g.*, Robert P. Mosteller, *The Unnecessary Victims' Rights Amendment*, 1999 UTAH L. REV. 443 *passim* [hereinafter Mosteller, *Unnecessary Amendment*]; *see also* Robert P. Mosteller, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691, 1692 (1997) [hereinafter Mosteller, *Recasting the Battle*].

[14]*See* Lynne Henderson, *Revisiting Victim's Rights*, 1999 UTAH L. REV. 383 *passim*.

the vast bulk of the opponents flatly concede the need for victim participation in the criminal justice system. For example, the senators on the Senate Judiciary Committee who dissented from supporting the Amendment[15] began by agreeing that "[t]he treatment of crime victims certainly is of central importance to a civilized society, and we must never simply 'pass by on the other side.'"[16] Additionally, various law professors who sent a letter to Congress opposing the Amendment similarly begin by explaining that they "commend and share the desire to help crime victims" and that "[c]rime victims deserve protection."[17] Further, Professor Mosteller agrees that "every sensible person can and should support victims of crime" and that the idea of "guarantee[ing] participatory rights to victims in judicial proceedings . . . is salutary."[18]

The principal critics of the Amendment agree not only with the general sentiments of victims' rights advocates but also with many of their specific policy proposals. Striking evidence of this agreement comes from the federal statute proposed by the dissenting senators, which would extend to victims in the federal system most of the same rights provided in the Amendment.[19] Other critics, too, have suggested protection for victims in statutory rather than constitutional terms.[20] In parsing through the relevant congressional hearings and academic literature, many of the important provisions of the Amendment appear to garner wide acceptance. Few disagree, for example, that victims of violent crime should receive notice that the offender has escaped from custody and should receive restitution from an offender. What is most striking, then, about debates over the Amendment is not the scattered points of disagreement, but rather the abundant points of *agreement*.[21] This harmony suggests that the Amendment satisfies a basic requirement for a constitutional amendment—that it reflect values widely shared throughout

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[15]Unless otherwise specifically noted, I will refer to the minority views of Senators Leahy, Kennedy, and Kohl as the "dissenting Senators," although a few other Senators also offered their dissenting views.

[16]S. REP. NO. 105-409, at 50 (1998) (minority views of Sens. Leahy, Kennedy, and Kohl).

[17]*1997 Senate Judiciary Comm. Hearings*, *supra* note 6, at 140–41 (letter from various law professors).

[18]Mosteller, *Recasting the Battle*, *supra* note 13, at 1692.

[19]*See* Crime Victims Assistance Act, S. 1081, 105th Cong., 1st Sess. (1997) (providing victims with enhanced rights in trial process); *see also* S. REP. NO. 105-409, at 77 (1998) (minority views of Sens. Leahy and Kennedy) (defending this statutory protection of victims' rights).

[20]*See, e.g.*, *1997 Senate Judiciary Comm. Hearings*, *supra* note 6, at 141 (letters from various law professors) ("Crime victims deserve protection, but this should be accomplished by statutes, not a constitutional amendment.").

[21]*See generally* Twist, *supra* note 12, at 378 (noting frequency with which opponents of Amendment endorse its goals).

society. There is, to be sure, normative disagreement about some of the proposed provisions in the Amendment, disagreements analyzed below. But the natural tendency to focus on points of conflict should not obscure the substantial points of widespread agreement.

While there exists near consensus on the desirability of many of the values reflected in the Amendment, a few rights are disputed on grounds that can be conveniently divided into two groups. Some rights are challenged as unfairly harming defendants' interests in the process, others as harming interests of prosecutors. That the Amendment has drawn fire from some on both sides might suggest that it has things about right in the middle. Contrary to these criticisms, however, the Amendment does not harm the legitimate interests of either side.

A. Defendant-Oriented Challenges to Victims' Rights

Perhaps the most frequently repeated claim against the Amendment is that it would harm defendants' rights. Often this claim is made in general terms, relying on little more than the reflexive view that anything good for victims must be bad for defendants. But, as the general consensus favoring victims' rights suggests, rights for victims need not come at the expense of defendants. Strong supporters of defendants' rights agree. Professor Laurence Tribe, for example, has concluded that the proposed Amendment is "a carefully crafted measure, adding victims' rights that can coexist side by side with defendants'."[22] Similarly, Senator Joseph Biden reports: "I am now convinced that no potential conflict exists between the victims' rights enumerated in [the Amendment] and any existing constitutional right afforded to defendants . . . ."[23] A recent summary of the available research on the purported conflict of rights supports these views, finding that victims' rights do not harm defendants:

> [S]tudies show that there "is virtually no evidence that the victims' participation is at the defendant's expense." For example, one study, with data from thirty-six states, found that victim-impact statutes resulted in only a negligible effect on sentence type and length. Moreover, judges interviewed in states with legislation granting rights to the crime victim indicated that the balance was not improperly tipped in favor of the victim. One article studying victim participation in plea bargaining found that

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[22]Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B5. For a more detailed exposition of Professor Tribe's views, see *1996 House Judiciary Comm. Hearings*, *supra* note 7, at 238 (letter from Prof. Tribe).

[23]S. REP. NO. 105-409, at 82 (1998) (additional views of Sen. Biden).

> such involvement helped victims "without any significant detrimental impact to the interests of prosecutors and defendants." Another national study in states with victims' reforms concluded that: "[v]ictim satisfaction with prosecutors and the criminal justice system was increased without infringing on the defendant's rights."[24]

Given these empirical findings, it should come as no surprise that claims that the Amendment would injure defendants rest on a predicted parade of horribles, not any real-world experience. Yet this experience suggests that the parade will never materialize, particularly given the redrafting of the proposed amendment to narrow some of the rights it extends.[25] A careful

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[24]Chief Justice Richard Barajas & Scott A. Nelson, *The Proposed Crime Victims' Federal Constitutional Amendment: Working Toward a Proper Balance*, 49 BAYLOR L. REV. 1, 18–19 (1987) (quoting Deborah P. Kelly, *Have Victim Reforms Gone Too Far—or Not Far Enough?*, 5 CRIM. JUST., Fall 1991, at 28, 28; Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301, 355 (1987)) (internal footnotes omitted).

[25]As originally proposed, the Amendment extended to victims a broad right "[t]o a final disposition of the proceedings relating to the crime free from unreasonable delay." S.J. Res. 6, 105th Cong. § 1 (1997). It now provides victims a narrower right to "consideration of the interest of the victim that any trial be free from unreasonable delay." S.J. Res. 3, 106th Cong. § 1 (1999). This narrower formulation, limited to a "trial," avoids the objection that an open-ended right to a speedy disposition could undercut a defendant's post-trial, habeas corpus rights, particularly in capital cases. *See, e.g.*, *1997 Senate Judiciary Comm. Hearings*, *supra* note 6, at 155 (statement of Mark Kappelhoof, ACLU Legislative Counsel) (stating that "right of habeas corpus is also threatened under [the Amendment]").

As originally proposed, the Amendment also promised victims a broad right to "be reasonably protected from the accused." S.J. Res. 6, 105th Cong. (1997). It now provides victims a right to have the "safety of the victim [considered] in determining [a] release from custody." S.J. Res. 3, 106th Cong. § 1 (1999). This narrower formulation was apparently designed, in part, to respond to the objection that the Amendment might be construed to hold offenders "beyond the maximum term or even indefinitely if they are found to pose a danger to their victims." *1997 Senate Judiciary Comm. Hearings*, *supra* note 6, at 155 (statement of Mark Kappelhoof, ACLU Legislative Counsel).

Professor Mosteller has argued that these particular changes, and several others like them, were designed to move the Amendment away from providing aid to victims to instead provide nothing but a benefit to prosecutors. *See* Robert P. Mosteller, *Victims' Rights and the Constitution: Moving from Guaranteeing Participatory Rights to Benefiting the Prosecution*, 29 ST. MARY'S L.J. 1053, 1058 (1998). This strikes me as a curious view, given that these changes specifically responded to concerns expressed by advocates of defendants' rights, including Mosteller himself. *See* Mosteller, *Recasting the Battle*, *supra* note 13, at 1707 n.58. More generally, it should be clear that the proposed Amendment is not predicated on the idea of providing benefits to prosecutors. Not only has the Amendment been attacked as harming prosecution interests, *see infra* notes 127–47 and accompanying text, but it does not attempt to achieve such a favorite goal of prosecutors as overturning the exclusionary rule. *Cf.* CAL. CONST. art. I, § 28 (victims' initiative restricting exclusion of evidence); OR. CONST. art. I, § 42 (same), *invalidated*, Armatta v. Kitzhaber, 959 P.2d 49, 64 (Or. 1998) (holding that initiative violated Oregon Constitution's single subject rule). *See generally* PRESIDENT'S TASK

examination of the most-often-advanced claims of conflict with defendants' legitimate interests reveals that any purported conflict is illusory.[26]

1. The Right to Be Heard

Some opponents of the Amendment object that the victim's right to be heard will interfere with a defendant's efforts to mount a defense. At least some of these objections refute straw men, not the arguments for the Amendment. For example, to prove that a victim's right to be heard is undesirable, objectors sometimes claim (as was done in the Senate Judiciary Committee minority report) that "[t]he proposed Amendment gives victims [a] constitutional right to be heard, if present, and to submit a statement at *all* stages of the criminal proceeding."[27] From this premise, the objectors then postulate that the Amendment would make it "much more difficult for judges to limit testimony by victims *at trial*" and elsewhere to the detriment of defendants.[28] This constitutes an almost breathtaking misapprehension of the scope of the rights at issue. Far from extending victims the right to be heard at "all" stages of a criminal case including the trial, the Amendment explicitly limits the right to public "proceedings to determine a conditional release from custody, an acceptance of a negotiated plea, or a sentence."[29] At these three kinds of hearings—bail, plea, and sentencing—victims have compelling reasons to be heard and can be heard without adversely affecting the defendant's rights.

Proof that victims can properly be heard at these points comes from what appears to be a substantial inconsistency by the dissenting senators. While criticizing the right to be heard in the Amendment, these senators simultaneously sponsored federal legislation to extend to victims in the federal

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FORCE ON VICTIMS OF CRIME, FINAL REPORT 24–28 (1982) (urging abolition of exclusionary rule on victim-related grounds).

[26]Until the opponents of the Amendment can establish any conflict between defendants' rights under the Constitution and victims' rights under the Amendment, there is no need to address the subject of how courts should balance the rights in case of conflict. *Cf.* S. REP. NO. 105-409, at 22–23 (1998) (explaining reasons for rejecting balancing language in Amendment); *A Proposed Constitutional Amendment to Protect Crime Victims: Hearings on S.J. Res. 44 Before the Senate Comm. on the Judiciary*, 105th Cong. 45 (1998) [hereinafter *1998 Senate Judiciary Comm. Hearings*] (statement of Prof. Paul Cassell), *discussed in* Mosteller, *Unnecessary Amendment*, *supra* note 13, at 464–65 (discussing how balancing language might be drafted if conflict were to be proven).

[27]S. REP. NO. 105-409, at 66 (1998) (minority views of Sens. Leahy, Kennedy, and Kohl) (emphasis added).

[28]*Id.* (emphasis added).

[29]S.J. Res. 3, 106th Cong. § 1 (1999).

system precisely the same rights.[30] They urged their colleagues to pass their statute in lieu of the Amendment because "our bill provides the very same rights to victims as the proposed constitutional amendment."[31] In defending their bill, they saw no difficulty in giving victims a chance to be heard,[32] a right that already exists in many states.[33]

A much more careful critique of the victim's right to be heard is found in a recent prominent article by Professor Susan Bandes.[34] Like most other opponents of the Amendment, she concentrates her intellectual fire on the victim's right to be heard at sentencing, arguing that victim impact statements are inappropriate narratives to introduce in capital sentencing proceedings.[35] While rich in insights about the implications of "outsider narratives," the article provides no general basis for objecting to a victim's right to be heard at sentencing. Her criticism of victim impact statements is limited to *capital* cases, a tiny fraction of all criminal trials.[36]

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[30]*See* S. 1081, 105th Cong. 1st Sess. § 101 (1997) (establishing right to be heard on issue of detention); *id.* § 121 (establishing right to be heard on merits of plea agreement); *id.* § 122 (establishing enhanced right of allocution at sentencing).

[31]S. REP. NO. 105-409, at 77 (1998) (minority views of Sens. Leahy and Kennedy).

[32]*See, e.g.*, 143 CONG. REC. S8275 (daily ed. July 29, 1997) (statement of Sen. Kennedy) (supporting statute expanding victims' rights to participate in all phases of process); *id.* at S8269 (statement of Sen. Patrick Leahy) (supporting Crime Victims' Assistance Act).

[33]*See* Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1394–96 (collecting citations to states granting victims a right to be heard).

[34]*See* Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 364 (1996).

[35]*See id.* at 390–93.

[36]*See id.* at 392–93. In a recent conversation, Professor Bandes stated that though her article focused on the capital context, she did not intend to imply that victim impact statements ought to be admissible in noncapital cases. Indeed, based on the proponents' argument that victim impact statements by relatives and friends are needed because the homicide victim is, by definition, unavailable, she believes such statements would seem even less defensible in nonhomicide cases. Personal Communication with Susan Bandes, Professor of Law, DePaul University (Dec. 14, 1998). This extension of her argument seems unconvincing, as the case for excluding victim statements is even weaker for noncapital cases. Not only are noncapital cases generally less fraught with emotion, but the sentence is typically imposed by a judge, who can sort out any improper aspects of victim statements. For this reason, even when victim impact testimony was denied in capital cases to juries, courts often concluded that judges could hear the same evidence. *See* Lightbourne v. Dugger, 829 F.2d 1012, 1027 (11th Cir. 1987); State v. Beaty, 762 P.2d 519, 531 (Ariz. 1988); State v. Card, 825 P.2d 1081, 1089 (Idaho 1991); People v. Johnson, 594 N.E.2d 253, 270 (Ill. 1992); State v. Post, 513 N.E.2d 754, 759 (Ohio. 1987). It is also hazardous to generalize about such testimony given the vast range of varying circumstances presented by noncapital cases. *See generally* Stephen J. Schulhofer, *The Trouble with Trials; the Trouble with Us*, 105 YALE L.J. 825, 848–49 (1995) (noting differences between victim participation in capital and noncapital sentencings and concluding that "wholesale condemnation of victim participation under all circumstances is surely

Professor Bandes's objection is important to consider carefully because it presents one of the most thoughtfully developed cases against victim impact statements.[37] Her case, however, is ultimately unpersuasive. She agrees that capital sentencing decisions ought to rest, at least in part, on the harm caused by murderers.[38] She explains that, in determining which murderers should receive the death penalty, society's "gaze ought to be carefully fixed *on the harm they have caused* and their moral culpability for that harm."[39] Bandes then contends that victim impact statements divert sentencers from that inquiry to "irrelevant fortuities" about the victims and their families.[40] But in moving on to this point, she apparently assumes that a judge or jury can comprehend the full harm caused by a murder without hearing testimony from the surviving family members. That assumption is simply unsupportable. Any reader who disagrees with me should take a simple test. Read an actual victim impact statement from a homicide case all the way through and see if you truly learn nothing new about the enormity of the loss caused by a homicide. Sadly, the reader will have no shortage of such victim impact statements to choose from. Actual impact statements from court proceedings are accessible in various places.[41] Other examples can be found in moving accounts written by family members who have lost a loved one to a murder. A powerful example is the collection of statements from families devastated by the Oklahoma City bombing collected in Marsha Kight's affecting *Forever Changed: Remembering Oklahoma City, April 19, 1995.*[42] Kight's compelling book is not unique, as equally powerful accounts

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unwarranted").

[37]Several other articles have also focused on and carefully developed a case against victim impact statements. *See, e.g.*, Donald J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AM. CRIM. L. REV. 233, 235 (1991) (arguing that "the fundamental evil" associated with victim statements is "disparate sentencing of similarly situated defendants"); Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 986–1006 (1985) (outlining why goals of criminal statements do not support victim participation in sentencing). Because Professor Bandes's article is the most current, I focus on it here as exemplary of the critics' position.

[38]*See* Bandes, *supra* note 34, at 398.

[39]*Id.* (emphasis added).

[40]*Id.*

[41]*See, e.g.*, Booth v. Maryland, 482 U.S. 496, 509–15 (1987) (attaching impact statement to opinion); United States v. Nichols, No. 96-CR-68, 1997 WL 790551, at **1–47 (D. Colo. Dec. 29, 1997) (various victim impact statements at sentencing of Terry Nichols); United States v. McVeigh, No. 96-CR-68, 1997 WL 296395, at **1–53 (D. Colo. June 5, 1997) (various victim impact statements at sentencing of Timothy McVeigh); *A Federal Judge Speaks Out for Victims*, AM. LAWYER, Mar. 20, 1995, at 4 (statement by Federal Judge Michael Luttig at the sentencing of his father's murderers).

[42]*See* MARSHA KIGHT, FOREVER CHANGED: REMEMBERING OKLAHOMA CITY, APRIL 19, 1995 (1998).

from the family of Ron Goldman,[43] children of Oklahoma City,[44] Alice Kaminsky,[45] George Lardner Jr.,[46] Dorris Porch and Rebecca Easley,[47] Mike Reynolds,[48] Deborah Spungen,[49] John Walsh,[50] and Marvin Weinstein[51] make all too painfully clear. Intimate third-party accounts offer similar insights about the generally unrecognized, yet far-ranging consequences of homicide.[52]

Professor Bandes acknowledges the power of hearing from victims' families. Indeed, in a commendable willingness to present victim statements with all their force, she begins her article by quoting from the victim impact statement at issue in *Payne v. Tennessee*,[53] a statement from Mary Zvolanek about her daughter's and granddaughter's deaths and their effect on her three-year-old grandson:

> He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie.[54]

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[43]*See* THE FAMILY OF RON GOLDMAN, HIS NAME IS RON: OUR SEARCH FOR JUSTICE (1997).

[44]*See* NANCY LAMB AND CHILDREN OF OKLAHOMA CITY, ONE APRIL MORNING: CHILDREN REMEMBER THE OKLAHOMA CITY BOMBING (1996).

[45]*See* ALICE R. KAMINSKY, THE VICTIM'S SONG (1985).

[46]*See* GEORGE LARDNER JR., THE STALKING OF KRISTIN: A FATHER INVESTIGATES THE MURDER OF HIS DAUGHTER (1995).

[47]*See* DORRIS D. PORCH & REBECCA EASLEY, MURDER IN MEMPHIS: THE TRUE STORY OF A FAMILY'S QUEST FOR JUSTICE (1997).

[48]*See* MIKE REYNOLDS & BILL JONES, THREE STRIKES AND YOU'RE OUT . . . A PROMISE TO KIMBER: THE CHRONICLE OF AMERICA'S TOUGHEST ANTI-CRIME LAW (1996).

[49]*See* DEOBRAH SPUNGEN, AND I DON'T WANT TO LIVE THIS LIFE (1983).

[50]*See* JOHN WALSH, TEARS OF RAGE: FROM GRIEVING FATHER TO CRUSADER FOR JUSTICE: THE UNTOLD STORY OF THE ADAM WALSH CASE (1997). Professor Henderson describes Walsh as "preaching [a] gospel of rage and revenge." Henderson, *supra* note 14, at [18]. This seems to me to misunderstand Walsh's efforts, which Walsh has explained as making sure that his son Adam "didn't die in vain." WALSH, *supra*, at 305. Walsh's Herculean efforts to establish the National Center for Missing and Exploited Children, *see id.* at 131–58, is a prime example of neither rage nor revenge, but rather a desirable public policy reform springing from a tragic crime.

