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## Victims' Rights Amendment: Proposals to Amend the United States Constitution in the 106<sup>th</sup> Congress

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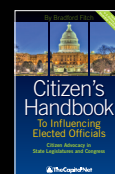


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### **ABSTRACT**

This is an examination of the S.J.Res. 3 and H.J.Res. 64, proposals to add a victims' rights amendment to the United States Constitution in the context of debate over issues associated with such amendments and in light of existing victims rights laws. It appears in abbreviated form as *Victims' Rights Amendments: Overview of Suggestions to Amend the Constitution*, CRS Report 97-736 A (April 13, 2000) and is a companion to *Victims' Rights Amendment: Background & Issues Associated With Proposals to Amend the United States Constitution*, CRS Report 97-735 A (April 13, 2000).

# Victims' Rights Amendment: Proposals to Amend the United States Constitution in the 106<sup>th</sup> Congress

## Summary

Thirty-three states have added a victims rights amendment to their state constitutions. Both House and Senate Judiciary Committees have held hearings on similar proposals to amend the United States Constitution, in the Senate on S.J.Res. 3 introduced by Senator Kyl for himself and Senator Feinstein and in the House on H.J.Res. 64 introduced by Representative Chabot. The Senate Committee has reported out S.J.Res. 3, S.Rept. 106-254, and the Senate debated the measure for two days in April.

The proposed amendment defines the participation of crime victims in state and federal official proceedings generated by the crimes committed against them. It gives them qualified notification, attendance, articulation, and consideration rights. Victims' safety must be considered in bail proceedings, victim restitution must be a consequence of conviction, and victims' interests must be weighed when the time tables for official proceedings are set or reset. Victims must be allowed to speak on questions of bail, plea agreements, sentencing, and pardons. They must be informed of, and not excluded from, crime-related public proceedings. They must be notified of escapes and releases and advised of their rights under the amendment.

Arguments put forward in support of an amendment include: (1) the criminal justice system is badly tilted in favor of criminal defendants and against victims' interests and a more appropriate balance should be restored; (2) the shabby treatment afforded victims has chilled their participation in the criminal justice system to the detriment of all; (3) society has an obligation to compensate victims; (4) existing statutory and state constitutional provisions are wildly disparate in their coverage, resulting in uneven treatment and harmful confusion throughout the criminal justice system; and (5) existing state and federal law is inadequate and likely to remain inadequate.

Critics argue to the contrary that: (1) the criminal justice system is not out of balance; misguided interjection of victim participation threatens to render the process inaccurate, and unfair; (2) if the mischief possible through a victims' rights amendment is avoided, the proposal becomes purely hortatory; the Constitution is no place for commemorative decorations; (3) the proposals are inconsistent with the basic notions of federalism; (4) the Senate proposal, limited to violent crimes, is too narrow; or conversely, the House proposal, applied to all felonies, is too broad; and (5) the proposals do not clearly preserve the constitutional rights of the accused.

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# Victims' Rights Amendment: Proposals to Amend the United States Constitution in the 106<sup>th</sup> Congress

## Introduction

A victims' rights amendment to the United States Constitution (S.J.Res. 3) was reported out of the Senate Judiciary Committee on October 4, 1999 without written report, 145 *Cong.Rec.* S11879. The Committee subsequently submitted an accompanying report, S.Rep. 106-254, on April 4, 2000, 146 *Cong.Rec.* S2106. A similar resolution (H.J.Res. 64), virtually identical with one exception, was previously introduced in the House. This is a brief discussion of the content of the resolutions and of some of the issues they raise.<sup>1</sup>

## Text

Upon two-thirds vote in each House and ratification by three quarters of the states, the amendment would provide:

SECTION 1.<sup>2</sup> *A victim of a crime of violence, as these terms may be defined by law, shall have the rights* [Each individual who is a victim of a crime for which the defendant can be imprisoned for a period longer than one year or any other crime that involves violence shall have the rights]:

