RESPONSE TO MINORITY VIEWS OF SENATORS LEAHY, KENNEDY, KOHL, FEINGOLD, SCHUMER, AND DURBIN

by
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A. INTRODUCTION

On November 7, 2003, Senators Leahy, Kennedy, Kohl, Feingold, Schumer, and Durbin presented their "Minority Views" to Senate Report 108-191, the Judiciary Committee's Report accompanying S. J. Res. 1, the Crime Victims Rights Amendment (hereinafter "Minority Senators"). The Minority Senators set forth their reasons for opposing S. J. Res. 1. This is a response to their arguments.

At the outset it should be noted that the Minority Senators concede, "The treatment of crime victims certainly is of central importance to a civilized society." Surely something of "central importance to a civilized society" is important enough to warrant protection in our fundamental charter. Surely things of such "central importance" should not be subject to the shifting influences of legislative majorities. Surely things of "central importance" to our civilization should not be subject to judicial activism, without grounding in the Constitution. Let us agree that while the treatment of victims is of "central importance," so is the treatment of defendants. The centrality of both defendants and victims rights should be protected against government usurpation.

Perhaps the minority view is grounded in the belief that victims are less "central" to our civilized society than defendants. Or perhaps use of the word "treatment" implies that victims are to be simply the objects of a beneficent government's largesse, and if so all will be well. Yet crime victims, along with defendants, simply seek what the minority view asserts to be of central importance to our society. Victims do not seek to be objects of the government's largesse; rather, they seek as free citizens to be empowered with rights and standing that no judicial or legislative majority can ignore or take away.

The minority view questions the "emotional engine feeding this amendment." Surely those of that view would concede that similar engines fed the movements for the civil rights amendments, women's suffrage, the 18-year-old voting age requirement, and indeed similar engines fed the campaign for the Bill of Rights itself. The emotion of the parents of a murdered child forced to sit outside the courtroom during trial, the emotion of a battered woman who cannot address the court before her abuser is released -- these and other emotions are not illegitimate. Injustice creates emotion in the heart of every American, and that emotion feeds reform movements. In our history those movements have often led to

constitutional amendments. We are a better country for it. Surely something of *central importance to our civilized society* ranks with the best of these movements.

If crime victims, as a class, were as "politically popular" as the minority view suggests, they would not be forced to endure the sustained injustice that is their unquestioned lot. Even the Minority Senators do not question the multiple, repeated cases of injustice presented to the Committee. They acknowledge the injustice, but simply propose to address it through statutory reform. Yet the history of our country confirms that great injustice can only be ended through the reform of our basic charter.

James Madison, the Minority Senators note, cautioned that amendments be reserved for "certain great and extraordinary occasions." What the minority view does not mention is that Madison wrote those words in Federalist No. 49, published on February 2, 1788. Fifteen months later, on June 8, 1789, Madison proposed the Bill of Rights, saying in his speech to Congress, "… if we can make the constitution better in the opinion of those who are opposed to it, without weakening its frame, or abridging its usefulness, in the judgment of those who are attached to it, we act the part of wise and liberal men to make such alterations as shall produce the effect."

B. IT IS NECESSARY TO AMEND THE CONSTITUTION TO PROTECT VICTIMS' RIGHTS

The minority view disputes the "need" to amend the Constitution "to protect the rights of crime victims." Despite the best efforts of the States and the Federal Government, twenty years of experience with lesser laws than the U. S. Constitution has confirmed that they are inadequate. Only the Constitution of the United States, the "will of all of us," as Madison scholar Robert Goldwin described it, has the power to change the culture of our country's criminal justice systems. The best intended and drafted Federal statutes can only address the problems of victims of Federal crimes; they cannot address the vast majority of crime victims in the nation. Each State can only reform its own system, and then only in the shadow of the Constitution which has no rights for victims. Only the Constitution has the power to become "the supreme Law of the Land," and as such, only the Constitution can give every American what should be a birthright to fair treatment.

The standard of article V of the Constitution, that an amendment be "necessary," is, of course, met whenever the Congress and the States so decide. It may not seem "necessary" to the minority view that the parents of a murdered child be allowed to remain in the courtroom throughout the trial, or that the voice of a battered woman be heard on the matter of the release or plea bargain for her batterer, but in a decent and free society, these citizens should be able to make that choice for themselves.

1. Congress and the States Have Inadequate Power to Protect Victims' Rights Without a Federal Constitutional Amendment

If the "power" of statutes and State constitutional amendments had been "adequate," as the Minority Senators suggest, the "emotional engine feeding this amendment" which the minority view somewhat derisively compares with temperance movement, surely would have dissipated long ago.

The Minority Senators write, "No Victims' Rights Amendment was necessary, for example, to secure a role for victims at pretrial detention and capital sentencing hearings." What the minority view claims to know is, as stated, sadly just not so. *Salerno,* cited by the Minority Senators for the first proposition, did not secure for victims a right to be present and heard at pre-trial detention proceedings, and still today despite our best efforts in the States, victims are still not afforded this basic right. Victim allocution at capital sentencing hangs by a mere thread at the Supreme Court and, in most places in the country, contrary to the rights of the defendant's family, victims are not allowed to offer a recommendation as to the sentence. *See, Lynn v. Reinstein*, 68 P.3d 412 (Ariz. 2003), *cert denied*, 2004 WL 47465 (U.S.Ariz.). This is because neither the Congress nor the States may pass statutes that address criminal procedure without opening the door to claims by defendants, however unfounded, that their "rights are being violated." No constitutional right of a defendant is infringed by the victims' rights that are being proposed. However, that does not stop a defendant from raising the claim, or trial courts from taking the path of least resistance to uphold the claim and protect their record, as little or no opportunity exists for victims to challenge adverse rulings.

The law professors cited by the Minority Senators have not offered any evidence to support their conclusion that Federal or State laws work, nor can they. The unreported decision of the Maryland Court of Special Appeals in *Rippeon and Dobbin v. State of Maryland,* No. 2554 (July 9, 2002) should prove the point conclusively. There, despite a constitutional right to be present at trial and to be heard at sentencing, the parents of a murdered child were excluded from the courtroom during the trial and the mother was silenced at the sentencing. Moreover, the court concluded the parents had no remedy because when they sought appellate review the court found the matter was moot.

The fact that there is not as large "an objectionable body of law" as the minority view would like is actually evidence of the failure of victims' rights laws to date. They are too often ignored and their denial is rarely subject to appellate review because of standing and mootness.

The Minority Senators support "training and education" as a substitute for fundamental rights. Presumably they would not recommend the same remedy for the protection of defendants' rights

2. Statutes Are Not Preferable To Amending the Federal Constitution

No civil libertarian would propose that defendants' rights be protected only by statute and that they need not be protected by the constitution. Yet victims' rights are relegated to this second-class status. Why are the participatory rights of victims deemed less worthy? The view that only defendants are an "insular minority" needing constitutional protection is inaccurate. If crime victims were so popular a political force as some would suggest, why are they regularly on the outside of the system looking in? Why are their claims for just treatment so often ignored? Statutes have proven to be unenforceable appeasements and nothing more. While it is true that statutes can be more easily amended and are hence more "flexible" it is precisely for this reason that they are not adequate to secure fundamental rights.

The Minority Senators cite opposition from certain groups, while failing to recognize the vast majority of mainstream victims' rights and law enforcement groups supporting S. J. Res. 1. Attached as Appendix A is a response to the opposition from several of the groups cited by the Minority Senators.

3. An Extensive Framework of Victims' Rights Has Proven Inadequate

The litany of laws identified by the Minority Senators proves the point made here. Together they have proven wholly inadequate to change the fundamental disrespect for victims, who remain outside the doors of the courts looking in. Together these laws have not given victims the rights to notice, presence, and allocution that everyone, even the Minority Senators, thinks they deserve.

The Minority Senators assert, "An extensive framework of victims' rights has already been created through federal and State legislation and amendments to State constitutions." This same argument was offered in 1789 by those opposed to the Bill of Rights. Critics of Madison's proposed amendments claimed they were unnecessary, especially so in the United States, because states had bills of rights. Madison responded with the observation that "some states have no bills of rights, there are others provided with very defective ones, and there are others whose bills of rights are not only defective, but absolutely improper." James Madison, Speech to the Congress, June 8, 1789. Our experience in the victims' rights movement is no different. Not all states have constitutional rights, nor even adequate statutory rights.

Madison went on to say to his critics, "If they [the rights] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights." Now, as when Madison spoke these words, only the U.S. Constitution can establish "an impenetrable bulwark" for rights which the Minority Senators concede are "of central

importance to a civilized society."

The Minority Senators cite a 15 year old study from the American Bar Association which concluded that criminal justice professionals were "almost universally satisfied" with victims rights laws. The fact the 15 years ago a group of criminal justice professionals were "almost universally satisfied" with victims rights law should not surprise anyone; it surely does not surprise crime victims. That the Minority Senators would find it reason to oppose victims' rights is regrettable, if not surprising.

Today, 42 State Attorneys General, the IACP, the California District Attorneys Association, many other major law enforcement organizations, and the mainstream victims movement disagree and have called for passage of the Crime Victims Rights Amendment. Even if the statement remained true, it makes the case for the amendment. The people, whose rights are being denied, the victims of crime, are clearly not "satisfied" with the injustice that confronts them daily. Perhaps the Vera Institute is correct that local criminal justice officials "are making a serious effort to implement the state [victims' rights] statutes." But "serious effort[s]" are not working, as the many cases of injustice attest. And "serious effort[s]" would not be accepted by the Minority Senators as a substitute for constitutional rights for defendants. They should not be accepted for victims.

The Minority Senators assert that amending the constitution should not be the "first option." How can they recite a litany of (failed) statues and, for the last three Congresses, listen to the voices of those who have tried other options *for more than two decades* and still characterize S. J. Res. 1 as a "first option?"

4. Victims' Rights Need To Be "Restored"

The minority view has its history wrong when it minimizes the role of private prosecutions at the time of the Founding. The clearest analysis on this point has been offered in Senator Feinstein's May 2, 2000 statement on victim participation in criminal cases in the 18th and 19th century (p. S3249 of the Congressional Record):

> Mrs. FEINSTEIN. Mr. President, last week, during the debate on a proposed constitutional amendment to protect the rights of crime victims, Senator LEAHY made several lengthy statements challenging some of the facts set forth by supporters of the amendment, including myself. We responded to many of those arguments at the time--and, I believe, refuted them. I do want not burden the record now by repeating all our contentions or making new ones.
>
> However, there is one argument that the Senator from Vermont made during the waning hours of debate on the amendment that I find

particularly troubling. It involves the role of victims in criminal proceedings at the time our Constitution was written. Because I believe the Senator's comments contradict the clear weight of American history, I feel compelled to respond.

Here is the argument Senator LEAHY disputes: At the time the Constitution was written, the bulk of prosecutions were by private individuals. Typically, a crime was committed and then the victim initiated and then pursued that criminal case. Because victims were parties to most criminal cases, they enjoyed the basic rights to notice, to be present, and to be heard under regular court rules. Given the fact that victims already had basic rights in criminal proceedings, it is perhaps understandable that the Framers of our Constitution did not think to provide victims with protection in our national charter.

The Senator from Vermont tried to rebut this argument. Citing an encyclopedia article and a couple of law review articles, he claimed that, by the time of the Constitutional Convention, public prosecution was ``standard'' and private prosecution had largely disappeared.

Because Senator LEAHY's comments suggest that some confusion about this issue lingers among my colleagues, I would now like to provide some additional evidence demonstrating that private prosecutions had not only not largely disappeared in the late 18th century but in fact were the norm.

First, it is important to concede one point: some public prosecutors did exist at the time of the framing of the Constitution. Certainly, by then, the office of public prosecutor had been established in some of the colonies--such as Connecticut, Vermont, and Virginia. But just because some public prosecutors existed in the late 18th century does not mean that they played a major role or that public prosecution had supplanted private prosecution. In fact, criminal prosecution in 18th century English and colonial courts consisted primarily of private suits by victims. Such prosecutions continued in many States throughout much of the 19th century.

