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PHOENIX LAW REVIEW

SPECIAL ISSUE: A PROPOSED VICTIMS' RIGHTS AMENDMENT TO THE CONSTITUTION

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Sincerely,
Jason R. Holmes, Editor in Chief, *Phoenix Law Review*

THE VICTIMS' RIGHTS AMENDMENT: A SYMPATHETIC, CLAUSE-BY-CLAUSE ANALYSIS

Paul G. Cassell*

I. INTRODUCTION

Recently, Representatives Trent Franks (R-AZ) and Jim Costa (D-CA) introduced 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

* Ronald N. Boyce Presidential Professor of Criminal Law. I thank the students at *Phoenix Law Review* for great editorial assistance on this article, as well as the members of the National Victim Constitutional Amendment Network, Doug Beloof, Meg Garvin, and especially Steve Twist for his continued vision in pressing for a constitutional amendment.

[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,

helped organize a *Utah Law Review s*ymposium 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 contended that the "values undergirding it are widely shared in our country, reflecting a strong consensus that victims' rights should receive [strong] protection."[5] Contrary to the claims that a constitutional amendment is somehow unnecessary, practical experience demonstrates that only federal constitutional protection will overcome the institutional resistance to recognizing victims' interests. And while some have argued that crime victims' rights do not belong in the Constitution, in fact the VRA addresses subjects that have long been considered entirely appropriate for constitutional treatment.

My goal in this article is not to revisit these policy debates surrounding the VRA. Instead of a normative project, my aim here is a descriptive one: to 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 article 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.

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.

[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.

[5] *Id.*

II. A Brief History of the Efforts to Pass a Victims' Rights Amendment[6]

A. *The Crime Victims' Rights Movement*

The Crime Victims' Rights Movement developed in the 1970s because of a perceived imbalance in the criminal justice system. The victims' absence from criminal processes conflicted with "a public sense of justice keen enough that it has found voice in a nationwide 'victims' rights' movement."[7] 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.[8] 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.[9]

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").[10] 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

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[6] 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.

[7] 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).

[8] *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 7, at 1380-82.

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

[10] 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.

transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed."[11] 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.[12] The Task Force also urged that courts should receive victim impact evidence at sentencing, order restitution in most cases, and allow victims and their families to attend trials even if they would be called as witnesses.[13] 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."[14]

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.[15] To date, more than thirty states have adopted victims' rights amendments to their own state constitutions,[16] 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.[17] Since then, Congress has passed several acts which gave further protection to victims' rights, including the Victims of Crime Act of 1984,[18] the Victims' Rights and Restitution Act of 1990,[19] the Violent Crime Control and

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[11] *Id.* at 114.

[12] *Id.* at 63.

[13] *Id.* at 72-73.

[14] *Id.* at 114 (emphasis omitted).

[15] *See* S. REP. NO. 108-191 (2003).

[16] *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.

[17] Pub. L. No. 97-291, 96 Stat. 1248 (1982).

[18] Pub. L. No. 98-473, 98 Stat. 1837 (1984).

[19] Pub. L. No. 101-647, 104 Stat. 4789 (1990).

Law Enforcement Act of 1994,[20] the Antiterrorism and Effective Death Penalty Act of 1996,[21] the Victim Rights Clarification Act of 1997,[22] and, most recently, the Crime Victims' Rights Act ("CVRA").[23] Other federal statutes have been passed to deal with specialized victim situations, such as child victims and witnesses.[24]

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.[25] The Act commanded that "a crime victim has the following rights."[26] Among the listed rights were the right to "be treated with fairness and with respect for the victim's dignity and privacy,"[27] to "be notified of court proceedings,"[28] to "confer with [the] attorney for the Government in the case,"[29] 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.[30] The Victims' Rights Act also directed the Justice Department to make "its best efforts" to ensure that victims received their rights.[31] 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."[32] As a result, the statute was generally unknown to federal judges and criminal law practitioners. Federal practitioners reflexively consult Title 18 for guidance on criminal law issues.[33] More prosaically, federal criminal enactments are bound together in a single publication—the *Federal Criminal Code and Rules*.[34] This book is carried to court by prosecutors and defense attorneys and is on the desk

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[20] Pub. L. No. 103-322, 108 Stat. 1796 (1994).
[21] Pub. L. No. 104-132, 110 Stat. 1214 (1996).
[22] Pub. L. No. 105-6, 111 Stat. 12 (1997).
[23] Pub. L. No. 108-405, 118 Stat. 2260 (2004).
[24] *See, e.g.,*18 U.S.C. § 3509 (2009) (protecting rights of child victim-witnesses).
[25] Pub. L. No. 101-647, § 502, 104 Stat. 4789 (1990).
[26] *Id.* § 502(b).
[27] *Id.* § 502(b)(1).
[28] *Id.* § 502(b)(3).
[29] *Id.* § 502(b)(5).
[30] *Id.* § 502(b)(4).
[31] *Id.* § 502(a).
[32] 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)).
[33] *See generally* U.S.C. tit. 18.
[34] THOMSON WEST, FEDERAL CRIMINAL CODE AND RULES (2012 ed. 2012).

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.[35]

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."[36] 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.
>
> These significant State efforts simply are not sufficiently consistent, comprehensive, or authoritative to safeguard victims' rights.[37]

To place victims' rights in the Constitution, victims advocates (led most prominently by the National Victims Constitutional Amendment Network[38]) approached the President and Congress about a federal amendment.[39] In April 22, 1996, Senators Kyl and Feinstein introduced a federal victims' rights amendment with the backing of President Clinton.[40] The intent of the amendment was "to restore, preserve, and protect, as a matter of right for the victims

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[35] *See generally* Cassell, *supra* note 3, at 515-22 (discussing this case in greater detail).

[36] Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B5.

[37] *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.).

[38] *See* NAT'L VICTIMS' CONST. AMENDMENT PASSAGE, http://www.nvcap.org/ (last visited Mar. 22, 2012).

[39] *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).

[40] S.J. Res. 52, 104th Cong. (1996).

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."[41] A companion resolution was introduced in the House of Representatives.[42] 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.[43]

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.[44] A series of hearings were held that year in both the House and the Senate.[45] Responding to some of the concerns raised in these hearings, the amendment was reintroduced the following year.[46] The Senate Judiciary Committee held hearings[47] and passed the proposed amendment out of committee.[48] The full Senate did not consider the amendment. In 1999, Senators Kyl and Feinstein again proposed the amendment.[49] On September 30, 1999, the Judiciary Committee again voted to send the amendment to the full Senate.[50] 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.[51] At the same time, hearings were held in the House on the companion measure there.[52]

Discussions about the amendment began again after the 2000 presidential elections. On April 15, 2002, Senators Kyl and Feinstein again introduced the amendment.[53] The following day, President Bush announced his support.[54] On May 2, 2002, a companion measure was proposed in the House.[55] On Janu-

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41 S. REP. NO. 108-191, at 1-2 (2003); *see also* S. REP. NO. 106-254, at 1-2 (2000).

42 H.R.J. Res. 174, 104th Cong. (1996).

43 S.J. Res. 65, 104th Cong. (1996).

44 S.J. Res. 6, 105th Cong. (1997).

45 *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).

46 S.J. Res. 44, 105th Cong. (1998).

47 *A Proposed Constitutional Amendment to Protect Crime Victims: Hearing on S.J. Res. 44 Before the S. Comm. on the Judiciary*, 105th Cong. (1998).

48 *See* 144 CONG. REC. 22496 (1998).

49 S.J. Res. 3, 106th Cong. (1999).

50 *See* 146 CONG. REC. 6020 (2000).

51 *Id.*

52 H.R.J. Res. 64, 106th Cong. (1999).

53 S.J. Res. 35, 107th Cong. (2002).

54 Press Release, Office of the Press Sec'y, President Calls for Crime Victims' Rights Amendment (Apr. 16, 2002) (on file with author).

55 H.R.J. Res. 91, 107th Cong. (2002).

ary 7, 2003, Senators Kyl and Feinstein proposed the amendment as S.J. Res. 1.[56] The Senate Judiciary Committee held hearings in April of that year,[57] followed by a written report supporting the proposed amendment.[58] On April 20, 2004, a motion to proceed to consideration of the amendment was filed in the Senate.[59] Shortly thereafter, the motion to proceed was withdrawn when proponents determined they did not have the sixty-seven votes necessary to pass the measure.[60] After it became clear that the necessary super-majority was not available to amend the Constitution, victims' advocates turned their attention to enactment of a comprehensive victims' rights statute.

B. The Crime Victims' Rights Act

The CVRA ultimately resulted from a decision by the victims' movement to seek a more comprehensive and enforceable federal statute rather than pursuing the dream of a federal constitutional amendment. In April of 2004, victims' advocates met with Senators Kyl and Feinstein to decide whether to again push for a federal constitutional amendment. Concluding that the amendment lacked the required super-majority, the advocates decided to press for a far-reaching federal statute protecting victims' rights in the federal criminal justice system.[61] 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.[62] 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.[63] The victims' movement would then see how this statute worked in future years before deciding whether to continue to push for a federal amendment.[64]

The legislation that ultimately passed—the Crime Victims' Rights Act—gives victims "the right to participate in the system."[65] It lists various rights for

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[56] S. REP. NO. 108-191, at 6 (2003).

[57] *Proposed Constitutional Amendment to Protect Crime Victims: Hearing on S.J. Res. 1 Before the S. Comm. on the Judiciary*, 108th Cong. (2003).

[58] S. REP. NO. 108-191.

[59] Kyl et al., *supra* note 39, at 591.

[60] *Id.*

[61] *Id.* at 591-92.

[62] 150 CONG. REC. 7295 (2004) (statement of Sen. Feinstein).

[63] *Id.* at 7296 (statement of Sen. Feinstein).

[64] *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).

[65] 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).

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.[66] Rather than relying merely on best efforts of prosecutors to vindicate the rights, the CVRA also contains specific enforcement mechanisms.[67] Most important, the CVRA directly confers standing on victims to assert their rights, a flaw in the earlier enactment.[68] 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."[69] The victim (or the government) may appeal any denial of a victim's right through a writ of mandamus on an expedited basis.[70] The courts are also required to "ensure that the crime victim is afforded" the rights in the new law.[71] These changes were intended to make victims "an independent participant in the proceedings."[72]

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."[73]

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 who had illegally sold the murder weapon used to kill their daughter.[74] After the district court denied their motion to have

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[66] § 3771.

[67] *Id.* § 3771(c).

[68] *Cf.* Beloof, *Standing, Remedy, and Review, supra* note 8, at 283 (identifying this as a pervasive flaw in victims' rights enactments).

[69] § 3771(d).

[70] *Id.* § 3771(d)(3).

[71] *Id.* § 3771(b)(1).

[72] 150 CONG. REC. 7302 (2004) (statement of Sen. Kyl).

[73] 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).

[74] *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.

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.[75]

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.[76] 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.[77] But the district court again stymied the Antrobuses' attempt by refusing to grant their unopposed motion for release of the documents.[78]

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.[79] 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.[80] So they did—only to lose again in the district court.[81] 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.[82] 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*.[83]

Another case in which victims' rights advocates were disappointed arose in the Fifth Circuit's decision *In re Dean*.[84] In *Dean*, the defendant—the American subsidiary of well-known petroleum company BP—and the prosecution

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[75] *In re* Antrobus, 519 F.3d 1123, 1126-27 (10th Cir. 2008) (Tymkovich, J., concurring).

[76] *In re* Antrobus, 563 F.3d 1092 (10th Cir. 2009).

[77] *Id.* at 1095.

[78] United States v. Hunter, No. 2:07CR307DAK, 2008 U.S. Dist. LEXIS 108582, at *1-2 (D. Utah Mar. 17, 2008).

[79] United States v. Hunter, 548 F.3d 1308, 1317 (10th Cir. 2008).

[80] *Id.* at 1316-17.

[81] United States v. Hunter, 2009 U.S. Dist. LEXIS 90822, at *2–4 (D. Utah Feb. 10, 2009).

[82] *In re Antrobus*, 563 F.3d at 1099.

[83] Nate Carlisle, *Notes Confirm Suspicions of Trolley Square Victim's Family*, SALT LAKE TRIB., June 25, 2009, http://www.sltrib.com/news/ci_12380112.

[84] *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*

arranged a secret plea bargain to resolve the company's criminal liability for violations of environmental laws.[85] 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.[86] 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."[87]

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.[88] 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 the CVRA."[89] Nonetheless, the court declined to award the victims any relief because it viewed the CVRA's mandamus petition as providing only discretionary relief.[90] 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."[91] Nonetheless, the court of appeals thought that all the victims were entitled to was another hearing in the district court.[92] After a hearing, the district court declined to grant the victims any further relief.[93]

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.[94] 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

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Response to the Critics of the Crime Victims' Rights Act, 105 NW. U. L. REV. COLLOQUY 164 (2010).

[85] *See* United States v. BP Prods. N. Am. Inc., No. H-07-434, 2008 WL 501321 (S.D. Tex. Feb. 21, 2008).

[86] *See In re* Dean, 527 F.3d at 392.

[87] *Id.* at 394.

[88] *See id.* at 392.

[89] *Id.* at 394.

[90] *Id.* at 396.

[91] *Id.* at 396.

[92] *Id.*

[93] United States v. BP Prods. N. Am. Inc., 610 F. Supp. 2d 655, 730 (S.D. Tex. 2009).

[94] *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).

country for the purpose of providing pro bono representation for crime victims' rights.[95]

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

Because of the problems with implementing the CVRA, in early 2012 the National Victim Constitutional Amendment Network ("NVCAN") decided it was time to re-approach Congress about the need for constitutional protection for crime victims' rights.[96] Citing the continuing problems with implementing other-than-federal constitutional protections for crime victims, NVCAN proposed to Congress a new version of the Victims' Rights Amendment. In March 2012, Representatives Trent Franks (R-AZ) and Jim Costa (D-CA) introduced the VRA as H.R.J. Res. 106.[97] As introduced, the amendment would extend crime victims constitutional protections as follows:

> SECTION 1. The rights of a crime victim to fairness, respect, and dignity, being capable of protection without denying the constitutional rights of the accused, shall not be denied or abridged by the United States or any State. The crime victim shall, moreover, have the rights to reasonable notice of, and shall not be excluded from, public proceedings relating to the offense, to be heard at any release, plea, sentencing, or other such proceeding involving any right established by this article, to proceedings free from unreasonable delay, to reasonable notice of the release or escape of the accused, to due consideration of the crime victim's safety, and 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 con-

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[95] *See id.*

[96] 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.*

[97] H.R.J. Res. 106, 112th Cong. (2012).

> duct 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.[98]

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

A. Section 1

The rights of a crime victim . . .

This clause extends rights to victims of both violent and property offenses. This is a significant improvement over the previous version of the VRA—S.J. Res. 1—which only extended rights to "victims of violent crimes."[99] While the Constitution does draw lines in some situations,[100] ideally crime victims' rights would extend to victims of both violent and property offenses. The previous limitation appeared to be a political compromise.[101] There appears to be no

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[98] *Id.*

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

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

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

principled reason why victims of economic crimes should not have the same rights as victims of violent crimes.[102]

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

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

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

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

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

The caselaw developing under the CVRA provides an understanding of the kinds of victims' interests these rights protect. Senator Kyl offered these examples of how these rights might apply under the CVRA: "For example, a victim should be allowed to oppose a defense discovery request for the reproduction of child pornography, the release of personal records of the victim, or the release of personal identifying or locating information about the victim."[110] Since the enactment of the CVRA, courts have applied the CVRA's rights to fair treatment in various contexts. For example, the Sixth Circuit concluded that unexplained delay in ruling on a crime victim's motion for three months raised fairness issues.[111] Other district courts have ruled that a victim's right to fair-

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

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

[104] *See infra* notes 212-16 and accompanying text.

[105] Morris v. Slappy, 461 U.S. 1, 14 (1983).

[106] Snyder v. Massachusetts, 291 U.S. 97, 122 (1934).

[107] *See, e.g.,* ARIZ. CONST. art. II, § 2.1(A)(1); IDAHO CONST. art. I, § 22(1); ILL. CONST. art. I, § 8.1(a)(1); MD. DECLARATION OF RIGHTS, art. 47(a); N.J. CONST. art. I, para. 22; TEX. CONST. art. 1, § 30(a)(1); WIS. CONST. art. I, § 9m; UTAH CONST., art. I, § 28(1)(a).

[108] ARIZ. CONST. art. II, § 2.1(A)(1).

[109] 18 U.S.C. § 3771(a)(8) (2006).

[110] Kyl et al., *supra* note 39, at 614.

[111] *In re* Simons, 567 F.3d 800, 801 (6th Cir. 2009).

ness (and to attend court proceedings) is implicated in any motion for a change of venue.[112] Another district court has ruled that the victim's right to fairness gives the court the right to hear from a victim during a competency hearing.[113] And another district court has stated that the victim's right to be treated with fairness is implicated in a court's decision of whether to dismiss an indictment.[114]

The CVRA rights of victims to be treated with respect for their dignity and privacy have also been applied in various settings.[115] Trial courts have used the rights to prevent disclosure of sensitive materials to defense counsel[116] and to the public,[117] particularly in extortion cases where disclosure of the material would subject the victim to precisely the harm threatened by the defendant.[118] Another court has ruled that the right to be treated with dignity means that the prosecution could refer to the victim as a "victim" in a case.[119] Still another district court used the rights to dignity and privacy to prohibit the display of graphic videos to persons other than the jury and restrict a sketch artist's activities, particularly because the victim was mentally-ill.[120]

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

This preamble was authored by Professor Laurence Tribe of Harvard Law School.[121] It makes clear that the amendment is not intended to, nor does it have the effect of, denying the constitutional rights of the accused. Crime vic-

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[112] United States v. Agriprocessors, Inc., No. 08-CR-1324-LRR, 2009 WL 721715, at *2 n.2 (N.D. Iowa Mar. 18, 2009); United States v. Kanner, No. 07-CR-1023-LRR, 2008 WL 2663414, at *8 (N.D. Iowa June 27, 2008).

[113] United States v. Mitchell, No. 2:08CR125DAK, 2009 WL 3181938, at *8 n.3 (D. Utah Sept. 28, 2009).

[114] United States v. Heaton, 458 F. Supp. 2d 1271, 1272-73 (D. Utah 2006).

[115] *See generally* Fern L. Kletter, Annotation, *Validity, Construction and Application of Crime Victim's Rights Act (CVRA), 18 U.S.C.A. § 3771*, 26 A.L.R. FED. 2D 451 (2008).

[116] United States v. Darcy, No. 1:09CR12, 2009 WL 1470495, at *1 (W.D.N.C. May 26, 2009).

[117] Gueits v. Kirkpatrick, 618 F. Supp. 2d 193, 198 n.1 (E.D.N.Y. 2009) *rev'd on other grounds*, 612 F.3d 118 (2d Cir. 2010); United States v. Madoff, 626 F. Supp. 2d 420, 425-28 (S.D.N.Y. 2009); *United States v. Patkar*, No. 06-00250 JMS, 2008 WL 233062, at *3-5 (D. Haw. Jan. 28, 2008).

[118] United States v. Robinson, Cr. No. 08-10309-MLW, 2009 WL 137319, at *1-3 (D. Mass. Jan. 20, 2009).

[119] United States v. Spensley, No. 09-CV-20082, 2011 WL 165835, at *1-2 (C.D. Ill. Jan. 19, 2011).

[120] United States v. Kaufman, Nos. CRIM.A. 04-40141-01, CRIM.A. 04-40141-02, 2005 WL 2648070, at *1-4 (D. Kan. Oct. 17, 2005).

[121] *Proposed Constitutional Amendment to Protect Crime Victims: Hearing on S.J. Res. 1 Before the S. Comm. on the Judiciary*, 108th Cong. 230 (2003) (statement of Steven J. Twist).

tims' rights do not stand in opposition to defendants' rights but rather parallel to them.[122] For example, just as a defendant possesses a right to speedy trial,[123] the VRA would extend to crime victims a corresponding right to proceedings free from unreasonable delay.

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

At the same time, the VRA will eliminate a common reason for failing to protect victims' rights: the misguided view that the mere assertion of a defendant's constitutional right automatically *trumps* a victim's right. In some of the litigated cases, victims' rights have not been enforced because defendants have made vague, imprecise, and inaccurate claims about their federal constitutional due process rights being violated. Those claims would be unavailing after the passage of a federal amendment. For this reason, the mere fact of passing a Victims' Rights Amendment can be expected to bring a dramatic improvement to the way in which victims' rights are enforced, even were no enforcement actions to be brought by victims or their advocates.

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

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

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[122] *See generally* Richard Barajas & Scott Alexander Nelson, *The Proposed Crime Victims' Federal Constitutional Amendment: Working Toward a Proper Balance*, 49 BAYLOR L. REV. 1, 16-19 (1997).

[123] U.S. CONST. amend. VI.