[51]*See* MILTON J. SHAPIRO WITH MARVIN WEINSTEIN, WHO WILL CRY FOR STACI? THE TRUE STORY OF A GRIEVING FATHER'S QUEST FOR JUSTICE (1995).

[52]*See, e.g.*, GARY KINDER, VICTIM 41–45 (1982); JANICE HARRIS LORD, NO TIME FOR GOODBYES: COPING WITH SORROW, ANGER AND INJUSTICE AFTER A TRAGIC DEATH xii (4th ed. 1991); SHELLEY NEIDERBACH, INVISIBLE WOUNDS: CRIME VICTIMS SPEAK 19 (1986); DEBORAH SPUNGEN, HOMICIDE: THE HIDDEN VICTIMS xix–xxiii (1998); JOSEPH WAMBAUGH, THE ONION FIELD 169–71 (1973).

[53]501 U.S. 808 (1991).

[54]Bandes, *supra* note 34, at 361 (quoting *Payne*, 501 U.S. at 814–15).

Bandes quite accurately observes that the statement is "heartbreaking" and "[o]n paper, it is nearly unbearable to read."[55] She goes on to argue that such statements are "prejudicial and inflammatory" and "overwhelm the jury with feelings of outrage."[56] In my judgment, Bandes fails here to distinguish sufficiently between prejudice and *unfair* prejudice from a victim's statement. It is a commonplace of evidence law that a litigant is not entitled to exclude harmful evidence, but only *unfairly* harmful evidence.[57] Bandes appears to believe that a sentence imposed following a victim impact statement rests on unjustified prejudice; alternatively, one might conclude simply that the sentence rests on a fuller understanding of all of the murder's harmful ramifications. Why is it "heartbreaking" and "nearly unbearable to read" about what it is like for a three-year-old to witness the murder of his mother and his two-year-old sister? The answer, judging from why my heart broke as I read the passage, is that we can no longer treat the crime as some abstract event. In other words, we begin to realize the nearly unbearable heartbreak—that is, the actual and total harm—that the murderer inflicted.[58] Such a realization undoubtedly will hamper a defendant's efforts to escape a capital sentence. But given that loss is a proper consideration for the jury, the statement is not unfairly detrimental to the defendant. Indeed, to conceal such evidence from the jury may leave them with a distorted, minimized view of the impact of the crime.[59] Victim impact statements are thus easily justified because they provide the jury with a full picture of the murder's consequences.[60]

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[55]*Id.* at 361.

[56]*Id.* at 401.

[57]*See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 4.10, at 194 (2d ed. 1999).

[58]*Cf.* Edna Erez, *Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, CRIM. L. REV. (forthcoming 1999) ("[L]egal professionals [in South Australia] who have been exposed to [victim impact statements] have commented on how uninformed they were about the extent, variety and longevity of various victimizations, how much they have learned . . . about the impact of crime on victims . . . .").

[59]*See* Brooks Douglass, *Oklahoma's Victim Impact Legislation: A New Voice for Victims and Their Families: A Response to Professor Coyne*, 46 OKLA. L. REV. 283, 289 (1993) (offering example of jury denied truth about full impact of a crime).

[60]In addition to allowing assessment of the harm of the crime, victim impact statements are also justified because they provide "a quick glimpse of the life which a defendant chose to extinguish." *Payne*, 501 U.S. at 822 (internal quotation omitted). In the interests of brevity, I will not develop such an argument here, nor will I address the more complicated issues surrounding whether a victim's family members may offer opinions about the appropriate sentence for a defendant. *See id.* at 830 n.2 (reserving this issue); S. REP. NO. 105-409, at 28–29 (1998) (indicating that Amendment does not alter laws precluding victim opinion as to proper sentence).

Bandes also contends that impact statements "may completely block" the ability of the jury to consider mitigation evidence.[61] It is hard to assess this essentially empirical assertion, because Bandes does not present direct empirical support.[62] Clearly many juries decline to return death sentences even when presented with powerful victim impact testimony, with Terry Nichols's life sentence for conspiring to set the Oklahoma City bomb a prominent example. Indeed, one recent empirical study of decisions from jurors who actually served in capital cases found that facts about adult victims "made little difference" in death penalty decisions.[63] A case might be

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[61]Bandes, *supra* note 34, at 402.

[62]The only empirical evidence Bandes discusses concerns the alleged race-of-the-victim effect found in the Baldus study of Georgia capital cases in the 1980s. *See id.* This study, however, sheds no direct light on the effect of victim impact statements on capital sentencing, as victim impact evidence apparently was not, and indeed could not have been at that time, one of the control variables. *See* GA. CODE ANN. §§ 17-10-1.1 to -1.2 (1986) (barring victim impact testimony). Had victim impact evidence been one of the variables, it seems likely that any race-of-the-victim effect would have been reduced by giving the jurors actual information about the uniqueness and importance of the life taken, thereby eliminating the jurors' need to rely on stereotypic, and potentially race-based, assumptions. In any event, there is no need to ponder such possibilities at length here because the race-of-the-victim "effect" disappeared when important control variables were added to the regression equations. *See* McCleskey v. Zant, 580 F. Supp. 338, 366 (D. Ga. 1984) (concluding that "there is no support for a proposition that race has any effect in any single case"), *aff'd in part and rev'd in part*, 753 F.2d 877 (11th Cir. 1986), *aff'd*, 481 U.S. 279 (1987).

[63]Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1556 (1998). The study concluded that jurors would be more likely to impose death if the victim was a child, and that "extreme caution" was warranted in interpreting its findings. *Id.* It should be noted that the study data came from cases between roughly 1986 and 1993, when victim impact statements were not generally used. *See id.* at 1554. However, it is possible that a victim impact statement may have been introduced in a few of the cases in the data set after the 1991 *Payne* decision. Electronic Mail from Stephen P. Garvey, Professor, Cornell Law School, to Prof. Paul G. Cassell (Feb. 11, 1999) (on file with author).

Garvey's methodology of surveying real juries about real cases seems preferable to relying on mock jury research, which suggests that victim impact statements may affect jurors' views about capital sentencing. *See* Edith Greene, *The Many Guises of Victim Impact Evidence and Effects on Jurors' Judgments*, PSYCHOL., CRIME & L. (forthcoming 1999) (discussing mock jury research); Edith Greene & Heather Koehring, *Victim Impact Evidence in Capital Cases: Does the Victim's Character Matter?*, 28 J. APPLIED SOC. PSYCHOL. 145, 154 (1998) (finding support for hypothesis that victim impact evidence would affect jurors' capital sentencing decisions); James Luginbuhl & Michael Burkhead, *Victim Impact Evidence in Capital Trial: Encouraging Votes for Death*, 20 AM. J. CRIM. JUST. 1, 9 (1995) (finding support for hypothesis that victim impact evidence would increase jurors' votes for death penalty). *But cf.* Ronald Mazzella & Alan Feingold, *The Effects of Physical Attractiveness, Race, Socioeconomic Status, and Gender of Defendants and Victims on Judgments of Mock Jurors: A Meta-Analysis*, 1994 J. APPLIED SOC. PSYCHOL. 1315, 1319–30 (1994) (finding, through meta-analysis of previous research, that effects of victim characteristics on juror's

crafted from the available national data that Supreme Court decisions on victim impact testimony did, at the margin, alter some cases. It is arguable that the number of death sentences imposed in this country fell after the Supreme Court prohibited use of victim impact statements in 1987[64] and then rose when the Court reversed itself a few years later.[65] As discussed in greater length in Appendix B,[66] however, this conclusion is far from clear and, in any event, the effect on likelihood of a death sentence would be, at most, marginal.

The empirical evidence in noncapital cases also finds little effect on sentence severity. For example, a study in California found that "[t]he right to allocution at sentencing has had little net effect . . . on sentences in general."[67] A study in New York similarly reported "no support for those who argue against [victim impact] statements on the grounds that their use places defendants in jeopardy."[68] A careful scholar recently reviewed comprehensively all of the available evidence in this country and elsewhere, and concluded that "sentence severity has not increased following the passage of [victim impact] legislation."[69] It is thus unclear why we should credit

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judgments were generally inconsequential). Whether mock jury simulations capture real-world effects is open to question generally. *See* Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523, 600 (1999) (collecting evidence on this point); *see also* Free v. Peters, 12 F.3d 700, 705–06 (7th Cir. 1994) (en banc) (finding that there is little "a priori reason" to think that results of examination setting offer insight to abilities of real juries who spend days and weeks becoming familiar with case). The concerns about the realism of mock jury research apply with particular force to emotionally charged death penalty verdicts. *See* Mark Costanzo & Sally Costanzo, *Jury Decision Making in the Capital Penalty Phase*, 16 LAW & HUM. BEHAV. 185, 191 (1992) ("[T]he very nature of the [death] penalty decision may render it an inappropriate topic for jury simulation studies.").

[64]*See Booth*, 482 U.S. at 509 (concluding that introduction of impact statement in sentencing phase of capital murder violates Eighth Amendment).

[65]*See Payne*, 501 U.S. at 830 (overruling *Booth*).

[66]*See infra* Appendix B.

[67]NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, EXECUTIVE SUMMARY, VICTIM APPEARANCES AT SENTENCING HEARINGS UNDER THE CALIFORNIA VICTIMS' BILL OF RIGHTS 61 (1987) [hereinafter NIJ SENTENCING STUDY].

[68]Robert C. Davis & Barbara E. Smith, *The Effects of Victim Impact Statements on Sentencing Decisions: A Test in an Urban Setting*, 11 JUST. QUART. 453, 466 (1994); *accord* ROBERT C. DAVIS ET AL., VICTIM IMPACT STATEMENTS: THEIR EFFECTS ON COURT OUTCOMES AND VICTIM SATISFACTION 68 (1990) (concluding that result of study "lend[s] support to advocates of victim impact statements" since no evidence indicates that these statements "put[] defendants in jeopardy [or] result in harsher sentences").

[69]Erez, *supra* note 58, at 5; *accord* Edna Erez, *Victim Participation in Sentencing: And the Debate Goes On . . .*, 3 INT'L REV. OF VICTIMOLOGY 17, 22 (1994) [hereinafter Erez, *Victim Participation*] ("Research on the impact of victims' input on sentencing outcome is inconclusive. At best it suggests that victim input has only a limited effect."). For further

Bandes's assertion that victim impact statements seriously hamper the defense of capital defendants.

Even if such an impact on capital sentences were proven, it would be susceptible to the reasonable interpretation that victim testimony did not "block" jury understanding, but rather presented enhanced information about the full horror of the murder or put in context mitigating evidence of the defendant. Professor David Friedman has suggested this conclusion, observing that "[i]f the legal rules present the defendant as a living, breathing human being with loving parents weeping on the witness stand, while presenting the victim as a shadowy abstraction, the result will be to overstate, in the minds of the jury, the cost of capital punishment relative to the benefit."[70] Correcting this misimpression is not distorting the decision-making process, but eliminating a distortion that would otherwise occur.[71] This interpretation meshes with empirical studies in noncapital cases suggesting that, if a victim impact statement makes a difference in punishment, the description of the harm sustained by the victims is the crucial factor.[72] The studies thus indicate that the general tendency of victim impact evidence is to enhance sentence accuracy and proportionality rather than increase sentence punitiveness.[73]

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discussion of the effect of victim impact statements, see, for example, Edna Erez & Pamela Tontodonato, *The Effect of Victim Participation in Sentencing on Sentence Outcome*, 28 CRIMINOLOGY 451, 467 (1990); SUSAN W. HILLENBRAND & BARBARA E. SMITH, VICTIMS RIGHTS LEGISLATION: AN ASSESSMENT OF ITS IMPACT ON CRIMINAL JUSTICE PRACTITIONERS AND VICTIMS, A STUDY OF THE AMERICAN BAR ASSOCIATION'S CRIMINAL JUSTICE SECTION VICTIM WITNESS PROJECT 159 (1989). *See also* 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) (Australian study finding no support for claim that impact statements increase sentence severity); R. Douglas et al., *Victims of Efficiency: Tracking Victim Information Through the System in Victoria, Australia*, 3 INT'L REV. VICTIMOLOGY 95, 103 (1994) (concluding that greater information about nature of victimization makes little difference in sentencing); Edna Erez & Linda Rogers, *Victim Impact Statements and Sentencing Outcomes and Processes: The Perspectives of Legal Professionals*, 39 BRIT. J. CRIMINOLOGY 216, 234–35 (1999) (same).

[70]David D. Friedman, *Should the Characteristics of Victims and Criminals Count?: Payne v. Tennessee and Two Views of Efficient Punishment*, 34 B.C. L. REV. 731, 749 (1993).

[71]*See id.* at 750 (reasoning that *Payne* rule "can be interpreted . . . as a way of reminding the jury that victims, like criminals, are human beings with parents and children, lives that matter to themselves and others").

[72]*See* Erez & Tontodonato, *supra* note 69, at 469.

[73]*See* Erez, *Perspectives of Legal Professionals*, *supra* note 69, at 235 (discussing South Australian study); Edna Erez, *Victim Participation in Sentencing: Rhetoric and Reality*, 18 J. CRIM. JUSTICE 19, 29 (1990).

Finally, Bandes and other critics argue that victim impact statements result in unequal justice.[74] Justice Powell made this claim in his since-overturned decision in *Booth v. Maryland*, arguing that "in some cases the victim will not leave behind a family, or the family members may be less articulate in describing their feelings even though their sense of loss is equally severe."[75] This kind of difference, however, is hardly unique to victim impact evidence.[76] To provide one obvious example, current rulings from the Court invite defense mitigation evidence from a defendant's family and friends, despite the fact that some defendants may have more or less articulate acquaintances. In *Payne*, for example, the defendant's parents testified that he was "a good son" and his girlfriend testified that he "was affectionate, caring, and kind to her children."[77] In another case, a defendant introduced evidence of having won a dance choreography award while in prison.[78] Surely this kind of testimony, no less than victim impact statements, can vary in persuasiveness in ways not directly connected to a defendant's culpability;[79] yet, it is routinely allowed. One obvious reason is that if varying persuasiveness were grounds for an inequality attack, then it is hard to see how the criminal justice system could survive at all. Justice White's powerful dissenting argument in *Booth* went unanswered, and remains unanswerable: "No two prosecutors have exactly the same ability to present their arguments to the jury; no two witnesses have exactly the same ability to communicate the facts; but there is no requirement . . . [that] the evidence and argument be reduced to the lowest common denominator."[80]

Given that our current system allows almost unlimited mitigation evidence on the part of the defendant, an argument for equal justice requires, if anything, that victim statements be allowed. Equality demands fairness not only *between* cases, but also *within* cases.[81] Victims and the public generally

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[74]*See, e.g.*, Bandes, *supra* note 34, at 408 (arguing that victim impact statements play on our pre-conscious prejudices and stereotypes).

[75]*Booth*, 482 U.S. at 505, *overruled in* Payne v. Tennessee, 501 U.S. 808, 830 (1991).

[76]*See* Paul Gewirtz, *Victims and Voyeurs at the Criminal Trial*, 90 NW. U. L. REV. 863, 882 (1996) ("If courts were to exclude categories of testimony simply because some witnesses are less articulate than others, no category of oral testimony would be admissible.").

[77]*Payne*, 501 U.S. at 826.

[78]*See* Boyde v. California, 494 U.S. 370, 382 n.5 (1990). *See generally* Susan N. Cornille, Comment, *Retribution's "Harm" Component and the Victim Impact Statement: Finding a Workable Model*, 18 U. DAYTON L. REV. 389, 416–17 (1993) (discussing *Boyde*).

[79]*Cf.* Walton v. Arizona, 497 U.S. 639, 674 (1990) (Scalia, J., concurring) (criticizing decisions allowing such varying mitigating evidence on equality grounds).

[80]*Booth*, 482 U.S. at 518 (White, J., dissenting).

[81]*See* Gewirtz, *supra* note 76, at 880–82 (developing this position); *see also* Beloof, *supra* note 9, at 291 (noting that this value is part of third model of criminal justice); PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 16 (1982) (for laws to be

perceive great unfairness in a sentencing system with "one side muted."[82] The Tennessee Supreme Court stated the point bluntly in its decision in *Payne*, explaining that "[i]t is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant . . . without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims."[83] With simplicity but haunting eloquence, a father whose ten-year-old daughter, Staci, was murdered, made the same point.[84] Before the sentencing phase began, Marvin Weinstein asked the prosecutor for the opportunity to speak to the jury because the defendant's mother would have the chance to do so.[85] The prosecutor replied that Florida law did not permit this.[86] Here was Weinstein's response to the prosecutor:

> What? I'm not getting a chance to talk to the jury? He's not a defendant anymore. He's a murderer! A convicted murderer! The jury's made its decision. . . . His mother's had her chance all through the trial to sit there and let the jury see her cry for him while I was barred.[87] . . . Now she's getting another chance? Now she's going to sit there in that witness chair and cry for her son, that murderer, that murderer who killed my little girl! Who will cry for Staci? Tell me that, who will cry for Staci?[88]

There is no good answer to this question,[89] a fact that has led to a change in the law in Florida and, indeed, all around the country. Today the laws of the overwhelming majority of states admit victim impact statements in capital and other cases.[90] These prevailing views lend strong support to the

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respected, they must be just—not only to accused, but to victims as well).

[82]*Booth*, 482 U.S. at 520 (Scalia, J., dissenting); *accord* PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 77 (1982); Gewirtz, *supra* note 76, at 825–26.

[83]Tennessee v. Payne, 791 S.W.2d 10, 19 (1990), *aff'd*, 501 U.S. 808 (1991).

[84]*See* SHAPIRO, *supra* note 51, at 215.

[85]*See id.* at 215–16.

[86]*See id.*

[87]Weinstein was subpoenaed by the defense as a witness and therefore required to sit outside the courtroom. *See id.* at 215–16.

[88]*Id.* at 319–20.

[89]A narrow, incomplete answer might be that neither the defendant's mother nor the victim's father should be permitted to *cry* in front of the jury. But assuming an instruction from the judge not to cry, the question would still remain why the defendant's mother could testify, but not the victim's father.

[90]*See, e.g.*, ARIZ. REV. STAT. §§ 13-4410(C), -4424, -4426 (1989); MD. CODE art. 41, § 4-609(d) (1993); N.J. STAT. ANN. § 2C:11-3c(6) (1995); UTAH CODE ANN. § 76-3-207(2) (1998). *See generally Payne*, 501 U.S. at 821 (finding that Congress and most states allow victim impact statements); State v. Muhammad, 678 A.2d 164, 177–78 (N.J. 1996) (collecting

conclusion that equal justice demands the inclusion of victim impact statements, not their exclusion.

These arguments sufficiently dispose of the critics' main contentions.[91] Nonetheless, it is important to underscore that the critics generally fail to grapple with one of the strongest justifications for admitting victim impact statements: avoiding additional trauma to the victim. For all the fairness reasons just explained, gross disparity between defendants' and victims' rights to allocute at sentencing creates the risk of serious psychological injury to the victim.[92] As Professor Douglas Beloof has nicely explained, a justice system that fails to recognize a victim's right to participate threatens "secondary harm"—that is, harm inflicted by the operation of government processes beyond that already caused by the perpetrator.[93] This trauma stems

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state cases upholding victim impact evidence in capital cases). These laws answer Bandes's brief allusion to the principle of *nulla poena sine lege* (the requirement of prior notice that particular conduct is criminal). *See* Bandes, *supra* note 34, at 396 n.177. Because murderers are now plainly on notice that impact testimony will be considered at sentencing, the principle is not violated. Murderers can also fully foresee the possibility of victim impact testimony. Murder is always committed against "a 'unique' individual, and harm to some group of survivors is a consequence of a successful homicidal act so foreseeable as to be virtually inevitable." *Payne*, 501 U.S. at 838 (Souter, J., concurring). Moreover, it is unclear the extent to which *nulla poena sine lege* is designed to regulate sentencing decisions. The principle is one that "condemns judicial crime creation," Bynum v. State, 767 S.W.2d 769, 773 n.5 (Tex. Crim. App. 1989), but not the crafting of appropriate penalties for a previously defined crime like capital murder.