Thus, contrary to Senator LEAHY's suggestion that a ``system of public prosecutions'' was ``standard'' at the time of the framing of the Constitution, the evidence is clear that private individuals--victims--initiated and pursued the bulk of prosecutions before, during, and for some time after the Constitution Convention.

Let's look, for example, at the research of one scholar, Professor Allen Steinberg, who spent a decade sifting through

dusty criminal court records in Philadelphia and wrote a book about his findings. Based on a detailed review of court docket books and other evidence, Professor Steinberg determined that private prosecutions continued in that city through most of the 19th century.

In Professor Steinberg's words, by the mid-19th Century, ``private prosecution had become central to the city's system of criminal law enforcement, so entrenched that it would prove difficult to dislodge. ....."

Of course, Philadelphia was the city where the Constitution was debated, drafted, and adopted. And for decades it was our new nation's most populous city--and its cultural and legal capital as well.

It is difficult to reconcile the assertion that a ``system of public prosecutions" was ``standard" at the time of the Constitution Convention with historical research showing that, in the same city where the Convention was held, private prosecutions--inherited from English common law--continued to be ``standard" through the mid-19th century.

It is not surprising that the Senator from Vermont would conclude that public prosecution had replaced private prosecution by the late 18th century. A cursory exam of historical documents might lead to such a conclusion, for the simple reason that documents regarding public prosecutors and public prosecutions (what few there were) are easier to find than documents regarding private prosecutions. As Stephanie Dangel has explained in the Yale Law Journal:

[e]arly studies concentrating on legislation naturally over-emphasized the importance of the public prosecutor, since a private prosecution system inherited from the common law would not appear in legislation. Examinations of prosecutorial practice were cursory and thus skewed. The most readily accessible information relating to criminal prosecutions predictably concerned the exceptional, well publicized cases involving public prosecutors, not the vast majority of mundane cases, involving scant paperwork and handled through the simple procedures of private prosecution .....

Dangel has summed up recent historical research into the nature of

prosecution in the decades leading up to the framing of the Constitution as follows:

First, private individuals, not government officials, conducted the bulk of prosecution. Second, the primary work of attorneys general and district attorneys consisted on non-prosecutorial duties, with their prosecutorial discretion limited to ending, rather than initiating or conducting, prosecutions.

Regarding the prevalence of private prosecution in the colonies, Dangel noted:

Seventeenth and eighteenth century English common law viewed a crime as a wrong inflicted upon the victims not as an act against the state. An aggrieved victim, or interested party, would initiate prosecution. After investigation and approval by a justice of the peace and grand jury, a private individual would conduct the prosecution, sometimes with the assistance of counsel..... Private parties retained ultimate control, often settling even after grand juries returned indictments. Contemporaneous sources confirm the relative insignificance of public prosecutions in the colonial criminal system. Only five of the first thirteen constitutions mention a state attorney general and only Connecticut mentions the local prosecutor. Secondary references are similarly rare. Finally, the earliest judicial decision voicing disapproval of private prosecution did not appear until 1849. No decision affirming public prosecutors' virtually unreviewable discretion appeared before 1883.

The historical evidence is clear: Because victims were parties to most criminal prosecutions in the late 18th century, they had basic rights to notice, to be present, and to participate in the proceedings under regular court rules. Today, victims are not parties to criminal prosecutions, and they are often denied these basic rights. Thus, a constitutional victims' rights amendment would restore some of the rights that victims enjoyed at the time the Framers drafted the Constitution and Bill of Rights.

If this historical evidence about prosecutions in the colonies is not enough, I would repeat a point Senator LEAHY made himself last week: that in England, any crime victim had the right to initiate and conduct criminal proceedings all the way up to the middle of the 19th century. As we know from Senator BYRD's enlightening remarks last week, many of the rights and liberties of our Constitution--such as those for criminal defendants--have their roots in English history and the English

constitution.

Given the fact, then, that virtually all the protections for criminal defendants in the Bill of Rights have English antecedents--including habeas corpus, trial by jury, due process, prohibition against excessive fines, and so on--it is hardly a stretch to think that the lack of rights for crime victims in the Bill of Rights would reflect an English antecedent as well: the long-established right of victims to prosecute crimes themselves.

Let me be clear: I do not support a return to the old system of private prosecution. My only point is that we can cogently explain why the Framers did not include a single word on behalf of crime victims in the Constitution. And, given the relatively recent development in the United States of a system of 100% public prosecution, we can offer strong reasons to restore basic rights for victims in our criminal justice system.

Just so there is no more confusion on this point, let us return to Professor Allen Steinberg, a legal historian who researched and wrote a 326-page book on prosecutions in 19th century Philadelphia--the most in-depth study of private prosecution in the United States.

Did Professor Steinberg find that public prosecution was ``standard'' in Philadelphia even decades after the Constitution and Bill of Rights were adopted, as Senator LEAHY suggests? No. In fact, he found that victims directly prosecuted crimes in Philadelphia until at least 1875.

The fact that Professor Steinberg's research is on Philadelphia is undeniably important. Not only did the Framers live in Philadelphia while debating and drafting the Constitution, but many had resided there earlier as well.

For example, James Madison--sometimes called the Father of our Constitution--was not only a delegate at the Philadelphia Convention, he served in the Continental Congress in Philadelphia from March 1780 through December 1783. I have little doubt that Madison knew that the bulk of criminal prosecutions in Philadelphia consisted of private prosecutions. Here is what Professor Steinberg writes about private prosecutions in Philadelphia:

[T]he criminal law did have a central place in the everyday social life of mid-nineteenth-century Philadelphia. Private prosecution--one citizen

taking another to court without the intervention of the police--was the basis of law enforcement in Philadelphia and an anchor of its legal culture, and this had been so since colonial times ..... Well past mid-century, private prosecution remained popular among a broad spectrum of ordinary Philadelphians. Familiar and frequent, it was rooted in a complex political and legal structure that linked political parties, courthouses, saloons and other centers of popular culture, real crime and dangerous disorder, and ordinary disputes and transgressions of everyday life ..... Through the process of private prosecution, the criminal courts of Philadelphia developed a distinctive set of practices and a culture that was remarkably resilient in the face of constant official hostility and massive social change.....

He continues:

Private prosecution refers to the system by which private citizens brought criminal cases to the attention of court officials, initiated the process of prosecution, and retained considerable control over the ultimate disposition of cases--especially when compared with the two main executive authorities of criminal justice, the police and the public prosecutor ..... Private prosecution ..... [was] firmly rooted in Philadelphia's colonial past. [It was an] example[] of the creative American adaptation of the English common law. By the seventeenth century, private prosecution was a fundamental part of English common law. Most criminal cases in England proceeded under the control of a private prosecutor, usually a relatively elite person, and often through a private society established for that purpose.

Professor Steinberg concludes that before the second half of the 19th Century, private prosecutions were the ``dominant'' mode of criminal justice in Philadelphia. He explains how this system worked:

When a person wanted to initiate a criminal prosecution, he or she went off to the nearest alderman's office, complained, and usually secured a warrant for the arrest of the accused. After the alderman's constable escorted the defendant to the office, the alderman conducted a formal hearing, and the process was underway. Most often, private prosecutors charged their adversaries with assault and battery, larceny, or some form of disorderly conduct. Well before 1850, aldermen and litigants established patterns of case disposition that would last through most of the century. Most criminal cases were fully disposed of by the alderman .....

Professor Steinberg also notes that:

[m]uch of the time, people used the criminal law in their private affairs in order to combat a perceived injustice or to assert basic rights they felt were violated. There was no better example of this than battered wives. Women regularly brought charges against men for assault ..... Most often, ... the batterer was punished in some manner .....

And what of the public prosecutor? Contrary to Senator LEAHY's suggestion that public prosecutors had consolidated control over prosecutions by the late 18th century, Professor Steinberg found that--even by the mid-19th Century--the Philadelphia public prosecutor did little more than act as a clerk to victims who were pursuing private prosecutions. Here is what Professor Steinberg found:

One of the major reasons for the weakness of the court officials was the limited power of the public prosecutor. Most discretion was exercised by the magistrates and private parties, some by the grand and petit juries, and little by anyone else. As late as the mid-1860s, for example, jurists agreed that, despite their importance on the streets, the police had no role in ordinary criminal procedure. More importantly, the same was basically true for the district attorney. In an 1863 outline of criminal procedure, Judge Joseph Allison did not mention the police and gave no discretionary role to the district attorney in the ``usual and ordinary mode of procedure." ..... The discretion of the private parties in criminal cases was not checked by the public prosecutor. Instead, the public prosecutor in most cases adopted a stance of passive neutrality. He was essentially a clerk, organizing the court calendar and presenting cases to grand and petit juries. Most of the time, he was either superseded by a private attorney or simply let the private prosecutor and his witnesses take the stand and state their case.

And the dominance of private prosecutions was certainly not unique to Philadelphia. Other legal historians who have sifted through court records have reached similar conclusions to Professor Steinberg.

In a 1995 article in the American Journal of Legal History, for example, Robert Ireland concluded that ``By 1820 most states had established local public prosecutors..... Yet, because of deficiencies in the office of public prosecutor, privately funded prosecutors constituted a significant element of the state criminal justice system throughout the

nineteenth century."

In a 1967 article in the New York University Law Review, William E. Nelson found that private prosecution was commonplace in a typical Massachusetts county between 1760 and 1810. Criminal trials, he writes, were ``in reality contests between subjects rather than contests between government and subject."

And the list goes on: other scholars who have acknowledged the prevalence of private prosecution in the American colonies and fledgling United States include Richard Gasjins (Connecticut), Michael S. Hindus (Massachusetts and South Carolina), William M. Lloyd, Jr. (Pennsylvania), and Edwin Surrency (Philadelphia). Indeed, William F. McDonald notes in the American Criminal Law Review that a system of private prosecution was preferred by many around the time of the American Revolution because of a fear of tyranny associated with government prosecutors and because it was less expensive.

In the face of this overwhelming historical evidence that the bulk of prosecutions at the time of the Constitutional Convention were private, the Senator from Vermont suggested instead that public prosecutions were ``standard." He relied on several sources for that conclusion: a four-page article in a legal encyclopedia and a few law review article quotes, one lacking citation and the rest citing the same four-page encyclopedia article.

Of particular importance seems to be a quotation from an article in the Rutgers Law Review that asserted that ``[b]y the time of the Revolution, public prosecution in America was standard, and private prosecution, in effect, was gone." But reading closer, one finds that the support for this statement was none other than a statement in the oft-cited four-page encyclopedia article that ``by the time of the American Revolution, each colony had established some form of public prosecution....."

Again, however, we have seen that the mere existence of ``some form of public prosecution" at the time of the American Revolution does not mean that public prosecution was ``standard." And it certainly does not mean that public prosecutors handled the bulk of prosecutions or had much a prosecutorial role. They did not. Rather, the weight of historical evidence on this subject--a subject which has been extensively researched and reviewed by some of our country's most distinguished legal historians and other scholars--suggests that private prosecutions were dominant.

> Mr. President, I am glad to have the chance to correct the historical record on this point. I have the utmost respect for my distinguished colleague from Vermont and I thank him for his thoughtful remarks on the history of prosecution in this country. However, I believe that my main point stands: we need to restore rights that crime victims enjoyed at the time the Framers drafted the Constitution and Bill of Rights.

5. The Bill of Rights Is Not Undermined By Enacting Constitutional Rights For Crime Victims

The Minority Senators claim that they support victims' rights in statutes. Presumably they mean nothing more nor less than the codification of the very rights they here argue would be so harmful to the Republic. The contradiction is remarkable.

The Minority Senators assert that the paramount purpose of a criminal trial is ... "not to make victims whole." Of course, the amendment does not purport to "make victims whole." But neither should it be the outcome of the justice system to make victims *worse* and yet sadly, in case after case, as the Congress has seen, it does just that. The criminal trial surely can remain a public prosecution, and its primary purpose surely can be to determine the guilt or innocence of the accused, without denying to victims the rights to notice, attendance, and allocution at a few critical stages.

When proponents of the amendment refer to "balance" in the justice system, they simply mean what the Minority Senators asserted at the outset: because of the "central[ity]" of victims rights to the core values of our "civilized society," balance and fairness require that victims' rights be in the same fundamental law as the defendants.