[124] *See* Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B5.

[125] *See, e.g.*, Press-Enter. Co. v. Superior Court, 478 U.S. 1, 9 (1986) (balancing the "qualified First Amendment right of public access" against the "right of the accused to a fair trial").

[126] *See* Barron *ex rel.* Tiernan v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

[127] U.S. CONST. amend. XIV.

rights have been "incorporated" into the Due Process Clause and thereby made applicable in state proceedings.[128]

It is true that plausible arguments could be made for trimming the reach of incorporation doctrine.[129] But it is unlikely that we will ever retreat from our current commitment to afford criminal defendants a basic set of rights, such as the right to counsel. Victims are not asking for any retreat, but for an extension—for a national commitment to provide basic rights in the process to criminal defendants *and* to their victims. This parallel treatment works no new damage to federalist principles.

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

> The rights of victims have always received secondary consideration within the U.S. judicial process, even though states and the American people by a wide plurality consider victims' rights to be fundamental. Protection of these basic rights is essential and can only come from a fundamental change in our basic law: the U.S. Constitution.[130]

It should be noted that the States and the federal government, within their respective jurisdictions, retain authority to define, in the first instance, conduct

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[128] U.S. CONST. amend. V.; *see, e.g.,* Duncan v. Louisiana, 391 U.S. 145 (1968); Malloy v. Hogan, 378 U.S. 1 (1964).

[129] *See, e.g.*, Donald A. Dripps, *Foreword: Against Police Interrogation—And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 701–02 (1988) (arguing for reduction of federal involvement in *Miranda* rights); Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure,* 53 CALIF. L. REV. 929 (1965) (criticizing interpretation that would become so extensive as to produce, in effect, a constitutional code of criminal procedure); Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Disincorporation*, 87 J. CRIM. L. & CRIMINOLOGY 63, 63–70 (1996) (arguing that state constitutional development has reduced need for federal protections).

[130] NAT'L GOVERNORS ASS'N, POLICY 23.1 (1997).

that is criminal.[131] The power to define victim is simply a corollary of the power to define criminal offenses and, for state crimes, the power would remain with state legislatures.

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

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

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

The Victims' Rights Amendment would guarantee crime victims a right to *reasonable notice*. This formulation tracks the CVRA, which extends to crime victims the right "to reasonable . . . notice" of court proceedings.[137] Similar formulations are found in state constitutional amendments. For instance, the California State Constitution promises crime victims "reasonable notice" of all public proceedings.[138]

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131 *See, e.g.*, United States v. L. Cohen Grocery Co., 255 U.S. 81, 87 (1921) ("Congress alone has power to define crimes against the United States.").

132 *See* S. REP. NO. 105–409, at 24 (1998) ("In other words, the amendment sets a national 'floor' for the protecting of victims rights, not any sort of 'ceiling.' Legislatures, including Congress, are certainly free to give statutory rights to all victims of crime, and the amendment will in all likelihood be an occasion for victims' statutes to be re-examined and, in some cases, expanded.").

133 *See* Michigan v. Long, 463 U.S. 1032, 1041 (1983).

134 U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 73, at 82.

135 National Victim Center, *Comparison of White and Non-White Crime Victim Responses Regarding Victims' Rights*, *in* BELOOF, CASSELL & TWIST, *supra* note 1, at 631.

136 *Id.*

137 18 U.S.C. § 3771(a)(2) (2006).

138 CAL. CONST. art. I, § 28(b)(7).

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

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

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

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

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

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

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

[144] United States v. Skilling, No. H-04-025-SS, 2009 WL 806757, at *1-2 (S.D. Tex. Mar. 26, 2009); United States v. Saltsman, No. 07-CR-641 (NGG), 2007 WL 4232985, at *1-2 (E.D.N.Y.

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

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

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

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

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

> [T]his procedure can be abused by [a defendant's] advocates and can impose an improper hardship on victims and their relatives. Time and again, we heard from victims or their families that they were unreasonably excluded from the trial at which responsibility for their victimization was assigned. This is especially difficult for the families of murder victims and for witnesses who are denied the supportive presence of parents or spouses during their testimony.
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> . . . .
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> Testifying can be a harrowing experience, especially for children, those subjected to violent or terrifying ordeals, or those whose loved ones have been murdered. These witnesses

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Nov. 27, 2007); United States v. Croteau, No. 05-CR-30104-DRH, 2006 U.S. Dist. LEXIS 23684, at *2-3 (S.D. Ill. 2006).

[145] HERRINGTON ET AL., *supra* note 10, at 80.

[146] *See* Douglas E. Beloof & Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481 (2005).

[147] Ken Eikenberry, *Victims of Crimes/Victims of Justice*, 34 WAYNE L. REV. 29, 41 (1987).

[148] *See generally* OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, THE CRIME VICTIM'S RIGHT TO BE PRESENT 2 (2001) (showing how defense counsel can successfully argue to have victims excluded as witnesses).

> often need the support provided by the presence of a family member or loved one, but these persons are often excluded if the defense has designated them as witnesses. Sometimes those designations are legitimate; on other occasions they are only made to confuse or disturb the opposition. We suggest that the fairest balance between the need to support both witnesses and defendants and the need to prevent the undue influence of testimony lies in allowing a designated individual to be present regardless of his status as a witness.[149]

Without a right to attend trials, "the criminal justice system merely intensifies the loss of control that victims feel after the crime."[150] It should come as no surprise that "[v]ictims are often appalled to learn that they may not be allowed to sit in the courtroom during hearings or the trial. They are unable to understand why they cannot simply observe the proceedings in a supposedly public forum."[151] One crime victim put it more directly: "All we ask is that we be treated just like a criminal."[152] In this connection, it is worth remembering that defendants never suggest that *they* could be validly excluded from the trial if the prosecution requests *their* sequestration. Defendants frequently take full advantage of their right to be in the courtroom.[153]

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

The amendment will give victims a right not to be excluded from public proceedings. The right is phrased in the negative—a right *not* to be excluded—

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[149] HERRINGTON ET AL., *supra* note 10, at 80.

[150] Deborah P. Kelly, *Victims*, 34 WAYNE L. REV. 69, 72 (1987).

[151] Marlene A. Young, *A Constitutional Amendment for Victims of Crime: The Victims' Perspective*, 34 WAYNE L. REV. 51, 58 (1987).

[152] *Id.* at 59 (quoting Edmund Newton, *Criminals Have All the Rights*, LADIES' HOME J., Sept. 1986).

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

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

[155] *See* Beloof & Cassell, *supra* note 146, at 520-34. *See, e.g.*, United States v. Edwards, 526 F.3d 747, 757-58 (11th Cir. 2008).

thus avoiding the possible suggestion that a right "to attend" carried with it a victim's right to demand payment from the public fisc for travel to court.[156]

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

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

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

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

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

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

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

> *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."[161] A number of states have likewise added provisions to their state constitutions allowing similar victim participation.[162]

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

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

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[161] 18 U.S.C. § 3771(a)(4) (2006).

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

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

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

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

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

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[164] *See generally* BELOOF, CASSELL & TWIST, *supra* note 1, at 422 (discussing this issue).

[165] *See, e.g.*, UTAH R. CRIM. P. 11(e) ("The court may refuse to accept a plea of guilty . . . ."); State v. Mane, 783 P.2d 61, 66 (Utah Ct. App. 1989) (following Rule 11(e) and holding "[n]othing in the statute requires a court to accept a guilty plea").

[166] HERBERT S. MILLER ET AL., PLEA BARGAINING IN THE UNITED STATES 70 (1978).

[167] BELOOF, CASSELL & TWIST, *supra* note 1, at 423.

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

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

Victims would exercise their right to be heard in any appropriate fashion, including making an oral statement at court proceedings or submitting written information for the court's consideration.[172] Defendants can respond to the information that victims provide in appropriate ways, such as providing counter-evidence.[173]

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

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

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168 *See, e.g.*, FED. R. EVID. 32(i)(4)(A); UTAH R. CRIM. P. 22(a).

169 Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611 (2009).

170 *Id.* at 619-25.

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

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

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

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

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

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

This provision is designed to be the victims' analogue to the defendant's right to a speedy trial found in the Sixth Amendment.[176] The defendant's right is designed, *inter alia*, "to minimize anxiety and concern accompanying public accusation" and "to limit the possibilities that long delay will impair the ability of an accused to defend himself."[177] The interests underlying a speedy trial, however, are not confined to defendant. Indeed, the Supreme Court has acknowledged that:

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

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

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

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

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

[177] Smith v. Hooey, 393 U.S. 374, 378 (1969) (citing United States v. Ewell, 383 U.S. 116, 120 (1966)).

[178] Barker v. Wingo, 407 U.S. 514, 519 (1972).

[179] LAFAVE ET. AL., *supra* note 157, at § 18.1(b) (footnote omitted).

measure must be regarded as unjustified and unreasonable, yet have no constitutional ability to challenge them.

It is not a coincidence that these delays are found most commonly in cases of child sex assault.[180] Children have the most difficulty in coping with extended delays. An experienced victim-witness coordinator in my home state described the effects of protracted litigation in a recent case: "The delays were a nightmare. Every time the counselors for the children would call and say we are back to step one. The frustration level was unbelievable."[181] Victims cannot heal from the trauma of the crime until the trial is over and the matter has been concluded.[182]

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

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

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[180] *See A Proposed Constitutional Amendment to Establish A Bill of Rights for Crime Victims: Hearing on S.J. Res. 52 Before the S. Comm. on the Judiciary*, 104th Cong. 29 (1996) (statement of John Walsh).

[181] Telephone Interview with Betty Mueller, Victim/Witness Coordinator, Weber Cnty. Attorney's Office (Oct. 6, 1993).

[182] *See* HERRINGTON ET AL., *supra* note 10, at 75; *Utah This Morning* (KSL television broadcast Jan. 6, 1994) (statement of Corrie, rape victim) ("Once the trial was over, both my husband and I felt we had lost a year and a half of our lives.").

[183] 18 U.S.C. § 3771(a)(7) (2006).

[184] *See* ARIZ. CONST. art. II, § 2.1(A)(10); CAL. CONST. art. I, § 29; ILL. CONST. art. I, § 8.1(a)(6); MICH. CONST. art. I, § 24(1); MO. CONST. art. I, § 32(1)(5); WIS. CONST. art I, § 9m.

[185] *See, e.g.*, United States v. Wilson, 350 F. Supp. 2d 910, 931 (D. Utah 2005) (interpreting CVRA's right to proceedings free from unreasonable delay to preclude delay in sentencing).

[186] Barker v. Wingo, 407 U.S. 514, 530-33 (1972).

[187] *See id. See generally* LAFAVE ET AL., *supra* note 157, at § 18.2.

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

It is also noteworthy that statutes in federal courts and in most states explicate a defendant's right to a speedy trial. For example, the Speedy Trial Act of 1974 specifically implements a defendant's Sixth Amendment right to a speedy trial by providing a specific time line (seventy days) for starting a trial in the absence of good reasons for delay.[191] In the wake of the passage of a Victims' Rights Amendment, Congress could revise the Speedy Trial Act to include not only defendants' interests but also victims' interests, thereby answering any detailed implementation questions that might remain. For instance, one desirable amplification would be a requirement that courts record reasons for granting any continuance. As the Task Force on Victims of Crime noted, "the inherent human tendency [is] to postpone matters, often for insufficient reason," and accordingly the Task Force recommended that the "reasons for any granted continuance . . . be clearly stated on the record."[192]

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

Defendants and convicted offenders who are released pose a special danger to their victims. An unconvicted defendant may threaten, or indeed carry out,

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188 *See Barker*, 407 U.S. at 528 ("We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right.").

189 *Id.* at 531-32.

190 *Id.* at 532.

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

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

violence to permanently silence the victim and prevent subsequent testimony. A convicted offender may attack the victim in a quest for revenge.

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

The VRA would ensure that victims are not suddenly surprised to discover that an offender is back on the streets. The notice is provided in either of two circumstances: either a *release*, which could include a post-arrest release or the post-conviction paroling of a defendant, or an *escape*. Several states have comparable requirements.[197] The administrative burdens associated with such notification requirements have recently been minimized by technological advances. Many states have developed computer-operated programs that can place a telephone call to a programmed number when a prisoner is moved from one prison to another or released.[198]

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

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

This provision guarantees that victims' safety will be considered by courts, parole boards, and other government actors in making discretionary decisions

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193 Jeffrey A. Cross, Note, *The Repeated Sufferings of Domestic Violence Victims Not Notified of Their Assailant's Pre-Trial Release from Custody: A Call for Mandatory Domestic Violence Victim Notification Legislation*, 34 U. LOUISVILLE J. FAM. L. 915, 915-16 (1996).

194 *See id.*

195 *Id.*

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

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

198 *See About VINELink*, VINELINK, https://www.vinelink.com/ (last visited on Mar. 23, 2012).

199 18 U.S.C. § 3771(a)(1) (2006).

200 CAL. CONST. art. I, § 28(b)(2)-(3).

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

Part of that consideration will undoubtedly be whether the defendant should be released subject to certain conditions. One often-used condition of release is a criminal protective order.[202] For instance, in many domestic violence cases, courts may release a suspected offender on the condition that he[203] refrain from contacting the victim. In many cases, *consideration* of the safety of the victim will lead to courts crafting appropriate *no contact* orders and then enforcing them through the ordinary judicial processes currently in place.

. . . to 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"),[204] 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."[205] In justifying this approach, the Judiciary Committee explained:

> The principle of restitution is an integral part of virtually every formal system of criminal justice, of every culture and every time. It holds that, whatever else the sanctioning power of society does to punish its wrongdoers, it should also ensure

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[201] In the case of a mandatory release of an offender (*e.g.*, releasing a defendant who has served the statutory maximum term of imprisonment), there is no such discretionary consideration to be made of a victim's safety.

[202] *See generally* BELOOF, CASSELL & TWIST, *supra* note 1, at 310-23.

[203] Serious domestic violence defendants are predominantly, although not exclusively, male.

[204] 18 U.S.C. §§ 3663A, 3664 (2006).

[205] § 3663A(a)(1) (emphasis added).

> that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being.[206]

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."[207] 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.[208]

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

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[206] 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).

[207] S. Rep. 104-179, at 13.

[208] CAL. CONST. art. I, § 28(b)(13).

[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).

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 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

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211 *See* § 3663A.

212 § 3771(d)(1).

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).

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.

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 incen-

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

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

[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.

tives for criminal justice agencies to comply with victims' rights requirements. Some states have authorized damages 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 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

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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].").

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 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.

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[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).

[227] *See, e.g.,* § 3771(d)(1); UTAH CODE ANN. § 77-38-9(6) (West, Westlaw through 2011 Legis. Sess.).

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 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 article.[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

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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).

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 74-83 and accompanying text.

234 United States v. Hunter, No. 2:07CR307DAK, 2008 WL 53125, at *5 (D. Utah 2008).

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]

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 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]

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[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).

[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).

[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).

IV. Conclusion

As explained in this article, 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 article 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 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 article 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'

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[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).

[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).

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.

THE PROPOSED VICTIMS' RIGHTS AMENDMENT:[1] A BRIEF POINT/COUNTERPOINT

Steven J. Twist* and Daniel Seiden**

[1] NAT'L VICTIMS' CONST. AMENDMENT PASSAGE, http://www.nvcap.org/ (last visited Mar. 21, 2012) [hereinafter Proposed VRA] (providing the full text of the proposed Victims' Rights Amendment). The key provisions include:

> 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.

Id.

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I. INTRODUCTION

A federal constitutional amendment for the rights of crime victims was first proposed by President Ronald Reagan's Task Force on Victims of Crime ("Task Force") in 1982.[2] The Task Force understood the serious implications of proposing an amendment to the U.S. Constitution:

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[2] LOIS HAIGHT HERRINGTON ET AL., PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME: FINAL REPORT 114 (1982), *available at* http://www.ojp.usdoj.gov/ovc/publications/presdntstskforcrprt/87299.pdf. The Task Force wrote:

> The guiding principle that provides the focus for constitutional liberties is that government must be restrained from trampling the rights of the individual citizen. The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed. To that end it is the recommendation of this Task Force that the Sixth Amendment to the Constitution of the United States be augmented.
>
> We propose that the Amendment be modified to read as follows:
>
> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defense. *Likewise, the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings.*

> We do not make this recommendation lightly. The Constitution is the foundation of national freedom, the source of national spirit. But the combined experience brought to this inquiry and everything learned during its progress affirm that an essential change must be undertaken; the fundamental rights of innocent citizens cannot adequately be preserved by any less decisive action. In this we follow Thomas Jefferson, who said: "I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times."[3]

The proposal to amend the Constitution sprang from an understanding developed by the Task Force over the course of many hearings across the country.[4] Those hearings confirmed that "[t]he innocent victims of crime have been overlooked, their pleas for justice have gone unheeded, and their wounds—personal, emotional, and financial—have gone unattended."[5]

Efforts to seek an amendment to the U.S. Constitution were not immediate; indeed the proposal lay dormant for fourteen years while advocates for victims' rights turned instead to the laboratories of the states.[6] In 1982, no state had either a comprehensive constitutional amendment for victims' rights or comprehensive statutes.[7] Just a decade later, every state had statutes addressing victims' rights and thirty-three states had constitutional amendments.[8] However, despite the legislative successes of the reform movement, even this robust level of legislative activity brought little real reform to the culture of the crimi-

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Id.

[3] *Id.* at 114-15.

[4] *Id.* at 126-33 (detailing the list of witnesses before the Task Force in six separate hearings throughout 1982).

[5] *Id.* at ii.

[6] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

[7] *See* CAL. CONST. art. I, § 28. In 1982, California passed a constitutional amendment that included victims' rights to restitution and other reforms not directly related to participatory or substantive rights for victims. *Id.*

[8] *See State Victim Rights Amendments*, NAT'L VICTIMS' CONST. AMENDMENT PASSAGE, http://www.nvcap.org/ (follow "state vras" hyperlink on left side of page) (last visited Mar. 21, 2012) (providing a map of states with amendments and the dates of their enactment).

nal justice system in the way it treated victims of crimes.[9] By the mid-1990s the unjust treatment of victims persisted. The nature of that injustice continued to be both procedural and substantive. In too many cases across America, victims were still not given notice of court proceedings, still not allowed to be present in the courtroom during trial, still not given a voice at critical stages, still not free from unreasonable delay, still not receiving restitution, still not having their safety considered when release decisions were made, and still not treated with respect, dignity, or fairness.[10]

In 1996, Senator Jon Kyl (R-AZ) and Senator Dianne Feinstein (D-CA) introduced Senate Joint Resolution 52,[11] a comprehensive constitutional amendment for victims' rights. From 1996 through 2004, hearings were held in the Senate and House to consider the proposals.[12] While there has always been strong majority support for the amendment, there has also been strong minority opposition. Given the Constitution's command that amendments can only be referred to the States upon a two-thirds vote of both houses,[13] the minority has always been sufficient to stop the passage. The purpose of this article is to set forth in short hand form the major arguments against passage of the Victims' Rights Amendment ("VRA") and to offer responses to those arguments. Perhaps the best articulation of the minority view is found in the views of Senators Leahy, Kennedy, Kohl, Feingold, Schumer, and Durbin (collectively "Minority Senators") found in the 2003 Senate Report.[14]

Essentially, the arguments against passage fall into four categories: first, the U.S. Constitution does not have to be amended to provide rights for crime victims, statutes and state constitutions are adequate, and where the constitution

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[9] *See* S. REP. NO. 108-191 (2003) (providing a more complete assessment of this conclusion); s*ee also* OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY 9-12 (1998) (repeating the call for a federal constitutional amendment during President Clinton's second term).

[10] OFFICE FOR VICTIMS OF CRIME, *supra* note 9, at 11-22.

[11] *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, 589-90 (2005) (providing a more complete history of the congressional consideration of the federal amendment).

[12] S. REP. NO. 108-191, at 2-6 (outlining the legislative history of previous proposals for a victims' rights federal amendment).

[13] U.S. CONST. art. V.

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several states . . . .

Id.

[14] S. REP. NO. 108-191, at 56-110.

need not be amended it should not be amended; second, the rights proposed will diminish the more important rights of the accused; third, the VRA will infringe on the rights of the States; and fourth, many of the individual rights are problematic. Let us take each of these in turn.

II. Point Against the Amendment: Rights for Victims Do Not Need to Be Included in the U.S. Constitution; Federal and State Statutes and State Constitutions are Adequate[15]

As the Task Force conceded, proposing an amendment to the U.S. Constitution should not be done lightly.[16] Yet there is something compelling about the notion of basic fairness for crime victims. Even the VRA's most ardent critics usually say they support most of the rights in principle.[17] If there is one thing certain in the victims' rights debate, it is that these words, 'I'm all for victims' rights but . . .,' are heard repeatedly. But while supporting the rights in principle, opponents in practice end up supporting, if anything, mere statutory fixes that have proven inadequate to the task of vindicating the interests of victims.