[91]Professor Bandes and others also have suggested that the admission of victim impact statements would lead to offensive mini-trials on the victim's character. *See, e.g.*, Bandes, *supra* note 34, at 407–08. However, a recent survey of the empirical literature concludes that "[c]oncern that defendants would challenge the content of [victim impact statements] thereby subjecting victims to unpleasant cross examination on their statements has also not materialized." Erez, *supra* note 58, at 6. In neither the McVeigh trial nor the Nichols trial, for example, did aggressive defense attorneys cross-examine the victims at any length about the impact of the crime.

[92]For general discussion of the harms caused by disparate treatment, see LINDA E. LEDRAY, RECOVERING FROM RAPE 125 (2d ed. 1994) (noting that it is important in healing process for rape victims to take back control from rapist and to focus their anger towards him); LEE MADIGAN & NANCY C. GAMBLE, THE SECOND RAPE: SOCIETY'S CONTINUED BETRAYAL OF THE VICTIM 97 (1989) (noting that during arraignment, survivors "first realized that it was not their trial, [and] that the attacker's rights were the ones being protected."); Beloof, *supra* note 9, at 294–96 (explaining that victims are exposed to two types of harms: the first from crime itself, and the second, from criminal process); Deborah P. Kelly, *Victims*, 34 WAYNE L. REV. 69, 72 (1987) (noting that "victims want[] more than pity and politeness; they want[] to participate"); Marlene A. Young, *A Constitutional Amendment for Victims of Crime: The Victims' Perspective*, 34 WAYNE L. REV. 51, 58 (1987) (discussing ways in which victims feel aggrieved from unequal treatment).

[93]*See generally* SPUNGEN, *supra* note 52, at 10 (explaining concept of secondary victimization); DOUGLAS E. BELOOF, *Constitutional Civil Rights of Crime Victim Participation: The Emergence of Secondary Harm as a Rational Principle*, *in* VICTIMS IN CRIMINAL

from the fact that the victim perceives that the "system's resources are almost entirely devoted to the criminal, and little remains for those who have sustained harm at the criminal's hands."[94] As two noted experts on the psychological effects of crime have concluded, failure to offer victims a chance to participate in criminal proceedings can "result in increased feelings of inequity on the part of the victims, with a corresponding increase in crime-related psychological harm."[95] On the other hand, there is mounting evidence that "having a voice may improve victims' mental condition and welfare."[96] For some victims, making a statement helps restore balance between themselves and the offenders.[97] Others may consider it part of a just process or may want "to communicate the impact of the offense to the offender."[98] This multiplicity of reasons explains why victims and surviving family members want so desperately to participate in sentencing hearings, even though their participation may not necessarily change the outcome.[99]

The possibility of the sentencing process aggravating the grievous injuries suffered by victims and their families is generally ignored by the Amendment's opponents. But this possibility should give us great pause before we structure our criminal justice system to add the government's insult to criminally inflicted injury. For this reason alone, victims and their families, no less than defendants, should be given the opportunity to be heard at sentencing.

PROCEDURE 10–18 (1999) (explaining concept of secondary harm);.

[94]Task Force on the Victims of Crime and Violence, *Executive Summary: Final Report of the APA Task Force on the Victims of Crime and Violence*, 40 AM. PSYCHOLOGIST 107, 109 (1985).

[95]Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 WAYNE L. REV. 7, 21 (1987) (collecting evidence on this point); *see also* Ken Eikenberry, *The Elevation of Victims' Rights in Washington State: Constitutional Status*, 17 PEPP. L. REV. 19, 26–32 (1989) (studying positive impacts of Washington's victims' rights constitutional amendment); Erez, *supra* note 58, at 8–10 ("The cumulative knowledge acquired from research in various jurisdictions . . . suggests that victims often *benefit* from participation and input."); Jason N. Swensen, *Survivor Says Measure Would Dignify Victims*, THE DESERET NEWS (Salt Lake City), Oct. 21, 1994, at B4 (noting anguish widow suffered when denied chance to speak at sentencing of husband's murderer).

[96]Erez, *supra* note 58, at 10.

[97]*See id.*

[98]*Id.* at 10; *see also* S. REP. NO. 105-409, at 17 (1998) (finding that victims' statements have important "cathartic" effects).

[99]*See* Erez, *supra* note 58, at 10 ("[T]he majority of victims of personal felonies wished to participate and provide input, even when they thought their input was ignored or did not affect the outcome of their case. Victims have multiple motives for providing input, and having a voice serves several functions for them . . . .") (internal footnote omitted).

2. The Right to Be Present at Trial

The allegation that the Amendment will impair defendants' rights is most frequently advanced in connection with the victim's right to be present at trial.[100] The most detailed and careful explication of the argument is Professor Mosteller's, advanced in this Symposium and elsewhere[101] and recently relied upon by the dissenting senators of the Judiciary Committee.[102] In brief, Mosteller believes that fairness to defendants requires that victims be excluded from the courtroom, at least in some circumstances, to avoid the possibility that they might tailor their testimony to that given by other witnesses.[103] While I admire the clarity and doggedness with which Mosteller has set forth his position, I respectfully disagree with his conclusions for reasons to be articulated at length elsewhere.[104] Here it is only necessary to note that even this strong opponent of the Amendment finds himself agreeing with the value underlying the victim's right. He writes: "Many victims have a special interest in witnessing public proceedings involving criminal cases that directly touched their lives."[105] This view is widely shared. For instance, the Supreme Court has explained that "[t]he victim of the crime, the family of the victim, [and] others who have suffered similarly . . . have an interest in observing the course of a prosecution."[106] Victim concern about the prosecution stems from the fact that society has withdrawn "both from the victim and the vigilante the enforcement of criminal laws, but [it] cannot erase from people's consciousness the fundamental, natural yearning to see justice done—or even the urge for retribution."[107]

Professor Mosteller also seems to suggest that defendants currently have no constitutional right to exclude victims from trials, meaning that his

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[100]Technically, the right is "not to be excluded." *See infra* notes 136–39 and accompanying text (explaining reason for this formulation).

[101]*See* Mosteller, *Unnecessary Amendment*, *supra* note 13, at 457–69; *see also* Mosteller, *Recasting the Battle*, *supra* note 13, at 1698–1704.

[102]*See* S. REP. NO. 105-409, at 66 & n.44 (1998) (citing Mosteller).

[103]*See* Mosteller, *Unnecessary Amendment*, *supra* note 13, at 465 (finding that in specific situations, defendant's "due process right to a fair trial may require exclusion of [victim-] witnesses").

[104]*See* Paul G. Cassell & Douglas E. Beloof, The Victim's Right to Attend the Trial 10–18 (1999) (working manuscript, on file with author) (responding to Mosteller's view that victim's presence in courtroom infringes on defendant's rights).

[105]Mosteller, *Recasting the Battle*, *supra* note 13, at 1699.

[106]Gannett Co. v. DePasquale, 443 U.S. 368, 428 (1979) (Blackmun, J., concurring in part and dissenting in part).

[107]Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571 (1980) (plurality opinion); *see also* Pizzi, *supra* note 10, at [4] (noting importance of victim's right to attend trials).

argument rests purely on policy.[108] Mosteller's policy claim is not the general one that most victims ought to be excluded, but rather the much narrower one that "victims' rights to attend . . . proceedings should be guaranteed unless their presence threatens accuracy and fairness in adjudicating the guilt or innocence of the defendant."[109] On close examination, it turns out that, in Mosteller's view, victims' attendance threatens the accuracy of proceedings not in a typical criminal case, but only in the atypical case of a crime with multiple victims who are all eyewitness to the same event and who thus might tailor their testimony if allowed to observe the trial together.[110] This is a rare circumstance indeed, and it is hard to see the alleged disadvantage in this unusual circumstance outweighing the more pervasive advantages to victims in the run-of-the-mine cases.[111] Moreover, even in rare circumstances of multiple victims, other means exist for dealing with the tailoring issue. For example, the victims typically have given pretrial statements to police, grand juries, prosecutors, or defense investigators that would eliminate their ability to change their stories effectively.[112] In addition, the defense attorney may argue to the jury that victims have tailored their testimony even when they have not[113]—a fact that leads some critics of the Amendment to conclude that this provision will, if anything, help defendants rather than harm them. The dissenting Senators, for example, make precisely this helps-the-defendant

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[108]*See* Mosteller, *Recasting the Battle*, *supra* note 13, at 1701 n.29 ("I question whether the practice [permitting multiple victim-eyewitnesses to remain in the courtroom and hear the testimony of others] would violate a defendant's constitutional rights, although I acknowledge that the result is not entirely free from doubt."). In his article in this Symposium, Professor Mosteller has amplified his view somewhat, taking the position that "in extreme factual situations" a defendant will have a constitutional right to exclude witnesses. *See* Mosteller, *Unnecessary Amendment*, supra note 13, at 465. His position, however, seems to rest largely on policy grounds.

[109]Mosteller, *Recasting the Battle*, *supra* note 13, at 1699; *see also* Mosteller, *Unnecessary Amendment*, *supra* note 13, at 449–50 (finding that "the most important reason" that victims' rights are not fully enforced is lack of resources and personnel).

[110]*See* Mosteller, *Recasting the Battle*, *supra* note 13, at 1700 (arguing that, in cases of multiple victims, "a substantial danger exists" that victim-witnesses will be influenced during testimony of others); Mosteller, *Unnecessary Amendment*, *supra* note 13, at 465 (similar argument).

[111]*See* Erez, *Victim Participation*, *supra* note 69, at 29 (criticizing tendency of lawyers "to use an atypical or extreme case to make their point" and calling for public policy in the victims area to be based on more typical cases); *cf.* Robert P. Mosteller, Book Review, *Popular Justice*, 109 HARV. L. REV. 487, 487 (1995) (critiquing George P. Fletcher's book, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS (1995), for "ignor[ing] how the criminal justice system operates in ordinary" cases).

[112]*See* Cassell, *supra* note 104 (explaining how prior statements would make it difficult for victim to change story).

[113]*See* S. REP. NO. 105-409, at 82 (1998) (additional views of Sen. Biden).

argument,[114] although at another point they present the contrary harms-the-defendant claim.[115] In short, the critics have not articulated a strong case against the victim's right to be present.

3. The Right to Consideration of the Victim's Interest in a Trial Free from Unreasonable Delay

Opponents of the Amendment sometimes argue that giving victims a right to "consideration" of their interest "that any trial be free from unreasonable delay"[116] would impinge on a defendant's right to prepare an adequate defense. For example, the dissenting senators in the Judiciary Committee claimed that "the defendant's need for more time could be outweighed by the victim's assertion of his right to have the matter expedited, seriously compromising the defendant's right to effective assistance of counsel and his ability to receive a fair trial."[117] Similarly, Professor Mosteller advances the claim here that this right "also affect[s] substantial interests of the defendant and may even alter the outcomes of cases."[118]

These arguments fail to consider the precise scope of the victim's right in question. The right the Amendment confers is one to "*consideration* of the interest of the victim that any trial be free from *unreasonable* delay."[119] The opponents never seriously grapple with the fact that, by definition, all of the examples that they give of defendants legitimately needing more time to prepare would constitute reasons for "reasonable" delay. Indeed, it is interesting to note similar language in the American Bar Association's directions to defense attorneys to avoid "unnecessary delay" that might harm victims.[120] The victim's right, moreover, is to "consideration" of the victim's interests. The proponents of the Amendment could not have been clearer

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[114]*See id.* at 61 (minority views of Sens. Leahy, Kennedy, and Kohl) ("[T]here is also the danger that the victim's presence in the courtroom during the presentation of other evidence will cast doubt on her credibility as a witness . . . . Whole cases . . . may be lost in this way.").

[115]*See id.* at 65 (minority views of Sens. Leahy, Kennedy, and Kohl) ("Accuracy and fairness concerns may arise . . . where the victim is a fact witness whose testimony may be influenced by the testimony of others.").

[116]S.J. Res. 3, 106th Cong. § 1 (1999).

[117]S. REP. NO. 105-409, at 66 (1998) (minority views of Sens. Leahy, Kennedy, and Kohl).

[118]Mosteller, *Unnecessary Amendment*, *supra* note 13, at 473; *see also* Mosteller, *Recasting the Battle*, *supra* note 13, at 1706–08 ("[L]egislation enacted under § 3 of the . . . Amendment to enforce the right to final disposition free from unreasonable delay may conflict with the right to effective assistance of counsel and with basic due process rights.").

[119]S.J. Res. 3, 106th Cong. § 1 (1999).

[120]A.B.A., SUGGESTED GUIDELINES FOR REDUCING ADVERSE EFFECTS OF CASE CONTINUANCES AND DELAYS ON CRIME VICTIMS AND WITNESSES 4 (1985).

about the intent to allow legitimate defense continuances. As the Judiciary Committee explained:

> The Committee intends for this right to allow victims to have the trial of the accused completed as quickly as is reasonable under all of the circumstances of the case, giving both the prosecution and the defense a reasonable period of time to prepare. The right would not require or permit a judge to proceed to trial if a criminal defendant is not adequately represented by counsel.[121]

Such a right, while not treading on any legitimate interest of a defendant, will safeguard vital interests of victims. Victims' advocates have offered repeated examples of abusive delays by defendants designed solely for tactical advantage rather than actual preparation of the defense of a case.[122] Abusive delays appear to be particularly common when the victim of the crime is a child, for whom each day up until the case is resolved can seem like an eternity.[123] Such cases present a strong justification for this provision in the Amendment. Nonetheless, writing in this Symposium, Professor Mosteller advances the proposition that this right "should undergo rigorous debate on [its] merits and should not slide in under the cover of a campaign largely devoted to giving victims' rights to notice and to participate in criminal proceedings."[124] This seems a curious argument, as the victims community has tried to debate this right "on its merits" for years. As long ago as 1982, the President's Task Force on Victims of Crime offered suggestions for protecting a victim's interest in a prompt disposition of the case.[125] In the years since then, it has been hard to find critics of victims' rights willing to contend, on the merits, the need for protecting victims against abusive delay.[126] If anything, the time has arrived for the opponents of the victim's

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[121]S. REP. NO. 105-409, at 3 (1998); *see also 1998 Senate Judiciary Comm. Hearings*, *supra* note 26, at 37–38 (statement of Prof. Paul Cassell) (discussing factors that could be used to evaluate victims' claims of unreasonable delay).

[122]*See, e.g., 1997 Senate Judiciary Comm. Hearings*, *supra* note 6, at 115–16 (statement of Paul G. Cassell, Professor of Law, University of Utah College of Law) (describing such a case); *see also* Paul G. Cassell & Evan S. Strassberg, *Evidence of Repeated Acts of Rape and Child Molestation: Reforming Utah Law to Permit the Propensity Inference*, 1998 UTAH L. REV. 145, 146 (discussing case where defendant delayed trial three years by refusing to hire counsel and falsely claiming indigency).

[123]*See* Cassell, *supra* note 33, at 1402–05 (providing illustration).

[124]Mosteller, *Unnecessary Amendment*, *supra* note 13, at 473.

[125]*See* PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME. FINAL REPORT 76 (1982).

[126]*Cf.* Henderson, *supra* note 14, at 419 (conceding that "reasonableness" language might "allow judges to ferret out instances of dilatory tactics while recognizing the genuine need for time," but concluding that constitutional amendment is not needed to confer this power on

right to proceedings free from unreasonable delay to address the serious problem of unwarranted delay in criminal proceedings or to concede that, here too, a strong case for the Amendment exists.

B. Prosecution-Oriented Challenges to the Amendment

Some objections to victims' rights rest not on alleged harm to defendants' interests but rather on alleged harm to the interests of the prosecution. Often these objections surprisingly come from persons not typically solicitous of prosecution concerns,[127] suggesting that some skepticism may be warranted. In any event, the arguments lack foundation.

It is sometimes argued that only the State should direct criminal prosecutions. This claim might have some bite against a proposal to allow victims to initiate or otherwise control the course of criminal prosecutions,[128] but it has little force against the proposed amendment. The Victims' Rights Amendment assumes a prosecution-directed system and simply grafts victims' rights onto it. Victims receive notification of decisions that the prosecution makes and, indeed, have the right to provide information to the court at appropriate junctures, such as bail hearings, plea bargaining, and sentencing. However, the prosecutor still files the complaint and moves it through the system, making decisions not only about which charges, if any, to file, but also about which investigative leads to pursue and which witnesses to call at trial. While victims can "follow[] their own case down the

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judges).

[127] *See, e.g.*, Scott Wallace, *Mangling the Constitution: The Folly of the Victims' Rights Amendment*, WASH. POST, June 28, 1996, at A21 (op-ed piece from special counsel with National Legal Aid and Defender Association warning that Amendment would harm police and prosecutors).

[128] *See, e.g.*, Peter L. Davis, *The Crime Victim's "Right" to a Criminal Prosecution: A Proposed Model Statute for the Governance of Private Criminal Prosecutions*, 38 DEPAUL L. REV. 329, 330 (1989) (proposing statute to govern private criminal prosecutions). *See generally* DOUGLAS BELOOF, VICTIMS IN CRIMINAL PROCEDURE 235–357 (1999) (comprehensively discussing current means of victim involvement in charging process). Allowing victims to initiate their own prosecutions is no novelty, as it is consistent with the English common-law tradition of private prosecutions, brought to the American colonies. *See* 1 SIR JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 493–503 (1883); Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517, 521–22; Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 359, 384 (1986); Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 PEPP. L. REV. 117, 125–26 (1984); William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 651–54 (1976).

assembly line" in Professor Beloof's colorful metaphor,[129] the fact remains that the prosecutor runs the assembly line. This general approach of grafting victims' rights onto the existing system mirrors the approach followed by all of the various state victims' amendments, and few have been heard to argue that the result has been interference with legitimate prosecution interests.

Perhaps an interferes-with-the-prosecutor objection might be refined to apply only against a victim's right to be heard on plea bargains, since this right arguably hampers a prosecutor's ability to terminate the prosecution. But today, it is already the law of many jurisdictions that the court must determine whether to accept or reject a proposed plea bargain after weighing all relevant interests.[130] Given that victims undeniably have relevant, if not compelling, interests in proposed pleas, the Amendment neither breaks new theoretical ground nor displaces any legitimate prosecution interest. Instead, victim statements simply provide more information for the court to consider in making its decision. The available empirical evidence also suggests that victim participation in the plea bargaining process does not burden the courts and produces greater victim satisfaction even where, as is often the case, victims ultimately do not influence the outcome.[131]

In addition, critics of victim involvement in the plea process almost invariably overlook the long-standing acceptance of judicial review of plea bargains. These critics portray pleas as a matter solely for a prosecutor and a defense attorney to work out. They then display a handful of cases in which the defendant was ultimately acquitted at trial after courts had the temerity to reject a plea after hearing from victims. These cases, the critics maintain, prove that any outside review of pleas is undesirable.[132] The possibility of an

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[129]Beloof, *supra* note 9, at 296 (referring to HERBERT PACKER, THE LIMITS OF CRIMINAL SANCTION 163 (1968)).