Moreover, nothing in the proposal threatens the office of the public prosecutor; were it otherwise a substantial majority of state Attorneys General would not have supported the amendment**,** nor the California District Attorneys Association, nor the many other prosecutors around the country.

6. There Is A Need For A National Standard Of Victims Rights

The Minority Senators assert that "every State already protects the rights of crime victims, …." The nation, as seen by the minority view, is far different from the one actually inhabited by victims of crime, whose "rights" continually are disregarded. Once again the argument of the minority view folds in on itself. The minority view first asserts that victims' rights need to be established, just not in the constitution; then it asserts victims'

rights are now already protected "in every State." The speed and agility with which these two arguments are interchanged by the minority view is quite remarkable.

The Minority Senators quote five law professors who acknowledge "where fundamental human rights are in imminent jeopardy, the Constitution might need to be amended to provide a national standard." It could not have been better said. Perhaps the five law professors, and the Minority Senators, believe that it is more "fundamental" for criminal defendants to have due process rights (all added by amendments to the constitution) than for crime victims to have them, but the principled basis for such a conclusion is, at best, seen through a glass darkly. For the parents of a murdered child who are excluded from the courtroom of their child's murderer and for a battered woman who is silenced at the release hearing for her abuser, the rights look pretty fundamental. The five law professors and the Minority Senators think the extension of participatory rights to criminal defendants was necessary for us to be "a strong and decent nation," but that extending the very same kinds of rights to crime victims is unnecessary. This unequal, double-standard of justice remains unexplained.

In fact, there is a need for a uniform national standard that sets a floor of victims' rights for the very same reasons that there is a national standard for the rights of defendants. The rights proposed in S. J. Res. 1 should be the birthright of every American, indeed, every crime victim in our country, wherever the crime occurs.

7. A Constitutional Amendment Would Mean Victims in Every State Would Have Standing to Enforce Their Rights

The Minority Senators say that a statute may grant standing to victims to assert their rights. This is correct. But establishing the rights in the constitution will create standing, so as to make unnecessary the fight for standing in every State. The Minority Senators don't oppose standing for victims, indeed they are "committed to giving victims real and enforceable rights." Why constitutional standing to enforce those rights would be a bad thing is not explained by the Minority Senators.

C. THE PROPOSED AMENDMENT WILL NOT HAVE DANGEROUS AND UNCERTAIN CONSEQUENCES FOR THE NATION'S CRIMINAL JUSTICE SYSTEM; IT WILL, IN FACT, HAVE BENEFICIAL CONSEQUENCES

At its roots, the effective functioning of our justice system relies on the voluntary cooperation of crime victims to report the crimes against them and testify truthfully when called upon. Victim distrust of the system and belief that it is unjust cripple the nation's confidence in its courts wherever it occurs. This indeed has "dangerous" consequences for the nation. But expanding rights for America's crime victims does not. The Minority Senators express a fear that the amendment "could help criminals," and at the same time

could cause “the conviction of some who are innocent and wrongly accused.” There is no basis for these extraordinary conclusions. Certainly none when the Minority Senators claim to support the very same rights in statute.

1. The Amendment Will Not Impair the Ability Of Prosecutors To Convict Violent Criminals and Disrupt the War on Terror

No language in the amendment would allow a victim to “compromise prosecutorial discretion and independence,” to “effectively dictate policy decisions,” to place “unknowing, and unacceptable, restrictions on prosecutors” or to “override the professional judgment of the prosecutor” regarding investigation, timing, disposition, or sentencing. These assertions by the Minority Senators are all the more remarkable given their claim to support “comprehensive” statutory rights.

The amendment gives victims the right to be heard at a public plea proceeding; it is a right to simply a voice not a veto, not an “override,” nor the power to “dictate,” as the Minority Senators assert. From this simple right the Minority Senators project “dangerous” consequences. 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 the Minority Senators asserts. No prosecutor could ever be “forc[ed],” as asserted in the Minority Senators, to disclose “investigative strategies or weaknesses in their case” under the amendment. Beth Wilkinson’s fearful testimony to the contrary notwithstanding, the real life experience in Arizona, with more than a decade 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 be of concern to 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 willfully and maliciously deny rights to a victim. No such action has been filed in the fourteen years the law has been on the books. The minority view posits 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 view that a conflict between the victim and the prosecutor would require prosecutors “to recuse themselves from the case” is unfounded. 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.

Senators Leahy and Kennedy support statutory rights that are “strong and enforceable” and which they assert will “do more to protect victims than S. J. Res. 1.” And yet, 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. The Minority Senators assert that “sequestration rules … are in effect in every jurisdiction in the country.” 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. 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 view’s speculation 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 years and years without evidence of perjury.

Common sense is enough to conclude why the exception does not create the evils predicted by the minority view. First, it's perjury and the victim might go to prison. Second, changing a statement subjects the victim to devastating cross-examination because of the 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 14 years no “tailored … testimony” has been found in Arizona, nor is there any evidence from the real world of jury “discredit[ing] or discount[ing]” a victim's testimony as the Minority Senators speculate. The Minority Senators surely know this experience from Arizona. Where their speculative theory conflicts with hard facts, the minority view seems to choose theory every time.

The amendment protects a victim's right not to be excluded from "public proceedings." It leaves untouched the law which defines when proceedings may be closed. 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." The Minority Senators challenge the application of § 50.9, yet their hypothetical of the pleading mob soldier fits squarely within the four corners of the rule. The rule permits the government to seek closure when, among other standards, there is "(ii) a substantial likelihood of imminent danger to the safety of parties, witnesses, or other persons; or (iii) a substantial likelihood that ongoing investigations will be seriously jeopardized." These are the very circumstances the Minority Senators posit.

Nothing in the amendment could possibly be construed to "[force] prosecutors to try cases before they are fully prepared." The right to have an interest in avoiding unreasonable delay duly considered carries with it no power to "forc[e]" cases to trial prematurely; indeed, such a result itself would be inherently "unreasonable."

The Minority Senators fear the impact the amendment might have on terrorist trials before military commissions. The proposed amendment would not impair the administration of justice through its application in proceedings before military commissions. Although the minority view correctly notes that the amendment lacks a phrase that would limit its application in military proceedings "to the extent that Congress may provide by law," this purposeful omission of the phrase is by no means a roadmap to the amendment's meaning on this issue. While the minority view would have one believe that the omission in the amendment is a literary talisman whose application would stifle the functioning of the court system in certain situations, the plain meaning of the amendment suggests otherwise. The proposed amendment is silent on the application before military commissions issue because the application will be left up to Congress and therefore on its face the amendment neither supports nor rejects its application in proceedings before military commissions.

2. The Amendment Will Not Impose Tremendous New Costs on the System

The Minority Senators fear that the right to reasonable notice will lead to staggering costs. It has not. The costs are far from staggering and testimony before the Committee has confirmed this. Moreover, with technological advances, the costs are reducing. Would costs stop the minority view from defending notice for defendants, or the state? Why should victims be excluded from this basic element of fairness? Surely in America we are a great enough, and decent enough, and compassionate enough country to extend to victims of crime the same notice we give to defendants and the government.

Nothing in the amendment requires appointment of counsel for crime victims. The Sixth Amendment comparison offered by the minority view is flawed; clearly there is no

parallel "right to counsel" expressly written into the proposed amendment. Nor would any sheriff 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. Moreover, the revised restrictions clause allows greater flexibility in this regard. The right otherwise parallels the defendant's rights in that neither the defendant nor the victim would be subject to the sequestration rule.

3. The New Constitutional Rights for Victims Will Not, In Any Way, Undermine Bedrock Constitutional Protections Afforded To the Accused by the Bill Of Rights

The Minority Senators concede that "[c]onflicts between victims' rights … and the protections afforded defendants by the Bill of Rights likely would be infrequent," and suggest five examples. None of them conflicts with the Bill of Rights.

Giving victims rights at the accusatory stage of criminal proceedings does not undercut the presumption of innocence

The minority view asserts that "the proposed amendment would undercut …the presumption of innocence." This is 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. It does not require that the defendant remain at large pending the outcome of the trial. 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 defendant. 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 pre-trial detention decisions. 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 view, of the assault defendant who claims self defense is unpersuasive. The minority view 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 amendment. They write, "While society certainly has an interest in preserving the safety of the victim, this fact alone cannot be said to overcome a defendant's liberty interest as afforded to him under the due process and excessive bail clauses." 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 U. S. Supreme Court, the "interest in preserving the safety of the victim" does overcome a defendant's liberty interest when pre-trial detention is necessary to protect the victim or the community. 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.

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

The Minority Senators argue that the victims' right not to be excluded from public proceedings could "overcome a right currently afforded defendants." They do not specify the defendant's right to which they refer, perhaps because there is none; the sequestration rule is not a constitutional right. The fears of the Minority Senators again are misplaced. While they exhibit no concern for the pain and injustice inflicted on victims who must sit in the hallway while the defendant and his friends and family are ushered into seats in the front rows of the courtroom, they posit groundless concerns that the defendant will be denied the right to a fair trial by the mere presence of the victim. Where is the case from any jurisdiction that permits victims to be present where this unfairness has occurred? None is cited; none exists.

The minority view asserts that this right might interfere with the accused's right to a fair trial. The minority view might do well to reconsider Prof. Paul Cassell's 1999 testimony on this objection. His analysis is yet to be contradicted, except by unfounded by unfounded assertions:

> **2. The right to be present at trial.**
>
> The victim's right to be present at trial creates the most frequently alleged conflict between the Amendment and the defendant's rights.[96] The most detailed and careful explication of this view is Professor Mosteller's, advanced in various articles[97] and recently relied upon by the dissenting senators of this Committee.[98] In brief, Mosteller believes that fairness to defendants requires that victims be excluded from the courtroom, at least in some circumstances, to avoid the possibility that they might tailor their testimony to that given by other witnesses. While I admire the clarity and doggedness with which Mosteller has set forth his position, I respectfully disagree with his conclusions for reasons to be articulated at length elsewhere.[99] Here it is only necessary to note that even this strong opponent of the Amendment finds himself agreeing with the value underlying the victim's right. He writes: "Many victims have a special interest in

witnessing public proceedings involving criminal cases that directly touched their lives."[100] This view is widely shared. For instance, the Supreme Court has explained that "[t]he victim of the crime, the family of the victim, [and] others who have suffered similarly . . . have an interest in observing the course of a prosecution."[101] Victim concern about the prosecution stems from the fact that society has withdrawn "both from the victim and the vigilante the enforcement of criminal laws, but [it] cannot erase from people's consciousness the fundamental, natural yearning to see justice done - or even the urge for retribution."[102]

Professor Mosteller also seems to concede that defendants currently have no constitutional right to exclude victims from trials,[103] meaning that his argument rests purely on policy. Mosteller's policy claim is not the general one that most victims ought to be excluded, but rather the much narrower one that "victims' rights to attend . . . proceedings should be guaranteed unless their presence threatens accuracy and fairness in adjudicating the guilt or innocence of the defendant."[104] On close examination, it turns out that, in Mosteller's view, victims' attendance threatens the accuracy of proceedings not in a typical criminal case, but only in the atypical case of a crime with multiple victims who are all eyewitness to the same event and who thus might tailor their testimony if allowed to observe the trial together.[105] This is a rare circumstance indeed, and it is hard to see the alleged disadvantage in this unusual circumstance outweighing the more pervasive advantages to victims in the run-of-the-mine cases.[106] Moreover, even in rare circumstances of multiple victims, other means exist for dealing with the tailoring issue. For example, the victims typically have given pretrial statements to police, grand juries, prosecutors, or defense investigators that would eliminate their ability to change their stories effectively.[107] In addition, the defense attorney may argue to the jury that victims' have tailored their testimony even when they have not[108] - a fact that leads some critics of the Amendment to conclude this provision will, if anything, help defendants rather than harm them. The dissenting senators, for example, make this harms-the-prosecutor argument,[109] although at another point they appear to present a contrary harms-the-defendant claim.[110] In short, the critics have not articulated strong case against the victim's right to be present.

[96]: Technically the right is "not to be excluded." *See infra* notes 130-33 and accompanying text (explaining reason for this formulation).

[97]: *See* Mosteller, *Unnecessary Amendment*, *supra* note 18; *see also* Mosteller, *Recasting the Battle*, *supra* note 18, at 1698-1704.