As Attorney General Reno testified before the Committee on the Judiciary, "[e]fforts to secure victims' rights through means other than a constitutional amendment have proved less than fully adequate."[18] The Crime Victims' Rights Act[19] ("CVRA"), after almost eight years of being tested in the courts, has proven inadequate to change the culture of our justice system in ways that make it fairer for all Americans.

In many states, statutes have proven inadequate to change the justice system. Despite its successes, Arizona's state constitutional amendment has proven inadequate to fully implement victims' rights. While the state's amendment has improved the treatment of victims, it does not provide the unequivocal command that is needed to completely change old ways. In Arizona, as in other states, the existing rights too often "fail to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indiffer-

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[15] The points and counterpoints in this Part are adapted and expanded upon from previous Senate hearings, regarding previous proposals for a federal constitutional VRA. *See Victim's Rights Amendment: Hearing on H.J. Res. 91 Before the Comm. on the Judiciary*, 107th Cong. 10-11 (2002) (statement of Steven J. Twist, Steering Committee for the National Victims' Rights Constitutional Amendment Network); *see also* Steven J. Twist, *The Crime Victims' Rights Amendment and Two Good and Perfect Things*, 1999 Utah L. Rev. 369 (1999).

[16] *See supra* note 2 and accompanying text.

[17] S. Rep. No. 108-191, at 56 ("The treatment of crime victims certainly is of central importance to a civilized society. The question is not whether we should help victims, but how.").

[18] S. Rep. No. 108-191, at 12.

[19] 18 U.S.C. § 3771 (2006).

ence, sheer inertia or the mere mention of an accused's rights—even when those rights are not genuinely threatened."[20]

A study by the National Institute of Justice found that "even in States where victims' rights were protected strongly by law, many victims were not notified about key hearings and proceedings, many were not given the opportunity to be heard, and few received restitution."[21] The victims most likely to be affected by this continuing haphazard implementation are, perhaps not surprisingly, racial minorities.[22] These problems persist today. In Arizona, most crime victims still are not given notice of initial appearances, despite the fact that for some the chance to see a judge before a release decision is made may be a matter of life or death. This is true even though the right to notice has been a command of the Arizona Constitution for almost twenty-two years.[23]

To answer the question, whether the VRA should be added as a constitutional amendment, it is useful to turn to an organization calling itself Citizens for the Constitution ("the Citizens"), which formed under the auspices of The Century Foundation's Constitution Project.[24] Their purpose is to call for restraint in the consideration of amendments to the U.S. Constitution.[25] The group has propounded eight guidelines which, they argue, should be satisfied before any constitutional amendment would be justified.[26]

Indeed, the Citizens raise some questions, in the commentary following their guidelines, about the VRA itself.[27] Application of these rigorous guidelines, however, despite the reservations of the Citizens themselves, demonstrates the strength of the case for why the rights proposed need to be adopted as an amendment to the U.S. Constitution.

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[20] Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B5.

[21] Dean G. Kilpatrick et al., *The Rights of Crime Victims—Does Legal Protection Make a Difference?*, NAT'L INST. JUST., Dec. 1998, at 1, 10, *available at* https://www.ncjrs.gov/pdffiles/173839.pdf.

[22] *See id.* at 1, 7.

[23] ARIZ. CONST. art. II, §2.1(A) ("To preserve and protect victims' rights to justice and due process, a victim of crime has a right: 1. *To be treated with fairness*, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process. 2. *To be informed, upon request, when the accused* or convicted person *is released from custody* or has escaped. 3. *To be present at and, upon request, to be informed of all criminal proceedings where the defendant has the right to be present.* 4. *To be heard at any proceeding involving a post-arrest release decision*, a negotiated plea, and sentencing." (emphasis added)).

[24] CITIZENS FOR THE CONSTITUTION, GREAT AND EXTRAORDINARY OCCASIONS: DEVELOPING GUIDELINES FOR CONSTITUTIONAL CHANGE viii (1999); *see About the Century Foundation*, CENTURY FOUND., http://tcf.org/about (last visited March 21, 2012). The Century Foundation, founded in 1919, calls itself a "progressive non-partisan think tank." *Id.*

[25] *See* CITIZENS FOR THE CONSTITUTION, *supra* note 24, at 3-6.

[26] *See id.* at 7.

[27] *See id.* at 13.

A. The Proposed Eight Guidelines for Constitutional Amendments, Per the Citizens

What follows is a discussion of each of the eight guidelines proposed by the Citizens.

1. "Does the proposed amendment address matters that are of more than immediate concern and that are likely to be recognized as of abiding importance by subsequent generations?"[28]

Answer: Yes.

Even as the constitutional rights of persons accused or convicted of crimes address issues of abiding importance, so too do the proposed rights of crime victims. Indeed, the Minority Senators concede the point, stating "[t]he treatment of crime victims certainly is of central importance to a civilized society."[29] Surely something of "central importance to a civilized society" is of "abiding importance."[30]

The legitimate rights of the accused to notice, the right to be present, the right to be heard or remain silent, the right to a speedy and public trial, or any of the other constitutional rights of the accused are surely of abiding importance.[31] But the rights of the accused are no more enduring than the legitimate interests of the victim to notice, presence, the right to be heard, or any of the other rights proposed by the VRA.

Indeed, it is precisely because these values for victims are of enduring, or *abiding* importance that they must be protected against erosion by any branch or by majoritarian will. That they do not exist today broadly across the country is evidence that they are not adequately protected despite general acceptance of their merit.

Two leading constitutional law scholars reached similar conclusions:

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

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[28] *Id.* at 7.

[29] S. REP. NO. 108-191, at 56 (2003).

[30] *Id.*; CITIZENS FOR THE CONSTITUTION, *supra* note 24, at 7.

[31] *See generally* U.S. CONST.

> *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.*[32]

2. "Does the proposed amendment make our system more politically responsive or protect individual rights?"[33]

Answer: Yes.

Clearly the proposed amendment is offered to protect individual rights. That is its sole purpose. The Citizens, however, suggest that "Congress should ask whether crime victims are a 'discreet and insular minority' requiring constitutional protection against overreaching majorities or whether they can be protected through ordinary political means. Congress should also ask whether it is appropriate to create rights for them that are virtually immune from future revision."[34] Let us review these two questions.

"[O]rdinary political means"[35] have proven wholly inadequate to establish and protect the rights reviewed above. If this were not so, the rights would exist and be respected in every state and throughout the federal government. The evidence that the rights are not in existence is as compelling as it is overwhelming. From every state, we continue to see stories of victims who are denied notice, the right to be present, the right to be heard, the right to timely proceedings, the right to have their safety considered, the right to restitution, and the right to standing. Why is this so? Are crime victims unpopular? No, but as a class they are ignored; their interests subordinated to the interests of the defendant and the professionals in the system. And those interests are entrenched as deeply as any in this society. Crime victims become a "discreet and insular minority"[36] by virtue of their transparency in a justice system that has come to be characterized as a contest wholly between the state and the defendant.[37]

With respect to the second question, it is precisely because establishing rights for crime victims is a matter of "central importance to a civilized soci-

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[32] Tribe & Cassell, *supra* note 20 (emphasis added).

[33] CITIZENS FOR THE CONSTITUTION, *supra* note 24, at 7.

[34] *Id.* at 13.

[35] *Id.*

[36] *Id.*

[37] The role of the victim in the criminal justice system has been relegated to that of mere evidence. *See* Linda R. S. v. Richard D., 410 U.S. 614, 619 (1973) ("[I]n American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.").

ety"[38] that they must be established in a manner that keeps them immune from the shifts of majoritarian whim or an indifference that is not compatible with deference accorded to constitutional rights. For the same reasons that we preserve the rights of defendants from political revision, we must do the same for their victims.

3. "Are there significant practical or legal obstacles to the achievement of the objectives of the proposed amendment by other means?"[39]

Answer: Yes.
The Citizens write:

> The proposed victims' rights amendment raises troubling questions under this Guideline. Witnesses testifying in Congress on behalf of the federal amendment point to the success of state amendments as reason to enact a federal counterpart. But the passage of the state amendments arguably cuts just the other way: for the most part, states are capable of changing their own law of criminal procedure in order to accommodate crime victims, without the necessity of federal constitutional intervention. While state amendments cannot affect victims' rights in federal courts, Congress has considerable power to furnish such protections through ordinary legislation. Indeed, it did so in March 1997 with Public Law 105-6, which allowed the victims of the Oklahoma City bombing to attend trial proceedings.[40]

Steve Twist was one of those witnesses to whom the Citizens referred. They should have read the complete testimony. No witness before Congress said the U.S. Constitution should be amended to add victims' rights because the state amendments were working so well. Let us repeat again one of the Twist statements:

> In my state, the statutes were inadequate to change the justice system. And now, despite its successes, we realize that our state constitutional amendment will also prove inadequate to fully implement victims' rights. While the amendment has improved the treatment of victims, it does not provide the unequivocal command that is needed to completely change old

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[38] S. REP. NO. 108-191, at 56 (2003).
[39] CITIZENS FOR THE CONSTITUTION, *supra* note 24, at 7.
[40] *Id.* at 15-16 (citation omitted).

> ways. In our state, as in others, the existing rights too often "fail to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indifference, sheer inertia or the mere mention of an accused's rights—even when those rights are not genuinely threatened."[41]

Moreover, our courts have now made explicit in a series of cases what was always understood: that the U.S. Constitutional rights of the defendant will always trump any right of the victim without any fair attempt to balance the rights of both.[42]

On the Oklahoma City bombing point that the Citizens make, they should have read the whole testimony of Professor Paul Cassell, who convincingly demonstrates how the statute cited by the Citizens was inadequate to the task of fully protecting even these high profile and compelling victims.[43] The law did not work for them. How much less must it work for victims who do not have the clout to get an act of Congress passed? Those "other means," to use the Citizens phrase,[44] have simply proven inadequate, as has been concurred in by a broad consensus that included past Justice Departments under bi-partisan leadership, constitutional scholars of the highest regard from both ends of the political spectrum, Presidents George H. W. Bush, William J. Clinton, and George W. Bush, the platforms of both major political parties, a bi-partisan coalition of Members of Congress and Senators, and crime victim advocates throughout our country.

4. "Is the proposed amendment consistent with related constitutional doctrine that the amendment leaves intact?"[45]

Answer: Yes.

The proposed rights[46] are perfectly consistent with the constitutional doctrine that fundamental rights for citizens in our justice system need the protection of our fundamental law. The Constitution was established "in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty."[47] The proposed VRA directly relates to establishing "Justice," insuring "domestic Tranquility," promoting "the general Welfare,"

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[41] S. REP. NO. 106-254, at 16 (2000) (quoting Tribe & Cassell, *supra* note 20).

[42] *See generally* State *ex rel*. Romley v. Superior Court (*Wilkinson*), 891 P.2d 246 (Ariz. Ct. App. 1995).

[43] S. REP. NO. 108-191, at 23-25; CITIZENS FOR THE CONSTITUTION, *supra* note 24, at 16.

[44] CITIZENS FOR THE CONSTITUTION, *supra* note 24, at 14-17.

[45] *Id.* at 7.

[46] *See* Proposed VRA, *supra* note 1.

[47] U.S. CONST. pmbl.

and securing "the Blessings of Liberty."[48] Each of these goals is furthered by the establishment of participatory and substantive rights for crime victims. The constitutions of several states now recognize victims' rights as matters of justice.[49] It is a long-acknowledged view that creating a justice system, which treats victims with fairness, promotes domestic tranquility by promoting the reporting of offenses to authorities rather than encouraging victims to rely on private vengeance.[50] Surely, it will be conceded that promoting justice and fairness for victims of crime also promotes the general welfare. Moreover, the VRA directly secures the blessings of liberty by limiting the power of the state to adjudicate criminal cases without respect for the victim.

The VRA leaves intact the rights of accused and convicted offenders.[51]

5. "Does the proposed amendment embody enforceable, and not purely aspirational, standards?"[52]

Answer: Yes.

The text of the proposed amendment[53] grants to crime victims constitutional standing to appear before the appropriate court and seek orders protecting and enforcing the established rights. This is the essence of enforceability. This enforcement parallels the defendant's right to seek orders in the criminal case protecting the constitutional and statutory rights of the defendant. For victims, these orders can include the vacating of decisions reached in violations of the victims' rights and ordering that proceedings be re-done.[54]

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[48] *Id.*; *see* Proposed VRA, *supra* note 1.

[49] *See, e.g.*, ARIZ. CONST. art. II, § 2.1; CAL. CONST. art. I, § 28; OR. CONST. art. I, §§ 42-43; S.C. CONST. art. I, § 24; TENN. CONST. art. I, § 35; UTAH CONST. art. I, § 28.

[50] William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim,* 13 AM. CRIM. L. REV. 649, 663-65 (1976) ("Therein lies the exquisite irony of modern law. The age-old struggle of civilization has been to persuade people not to take justice into their own hands but rather to let their vengeance and righteous indignation be wrought by the law[,] . . . settling for the more intangible satisfaction of knowing that justice would be done. Now, the modern criminal justice system operates . . . without bothering to give the victim even the minimal satisfaction of knowing what happened to his case and why. . . . However, while pursuing the ideal of impersonal justice, the system has neglected the continuing struggle of all societies to convince their members not to resort to personal vengeance to settle their grievances. Lawfulness in society is increased or diminished to the extent that this struggle is successful." (footnotes omitted)).

[51] *See infra* Part III.

[52] CITIZENS FOR THE CONSTITUTION, *supra* note 24, at 7.

[53] Proposed VRA, *supra* note 1.

[54] *See* ARIZ. REV. STAT. ANN. §§ 13-4436, 4437 (Westlaw through 2012 Legis. Sess.); State v. Ariz. Bd. of Pardons & Paroles, 875 P.2d 824, 831 (Ariz. Ct. App. 1993) ("We turn now to the remedy for a violation. If a victim does not receive notice of a post-conviction release hearing to which she was entitled, she may have the results of that hearing set aside and have a new hearing ordered.").

6. "Have proponents of the proposed amendment attempted to think through and articulate the consequences of their proposal, including the ways in which the amendment would interact with other constitutional provisions and principles?"[55]

Answer: Yes.

More than simply think through the proposal, proponents of the VRA have taken over two decades of experience with state statutes and constitutional provisions to develop a very refined understanding of the limits of state and federal law, the need for a federal amendment, and how that amendment would work in actual practice and be interpreted.[56] No other constitutional amendment has had this degree of vetting.

7. "Has there been full and fair debate on the merits of the proposed amendment?"[57]

Answer: Yes.

Congress has had the VRA under consideration since 1996.[58] There have been major hearings in both bodies on multiple occasions. The record of debate and discussion throughout the country is extensive.

8. "Has Congress provided for a nonextendable deadline for ratification by the states so as to ensure that there is a contemporaneous consensus by Congress and the states that the proposed amendment is desirable?"[59]

Answer: Yes.

The proposal establishes a definitive fourteen-year deadline for state ratification. The proposed amendment passes each of the tests set forth in the Citizens' Guidelines.[60] More importantly, it is fully faithful to the spirit and design of James Madison.

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[55] CITIZENS FOR THE CONSTITUTION, *supra* note 24, at 7.

[56] *See* S. REP. NO. 108-191 (2003); S. REP. NO. 106-254 (2000); *see generally* Proposed VRA, *supra* note 1.

[57] CITIZENS FOR THE CONSTITUTION, *supra* note 24, at 7.

[58] S. REP. NO. 108-191, at 2-6; *see also* Kyl et al., *supra* note 11, at 588-93 (providing a more complete history of the congressional consideration of the federal amendment).

[59] CITIZENS FOR THE CONSTITUTION, *supra* note 24, at 7.

[60] *Id.*

The Citizens' pamphlet, *Great and Extraordinary Occasions*,[61] takes its name from a line in The Federalist No. 49, authored by James Madison.[62] There Madison rightly argued for restraint in the use of the amendment process.[63] And consistent with the principle of rightful restraint he proposed the first twelve amendments.

B. Constitutional Amendments and the views of James Madison

When James Madison took to the floor and proposed the Bill of Rights during the first session of the First Congress, on June 8, 1789, "[h]is primary objective was to keep the Constitution intact, to save it from the radical amendments others had proposed."[64] In doing so, he acknowledged that many Americans did not yet support the Constitution. As Robert Goldwin has stated, discussing the speech Madison gave to the First Congress and the timing of the proposed amendments:

> Prudence dictates that advocates of the Constitution take steps now to make it "as acceptable to the whole people of the United States, as it has been found acceptable to a majority of them."
>
> The fact is, Madison said, there is still "a great number" of the American people who are dissatisfied and insecure under the new Constitution. So, "if there are amendments desired of such a nature as will not injure the [C]onstitution, and they can be ingrafted so as to give satisfaction to the doubting part of our fellow-citizens," why not, in the spirit of "deference and concession," adopt such amendments?[65]

Madison adopted this tone of "deference and concession" because he realized that the Constitution must be the "will of all of us, not just a majority of us."[66] By adopting a bill of rights, Madison thought, the Constitution would live up to this purpose.[67] He also recognized how the Constitution was the

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[61] *See generally* CITIZENS FOR THE CONSTITUTION, GREAT AND EXTRAORDINARY OCCASIONS: DEVELOPING GUIDELINES FOR CONSTITUTIONAL CHANGE (1999).

[62] THE FEDERALIST NO. 49 (James Madison).

[63] *Id.*

[64] ROBERT A. GOLDWIN, FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION 73, 75 (1997).

[65] *Id.* at 79 (quoting James Madison).

[66] *Id.* at 79, 100.

[67] *Id.* at 101 ("Madison saw that the proposed amendments could make the Constitution universally revered.").

only document, which could likely command this kind of influence over the culture of the country.[68]

The goals of the VRA are perfectly consistent with the goals that animated James Madison. There is substantial evidence that the Constitution today does not serve the interests of the whole people in matters relating to criminal justice. The way to restore balance to the system in a manner that becomes part of our culture is to amend our fundamental law.

"[The Bill of Rights will] have a tendency to impress some degree of respect for [the rights], to establish the public opinion in their favor, and rouse the attention of the whole community . . . . [They] acquire by degrees the character of fundamental maxims . . . as they become incorporated with the national sentiment . . . ."[69] Critics of Madison's proposed amendments claimed they were unnecessary, especially so in the United States, because states had bills of rights.[70] Madison responded, in part, with the observation that "not all the states have bills of rights, and some of those that do have inadequate and even 'absolutely improper' ones."[71] The experience in the victims' rights movement is no different. Not all states have constitutional rights, nor even adequate statutory rights. There are thirty-three state constitutional amendments and they are of varying degrees of value.[72]

Harvard Law School Professor Lawrence Tribe has observed this failure: "[T]here appears to be a considerable body of evidence showing that, even where statutory or regulatory or judge-made rules exist to protect the participatory rights of victims, such rights often tend to be honored in the breach . . . ."[73] As a consequence, Professor Tribe has concluded that crime victims' rights "are the very kinds of rights with which our Constitution is typically and properly concerned."[74]

After years of experience, it is now clear that the only way to make respect for the rights of crime victims "incorporated with the national sentiment," is to make them a part of the "sovereign instrument of the whole people," the Constitution.[75] Just as James Madison would have done.

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[68] *Id.* at 101 ("A bill of rights added to the intact Constitution would bring to it the only thing it presently lacked—the support of the whole people.").

[69] *Id.* at 92, 99 (quoting James Madison).

[70] *Id.* at 92.

[71] *Id.* at 93 (quoting James Madison).

[72] *See State Victim Rights Amendments*, *supra* note 8.

[73] Laurence H. Tribe, *In Support of a Victims' Rights Constitutional Amendment,* RESPONSIVE COMMUNITY, Winter 1997-98, at 53, 55.

[74] *Id.* at 53-54.

[75] GOLDWIN, *supra* note 64, at 99, 102 (quoting James Madison).

More than thirty years ago, the Task Force concluded that a federal constitutional amendment was necessary to protect the rights of crime victims.[76] Specifically, the Task Force noted: "The guiding principle that provides the focus for constitutional liberties is that government must be restrained from trampling the rights of the individual citizen. The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed."[77]

In fact, the Committee on the Judiciary of the United States Senate concluded that the VRA was consistent with "the great theme of the Bill of Rights—to ensure the rights of citizens against the deprecations and intrusions of government—and to advance the great theme of the later amendments, extending the participatory rights of American citizens in the affairs of government."[78]

Further, the Committee concluded:

> [I]t is appropriate that victims' rights reform take the form of a Federal constitutional amendment. A common thread among many of the previous amendments to the Federal constitution is a desire to expand participatory rights in our democratic institutions. For example, the 15th Amendment was added to ensure African-Americans could participate in the electoral process, the 19th Amendment to do the same for women, and the 26th amendment expanded such rights to young citizens. . . .
>
> Other provisions of the Constitution guarantee the openness of civil institutions and proceedings, including the rights of free speech and assembly, the right to petition the Government for redress of grievances, and perhaps most relevant in this context, the right to a public trial. It is appropriate for this country to act to guarantee rights for victims to participate in proceedings of vital concern to them. These participatory rights serve an important function in a democracy. Open governmental institutions, and the participation of the public, help ensure public confidence in those institutions. In the case of trials, a public trial is intended to preserve confidence in the judicial system, that no defendant is denied a fair and just trial.