[130]For cogent explication of the law on this issue, see BELOOF, *supra* note 128, at 462–88 (1999). *See also* NATIONAL CONFERENCE OF THE JUDICIARY ON THE RIGHTS OF VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, STATEMENT OF RECOMMENDED JUDICIAL PRACTICES 10 (1983) (recommending victim participation in plea negotiations).

[131]*See, e.g.*, DEBORAH BUCHNER ET AL., INSLAW, INC., EVALUATION OF THE STRUCTURED PLEA NEGOTIATION PROJECT: EXECUTIVE SUMMARY 15, 21 (1984) (examining effects of structured plea negotiations in which judge, defendant, victim, prosecutor, and defense attorney all participate).

[132]*See, e.g.*, S. REP. NO. 105-409, at 60–61 (1998) (minority views of Sens. Leahy, Kennedy, and Kohl).

An illustration of this position is found in recent testimony by former federal prosecutor Beth Wilkinson. She argued that if victims had been heard during the Oklahoma City bombing case they would have prevented a government plea agreement with Michael Fortier and hurt the prosecution's case against Timothy McVeigh and Terry Nichols. *See Testimony of Beth A. Wilkinson Before the Senate Judiciary Comm. on the Proposed Victims' Rights Amendment* (Mar. 24, 1999) <http://www.senate.gov/~judiciary/32499bw.htm> (cited in Mosteller, *Unnecessary Amendment*, *supra* note 13, at 463 n.57). Wilkinson's argument is flawed because

erroneous rejection of a plea is, of course, inherent in any system allowing review of a plea. In an imperfect world, judges will sometimes err in rejecting a plea that, in hindsight, should have been accepted. The salient question, however, is whether as a whole judicial review does more good than harm—that is, whether, on balance, courts make more right decisions than wrong ones. Just as cases can be cited where judges possibly made mistakes in rejecting a plea, so too cases exist where judges rejected plea bargains that were unwarranted.[133] These reported cases of victims persuading judges to reject unjust pleas form just a small part of the picture, because in many other cases, the mere prospect of victim objection undoubtedly has restrained prosecutors from bargaining cases away without good reason. My strong sense is that judicial review of pleas by courts after hearing from victims more often improves rather than retards justice. The failure of the critics to contend on the issue of *net* effect and the growing number of jurisdictions that allow victim input[134] is strong evidence for this conclusion.

Another prosecution-based objection to victims' rights is that, while they are desirable in theory, in practice they would be unduly expensive.[135] Here again, prominent critics must distort the language of the Amendment to

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it assumes, without giving any good reason, that the judge would have simply rejected the plea if the victims had opposed it. In any event, the great majority of the victims would have supported the plea if the government had explained it to them. *See Hearings on S.J. Res. 3 Before the Senate Comm. on the Judiciary*, 106th Cong. (forthcoming 1999) [hereinafter *1999 Senate Judiciary Comm. Hearings*] (statement of Marsha A. Kight, Director of Families and Survivors United, Oklahoma City). Moreover, Fortier's testimony was not important to obtaining the convictions of McVeigh and Nichols, as the jurors later made clear. *See id.*

If anything, the handling of the Fortier plea demonstrates that even federal statutes do not effectively protect victims' rights. In an effort to ram the Fortier plea through, the prosecution did not notify the victims about it. *See id.* Both of these failures were apparent violations of federal law. *See* 42 U.S.C. § 10606(b)(3) (1994) (giving victims right "to be notified of court proceedings"); *id.* § 10606(b)(5) (giving victims right "to confer with [the] attorney for the government"); *see supra 1999 Senate Judiciary Comm. Hearings* (statement of Marsha Kight) (noting these violations of federal law).

[133]*See, e.g.*, People v. Stringham, 253 Cal. Rptr. 484, 488–96 (Cal. App. 1988) (rejecting unwarranted plea bargain).

[134]*See* BELOOF, *supra* note 128, at 462.

[135]Sometimes the argument is cast not in terms of the Amendment diminishing prosecutorial resources, but rather victim resources. For example, Professor Henderson urges rejection of the Amendment on grounds that "we need to concentrate on things that aid recovery" by spending more on victim assistance and similar programs. Henderson, *supra* note 14, at 441; *see also* Lynne Henderson, *Co-Opting Compassion: The Federal Victim's Rights Amendment*, 10 ST. THOMAS L. REV. 579, 606 (1998) (noting benefits of programs to help victims deal with trauma). But there is no incompatibility between passing the Amendment and expanding such programs. Indeed, if the experience at the state level is any guide, passage of the Amendment will, if anything, lead to an increase in resources devoted to victim-assistance efforts because of their usefulness in implementing the rights contained in the Amendment.

manufacture a point in their favor. For example, the dissenting Senators claimed that the victim's right "not to be excluded *from*" the trial equates with a victim's right to be transported *to* the trial. They then conclude that "[t]he right not to be excluded could create a duty for the Government to provide travel and accommodation costs for victims who could not otherwise afford to attend."[136] This fanciful objection runs contrary to both the plain language of the Amendment and the explicit statements of its supporters and sponsors. The underlying right is not for victims to be transported to the courthouse, but simply to enter the courthouse once there. As the Senate Judiciary Committee report explains, "The right conferred is a negative one—a right '*not* to be excluded'—to avoid the suggestion that an alternative formulation—a right "to attend"—might carry with it some governmental obligation to provide funding . . . for a victim to attend proceedings."[137] The objection also runs counter to current interpretations of comparable language in other enactments. Federal law and many state constitutional amendments already extend to victims the arguably more expansive right "to be present" at or "to attend" court proceedings.[138] Yet no court has interpreted any one of these provisions as guaranteeing a victim a right of transportation and lodging at public expense. The federal amendment is even less likely to be construed to confer such an unprecedented entitlement because of its negative formulation.[139]

Once victims arrive at the courthouse, their attendance at proceedings imposes no significant incremental costs. In exercising their right to attend, victims simply can sit in the benches that have already been built. Even in cases involving hundreds of victims, innovative approaches such as closed-

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[136]S. REP. NO. 105-409, at 63 (1998) (minority views of Sens. Leahy, Kennedy, and Kohl).

[137]*Id.* at 26. The government, of course, already provides travel and accommodation expenses for the many victims who are witnesses in criminal cases.

[138]For right "to be present" formulations, see, for example, 42 U.S.C. § 10606(b)(4) (1994); ALASKA CONST. art. I, § 24; ARIZ. CONST. art. 2, § 2.1(A)(3)–(4); IDAHO CONST. art. I, § 22(4), (6); ILL. CONST. art. I, § 8.1; IND. CONST. art. I, § 13(b); MISS. CODE ANN. § 59-36-5(2) (1994); MO. CONST. art. I, § 32(1)(i); NEV. CONST. art. I, § 8(2)(b); N.M. CONST. art. II, § 24(A)(5); N.C. CONST. art. I, § 37(1)(a); OKLA. CONST. art. II, § 34A; S.C. CONST. art. I, § 24(A)(3); UTAH CONST. art. I, § 28(1)(b); *see also* ARK. CODE ANN.§ 16-41-101 (1994) (Rule 616). For a right "to attend" formulation, see MICH. CONST. art. I, § 24(1).

[139]An Alabama statute also uses this phrasing without reported deleterious consequences. *See* ALA. CODE § 15-14-54 (1995) (recognizing victim's right "not [to] be excluded from court or counsel table during the trial or hearing or any portion thereof.").

circuit broadcasting have proven feasible.[140] As for the victim's right to be heard, the state experience reveals only a modest cost impact.[141]

Most of the cost arguments have focused on the Amendment's notification provisions. Yet, it is already recognized as sound prosecutorial practice to provide notice to victims. The National Prosecution Standards prepared by the National District Attorneys Association recommend that victims of violent crimes and other serious felonies should be informed, where feasible, of important steps in the criminal justice process.[142] In addition, many states have required that victims receive notice of a broad range of criminal justice proceedings. Nearly every state provides notice of the trial, sentencing, and parole hearings.[143] In spite of the fact that notice is already required in many circumstances across the country, the dissenting senators on the Judiciary Committee argued that the "potential costs of [the Amendment's] constitutionally mandated notice requirements alone are staggering."[144] Perhaps these predictions should simply be written off as harmless political rhetoric, but it is important to note that these suggestions are inconsistent with the relevant evidence. The experience with victim notice requirements already used at the state level suggests that the costs are relatively modest, particularly since computerized mailing lists and automated telephone calls can be used. The Arizona amendment serves as a good illustration. That amendment extends notice rights far beyond what is called for in the federal amendment;[145] yet, prosecutors have not found the

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[140]*See* 42 U.S.C.A. 10608(a) (West Supp. 1998) (authorizing closed circuit broadcast of trials whose venue has been moved more than 350 miles). This provision was used to broadcast proceedings in the Oklahoma City bombing trial in Denver back to Oklahoma City.

[141]*See, e.g.*, NIJ SENTENCING STUDY, *supra* note 67, at 59 (stating that right to allocute in California "has not resulted in any noteworthy change in the workload of either the courts, probation departments, district attorneys' offices or victim/witness programs"); *id.* at 69 (finding no noteworthy change in workload of California parole board); Erez, *Victim Participation*, *supra* note 69, at 22 ("Research in jurisdictions that allow victim participation indicates that including victims in the criminal justice process does not cause delays or additional expense."); *see also* DAVIS ET AL., *supra* note 68, at 69 (noting that expanded victim impact program did not delay dispositions in New York).

[142]NATIONAL DISTRICT ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS § 26.1, at 92 (2d ed. 1991).

[143]*See* NATIONAL VICTIM CENTER, 1996 VICTIMS' RIGHTS SOURCEBOOK: A COMPILATION AND COMPARISON OF VICTIMS' RIGHTS LEGISLATION 24 (collecting statutes).

[144]S. REP. NO. 105-409, at 62 (1998) (minority views of Sens. Leahy, Kennedy, and Kohl).

[145]The Arizona Amendment extends notification rights to all crime victims, not just victims of violent crime as provided in the federal amendment. *Compare* ARIZ. CONST. art. II § 2.1(A)(3), (C), *with* S.J. Res. 3, 106th Cong. § 2 (1999).

expense burdensome in practice.[146] As a result of the existing state notification requirements, any incremental expense in Arizona from the federal amendment should be quite modest.

The only careful and objective assessment of the costs of the Amendment also reaches the conclusion that the costs are slight. The Congressional Budget Office reviewed the financial impact of not just the notification provisions of the Amendment, but of all its provisions, on the federal criminal justice system. The CBO concluded that, were the Amendment to be approved, it "could impose additional costs on the Federal courts and the Federal prison system . . . . However, CBO does not expect any resulting costs to be significant."[147]

This CBO report is a good one on which to wrap up the discussion of normative objections to the Amendment. Here is an opportunity to see how the critics' claims fare when put to a fair-minded and neutral assessment. In fact, the critics' often-repeated allegations of "staggering" costs were found to be exaggerated.

II. JUSTIFICATION CHALLENGES

A. The "Unnecessary" Constitutional Amendment

Because the normative arguments for victims' rights are so powerful, some critics of the Victims' Rights Amendment take a different tack and mount what might be described as a justification challenge. This approach concedes that victims' rights may be desirable, but maintains that victims already possess such rights or can obtain such rights with relatively minor modifications in the current regime. The best single illustration of this attack is found in Professor Mosteller's article in this Symposium, entitled *The Unnecessary Victims' Rights Amendment*.[148] There, Mosteller contends that a constitutional amendment is not needed because the obstacles that victims face—described by Mosteller as "official indifference" and "excessive judicial deference"—can all be overcome without a constitutional amendment.[149]

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[146]*See* Richard M. Romley, *Constitutional Rights for Victims: Another Perspective*, THE PROSECUTOR, May 1997, at 7 (noting modest cost of state amendment in Phoenix); *1997 Senate Judiciary Comm. Hearings*, *supra* note 6, at 97 (1997) (statement of Barbara LaWall, Pima County Prosecutor) (noting that cost has not been problem in Tucson).

[147]CONGRESSIONAL BUDGET OFFICE COST ESTIMATE, S.J. RES. 44, *reprinted in* S. REP. NO. 105-409, at 39–40 (1998).

[148]Mosteller, *Unnecessary Amendment*, *supra* note 13.

[149]*Id.* at 449; *see also* Mosteller, *Recasting the Battle*, *supra* note 13, at 1711–12 (developing similar argument).

Professor Mosteller's clearly developed position is ultimately unpersuasive because it supplies a purely theoretical answer to a practical problem. In theory, victims' rights could be safeguarded without a constitutional amendment. It would only be necessary for actors within the criminal justice system—judges, prosecutors, defense attorneys, and others—to suddenly begin fully respecting victims' interests. The real-world question, however, is how to actually trigger such a shift in the *Zeitgeist*. For nearly two decades, victims have obtained a variety of measures to protect their rights. Yet, the prevailing view from those who work in the field is that these efforts "have all too often been ineffective."[150] Rules to assist victims "frequently fail to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indifference, [or] sheer inertia."[151] The view that state victim provisions have been and will continue to be often disregarded is widely shared, as some of the strongest opponents of the Amendment seem to concede the point. For example, Ellen Greenlee, President of the National Legal Aid and Defender Association, bluntly and revealingly told Congress that the state victims' amendments "so far have been treated as mere statements of principle that victims ought to be included and consulted more by prosecutors and courts. A state constitution is far . . . easier to ignore[] than the federal one."[152]

Professor Mosteller attempts to minimize the current problems, conceding only that "existing victims' rights are not uniformly enforced."[153] This is a grudging concession to the reality that victims' rights are often denied today, as numerous examples of violations of rights in the congressional record and elsewhere attest.[154] A comprehensive view comes from a careful study of the issue by the Department of Justice. As reported by the Attorney General, the Department found that

> efforts to secure victims' rights through means other than a constitutional amendment have proved less than fully adequate. Victims' rights advocates have sought reforms at the state level for the past twenty years,

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[150]Tribe & Cassell, *supra* note 22, at B5; *see, e.g., 1996 Senate Judiciary Comm. Hearings*, *supra* note 8, at 109 (statement of Steven Twist) ("There are victims of arson in Atlanta. GA, who have little or no say, as the victims . . . of an earlier era had about their victimization."); *id.* at 30 (statement of John Walsh) (stating that victims' rights amendments on state level do not work); *id.* at 26 (statement of Katherine Prescott) ("Victims' roles in the prosecution of cases will always be that of second-class citizens" if victims' rights are only specified in state statutes).

[151]Tribe & Cassell, *supra* note 22, at B5.

[152]*1996 House Judiciary Comm. Hearings*, *supra* note 7, at 147.

[153]Mosteller, *Unnecessary Amendment*, *supra* note 13, at [4].

[154]*See, e.g., 1998 Senate Judiciary Comm. Hearings*, *supra* note 26, at 103–06 (statement of Marlene Young).

> and many states have responded with state statutes and constitutional provisions that seek to guarantee victims' rights. However, these efforts have failed to fully safeguard victims' rights. These significant state efforts simply are not sufficiently consistent, comprehensive, or authoritative to safeguard victims' rights.[155]

Similarly, an exhaustive report from those active in the field concluded that "[a] victims' rights constitutional amendment is the only legal measure strong enough to rectify the current inconsistencies in victims' rights laws that vary significantly from jurisdiction to jurisdiction on the state and federal levels."[156]

Hard statistical evidence on noncompliance with victims' rights laws confirms these general conclusions about inadequate protection. A 1998 report from the National Institute of Justice ("NIJ") found that many victims are denied their rights and concluded that "enactment of State laws and State constitutional amendments alone appears to be insufficient to guarantee the full provision of victims' rights in practice."[157] The report found numerous examples of victims not provided rights to which they were entitled. For example, even in several states identified as giving "strong protection" to victims rights, fewer than 60% of the victims were notified of the sentencing hearing and fewer than 40% were notified of the pretrial release of the defendant.[158] A follow-up analysis of the same data found that racial minorities are less likely to be afforded their rights under the patchwork of existing statutes.[159] Professor Mosteller dismisses these figures with the essentially *ad hominem* attack that they were collected by the National Victim Center, which supports a victims' rights amendment.[160] However, the data themselves were collected by an independent polling firm.[161] Mosteller also

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[155] *1997 Senate Judiciary Comm. Hearings*, *supra* note 6, at 64 (statement of Att'y Gen. Reno).

[156] OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY 10 (1998).

[157] NAT'L INST. OF JUSTICE, RESEARCH IN BRIEF, THE RIGHTS OF CRIME VICTIMS—DOES LEGAL PROTECTION MAKE A DIFFERENCE? 1 (Dec. 1998) [hereinafter NIJ REPORT]. An earlier version of essentially the same report is reprinted in *1997 Senate Judiciary Comm. Hearings*, *supra* note 6, at 15.

[158] NIJ REPORT, *supra* note 157, at 4 exh.1.

[159] *See* NATIONAL VICTIM CENTER, STATUTORY AND CONSTITUTIONAL PROTECTION OF VICTIMS' RIGHTS, IMPLEMENTATION AND IMPACT ON CRIME VICTIMS, SUB-REPORT: COMPARISON OF WHITE AND NON-WHITE CRIME VICTIM RESPONSES REGARDING VICTIMS' RIGHTS 5 (1997) [hereinafter NVC RACE SUB-REPORT] ("[I]n many instances non-white victims were less likely to be provided those [crime victims'] rights . . . .").

[160] *See* Mosteller, *Unnecessary Amendment*, *supra* note 13, at 447 n.13.

[161] *See* NIJ REPORT, *supra* note 157, at 11.

cites one internal Justice Department reviewer who stated during the review process in conclusory terms that the report was unsatisfactory and should not be published.[162] The conclusion of the NIJ review process, however, after hearing from all reviewers, including apparently favorable peer reviews, was to publish the study.[163] Finally, Mosteller criticizes the data as resting on unverified self-reported data from crime victims. However, since the research question was how many victims had been afforded their rights, asking victims, rather than the agencies suspected of failing to provide rights, would appear to be a standard methodological approach. The study also obtained a very high response rate (83%) from the victims interviewed,[164] suggesting that the findings are not due to any kind of responder bias. And given the magnitude of the alleged failures to provide victims' rights—ranging up to 60% and more—the general dismissal picture presented by the NIJ report is clear. Opponents of the Amendment offer no competing statistics, and such other data as exist tend to corroborate the NIJ findings of substantial noncompliance.[165]

Given such statistics, it is interesting to consider what the defenders of the status quo believe is an acceptable level of violation of rights. Suppose new statistics could be gathered that show that victims' rights are respected in 75% of all cases, or 90%, or even 98%. America is so far from a 98% rate for affording victims rights that my friends on the front lines of providing victim services probably will dismiss this exercise as a meaningless law school hypothetical. But would a 98% compliance rate demonstrate that the amendment is "unnecessary"? Even a 98% enforcement rate would leave numerous victims unprotected. As the Supreme Court has observed in response to the claim that the Fourth Amendment exclusionary rule affects

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[162]*See* Mosteller, *Unnecessary Amendment*, *supra* note 13, at 447 n.13 (citing Memorandum from Sam McQuade, Program Manager, NIJ, to Jeremy Travis, Director, NIJ (May 16, 1997)).

[163]NAT'L INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, GUIDE TO WRITING REPORTS FOR NIJ: POLICY, REQUIREMENTS, AND PROCEDURES 3 (1998) (listing procedures for NIJ's publication process, including external peer review panel).