[98]: S. Rep. 105-409 at 66 & n.44.

[99]: *See* Paul G. Cassell, *The Victim's Right to Attend the Trial: The Emerging National Consensus* (working paper - to be submitted for publication shortly); *see also 1996 Sen. Judiciary Comm. Hearings*, *supra* note 16, at 73-81 (explaining why victim's right to attend does not conflict with defendant's rights).

[100]: Mosteller, *Recasting the Battle*, *supra* note 18, at 1699.

[101]: Gannett Co. v. DePasquale, 443 U.S. at 428 (Blackmun, J., concurring in part and dissenting in part).

[102]: Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571 (1980) (plurality opinion); *see also* William Pizzi, *Victims' Rights: Rethinking Our "Adversary* System", 1999 Utah L. Rev. 349 (noting importance of victim right to attend trials).

[103]: *See* Mosteller, *Recasting the Battle*, *supra* note 18, at 1701 n.29.

[104]: Mosteller, *Recasting the Battle*, *supra* note 18, at 1699; *see also* Mosteller, *Unnecessary Amendment*, *supra* note 18.

[105]: Mosteller, *Recasting the Battle*, *supra* note 18, at 1700; *see also* Mosteller, *Unnecessary Amendment*, *supra* note 18.

[106]: *See* Eraz, *supra* note 201, at 29 (criticizing tendency of lawyers "to use an atypical or extreme case to make their point" and calling for public policy in the victims area to be based on more typical cases). *Cf.* Robert P. Mosteller, *Popular Justice*, 109 Harv. L. Rev. 487, 487 (1995) (critiquing George P. Fletcher's book *With Justice for Some: Victims' Rights in Criminal Trials* (1995) for "ignor[ing] how the criminal justice system operates in ordinary" cases).

[107]: *See* Cassell, *supra* note 99.

[108]: *See* S. Rep. 105-409 at 82 (additional views of Sen. Biden).

[109]: S. Rep. 105-409 at 61 (minority views of Sens. Leahy, Kennedy, and Kohl) ("there is also the danger that the victim's presence in the courtroom during the presentation of other evidence will cast doubt on

her credibility as a witness . . . . . Whole cases . . . may be lost in this way").

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

And his 1996 testimony:

1. An Illustration: The Victims' Right to Attend Trials.

A good illustration of the illusory nature of the conflict between victims' and defendants rights is provided by the victims' right to attend a trial. Frequently it is claimed that such a right would infringe on the defendants' rights. Yet these claims have no substance. I will discuss this situation at some length because it makes the more general point that victim-versus-offender rights is not necessarily a "zero-sum game" -- that is, that the adoption of victims' rights does not have to come at the expense of the offenders' recognized constitutional rights.

While compelling policy reasons support the victims' right to attend trials, defendants and defense attorneys sometimes make generalized allusions to a superseding federal "constitutional right" to have the victim excluded. They rarely define with any precision from whence this constitutional right derives nor explains how it invalidates a constitutional provision giving victims' a right to attend trials. Instead, one finds that defendants simply argue that they have a right to exclude victims under the Fifth and Sixth Amendments.[103]

I have scoured those provisions carefully in search of language that would support the far- reaching argument that it is positively unconstitutional for a state to allow a victim to remain in the courtroom during a criminal trial. I have discovered no specific language, or even a penumbra of a specific language, that appears to support that claim. 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 Amendment's guarantee of "due process of law," which construed in

light of historical and contemporary standards suggests victims can attend trials.[104]

a. The Right to a Public Trial.

The effort to discover a federal constitutional right to exclude crime victim's founders on the very amendment often cited for support. The Sixth Amendment guarantees a defendant the right to a "*public* trial."[105] These words suggest that the admission of persons to a trial -- not their exclusion -- is the constitutionally-protected value.

Nor do these words contain any implicit right to closure. As the Supreme Court's leading opinion on this provision explains, "While the Sixth Amendment guarantees to a defendant in a criminal case the right to a public trial, it does not guarantee the right to compel a private trial. 'The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right.'"[106] In short, "[t]he right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness."[107]

The application of the public trial right has obvious implications for victims of crime. "[P]ublic proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct . . . ."[108] "Public judicial proceedings have an important educative role . . . . The victim of the crime, the family of the victim, [and] others who have suffered similarly . . . have an interest in observing the course of a prosecution."[109] Victim concern about the course of a criminal prosecution stems from the fact that society has withdrawn "both from the victim and the vigilante the enforcement of criminal laws, but [it] cannot erase from people's consciousness the fundamental, natural yearning to see justice done " or even the urge for retribution."[110]

Of course, the right to a public trial can be overcome by competing interests.[111] Indeed, crime victims are often beneficiaries of narrowly-drawn court closure orders.[112] And the Sixth Amendment does not, by itself, confer rights on anyone other than the defendant.[113] But the limited claim here is not that the Sixth Amendment *requires* Congress and the states to admit crime victims -- only that it *permits* them to do so.[114] If the Sixth Amendment suggests, if anything, a right to have a crime victim admitted to a trial, surely the opposite reading is completely untenable.

b. *The Right to Confront Witnesses*.

The only other language in the Constitution that appears to have direct application to the claim that defendants can exclude crime victims suggests -- once again -- the opposite conclusion. The Sixth Amendment guarantees that in all criminal prosecutions that "the accused shall enjoy the right . . . to be confronted with the witnesses against him."[115] The provision guarantees, "[s]imply as a matter of English," that the defendant has "a right to meet face to face all those who appear and give evidence at trial."[116] In interpreting the right to confront, the Court recited a passage from Shakespeare concerning a face-to-face meeting between the defendant and victim: "Shakespeare was thus describing the root meaning of confrontation when he had Richard the Second say: 'Then call them to our presence -- face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak . . . .'"[117] The suggestion that the victim should have been excluded from the courtroom, at least while not testifying, hardly finds support in this vision of confrontation.

Naturally, the right to confront witnesses is not absolute. Crime victims are often the beneficiaries of this fact.[118] But, again, the point here is a limited one, specifically that the Constitution surely cannot be read as forbidding the presence of a victim at trial when the only relevant language suggests that, at least at some point in most cases, the victim's presence is required.

Confrontation contains a second component: the right to cross-examine opposing witnesses. Plainly that component of confrontation is satisfied even when victims remain in the courtroom for trial. Defendants sometimes suggest that their right of confrontation is somehow infringed because their cross-examination of the victim conceivably might have been more effective if she had not heard other witnesses testify. Even if such proof were made (and it seems unlikely in all but the most bizarre kinds of cases), that would not establish a constitutional violation. "The Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent the defense might wish."[119] Thus, in the *United States v. Owens*, the Supreme Court held that the right of confrontation was not denied by testimony from a witness who could not longer remember why he had accused the defendant. The Court explained, "The weapons available to impugn the witness' statement when memory loss is asserted will of course

not always achieve success, but successful cross-examination is not the constitutional guarantee."[120]

c. The Due Process Clause.

Because the only specific provisions of the Bill of Rights with an arguable connection to this issue suggest a defendant may not eject a victim from the courtroom during trial, the only remaining possibility is to somehow read such a right into the general provision guaranteeing that no person shall be deprived of "life, liberty, or property, without due process of law."[121] To ascertain the meaning of this general phrase, one could look either to historical understanding or contemporary societal norms. On either approach, there is no support for a defendant's right to exclude a victim from a trial.

The original meaning of the Bill of Rights does not embrace excluding a victim from the courtroom. While a limited right to sequester witnesses has historical roots,[122] courts have long recognized that a motion for sequestration is a request addressed to the trial court's discretion, not a demand to invoke a right. As explained in what appears to be the first Utah case to address the exclusion of witnesses, "The modification of the order [excluding witnesses] was a matter of discretion, as was also the making of it at first."[123] This is consistent with the early English doctrine.[124]

Tracking the English practice, many state courts had ruled that a motion to exclude witnesses is grantable only in the trial court's discretion.[125] To be sure, even under an abuse of discretion standard, some courts had occasionally found that denial of a sequestration order was an abuse.[126] But the fundamental point remains that generally in this country a request for witness sequestration has been viewed not as an entitlement of a defendant, but rather as a "matter of discretion."[127] Thus, "'whether and to what extent witnesses should be excluded in generally within the prerogative of the trial judge, and he should be allowed considerable latitude of discretion in making such orders.'"[128] This is not the material from which an nontextual, due process "right" can be manufactured.

Even more devastating to the notion that due process creates a constitutional right to exclude a crime victim is that "[i]t seems to be universally conceded that the trial court may authorize individual omissions" to a sequestration order.[129] Historically, a number of cases

upheld exclusions from sequestration orders for a crime victim or a family member of a crime victim.[130]

A related argument stems from the principle that a party to a lawsuit generally may not be excluded under a sequestration order.[131] This principle has venerable roots.[132] The rationale supporting such an approach is apparent. "[A] party's presence at the proceeding may be essential in assisting in the presentation of its case and otherwise protecting its interests by observing the conduct of the trial."[133] Accordingly, as the Advisory Committee to the Federal Rules of Evidence has explained, "Exclusion of persons who are parties would raise serious problems of confrontation and due process."[134] Criminal defendants are, of course, excepted from the operation of the rule because "[a] sequestration order affects a defendant in quite a different way from the way it affects a nonparty witness who presumably has no stake in the outcome of the trial."[135]

Given that a party -- a witness with a "stake in the outcome of the trial" -- has historically not been subject to exclusion, the fallacy of the argument for excluding victims becomes clear. If the victim in a criminal case brought a civil suit against the defendant for the same conduct, she would be a party with a "stake in the trial" and the defendant could not exclude her from the trial. Yet if she could remain in the courtroom in a civil suit, then the Due Process Clause cannot require a different result in a criminal trial over the same facts. The Due Process Clause applies to civil and criminal cases alike.[136] It would be strange reading of this clause to say that while due process probably requires the victim's presence in a civil action for a crime, it positively prohibits her presence in a criminal case for the same conduct.[137]

Further supporting this conclusion is the fact that, at the time the Bill of Rights was drafted, crime victims could very well have been parties (or, at least, quasi-parties) to criminal lawsuits with a "stake in the trial." Before the American Revolution, "[v]ictims themselves investigated, arrested, and prosecuted individuals who committed crimes against them."[138] As a result, "[a]t trial, generally, there were no lawyers for either the prosecution or the defense. Victims of crime simply acted as their own counsel, although wealthier crime victims often hired a prosecutor."[139]

Gradually over time the office of public prosecutor began to generally displace private prosecutions. The reasons for this change remain

obscure.[140] However, even today there is statutory or case law retaining some vestige of "private prosecution" in many states. One scholar notes some 34 states gives victims the right to seek private prosecution as an alternative to public prosecution in certain cases.[141] Thus, when the Framers of the Constitution drafted the Due Process Clause to the Bill of Rights, they would have envisioned at least some criminal actions brought by crime victims and a sequestration rule with an exceptions for parties. Accordingly, it seems unlikely that the Framers unexpressed and hitherto undiscovered intent was to exclude crime victims generally.

While the historical understanding of the Due Process Clause is enough to dispose the claim that there is a constitutional right to exclude victims,[142] the same conclusion is reached if one looks to contemporary practices. In particular, over the last decade there has a been an explosion of interest in insuring that a crime victim can remain in the courtroom during a criminal trial. These actions stem from "[a]n outpouring of popular concern for what has come to be known as victims' rights . . . ."[143]

A related problem is that the argument for excluding crime victims, taken to its logical conclusion, would invalidate provisions in the Federal Rules of Evidence and parallel rules in the majority of the states. Defendants often argue broadly that admitting crime victims to trial is unconstitutional because, if a victim remains in the courtroom during trial, she can tailor her testimony to bolster the other witness' testimony. Of course, that principle would exclude from trials not only victims but also police officers. Yet under federal and many state rules, police officers who are "case agents" are almost invariably allowed to observe trials.[144] The widely-accepted principle that a police officer can remain at trial, even when he is a witness, disproves the position that the Constitution enshrines a right to exclude victims who might "tailor" their testimony to others.

In sum, there is no constitutional footing for concluding that, under contemporary constitutional principles, a criminal defendant has a federal constitutional right to exclude crime victims from trials.