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[76] HERRINGTON ET AL., *supra* note 2, at 113-15.

[77] *Id.* at 114.

[78] S. REP. NO. 108-191, at 2 (2003).

> However, it is no less vital that the public—and victims themselves—have confidence that victims receive a fair trial.[79]

Indeed, the National Governors Association, in a resolution supporting a federal constitutional amendment observed:

> 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.[80]

Additionally in a letter to Congress restating their support for a VRA, the Attorneys General of forty-eight states, the Virgin Islands, and Washington, D.C. wrote:

> Despite the best intentions of our laws, too often crime victims are still denied basic rights to fair treatment and due process that should be the birthright of every citizen who seeks justice through our courts. We are convinced that statutory protections are not enough; only a federal constitutional amendment will be sufficient to change the culture of our legal system.[81]

Finally, Attorney General Reno, after careful study, reported:

> Efforts to secure victims' rights through means other than a constitutional amendment have proved less than fully adequate. Victims' rights advocates have sought reforms at the State level for the past twenty years, and many States have responded with State statutes and constitutional provisions that seek to guarantee victims' rights. However, these efforts have failed to fully safeguard victims' rights. These significant State efforts simply are not sufficiently consistent, comprehensive, or authoritative to safeguard victims' rights.[82]

Likewise, a comprehensive report prepared by the U.S. Department of Justice during the Clinton Administration and by those active in the field of crime

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[79] *Id.* at 10-11.

[80] *Id.* at 3-4 (quoting NAT'L GOVERNORS ASS'N, POLICY 23.1(1997)).

[81] Letter from Nat'l Ass'n of Attorneys Gen. to Jon Kyl & Dianne Feinstein, U.S. Senators (Apr. 15, 2004) (on file with author).

[82] S. REP. NO. 108-191, at 12 (citing *The Victims' Bill of Rights Amendment: Hearing on the Victims' Bill of Rights Amendment Before the Comm. on the Judiciary*, 105th Cong. 64 (1997) (statement of Attorney General Reno)).

victim rights "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 level.' "[83]

Perhaps those who argue that the VRA need not be put into the U.S. Constitution know more about our Constitution than Professors Tribe and Cassell, every administration since Ronald Reagan, the Department of Justice, a bi-partisan majority of the Senate Judiciary Committee, the National Governor's Association, fifty State Attorneys General, and the mainstream of the victims' movement in the United States. The reasons for such a conclusion are not evident.

III. Point Against the Amendment: An Amendment Would Undermine the Rights of Defendants

Nothing in the VRA undermines rights of the accused. The rights proposed are clear and straightforward, expressed in language that does not undermine, but rather confirm the constitutional rights of the accused: "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."[84]

This language reaffirms the constitutional rights of the accused. And none of the specific rights which follow the first sentence undermine in any way the constitutional rights of the accused.

> 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.[85]

The right to reasonable notice of public proceedings does not undermine in any way the constitutional rights of the accused. There is no constitutional

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[83] *Id.* at 12 (quoting Office for Victims of Crime, *supra* note 9, at 10).

[84] Proposed VRA, *supra* note 1.

[85] *Id.*

right for a defendant to prevent a victim, or anyone else, from receiving notice of public court proceedings.

The right to reasonable notice of releases or escapes does not undermine in any way the constitutional rights of the accused. There is no constitutional right for a defendant to prevent a victim from knowing when the defendant has escaped or is released.

The right to not be excluded does not undermine in any way the constitutional rights of the accused. There is no constitutional right for a defendant to exclude a victim from trial, even when the victim is also a witness.[86]

The rights to be heard at release, plea, and sentencing proceedings do not undermine in any way the constitutional rights of the accused. While there remain limits regarding relevancy and due process, there is no constitutional right for a defendant to silence completely a victim who wants to be heard at these proceedings.[87]

The right to due consideration for the victim's safety does not undermine in any way the constitutional rights of the accused. There is no constitutional right for a defendant to prevent a court from considering the victim's safety when decisions are made. Indeed, victim safety is a legitimate and, according to the United States Supreme Court, constitutional consideration when making release decisions.[88]

The right to be free from unreasonable delay does not undermine in any way the constitutional rights of the accused. It is undisputed that the defendant has a right to a fair and speedy trial and the right to counsel which, according to the United States Supreme Court, includes the right to an effective lawyer—one who has had enough time to prepare a defense.[89] These rights do not prevent a victim's interest in avoiding *unreasonable* delay, meaning delay that is unrelated to the legitimate rights of the accused or the state.

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[86] *See* State v. Fulminante, 975 P.2d 75, 92 (Ariz. 1999); Stephens v. State, 720 S.W.2d 301, 302-03 (Ark. 1986); Wheeler v. State, 596 A.2d 78, 86-89 (Md. Ct. Spec. App. 1991); *see also The Victims' Bill of Rights Amendment: Hearing on the Victims' Bill of Rights Amendment Before the Comm. on the Judiciary*, 104th Cong. (1996) (statement of Paul G. Cassell, Professor of Law, University of Utah College of Law), *available at* http://www.nvcap.org/cassell2.htm ("In sum, there is no constitutional footing for concluding that, under contemporary constitutional principles, a criminal defendant has a federal constitutional right to exclude victims from trials."); Douglas E. Beloof & Paul G. Cassell, *The Crime Victims Right to Attend the Trial: The Reascendant National Consensus,* 9 LEWIS & CLARK L. REV. 481 (2005) (providing definitive work on this question).

[87] *See* Payne v. Tennessee, 501 U.S. 808 (1991); Lynn v. Reinstein, 68 P.3d 412 (Ariz. 2003), *cert. denied*, 540 U.S. 1141 (2004).

[88] United States v. Salerno, 481 U.S. 739 (1987).

[89] McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel.").

The right to due consideration for the victim's safety does not infringe on any right of an accused or convicted offender. A defendant has no constitutional right to deny to a court the ability to consider victim safety when making release, sentencing, or other decisions or to a victim to assert that interest. Indeed, the safety of the public and victim is one of the fundamental purposes of the justice system.[90]

The right to restitution does not undermine in any way the constitutional rights of the accused. There is no constitutional right for a convicted offender to prevent the law from requiring, nor the court from ordering, restitution for the victim.

The right to standing to enforce these rights does not undermine in any way the constitutional rights of the accused. There is no constitutional right for a defendant to prevent a victim from asserting his or her rights in court.

IV. Point Against the Amendment: Passage of the VRA Would Infringe on the Rights of the States and Would Lead to Federal Court Supervision Over the States

While it is certainly healthy to see the commitment the Minority Senators and others have to states' rights, it is odd that it should be addressed so vigorously in the context of criminal procedure. Few areas of the law have been more fully occupied by the federal government than the law of criminal procedure through the U.S. Supreme Court's interpretation of the U.S. Constitution and the incorporation of the Bill of Rights into every State's justice system. Nowhere have the Minority Senators objected to this federalization of state criminal law. Yet, the Minority Senators characterize the amendment as "locking States into an absolutist national pattern regarding the participation of victims in the criminal justice system."[91] It seems that only the federal constitutional rights of the accused are a more acceptable absolutist national pattern.

A. The Amendment Will Not End Constructive Experimentation by the States

The Minority Senators assert, "State experimentation with victims' rights initiatives is relatively new and untested; the laboratory evidence is as yet

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[90] *See* Ariz. Rev. Stat. Ann. §13-101 (Westlaw through 2012 Legis. Sess.) ("It is declared that the public policy of this state and the general purposes of the provisions of this title are: . . . 5. To insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized . . . .").

[91] S. Rep. No. 108-191, at 88 (2003).

inconclusive."[92] The record before the Congress refutes this assertion. The experiment with state laws, even strong state laws, has proven inadequate to fully protect the rights of victims. Even so, the amendment does not end constructive experimentation by the States. Setting a floor of national rights does not mean that States may not add to those rights as they see fit.[93] Nor does it mean that implementation of the rights must be in a uniform manner. For example, in one state notice may be provided by courts, in another state by prosecutors, and in a third state by a different manner altogether. States may vary in how they permit special actions to enforce the rights in state court.

In the end, the objection of the Minority Senators rings hollow. It is factually wrong and bespeaks a double standard in the protection of the rights of defendants and victims that does not befit a country that pledges itself to "justice for all."[94]

B. The Amendment Does Not Impose an Unfunded Mandate on the States

The Minority Senators express the concern that "[w]e need more information from the States about how much it costs to implement these programs, and what sort of resources are needed to be successful before we rush to validate a series of rights that could overwhelm the Nation's criminal justice system."[95] The rights proposed are not a *program* but rather in large part limitations on the state from proceeding with a criminal matter without fairness to the victim. The only right with any fiscal consequence is the right to notice and each state will be able to determine how to provide notice, indeed most already claim to do so today. And these costs are already carried by the Crime Victims Fund established by 42 U.S.C. §10601.[96] Rights to be not excluded, to speak, to have safety considered, or to be free from unreasonable delay do not impose additional costs on the system; they may reduce costs in fact by injecting a degree of discipline into the system that it has not had. There is more than enough money collected from criminal defendants across the country to cover the costs.[97]

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[92] *Id.* at 90.

[93] *See, e.g.*, Michigan v. Long, 463 U.S. 1032 (1983) (recognizing that state constitutions can provide independent grounds for extending greater rights); Arizona v. Ault, 724 P.2d 545 (Ariz. 1986) (holding that the Arizona Constitution's right to privacy provision has stronger protection for an accused offender than the U.S. Constitution's Fourth Amendment protections).

[94] 4 U.S.C. § 4 (2006) (providing the "Pledge of Allegiance to the Flag").

[95] S. REP. NO. 108-191, at 92.

[96] 42 U.S.C. § 10601 (2006); *see also VOCA Funding*, NAT'L ASS'N VOCA ASSISTANCE ADMIN., http://www.navaa.org/budget/index.html (last visited Mar. 21, 2012) (providing more information on funding).

[97] *See VOCA Funding*, *supra* note 96.

C. The Amendment Will Not Lead to Extensive Federal Court Supervision of State Law Enforcement Operations

The fear that state sovereignty will be lost is especially curious in the context of criminal procedure given the supremacy of federal law that already pervades the area.[98]

More importantly, the more fundamental purpose of the Constitution is not to enshrine state sovereignty for itself; state sovereignty was merely another means of securing liberty from encroachments of the federal government on the liberty of the people. The purposes of the Constitution include to "secure the Blessings of Liberty."[99] The federal nature of the government formed under the Constitution, the limitation on the power of the federal government, and the checks and balances among the separate branches are all established to protect individual liberty. When the right to liberty is written directly into the Constitution, as in the case of the VRA, the limitation on the power of the states, in fact, advances liberty. When the courts exercise the power to enforce the rights established by the VRA they will be advancing the cause of liberty and the Constitution.

V. Point Against the Amendment: The Individual Rights Provided to Victims by Passage of the VRA Will be Problematic

A. The VRA Would Not Leave Victims Without Adequate Remedies

The proposed VRA has an explicit grant of standing to victims so that they may pursue remedies independent of the government.[100] It is standing that provides the keys to remedies. Experience under the CVRA has demonstrated that victims can pursue and obtain remedies for violations of rights without any disruption in the fair administration of justice.[101]

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[98] *See, e.g.*, Klopfer v. North Carolina, 386 U.S. 213 (1967) (establishing that the defendant's right to a speedy trial applies to the States); Malloy v. Hogan, 378 U.S. 1 (1964) (establishing that the privilege against forced self-incrimination applies to the States); Mapp v. Ohio, 367 U.S. 643 (1961) (establishing that the exclusionary rules apply to the States).

[99] U.S. Const. pmbl.

[100] *See* Proposed VRA, *supra* note 1.

[101] *See* Kenna v. U.S. Dist. Court, 435 F.3d 1011 (9th Cir. 2006) (granting the victim's petition for writ of mandamus and finding the district court erred in denying the victims the right to be heard at the sentencing proceeding).

B. The Obligation Imposed by the VRA to Provide Notice of Proceedings Would Not Impose Enormous Costs on the System

The Minority Senators fear that the right to reasonable notice will lead to staggering costs.[102] It has not. The costs are far from staggering and testimony before the Senate Judiciary Committee confirmed this early on.[103] On May 12, 1997, Rick Romley, then Maricopa County Attorney, offered the following prepared statement for the Senate Judiciary Committee:

> During the victims' rights debate, detractors argued that such an amendment would be cost prohibitive. They predicted that such rights would bankrupt our criminal justice system. While I agree that there are costs associated with victims' rights services, those costs are minor when balanced with the benefit to our state. The citizens of Arizona voiced their opinion—affording victims' constitutional guarantees to participation is worth the expense.
>
> My Office provides victims [sic] rights services to over 19,000 victims of felonies perpetrated by adult offenders and over 10,000 victims of juvenile delinquents. Victim Advocates provide victims' rights notification and services to help victims navigate their way through what can be an intimidating process. The costs associated with these services account for no more than 3% of my entire budget. Costs associated with victims' rights services are far less than those associated with ensuring that those accused of crime are afforded their constitutional rights.
>
> To enhance the ability of criminal justice entities to provide victims' rights services, the Arizona legislature adopted a funding measure to offset these costs. Every offender who has been ordered to pay a fine must pay an additional surcharge, a percentage of which is dedicated to funding victims' rights services. As a result, more than two-thirds of the costs my Office incurs as a result of providing victims' rights services are offset by monies paid by convicted offenders.[104]

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[102] S. REP. NO. 108-191, at 80 (2003).

[103] *Constitutional Amendment to Protect the Rights of Crime Victims: Hearing on S.J. Res. 6 Before the Comm. on the Judiciary*, 105th Cong. (1997) (statement of Richard M. Romley, Maricopa County Attorney).

[104] *Id.*

Congress enacted the CVRA in 2004.[105] The CVRA provides, *inter alia*, that crime victims have "[t]he right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused."[106] In the seven and one half years since the enactment of this provision of the CVRA, the U.S. Department of Justice has not once complained to Congress that it cannot meet the requirements of providing notice. Notice is routinely provided to victims in federal cases. Notice continues to be provided in large local jurisdictions like Maricopa County, Arizona without complication. Moreover, with technological advances, the costs continue to reduce. The VRA establishes the right to *reasonable* notice. This permits the use of alternative means of notice in mass victim cases, rendering cost issues inconsequential.[107]

Despite the fact that the cost argument has been shown to be a red herring, there is a deeper, more significant point to be made about the nature of this argument in opposition because it portrays a telling approach to the entire debate. Would costs stop the opponents of the VRA from defending notice for defendants, or the state? Why should victims be excluded from this basic element of fairness? There is an element of second-class citizenship that underlies the role the opponents want to maintain for crime victims. Defendants and the government are surely entitled to notice, but crime victims are not. Surely, in America we are a great enough, decent enough, and compassionate enough country to extend to victims of crime the same notice we give to defendants and the government. Critics, however, say otherwise.

Critics of the VRA may inexplicably argue that just as the court's interpretation of the Sixth Amendment has lead to a vast increase of cost to the criminal justice system by requiring publicly funded defenders, the same issue of requiring publicly funded victim's attorneys could happen. However, the Sixth Amendment comparison offered by opponents is flawed; clearly there is no parallel 'right to counsel' expressly written into the proposed amendment.[108]

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[105] Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (codified at 18 U.S.C. § 3771 (2009)). The Act is commonly referred to as the Crime Victims' Rights Act ("CVRA"), but the full title is the *Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, Nila Lynn Crime Victims Rights Act* named in honor of the murdered loved ones of leaders in the national victims' rights movement. *See id.* Statements of these leaders are also included in this volume. 5 PHOENIX L. REV. (forthcoming April 2012).

[106] 18 U.S.C. § 3771(a)(2) (2009).

[107] The CVRA itself helps define the standard of reasonableness that can be applied. "In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings." *Id.* § 3771(d)(2) (2009).

[108] *See* Proposed VRA, *supra* note 1.

Additionally, under the VRA no sheriff would be required to transport an inmate victim to court because the right not to be excluded only applies when victims can otherwise present themselves at the courthouse.[109]

C. The VRA Would Not Impair the Ability of Prosecutors to Prosecute; It Will Not Effectively Obstruct Plea Agreements Nor Require Prosecutors to Disclose Weaknesses in Their Case to Persuade a Court to Accept a Plea

The National District Attorneys Association was a strong supporter of S.J. Res. 1,[110] the amendment considered in 2003 and 2004.[111] In 2004, the Attorneys General of forty-eight states, the Virgin Islands, and Washington, D.C. signed a letter supporting S.J. Res. 1.[112] It is unlikely that these prosecutors would support a constitutional amendment if it would impair their ability to prosecute cases.

History confirms good reason for their lack of concern on this point. In the over two decades since the passage of the Victims Bill of Rights ("VBR") in Arizona[113] the right to be heard at a proceeding involving a plea[114] has not obstructed plea agreements. Indeed, roughly the same percentage of cases is today resolved by plea as was resolved by plea before the VBR was passed.[115] Even in those cases involving a failure to inform the victim of the plea, the subsequent proceedings to assert the right of the victim does not impair the process.

The VBR has not required a disclosure to the defense of weaknesses in the government's cases. Pleas are submitted based on an agreed factual basis, which must establish the elements of the offense to which the defendant pleads guilty. The way victim allocution has worked in real practice has not confirmed the fears of opponents.

No language in the VRA would allow a victim to "compromise prosecutorial discretion and independence" to "effectively dictate policy decisions," to place "unknowing, and unacceptable, restrictions on prosecutors" or

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109 *See id.*

110 Letter from Nat'l Ass'n of Attorneys Gen. to Jon Kyl & Dianne Feinstein, *supra* note 81.

111 *See generally Proposed Constitutional Amendment to Protect Crime Victims: Hearing on S.J. Res. 1 Before the Comm. on the Judiciary*, 108th Cong. (2003).

112 Letter from Nat'l Ass'n of Attorneys Gen. to Jon Kyl & Dianne Feinstein, *supra* note 81.

113 Proposition 104, 1990 Leg., 39th Sess. (Ariz. 1990). The proposition became effective November 26, 1990, upon adoption of the official canvass. *Id.*

114 ARIZ. CONST. art. II, § 2.1 (A)(4). The victim has the right "[t]o be heard at any proceeding involving a post-arrest release decision, a negotiated plea, and sentencing." *Id.*

115 Interview with Hon. Bill Montgomery, Maricopa County Attorney, in Phoenix, Ariz. (Jan. 7, 2011).

to "override the professional judgment of the prosecutor" regarding investigation, timing, disposition, or sentencing.[116] These assertions by the Minority Senators are all the more remarkable given their claim to support comprehensive statutory rights.

The VRA gives victims the right to be heard at a public plea proceeding;[117] it is a right simply to a voice, not a veto, not an override, nor the power to dictate, as the opponents assert. From this simple right, opponents project "dangerous" consequences.[118] In the real world, no such consequences unfold. That a judge has the discretion to reject a plea when he or she determines it not to be in the best interests of justice and that a judge may exercise that discretion after hearing from the victim of the crime, does not undermine in any way the prosecutor's authority, any more than when a defendant speaks at a plea proceeding.

Merely giving victims a voice hardly gives victims the power or the right to "obstruct plea proceedings," as opponents assert.[119] No prosecutor could ever be "forc[ed]," as asserted by the Minority Senators, "to disclose investigative strategies or weaknesses in their case" under the amendment.[120] Fearful concerns to the contrary notwithstanding, the real life experience in Arizona, with more than two decades of history and the actual experience of literally hundreds of thousands of cases, confirms no threat to prosecution. At some point the fears of hypothesis must yield to reality. No hands are tied by extending this simple voice to crime victims.

Nor should the Federal Civil Rights laws concern prosecutors. Congress has the power to define the scope of any such remedy and civil rights action will lie for a prosecutor's unpopular choice. Indeed, under Arizona law, a victim may file an action for damages against those who intentionally, knowingly, or grossly violate the rights of a victim.[121] No such action has been filed in the twenty-one years the law has been on the books.