[164]*See* NIJ REPORT, *supra* note 157, at 3. Professor Mosteller criticizes the NIJ's reported 83% response figure, suggesting that it was actually as low as 29%. *See* Mosteller, *Unnecessary Amendment*, *supra* note 13, at 447 n.13. I will not take time here to explain why I disagree with his 29% calculation, but simply press the point that he offers no specific reason for believing that the basic finding of the NIJ would have been any different had the response rate been higher.

[165]*See, e.g.*, HILLENBRAND & SMITH, *supra* note 69, at 112 (noting that prosecutors and victims consistently report that victims are "not usually" given notice or consulted in significant proportion of cases); Erez, *Victim Participation*, *supra* note 69, at 26 (finding that victims are rarely informed of right to make statements and victim impact statements are not always prepared).

"only" about 2% of all cases in this country, "small percentages . . . mask a large absolute number of" cases.[166] A rough calculation suggests that even if the Victims' Rights Amendment improved treatment for only 2% of the violent crime cases it affects, a total of about 30,000 victims would benefit each year.[167] Even more importantly, we would not tolerate a mere 98% "success" rate in enforcing other important rights. Suppose that, in opposition to the Bill of Rights, it had been argued that 98% of all Americans could worship in the religious tradition of their choice, 98% of all newspapers could publish without censorship from the government, 98% of criminal defendants had access to counsel, and 98% of all prisoners were free from cruel and unusual punishment. Surely the effort still would have been mounted to move the totals closer to 100%. Given the wide acceptance of victims' rights, they deserve the same respect.

Professor Mosteller does not spend much time reviewing the level of compliance in the current system, instead moving quickly to the claim that the Amendment will "not automatically eliminate[]" the problem of official indifference to victims' rights.[168] But the key issue is not whether the Amendment will "eliminate" indifference, but rather whether it will reduce indifference—thereby improving the lot of victims. Here the posture of the Amendment's critics is quite inconsistent. On the one hand, they posit dramatic *damaging* consequences that will reverberate throughout the system after the Amendment's adoption, even though those consequences are entirely unintended. Yet, at the same time, they are unwilling to concede that the Amendment will make even modest *positive* consequences in the areas that it specifically addresses.

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[166]United States v. Leon, 468 U.S. 897, 907–08 n.6 (1984); *see also* CRAIG M. BRADLEY, THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION 43–44 (1993) (worrying about effect of exclusionary rule, if 5% of cases are dismissed due to *Miranda* violations and 5% are dismissed due to search problems).

[167]FBI estimates suggest an approximate total of about 2,303,600 arrests for violent crimes each year, broken down as follows: 729,900 violent crimes within the crime index (murder, forcible rape, robbery, aggravated assault), 1,329,000 other assaults, 95,800 sex offenses, and 149,800 offenses against family and children. *See* FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 1996, at 214 tbl.29 (1997). A rough estimate is that about 70% of these cases will be accepted for prosecution, within the adult system. *See* Brian Forst, *Prosecution and Sentencing*, *in* CRIME 363–64 (James Q. Wilson & Joan Petersilia eds., 1995). Assuming the Amendment would benefit 2% of the victims within these charged cases produces the figure in text. For further discussion of issues surrounding such extrapolations, see Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 438–40; Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—And From* Miranda, 88 J. CRIM. L. & CRIMINOLOGY 497, 514–16 (1998).

[168]Mosteller, *Unnecessary Amendment*, *supra* note 13, at 449.

The best view of the Amendment's effects is a moderate one that avoids the varying extremes of the critics. Of course the Amendment will not eliminate all violations of victims' rights, particularly because practical politics have stripped from the Amendment its civil damages provision.[169] But neither will the Amendment amount to an ineffectual response to official indifference. On this point, it is useful to consider the steps involved in adopting the Amendment. Both the House and Senate of the United States Congress would pass the measure by two-thirds votes. Then a full three-quarters of the states would ratify the provision.[170] No doubt these events would generate dramatic public awareness of the nature of the rights and the importance of providing them. In short, the adoption of the Amendment would constitute a major national event. One might even describe it as a "constitutional moment" (of the old fashioned variety) where the nation recognizes the crucial importance of protecting certain rights for its citizens.[171] Were such events to occur, the lot of crime victims likely would improve considerably. The available social science research suggests that the primary barrier to successful implementation of victims' rights is "the socialization of [lawyers] in a legal culture and structure that do not recognize the victim as a legitimate party in criminal proceedings."[172] Professor Mosteller seems to agree generally with this view, explaining that "officials fail to honor victims' rights largely as a result of inertia, past learning, insensitivity to the unfamiliar needs of victims, lack of training, and inadequate or misdirected institutional incentives."[173] A constitutional amendment, reflecting the instructions of the nation to its criminal justice system, is perfectly designed to attack these problems and develop a new legal culture supportive of victims. To be sure, one can paint the prospect of

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[169]*See* S.J. Res. 3, 106th Cong. § 2 (1999). *See generally* Cassell, *supra* note 33, at 1418–21 (discussing damages actions under victims' rights amendments).

[170]*See* U.S. CONST. art. V.

[171]*Cf.* 1 BRUCE ACKERMAN, WE THE PEOPLE *passim* (1990) (discussing "constitutional moments").

[172]Erez, *Victim Participation*, *supra* note 69, at 29; *see also* WILLIAM PIZZI, TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF CRIMINAL TRIALS HAS BECOME AN EXPENSIVE FAILURE AND WHAT WE NEED TO DO TO REBUILD IT 196–97 (1999) (discussing problems with American trial culture); Pizzi, *supra* note 10, at 359–60 (noting trial culture emphasis on winning and losing that may overlook victims); William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37, 37–40 (1996) ("So poor is the level of communication that those within the system often seem genuinely bewildered by the victims' rights movement, even to the point of suggesting rather condescendingly that victims are seeking a solace from the criminal justice system that they ought to be seeking elsewhere.").

[173]Mosteller, *Unneccesary Amendment*, *supra* note 13, at 449.

such a change in culture as "entirely speculative."[174] Yet this means nothing more than that, until the Amendment passes, we will not have an opportunity to precisely assay its positive effects. Constitutional amendments have changed our legal culture in other areas, and clearly the logical prediction is that a victims' amendment would go a long way towards curing official indifference. This hypothesis is also consistent with the findings of the NIJ study on state implementation of victims' rights. The study concluded that "[w]here legal protection is strong, victims are more likely to be aware of their rights, to participate in the criminal justice system, to view criminal justice system officials favorably, and to express more overall satisfaction with the system."[175] It is hard to imagine any stronger protection for victims' rights than a federal constitutional amendment. Moreover, we can confidently expect that those who will most often benefit from the enhanced consistency in protecting victims' rights will be members of racial minorities, the poor, and other disempowered groups. Such victims are the first to suffer under the current, "lottery" implementation of victims' rights.[176]

Professor Mosteller devotes much of his article to challenging the claim that the Amendment is needed to block excessive official deference to the rights of criminal defendants. Proponents of the Amendment have argued that, given two hundred years of well-established precedent supporting defendants' rights, the apparently novel victims' rights found in state constitutional amendments and elsewhere too frequently have been ignored on spurious grounds of alleged conflict.[177] Professor Mosteller, however, rejects this argument on the ground that there is no "currently valid appellate opinion reversing a defendant's conviction because of enforcement of a provision of state or federal law or state constitution that granted a right to a victim."[178] As a result, he concludes, there is no evidence of a "significant body of law that would warrant the remedy of a constitutional amendment."[179]

This argument does not refute the case for the Amendment, but rather is a mere straw man created by the opponents. The important issue is not whether victims' rights are thwarted by a body of *appellate* law, but rather whether they are blocked by *any* obstacles, including most especially obstacles at the trial level where victims must first attempt to secure their

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[174]*Id.* at 447.

[175]NIJ REPORT, *supra* note 157, at 10.

[176]*See supra* note 159 and accompanying text (noting that minority victims are least likely to be afforded rights today); *cf.* Henderson, *supra* note 14, at 421–22 (criticizing "lottery approach" to affording victims' rights).

[177]*See, e.g.*, *infra* Part II.B (discussing victims' rights in Oklahoma City bombing case).

[178]Mosteller, *Unnecessary Amendment*, *supra* note 13, at 452.

[179]*Id.* at 453; *see also* S. REP. NO. 105-409, at 51–52 (1998).

rights. One would naturally expect to find few appellate court rulings rejecting victims' rights; there are few victims' rulings anywhere, let alone in appellate courts. To get to the appellate level—in this context, the "mansion" of the criminal justice system—victims first must pass through the "gatehouse"—the trial court.[180] That trip is not an easy one. Indeed, one of the main reasons for the Amendment is that victims find it extraordinarily difficult to get anywhere close to appellate courts. To begin with, victims may be unaware of their rights or discouraged by prosecutors from asserting them. Even if aware and interested in asserting their rights in court, victims may lack the resources to obtain counsel. Finding counsel, too, will be unusually difficult, since the field of victims' rights is a new one in which few lawyers specialize.[181] Time will be short, since many victims' issues, particularly those revolving around sequestration rules, arise at the start of or even during the trial. Even if a lawyer is found, she must arrange to file an interlocutory appeal in which the appellate court will be asked to intervene in ongoing trial proceedings in the court below. If victims can overcome all these hurdles, the courts still possess an astonishing arsenal of other procedural obstacles to prevent victim actions, as Professor Bandes's paper in this Symposium cogently demonstrates.[182] In light of all these hurdles, appellate opinions about victim issues seem, to put it mildly, quite unlikely.

One can interpret the resulting dearth of rulings as proving, as Professor Mosteller would have it, that no reported appellate decisions strike down victims' rights. Yet it is equally true that, at best, only a handful of reported appellate decisions uphold victims' rights. This fact tends to provide an explanation for the frequent reports of denials of victims' rights at the trial level. Given that these rights are newly created and the lack of clear appellate sanction, one would expect trial courts to be wary of enforcing these rights against the inevitable, if invariably imprecise, claims of violations of a defendant's rights.[183] Narrow readings will be encouraged by the asymmetries

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[180]*Cf.* Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, *in* YALE KAMISAR ET AL., CRIMINAL JUSTICE IN OUR TIME 19 (1965) (famously developing this analogy in context of police interrogation).

[181]*See* Henderson, *supra* note 14, at 429. Hopefully this situation may improve with the publication of Professor Beloof's law school casebook on victim's rights, *see* BELOOF, *supra* note 128, which may encourage more training in this area.

[182]*See* Susan Bandes, *supra* note 11, *passim*; *see also* Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2273 (1991) [hereinafter Bandes, *The Negative Constitution*] (discussing courts' reluctance to review government inaction in protection of constitutional rights); Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 229–30 (1990) (noting how courts limit and define issues in case).

[183]As shown in Part I.A, *supra*, victims' rights do not actually conflict with defendant's rights. Frequently, however, it is the defendant's mere *claim* of alleged conflict, not carefully considered by the trial court, that ends up producing (along with the other contributing factors)

of appeal—defendants can force a new trial if their rights are denied, while victims cannot.[184] Victims, too, may be reluctant to attempt to assert untested rights for fear of giving a defendant grounds for a successful appeal and a new trial.[185]

In short, nothing in the appellate landscape provides a basis for concluding that all is well with victims in the nation's trial courts. The Amendment's proponents have provided ample examples of victims denied rights in the day-to-day workings of the criminal trials. The Amendment's opponents seem tacitly to concede the point by shifting the debate to the more rarified appellate level. Thus, here again, the opponents have not fully engaged the case for the Amendment.

As one final fallback position, the Amendment's critics maintain that it will not "eliminate" the problems in enforcing victims' rights because some level of uncertainty will always remain.[186] However, as noted before, the issue is not *eliminating* uncertainty, but *reducing* it. Surely giving victims explicit constitutional protection will vindicate their rights in many circumstances where today the trial judge would be uncertain how to proceed. Moreover, the Amendment's clear conferral of "standing" on victims[187] will help to develop a body of precedents on how victims are to be treated. There is, accordingly, every reason to expect that the Amendment will reduce uncertainties substantially and improve the lot of crime victims.

B. The Oklahoma City Illustration of the "Necessary" Amendment

On assessing whether the Amendment is "necessary," it might be said that "a page of history is worth a volume of logic."[188] To be sure, one can cite examples of victims who have received fair treatment in the criminal justice system, as Professor Henderson's moving narrative about her treatment during the prosecution of her rapist demonstrates.[189] Nonetheless, this and

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the denial of victims' rights.

[184]*See* Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1, 5–7 (1990) (examining consequences of asymmetric risk of legal error in criminal cases); *see also* Erez & Rogers, *supra* note 69, at 228–29 (noting reluctance of South Australian judges to rely on victim evidence because of appeal risk).

[185]*See* Paul G. Cassell, *Fight for Victims' Justice is Going Strong*, THE DESERET NEWS, July 10, 1996, at A7 (illustrating this problem with uncertain Utah case law on victim's right to be present).

[186]Mosteller, *Unnecessary Amendment*, *supra* note 13, at 464.

[187]*See* S.J. Res. 3, 106th Cong. § 2 (1999) ("Only the victim or the victim's legal representative shall have standing to assert the rights established by this article . . . .").

[188]New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (Holmes, J.).

[189]*See* Henderson, *supra* note 14, at 433–41.

other examples hardly make the case against reform, as even Henderson seems to concede that there is a need for improvement in many cases.[190] The question then becomes whether a constitutional amendment would operate to spur that improvement. Here it is necessary to look not at the system's successes in ruling on victims' claims, but rather at its failures. The Oklahoma City bombing case provides an illustration of the difficulties victims face in having their claims considered by appellate courts.

During a pre-trial motion hearing in the Timothy McVeigh prosecution, the district court *sua sponte* issued a ruling precluding any victim who wished to provide victim impact testimony at sentencing from observing any proceeding in the case.[191] The court based its ruling on Rule 615 of the Federal Rules of Evidence—the so-called "rule on witnesses."[192] In the hour that the court then gave to victims to make this wrenching decision about testifying, some of the victims opted to watch the proceedings; others decided to leave Denver to remain eligible to provide impact testimony.[193]

Thirty-five victims and survivors of the bombing then filed a motion asserting their own standing to raise their rights under federal law and, in the alternative, seeking leave to file a brief on the issue as *amici curiae*.[194] The victims noted that the district court apparently had overlooked the Victims' Bill of Rights, a federal statute guaranteeing victims the right (among others) "to be present at all public court proceedings, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial."[195]

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[190]*See id.* at 434.

[191]*See* United States v. McVeigh, No. 96-CR-68, 1996 WL 366268, at *2 (D. Colo. June 26, 1996).

[192]*Id.* at **2–3 (discussing application of FED. R. EVID. 615).

[193]*See 1997 Senate Judiciary Comm. Hearings*, *supra* note 6, at 73 (statement of Marsha Kight).

[194]Motion of Marsha and Tom Kight et al. and the National Organization for Victim Assistance Asserting Standing to Raise Rights Under the Victims' Bill of Rights and Seeking Leave to File a Brief as *Amici Curiae*, *United States v. McVeigh*, No. 96-CR-68-M, 1996 WL 570841 (D. Colo. Sept. 30, 1996). I represented a number of the victims on this matter on a pro bono basis, along with able co-counsel Robert Hoyt, Arnon Siegel, and Karan Bhatia of the Washington, D.C. law firm of Wilmer, Cutler, and Pickering, and Sean Kendall of Boulder, Colorado. For a somewhat fuller recounting of the victims' issues in the case, see *1997 Senate Judiciary Comm. Hearings*, *supra* note 6, at 106–13 (statement of Paul Cassell).

[195]42 U.S.C. § 10606(b)(4) (1994). The victims also relied on a similar provision found in the authorization for closed circuit broadcasting of the trial, 42 U.S.C.A. § 10608(a) (West Supp. 1998), and on a First Amendment right of access to public court proceedings, *see* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 577 (1980) (finding First Amendment right of court access).

The district court then held a hearing to reconsider the issue of excluding victim witnesses.[196] The court first denied the victims' motion asserting standing to present their own claims, allowing them only the opportunity to file amicus briefs.[197] After argument by the Department of Justice and by the defendants, the court denied the motion for reconsideration.[198] It concluded that victims present during court proceedings would not be able to separate the "experience of trial" from "the experience of loss from the conduct in question," and, thus, their testimony at a sentencing hearing would be inadmissible.[199] Unlike the original ruling, which was explicitly premised on Rule 615, the October 4 ruling was more ambiguous, alluding to concerns under the Constitution, the common law, and the rules of evidence.[200]

The victims then filed a petition for writ of mandamus in the U.S. Court of Appeals for the Tenth Circuit seeking review of the district court's ruling.[201] Because the procedures for victims appeals were unclear, the victims filed a separate set of documents appealing from the ruling.[202] Similarly, the Department of Justice, uncertain of precisely how to proceed procedurally, filed both an appeal and a petition for a writ of mandamus.

Three months later, a panel of the Tenth Circuit rejected—without oral argument—both the victims' and the Department's claims on jurisdictional grounds. With respect to the victims' challenges, the court concluded that the victims lacked "standing" under Article III of the Constitution because they had no "legally protected interest" to be present at the trial and consequently had suffered no "injury in fact" from their exclusion.[203] The Tenth Circuit also found that the victims had no right to attend the trial under any First Amendment right of access.[204] Finally, the Tenth Circuit rejected, on jurisdictional grounds, the appeal and mandamus petition filed by the Department.[205] Efforts by both the victims and the Department of Justice to obtain a rehearing were unsuccessful,[206] even with the support of separate

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[196]*See* United States v. McVeigh, No. 96-CR-68, 1996 WL 578525, at **16–25 (D. Colo. Oct. 4, 1996).

[197]*See id.* at *16.

[198]*See id.* at *25.

[199]*Id.* at *24.

[200]*See id.*

[201]Petition for Writ of Mandamus, Kight et al. v. Matsch, No. 96-1484 (10th Cir. Nov. 6, 1996) (on file with author).

[202]*See* United States v. McVeigh, 106 F.3d 325, 328 (10th Cir. 1997).

[203]*Id.* at 334–35.

[204]*See id.* at 335; *see supra* note 195 (discussing right of access for press under First Amendment).

[205]*See McVeigh*, 106 F.3d at 333.

[206]*See* Order, United States v. McVeigh, No. 96-1469, 1997 WL 128893, at *3 (10th Cir. Mar. 11, 1997).

briefs urging rehearing from forty-nine members of Congress, all six Attorneys General in the Tenth Circuit, and some of the leading victims' groups in the nation.[207]

In the meantime, the victims, supported by the Oklahoma Attorney General's Office, sought remedial legislation in Congress clearly stating that victims should not have to decide between testifying at sentencing and watching the trial. The Victims' Rights Clarification Act of 1997 was introduced to provide that watching a trial does not constitute grounds for denying the chance to provide an impact statement. Representative Wexler, a supporter of the legislation, observed the painful choice that the district court's ruling was forcing on the victims:

> As one of the Oklahoma City survivors put it, a man who lost one eye in the explosion, "'It's not going to affect our testimony at all. I have a hole in my head that's covered with titanium. I nearly lost my hand. I think about it every minute of the day.'"
>
> That man, incidentally, is choosing to watch the trial and to forfeit his right to make a victim impact statement. Victims should not have to make that choice.[208]

The measure passed the House by a vote of 418 to 19.[209] The next day, the Senate passed the measure by unanimous consent.[210] The following day, President Clinton signed the Act into law,[211] explaining that "when someone

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[207]*See* Brief for Amici Curiae Washington Legal Foundation and United States Senators Don Nickles and 48 Other Members of Congress, United States v. McVeigh, 106 F.3d 325 (10th Cir. Feb. 14, 1997) (No. 96-1469) (on file with author) (warning that decision meant that victims of federal crimes will never be heard for violations of their rights); Brief for Amici Curiae States of Oklahoma, Colorado, Kansas, New Mexico, Utah. and Wyoming Supporting the Suggestion for Rehearing and the Suggestion for Rehearing En Banc by the Oklahoma City Bombing Victims and the United States, United States v. McVeigh, 106 F.3d 325 (10th Cir. Feb. 14, 1997) (No. 96-1469) (on file with author) (warning that decision created "an 'important problem' for the administration of justice within the Tenth Circuit"); Brief for Amici Curiae National Victims Center, Mothers Against Drunk Driving, the National Victims' Constitutional Amendment Network, Justice for Surviving Victims, Inc., Concerns of Police Survivors, Inc., and Citizens for Law and Order, Inc., in Support of Rehearing, United States v. McVeigh, 106 F.3d 325 (10th Cir. Feb. 17, 1997) (No. 96-1469) (on file with author) (warning that decision will "preclude anyone from exercising any rights afforded under the Victims' Bill of Rights").