103. *See, e.g.*, Br. of Appellant at 18, *State v. Felix*, No. 950341-CA (Utah Ct. Apps. 1996).

104. *Accord Stephens v. State*, 720 S.W.2d 301, 303 (Ark. 1986) ("Nothing in the constitution touches on the exclusion of witnesses

during criminal trials. The Sixth Amendment to the Untied States Constitution . . . guarantee[s] an accused a speedy and public trial and to be confronted with witnesses against him. Otherwise [the] document contains [nothing] that might be seen as a right to limit those who may want to attend the trial.").

105. U.S. Const. amend VI (emphasis added).

106. *Gannett Co. v. DePasquale*, 443 U.S. 368, 382 (1979) (quoting *Singer v. United States*, 380 U.S. 24, 34-35 (1965)).

107. *Press-Enterprise Co v. Superior Court*, 478 U.S. 1, 7 (1986).

108. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 510, 509 (1984).

109. *Gannett Co. v. DePasquale*, 443 U.S. at 428 (Blackmun, J., concurring in part and dissenting in part).

110. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980) (plurality opinion).

111. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982).

112. *See, e.g., Douglas v. Wainwright*, 739 F.2d 531, 532-33 (11th Cir. 1984) ((per curiam) (partial closure of trial to public other than press and defendant's family justified for substantial reason of protecting rape victim from insult and embarrassment during testimony), cert. denied, 469 U.S. 1208 (1985).

113. *Gannett Co. v. DePasquale*, 443 U.S. 368, 391 (1979).

114. *See id*. at 385 ("it is important to distinguish between what the Constitution permits and what it requires").

115. U.S. Const., amend. VI.

116. *California v. Green*, 399 U.S. 149, 175 (1970) (Harlan, J., concurring).

117. *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) (quoting Richard II, Act I, sc. 1).

118. *See, e.g., Maryland v. Craig*, 497 U.S. 836, 844 (1990) (permitting child victim of sex offense to testify via closed-circuit television).

119. *United States v. Owens*, 484 U.S. 554, 559 (1988) (emphasis in original) (internal quotation omitted); *see also Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) ("trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of issues, the witness' safety . . . . .").

120. 484 U.S. at 560.

121. U.S. Const. amend. XIV.

122. *See generally* 6 J. Wigmore on Evidence § 1837, at 455-60 (Chadbourne rev. ed. 1974 & 1990 Supp.)

123. *People v. O'Loughlin*, 3 Utah 133, 1 P. 653, 657 (Utah 188

124. *See, e.g.*, Cook's Trial, 13 How. St. Tr. 322, 348 (1696) (L.C.J. Treby: "It is not necessary to be granted for the asking; for we are not to discourage or cast any suspicion upon the witnesses, when there is nothing made out against them; but it is a favour that the Court may grant, and does grant sometimes, and now does it to you; though it be not of necessity"); Vaughan's Trial, 13 How. St. Tr. 485, 494 (1696) (L.C.J. Holt: "You cannot insist upon it as you right, but only a favour that we may grant").

125. *See, e.g., Jones v. State*, 45 A.2d 350, 353 (Md. 1946) (allowing witnesses to stay in courtroom in discretion of trial court); State v. Barts, 38 A.2d 838, 844 (N.J. 1944) (same); State v. Quirk, 112 N.W. 409, 411 (Minn. 1907) (allowing rape victim to stay in courtroom); Barnes v. State, 7 So. 38, 39 (Ala. 1890) (same); *Parker v. State*, 10 A. 219, 219 (Md. 1887); *McLean v. State, 16 Ala. 672 (1849); Bellamack v. State, 294 P. 622 (1930). But cf. WIGMORE, supra* note, at section 1839 (arguing that the sequestration should be demandable as of right but recognizing that all but a "few courts" hold it "grantable only in the trial court's discretion"). 126. *See, e.g., Jones v. State*, 45 A.2d 350, 354 (Md. 1946).

127. *People v. O"Laughlin*, 3 Utah 133, 1 P. 653, 657 (1882).

128. *State v. Rangel*, 866 P.2d 607, 613 (Utah Ct. App. 1993) (quoting *Terry's Sales, Inc. v. Vander Veur*, 618 P.2d 29, 32 (Utah 1980)).

129. J. WIGMORE, *supra* note, at § 1841, at 472-73.

130. *See, e.g., Trammell v. State*, 97 S.W.2d 902, 905 (Ark. 1936) (murder victim's mother); *Norman v. State*, 175 S.E.2d 119, 120 (Ga. App.) (allowing victim to stay in courtroom if specified in indictment), cert. denied, 401 U.S. 956 (1972); *Coolman v. State*, 72 N.E. 568 (Ind. 1904) (prosecuting witness allowed to remain to aid the state's attorney); Butler v. State, 97 N.E.2d 492, 495 (Ind. 1951) (seven-year-old rape victim allowed to remain with her mother in the courtroom during trial); *State v. Pell*, 119 N.W. 154, 158 (Iowa 1909) (family of murdered man); State v. Smith. 180 N.W. 4, 7 (Iowa 1920) (rape victim's father allowed to remain); *Druin v. Commonwealth*, 124 S.W. 856, 858 (Ky. 1910) (father of underage rape victim allowed to remain); *McKinnon v. State*, 299 P.2d 535, 538 (Okl. Ct. App. 1956) (no error in allowing rape victim to remain "in the courtroom during the entire trial"); State v. Whitworth, 29 S.W. 595, 596 (Mo. 1895) (father of rape victim); *Milo v. State*, 214 S.W.2d 618, 618 (Tex. Ct. Crim. App. 1948) (rape victim allowed to remain in court after she testified); State v. Bonza, 72 Utah 177, 269 P. 480, 482 (Utah 1928) (sister of rape victim); Burford v. Commonwealth, 20 S.E.2d 509, 512 (Va. 1942) (victim of shooting exempted from operation of exclusionary rule).

131. *See, e.g., State v. Utah Merit System Council*, 614 P.2d 1259, 1262 (Utah 1980) ("Statutes in a number of jurisdictions establish the right of a party to an action to remain in attendance during the entire trial.").

132. *See* SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 432 at 474 n.3 (12th ed. 1866)("in those states in which parties are made competent witnesses, it would seem that the order of exclusion should not include them; and it is the better practice as general rule in these states, so far as it is known to be established, when the witnesses in a case are ordered to withdraw, to except parties from the order") (quoting *Pomeroy v. Badderley, Ry. & M.* 430).

133. *State v. Utah Merit System Council*, 614 P.2d 1259, 1262 (Utah 1980).

134. Advisory Comm. Note to Rule 615 of the Fed. Rules of Evidence.

135. *Geders v. United States*, 425 U.S. 80, 88 (1976).

136. *See* U.S. Const. amends. V, XIV (no person shall be deprived of "liberty" *or* "property" without "due process of law").

137. *Cf.* S. GREENLEAF, *supra* note, §432 at 474 (noting that the rule on exclusion of witnesses "in criminal and civil cases is [generally] the same").

138. Eikenberry, *supra* note, at 34.

139. Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POLICY 357, 367 (1986).

140. *See* Cassell, *supra* note, at 1380 & n.35 (reasons for transformation to system of public prosecutors unclear).

141. *See* William MacDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 648, 665 n.78 (1976) (collecting authorities allowing privately employed attorneys to assist the public prosecutor); *People v. Tidwell*, 4 Utah 506, 12 P. 61, 64 (1886) (concluding that the weight of authority allows relatives of the victim of a homicide to employ an attorney to assist in the prosecution).

142. *See, e.g.*, *United States v. Watson*, 423 U.S. 411 (1976) (rejecting defendant's claim for warrant to arrest based on historical understanding).

143. *Booth v. Maryland*, 482 U.S. 496, 520 (1987) (Scalia, J., dissenting), *overruled on grounds advocated in the dissent*, *Payne v. Tennessee*, 501 U.S. 808 (1991).

144. *See generally* FED. R. EVID. 615; 2 Gregory P. Joseph & Stephen A. Saltzburg, Evidence in America: The Federal Rules in the States 49.3 at 2 (1987 & 1994 Supp.) ("The second category, a non-natural party's designee, is most frequently applied in criminal cases to permit the government's chief investigating agent to assist the prosecution at trial.").

A victim's right to be heard does not undermine the accused's right to due process

The Minority Senators believe that the victim's right "reasonably to be heard" would "risk[] the denial of defendants' due process rights." The only case cited is that in which the victim in a capital case seeks to make a sentencing recommendation to the jury.

The minority view defends 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. The minority view calls this due process for the defendant. Victims call this unfair, unequal justice. The amendment does seek to eliminate this unfairness. The Minority Senators emphasize that sentencing decisions need to be reached "without fear, favor, or sympathy." Yet they tolerate a system that condones repeated pleas for sympathy for the defendant, but would deny to 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 amendment.

Here again, the testimony of Prof. Cassell is a complete 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 heard will interfere with a defendant's efforts to mount a defense. At least some of these objections appear to misunderstand the scope of the Amendment. For example, to prove that a victim's right to be heard is undesirable, objectors sometimes claim (as was done in the minority report of this Committee) that the proposed Amendment "gives victims a constitutional right to be heard, if present, and to submit a statement at *all* stages of the criminal proceeding."[30] From this premise, the objectors then postulate that the Amendment would make it "much more difficult for judges to limit testimony by victims *at trial*" and elsewhere to the detriment of defendants.[31] Yet, 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 . . . ."[32] 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.
>
> Proof that victims can properly be heard at these points comes from a legislative proposal by several dissenting members of this Committee. While criticizing the right to be heard in the constitutional amendment, these senators simultaneously sponsored federal

legislation to extend to victims in the federal system precisely the same rights.[33] 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 . . . ."[34] In defending their bill, they saw no difficulty with giving victims a chance to be heard,[35] a right that already exists in many states.[36]

A more detailed critique of the victim's right to be heard is found in a recent prominent article by Professor Susan Bandes.[37] Like most other opponents of the Amendment, she concentrates her intellectual fire on the victims' right to be heard at sentencing, arguing that victim impact statements are inappropriate narratives to introduce in capital sentencing proceedings. While rich in insights about the implications of "outsider narratives," the article provides no general basis for objecting to a victim's right to be heard at sentencing. Her criticism of victim impact statements is limited to *capital* cases, a tiny fraction of all criminal trials.[38]

Professor Bandes' objection is important to consider carefully because it presents one of the most thoughtfully developed cases against victim impact statements.[39] Her case, however, is ultimately unpersuasive. She agrees that capital sentencing decisions ought to rest, at least in part, on the harm caused by murderers. She explains that, in determining which murderers should receive the death penalty, society's "gaze ought to be carefully fixed *on the harm they have caused* and their moral culpability for that harm . . . ."[40] Bandes then contends that victim impact statements divert sentencers from that inquiry to "irrelevant fortuities" about the victims and their families.[41] But in moving on to this point, she apparently assumes that a judge or jury can comprehend the full harm caused by a murder without hearing testimony from the surviving family members. That assumption is simply unsupportable. Any reader who disagrees with me should take a simple test. Read an actual victim impact statement from a homicide case all the way through and see if you truly learn nothing new about the enormity of the loss caused by a homicide. Sadly, the reader will have no shortage of such victim impact statements to choose from. Actual impact statements from court proceedings are accessible in various places.[42] Other examples can be found in moving accounts written by family members who have lost a loved one to a murder. A powerful example is the collection of statements from families devastated by the Oklahoma City bombing collected in Marsha Kight's affecting *Forever Changed:*

Remembering Oklahoma City April 19, 1995.[43] Kight's compelling book is not unique, as equally powerful accounts from the family of Ron Goldman,[44] children of Oklahoma City,[45] Alice Kaminsky,[46] George Lardner Jr.,[47] Dorris Porch and Rebeca Easley,[48] Mike Reynolds,[49] Deborah Spungen,[50] John Walsh,[51] and Marvin Weinstein[52] make all too painfully clear. Intimate third party accounts offer similar insights about the generally unrecognized yet far- ranging consequences of homicide.[53]

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

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

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

of the crime.[59] Victim impact statements are thus easily justified because they provide the jury with a full picture of the murder's consequences.[60]

Bandes also contends that impact statements "may completely block" the ability of the jury to consider mitigation evidence.[61] It is hard to assess this essentially empirical assertion, because Bandes does not present direct empirical support.[62] Clearly many juries decline to return death sentences even when presented with powerful victim impact testimony, with Terry Nichols' life sentence for conspiring to set the Oklahoma City bomb a prominent example. Indeed, one recent empirical study of decisions from jurors who actually served in capital cases found that facts about adult victims "made little difference" in death penalty decisions.[63] A case might be crafted from the available national data that Supreme Court decisions on victim impact testimony did, at the margin, alter some cases. It is arguable that the number of death sentences imposed in this country fell after the Supreme Court prohibited use of victim impact statements in 1987[64] and then rose when the Court reversed itself a few years later.[65] This conclusion, however, is far from clear[66] and, in any event, the likelihood of a death sentence would be, at most, marginal. The empirical evidence in non-capital cases also finds little effect on sentence severity. For example, a study in California found that "[t]he right to allocution at sentence has had little net effect . . . on sentences in general."[67] A study in New York similarly reported "no support for those who argue against [victim impact] statements on the grounds that their use places defendants in jeopardy."[68] A recent comprehensive review of all of the available evidence in this country and elsewhere by a careful scholar concludes "sentence severity has not increased following the passage of [victim impact] legislation."[69] It is thus unclear why we should credit Bandes' assertion that victim impact statements seriously hamper the defense of capital defendants.