The Minority Senators posit a world in which prosecutors are regularly pitted against victims. Nothing could be further from the truth. In the real world, prosecutors are not threatened by a victim's voice, and victims understand that prosecutors are their champions. Prosecutors do not represent victims in a criminal case as a lawyer represents a client, and the suggestion from the Minority Senators that a conflict between the victim and the prosecutor would require prosecutors "to recuse themselves from the case" is

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116 S. REP. NO. 108-191, at 74 (2003).
117 Proposed VRA, *supra* note 1.
118 *See* S. REP. NO. 108-191, at 110.
119 *Id.* at 74.
120 *Id.*
121 ARIZ. REV. STAT. ANN. § 13-4437 (Westlaw through 2012 Legis. Sess.).

unfounded.[122] Victims do not see collateral civil litigation against prosecutors as a meaningful way to enforce rights in a criminal case for good reason: it would never work.[123]

Nothing in the amendment could possibly be construed to "[force] prosecutors to try cases before they are fully prepared."[124] The right to avoid unreasonable delay carries with it no power to *force* cases to trial prematurely; indeed, such a result itself would be inherently unreasonable.

D. Giving Victims Rights at the Accusatory Stage of Criminal Proceedings Does Not Undercut the Presumption of Innocence

The Minority Senators asserted that "the proposed amendment would undercut . . . the presumption of innocence."[125] This was a display of rhetorical exuberance that must now embarrass its author. The presumption of innocence remains robust and inviolate in Arizona and other jurisdictions whose victims of crime are afforded participatory rights, albeit inadequately. The presumption of innocence fundamentally places on the government the burden to prove beyond a reasonable doubt each element of the offense charged.[126] It does not require that the defendant remain at large pending the outcome of the trial.[127] It does not mean that the government may not be heard on matters of release, or other issues directly affecting the liberty interests of the defen-

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[122] S. REP. NO. 108-191, at 76; *see* Berger v. United States, 295 U.S. 78, 88, (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."); State *ex rel.* Romley v. Superior Court (*Wilkinson*), 891 P.2d 246, 250 (Ariz. Ct. App. 1995) ("Given this unique role of a prosecutor in a criminal action, we hold that the prosecutor does not 'represent' the victim as a 'client' in a way that runs afoul of the Rules of Professional Conduct. The prosecutor has no incentive to induce the victim in this case to 'please' the prosecutor in a way that would prejudice defendants' rights to a fair trial. We will not presume that the prosecutor will seek defendants' convictions at all costs, when his duty is to see that justice is done on behalf of both the victim and the defendants.").

[123] *See* Kilpatrick et al., *supra* note 21 ("Even when criminal justice officials know what the law requires of them, they may not have the means to carry out their duties. Victims' rights can be ensured only if resources are sufficient, and resource limitations were cited by officials as the most common reason for being unable to fulfill their duties under the law.").

[124] *See* S. REP. NO. 108-191, at 78.

[125] *Id.* at 83.

[126] *See In re* Winship, 397 U.S. 358, 363-644 (1970).

[127] *See* Carbo v. United States, 82 S. Ct. 662 (1962) (Douglas, J., as Circuit Judge, stating that bail may be denied if granting bail would jeopardize the safety of the community); Stack v. Boyle, 342 U.S. 1, 5 (1951) (holding that bail may be denied if the accused poses a substantial flight risk; "[T]he fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.").

dant.[128] Indeed, as the Minority Senators concede, the Supreme Court has established that no provision of the Constitution prohibits courts from considering the safety of the victim in making pretrial detention decisions.[129] It would be odd indeed to conclude that the Bill of Rights could be read to allow consideration of the victim's safety but silence the very voice which expresses the need for that safety.

The example provided by the Minority Senators of an assault defendant who claims self-defense is unpersuasive.[130] The Minority Senators would continue a system in which the defendant may be present and speak and the government may be present and speak, but where only the victim may do neither.

The Minority Senators show a disappointing disregard for the safety of victims that itself demonstrates the need for the VRA. They write, "[w]hile society certainly has an interest in preserving the safety of the victim, this fact alone cannot be said to overcome a defendant's liberty interest as afforded to him under the due process and excessive bail clauses."[131] Where to begin? First, while the statement displays a somewhat grudging acceptance of society's interest in the safety of the victim, it ignores altogether the victim's interest in the safety of the victim. This is precisely the kind of indifference to the plight of the victim that the amendment addresses. Second, according to the Supreme Court, the "interest in preserving the safety of the victim"[132] does overcome a defendant's liberty interest when pre-trial detention is necessary to protect the victim or the community.[133] The failure of the Minority Senators to recognize the centrality of the need to protect the victim is evidence of the cultural divide that crime victims face and is a compelling argument for the amendment.

E. The Right for a Victim to Not Be Excluded Would Not Interfere with the Accused's Right to a Fair Trial

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

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[128] Albright v. Oliver, 510 U.S. 266, 278 (1994) ("A person facing serious criminal charges is hardly freed from the state's control upon his release from a police officer's physical grip. He is required to appear in court at the state's command . . . [and to] seek formal permission from the court (at significant expense) before exercising what would otherwise be his unquestioned right to travel outside the jurisdiction."); United States v. Salerno, 481 U.S. 739, 748 (1987) ("We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest.").

[129] *See* S. REP. NO. 108-191, at 57.

[130] *See id.* at 83-84.

[131] *Id.* at 84.

[132] *Id.*

[133] *Salerno*, 481 U.S. 739.

in observing the course of a prosecution."[134] Professor Cassell's analysis confirms the conclusion that, if anything, the text of the Constitution provides support for the victim's attendance:

> Instead, there are three provisions that support, if anything, the opposite view that a victim of a crime should remain in the courtroom: the Sixth Amendment's guarantee of a "public" trial, not a private one; the Sixth Amendment's guarantee of a right to "confront" witnesses, not to exclude them; and the Fifth and Fourteenth Amendments' guarantee of "due process of law," which construed in light of historical and contemporary standards suggests victims can attend trials.[135]

The Minority Senators oppose the victim's right to be in the courtroom, speculating that victims will lie to conform their testimony to that of other witnesses.[136] The Minority Senators assert that "sequestration rules . . . are in effect in every jurisdiction in the country."[137] As applied to crime victims, this statement is untrue. Arizona and other states allow victims to be present throughout trial: in Alabama, crime victims even sit at counsel table.[138] Exceptions are made to the sequestration rule for important reasons, for the defendant, and for the government's chief investigator. No rule excludes parties in civil cases, who are also witnesses, and we surely value truth no less in civil cases.

Moreover, the Minority Senators' concern about victims lying is unproven speculation. And, there is no need to speculate; there are States that have not applied the sequestration rule to victims for decades without evidence of resulting perjury.

Common sense is enough to conclude why the exception does not create the evils predicted by the Minority Senators. First, it is perjury and the victim might go to prison. Second, changing a statement subjects the victim to devas-

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

135 *The Victims' Bill of Rights Amendment: Hearing on the Victims' Bill of Rights Amendment Before the Comm. on the Judiciary*, 104th Cong. (1996) (statement of Paul G. Cassell, Professor of Law, University of Utah College of Law), *available at* http://www.nvcap.org/cassell2.htm (footnote omitted).

136 S. REP. NO. 108-191, at 77.

137 *Id.*

138 *See* Crowe v. State, 485 So. 2d 351, 363 (Ala. Crim. App. 1984), *rev'd sub nom. Ex rel.* Crowe, 485 So. 2d 373 (Ala. 1985) ("Alabama Code § 15–14–53 (1975), provides that '[t]he victim of a criminal offense shall be entitled to be present in any court exercising any jurisdiction over such offense and therein to be seated at the counsel table of any prosecutor prosecuting such offense or other attorney representing the government or other persons in whose name such prosecution is brought.'").

tating cross examination because of prior inconsistent statements, all of which would have been recorded and made available to the defendant. Third, it would undermine the victim's true goal, which is to see the guilty punished, not the innocent. While a guilty defendant may have a self-interested motive to lie to escape justice, a victim has no similar self-interested motive to see an innocent person convicted while the guilty offender remains at large.

Perhaps these are the reasons why, in twenty-one years, no tailored testimony has been found in Arizona, nor is there any evidence from the real world of a jury discrediting or discounting a victim's testimony as the Minority Senators speculate.[139] The Minority Senators surely know this experience from Arizona. Where their speculative theory conflicts with hard facts, the Minority Senators seem to choose theory every time.

The VRA protects a victim's right not to be excluded from "public proceedings."[140] It leaves untouched the law that defines when proceedings may be closed.[141] As was stated in the Committee Report:

> Victims' rights under this provision are also limited to "public" proceedings. Some proceedings, such as grand jury investigations, are not open to the public and accordingly would not be open to the victim. Other proceedings, while generally open, may be closed in some circumstances. For example, while plea proceedings are generally open to the public, a court might decide to close a proceeding in which an organized crime underling would plead guilty and agree to testify against his bosses. See 28 C.F.R. 50.9. Another example is provided by certain national security cases in which access to some proceedings can be restricted. See The Classified Information Procedures Act, 18 U.S.C. app. 3. A victim would have no special right to attend. The amendment works no change in the standards for closing hearings, but rather simply recognizes that such nonpublic hearings take place.[142]

The Minority Senators challenge the application of section 50.9, yet their hypothetical of the pleading mob soldier fits squarely within the four corners of the rule.[143] The rule permits the government to seek closure when, among other standards, there is "[a] substantial likelihood of imminent danger to the safety of parties, witnesses, or other persons; or . . . [a] substantial likelihood that

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[139] *See* S. REP. NO. 108-191, at 77-78.
[140] Proposed VRA, *supra* note 1.
[141] *See id.*
[142] S. REP. NO. 108-191, at 34.
[143] *Id.* at 76 & n.67.

ongoing investigations will be seriously jeopardized."[144] These are the very circumstances the Minority Senators posit.

F. The Right for a Victim to Be Heard Would Not Interfere with the Accused's Right to Due Process

By advocating that the victim's right to be reasonably heard would "risk[ ] the denial of defendants' due process rights," the Minority Senators defend a system in which the defendant may make a sentencing recommendation to the jury, the defendant's family and friends may do so, the defendant's lawyer may do so, and the prosecutor may do so, but the victim *may not*.[145] With this argument, the Minority Senators misconstrue the Due Process Clause[146] and display an all-too-common callous disregard toward victims' rights.

As evidence for their position, the Minority Senators cite a singular case, in which the victim in a capital case seeks to make a sentencing recommendation to the jury, emphasizing that sentencing decisions need to be reached "without fear, favor, or sympathy."[147] It seems impossible to ignore the irony of that concern, especially regarding sympathy, considering the Minority Senators appear to accept a system that condones repeated pleas for sympathy for the defendant, but would deny victims the right to make, without undue prejudice, a simple statement as to the victim's desired sentence. This double standard of justice is another reason for the VRA.

The Minority Senators' argument is far from novel and has in fact been refuted by their own voting records, the courts, and by modern statutes. For instance, Professor Paul Cassell has already provided a response to the notion that giving victims a right to be heard at a few critical stages somehow undermines the Bill of Rights:

> 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." From this premise, the objectors then postulate

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144 28 C.F.R. § 50.9(c)(6)(ii)-(iii) (1998).
145 S. REP. NO. 108-191, at 84-85.
146 U.S. CONST. art. V.
147 S. REP. NO. 108-191, at 86 n.87.

> 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. 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." At these three kinds of hearings—bail, plea, and sentencing—victims have compelling reasons to be heard and can be heard without adversely affecting defendant's rights.
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> 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 system precisely the same rights. 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." In defending their bill, they saw no difficulty in giving victims a chance to be heard, a right that already exists in many states.[148]

Another common argument used to support the Minority Senators' assertion is that victims' participation at sentencing, specifically victim impact statements, somehow results in unequal justice for varying defendants. Again, Professor Cassell examined this argument and provided a rebuttal and analysis supported by the courts:

> 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." This kind of difference, however, is hardly unique to victim impact evidence. To provide one obvious example, current rulings from the Court invite defense mitigation evidence from a defendant's family and friends, despite the fact the some defendants may have

[148] Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479, 486-87 (1999) (citations omitted).

> 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." In another case, a defendant introduced evidence of having won a dance choreography award while in prison. 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; 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."
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> 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. Victims and the public generally perceive great unfairness in a sentencing system with "one side muted." 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."[149]

Fortunately, the majority of jurisdictions in the United States now admit victim impact statements in all cases. Regardless, in spite of their own votes to the contrary, the Supreme Court ruling to the contrary, and the majority of states creating laws to the contrary, the Minority Senators still believed that the defendant's due process rights could be impacted by allowing victims to be heard. Their disregard for these facts, as well as, the evidence of the negative emotional impact on victims who are denied the ability to speak, demonstrates

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[149] *Id.* at 494-95 (citations omitted).

the need to make victims' rights a part of the "sovereign instrument of the whole people."[150] If not, victims in the United States will never enjoy the true balance Justice Cardozo described in his statement: "[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."[151]

G. A Victim's Right to Expedite Trial Proceedings Would Not Undermine the Accused's Sixth Amendment Right

The Minority Senators assert that the language of the VRA, giving victims the right to be free from unreasonable delay,[152] will result in defendants being forced to trial before they are prepared, thus undermining basic Sixth Amendment protections. This is simply unfounded, as any fair reader of the actual proposed text will conclude. The amendment speaks of unreasonable delay, not any delay. It requires due consideration, not submission to the will of the victim. What is it that the Minority Senators can fear from this measured, balanced language, other than any fairness for victims? What the amendment will do, and why it is more than "hortatory" as the Minority Senators simultaneously suggest,[153] is give victims a voice in the matter of trial scheduling and continuances. This voice will simply permit a fuller consideration of all the interests at stake when scheduling decisions are made. Today, victims' interests are routinely ignored in these matters.

Professor Cassell offered in his 1999 prepared statement a rebuttal to this objection:

> Opponents of the Amendment sometimes argue that giving victims a right "to consideration" of their interest "that any trial be free from unreasonable delay" would impinge on a defendant's right to prepare an adequate defense. For example, the dissenting Senators in the Judiciary Committee argued 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." Similarly Professor Mosteller advances the claim that this right "also affects substantial interests of the defendant and may alter the outcomes of cases."

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[150] GOLDWIN, *supra* note 64, at 102.

[151] Snyder v. Massachusetts, 291 U.S. 97, 122 (1934), *overruled in part by* Malloy v. Hogan 378 U.S. 1 (1964).

[152] Proposed VRA, *supra* note 1.

[153] S. REP. NO. 108-191, at 87 (2003).

These arguments fail to adequately 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." The opponents never discuss 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. The victim's right, moreover, is to ''consideration'' of victims' interests. The proponents of the Amendment could not have been clearer about the intent to allow legitimate defense continuances. As this 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.

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. Abusive delays appear to be particularly common when the victims of the crime is [sic] a child, for whom each day without the case resolved can seem like an eternity. Such cases present a strong justification for this provision in the Amendment. Nonetheless, in his most recent article Professor Mosteller advances the proposition that this right "should be debated on [its] merits and not as part of a campaign largely devoted to giving victims' rights to notice and to participate in criminal proceedings." 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. In the years since then, it has been hard to find critics of victims'

> rights willing to contend on the merits of the need for protecting victims against abusive delay. If anything, the time has arrived for the opponents of the victim's right to proceedings free from unreasonable delay to address the serious problem of unwarranted delay in criminal proceedings to concede that, here too, a strong case for the Amendment exists.[154]

Just over thirty years ago, after the Task Force issued its call for constitutional rights for crime victims, they remain "oppressively burdened" by our justice system.[155] Consider how our system treats victims of domestic or sexual violence.

When the accused is arrested he is given a hearing, usually within twenty-four hours. This hearing determines whether the accused will be released on his own recognizance or on a bond, the amount of the bond, and what the other conditions of release will be. Routinely, the victim will never be given notice of this proceeding, will be denied any meaningful opportunity to attend, and will be given no voice regarding the release or other matters that may be crucial to her safety. Typically, she will not be informed of the defendant's release, or of the conditions of that release. Her safety will not be a factor in determining release conditions.[156]

These failures, at the very beginning stages of a criminal case, set the tone throughout and are of far more than academic interest. For women who are raped and beaten, these failures can be fatal.

As the case progresses, there will be little, if any, consideration for the victim's interest in a speedy trial. The defendant will ask for, and the court will grant, one continuance after another, without giving the victim a voice in the matter, and without regard to the often harmful effects the delay will have on her.[157]

It most cases, the defendant will be offered a plea bargain without the victim ever knowing about it. The plea bargain will be presented to the court at a formal proceeding, but the victim will be given no notice of this proceeding and she will have no right to attend. Even if she finds out about it, and even if she wants to tell the judge what she thinks about the plea bargain before the judge accepts it, she will have to stand silent, having no right to speak to the court.

If the case does go to trial, the victim will not be allowed in the courtroom during the trial, except when she testifies, even though the defendant will have

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[154] *A Proposed Constitutional Amendment to Protect Crime Victims: Hearing on S.J. Res. 3 Before the Comm. on the Judiciary*, 106th Cong. 37-38 (1999) (prepared statement of Paul G. Cassell, Professor of Law, University of Utah College of Law) (footnotes omitted).

[155] HERRINGTON ET AL., *supra* note 2.

[156] *See id.* at 4-5, 22-24.

[157] *See id.* at 6-9.

a right to be there, along with the defendant's family and friends, and even the state's chief investigator, who is also a witness.

After a conviction, the defendant will be sentenced, but the victim will not be allowed to speak at the sentencing proceeding, unless the prosecutor decides to call her as a witness, or if she is allowed an independent right to speak, what she says may be severely limited and she, unlike the defendant, may be subject to cross examination. Typically, the rapist or abuser will not be ordered to pay restitution. Her safety will not be considered when release decisions and probation conditions are established.

When the convicted offender is eligible for a parole or clemency hearing, the victim will routinely not be given notice and will have no fair opportunity to be heard. Again, her safety will not be considered when release decisions are made.

These conditions of injustice persist, despite the best efforts of the victims' rights movement; they persist despite more than two decades of efforts to pass and enforce victims' rights laws in every state.

When passed and ratified by the states, the VRA will establish basic rights to justice and fairness that no legislative body or court will be able to deny. The amendment will establish for victims of violent crime the right to reasonable notice of public proceedings in their cases, the right not to be excluded from those proceedings, and the right to be heard at release, plea, sentencing, and clemency proceedings.[158] It will require that the victim's interests in restitution, safety, and avoiding unreasonable delay be given due consideration.[159] It will establish for victims standing to enforce these rights.[160] The amendment's provisions are simple and direct, yet they will profoundly improve the quality of justice for crime victims.

Imagine the importance for a victim of sexual or domestic violence to have her safety considered when release decisions are made. Imagine the importance of giving her a voice at release, plea, sentencing, and clemency proceedings, or respecting her right to restitution, or her right to a speedy trial. These crimes often take from the victim her control over her own body, over her own life. The criminal justice system, by treating her as just another piece of evidence, perpetuates her loss of control. Imagine the importance of our system telling her that, as a matter of our fundamental law, she has the independent right, at crucial stages, to participate; that she is a person with worth and dignity and that the law will respect her.

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[158] *See* Proposed VRA, *supra* note 1.

[159] *Id.*

[160] *Id.*

How could anyone who truly advocates for victims of sexual or domestic violence oppose these measures? There are some who say that giving rights to crime victims will diminish the rights of the accused, as though rights competed in a zero-sum game.[161] No constitutional right of a defendant prevents a victim from receiving notice of proceedings, from being present at proceedings, from being heard at release, plea, sentencing, or clemency proceedings, or from having the victim's interest in safety, restitution or a speedy trial considered.

VI. CONCLUSION

Only through a federal constitutional amendment will the goal of justice for crime victims be achieved. For thirty years we have tried statutes and state constitutional amendments, and they have failed to change the culture of our justice system in any meaningful way. Amending the Constitution is the right way, indeed the only way, to secure lasting, meaningful, and enforceable civil rights for victims—rights that are beyond the ability of a legal culture, hidebound to its own power, to change. This is how it has been throughout the history of our country. James Madison argued that the Bill of Rights needed to be in the Constitution because over time the rights would take on "the character of fundamental maxims . . . [and be] incorporated with the national sentiment."[162] Victims' rights deserve no less. Those who argue that victims' rights do not need to be in the Constitution are simply condemning victims to perpetual second-class citizenship.

A constitutional amendment is necessary because no government should be allowed to treat crime victims the way they are treated today. No government should refuse to tell a crime victim about the release of her batterer, nor force her into silence about her safety or the offender's plea bargain or sentence, nor exclude her from the courtroom during trial, nor force her to endure years of delays, or go without restitution. The time for action has come so that no government will be able to treat crime victims with the gross injustice that continues, thirty years after the Task Force's report, to be the sad hallmark of our current system.

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[161] *See supra* Part III.

[162] James Madison, *James Madison to Thomas Jefferson, Oct. 17, 1788*, *in* 1 THE FOUNDERS' CONSTITUTION: MAJOR THEMES 477 (Philip B. Kurland & Ralph Lerner eds., 1987), *available at* http://press-pubs.uchicago.edu/founders/print_documents/v1ch14s47.html.