[208]143 CONG. REC. H1050 (daily ed. Mar. 18, 1997) (statement of Rep. McCollum).

[209]*See id.* at H1068 (five members not voting).

[210]*See* 143 CONG. REC. S2509 (daily ed. Mar. 19, 1997) (statement of Sen. Nickles).

[211]*See* Pub. L. No. 105-6, *codified at* 18 U.S.C.A. § 3510 (West Supp. 1998).

is a victim, he or she should be at the center of the criminal justice process, not on the outside looking in."[212]

The victims then promptly filed a motion with the district court asserting a right to attend under the new law.[213] The victims explained that the new law invalidated the court's earlier sequestration order and sought a hearing on the issue.[214] Rather than squarely uphold the new law, however, the district court entered a new order on victim-impact witness sequestration.[215] The court concluded that "any motions raising constitutional questions about this legislation would be premature and would present issues that are not now ripe for decision."[216] Moreover, the court held that it could address issues of possible prejudicial impact from attending the trial by conducting a voir dire of the witnesses *after* the trial.[217] The district court also refused to grant the victims a hearing on the application of the new law, concluding that its ruling rendered their request "moot."[218]

After that ruling, the Oklahoma City victim impact witnesses—once again—had to make a painful decision about what to do. Some of the victim impact witnesses decided *not* to observe the trial because of ambiguities and uncertainties in the court's ruling, raising the possibility of excluding testimony from victims who attended the trial.[219] The Department of Justice also met with many of the impact witnesses, advising them of these substantial uncertainties in the law, and noting that any observation of the trial would create the possibility of exclusion of impact testimony.[220] To end this confusion, the victims filed a motion for clarification of the judge's order.[221] The motion noted that "[b]ecause of the uncertainty remaining under

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[212]William J. Clinton, Statement by the President, Mar. 19, 1997 (visited May 17, 1999) <http://www.pub.whitehouse.gov/uri-res/I2R?urn:pdi://oma.eop.gov.us/1997/3/20/6.text.1>.

[213]*See* Memorandum of Marsha Kight et al. on the Victims Rights Clarification Act of 1997, United States v. McVeigh, No. 96-CR-68-M, 1997 WL 144614, at *3 (D. Colo. Mar. 21, 1997).

[214]*See* Motion of Marsha Kight et al. for Hearing, United States v. McVeigh, No. 96-CR-68-M, 1997 WL 144564, at *1 (D. Colo. Mar. 21, 1997).

[215]*See* Order Amending Order Under Rule 615, United States v. McVeigh, No. 96-CR-68-M, 1997 WL 136343, at *3 (D. Colo. Mar. 25, 1997).

[216]*Id.*

[217]*See id.*

[218]*See* Order Declaring Motion Moot, United States v. McVeigh, No. 96-CR-68-M, 1997 WL 136344, at *1 (D. Colo. Mar. 25, 1997).

[219]*See 1997 Senate Judiciary Comm. Hearings*, *supra* note 6, at 111 (statement of Prof. Paul Cassell); *id.* at 70 (statement of Marsha Kight).

[220]*See id.* at 111 (statement of Prof. Paul Cassell).

[221]*See* Request of the Victims of the Oklahoma City Bombing and the National Organization for Victim Assistance for Clarification of the Order Amending the Order Under Rule 615, United States v. McVeigh, No. 96-CR-68-M, 1997 WL 159969, at **1, 2 (D. Colo. Apr. 4, 1997) (requesting that court clarify ruling in which victim impact testimony could be

the Court's order, a number of the victims have been forced to give up their right to observe defendant McVeigh's trial. This chilling effect has thus rendered the Victims' Rights Clarification Act of 1997 . . . for practical purposes a nullity."[222] Unfortunately, the effort to obtain clarification did not succeed, and McVeigh's trial proceeded without further guidance for the victims.

After McVeigh was convicted, the victims filed a motion to be heard on issues pertaining to the new law.[223] Nonetheless, the court refused to allow the victims to be represented by counsel during argument on the law or during voir dire about the possible prejudicial impact of viewing the trial.[224] The court, however, concluded (as the victims had suggested all along) that no victim was in fact prejudiced as a result of watching the trial.[225]

This recounting of the details of the Oklahoma City bombing litigation leaves no doubt about the difficulties that victims face with mere statutory protection of their rights. For a number of the victims, the rights afforded in the Victims' Rights Clarification Act of 1997 and the earlier Victims' Bill of Rights were not protected. They did *not* observe the trial of defendant Timothy McVeigh because of lingering doubts about the constitutional status of these statutes.

Not only were these victims denied their right to observe the trial, but perhaps equally troubling is that the fact that they were never able to speak even a single word in court, through counsel, on this issue. This denial occurred in spite of legislative history specifically approving of victim participation. In passing the Victims' Rights Clarification Act, the House Judiciary Committee stated that it "assumes that both the Department of Justice *and victims* will be heard on the issue of a victim's exclusion, should a question of their exclusion arise under this section."[226] In the Senate, the

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denied).

[222]*Id.* at *2.

[223]*See* Motion of the Victims of the Oklahoma City Bombing to Reassert the Motion for a Hearing on the Application of the Victim Rights Clarification Act of 1997, United States v. McVeigh, No. 96-CR-68-M, 1997 WL 312104, at *6 (D. Colo. June 2, 1997) (arguing for opportunity to participate in any argument or constitutionality and application of Act).

[224]*See* Hearing on Victims Rights Clarification Act, United States v. McVeigh, No. 96-CR-68-M, 1997 WL 290019, at *7 (D. Colo. June 3, 1997) (concluding that statute does not "create[] standing for the persons who are identified as being represented by counsel in filing that brief").

[225]*See, e.g.*, Examination of Diane Leonard, United States v. McVeigh, No. 96-CR-68-M, 1997 WL 292341, at *4 (D. Colo. June 4, 1997) (testifying that she was not unduly influenced by trial proceedings).

[226]H.R. REP NO. 105-28, at 10 (1997) (emphasis added). Supporting this statement was the fact that, while the Victims Bill of Rights apparently barred some civil suits by victims, 42 U.S.C. § 10606(c), the new law contained no such provision. This was no accident. As the

primary sponsor of the bill similarly stated: "In disputed cases, the courts will hear from the Department of Justice, *counsel for the affected victims*, and counsel for the accused."[227] Yet, the victims were never heard.

Some might claim that this treatment of the Oklahoma City bombing victims should be written off as atypical. However, there is every reason to believe that the victims here were far *more* effective in attempting to vindicate their rights than victims in less notorious cases. The Oklahoma City bombing victims were mistreated while the media spotlight was on—when the nation was watching. The treatment of victims in forgotten courtrooms and trials is certainly no better, and in all likelihood much worse. Moreover, the Oklahoma City bombing victims had five lawyers working to press their claims in court—a law professor familiar with victims' rights, three lawyers at a prominent Washington, D.C. law firm, and a local counsel in Colorado—as well as an experienced and skilled group of lawyers from the Department of Justice. In the normal case, it often will be impossible for victims to locate a lawyer willing to pursue complex and unsettled issues about their rights without compensation. One must remember that crime most often strikes the poor and others in a weak position to retain counsel.[228] Finally, litigating claims concerning exclusion from the courtroom or other victims' rights promises to be quite difficult. For example, a victim may not learn that she will be excluded until the day the trial starts. Filing effective appellate actions in such circumstances promises to be practically impossible. It should therefore come as little surprise that this litigation was the *first* in which victims sought federal appellate court review of their rights under the Victims' Bill of Rights, even though that statute was passed in 1990.

The undeniable, and unfortunate, result of that litigation has been to establish—as the only reported federal appellate ruling—a precedent that will make effective enforcement of the federal victims' rights statutes quite difficult. It is now the law of the Tenth Circuit that victims lack "standing" to be heard on issues surrounding the Victims' Bill of Rights and, for good measure, that the Department of Justice may not take an appeal asserting rights for victims under the statute.[229] For all practical purposes, the treatment

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Report of the House Judiciary Committee pointedly explained: "The Committee points out that it has not included language in this statute that bars a cause of action by the victim, as it has done in other statutes affecting victims' rights." H.R. REP NO. 105-28 at 10 (1997).

[227]143 CONG. REC. S2507 (daily ed. Mar. 19, 1997) (statement of Sen. Nickles).

[228]*See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, VIOLENT CRIME IN THE UNITED STATES 8 (1991) (noting that crime is more likely to strike low-income families); *cf.* Henderson, *supra* note 135, at 579 (noting that many crime victims come from disempowered groups).

[229]*See* United States v. McVeigh, 106 F.3d 325, 335–36 (10th Cir. 1997) (finding that victims lack standing to challenge law).

of crime victims' rights in federal court in Utah, Colorado, Kansas, New Mexico, Oklahoma, and Wyoming has been remitted to the unreviewable discretion of individual federal district court judges. The fate of the Oklahoma City victims does not inspire confidence that all victims' rights will be fully enforced in the future. Even in other circuits, the Tenth Circuit ruling, while not controlling, may be treated as having persuasive value. If so, the Victims' Bill of Rights will effectively become a dead letter.

The Oklahoma City bombing victims would never have suffered these indignities if the Victims' Rights Amendment had been the law of the land. First, the victims would never have been subject to sequestration. The Amendment guarantees all victims the constitutional right "not to be excluded from[] any public proceedings relating to the crime."[230] This would have prevented the sequestration order from being entered in the first place. Moreover, the Amendment affords victims the right "to be heard, if present, . . . at [a public] proceeding[] to determine a . . . sentence."[231] This provision would have protected the victims' right to provide impact testimony. Finally, the Amendment provides that "the victim . . . shall have standing to assert the rights established by this article,"[232] a protection guaranteeing the victims, through counsel, the opportunity to be heard to protect those rights.

Critics of the Victims' Rights Amendment have cited the Oklahoma City remedial legislation as an example of the "ability of victims to secure their interests through popular political action"[233] and "a paradigmatic example of how statutes, when properly crafted, can and do work."[234] This sentiment is far wide of the mark. To the contrary, the Oklahoma City case provides a compelling illustration of why a constitutional amendment is "necessary" to fully protect victims' rights in this country.

III. STRUCTURAL CHALLENGES

A final category of objections to the Victims' Rights Amendment can be styled as "structural" objections. These objections concede both the normative claim that victims' rights are desirable and the factual claim that such rights are not effectively provided today. These objections maintain, however, that a federal constitutional amendment should not be the means

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[230]S.J. Res. 3, 106th Cong. § 1 (1999).

[231]*Id.*

[232]*Id.* § 2.

[233]Mosteller, *Unnecessary Amendment*, *supra* note 13, at 460.

[234]S. REP. NO. 105-409, at 56 (1998) (minority views of Sens. Leahy, Kennedy, and Kohl).

through which victims' rights are afforded. These objections come in three primary forms. The standard form is that victims' rights simply do not belong in the Constitution as they are different from other rights found there. A variant on this critique is that any attempt to constitutionalize victims' rights will lead to inflexibility, producing disastrous, unintended consequences. A final form of the structural challenge is that the Amendment violates principles of federalism. Each of these arguments, however, lacks merit.

A. Claims that Victims' Rights Do Not Belong in the Constitution

Perhaps the most basic challenge to the Victims' Rights Amendment is that victims' rights simply do not belong in the Constitution. The most fervent exponent of this view may be constitutional scholar Bruce Fein, who has testified before Congress that the Amendment is improper because it does not address "the political architecture of the nation."[235] Putting victims' rights into the Constitution, the argument runs, is akin to constitutionalizing provisions of the National Labor Relations Act or other statutes, and thus would "trivialize" the Constitution.[236] Indeed, the argument concludes, to do so would "detract from the sacredness of the covenant."[237]

This argument misconceives the fundamental thrust of the Victims' Rights Amendment, which is to guarantee victim participation in basic governmental processes. The Amendment extends to victims the right to be notified of court hearings, to attend those hearings, and to participate in them in appropriate ways. As Professor Tribe and I have explained elsewhere:

> These are rights not to be victimized again through the process by which government officials prosecute, punish and release accused or convicted offenders. These are the very kinds of rights with which our Constitution is typically and properly concerned—rights of individuals to participate in all those government processes that strongly affect their lives.[238]

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[235] *Proposals to Provide Rights to Victims of Crime: Hearings on H.J. Res. 71 & H.R. 1322 Before the House Comm. on the Judiciary*, 105th Cong. 96 (1997) (statement of Bruce Fein).

[236] *1996 Senate Judiciary Comm. Hearings*, *supra* note 8, at 101 (statement of Bruce Fein).

[237] *Id.* at 100. For similar views, see, for example, Stephen Chapman, *Constitutional Clutter: The Wrongs of the Victims' Rights Amendment*, CHI. TRIB., Apr. 20, 1997, at A21; *Cluttering the Constitution*, N.Y. TIMES, July 15, 1996, at A12.

[238] Tribe & Cassell, *supra* note 22, at B5.

Indeed, our Constitution has been amended a number of times to protect participatory rights of citizens. For example, the Fourteenth and Fifteenth Amendments were added, in part, to guarantee that the newly freed slaves could participate on equal terms in the judicial and electoral processes, the Seventeenth Amendment to allow citizens to elect their own Senators, and the Nineteenth and Twenty-Sixth Amendments to provide voting rights for women and eighteen-year-olds.[239] The Victims' Rights Amendment continues in that venerable tradition by recognizing that citizens have the right to appropriate participation in the state procedures for punishing crime.

Confirmation of the constitutional worthiness of victims' rights comes from the judicial treatment of an analogous right: the claim of the media to a constitutionally protected interest in attending trials. In *Richmond Newspapers, Inc. v. Virginia*,[240] the Court agreed that the First Amendment guaranteed the right of the public and the press to attend criminal trials.[241] Since that decision, few have argued that the media's right to attend trials is somehow unworthy of constitutional protection, suggesting a national consensus that attendance rights to criminal trials are properly the subject of constitutional law. Yet, the current doctrine produces what must be regarded as a stunning disparity in the way courts handle claims of access to court proceedings. Consider, for example, two issues actually litigated in the Oklahoma City bombing case. The first was the request of an Oklahoma City television station for access to subpoenas for documents issued through the court. The second was the request of various family members of the murdered victims to attend the trial, discussed previously.[242] My sense is that the victims' request should be entitled to at least as much respect as the media request. However, under the law that exists today, the television station has a First Amendment interest in access to the documents, while the victims' families have no constitutional interest in challenging their exclusion from the trial.[243] The point here is not to argue that victims deserve greater constitutional protection than the press, but simply that if press interests can

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[239]U.S. CONST. amends. XIV, XV, XIX, XXVI.

[240]448 U.S. 554 (1980).

[241]*See id.* at 557 (stating that right to attend criminal trials is implicit in guarantees of First Amendment).

[242]*See supra* Part II.B.

[243]*Compare* United States v. McVeigh, 918 F. Supp. 1452, 1465–66 (W.D. Okla. 1996) (recognizing press interest in access to documents), *with* United States v. McVeigh, 106 F.3d 325, 335–36 (10th Cir. 1997) (finding that victims do not have standing to raise First Amendment challenge to order excluding them from trial). *See also* United States v. McVeigh, 119 F.3d 806, 814–15 (10th Cir. 1997) (recognizing First Amendment interest of press in access to documents, but sufficient findings made to justify sealing order).

be read into the Constitution without somehow violating the "sacredness of the covenant," the same can be done for victims.[244]

Professor Henderson has advanced a variant on the victims'-rights-don't-belong-in-the-Constitution argument with her claim that "a theoretical constitutional ground for victim's rights" has yet to be provided.[245] Law professors, myself included, enjoy dwelling on theory at the expense of real-world issues, but even on this plane, the objection lacks merit. Henderson seems to concede, if I read her correctly, that new constitutional rights can be justified on grounds that they support individual dignity and autonomy.[246] In her view, then, the question becomes one of discovering which policies society should support as properly reflecting individual dignity and autonomy. On this score, there is little doubt that society currently believes that a victim's right to participate in the criminal process is a fundamental one deserving protection. As Professor Beloof has explained at length in his piece here, "It is time to face the fact that the law now acknowledges the importance of victim participation in the criminal process."[247]

A further variant on the unworthiness objection is that our Constitution protects only "negative" rights against governmental abuse. Professor Henderson writes here, for example, that the Amendment's rights differ from others in the Constitution, which "tend to be individual rights *against* government."[248] Setting aside the possible response that the Constitution ought to recognize affirmative duties of government,[249] the fact remains that

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[244]In this way, the Amendment does not detract from First Amendment liberties, but expands them. *But cf.* Henderson, *supra* note 14, at 420 (suggesting that victims' rights arguably could affect First Amendment liberties, but conceding that "advocates of the Amendment have not argued for a balancing of victim's rights against the rights of the press").

[245]*Id.* at 386.

[246]*See id.* at 396–400.

[247]Beloof, *supra* note 9, at 289; *see also id.* at 328 app. a (compiling victim participation laws from state to state); 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. OF INT'L & COMP. L. 839, 868–72 (1997) (discussing fundamental nature of victims' rights); Note, *Passing the Victims' Rights Amendment: A Nation's March Toward a More Perfect Union*, 24 CRIM. & CIV. CONFINEMENT 647, 681–85 (1998) (same). *See generally* BELOOF, *supra* note 128, *passim* (legal case book replete with examples of victims' rights in process).

[248]Henderson, *supra* note 14, at 397; *see also 1996 House Judiciary Comm. Hearings*, *supra* note 7, at 194 (statement of Roger Pilon) (stating that Amendment has "feel" of listing "'rights' not as liberties that government must respect as it goes about its assigned functions but as 'entitlements' that the government must affirmatively provide"); Bruce Shapiro, *Victims & Vengeance: Why the Victims' Rights Amendment Is a Bad Idea*, THE NATION, Feb. 10, 1997, at 16 (suggesting that Amendment "[u]pends the historic purpose of the Bill of Rights").

[249]*See* Bandes, *The Negative Constitution*, supra note 182, at 2308–09 (suggesting that Constitution should be read to recognize and protect affirmative rights).

the Amendment's thrust is to check governmental power, not expand it.[250] Again, the Oklahoma City case serves as a useful illustration. When the victims filed a challenge to a sequestration order directed at them, they sought the liberty to attend court hearings. In other words, they were challenging the exercise of government power deployed against them, a conventional subject for constitutional protection. The other rights in the Amendment fit this pattern, as they restrain government actors, rather than extract benefits for victims. Thus, the State must give notice before it proceeds with a criminal trial; the State must respect a victim's right to attend that trial; and the State must consider the interests of victims at sentencing and other proceedings. These are the standard fare of constitutional protections, and indeed defendants already possess comparable constitutional rights. Thus, extending these rights to victims is no novel creation of affirmative government entitlements.[251]

Still another form of this claim is that victims' rights need not be protected in the Constitution because victims possess power in the political process—unlike, for example, unpopular criminal defendants.[252] This claim is factually unconvincing because victims' power is easy to overrate. Victims' claims inevitably bump up against well-entrenched interests within the criminal justice system,[253] and to date, the victims' movement has failed to achieve many of its ambitions. Victims have not, for example, generally

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[250]*See* Beloof, *supra* note 9, at 295 n.32.