Even if such an impact on capital sentences were proven, it would be susceptible to the reasonable interpretation that victim testimony did not "block" jury understanding, but rather presented information about the full horror of the murder or put in context mitigating evidence of the defendant. Professor David Friedman has suggested this conclusion, observing that "[i]f the legal rules present the defendant as a living, breathing human being with loving parents weeping on the witness stand, while presenting the victim as a shadowy abstraction, the result will be to overstate, in the minds of the jury, the cost of

capital punishment relative to the benefit."[70] Correcting this misimpression is not distorting the decision-making process, but eliminating a distortion that would otherwise occur.[71] This interpretation meshes with empirical studies in non-capital cases suggesting that, if a victim impact statement makes a difference in punishment, the description of the harm sustained by the victims is the crucial factor.[72] The studies thus indicate that the general tendency of victim impact evidence is to enhance sentence accuracy and proportionality rather than increase sentence punitiveness.[73]

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

Given that our current system allows almost unlimited mitigation evidence on the part of the defendant, an argument for equal justice requires, if anything, that victim statements be allowed. Equality demands fairness not only *between* cases, but also *within* cases.[81] Victims and the public generally perceive great unfairness in a sentencing system with "one side muted."[82] The Tennessee Supreme

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

What? I'm not getting a chance to talk to the jury? He's not a defendant anymore. He's a murderer! A convicted murderer! The jury's made its decision. . . . His mother's had her chance all through the trial to set there and let the jury see her cry for him while I was barred.[84] . . . Now she's getting another chance? Now she's going to sit there in that witness chair and cry for her son, that murderer, that murderer who killed my little girl! Who will cry for Staci? Tell me that, who will cry for Staci?[85]

There is no good answer to this question,[86] a fact that has led to a change in the law in Florida and, indeed, all around the country. Today the laws of the overwhelming majority of states admit victim impact statements in capital and other cases.[87] These prevailing views lend strong support to the conclusion that equal justice demands the inclusion of victim impact statements, not their exclusion.

These arguments sufficiently dispose of the critics' main contentions.[88] Nonetheless, it is important to underscore that the critics generally fail to grapple with one of the strongest justifications for admitting victim impact statements: avoiding additional trauma to the victim. For all the fairness reasons just explained, gross disparity between defendants' and victims' rights to allocute at sentencing creates the risk of serious psychological injury to the victim.[89] As Professor Doug Beloof has nicely explained, a justice system that fails to recognize a victim's right to participate threatens "secondary harm" - that is, harm inflicted by the operation of government processes beyond that already caused by the perpetrator.[90] This trauma stems from the fact that the victim perceives that the system's resources "are almost entirely devoted to the criminal, and little remains for those who have sustained harm at the criminal's

hands."[91] As two noted experts on the psychological effects of crime have concluded, failure to offer victims a chance to participate in criminal proceedings can "result in increased feelings of inequity on the part of the victims, with a corresponding increase in crime-related psychological harm."[92] On the other hand, there is mounting evidence that "having a voice may improve victims' mental condition and welfare."[93] For some victims, making a statement helps restore balance between themselves and the offenders. Others may consider it part of a just process or may want to communicate the impact of the offense to the offender.[94] This multiplicity of reasons explains why victims and surviving family members want so desperately to participate in sentencing hearings, even though their participation may not necessarily change the outcome.[95]

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

[30]: S. Rep. 105-409 at 66 (minority views of Sens. Leahy, Kennedy and Kohl) (emphasis added).

[31]: *Id.* (minority views of Sens. Leahy, Kennedy and Kohl).

[32]: S.J. Res. 3, § 1 (1999).

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

[34]: S. Rep. 105-409 at 50 (minority views of Sens. Leahy and Kennedy).

[35]: *See, e.g.*, Cong. Rec., July 29, 1997, at S8275 (statement of Sen. Kennedy); Statement of Sen. Patrick Leahy on the Introduction of the Crime Victims Assistance Act, July 29, 1997.

[36]: *See* Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 Utah L. Rev. 1373, 1394-96.

[37]: *See* Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. Chi. L. Rev. 361 (1996).

[38]: *See id*. at 392-93. In a recent conversation, Professor Bandes stated that though her article focused on the capital context, she did not intend to imply that victim impact statements ought to be admissible in non- capital cases. Indeed, based on the proponents' argument that victim impact statements by relatives and friends are needed because the homicide victim is, by definition, unavailable, she believes such statements would seem even less defensible in non-homicide cases. This extension of her argument seems unconvincing, as the case for excluding victim statements is stronger for capital cases than for others. Not only are noncapital cases generally less fraught with emotion, but the sentence is typically imposed by a judge, who can sort out any improper aspects of victim statements. For this reason, even when victim impact testimony was denied in capital case to juries, courts often concluded that judges could hear the same evidence. *See Lightbourne v. Dugger*, 829 F.2d 1012, 1027 (11th Cir. 1987); State v. Card, 825 P.2d 1081, 1089 (Idaho 1991); State v. Johnson, 594 N.E.2d 253, 270 (Ill. 1992); State v. Beaty, 762 P.2d 519, 531 (Ariz. 1988), *cert. denied*, 491 U.S. 910 (1989); State v. Post, 513 N.E.2d 754, 759 (Ohio. 1987). It is also hazardous to generalize about such testimony given the vast range of varying circumstances presented by noncapital cases. *See generally* Stephen J. Schulhofer, *The Trouble with Trials; the Trouble with Us*, 105 Yale L.J. 825, 848-49 (1995) (noting differences between victim participation in capital and noncapital sentencings and concluding "wholesale condemnation of victim participation under all circumstances is surely unwarranted").

[39]: Several other articles have also focused on and carefully developed a case against victim impact statements. *See*, e.g., Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 Stan. L. Rev. 937, 986-1006 (1985); Donald J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 Am. Crim. L. Rev. 233 (1991). Because Professor Bandes' is the most current, I focus on it here as exemplary of the critics' position.

[40]: *See* Bandes, *supra* note 37, at 398 (emphasis added).

[41]: *See id.* at 398-99.

[42]: *See, e.g.*, Booth v. Maryland, 482 U.S. 496, 509-515 (1987); *A Federal Judge Speaks Out for Victims*, Am. Lawyer, Mar. 20, 1995, at 4 (statement by federal judge Michael Luttig at the sentencing of his father's murderers); United States v. McVeigh, 1997 WL 296395 (various victim impact statements at sentencing of Timothy McVeigh); United States v. Nichols, 1997 WL at 790551 (various victim impact statements at sentencing of Terry Nichols).

[43]: Marha Kight, Forever Changed: Remembering Oklahoma City, April 19, 1995 (1998).

[44]: The Family of Ron Goldman, His Name is Ron (1997).

[45]: Nancy Lamb and Children of Oklahoma City, One April Morning: Children Remember the Oklahoma City Bombing (1996).

[46]: Alice R. Kaminsky, The Victim's Song (1985).

[47]: George Lardner Jr., The Stalking of Kristin: A Father Investigates the Murder of His Daughter (1995).

[48]: Dorris D. Porch & Rebecca Easley, Murder in Memphis: The True Story of a Family's Quest for Justice (1997).

[49]: Mike Reynold & Bill Jones, Three Strikes and You're Out . . . A Promise to Kimber: The Chronicle of America's Toughest Anti-Crime Law (1996).

[50]: Deobrah Spungen, And I Don't Want to Live This Life (1984).

[51]: John Walsh, Tears of Rage: From Grieving Father to Crusader for Justice: The Untold Story of the Adam Walsh Case (1997). Professor Henderson describes Walsh as preaching a "gospel of rage and revenge." Lynne Henderson, *Revisiting Victim's Rights*, 1999 Utah L. Rev. 383, 395. This seems to me to misunderstand Walsh's efforts, which Walsh has explained as making sure that his son Adam "didn't die in vain." Walsh, *supra*, at 305. Walsh's Herculean efforts to establish the National Center for Missing and Exploited Children, *see id*, at 131-58, is a prime example of neither rage nor revenge, but rather a desirable public policy reform springing from a tragic crime.

[52]: Milton J. Shapiro with Marvin Weinstein, Who Will Cry for Staci? The True Story of a Grieving Father's Quest for Justice (1995).

[53]: *See, e.g.*, Shelley Neiderbach, Invisible Wounds: Crime Victims Speak (1986); Gary Kinder, Victim (1982); Joseph Wambaugh, The Onion Field (1973); Deborah Spungeon, Homicide: The Forgotten Victims (1998); Janice Harris Lord, No Time for Goodbyes: Coping with Sorrow, Anger and Injustice After a Tragic Death (4th ed. 1991).

[54]: Bandes, *supra* note 37, at 361 (*quoting Payne v. Tennessee*, 501 U.S. 808, 814-15 (1991)).

[55]: *Id.* at 361.

[56]: *Id.* at 401.

[57]: *See* Christopher B. Mueller & Laird C. Kirkpatrick, Evidence § 4.5 at 197 (1995).

[58]: *Cf.* Erez, *Who's Afraid of the Victim?*, *supra* note 69, at [13] ("legal professionals [in South Australia] who have been exposed to [victim impact statements] have commented on how uninformed they were about the extent, variety and longevity of various victimization, how much they have learned . . . about the impact of crime on victims") .

[59]: *See* Brooks Douglas, *Oklahoma's Victim Impact Legislation: A New Voice for Victims and Their Families*, 46 Okla. L. Rev. 283, 289 (1993) (offering an example of a jury denied the truth about the full impact of a crime).

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

[61]: Bandes, *supra* note 37, at 402.

[62]: The only empirical evidence Bandes discusses concerns the alleged race-of-the-victim effect found in the Baldus study of Georgia capital cases in the 1980s. This study, however, sheds no direct light

on the effect of victim impact statements on capital sentencing, as victim impact evidence apparently was not, and indeed could not have been at that time, one of the control variables. *See* Ga. Code Ann. §§ 17-10-1.1, -1.2 (Mich. Supp. 1986) (barring victim impact testimony). Had victim impact evidence been one of the variables, it seems likely that any race-of-the-victim effect would have been reduced by giving the jurors actual information about the uniqueness and importance of the life taken, thereby eliminating the jurors' need to rely on stereotypic, and potentially race-based, assumptions. In any event, there is no need to ponder such possibilities at length here because the race-of-the-victim "effect" disappeared when important control variables were added to the regression equations. *See* McCleskey v. Zant, 580 F. Supp. 338, 366 (D. Ga. 1984), *aff'd in part and rev'd in part*, 753 F.2d 877 (11th Cir. 1986), *aff'd*, 481 U.S. 279 (1987).