Statement from the Author

Hon. Collene (Thompson) Campbell*

> Scott Campbell, 27, the only son of Gary and Collene Campbell, was last seen on April 16, 1982. He had planned to fly in a private plane to Fargo, North Dakota with a man named Larry Cowell. Unbeknownst to Scott, Cowell and another man, Donald Dimascio, planned to murder Scott. Dimascio was hiding in the back of the plane. He broke Scott's neck and then the killers threw Scott's body into the ocean, somewhere between the mainland of Southern California and Catalina Island. His body was never found. During the trials, Scott's family was barred from entering the courtroom, while the defendants' families were ushered to reserved seats. Gary and Collene were never notified of proceedings in the case in the District Court of Appeals, or of the pre-trial release of one of the killers. They were never allowed to speak at critical stages of the proceedings, including the sentencing for both murderers.[1]

Unintended by our Forefathers, possibly the cruelest discrimination in our country is caused by the total absence of crime victims' rights in our United States Constitution. In huge contrast, the accused criminal has twenty-three rights in that same great document.[2] Over the years, with the changing of our judicial system, the lack of any constitutional rights for crime victims has escalated into a huge stain on justice. This imbalance of rights has become increasingly unjust and causes additional grief and damage to the already devastated victims of crime. In addition, this inequity makes fair and balanced justice impossible.

It is tragic that through our nation's most supreme document, the United States Constitution, crime victims are forced to endure incredibly cruel discrim-

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* The author is writing on behalf of the Gary and Collene Campbell Family, in memory of crime victims everywhere, and MOVE Force 100.

[1] 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, 582 (2005).

[2] *See generally* U.S. Const.

ination. The crime victim does not have a single right in our nation's Constitution. In huge contrast, the accused criminal, who may be a killer, a rapist, a child molester—their crime does not matter—is entitled to twenty-three rights in that same document.

Obviously, the authors of our Constitution did not intend to allow preferential treatment to accused criminals against the rights of their victims. However, at the time our Constitution was written, the court system worked much differently. Victims were their own prosecutors. For the reasons I discuss here, our nation must now move quickly to balance justice by passing a twenty-eighth amendment, giving victim's rights in our United States Constitution.[3] Every day of delay is costing lives, pain, injustice, and millions of taxpayers' dollars. The Victims' Rights Amendment is not political; it is not intended to favor democrats, republicans, different religious beliefs, or favor any ethnic group, but it will assist America to produce a better balanced justice system for all.

Thirty years ago, President Ronald Reagan's Task Force on Victims of Crime ("Task Force") produced a recommendation that the U.S. Constitution must be amended to also protect victims. This goal remains unfinished. It leaves a system that heavily favors the rights of defendants and imposes enormous costs on victims. However, excluding the wasted costs and time and just focusing on additional crimes permitted because of the lack of rights for victims, the additional pain to victims is astronomical. Obviously, this biased treatment not only causes additional grief for victims, but it frequently allows more crimes to be committed by the accused.

To help equalize justice, victims, among other rights, must have constitutional rights to be treated with fairness and respect, to be notified, heard, and not excluded from proceedings, to be free from unnecessary delay, and to have their safety considered. And they must have standing to assert these rights in court if they are to be meaningful.

I am going to try and relate a tiny bit of our family's life as victims of crime. In my attempt to give you a little better understanding of the crime victims' situation, I will try to express a very brief history regarding our family's experience, education, and our on-the-job-training concerning the subject of victims' rights.

Often, you hear that a victim's lifestyle could have caused the crime. That theory is a sad scenario for most victims. I feel compelled to expose a tiny bit regarding our honest and giving American family, which has endured thirty

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[3] *See generally Renewed Effort for Federal Victims' Rights Amendment Underway*, NAT'L VICTIMS' CONST. AMENDMENT PASSAGE, http://www.nvcap.org/ (last visited Mar. 17, 2012) (providing the full text of the proposed Victims' Rights Amendment).

years of devastating murders, lies, justice delays, trials, exclusion from trials, death threats, appellant courts, and parole hearings.

My father, Marion L. Thompson was a dedicated and hard-working Chief of Detectives on the Alhambra, California Police Department, and he volunteered and served in the armed forces during World War II. My mother, Geneva C. Thompson was president of the Marguerita School PTA and volunteered her services nearly full time to the American Red Cross throughout those war years.

I met my husband, Gary Campbell, in the second grade. Gary's father, Martin J. Campbell, retired from the Alhambra Post Office, and his mother, Corean A. Campbell, worked as a secretary for the high school district and volunteered time helping others.

Shortly after our marriage in 1951, Gary enlisted in the Navy and served in the combat zone during the Korean conflict. In 1954, we were blessed with a wonderful son, Scott, and in 1957, our dreams were fulfilled with the birth of our daughter, Shelly.

We had a hard-working, fun-loving, awesome family and life was wonderful. We vacationed together going water and snow skiing and we spent every holiday together. We were honest, law-abiding, and hard-working.

Yes, life was good, until three decades ago, on April 17, 1982, when our world drastically changed as we first encountered the results of a vicious murder and its aftermath.

We have endured a *real life* education regarding the justice system and are living through the never-ending brutal murders of our family. Yes, the justice system has kicked us around for thirty straight years without a break.

The first crime committed against our small, honest family came in 1982, the exact year the Task Force recognized the lack of justice for victims of crime and recommended that our U.S. Constitution be amended to establish rights for victims.

It is a painful reality that many of our legislators, after thirty years, just don't get it. I wish on behalf of our country they were better informed—maybe, like our family, they need to live the life of good American citizens who, through no fault of their own, become victims of violent crime. It is way past time for our legislators to, as my brother used to say, "Stand on the gas and get headed in the correct direction" to help save victims of crime from being thrust into a system that treats them with such unfairness.

We are only one of millions of crime victims' families devastated by crime, then treated unjustly due to the absence of any victims' rights in our U.S. Constitution. Why do I believe so strongly and feel so well educated on the harm continually being done due to the lack of victims' rights in our U.S. Constitution?

Please permit me to share with you a tiny example of the real world of crime. This is not easy for someone to read; I can assure you, it is also not easy to write. Hopefully, we are doing this for the good of others, which is my motivation and intention. I am a lady who has a very extensive and knowledgeable crime victim's education. I have three very complex degrees. I absolutely do not want others to receive this education nor obtain the degrees, which my husband, Gary, and I have received.

In April 1982, we received our first horrifying degree. Regrettably, it was the first-degree murder of our only son, Scott.

In March 1982, Scott, our twenty-seven-year-old electronics genius, mentioned he was going to see Larry Cowell to introduce and familiarize him with Scott's digital speedometers. Scott had invented and had a patent pending on the first digital speedometer and was marketing it to the automotive aftermarket and original equipment manufacturers industries. My brother, auto-racing legend Mickey Thompson, and Scott modified the invention for Mickey to use in his Baja off-road racing vehicles.

However, we had heard that sadly Cowell had been involved in illegal activities, though we didn't know to what extent. As a typical concerned mom, when Scott said he was going to see Cowell, I said, "Scott, you'd better stay away from him, he's trouble." Scott answered with, "Mom, the guy *is* in trouble and has a lot of problems, but maybe I can be a friend and help him with my invention so he can utilize it at his Pantera Shop."

Immediately after that conversation, on April 17, 1982, Scott disappeared. We desperately searched for him for eleven agonizingly long months, before we learned the horrible truth.

Anyone would be hard pressed to think of a murder that was more calculated, barbaric and cold-blooded than the savage act planned and performed by the cowardly killers of our son. Cowell planned and calculated Scott's barbaric murder. He rented an airplane and told Scott that Don Dimascio was a flight instructor; when in fact, Dimascio was an ex-convict and paid killer that Cowell had hired. Cowell arranged to rob Scott of his Pantera sports car, then cruelly and viciously murder him, and callously dispose of his body by pushing it out of the plane into the ocean off Catalina Island. Cowell and his family watched as we searched for our son for eleven months.

Prior to killing Scott, Dimascio made certain that he had Scott's Pantera sports car in his possession. After murdering Scott, he proceeded to disassemble Scott's car, selling off and utilizing the parts.

By the time Scott's car was found in Cowell's shop and identified by Scott's Uncle Mickey, Cowell had filed off the car's vehicle identification number and changed the plates. It was indeed, a well-planned, premeditated

murder for hire; lying in wait for the opportune moment to kill Scott and to commit robbery.

We are among millions of other Americans who have become victims of evil repeat predators who should have been in prison when their murders were committed. One of the killers had previously been sentenced to three indeterminate life sentences but was released in only four years, providing him with the opportunity to kill our son. The other killer was out of prison on work furlough, even after killing his passenger in a drug and alcohol related accident. Scott is dead because of a weak and forgiving criminal justice system that does not respect the rights of its victims to safety. Had his killers remained incarcerated, Scott would be alive today.

Six years later, on March 16, 1988, we obtained two additional degrees. They were the first-degree murders of my only sibling, my brother, auto racing legend Mickey Thompson and his wife, Trudy. Some years ago, Mickey was the best man at our wedding and still today, we feel he is the *best* and a great and accomplished man who did so much for others. He and Trudy were murdered by two killers who had been hired by a former business partner of Mickey's. Michael Goodwin ordered the murders to avoid paying a judgment Mickey had obtained against Goodwin because of Goodwin's fraudulent business practices. Goodwin had become a convicted felon (after his relationship with Mickey ended) who should have been in prison when he ordered the murders.

As horrible as these crimes have been for our family to bear, our treatment in the justice system was just as bad. We have endured the criminal justice system for thirty years, since 1982 when Scott first disappeared. Like many others, our family has continued in our efforts to deal with the never ending, grueling inequalities, while attempting to bring justice for three murders within our family, and trying to maintain a decent life for our family and friends. The battle for justice concerning our family's murders has been long and exhausting and it continues non-stop.

Hopefully, as you read my words you will understand there are degrees and then there are *degrees*. I will leave it up to each individual to decide which are the most significant and educational in our fight for justice and obtaining due process for the law-abiding crime victim. Most of us wish we did not have the experience to address these issues. However, not only the knowledge, but the scars and the pain are a constant reminder that no American crime victim should be controlled by cruel and senseless discrimination fostered by the lack of rights in our U.S. Constitution. As it stands now, it is cruel and un-American and it must be stopped by the addition of victim's rights.

Please consider our experience, and know that what happened to us continues to happen to families in cases all across our country, even today.

- We were excluded from the courtroom during all three of our son's murder trials, while the murderers' family and friends were allowed reserved seats.
- We were not allowed to be heard at any critical stage during any of the three trials.
- We were not notified of the convicted killer's appeal hearing; the killer's family and supporters were all notified and present. We were uninformed and not in the courtroom because we did not have the right to be notified.
- The murder trial of one of the convicted killers of our son was overturned and we learned about that ruling through the media. Again, we were not notified because we had no rights.
- The convicted killer of our son was released and again we were not notified. We learned he was back on the streets through friends and the media. We did not have the right to be notified or heard regarding the matter of his release.
- During the time I was mayor in the city of San Juan Capistrano, California, naturally, I was very easily located. Even though I had previous death threats from the suspected killer of my brother, I did not have the right to have my safety considered. After leaving a city council meeting, my car was blocked by a large van with darkened windows. It was an attempted murder. Had I not had a concealed weapon permit and been proficient with a gun, I probably would be dead. As a crime victim, I did not have a right to be protected from the killer of my brother and sister-in-law.
- We did not have a right to a speedy trial unlike the accused criminals, whose attorneys continued to cause delay after delay. The trials of the killer of our son took nearly eight years, appearing before more than twenty judges. At none of these delay hearings did we have the right to be heard about the impact of the delay on our family.
- The trial and conviction of the killer of my brother and his wife began after sixty-five court appearances, delays caused by forty defense motions. The killer's conviction took nineteen years to obtain. Obviously, this was not only costly in many ways to the victims' family, but it was also very financially devastating to the taxpayers. We did not have a right to a speedy trial.
- In both of our family's murder cases, the defense lied and continually tried to demean our family, both in court and to the media. Painfully, some of the untruths were picked up and used by the media. It is difficult for grandparents to explain to their grandchildren that the killers of

their loved ones can get by with lying and there is no consequence, as the victims don't have the right to be treated with respect.

- After nineteen years, the killer of Mickey and Trudy was finally convicted of murder and sentenced to two life sentences without the possibility of parole. From prison he continues to try to hurt and demean our family and witnesses. He is obtaining access to the internet and posting hurtful and vicious lies about the homicide detective on the case, plus the witnesses and our family. Our ordeal continues.
- A year ago, in 2011, the third parole hearing was scheduled for the killer of our son. Because I have served on many boards and commissions, I called to make certain there was not a conflict due to the fact I might know the assigned parole commissioner. I was told they could not tell me who the commissioner would be, as I might try to bribe him! As it worked out, we drove the five hours to the prison, went through the process of getting inside the prison, only to have one of the parole commissioners stand up and give me a hug. Yes, it was a gentleman with whom I had served on a state commission. Due to a possible conflict, the hearing naturally could not go forward and a new date had to be set, again wasting time and dollars.
- The parole hearing date for the killer of our son was reset for three months later. At the hearing the inmate was denied his request for parole and told he could reapply in five years. However, the parole commissioner said to me, "Mrs. Campbell, this hearing is no longer about the crimes this inmate committed, it is about if he has been good in prison." I guess that means it should no longer matter that our son was murdered. That statement and thinking is more of no respect for the victim and their family. The killer of our son has a long history of crime and violence that apparently is no longer relevant for release. This was shocking news to us, that his crimes no longer mattered, we must realize he only killed two people and hurt many others. Apparently in the future California inmates will be judged by their actions, while under supervision, in the prison. There is no right to justice in this, no right to consideration for our safety or the safety of others, no right to be treated with fairness.

Mickey Thompson will always be remembered as a fantastic, kind man and a hero to many. He is an admired legend whose notoriety was totally unimportant to him. During Mickey's life, he cared most about aiding and working with needy and blind children. He also worked with high school students helping in their auto shop classes. Mickey developed important automotive safety equipment and tires used throughout the entire world.

Why am I telling you this? I feel it is tremendously important to recognize what we can and do lose when justice is denied. If our justice system worked

properly, Mickey, Trudy, and Scotty would all be alive, as their killers would have been previously incarcerated and off the streets.

If Mickey were here to help, he would say, "Let's go, stand on the gas, let's get the job done and get to the finish line, making certain our nation has justice for all citizens, including crime victims. Get across that finish line and don't stop in the middle of such an important race, get it done."

We hope everyone will agree and race forward quickly to receive that checkered flag and be a winner for America.

As one of the millions of Americans that has endured crime and the justice system, I ask the question, "What are our legislators waiting for?" They have had the recommendation from the Task Force for thirty years. Think of the extended damage and pain that has taken place during that period of no action.

I believe the authors of our Constitution would be ashamed of our federal legislators' lack of concern, knowledge, or ability to update and right the Constitution. Again, I ask the question, are those elected legislators uninformed regarding the imbalanced justice system, or do they just not care enough?

It is not my intent to be a complainer; however, I will say again, I feel it is extremely important to in *some way* make our legislators better understand the ramifications caused by the lack of victims' rights. Those lawmakers need to become familiar with the real and truthful world of being a victim of crime, without any federal constitutional rights. Unfortunately, our victims' experiences are not that extraordinary in our current justice system.

How long are our elected Congressmen and Senators going to allow this unfairness and inequality to continue? I do not wish pain and grief on anyone. However, if our national representatives were forced to endure an evil crime, like many of us, they would become educated, more aware, and hopefully they would quickly move to eliminate the inequalities victims face and work to better balance our justice system by giving victims of crime rights in the Constitution.

Sadly, victims of crime have learned through tough experiences that our American justice system is not fair, causing a huge blow to our once trusting and now devastated victims. Obviously, the concept of justice is that everyone should be treated fairly, which is the worthy and noble necessity on which our nation was founded. All Americans should be entitled to a fair and balanced justice system and know it is a level playing field for both the criminal and their victim. Neither side should have an advantage such as the accused criminal has today.

I am forced to ask myself this question: How does a law-abiding American family get the attention of our nation's legislators to get busy and balance our country's justice system and place victims' rights in our U.S. Constitution?

We do not desire our decision makers to be forced to endure and live through one minute of our crime victims' agony. However, if they experienced it by living it, they would certainly understand and hopefully their conscience, responsibility, and good judgment would cause them to take action and get going.

Hopefully, by painfully revealing a tiny bit of the often hidden truth and the factual world of victims of violent crimes, I am taking on the huge challenge of attempting to bring a little improved understanding of the desperate need for victims' rights to be included in our U.S. Constitution. Yes, sadly, I am a very experienced victim of violent crime and I would be tremendously honored, in memory of my three murdered and greatly loved family members, plus all other victims of crime, *if* our nation's leaders and our states would better help preserve the lives of our families by balancing the justice system.

It is amazing that hundreds of thousands of vicious crimes are committed in our nation and the legislators refuse to take action that would save lives and taxpayers' dollars and help balance the justice system.

As we all listen to the presidential candidates, on both sides of the aisle, we do not hear a single word about public safety, the single greatest responsibility of government. Do you not find it disgraceful that many more people are murdered in America than all of our wars over the years? Our families and their safety must be our top priority.

For three decades, without a break, my husband and I have been forced to endure the torture of being continually demeaned and treated unfairly by our nation's justice system which does not balance the rights of accused criminals, murderers, sex offenders, robbers, and the all-around evil offenders with rights for their victims.

Why is this happening? I will repeat it again: Sadly, in our noble United States Constitution, the accused criminal has twenty-three rights. Conversely, the victims of crime have not a single right in that document. Unless you have personally endured a violent crime, there is no way you can comprehend the overwhelming results and the damage caused by the victims being eliminated from having rights within our justice system, caused by the lack of rights in our U.S. Constitution. Yes, if you have not suffered the murder of a loved one, it might be difficult for you, our legislators, to even begin to understand the additional cost to taxpayers and the torture and lack of justice that emanates from this tremendous imbalance of no rights for victims in our Constitution.

I am standing as a caring citizen who wants to save others from our fate and the devastation of millions of Americans. Obviously, in this written piece it would be impossible for me to clearly depict our small family's years of enduring three murders, searching for our son's body, coping with the lack of justice, having no protection for our safety, no notification of court dates, and

the killer's release. In addition to the lies and demeaning by the defense, death threats, and lack of respect, we have endured our exclusion from the three murder trials of our son, our not being allowed to be heard, having no right to a speedy trial and being forced through five drawn-out murder trials during a twenty-five year span.

I am a police officer's daughter and considered to be a strong, hard-working, and honest American. I was taught early in life to always give more to your community and your country than you take and my family has done this for generations. The men have fought for their country and the women have donated their time to help others. I am a two-term mayor, served on many state and national commissions, including the California Peace Officer Standards and Training, where I was elected chairman numerous times during my eighteen years of volunteering my services. The members of my family are dead because of a justice system that does not respect victims or the law-abiding. If one knows the facts, it does not take too many brains to figure that the honest law-abiding citizen who becomes a victim should, at the very least, have equivalent rights to their perpetrator.

Writing this piece is certainly not easy for me; in fact, it is very difficult. However, to help save others I am attempting to give you just a few of the undistorted facts regarding the torture of an American victim of crime.

Even through this effort of trying to briefly describe a true example of a crime victim's life, it causes additional agony. No one wants to volunteer their time to do this. Believe me, I write this with the hope that it can make a difference and others will not be forced to endure the constant pain of vicious crime, ridiculous defense motions, lack of information, being treated without respect, unnecessary parole hearings, appeals, and then convicted inmates having the right to place spiteful lies on the web regarding law enforcement, witnesses, the victim and their family.

It is so difficult to endure the never-ending sleepless nights and the continual visualizing and reliving of the horrifying crime, enduring the very graphic nightmares, which are expanded and generated by the constant and forever maneuvering of the defense. Yes, thirty years is a long time to have the killers continuing to invade our small family's life, but *they* have that right.
Does our nation truly feel that the killers of our loved ones deserve rights, but that we, the victims deserve none?

Statement from the Author

Roberta Roper*

> Stephanie Roper, 22, was the daughter of Roberta and Vince Roper of Maryland. She was kidnapped by two men after her car broke down on April 3, 1982. Over the next five hours, they repeatedly raped and tortured her. They then took her to a deserted shack in another county and repeated these crimes. Stephanie made several attempts to escape. When the killers recaptured her for the last time, they beat her with logging chains, shot her to death, burned her body, and attempted to dismember her. During the trials of the killers, the court excluded Stephanie's family from the courtroom and never notified them of continuances.[1]

April 3, 2012, is the thirtieth anniversary of the murder of our daughter, Stephanie Ann Roper. That date is also the eighth anniversary of the drunk-driving crash that took the life of our first grandchild, Samia Roper. 2012 is also the thirtieth birthday of the organization that was founded by my husband, Vincent, and me in tribute to our slain daughter. Originally created as the Stephanie Roper Committee & Foundation, Inc. ("Committee & Foundation"), this statewide non-profit began on a grass-roots level and today continues to serve victims of all crimes as the Maryland Crime Victims' Resource Center, Inc.