[251]Perhaps some might quibble with this characterization as applied to a victim's right to an order of restitution, contending that this is a right solely directed against deprivations perpetrated by private citizens. However, the right to restitution is a right against government, as it is a right to "an *order* of restitution," an order that can only be provided by the courts. In any event, even if the restitution right is somehow regarded as implicating private action, it should be noted that the Constitution already addresses private conduct. The Thirteenth Amendment forbids "involuntary servitude," U.S. CONST. amend. XIII, a provision that encompasses private violation of rights. *See, e.g.*, United States v. Kozminski, 487 U.S. 931, 942 (1988) (stating that Thirteenth Amendment extends beyond state action). *See generally* Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to* Deshaney, 105 HARV. L. REV. 1359, 1365–68 (1992) (discussing contours of Thirteenth Amendment); Henderson, *supra* note 14, at 387–88 (noting "good arguments" that Thirteenth Amendment "appl[ies] to the acts of individuals").

[252]*See, e.g.*, *1996 Senate Judiciary Comm. Hearings*, *supra* note 8, at 100 (statement of Bruce Fein) (stating that defendants are subject to whims of majority); Henderson, *supra* note 14, at 400 (asserting that victims' rights are protected through democratic process); Mosteller, *supra* note 13, at 474 (maintaining that defendants are despised and politically weak, thus needing constitutional protection).

[253]*See* Andrew J. Karmen, *Who's Against Victims' Rights? The Nature of the Opposition to Pro-Victim Initiatives in Criminal Justice*, 8 ST. JOHN'S J. OF LEGAL COMMENT. 157, 162–69 (1992) (stating that if victims gain influence in criminal justice process, they will inevitably conflict with officials).

obtained the right to sue the government for damages for violations of their rights, a right often available to criminal defendants and other ostensibly less powerful groups. Additionally, the political power claim is theoretically unsatisfying as a basis for denying constitutional protection. After all, freedom of speech, freedom of religion, and similar freedoms hardly want for lack of popular support, yet they are appropriately protected by constitutional amendments. A standard justification for these constitutionally guaranteed freedoms is that we should make it difficult for society to abridge such rights, to avoid the temptation to violate them in times of stress or for unpopular claimants.[254] Victims' rights fit perfectly within this rationale. Institutional players in the criminal justice system are subject to readily understandable temptations to give short shrift to victims' rights, and their willingness to protect the rights of unpopular crime victims is sure to be tested no less than society's willingness to protect the free speech rights of unpopular speakers.[255] Indeed, evidence exists that the biggest problem today in enforcing victims' rights is inequality, as racial minorities and other less empowered victims are more frequently denied their rights.[256]

A final worthiness objection is the claim that victims' rights "trivialize" the Constitution,[257] by addressing such a mundane subject. It is hard for anyone familiar with the plight of crime victims to respond calmly to this claim. Victims of crime literally have died because of the failure of the criminal justice system to extend to them the rights protected by the Amendment. Consider, for example, the victims' right to be notified upon a prisoner's release. The Department of Justice recently explained that

> [a]round the country, there are a large number of documented cases of women and children being killed by defendants and convicted offenders recently released from jail or prison. In many of these cases, the victims

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[254]*See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (stating that we should be vigilant against attempts to infringe on free speech rights, unless danger and threat is immediate and clear); *see also* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449–52 (1985) (arguing that First Amendment should be targeted to protect free speech rights even at worst times).

[255]*See* Karmen, *supra* note 253, at 168–69 (explaining why criminal justice professionals are particularly unlikely to honor victims' rights for marginalized groups).

[256]*See* NVC RACE SUB-REPORT, *supra* note 159, at 5 ("[I]n many instances non-white victims were less likely to be provided [crime victims'] rights . . . .").

[257]*1996 Senate Judiciary Comm. Hearings*, *supra* note 8, at 101 (statement of Bruce Fein); *see also* S. REP. NO. 105-409, at 54 (1998) (minority views of Sens. Leahy, Kennedy, and Kohl) ("We should not diminish the majesty of the Constitution . . . .").

> were unable to take precautions to save their lives because they had not been notified.[258]

The tragic unnecessary deaths of those victims is, to say the least, no trivial concern.

Other rights protected by the Amendment are similarly consequential. Attending a trial, for example, can be a crucial event in the life of the victim. The victim's presence can not only facilitate healing of debilitating psychological wounds,[259] but also help the victim try to obtain answers to haunting questions. As one woman who lost her husband in the Oklahoma City bombing explained, "When I saw my husband's body, I began a quest for information as to exactly what happened. The culmination of that quest, I hope and pray, will be hearing the evidence at a trial."[260] On the other hand, excluding victims from trials—while defendants and their families may remain—can itself revictimize victims, creating serious additional or "secondary" harm from the criminal process itself.[261] In short, the claim that the Victims' Rights Amendment trivializes the Constitution is itself a trivial contention.

B. The Problem of Inflexible Constitutionalization

Another argument raised against the Victims' Rights Amendment is that victims' rights should receive protection through flexible state statutes and amendments, not an inflexible, federal, constitutional amendment. If victims' rights are placed in the United States Constitution, the argument runs, it will be impossible to correct any problems that might arise. The Judicial Conference explication of this argument is typical: "Of critical importance, such an approach is significantly more flexible. It would more easily accommodate a measured approach, and allow for 'fine tuning' if deemed

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[258] OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY 13–14 (1998); *see* Jeffrey A. Cross, Note, *The Repeated Sufferings of Domestic Violence Victims Not Notified of Their Assailant's Pre-Trial Release from Custody: A Call for Mandatory Domestic Violence Victim Notification Legislation*, 34 J. FAM. L. 915, 932–33 (1996) (arguing for legislation that requires notification to victim when assailant is released from prison).

[259] *See supra* notes 92–99 and accompanying text (discussing how victim participation can have healing effect).

[260] *1997 Senate Judiciary Comm. Hearings*, *supra* note 6, at 110 (statement of Paul Cassell) (quoting victim).

[261] *See supra* notes 92–99 and accompanying text.

necessary or desirable by Congress after the various concepts in the Act are applied in actual cases across the country."[262]

This argument contains a kernel of truth because its premise—that the Federal Constitution is less flexible than state provisions—is undeniably correct. This premise is, however, the starting point for the victims' position as well. Victims' rights all too often have been "fine tuned" out of existence. As even the Amendment's critics agree, state amendments and statutes are "far easier . . . to ignore,"[263] and for this very reason victims seek to have their rights protected in the Federal Constitution. To carry any force, the argument must establish that the greater respect victims will receive from constitutionalization of their rights is outweighed by the unintended, undesirable, and uncorrectable consequences of lodging rights in the Constitution.

Such a claim is untenable. To begin with, the Victims' Rights Amendment spells out in considerable detail the rights it extends. While this wordiness has exposed the Amendment to the charge of "cluttering the Constitution,"[264] the fact is that the room for surprises is substantially less than with other previously adopted, more open-ended amendments. On top of the Amendment's precision, its sponsors further have explained in great detail their intended interpretation of the Amendment's provisions.[265] In response, the dissenting Senators were forced to argue not that these explanations were imprecise or unworkable, but that courts simply would ignore them in interpreting the Amendment[266] and, presumably, go on to impose some contrary and damaging meaning. This is an unpersuasive leap because courts routinely look to the intentions of drafters in interpreting constitutional language no less than other enactments.[267] Moreover, the assumption that courts will interpret the Amendment to produce great mischief requires justification. One can envision, for instance, precisely the same arguments about the need for flexibility being leveled against a

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[262]S. REP. NO. 105-409, at 53 (1998) (reprinting Letter from George P. Kazen, Chief U.S. District Judge, Chair, Comm. on Criminal Law of the Judicial Conference of the United States, to Sen. Edward M. Kennedy, Senate Comm. on the Judiciary 2 (Apr. 17, 1997)).

[263]*1996 House Judiciary Comm. Hearings*, *supra* note 7, at 147 (statement of Ellen Greenlee, Nat'l Legal Aid & Defender Assoc.).

[264]*Cluttering the Constitution*, N.Y. TIMES, July 15, 1996, at A12 (arguing that political expediency is no excuse for amending Constitution).

[265]*See* S. REP. NO. 105-409, at 22–37 (1998) (considering specific analysis of each section of Amendment).

[266]*See id.* at 50–51 (minority views of Sens. Leahy, Kennedy, and Kohl) (arguing that "courts will not care much" for analysis in Senate Report).

[267]*See, e.g.*, U.S. Term Limits, Inc. v. Thorton, 514 U.S. 779, 790 (1995).

defendant's right to a trial by jury.[268] What about petty offenses?[269] What about juvenile proceedings?[270] How many jurors will be required?[271] All these questions have, as indicated in the footnotes, been resolved by court decision without disaster to the Union. There is every reason to expect that the Victims' Rights Amendment will be similarly interpreted in a sensible fashion. Just as courts have not read the seemingly unqualified language of the First Amendment as creating a right to yell "Fire!" in a crowded theater,[272] they will not construe the Victims' Rights Amendment as requiring bizarre results.[273]

In any event, the claim of unintended consequences amounts to an argument about language—specifically, that the language is insufficiently malleable to avoid disaster. An argument about inflexible language can be answered with language providing elasticity. The Victims' Rights Amendment has a provision addressed precisely to this point. The Amendment provides that "[e]xceptions to the rights established by this article may be created . . . when necessary to achieve a compelling interest."[274] Any parade of horribles collapses under this provision. A serious unintended consequence under the language of the Amendment is, by definition, a compelling reason for creating an exception. Curiously, those who argue that the Amendment is not sufficiently flexible to avoid calamity have yet to explain why the exceptions clause fails to guarantee all the malleability that is needed.

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[268]*See* U.S. CONST. amend. VI ("[T]he accused shall enjoy the right to a . . . trial[] by an impartial jury . . . .").

[269]*See* Baldwin v. New York, 399 U.S. 66, 73–74 (1970) (holding that jury trial is required for petty offenses as long as possible jail time exceeds six months).

[270]*See* McKeiver v. Pennsylvania, 403 U.S. 528, 549–51 (1971) (holding that jury trial is not required in juvenile proceedings).

[271]*See* Williams v. Florida, 399 U.S. 78, 103 (1970) (holding that six-person jury satisfies Sixth Amendment).

[272]*See* Schenck v. United States, 249 U.S. 47, 52 (1919) (noting that First Amendment does not allow person to yell "Fire!" in crowded theater).

[273]Critics of the Amendment have been forced to use improbable examples to suggest that the Amendment will create unintended difficulties. *See 1997 Senate Judiciary Comm. Hearings*, *supra* note 6, at 117–21 (statement of Paul Cassell). It is interesting on this score to note that the law professors opposed to the Amendment were unable to cite any real-world examples of language in the many state victims' rights amendments that has produced serious unintended consequences. *See id.* at 140 (letter from law professors); *1996 House Judiciary Comm. Hearings*, *supra* note 7, at 225 (letter from law professors).

[274]S.J. Res. 3, 106th Cong. § 3 (1999).

C. Federalism Objections

A final structural challenge to the Victims' Rights Amendment is the claim that it violates principles of federalism by mandating rights across the country. For example, a 1997 letter from various law professors objected that "amending the Constitution in this way changes basic principles that have been followed throughout American history. . . . The ability of states to decide for themselves is denied by this Amendment."[275] Similarly, the American Civil Liberties Union warned that the Amendment "constitutes [a] significant intrusion of federal authority into a province traditionally left to state and local authorities."[276]

The inconsistency of many of these newfound friends of federalism is almost breathtaking. Where were these law professors and the ACLU when the Supreme Court federalized a whole host of criminal justice issues ranging from the right to counsel, to *Miranda*, to death penalty procedures, to search and seizure rules, among many others? The answer, no doubt, is that they generally applauded nationalization of these criminal justice standards despite the adverse effect on the ability of states "to decide for themselves." Perhaps the law professors and the ACLU have had some epiphany and mean now to launch an attack on the federalization of our criminal justice system, with the goal of returning power to the states. Certainly quite plausible arguments could be advanced in support of trimming the reach of some federal doctrines.[277] But whatever the law professors and the ACLU may think, it is unlikely that we will ever retreat from our national commitment to afford criminal defendants basic rights like 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 process to criminal defendants *and* to their victims. This parallel treatment works no new damage to federalist principles.[278]

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[275] *1997 Senate Judiciary Comm. Hearings*, *supra* note 6, at 140–41 (letter from law professors); *see also* Mosteller, *Unnecessary Amendment*, *supra* note 13, at 444 (suggesting that "flexible uniformity" may be accomplished through federal legislation and incentives).

[276] *1997 Senate Judiciary Comm. Hearings*, *supra* note 6, at 159.

[277] *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); 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).

[278] If federalism were a serious concern of the law professors, one would also expect to see them supporting language in the Amendment guaranteeing flexibility for the states. Yet, the professors found fault with language in an earlier version of the Amendment that gave both Congress *and the states* the power to "enforce" the Amendment. *See 1997 Senate Judiciary*

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 those rights, victims have 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 decision 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—has strongly endorsed the Amendment:

> 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.[279]

While the Victims' Rights Amendment will extend basic rights to crime victims across the country, it leaves considerable room to the states to determine how to accord those rights within the structures of their own systems. For starters, the Amendment extends rights to a "victim of a crime of violence, as these terms may be defined by *law*."[280] The "law" that will define these crucial terms will come from the states. Indeed, states retain a bedrock of control over all victims' rights provisions—without a state statute defining a crime, there can be no "victim" for the criminal justice system to consider.[281] The Amendment also is written in terms that will give the states considerable latitude to accommodate legitimate local interests. For example, the Amendment only requires the states to provide "reasonable" notice to victims, avoiding the inflexible alternative of mandatory notice (which, by the way, is required for criminal defendants[282]).

Comm. Hearings, *supra* note 6, at 141 (letter from law professors).

[279]National Governors Association, Executive Committee Policy 23.1 ("Protecting Victims' Rights") (effective winter 1997 to winter 1999) (visited Mar. 3, 1999) <http://www.nga.org/Pubs/Policies/EC/ec23.asp>.

[280]S.J. Res. 3, 106th Cong. § 1 (1999) (emphasis added).

[281]*See* BELOOF, *supra* note 128, at 41–43 (discussing and listing various legal definitions of "victim").

[282]*See* United States v. Reiter, 897 F.2d 639, 642–44 (2d Cir. 1990) (requiring notice to apprise defendant of nature of proceedings against him).

In short, federalism provides no serious objection to the Amendment. Any lingering doubt on the point disappears in light of the Constitution's prescribed process for amendment, which guarantees ample involvement by the states. The Victims' Rights Amendment will not take effect unless a full three-quarters of the states, acting through their state legislatures, ratify the Amendment within seven years of its approval by Congress.[283] It is critics of the Amendment who, by opposing congressional approval, deprive the states of their opportunity to consider the proposal.[284]

CONCLUSION

This Article has attempted to review thoroughly the various objections leveled against the Victims' Rights Amendment, finding them all wanting. While a few normative objections have been raised to the Amendment, the values undergirding it are widely shared in our country, reflecting a strong consensus that victims' rights should receive protection. Contrary to the claims that a constitutional amendment is somehow unnecessary, practical experience demonstrates that only federal constitutional protection will overcome the institutional resistence to recognizing victims' interests. And while some have argued that victims' rights do not belong in the Constitution, in fact the Victims' Rights Amendment addresses subjects that have long been considered entirely appropriate for constitutional treatment.

Stepping back from these individual objections and viewing them as a whole reveals one puzzling feature that is worth a few concluding observations. While some of the objections are thoughtfully advanced,[285] many are contradicted by either specific language in the Amendment or real-world experience with the implementation of victims' rights programs. I hasten to add that others have observed this phenomenon of unsustainable arguments being raised against victims' rights. 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

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[283]*See* U.S. CONST. amend. V; S.J. Res. 3. 106th Cong. Preamble (1999); *see also* THE FEDERALIST No. 39 (James Madison) (discussing process of amending Constitution).

[284]*Cf.* RICHARD B. BERNSTEIN, AMENDING AMERICA 220 (1993) (recalling defeat of Equal Rights Amendment in states and observing that "[t]he significant role of state governments as participants in the amending process is thriving"); Mosteller, *Unnecessary Amendment*, *supra* note 13, at 451 n.21 (noting that "unfunded mandates" argument is "arguably inapposite for a constitutional amendment that must be supported by three-fourths of the states since the vast majority of states would have approved imposing the requirement on themselves").

[285]For three particularly thoughtful discussions of criticisms of the Amendment, see Bandes, *supra* note 11, *passim*; Mosteller, *Unnecessary Amendment*, *supra* note 13, *passim*; Henderson, *supra* note 14, *passim*.

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."[286] 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 the latter group in a legal culture and structure that do not recognize the victim as a legitimate party in criminal proceedings."[287]

The objections against the Victims' Rights Amendment, often advanced by attorneys, provide support for Erez's hypothesis. Many of the complaints rest on little more than an appeal to retain a legal tradition that excludes victims from participating in the process, to in some sense leave it up to the "professionals"—the judges, prosecutors, and defense attorneys—to do justice as they see fit. Such entreaties may sound attractive to members of the bar, who not only have vested interests in maintaining their monopolistic control over the criminal justice system, but also have grown up without any exposure to crime victims or their problems. The "legal culture" that Erez accurately perceived is one that has not made room for crime victims. Law students learn to "think like lawyers" in classes such as criminal law and criminal procedure, where victims' interests receive no discussion. In the first year in criminal law, students learn in excruciating detail to focus on the state of mind of a criminal defendant, through intriguing questions about mens rea and the like.[288] In the second year, students may take a course on criminal procedure, where defendants' and prosecutors' interests under the constitutional doctrine governing search and seizure, confessions, and right to counsel are the standard fare. Here, too, victims are absent.[289] The most popular criminal procedure casebook, for example, spans some 877 pages;[290]

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[286]Erez, *Victim Participation*, *supra* note 69, at 28; *accord* Deborah P. Kelly & Edna Erez, *Victim Participation in the Criminal Justice System*, *in* VICTIMS OF CRIME 231, 241 (Robert C. Davis ed., 2d ed. 1997).

[287]*Id.* at 29; *see also* Erez & Rogers, *supra* note 69, at 234–35 (noting similar barriers to implementing victims reforms in South Australia); Edna Erez & Kathy Laster, Neutralizing Victim Reform: Legal Professionals' Perspectives on Victims and Impact Statements *passim* (Dec. 16, 1998) (unpublished manuscript, on file with author) (discussing how and why legal professionals resist reform of criminal justice process through increased victim participation).

[288]For a good example of the standard criminal law curriculum, see ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW AND PROCEDURE: CASES AND MATERIALS (7th ed. 1989).

[289]For a comprehensive and cogent examination of the absence of victims in criminal procedure courses, see Douglas E. Beloof, Are Your Criminal Procedure Students Out of Touch? A Review of Criminal Procedure Casebooks for Material on the Role of the Crime Victim (unpublished manuscript, on file with author).