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

Garvey's methodology of surveying real juries about real cases seems preferable to relying on mock jury research, which suggests that victim impact statements may affect jurors' views about capital sentencing. *See* Edith Greene, *The Many Guises of Victim Impact Evidence and Effects on Jurors' Judgments*, 5 Psychology, Crime & Law 331 (1999); Edith Greene & Heather Koehring, *Victim Impact Evidence in Capital Cases: Doe the Victim's Character Matter?*, 28 J. Applied Social Psychology 145 (1998); James Luginbuhl & Michael Burkhead, *Victim Impact Evidence in Capital Trial: Encouraging Votes for Death*, 20 Am. J. Crim. Just. 1 (1995); *but cf.* Ronald Mazzella & Alan Feingold, *The Effects of Physical Attractiveness, Race, Socioeconomic Status, and Gender of Defendants and Victims on Judgments of Mock Jurors: A Meta-Analysis*, 1994 J. Applied Social Psychology 1315 (1994) (meta-analysis of previous research finds that effects of victim

characteristics on juror's judgments were generally inconsequential). Whether mock jury simulations capture real world effects is open to question generally. *See* Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confession*, 22 Harv. J.L. & Pub. Pol'y 523 (1999); Free v. Peters, 12 F.3d 700, 705-06 (7th Cir. 1994) (en banc). The concerns about the realism of mock jury research apply with particular force to emotionally-charged death penalty verdicts. *See* Mark Costanzo & Sally Costanzo, *Jury Decision Making in the Capital Penalty Phase*, 16 Law & Human Behavior 185, 191 (1992) ("the very nature of the [death] penalty decision may render it an inappropriate topic for jury simulation studies").

[64]: *See* Booth v. Maryland, 482 U.S. 496 (1987).

[65]: *See* Payne v. Tennessee, 501 U.S. 808 (1991).

[66]: A full discussion of the data is found in Appendix B of my forthcoming article in the *Utah Law Review*, *supra* note 17.

[67]: *See* U.S. Dep't of Justice, Nat'l Inst. Of Justice, Victim Appearances at Sentencing Hearings Under the California Victims' Bill of Rights 61 (1987) () (hereinafter NIJ Sentencing Study).

[68]: Robert C. Davis & Barbara E. Smith, *The Effects of Victim Impact Statements on Sentencing Decisions: A Test in an Urban Setting*, 11 Just. Quart. 453, 466 (1994); *accord* Robert C. Davis et al., Victim Impact Statements: Their Effects on Court Outcomes and Victim Satisfaction 68 (1990).

[69]: Edna Erez, *Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment* and *Enhancement of Justice*, 1999 Crim. L. Rev. 545 (hereinafter Erez, *Who's Afraid of the Victim?*); *accord* Edna Erez, *Victim Participation in Sentencing: And the Debate Goes On . . .* , 3 Int'l Rev. of Victimology 17, 22 (1994) ("[r]esearch on the impact of victims' input on sentencing outcome is inconclusive. At best it suggests that victim input has only a limited effect") (hereinafter Erez, *Victim Participation*). For further discussion of the effect of victim impact statements, *see, e.g.*, Edna Erez & Pamela Tontodonato, *The Effect of Victim Participation in Sentencing on Sentence Outcome*, 28 Criminology 451, 467 (1990); Susan W. Hillenbrand & Barbara E. Smith, Victims Rights Legislation: An Assessment of Its Impact on Criminal Justice Practitioners and Victims, A Study of the ABA Criminal Justice Section Victim Witness

Project 159 (1989); *see also* Edna Erez & L. Roeger, *The Effect of Victim Impact Statements on Sentencing Patterns and Outcomes: The Australian Experience*, 23 J. Crim. Justice 363 (1995) (Australian study); R. Douglas et al., *Victims of Efficiency: Tracking Victim Information Through the System in Victoria, Australia*, 3 Int'l Rev. of Victimology 95 (1994) (same); Edna Erez, *Victim Impact Statements and Sentencing Outcomes and Process: The Perspectives of Legal Professionals*, 39 British J. of Criminology 216 (forthcoming 1999) (same).

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

[71]: *See id.*

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

[73]: *See* Erez, *Perspectives of Legal Professionals*, *supra* note 69, at [30] (South Australian study); *see also* Edna Erez, *Victim Participation in Sentencing: Rhetoric and Reality*, 18 J. Crim. Justice 19 (1990).

[74]: *See, e.g.*, Bandes, *supra* note 37, at 408.

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

[76]: *See* Paul Gewirtz, *Victims and Voyeurs at the Criminal Trial*, 90 Nw. U.L. Rev. 863, 882 (1996).

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

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

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

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

[81]: Gewirtz, *supra* note 76, at 880-82; *see also* Beloof, *supra* note 89 (noting this value as part of a third model of criminal justice); President's Task Force on Victims of Crime, Final Report 16 (1982).

[82]: *Id.* at 520 (Scalia, J., dissenting); *accord* President's Task Force on Victims of Crime, Final Report 77 (1982); Gewirtz, *supra* note 76, at 825-26.

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

[84]: Weinstein was subpoenaed by the defense as a witness and therefore required to sit outside the courtroom. *See* Shapiro, *supra* note 52, at 215-16.

[85]: *Id.* at 319-20.

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

[87]: *See, e.g.,*Ariz..Rev. Stat. § 13- 4410(C),-4424, -4426; Md.Code (1957, 1993 Repl. Vol.), Art. 41, S 4-609(d); N.J. Stat. Ann. 2C:11-3c(6); Utah Code Ann. 76- 3-207(2). *See generally* State v. Muhammad, 678 A.2d 164, 177-78 (N.J. 1996) (collecting state cases upholding victim impact evidence in capital cases); Payne v. Tennessee, 501 U.S. at 821 (Congress and most states allow victim impact statements). These laws answer Bandes' brief allusion to the principle of *nulla poena sine lege* (the requirement of prior notice that particular conduct is criminal). *See* Bandes, *supra* note 37, at 396 n.177. Because murderers are now plainly on notice that impact testimony will be considered at sentencing, the principle is not violated. Murderers can also fully foresee the possibility of victim impact testimony. Murder is always committed against "a `unique' individual, and harm to some group of survivors is a consequence of a successful homicidal act so foreseeable as to be virtually inevitable." Payne v. Tennessee, 501 U.S. at 838 (Souter, J., concurring). Moreover, it is unclear the extent to which *nulla poena sine lege* is designed to regulate sentencing decisions. The principle is one that "condemns judicial crime creation," Bynum v. State, 767 S.W.2d 769,

773 n.5 (Tex. Ct. Crim. Apps. 1989), not crafting of appropriate penalties for a previously-defined crime like capital murder.

[88]: Professor Bandes and others also have suggested that the admission of victim impact statements would lead to offensive minitrials on the victim's character. *See, e.g.*, Bandes, *supra* note 37, at 407-08. However, a recent survey of the empirical literature concludes that "[c]oncern that defendants would challenge the content of [victim impact statements] thereby subjecting victims to unpleasant cross examination on their statements has also not materialized"). Erez, *Who's Afraid of the Victim?*, *supra* note 69, at 6. In neither the McVeigh nor Nichols trials, for example, did aggressive defense attorneys cross-examine the victims at any length about the impact of the crime.

[89]: For general discussion of the harms caused by disparate treatment, see Lee Madigan & Nancy C. Gamble, The Second Rape: Society's Continued Betrayal of the Victim 97 (1989); Linda E. Ledray, Recovery from Rape 125 (2d ed. 1994); Marlene A. Young, *A Constitutional Amendment for Victims of Crime: The Victims' Perspective*, 34 Wayne L. Rev. 51, 58 (1987); Deborah P. Kelly, *Victims*, 34 Wayne L. Rev. 69, 72 (1987); Douglas Evan Beloof, *A Third Model of Criminal Process: The Victim Participation Model*, 1999 Utah L. Rev. 289.

[90]: *See generally* Douglas Evan Beloof, *Constitutional Civil Rights of Crime Victim Participation: The Emergence of Secondary Harm as a Rational Principle*, in Beloof, *supra* note 124, at [10-18] (explaining concept of secondary harm); Spungeon, *supra* note 11, at 10 (explaining concept of secondary victimization).

[91]: Task Force on the Victims of Crime and Violence, Final Report of the APA Task Force on the Victims of Crime and Violence, 40 Am. Psych. 107 (1985).

[92]: Kilpatrick and Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 Wayne L. Rev. 7, 21 (1987) (collecting evidence on this point); Erez, *Who's Afraid of the Victim?*, *supra* note 69, at [9] ("[t]he cumulative knowledge acquired from research in various jurisdictions . . .. suggests that victims often *benefit* from participation and input"); Ken Eikenberry, *The Elevation*

of Victims' Rights in Washington State: Constitutional Status, 17 Pepperdine L. Rev. 19, 41 (1989); *see also*

Jason N. Swensen, *Survivor Says Measure Would Dignify Victims,* Deseret News (Salt Lake City), Oct. 21, 1994, at B4 (noting anguish widow suffered when denied chance to speak at sentencing of husband's murderer).

[93]: Erez, *Who's Afraid of the Victim?, supra* note 69, at [10].

[94]: *Id. see also* S. Rep. 105-409 at 17. .

[95]: Erez, *Who's Afraid of the Victim?, supra* note 69, at [10] ("the majority of victims of personal felonies wished to participate and provide input, even when they thought their input was ignored or did not affect the outcome of their case. Victims have multiple motives for providing input, and having a voice serves several functions for them").

A victim's right to expedite trial proceedings does not undermine the accused's sixth amendment rights

The Minority Senators assert that the language of the amendment giving victims the right to due consideration for their interests in avoiding unreasonable delay 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, 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 testimony 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"[111] 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."[112] Similarly Professor Mosteller advances the claim that this right "also affects substantial interests of the defendant and may alter the outcomes of cases."[113]

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.[114] 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.[115]

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.[116] Abusive delays appear to be particularly common when the victims of the crime is a child, for whom each day without the case resolved can seem like an eternity.[117] 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."[118] 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.[119] 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.[120] 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.

[111]: S.J. Res. 44, § 1.

[112]: S. Rep. 105-409, at 66 (minority view of Sens. Leahy, Kennedy and Kohl).

[113]: Mosteller, *Unnecessary Amendment*, *supra* note 18; Mosteller, *Recasting the Battle*, *supra* note 18, at 1706-07.

[114]: American Bar Association, Suggested Guidelines for Reducing Adverse Effects of Case Continuances and Delays on Crime Victims and Witnesses 4 (Dec. 1985).

[115]: S. Rep. 105-409 at 3; *see also* The Victims Right Amendment: Hearings Before the Senate Comm. on the Judiciary, 105th Cong., 2nd Sess. (Apr. 28, 1998) (statement of Paul G. Cassell at 17-18).

[116]: *See, e.g., 1997 Sen. Judiciary Comm. Hearing*, *supra* note 14, at 115-16; *see also* Paul G. Cassell & Evan S. Strassberg, *Evidence of Repeated Acts of Rape and Child Molestation: Reforming Utah Law to Permit the Propensity Inference*, 1998 Utah L. Rev. 145, 146.

[117]: *See* Cassell, *supra* note 36, at 1402-05.

[118]: Mosteller, *Unnecessary Amendment*, *supra* note 18.

[119]: *See* President's Task Force on Victims of Crime, Final Report 76 (1982).

[120]: *Cf.* Henderson, *supra* note 10 (conceding that "reasonableness" language might "allow judges to ferret out instances of dilatory tactics while recognizing the genuine need for time," but concluding that a constitutional amendment is not needed to confer this power on judges).

Earlier testimony was provided by Prof. Cassell in 1998:

Each victim . . . shall have the rights . . . to consideration for the interest of the victim in a trial 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. 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." The interests underlying a speedy trial, however, are not confined to defendant. Indeed, the Supreme Court has acknowledged that "there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interest of the accused. The inability of courts to provide a prompt trial has contributed to a large backlog of cases in urban courts which, among other things, enable defendants to negotiate more effectively for pleas of guilty to lesser offenses and otherwise manipulate the system." 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 does not speak of the rights and interest of the government." As a result, victims frequently face delays that by any measure must be regarded as unjustified and unreasonable, yet have no constitutional ability to challenge them. It is not a coincidence that these delays are found most commonly in cases of child sex assault. Children have the most difficulty in coping with extended delays. As an experienced victim-witness coordinator in my home state described the effects 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." Victims cannot heal from the trauma of the crime until the trial is over and the matter has been concluded.