People often ask how we can do this work. They believe that serving crime victims and their families must be very difficult, depressing, and challenging work. My reply is, "How could I not!" Difficult and challenging, it has been. Yet victim advocacy and assistance is work inspired by the strength, courage, and dignity of victims and survivors themselves. We speak on behalf of those who do not have a voice and cannot stand up for their rights. And these efforts are sustained by the satisfaction that other crime victims have been given new hope and healing to live as survivors.

Reflecting on these thirty years, we are humbled at the extraordinary efforts and achievements that have changed the treatment of crime victims and

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* The author is the founder of the Maryland Crime Victims Resource Center.

[1] 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, 582 (2005).

have brought distinction to Maryland as a national leader for crime victims' rights and services. From the *dark ages* of our family's experience beginning in 1982, to a more *enlightened* time today, crime victims' rights and services have advanced from nothing *(then)* to a wealth of statutory and state constitutional rights (*today*). Additionally, programs provide support and legal services to enable crime victims and their families to access tools to rebuild lives shattered by criminal violence. And while these achievements have made a difference in the criminal justice system's treatment of crime victims, we should not be deceived or complacent that justice for victims has been achieved. Far too many American citizens have suffered the consequences of a criminal justice system that is flawed in regard to the role of crime victims.

The heinous crimes committed against our daughter, Stephanie, and the criminal justice proceedings that followed became the catalyst for changes and created a movement to establish rights and support services for crime victims in Maryland. Ours was but one example of thousands of families who suffered similar undeserved consequences. Like other victim survivors across America, my husband and I were desperate to find hope and healing for our family as well as preventing others from enduring our experience. As we struggled to find new meaning and purpose in our lives, we began an uncharted journey for victim justice that continues today.

Stephanie was the oldest of our five children, a bright and gifted young artist about to graduate *magna cum laude* from Frostburg State University. In that early spring of 1982, she came home to Croom, Maryland for a weekend visit with her family and to prepare for her senior art show. Upon returning from an evening out with friends, Stephanie's car became disabled on a country road in Brandywine, Maryland. Two men stopped, but instead of helping her, they kidnapped her and, over a five-hour period, repeatedly and brutally raped and tortured her. They took her to a deserted shack in St. Mary's County, where they fractured her skull with a logging chain, shot her, dismembered her body, and set it on fire.

Stephanie had done nothing to deserve becoming a victim of crime. We, her parents and her four surviving siblings, should have been treated with dignity and respect, received information, and been given the right to observe the trial and to provide a victim impact statement to the sentencing court. This did not happen. Instead, we were shut out of the courtroom and silenced at sentencing. Unlike Stephanie's convicted killers, we had no rights to information, no rights to observe the trial, and no right to be heard at sentencing. Likewise, the court's lenient sentence did not match the severity of the crimes. Our children asked us why liberty and justice for all did not include us. As parents, we were challenged to explain to them that the system we had taught them to believe in, to trust, and to respect, was responsible for these additional injuries.

Somehow despite this tragedy and injustice, we would find ways to triumph over evil. With the support of many, and through the advocacy of our organization, more than seventy-five pieces of legislation would be enacted to provide victims with rights and support services.[2] The most significant achievement was the passage of a Maryland State Constitutional Amendment for crime victims' rights passed in 1994, and approved by voters by 92.5%.[3] Despite the opponents who said our efforts would make a victim of the constitution, these accomplishments stand as a beacon of hope to all crime victims today.

The crimes against Stephanie and the response of the criminal justice system captured public attention and mobilized citizen support for the efforts of the Committee & Foundation in ways that are rarely seen. Ordinary people identified with Stephanie and with our family. Ordinary people rolled up their sleeves and were prepared to work!

In light of this success, one might then question, "What is there left to do today? Why are efforts to amend the United States Constitution for victims' rights necessary to pursue?" Advocates in Maryland and across America have learned, despite their best efforts and successes, that until the fundamental law of the land provides equal justice for victims as well as those accused or convicted of crime, crime victims and survivors will remain second class citizens! We have learned that enacting statutes and state constitutional amendments without enforcement power and without the power of the nation's highest law continues to leave victims' rights dependent upon individuals, not imbedded in the law of the land. Victims' rights, like those of the accused or convicted, deserve the protection of our Constitution. They should not be a-roll-of-the-dice and dependent upon the will of an individual. As one victim said when comparing his rights to those of the person who committed the crime, "Treat us like a criminal. Then we know our rights will be protected and enforced because the Constitution requires it!"

Acting upon the final recommendation of President Ronald Reagan's Task Force on Victims of Crime and the results of efforts in their respective states, advocates banded together as a national coalition to seek the passage of an amendment to the United States Constitution beginning in the late 1980's. We worked with diligence, did our homework and overcame many of the misperceptions of our critics. And yet we have been held hostage by political

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[2] *See The History of Crime Victims' Rights in Maryland*, MD. CRIME VICTIMS' RESOURCE CENTER, http://www.mdcrimevictims.org/laws-and-policies/history-of-crime-victims-rights-in-maryland/ (last visited Mar. 17, 2012).

[3] GOVERNOR'S OFFICE OF CRIME CONTROL & PREVENTION & THE MD. STATE BD. OF VICTIM SERVS., THE RIGHTS OF CRIME VICTIMS IN MARYLAND para. 1 (2007); *see* MD. CONST., DECLARATION OF RIGHTS, art. 47.

power brokers and amendment opponents, despite the truth that this is neither a liberal nor conservative issue, but simply a human rights issue that is the *right thing* to do.

On April 22, 2004, the U.S. Senate passed a federal statute in lieu of a federal constitutional amendment.[4] In good faith, advocates accepted the Crime Victims' Rights Act,[5] as a critical opportunity to prove, once and for all, that statutes are simply not enough. A constitutional amendment is the only means to ensure that crime victims' rights are fully applied and that victims are treated with fairness, dignity, and respect.

Since the passage of the federal law, we continue to witness the failure of this statute to protect the rights of crime victims. We have witnessed exemplary programs that offer legal representation to crime victims shut down and funding ended. And without legal representation, enforcement of victims' rights once again becomes dependent upon the good will of an individual. While we are deeply grateful to the amendment's sponsors, Senators Jon Kyl (R-AZ) and Dianne Feinstein (D-CA) for their unwavering bi-partisan leadership, we are left with the evidence that this failure represents yet another broken promise to America's victims of crime.

We ask everyone to pause and remember with us and to celebrate our accomplishments and those of the victims' rights movement to date. Stephanie believed that *one person can make a difference and every person should try*. We also ask citizens to commit or to re-commit to keeping this legacy of hope alive. We urge them to actively support the passage of an amendment to the U.S. Constitution so that "justice for all" includes all victims of crime.

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[4] *See* Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (codified at 18 U.S.C. § 3771 (2009)).

[5] *Id.*

Statement from the Author

Bob Preston*

> Wendy Preston, 22, was murdered on June 23, 1977 in her parents' Florida home. She was a geriatric nurse, and was visiting her mother and father, Bob and Pat Preston, before leaving for the New York School of Ballet to begin a new career. While out with her friends, she mentioned that her parents would not be home for awhile. The killer overheard her, found her parents' home, broke in to find money to buy drugs, and murdered Wendy. Friends found her body six days later. Her parents were told that the state of Florida was the "victim" in this case, and that they would be notified only if they were to be called as witnesses.[1]

My continuing commitment is to establish a constitutional guarantee that federal legislation passed to offer federal crime victims certain rights does not get overturned, as we experienced in Florida in 1987, and that crime victims all across our country will have a baseline of fair and meaningful rights.

My daughter, Wendy Preston, was murdered in 1977, at our Florida home. After first-degree murder charges were filed, my wife and I were told that Florida was the victim, and we would be notified if we were to be called as witnesses. After that, it became extremely difficult for us to get information about the case—the case that we regarded as our case. Ultimately, after a series of misadventures that I will not relate here, the murderer was allowed to plead to a second-degree murder charge.

David Tal-Mason, the murderer of my daughter, had constitutional rights. What, I wondered, were the constitutional rights of victims? There were none. We were told by the Office of the State Attorney of Broward County, Florida that it was a crime against the state and we were not the victims. We would be called if needed as witnesses

In 1979, we joined with other homicide survivors in a volunteer effort to seek legislation enabling crime victims to participate in the American justice

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* The author is a Co-Chair of the National Victim Constitutional Amendment Network.

[1] 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, 582 (2005).

process, and we established Justice for Surviving Victims. Many well-intentioned bills were passed by the Florida legislature, attempting to do something for victims.[2] Yet our fear was that without constitutional guarantees, much of it would turn out to be poetry.

In 1984, Florida voters approved a twenty-eight page Victim and Witness Protection Act, which offered victims and survivors some rights to participate in the justice process.[3] In 1987, while, as part of the plea, David Tal-Mason had agreed that he would not ask for or receive credit for time served in a mental institution, he immediately appealed on that basis and was given credit for time served. The Florida Supreme Court said that to not give him credit would "implicate significant constitutional rights."[4]

In 1988, article 1, section 16, of the Florida Constitution was amended to ensure crime victims had the constitutional guarantee "to be informed, to be present, and to be heard *when relevant*, at all *crucial* stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused."[5] After the passage of the Florida amendment, we were present at all subsequent parole hearings for the next twenty years. But the limitations of the State amendment are evident.

While thirty-three states now have similar constitutional rights for victims, seventeen states do not,[6] and the ones that do differ in force and effect. My fear is that the well-intended legislation passed by the U.S. House and Senate and in the states has proven inadequate to really make our system fair for victims everywhere. Just as the rights of the offender are protected in our U.S. Constitution, so should the rights of the victim. This is a simple matter of common sense and fairness.

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[2] *See generally* FLA. STAT. §§ 960.001-960.298 (2011), *available at* http://www.flsenate.gov/Laws/Statutes/2011/Chapter960.

[3] Press Release, Dep't of Justice, 1987 National Victims Crime Week Honorees (Apr. 29, 1987), http://www.ojp.usdoj.gov/ovc/ncvrw/1987/press.htm.

[4] Tal-Mason v. State, 515 So. 2d 738, 740 (Fla. 1987).

[5] FLA. CONST. art. 1, § 16(b) (emphasis added).

[6] *State Victim Rights Amendments*, NAT'L VICTIMS' CONST. AMENDMENT PASSAGE, http://www.nvcap.org/ (follow "state vras" hyperlink on left side of page) (last visited Mar. 17, 2012).

Statement from the Author

Hon. John Gillis*

> Louarna Gills, 22, John Gillis' . . . daughter, was murdered on January 17, 1979 as part of a gang initiation in Los Angeles. The quickest way to be initiated into the "Mexican Mafia" was to murder the daughter of a Los Angeles Police Department officer; John had been a homicide detective with the department and was at the time serving as a sergeant on the Los Angeles Police Commission. The killer targeted Louarna because he knew that she was the daughter of a police officer. He picked her up a few blocks from her home, drove her to an alley, shot her in the head as she sat in the car, pushed her into the alley, and then fired additional shots into her back. The family was not notified of critical proceedings in the killer's trial, including the arraignment. John, [former] Director of the Office for Victims of Crime of the U.S. Department of Justice, was not allowed to enter the courtroom during the trial.[1]

For more than five decades I have been involved with the criminal justice system and during that time not a lot has changed for victims of crime. As a child, long before my involvement with the system, I remember watching the cowboy movies and the gangster movies that had one predominant scene. The bad guys would commit a crime, mount their favorite mode of travel, and head for the county or state line because they knew the pursuing authorities had no jurisdiction once they crossed that magic line. Victims of today face a similar dilemma. The treatment depends on where they are victimized.

At the time of the writing of the U.S. Constitution, victim rights were not perceived to be an issue. The victim, or next of kin, was an active and primary participant in the entire process. There was never a question about the victim being present at the hearings. There was no question regarding the victim's

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* The author is the former Director of the Office for Victims of Crime, for the United States Department of Justice.

[1] 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, 582 (2005).

participation in the proceedings and no restriction about the victim talking about the impact of the crime at the hearing. When the government began taking over the role of prosecuting crimes on behalf of the victim, things dramatically changed for the victim. The victim became the necessary piece of evidence to prove the case, and nothing more. The victim had no other role than to be the *corpus delecti* of the crime. If other evidence could be produced without the victim, the victim was relegated to the halls of the courthouse. I have been there. I was that next of kin, required to wait in the hallway while the trial for the murderer of my daughter took place.

In 1979, I was a sergeant with the Los Angeles Police Department. My daughter, Louarna Gillis, was murdered by a young gang member who wanted move up in the ranks of the Mexican Mafia. The quickest way for him to do that was to kill a cop or a family member of a cop. Louarna was a twenty-two-year-old nursing student, and she was employed part-time as a nurse's aide. One week after Louarna's twenty-second birthday, the defendant told her he had been designated by her friends to pick her up and take her to a surprise birthday party. He picked her up as planned, drove her to an alley where he shot her in the head, and emptied the gun in her back as she lay on the ground. The defendant was arrested a few months later and shortly thereafter we were in trial. My wife and I were both excluded from the courtroom for the entire process. We sat in the hallway while the defendant's friends and family paraded in and out of the courtroom. At times they would look at us and laugh, other times they would give us dirty looks as they flashed signs and wore their colors. Although the trial took place in 1979, this scenario still plays out day after day across America. Victims and next of kin are still stuck in the hallways of justice while the government panders to the every need of the defendant. Defenders of the indefensible still believe that victims in the courtroom might cause a juror or judge to disregard the facts of the case and convict the defendant. They do not mention it may be a little more difficult for the defense to puff or lie while the aggrieved parties are listening.

In the case of my daughter's murderer, the jury came back with a verdict of eleven for first degree murder and one not guilty. I don't know what was said during the trial that caused one juror to come back with a not guilty verdict, but I believe my family could have corrected any misinformation put forth by the defense. Our input may have been enough to save the case.

As we were rapidly preparing for a retrial the defendant offered to plead to second degree murder. We accepted the plea, but again, we were not in court for sentencing, and impact statements were things of the future. It is unconscionable that victims, even as we speak, do not have the constitutional rights to be in court and to be heard. Our Constitution should give as much protection to the injured party as it does to the accused. While no innocent party should

ever be wrongly convicted there is little or no guesswork when it comes to identifying the victim of a violent crime. Recognizing the victim's rights in no way violates the defendant's right to a fair and impartial hearing.

After Louarna's murderer was sentenced to state prison he contacted federal authorities and volunteered to testify in a RICO hearing. When he finished his testimony the feds moved him to a hideout federal prison—they say for his protection—where he has been since 1992. He is eligible for parole and thereby gets parole suitability hearings to determine if he should be released. Since my family and I are not permitted to know where he is, or what he is doing, the Department of Corrections makes all the arrangements and then tells us where to be if we want to be present at the hearing. For one hearing in the late 90's, my wife and I were at a prison in California and we were connected to another prison somewhere in the United States; the hearing was conducted by conference call. The next hearing, held five years later, was held at a prison in Chicago, Illinois. My wife and I had to pay all travel and lodging expenses to attend the hearing in Chicago. This year the hearing was held in California. The expenses for us just keep piling up, but I know about the many families across the United States that have been financially devastated. These families are not able to attend the hearings and in many instances are never notified that a hearing is taking place.

In April of 2001, I was nominated by President George W. Bush to serve as Director, Office for Victims of Crime, United States Department of Justice. I was confirmed by the U.S. Senate during the week of September 11, 2001 and served until January 20, 2009. During my tenure with the Office for Victims of Crime I heard and saw, first-hand, the pain and suffering of crime victims all across America. I talked with scores of families who had literally lost their jobs, their homes, their self-pride, and respect because they had the misfortune of becoming a crime victim. And those who were hurt the most were those who were inter-state victims. They were victimized in one state and resided in another. Although many states have amended their constitutions to include rights for victims, the constitutions are not binding outside the state borders. Even within the state, the state's constitution too often has the clout of a marshmallow! It is time we amended the U.S. Constitution to include rights for victims of crime. Americans who become crime victims in any state should have the same rights as any crime victim anywhere in the United States.

The Preamble of the U.S. Constitution states that it is established to "promote the general Welfare";[2] therefore it is imperative that victims' rights be included as an amendment.

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[2] U.S. CONST. pmbl.

Statement from the Author

Duane Lynn*

> Nila Lynn, 69, of Peoria, Arizona, was murdered at a homeowner's association meeting on April 19, 2000 by a man unhappy with the way the association had trimmed the bushes in his yard. Nila and another woman were killed, and several other men were injured. Nila died on the floor in the arms of her husband, Duane. They were three months short of their 50th wedding anniversary. Their children paid for her casket with the money they had saved for an anniversary gift. Duane wanted the killer to be sentenced to life without parole, rather than endure the lengthy appeals of a capital case. Despite having clear constitutional and statutory rights, Duane was not allowed to make a sentencing recommendation. The killer received the death penalty.[1]

Ventana Lakes is a senior community and has its own home owners association with a seven-person board of directors. In April, 2000, I was a member of that board and was in charge of the landscaping for the grounds. The first Wednesday of each month we held our board meeting. On April 19th, my wife, Nila Ruth, was going to the meeting with me.

We arrived at the meeting hall about thirty minutes early so I asked Nila if she would sit with a lady by the name of Ester LaPante for a few minutes because she was new to our board and that was to be her first meeting. Little did I know that in about two hours both Nila Ruth and Ester would be dead.

About thirty minutes before we closed the meeting, a man entered the room and began shooting a pistol at the board members. I later learned he had four guns with him and about 700 rounds of ammunition. About eight months earlier I had taken a lawn maintenance crew and cleared off his lawn. We trimmed his trees, cut his shrubs, and cleared off his lawn. All of this type of maintenance was required by our rules and regulations. He had refused to follow these rules. A few weeks after I had done this he and his wife moved. We

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* The author is a retired officer with the Arizona Highway Patrol.

[1] 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, 583 (2005).

all were very glad to hear this; however, what we did not know was that he had been evicted for non-payment by his mortgage company.

There were ten shots fired; my wife and Ester were killed, and three men were hit and wounded. It all took place in twenty seconds. My entire life changed forever in that short period of time.

Almost three years later the trial for the murders of Nila Ruth and Ester began. It was to be a capital trial seeking the death penalty. I was very much against the death penalty and let the county attorney's office know my views. But I was only talking to a wall. Nobody cared and of course nobody heard my cries. For the sake of my life and that of my family, I wanted to have the increased certainty that would come with a life sentence, but my reasons were ignored.

I was told that in Arizona crime victims had a constitutional right to be heard at sentencing. We had moved during this time from judge sentencing to jury sentencing after the *Ring* case.[2] Even before trial, I asked the judge to protect my right to be heard and to tell the jury that I wanted to ask for life imprisonment and not the death penalty, and I wanted to tell them my reasons.

With an organization called Arizona Voice for Crime Victims representing me, I filed a motion before the trial judge but it was denied.[3] We sought a review of this decision before the Arizona Court of Appeals and the Arizona Supreme Court.[4] We lost in both courts, again on the basis of the Eighth Amendment.[5] The Arizona Supreme Court concluded that for me to exercise my right to be heard under the Arizona Constitution to ask for life imprisonment and not the death penalty would deny the defendant his Eighth Amendment right against cruel and unusual punishment.[6] We asked the Supreme Court of the United States to review this but they refused to accept it.[7] So it seemed that my rights were of little value. My right to be heard was not the only right of mine that was ignored.

During the long period of time that it was taking to start the trial, I asked why so long and again it was never explained. I asked where the *speedy* part of our Constitution was, and was told that it only applied to criminals—not to victims. Also, I was requested to remain quiet so the trial could begin. I asked where was the part of our Constitution that covered *freedom of speech* and again I was told that victims had no right to be heard at the start of a trial. It turns out that the Constitution of the United States of America is only for

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[2] Ring v. Arizona, 536 U.S. 584 (2002).

[3] Minute Entry at 1, 5, Arizona v. Glassel, CR 2000-006872 (Super. Ct. Ariz. Nov. 12, 2002).

[4] Lynn v. Reinstein, 68 P.3d 412, 414 (Ariz. 2003).

[5] *Id.*

[6] *Id.*

[7] Lynn v. Reinstein, 540 U.S. 1141 (2004).

accused or convicted criminals and there is nothing in the Constitution for the victims of crimes. Why? What is being done today for victims to allow them to have a voice in how their lives will be lived and how they will forever cope with that new life they are now living?

Everything the victims go through is done in a very hard way. There was a short hearing after conviction for restitution. A certain small portion was to be taken from monies received by this inmate and given to the victims for the cost they had to bear. Ten years after the trial, I had yet not received any money from this man, and I learned that he was receiving money each month from his wife. I had to go back to the courts to fight for my rights again. I truly believe that the court should have seen that restitution was being taken from his money. After all, my right to restitution is also written into the Arizona Constitution.[8] It ended up again with my having to fight for my rights. I ended up once again in the Arizona Court of Appeals. It took eleven years after the death of my wife before I received any funds for restitution. If you are a victim, nothing is simple; even with so called state rights we are treated as second-class citizens.