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

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

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<sup>1</sup> For a more extensive background discussion see, Doyle, VICTIMS' RIGHTS AMENDMENT: BACKGROUND & ISSUES ASSOCIATED WITH PROPOSALS TO AMEND THE UNITED STATES CONSTITUTION, CRS REPORT 97-735 A (April 2000) from which some of this report has been borrowed; see also, Morgan, S.J.RES. 3, 106TH CONGRESS, A PROPOSAL TO AMEND THE CONSTITUTION OF THE UNITED STATES TO PROTECT THE RIGHTS OF CRIME VICTIMS, CRS Report RS20404 (Nov. 22, 1999).

<sup>2</sup> S.J.Res. 3 in italics; H.J.Res. 64 in brackets and underlined, where they differ; throughout references to S.J.Res. 3 are to the resolution as amended and reported out of Committee unless otherwise noted.

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

to the foregoing rights at a parole proceeding that is not public, to the extent those rights are afforded to the convicted offender;<sup>3</sup>

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

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

to an order of restitution from the convicted offender;

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

to reasonable notice of the rights established by this article.

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

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

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

SECTION 5. The rights and immunities established by this article shall apply in Federal and State proceedings, including military proceedings to the extent that the Congress may provide by law, juvenile justice proceedings, and proceedings in the District of Columbia and any commonwealth, territory, or possession of the United States.

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<sup>3</sup> H.J.Res. 64 locates this parole rights clause here after the pardon or commutation allocation clause; S.J.Res. 3 places it immediately after the sentencing allocation clause but before the pardon or sentence allocation clause.

## Background

Senator Kyl introduced S.J.Res. 3 on January 19, 1999, for himself and Senators Feinstein, Biden, Grassley, Inouye, DeWine, Landrieu, Snowe, Lieberman, Mack, Cleland, Coverdell, Smith of New Hampshire, Shelby, Hutchinson, Gregg, Thomas, Craig, Grams, Inhofe, Thurmond, Warner, Torricelli, Bryan, Hagel, Campbell, Murkowski, Bunning, Voinovich, Helms, Frist, Gram, Lott, and Hutchison.

Representative Chabot introduced H.J.Res. 64 on August 4, 1999 for himself and Representatives Ros-Lehtinen, Salmon, Barcia, Sessions, Brady of Texas, Pryce, LoBiondo, Bono, Shadegg, Smith of New Jersey, Horn, Cunningham, Ingham, Green of Wisconsin, Latourette, LaHood, Granger, Gallegly, Gekas, DeLay, Young of Alaska, Moran of Virginia, Foley, and Mryick.

Proposals had been offered in each body in the two earlier Congresses.<sup>4</sup> Hearings have been held in all three Congresses,<sup>5</sup> and a resolution reported out in the Senate late in the 105th and in this Congress.<sup>6</sup>

Thirty-three states have added victims' rights amendments of varying stripes to their state constitutions.<sup>7</sup> The remaining states and the federal government have enacted similarly individualistic general victims' rights statutes.<sup>8</sup>

<sup>4</sup> 104th Congress: S.J.Res. 52, S.J.Res. 65, H.J.Res. 173, and H.J.Res. 173; 105th Congress: S.J.Res. 6, S.J.Res. 44, H.J.Res. 71, and H.J.Res. 129.

<sup>5</sup> *A Proposed Constitutional Amendment to Establish a Bill of Rights for Crime Victims: Hearing Before the Senate Comm. on the Judiciary (Senate Hearing I)*, 104th Cong., 2d Sess. (1996); *Proposals to Provide Rights to Victims of Crime: Hearing Before the House Comm. on the Judiciary (House Hearing II)*, 105th Cong., 1st Sess. (1997); *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearing Before the Senate Comm. on the Judiciary (Senate Hearing II)*, 105th Cong., 1st Sess. (1997); *A Proposed Constitutional Amendment to Protect Crime Victims: Hearing Before the Senate Comm. on the Judiciary (Senate Hearing III)*, 106th Cong., 1st Sess. (1999). The hearings held before the Subcommittee on the Constitution of the House Judiciary Committee on March 23, 2000 (*House Hearing III*) have yet to be printed, but the prepared statements of the witness at the hearing are available on the Committee's webpage ([www.house.gov/judiciary](http://www.house.gov/judiciary)).