To avoid such unwarranted delays, the Crime Victims' Rights Amendment requires that courts give "consideration" to the victims' interest "in a trial free from unreasonable delay." A number of states have already established similar protections for victims. As the wording of the federal provision makes clear, the courts are not required to follow victims demands for scheduling trial, but rather to give fair consideration to the victims' views. Moreover, the courts are directed to insure not against all delay, but rather against "unreasonable" delay. 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 defendant's speedy trial challenges in the wake of a delay. 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. These kinds of factors could also be applied victims' claims. For example, the length of the delay and the reason to the delay (factors (1) and (2)) would remain relevant in assessing victims claims. Whether and when a victim asserted the right (factor (3)) would also be relevant, although due regard should be given to the difficulty that frequently 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. Rather, the circumstances of the defendants' assertion of the right is given "strong evidentiary weight" in evaluating his claims. 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" must 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 impair." 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 defendants' 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. In the wake of the passage of the Crime 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 court record reasons for granting any continuance. As the President's 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."

Prof. Cassell's compelling, insightful analysis remains unaddressed by the Minority Senators. On this point and others, they construe the amendment as simultaneously an end to the Bill of Rights and meaningless. It is neither.

Constitutionalizing victims' rights does not raise equal protection concerns

The Minority Senators ask whether a defendant's sentence should depend on whether the victim is either articulate or inarticulate when making a sentencing impact statement. They suggest that because not all victim would speak with equal clarity, the amendment raises "equal protection concerns." Justice White, in his dissent in *Booth v. Maryland*, dispatched this concern quite easily, "… reliance on the alleged arbitrariness that can result from the differing ability of victims' families to articulate their sense of loss is a makeweight consideration: 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 in capital cases that the evidence and argument be reduced to the lowest common denominator."

The United States Supreme Court also addressed the Senators' concerns in *Payne v. Tennessee*:

> As a general matter, however, victim impact evidence is not offered to encourage comparative judgments of this kind--for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead *each* victim's "uniqueness as an individual human being," whatever the jury might think the loss to the community resulting from his death might be. The facts of *Gathers* are an excellent illustration of this: The evidence showed that the victim was an out of work, mentally handicapped individual, perhaps not, in the eyes of most, a significant contributor to society, but nonetheless a murdered human being.

> …
>
> Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities. We think the *Booth* Court was wrong in stating that this kind of evidence leads to the arbitrary imposition of the death penalty. In the majority of cases, and in this case, victim impact evidence serves entirely legitimate purposes. In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief. See *Darden v. Wainwright,* 477 U.S. 168, 179-183, 106 S.Ct. 2464, 2470-2472, 91 L.Ed.2d 144 (1986). Courts have always taken into consideration the harm done by the defendant in imposing sentence, and the evidence adduced in this case was illustrative of the harm caused by Payne's double murder.
>
> We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. "[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." *Booth,* 482 U.S., at 517, 107 S.Ct. at 2540 (WHITE, J., dissenting) (citation omitted). By turning the victim into a "faceless stranger at the penalty phase of a capital trial," *Gathers,* 490 U.S., at 821, 109 S.Ct. at 2216 (O'CONNOR, J., dissenting), *Booth* deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder.

Despite the repeated avowals that they support victims' rights, the Minority Senators again demonstrate opposition to the very participation that stands at the core of victims' rights.

The Proposed Amendment Is Not Purely Hortatory

The Minority Senators attempt to simultaneously maintain that the proposed

amendment will destroy the Bill of Rights, and yet, "fail to define real rights or to give real remedies." These two claims are incompatible. The truth lies with neither of these extremes. Rather, it lies on more moderate ground; the amendment will provide real and enforceable rights and those rights will not threaten the Bill of Rights.

4. Passage of the Proposed Amendment Will Help Crime Victims

The Minority Senators assert that the amendment could well "mak[e] the lives of crime victims more difficult." It is not unusual for crime victims to encounter paternalistic attitudes. However, perhaps the National Organization of Parents of Murdered Children, MADD, the National Organization for Victim Assistance, and the National Victims Constitutional Amendment Network, along with hundreds of state and local victim advocate groups are the better judge of this point. They all support the amendment.

D. THE PROPOSED AMENDMENT DOES NOT INFRINGE UNDULY ON STATES' RIGHTS

While it is certainly healthy to see the commitment these Senators have to "states' rights," it is odd that it should be addressed so vigorously in the context of criminal procedure. There are few areas of the law that have not 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 would the Minority Senators object 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." It seems that *only* the federal constitutional rights of the accused are not "an absolutist national pattern."

1. 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 inconclusive." The record before the Congress refutes this assertion. The experiment with state laws, even strong state laws is a failure. 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. 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 by prosecutors, in a third 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.

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

Constant repetition that the costs of the amendment are "potentially staggering" will not make them so. The Minority Senators offer no evidence to refute the testimony before the Senate from Arizona County Attorneys Barbara LaWall and Rick Romley that the costs of implementing the notice requirements of Arizona's Victims' Bill of Rights (which require notice of every proceeding to every victim) have been modest. Moreover, States will have the right to consider funding issues during the ratification process.

3. The Amendment Will Not Lead To Extensive Federal Court Supervision of State Law Enforcement Operations

If this assertion were true the "extensive federal court supervision" would already be occurring, only in the context of defendants' rights. In the real world this does not occur and it will not after the proposed amendment becomes law. In fact, the Congress fully controls the keys to the federal courthouse; it will be up to Congress to decide when and under what circumstances victims will gain access to those keys. 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. The offered argument, given the reality of defendants' federal rights, is much more excuse than reason.

4. The Amendment Will Not Adversely Affect the Authority of Governors to Grant Clemency

The Minority Senators argue that the amendment will "affect the clemency authority of State Governors." It is hard to know how the Minority Senators reached this conclusion. Again the text of the proposal itself answers the argument. Under the amendment crime victims would have the right "to be heard at any public … reprieve and pardon proceeding." In States that have no such proceeding antecedent to a governor's clemency decision the right would never attach because it only attaches to proceedings. In States that have such a proceeding the victim merely has the right to "reasonably … be heard." The position of the Minority Senators is again groundless.

E. THE WORDING OF THE PROPOSED AMENDMENT IS NOT PROBLEMATIC

The Minority Senators object to the fact that the amendment has gone through various revisions designed to accommodate the interests of the former Clinton Administration and of dissenting Senators, in an effort to reach consensus. They see this as a mark of the proposal's weakness. Rather, it is a mark of its strength and of the authors' devotion to an open and deliberative process.

1. The Term "Victim" Does Not Need Constitutional Definition

All of the questions raised by the Minority Senators about the lack of a constitutional definition for "victim" are easily answered, notwithstanding the evident angst in their assertions and hypotheticals. The States, and the Federal Government, within their respective jurisdictions, retain authority to define, in the first instance, conduct that is criminal. The power to define "victim" is simply a corollary of the power to define the elements of criminal offenses and, for State crimes, the power would remain with State Legislatures. The "victim" in a simple and straightforward sense, is the person against whom the offense is committed. If the person is killed or incapacitated by the offense, the person's lawful representative will stand in the shoes of the victim for the purpose of exercising the victim's rights. The definition of "lawful representative" will be established by each State according to its own decision. These are not hard concepts to understand or apply; indeed they are easily applied already in the States.

2. The Term "Violent Crime" Does Not Need Constitutional Definition

For the same reasons set forth in paragraph 1 above, the amendment need not define this term. The States and the Federal Government, within their respective jurisdictions will do so.

3. The Right to "Reasonable and Timely Notice of Any Public Proceeding Involving the Crime" Does Not Need Constitutional Definition

The standard of "reasonable and timely notice" is so well considered in American law that it is odd the Minority Senators would offer this objection. Suffice it to say settled legal concepts will not be hard to apply in this context. The amendment, by its terms and the context of those terms, will apply to criminal proceedings, not collateral civil lawsuits that arise out of the same facts. Any suggestion to the contrary is frankly silly. The proceeding must involve "the crime." Collateral damage lawsuits do not involve "the crime" defined by criminal statute, but rather tortious conduct defined by the common law.

4. The "Adjudicative Decisions" Clause Does Not Need Constitutional Definition

The Minority Senators read to much and too little into the simple words of the proposed amendment. The interests included in the "adjudicative decisions" clause -- safety, timeliness, and restitution -- simply require due consideration. The parade of horribles projected by the Minority Senators is evidence of rhetorical excess, but not problems with the text. The phrase extends to decisions reached as the result of an adjudicative process that determines the outcome of a contested issue that fairly and clearly involves a stated interest. It is no more complicated than that and should not lead to the hand-wringing speculation of "endless litigation" offered. The Minority Senators would require a degree of textual precision that is simply not possible in the drafting of a constitution without

running afoul of the opposite criticism that the amendment reads like a statute. Not even the Bill of Rights or the "due process" and "equal protection" clauses of the 14th Amendment could measure up to the mathematical precision required by the Minority Senators.

5. The Rights Are Enforceable

Yet again, the minority view argues inconsistent positions with equal vigor: the amendment's remedies will "undermine the criminal justice system" and the amendment "creates rights without remedies." Neither extreme is accurate. Efforts to enforce rights in State proceedings are now common-place. They have not exhausted judicial resources and have not delayed case outcomes. The Congress and the States within their respective jurisdictions will decide the process for enforcing the rights, with Congress being the final arbiter of which cases get into federal court.

6. The "Restrictions" Clause Strengthens the Amendment

The concern expressed regarding organized crime cases is resolved by the ability to close proceedings. The concern expressed about "mass" victim cases is resolved by permitting restrictions that are necessary for the administration of criminal justice. The concern expressed for domestic violence cases is resolved by permitting restrictions for safety. The amendment, by its terms, does not apply to civil cases, but only proceedings involving "*crime.*"

7. The "Hereby Established" Clause is Harmless

The Minority Senators concede their fear regarding this clause, that it will "undermine other constitutional rights" is "unlikely" to happen. Enough said.

8. There Are No Definitional Failures in S. J. Res. 1

The definitions needed for implementation of the amendment do not rely on the "enforcement clause." Instead, the definitional power lies in the legislative power of the States and the Congress.

F. CONCLUSION

Just over twenty years ago, President Ronald Reagan's Task Force on Victims of Crime issued its call for constitutional rights for crime victims. In concluding that a federal constitutional amendment was necessary, the President's 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.

Sadly, more than two decades later, crime victims remain "oppressively burdened" by our justice system. Consider how our system treats victims of domestic or sexual violence.

When the accused is arrested he is given a hearing, usually within 24 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.

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 are all too often 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.

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 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. Realizing that only fundamental reform through our most basic law will bring lasting justice and fairness to victims, the mainstream victims' rights movement has forged a bi-partisan coalition that seeks a federal crime victims' rights constitutional amendment. Senator Dianne Feinstein (D-CA) and Senator Jon Kyl (R-AZ) lead the coalition.

When passed and ratified by the States, the amendment 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. It will require that the victim's interests in restitution, safety, and avoiding unreasonable delay be given due consideration. It will establish for victims standing to enforce these rights. 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.

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. 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.

Only through a federal constitutional amendment will the goal of justice for crime victims be achieved. For 20 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 in the national sentiment." Victims' rights deserve no less. Those who argue that victims' rights don't need to be in the Constitution are simply condemning victims to perpetual second-class citizenship.

As constitutional scholar Prof. Larry Tribe of Harvard Law School, has pointed out, the rights proposed in S. J. Res. 1:

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

The Committee on the Judiciary of the United States Senate concluded that the Crime Victims Rights Amendment 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."

The National Governors Association in a resolution supporting a Federal constitutional amendment observed:

> "… 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."

Forty-two State Attorneys General, in supporting the Crime Victims Rights Amendment, wrote, "Despite the best intentions … crime victims are still denied basic rights to fair treatment and due process that should be the birthright of every citizen … only a federal constitutional amendment will be sufficient to change the culture of our legal system."

These authorities are a compelling rebuke to the voices of opposition. We seek a constitutional amendment because no government should be allowed to treat crime victims

the way they are treated today.

No government should refuse to tell a battered woman 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 has come to be the sad hallmark of our current system.