[290]YALE KAMISAR ET AL., BASIC CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS (8th ed. 1994).

yet, victims' rights appear only in two paragraphs, made necessary because in California, a victims' rights initiative affected a defendant's right to exclude evidence.[291] Finally, in their third year, students may take a clinical course in the criminal justice process, where they may be assigned to assist prosecutors or defense attorneys in actual criminal cases. Not only are they never assigned to represent crime victims, but in courtrooms they will see victims frequently absent, or participating only through prosecutors or the judicial apparatus, such as probation officers.

Given this socialization, it is no surprise to find that when those lawyers leave law school, they become part of a legal culture unsympathetic, if not overtly hostile, to the interests of crime victims.[292] The legal insiders view with great suspicion demands from the outsiders—the barbarians, if you will—to be admitted into the process. A prime illustration comes from Justice Stevens's concluding remarks in his dissenting opinion in *Payne v. Tennessee*.[293] He found it almost threatening that the Court's decision admitting victim impact statements would be "greeted with enthusiasm by a large number of concerned and thoughtful citizens."[294] For Justice Stevens, the Court's decision to structure this rule of law in a way consistent with public opinion was "a sad day for a great institution."[295] To be sure, the Court must not allow our rights to be swept away by popular enthusiasm. But when the question before the Court is the separate and ancillary one of whether to recognize rights for victims, one would think that public consensus on the legitimacy of those rights would be a virtue, not a vice. As Professor Gewirtz has thoughtfully concluded after reviewing this same passage, "[T]he place of public opinion cannot be dismissed so quickly, with 'a sad day' proclaimed because a great public institution may have tried to retain the confidence of its public audience."[296]

Justice Stevens's views were, on that day at least,[297] in the minority, but in countless other ways, his antipathy to recognizing crime victims prevails in the day-to-day workings of our criminal justice system. Fortunately, there is a way to change this hostility, to require the actors in the process to

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[291]*See id.* at 60 (discussing CAL. CONST. art. I, § 28, the "truth-in-evidence" provision).

[292]One hopeful sign of impending change is the publication of an excellent casebook addressing victims in criminal procedure. *See* BELOOF, *supra* note 128.

[293]501 U.S. 808 (1991).

[294]*Id.* at 867 (Stevens, J., dissenting).

[295]*Id.* (Stevens, J., dissenting).

[296]Gewirtz, *supra* note 76, at 893.

[297]*Cf.* South Carolina v. Gathers, 490 U.S. 805, 811–12 (1989) (finding victim impact statements in capital cases unconstitutional); Booth v. Maryland, 482 U.S. 496, 508 (1987) (same).

recognize the interests of victims of crime. As Thomas Jefferson once explained,

> Happily for us, . . . when we find our constitutions defective and insufficient to secure the happiness of our people, we can assemble with all the coolness of philosophers, and set them to rights, while every other nation on earth must have recourse to arms to amend or to restore their constitutions.[298]

Our nation, through its assembled representatives in Congress and the state legislatures, should use the recognized amending power to secure a place for victims' rights in our Constitution. While conservatism is often a virtue, there comes a time when the case for reform has been made. Today the criminal justice system too often treats victims as second-class citizens, almost as barbarians at the gates that must be repelled at all costs. The widely shared view is that this treatment is wrong, that victims have legitimate concerns that can—indeed must—be fully respected for the system to be fair and just. The Victims' Rights Amendment is an indispensable step in that direction, extending protection for the rights of victims while doing no harm to the rights of defendants and of the public. The Amendment will not plunge the criminal justice system into the dark ages, but will instead herald a new age of enlightenment. It is time for the defenders of the old order to recognize these facts, to help swing open the gates, and welcome victims to their rightful place in our nation's criminal justice system.

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[298] Thomas Jefferson, Letter to C.W.F. Dumas, Sept. 1787, *reprinted in* THE JEFFERSONIAN CYCLOPIDIA 198 (John P. Foley ed., 1900).

APPENDIX A. TEXT OF THE PROPOSED VICTIMS' RIGHTS AMENDMENT

106TH CONGRESS, 1ST SESSION

S. J. RES. 3

Proposing an amendment to the Constitution of the United States to protect
the rights of crime victims.

IN THE SENATE OF THE UNITED STATES

JANUARY 19, 1999

Mr. KYL (for himself, Mrs. FEINSTEIN, Mr. BIDEN, Mr. GRASSLEY, Mr. INOUYE, Mr. DEWINE, Ms. LANDRIEU, Ms. SNOWE, Mr. LIEBERMAN, Mr. MACK, Mr. CLELAND, Mr. COVERDELL, Mr. SMITH of New Hampshire, Mr. SHELBY, Mr. HUTCHINSON, Mr. HELMS, Mr. FRIST, Mr. GRAMM, Mr. LOTT, and Mrs. HUTCHISON) introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

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JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States to protect the rights of crime victims.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid for all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE—

"SECTION 1. A victim of a crime of violence, as these terms may be defined by law, shall have the rights:

"to reasonable notice of, and not to be excluded from, any public proceedings relating to the crime;

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

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

"to reasonable notice of and an opportunity to submit a statement concerning any proposed pardon or commutation of a sentence;[299]

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

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

"to an order of restitution from the convicted offender;

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

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

"SECTION 2. Only the victim or the victim's lawful representative shall have standing to assert the rights established by this article. Nothing in this article shall provide grounds to stay or continue any trial, reopen any proceeding or invalidate any ruling, except with respect to conditional release or restitution or to provide rights guaranteed by this article in future proceedings, without staying or continuing a trial. Nothing in this article shall give rise to or authorize the creation of a claim for damages against the United States, a State, a political subdivision, or a public officer or employee.

"SECTION 3. The Congress shall have the power to enforce this article by appropriate legislation. Exceptions to the rights established by this article may be created only when necessary to achieve a compelling interest.

"SECTION 4. This article shall take effect on the 180th day after the ratification of this article. The right to an order of restitution established by this article shall not apply to crimes committed before the effective date of this article.

"SECTION 5. The rights and immunities established by this article shall apply in Federal and State proceedings, including military proceedings to the

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[299]This clause was added during deliberations in the Subcommittee on the Constitution, Federalism, and Property Rights.

extent that the Congress may provide by law, juvenile justice proceedings, and proceedings in the District of Columbia and any commonwealth, territory, or possession of the United States."

APPENDIX B: DO VICTIM IMPACT STATEMENTS INCREASE THE NUMBER OF DEATH SENTENCES?

While much speculation has been bandied about concerning the effect of victim impact statements on capital sentences, surprisingly little hard research on the subject has been conducted. The available empirical research on victim impact statements in noncapital cases has generally found, at most, a modest effect on sentence severity.[300] This Appendix offers some tentative empirical observations that support the same conclusion about victim impact statements in capital cases.

In 1991, the Supreme Court specifically approved the admission of victim impact statements in capital cases in *Payne v. Tennessee*.[301] This decision triggered a number of scholarly articles suggesting that the effect would be to make it easier for prosecutors to obtain death sentences,[302] but empirical follow-up on this question has been scant. One possible way of researching the assertion is simply to look at the total number of death sentences returned after *Payne* to determine whether they increased. In the same vein, it may be useful to examine whether the number of death sentences decreased after *Booth v. Maryland*,[303] the Supreme Court's decision four years earlier in 1987 barring victim impact statements in capital cases.

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[300] *See supra* notes 62–73 and accompanying text (asserting that empirical evidence suggests that victim impact statements might have modest effect on sentence severity).

[301] 501 U.S. 808, 832–33 (1991) (holding that Eighth Amendment does not prohibit State from choosing to admit certain evidence with regard to victim's personal characteristics or impact of crime).

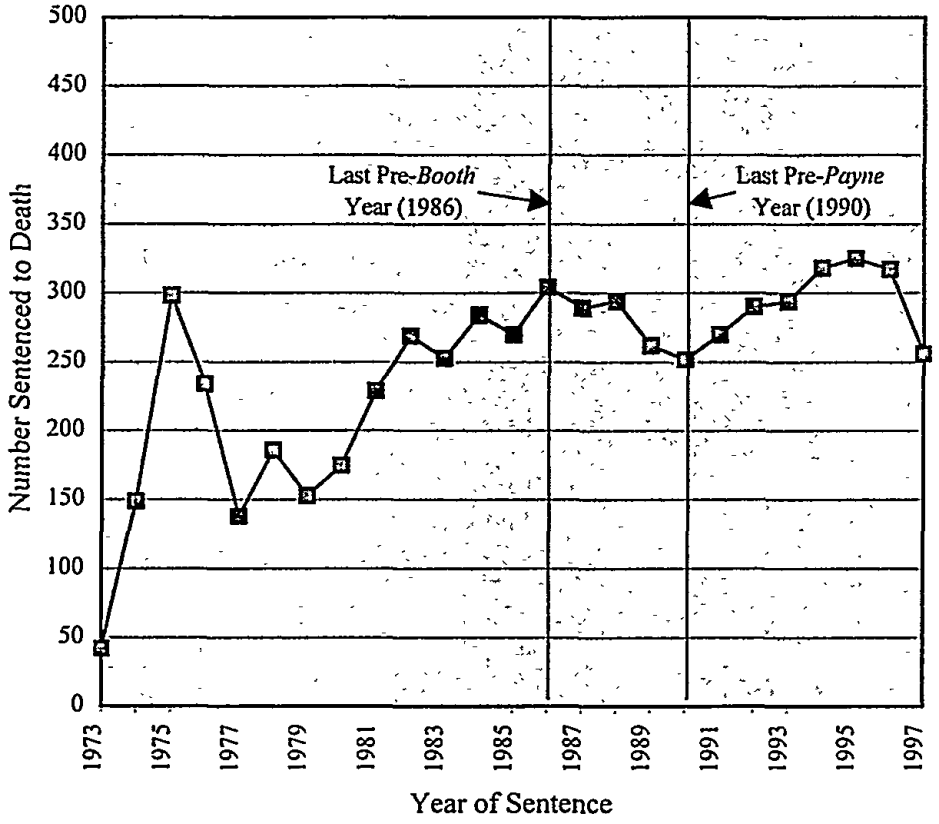
[302] *See, e.g.*, Jonathan H. Levy, Note, *Limiting Victim Impact Evidence and Argument After* Payne v. Tennessee, 45 STAN. L. REV. 1027, 1046 (1993) (asserting that victim impact statements will motivate jurors to impose death penalties out of emotion); Beth E. Sullivan, Note, *Harnessing* Payne*: Controlling the Admission of Victim Impact Statements to Safeguard Capital Sentencing Hearings from Passion and Prejudice*, 25 FORDHAM URB. L.J. 601, 630 (1998) (noting that victim impact statements create greater possibilities for prosecutors to seek death penalty).

[303] 482 U.S. 496, 502–03 (1987) (holding that victim impact statements create risk that "a death sentence will be based on considerations that are 'constitutionally impermissible or totally irrelevant to the sentencing process'").

Such time series analyses have been used to investigate the impact of other legal changes[304] and constitute a standard way of analyzing legal reforms.[305]

The time series for death sentences returned in this country over the last quarter century is shown in Figure 1.[306]

FIGURE 1: DEFENDANTS SENTENCED TO DEATH
(1973 TO 1997)



[304]*See, e.g.*, Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda*'s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1072–74 (1998) (using time series analysis to consider effects of *Miranda*); Raymond A. Atkins & Paul H. Rubin, Effects of Criminal Procedure on Crime Rates: Mapping of the Consequences of the Exclusionary Rule *passim* (1998) (unpublished manuscript, on file with author) (utilizing time series analysis to chart exclusionary rule's harmful effect on crime rates).

[305]*See* Donald T. Campbell, *Reforms as Experiments*, 24 AM. PSYCHOLOGIST 409, 417 (1969) (concluding that time series analysis is common method of investigating reform measures); D.J. Pyle & D.F. Deadman, *Assessing the Impact of Legal Reform by Intervention Analysis*, 13 INT'L REV. L. & ECON. 193, 194–96 (1993) (concluding that time series analysis is common method for analyzing economic and social data).

[306]The data is taken from BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1997, at 13 (1998) [hereinafter CAPITAL PUNISHMENT (year)].

As the chart reveals, after an initial shake-out period in the mid-1970s,[307] the number of death sentences imposed generally climbed through 1986. Then, in 1987, the Court held in *Booth* that victim impact statements could not be used in capital cases. Death sentences declined slightly. Finally, in 1991, the Court reversed itself in *Payne*, allowing such statements. Death sentences thereafter increased modestly before turning to a level only slightly above that before *Payne*. The raw data would therefore suggest the possibility of a short term, meager association between victim impact statements and death sentences.

A small note on timing is in order. Both *Booth* and *Payne* were handed down by the Court in mid-year (on June 15 and June 27 respectively). Thus, the vertical lines in Figure 1 depicting the "last pre-*Booth* year" and the "last pre-*Payne*" year are drawn to show the last year in which death sentences were unaffected by the ensuing Supreme Court decision, assuming the Court's decision affected capital cases as soon as it was announced. These timing assumptions are open to question. It is possible that prosecutors "anticipated" *Booth* by restricting their use of victim impact statements to avoid the possibility of reversal. The Court agreed to review the case on October 15, 1986,[308] so perhaps the last year entirely unaffected by *Booth* was 1985, not 1986. Also, *Payne* may not have resulted in the immediate use of victim impact statements. Defendants might have continued to have been tried under the old law for months afterwards because of the problem of giving notice to them that such evidence would be introduced[309] and of adding authorizations for the use of impact statements.[310]

Before a causal inference could be drawn that the fluctuations shown in Figure 1 are attributable to the Court's decision on victim impact statements,

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[307]In *Furman v. Georgia*, 408 U.S. 238, 256–57 (1972), the Court concluded that the death penalty as then administered was arbitrary and capricious. States responded with new statutes more carefully defining death penalty offenses, reflected in an increasing number of capital sentences from 1973 through 1975. In 1976, the Court upheld some of these statutes but struck down those with mandatory features. *Compare* Gregg v. Georgia, 428 U.S. 153, 206–08 (1976) (upholding Georgia's death penalty statute), *with* Woodson v. North Carolina, 428 U.S. 280, 304–05 (1976) (invalidating North Carolina's mandatory death penalty statute). The invalidation of those statutes likely accounts for the drop in death penalties in 1976 and 1977.

[308]479 U.S. 882, 882 (1986) (granting writ of certiorari).

[309]*But cf.* Free v. Peters, 12 F.3d 700, 703 (7th Cir. 1993) (holding that defendant could not argue against application of *Payne* on ground that it was new rule); State v. Card, 825 P.2d 1081, 1088–90 (Idaho 1991) (applying *Payne* retroactively).

[310]*See, e.g.*, UTAH CODE ANN. § 76-3-207(2)(a)(iii) (Supp. 1998) (allowing use of impact statements); Crime Victim Rights Amendments, ch. 352, § 5, 1995 Utah Laws 1361 (amending this provision).

alternate causes would need to be carefully and fully considered.[311] I leave this task to others. One issue that should be examined is whether the number of homicides changed during the period, particular homicides for which the death penalty was a serious prospect.[312] Another possibility is that internal changes in sentencing procedures within large states returning the most capital sentences caused the fluctuations.[313] Still another obvious alternate causality is other Supreme Court decisions around the time of *Booth* and *Payne* that might have made it easier or harder for prosecutors to obtain capital sentences. The Supreme Court death penalty jurisprudence has not been, shall we say, a model of perfect consistency over time. At almost the same time that the Court blocked the use of victim statements in *Booth*, it also increased the ability of defendants to introduce mitigating evidence. In 1985, the Court held that defendants must be given access to a competent psychiatrist at trial and sentencing if mental state is an issue.[314] In 1986, the Court significantly expanded the types of mitigating evidence that defendants could introduce by invalidating contrary state evidentiary rules.[315] And in 1989, the Court expanded the circumstances in which juries should be instructed about the effect of mitigating evidence.[316] It is possible that these decisions, and not *Booth*, explain the 1987–1990 dip in death penalties. The Court also handed down other decisions favorable to death penalty prosecutions at about the time of *Payne* that might explain the rise in death penalties in recent years.[317]

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[311]For an introduction to some of these issues, see Cassell & Fowles, *supra* note 304, at 1107–19; John J. Donohue III, *Did* Miranda *Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147, 1149–51 (1998); Paul G. Cassell & Richard Fowles, *Falling Clearance Rates After* Miranda*: Coincidence or Consequence?*, 50 STAN. L. REV. 1181, 1181 (1998).

[312]Murder rates went up modestly from 1984 to 1991. *See* FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 1993, at 284.

[313]For example, much of the 1986–87 drop in death penalties is apparently explained by changes in Illinois. *Compare* CAPITAL PUNISHMENT 1986, *supra* note 306, at 5 tbl.4 (25 death sentences in Illinois in 1986). *with* CAPITAL PUNISHMENT 1987, *supra* note 306, at 6 tbl.4 (11 death sentences in Illinois in 1987). Much of the 1990–91 rise in death penalties is apparently explained by changes in Florida. *Compare* CAPITAL PUNISHMENT 1990, *supra* note 306, at 6 tbl.4 (31 death sentences in Florida in 1990), *with* CAPITAL PUNISHMENT 1991, *supra* note 306, at 8 tbl.4 (45 death sentences in Florida in 1991).

[314]*See* Ake v. Oklahoma, 470 U.S. 68, 84–87 (1985) (holding that denial of access to psychiatrist was violation of due process).

[315]*See* Skipper v. South Carolina, 476 U.S. 1, 4–8 (1986) (excluding mitigating evidence violated Eighth Amendment).

[316]*See* Penry v. Lynaugh, 492 U.S. 302, 337–40 (1989) (holding that sentencing body must be allowed to consider mental retardation as mitigating factor).

[317]*See, e.g.*, Graham v. Collins, 506 U.S. 461, 475–78 (1993) (restricting *Penry*); Johnson v. Texas, 509 U.S. 350, 369–73 (1993) (distinguishing *Penry*); Schad v. Arizona, 501 U.S. 624, 646–48 (1991) (holding that defendant was not necessarily entitled to instructions on every lesser included offense).

These and other potentially complicating factors would have to be assessed before any firm conclusions could be reached about the aggregate death penalty data plotted in Figure 1. Nevertheless, even assuming that all other factors but the Court's victim impact decisions could be ruled out as causes of the changes, the relative magnitude of the changes appear to be, at most, modest.[318]

Until we have further analysis of the data, lack of firm proof that *Payne* increased the number of death penalty convictions should count heavily against Professor Bandes and others who argue against admitting victim impact statements because of their effects on juries.[319] Allowing surviving family members to make impact statements clearly improves the perceived fairness of the process[320] and we have no proof that juries have been influenced, let alone unfairly influenced.[321]

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[318]The 1986 data divided by the 1988 data (the first full year under *Booth*), suggests that death penalties fell by 4% when victim impact evidence was banned in *Booth*. The 1992 data divided by the 1990 data (the first full year under *Payne*), suggests that death penalties rose by 15% when victim impact evidence was allowed in *Payne*. Using a longer time horizon, the 1997 data divided by the 1990 data suggests only a 2% rise in death penalty convictions after *Payne*. These calculations assume, in addition to the many other caveats noted in text, no confounding trends.

[319]*See* Susan Bandes, *Reply to Paul Cassell: What We Know About Victim Impact Statements* 1999 UTAH L. REV. 545 *passim*.

[320]*See supra* notes 81–90 and accompanying text.

[321]*Cf. supra* notes 27–99 and accompanying text (arguing that, even if *Payne* increased death sentences, this was a just result).