<sup>6</sup> S.Rep.No.105-409 (1998); S.J.Res. 3 was reported out without a printed report, 145 *Cong.Rec.* S11879 (daily ed. Oct. 4, 1999).

<sup>7</sup> ALA.CONST., Amend. 557; ALASKA CONST. art.I, §24; ARIZ.CONST. art.2, §2.1; CAL.CONST. art.I, §28; COLO.CONST. art.II, §16a; CONN. CONST. art.I, §8[b.]; FLA.CONST. art.I, §16(b); IDAHO CONST. art.I, §22; ILL. CONST. art.I, §8.1; IND.CONST. art.1, §13; LA.CONST. art.1, §25; KAN.CONST. art.15, §15; MD.D.OF RTS. art.47; MICH.CONST. art.I, §24; MISS. CONST. art. 3, §26A; MO.CONST. art.I, §32; MONT. CONST. Art.2, §28; NEB.CONST. Art.1, §28; NEV.CONST. art.1, §8; N.J. CONST. art.I, §22; N.MEX. CONST. art.II, §24; N.C. CONST. art.I, §37; OHIO CONST. art.I, §10a; OKLA.CONST. art.II, §34; ORE. CONST. art. I, §24; R.I.CONST. art.I, §23; S.C.CONST. art.I, §24; TENN.CONST. art.I, §35; TEX.CONST. art.I, §30; UTAH CONST. art.I, §28; VA.CONST. art.I, §8-A; WASH.CONST. art.I, §35; WIS. CONST. art.I, §9m.

<sup>8</sup> ARK.CODE ANN. §§16-90-1101 to 16-90-1115; DEL.CODE ANN. tit.11 §§9401 to 9419; GA.CODE ANN. §§ 17-17-1 to 17-17-165; HAW.REV.STAT. §§801D-1 to 801D-7; IOWA



## Purpose

Why pass a victims' rights amendment to the United States Constitution? Proponents have historically offered several reasons:

- the criminal justice system is badly tilted in favor of criminal defendants and against victims' interests and a more appropriate balance should be restored;
- the shabby treatment afforded victims has chilled their participation in the criminal justice system to the detriment of all;
- society has an obligation to compensate victims;
- existing statutory and state constitutional provisions are wildly disparate in their coverage, resulting in uneven treatment and harmful confusion throughout the criminal justice system; and
- existing state and federal law is inadequate and likely to remain inadequate.<sup>9</sup>

## The Need for Greater Balance

The balance argument is hardly new. Close to three quarters of a century ago, the Supreme Court observed that “[t]he law, as we have seen, is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend. . . . But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true,” *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).

The due process clauses and other defendants' rights components of the Constitution supplied the foundation for the defendant-focused jurisprudence of the '50's and '60's. It has also served as one of the catalysts for the early victims' rights

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CODE ANN. §§915.1 to 915.100; KY.REV.STAT.ANN. §§421.500 to 421.550; ME.REV.STAT.ANN. tit.17-A §§1171 to 1175; MASS.GEN.LAWS ANN. ch.258B §§1 to 13; MINN.STAT.ANN. §§611A.01 to 611A.90; N.H.REV.STAT.ANN. §21-M:8-k; N.Y.EXEC.LAW §§640 to 649; N.D.CENT.CODE §§12.1-34-01 to 12.1-34-05; PA.STAT.ANN. tit.18 §11.201; S.D.COD.LAWS ANN. §§23A-28C-1 to 23A-28C-6; VT.STAT.ANN. tit.13 §§5301 to 5321; W.VA.CODE §§61-11A-1 to 61-11A-8; WYO.STAT. §§1-40-201 to 1-40-210.