What I don't understand is why our lawmakers cannot see the need for victims across the nation to be able to have *rights* just like the criminals have. One day, maybe somebody can really explain this to me. In the meantime, we as victims of crime will just have to go on living in the valley of death and walk in our shoes alone.

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[8] ARIZ. CONST. art. II, § 2.1.

Statement from the Author

Timothy Jeffries*

> Michael Jeffries, 22, the beloved older brother of Tim Jeffries, was kidnapped and beaten in Colorado Springs, Colorado and brutally murdered in the Rocky Mountains on November 3, 1981. After stabbing Michael 65 times, the two murderers were enraged that Michael was still alive, so they slit his throat and crushed his skull. The two murderers and the driver left Michael's massacred body in the Rocky Mountains for the animals to devour. After the horrific crime, the two murderers fled to Sioux Falls, Iowa. The driver and another assailant fled to Boston, Massachusetts. As a result of an unexpected tip, Michael's body was miraculously found in the Rockies and the four perpetrators were captured several weeks after the vicious murder. Victims' rights did not exist in Colorado or the United States at this time. For example, Tim Jeffries was denied the opportunity to speak at the sentencing of his brother's surviving killer. It is a scar Tim carries still to this day.[1]

"We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."[2]

Whenever I read the Preamble of the Constitution of the United States of America, I am struck by its brevity and magnitude, its simplicity and grandeur, its sobriety and joy, its pledge and promise. The constitutions of other countries have echoed these words, but no country has been so committed to securing the "Blessings of Liberty" for her citizens and their "Posterity."[3] As

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* The author is the Board President of the National Organization of Victims Assistance and serves as President of Arizona Voice for Crime Victims.

[1] This is an original synopsis, by Mr. Jeffries, and formatted as a block quote to maintain uniformity between sections.

[2] U.S. Const. pmbl.

[3] *Id.*

eloquently and powerfully stated in the Declaration of Independence, "with a firm reliance on the protection of divine Providence,"[4] one can reasonably state no country in the history of mankind has been so blessed.

There have only been twenty-seven Amendments to the Constitution of the United States of America,[5] and rightfully so. Our Founding Fathers, who risked their honor, fortunes, and lives, envisioned a prosperous country devoid of tyranny and focused on her citizens. Within fifteen years of the ratification of the U.S. Constitution, the first twelve Amendments, including the Bill of Rights, were ratified by our fledgling democracy.[6] Sixty years passed before the Thirteenth Amendment was ratified in 1865.[7] During the next seventy years, eight additional Amendments were ratified, including the repeal of the Eighteenth Amendment in 1919 by the ratification of the Twenty-first Amendment in 1933.[8] Over the next sixty years, only six Amendments were ratified, including the Twenty-seventh Amendment, which had been part of the proposed Bill of Rights in 1789.[9] In short, it is a rare and sacred event to amend our Constitution.

Two decades have passed since the Twenty-seventh Amendment was ratified 202 years after it was originally proposed.[10] It is now time to propose, pass, and ultimately ratify the Twenty-eighth Amendment to the Constitution of the United States of America.[11] The Victims' Rights Amendment would rebalance the Scales of Justice. It would ensure the democratic vision of our Founding Fathers is honored and the "Blessings of Liberty"[12] are secured for our citizens, specifically our citizens who have been impacted by the horrors of crime that plague our great country every day.

My beloved big brother, Michael, was a kind, simple, and beautiful soul. We grew up in a low-middle income family in Sacramento, California when former President Ronald Reagan was Governor of the Golden State. Like so

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[4] THE DECLARATION OF INDEPENDENCE para. 6 (U.S. 1776).

[5] *See* U.S. CONST. amends. I-XVII.

[6] U.S. CONST. amend. XII (ratified 1804); U.S. CONST. amend. XI (ratified 1795); U.S. CONST. amends. I-X (ratified 1791); U.S. CONST. art. VII (ratified 1787).

[7] U.S. CONST. amend. XIII (ratified 1865).

[8] U.S. CONST. amends. XX-XXI (ratified 1933); U.S. CONST. amend. XIX (ratified 1920); U.S. CONST. amend. XVIII (ratified 1919); U.S. CONST. amends. XVI-XVII (ratified 1913); U.S. CONST. amend. XV (ratified 1870); U.S. CONST. amend. XIV (ratified 1868).

[9] U.S. CONST. amend. XXVII (ratified 1992); U.S. CONST. amend. XXVI (ratified 1971); U.S. CONST. amend. XXV (ratified 1967); U.S. CONST. amend. XXIV (ratified 1964); U.S. CONST. amend. XXIII (ratified 1961); U.S. CONST. amend. XXII (ratified 1951).

[10] U.S. CONST. amend. XXVII (proposed 1789; ratified 1992).

[11] *Renewed Effort for Federal Victims' Rights Amendment Underway*, NAT'L VICTIMS' CONST. AMENDMENT PASSAGE, http://www.nvcap.org/ (last visited Mar. 21, 2012) [hereinafter Proposed VRA] (providing the full text of the proposed Victims' Rights Amendment).

[12] U.S. CONST. pmbl.

many families, our parents divorced during our teenage years, and bitter acrimony persisted between them. Michael struggled academically due to a learning deficiency and struggled socially due to a lack of self-confidence. Michael loved others, but was not typically loved in return. Despite his challenges, Michael was consistently kind, joyous, and loving to me. Despite the darkness of his oft-trying youth, Michael was always a bright, glowing light for me. Subsequently, as a young boy then young man, it vexed me to see Michael treated so unkindly by so many. Michael was the classic target for bullies, both physical and emotional.

Four days prior to Michael's kidnapping, beating, and murder on November 3, 1981, Michael lovingly assured me he was not worried about the transient gang of petty criminals who had beaten him up twice in the past month. With the sweet and unfortunate innocence that prevailed throughout his twenty-two years of far-too-short life, Michael said, "Don't worry about me, Tim. You know me, I always take care of myself. Besides, they are on one side of town, and I am on the other." With my heart aching and my worry soaring, I asked Michael if he would contact the police in Colorado Springs, Colorado. He quickly yet lovingly replied, "No, no, no, I don't want any more trouble." Tears are welling in my eyes as I recall and type this. Alas, thirty plus years later, time has not healed these wounds; it has only numbed them.

Michael was stabbed sixty-five times on a dark, lonely mountain in the Rocky Mountains. His two murderers stated Michael was still alive after their incomprehensibly vicious assault. Angered by Michael's amazing and heroic struggle to live, the two barbaric killers slit Michael's throat and crushed his skull. With Michael's final breath expelled, the evildoers left him there for the animals to feed on. If this pains you for me, I ask you to redirect your pain to my parents, particularly my mother. By the Grace of God, I was home from college the weekend prior to Thanksgiving when Detective Lou Smit of the Colorado Springs Police Department called. Several hours later, I had the unenviable task of telling my dear mother that her first born child had been brutally murdered. Suffice it to say, I witnessed a part of my mother die that day as she cried from a place that no man possesses.

Having served for several years with noble and venerable organizations, such as the National Organization for Victims Assistance, Parents of Murdered Children, and Arizona Voice for Crime Victims, I have come to learn and understand my family has been more fortunate than most families who are subjected to similar evils and burdens. For example, by way of an unexpected tip, Michael's body was miraculously found in the Rocky Mountains outside of Colorado Springs, Colorado several weeks after he was butchered. With information from the tipster and the evidence of his murder, Michael's two murder-

ers were quickly apprehended in Sioux Falls, Iowa, and two accomplices were quickly apprehended in Boston, Massachusetts.

Within a year of Michael's murder, three of the perpetrators had accepted plea agreements in exchange for testimony against the lead murderer. Shortly thereafter, the lead murderer (nicknamed "The Joker") hung himself in jail, albeit unsuccessfully; he then hung himself a second time, quite successfully. The surviving murderer continues to serve a life sentence with the possibility of parole in the Sterling Correctional Facility in Sterling, Colorado. The two accomplices in the kidnapping and beatings served their plea deals, and probably matriculated to additional mayhem. In summary, within one year of laying Michael to rest outside of Sacramento, California, we were able to focus exclusively on grieving for the next twenty years until the surviving murderer's first parole hearing in 2001. Unfortunately, we have endured two other parole hearings in 2004 and 2009, and must endure another one in 2014. Assuming justice is served and parole is denied, we will still endure several other parole hearings after 2014.

However, most families of murder victims and victims of heinous crime are not so fortunate, assuming the word *fortunate* can even be applied to a nightmare that no family should ever suffer and endure. Many families have not found their loved ones or all of their loved ones. (Yes, I did mean, "all of their loved ones." I will never forget meeting the sister of a murder victim and the tears she shed when she shared that the police had only found her sister's two arms.) Alas, many families, even with support from the proper authorities, have not found the murderers of their loved ones. Countless rape victims are haunted by their rapists, particularly when the rapists have not been caught. Quite often, crime victims and the supporting authorities have not found the evidence needed to bring justice to bear. Typically, the pursuit and implementation of justice takes numerous years which more often than not is wrenching for the victims and their families. Tragically, the pursuit of justice can last an entire life time. Consequently, it is reasonable to say it is difficult, and sometimes impossible, to enjoy the "Blessings of Liberty"[13] if justice has not been truly and fully administered to the perpetrators.

I have sought to comfort numerous crime victims in our country not only because they have suffered breathtaking evils, but also because they have suffered the justice system. Quite often, crime victims are re-victimized when the very justice system that should exist to protect the innocent and punish the guilty criminals further punishes the innocent victims.

There are twenty-three different protections for the defendants in the U.S. Constitution, but there are absolutely *zero* constitutional protections for crime

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[13] *Id.*

victims.[14] Thirty-three states have constitutional protections for victims, but seventeen states have absolutely *zero* constitutional protections for crime victims. In short, there is a sub-standard—better yet an unacceptable—patchwork of laws throughout our country to provide crime victims various protections. Far too many crime victims are denied the "Blessings of Liberty"[15] because they have no federal constitutional protections. And, it should be noted, a heartbreaking and disproportionate share of the most violent crime in our country is inflicted on the poor, the downtrodden, and the suffering. These are the very people that federal, state, county, and municipal officials often purport to care about deeply, but often overlook because they typically lack power.

The Victims' Rights Amendment provides a *right to fairness* for crime victims.[16] "[I]n Order to form a more perfect Union"[17] our Founding Fathers risked treason and death. There are twenty-three different protections for defendants in the U.S. Constitution.[18] Hopefully, it strikes you as just, and preferably paramount, that crime victims should enjoy federal protections too. "[A] more perfect Union"[19] can and will exist when a right to fairness for crime victims is enshrined in our U.S. Constitution.

The Victims' Rights Amendment provides a *right to respect* for crime victims.[20] Our Founding Fathers sought to "establish Justice"[21] throughout our sacred land. The United States of America is unparalleled in her successes and prosperity for many reasons, one being the Rule of Law. The Rule of Law is rooted in the faithful administration of justice. The justice system exists to do the just, not perpetuate injustice. When just things are done, respect is bestowed. Yet, crime victims have no federal constitutional guarantee of the *right to respect*, so many unjust things are done.

The Victims' Rights Amendment provides a *right to dignity* for crime victims.[22] As a great nation, we must "insure domestic Tranquility"[23] by granting crime victims the simple, basic and just *right to dignity*.[24] Our justice system should exist to protect the innocent and punish the guilty. Throughout our country, the Scales of Justice must respectfully be rebalanced, so crime victims

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[14] *See generally* U.S. CONST.
[15] U.S. CONST. pmbl.
[16] Proposed VRA, *supra* note 11.
[17] U.S. CONST. pmbl.
[18] *See generally* U.S. CONST.
[19] U.S. CONST. pmbl.
[20] Proposed VRA, *supra* note 11.
[21] U.S. CONST. pmbl.
[22] Proposed VRA, *supra* note 11.
[23] U.S. CONST. pmbl.
[24] *See* Proposed VRA, *supra* note 11.

are not further stripped of their dignity. This will not happen without federal constitutional protections.

The Victims' Rights Amendment provides a *right to reasonable notice* for crime victims.[25] The Preamble of our U.S. Constitution called on our young federal government to "promote the general Welfare"[26] of America's new citizens. The "general Welfare"[27] of crime victims, who are often the poor and downtrodden of our country, will be significantly improved with the granting of the *right to reasonable notice*.[28] There is no desire for unreasonable or impossible notice. There is only a desire, if not a collective cry, for just and fair notice. This right would ensure crime victims can prudently tend to the important matters of the justice system that they never wished upon themselves.

The Victims' Rights Amendment provides a *right not to be excluded* for crime victims.[29] Our Founding Fathers proclaimed, "We the People."[30] They did not write "some of the people" or "certain types of people." They wrote, "We the People."[31] Crime victims carry heavy burdens. These burdens are seen and unseen, tangible and intangible, known and unknown. Their burdens should not be worsened by being excluded when they should not be excluded. Our country should never permit a crime victim to be excluded from a legal proceeding that any reasonable person would view as the fair and just fulfillment of the Founding Fathers' pledge for the "Blessings of Liberty."[32]

The Victims' Rights Amendment provides a *right to be heard* for crime victims.[33] The First Amendment of our U.S. Constitution outlines several foundations for our country, of which "freedom of speech" is bedrock.[34] Among the many things crime victims seek to exercise is the right to free speech during key proceedings at appropriate moments. Crime victims often seek to give voice to their horrors, their concerns, and their grievances. When the surviving murderer of my beloved big brother, Michael, was sentenced to life in prison, I thought I had the right to be heard during the heart-wrenching proceeding. Unfortunately, I was wrong! I was terribly wrong. Although I had a respectful eight-to-ten minute speech prepared, I was denied the opportunity to speak for Michael, my mother, and my family. It was heart-breaking to be denied the opportunity to be heard. Instead, I had to wait twenty years to be

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[25] *Id.*
[26] U.S. CONST. pmbl.
[27] *Id.*
[28] *See* Proposed VRA, *supra* note 11.
[29] *Id.*
[30] U.S. CONST. pmbl.
[31] *Id.*
[32] *Id.*
[33] Proposed VRA, *supra* note 11.
[34] U.S. CONST. amend. I.

heard during the first parole hearing. Countless others have been subjected to much worse.

The Victims' Rights Amendment provides a *right to proceedings free from unreasonable delay* for crime victims.[35] The First Amendment of our U.S. Constitution also provides citizens the right "to petition the Government for a redress of grievances."[36] It is wrenching and tragic to behold crime victims mired in the very justice system that should prudently, expeditiously, and justly serve them. The multi-year delays that I have witnessed many crime victims suffer are not only unreasonable, they are inhumane. A vexing grievance exists in America, and should be constitutionally rectified. "[T]he Government,"[37] our federal government, should right this egregious wrong once and for all.

The Victims' Rights Amendment provides a *right to reasonable notice of release or escape of the accused* for crime victims.[38] How could anyone secure the constitutionally aspired "Blessings of Liberty"[39] if they suffer the indignity of last minute notice or no notice at all? How could anyone secure the constitutionally aspired "Blessings of Liberty"[40] if they suffer the distress and fear of discovering after the fact that their criminal has been released or has escaped? Suffering the evils of crime causes enough life-long pain. These excruciating burdens should not be compounded by an uncaring justice system.

The Victims' Rights Amendment provides a *right to restitution* for crime victims.[41] Unfortunately, crime victims often do not receive fair restitution even when it is deserved. Furthermore, it is a national embarrassment when criminals profit from their crimes and crime victims receive no restitution. In these wretched situations, crime victims are victimized again and suffer even greater injustice. In these abhorrent situations, the criminals may enjoy the "Blessings of Liberty,"[42] but the crime victims are unjustly burdened with it.

The Victims' Rights Amendment provides a *right to standing to assert these rights* for crime victims.[43] Specifically, Section 1 of the proposed Twenty-eighth Amendment states, "The crime victim or the crime victim's lawful representative has standing to assert these rights in any court."[44] This prudent right is absolutely paramount for crime victims who seek to participate in the relevant judicial proceedings in the aftermath of the evil they have suf-

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[35] Proposed VRA, *supra* note 11.
[36] U.S. CONST. amend. I.
[37] *Id.*
[38] Proposed VRA, *supra* note 11.
[39] U.S. CONST. pmbl.
[40] *Id.*
[41] Proposed VRA, *supra* note 11.
[42] U.S. CONST. pmbl.
[43] Proposed VRA, *supra* note 11.
[44] *Id.*

fered. Furthermore and notably, this pragmatic right honors the First Amendment right "to petition the Government for a redress of grievances."[45]

When our heroic Founding Fathers pledged their sacred honor to "provide for the common defence"[46] our young nation faced enemies near and far. Unfortunately, our nation still has enemies. America's enemies wish us harm and hope for our demise. America must be defended from these enemies. Yet, while doing so, we should never forget evil lives and thrives within our borders too. Based on federal crime statistics, someone is forcibly raped every 6.2 minutes in our country.[47] Someone is murdered every 35.6 minutes in our country.[48] In fact, every twelve weeks more people are murdered in America than died on the horrific morning of September 11, 2001.[49] Sadly, over 150,000 people have been murdered in America since 9/11.[50]

The "Blessings of Liberty"[51] providing, the Victims' Rights Amendment will become the Twenty-eighth Amendment to our U.S. Constitution. In the heroic, people-focused tradition of our Founding Fathers, the proposed Twenty-eighth Amendment calls for "fairness, respect, and dignity" for crime victims throughout our great land.[52] These are noble and pragmatic ideals, that should simply be present in our justice system, but often cannot be found. Many state

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[45] U.S. CONST. amend. I.

[46] U.S. CONST. pmbl.

[47] *2010 Crime Clock Statistics*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/offenses-known-to-law-enforcement/crime-clock (last visited Mar. 17, 2012).

[48] *Id.*

[49] *Compare* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 1-2 (2004), *with Crime in the United States, 2010—Murder*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/violent-crime/murdermain (last visited Mar. 17, 2012).

[50] *See* FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2004 15, 72 (2005); *Preliminary Semiannual Uniform Crime Report, January-June, 2011*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/preliminary-annual-ucr-jan-jun-2011/data-tables/table-1 (last visited Mar. 18, 2012); *Crime in the United States 2010—Murder*, *supra* note 49; *Crime in the United States, 2009—Murder*, FED. BUREAU OF INVESTIGATION, http://www2.fbi.gov/ucr/cius2009/offenses/violent_crime/murder_homicide.html (last visited Mar. 18, 2012); *Crime in the United States, 2008—Murder*, FED. BUREAU OF INVESTIGATION, http://www2.fbi.gov/ucr/cius2008/offenses/violent_crime/murder_homicide.html (last visited Mar. 18, 2012); *Crime in the United States, 2007*—Murder, FED. BUREAU OF INVESTIGATION, http://www2.fbi.gov/ucr/cius2007/offenses/violent_crime/murder_homicide.html (last visited Mar. 18, 2012); *Crime in the United States, 2006—Murder*, FED. BUREAU OF INVESTIGATION, http://www2.fbi.gov/ucr/cius2006/offenses/violent_crime/murder_homicide.html (last visited Mar. 18, 2012); *Crime in the United States, 2005—Murder*, FED. BUREAU OF INVESTIGATION, http://www2.fbi.gov/ucr/05cius/offenses/violent_crime/murder_homicide.html (last visited Mar. 18, 2012).

[51] U.S. CONST. pmbl.

[52] Proposed VRA, *supra* note 11.

constitutions possess such words yet grave injustices still exist. Tragically, seventeen state constitutions do not have any such words. In these states, there are no constitutional protections for crime victims whatsoever.

Various federal statutes have been enacted to provide rights for crime victims. Despite great hope and intent, the federal statutes have not been as effective as our citizens deserve. In short, our country has a patchwork quilt of crime victim rights that is tattered and worn. Even when enshrined in the law, crime victim rights are not uniformly applied nor embraced. Reprehensibly, there are courtrooms and jurisdictions where crime victim rights are not enforced. This is a huge problem for our country, not just for crime victims. It is a national wrong that must be made right, and it can only be made right with the proposed Twenty-eighth Amendment to our U.S. Constitution.

Our Founding Fathers were heroes of the first order. They risked treason and death when they pledged their sacred honor to our young country. Although they were imperfect men, they were God-loving men. They believed Providence would bless our young nation at its founding and for centuries to come. Therefore, our Founding Fathers are not 235-year-old anachronisms that should not be considered during the noble and just pursuit of the Twenty-eighth Amendment to the U.S. Constitution. Our Founding Fathers are eternal patriots with living voices of wisdom and worth that call us to build an even better country. Our Founding Fathers call us to pledge our sacred honor to "secure the Blessings of Liberty to ourselves and our Posterity."[53] Let us demonstrate we are worthy of this inspiring and humbling charge.

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[53] U.S. CONST. pmbl.