The states with constitutional amendments generally have comparable statutes, and virtually every state has victims' rights accommodations scattered throughout their codes.

<sup>9</sup> 145 *Cong.Rec.* S707-S708 (remarks of Sen. Kyl), S709-S710 (remarks of Sen. Feinstein) (daily ed. Jan. 19, 1999); see also, S.Rep.No. 106-254 at 2 (“This, then is the purpose of the Crime Victims' Rights Amendment: That we make it part of our highest law to honor the humanity and dignity of crime victims within our borders who entrust the Government to seek justice for them”); for justifications for a victims' rights amendment generally see, Hudson, *The Crime Victim and the Criminal Justice System: Time for a Change*, 11 PEPPERDINE LAW REVIEW 23, 29-33 (1984).

movement.<sup>10</sup> A call for greater constitutional protection of victims' rights seems a predictable feature of the belief that the criminal justice system must involve a greater balance between the rights of victim and those of the defendant.<sup>11</sup>

Critics might suggest that victims already enjoy equal constitutional rights with the accused. The victim who repels an unlawful assault with excessive force may find himself criminally charged. In that case, he is entitled to exactly the same constitutional rights as his attacker.<sup>12</sup>

They may also point out that, many of the constitutional rights afforded the accused benefit the victim as well. They are designed to ensure that the guilty are convicted and that the innocent are not. The accused benefits when the innocent are not convicted; the victim benefits when the guilty are.<sup>13</sup>

The more common response to the balance argument, however, has been that the balance argument "represents a fundamental misunderstanding of the nature and purpose of individual constitutional rights."<sup>14</sup> In the same vein, one of the motives critics attribute to victims' rights advocates is a rejection of a basic premise of the American criminal justice system. They suggest victims believe the criminal justice process constitutes an unjustifiable waste of time in a procedure that should be reduced to identifying and then punishing suspects; they consider "suspect",

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<sup>10</sup> E.g., *House Hearing III* (prepared statement of Rep. Chabot)("Currently, the U.S. Constitution is completely silent on victims' rights, while it speaks volumes as to the rights of the accused")

<sup>11</sup> 145 *Cong.Rec.* S707 (daily ed. Jan. 19, 1999)(remarks of Sen. Kyl) ("statutory and State constitutional provisions are always subservient to the Federal Constitution; so, in cases of conflict, the defendants' rights — which are already in the U.S. Constitution — will always prevail. Our amendment will correct this imbalance"); 145 *Cong.Rec.* S709 (daily ed. Jan. 19, 1999)(remarks of Sen. Feinstein ("nowhere in the text of the U.S. Constitution does there appear any guarantee of rights for crime victims. To rectify this disparity, Senator Kyl and I are putting forth is Crime Victims' Rights Amendment"); see also, *The Victims' Bill of Rights: Are Victims All Dressed Up With No Place to Go?* 8 ST. JOHN'S JOURNAL OF LEGAL COMMENTARY 251, 276 (1992); Young, *A Constitutional Amendment for Victims of Crime: A Victim's Perspective*, 34 WAYNE LAW REVIEW 51, 64-65 (1987); Eikenberry, *Victims of Crime/Victims of Justice*, 34 WAYNE LAW REVIEW 29, 48 (1987).

<sup>12</sup> Cf., Carter, *When Victims Happen to Be Black*, 97 YALE LAW JOURNAL 420 (1988)(discussing the case of Bernhart Goetz charged with attempted murder and assault and ultimately convicted for possession of an unlicensed handgun following a subway confrontation with muggers).

<sup>13</sup> Logic might suggest that the victim also suffers when the guilty escape unpunished because an innocent individual has been accused instead, but this view is rarely heard.

<sup>14</sup> Dolliver, *Victims' Rights Constitutional Amendment: A Bad Idea Whose Time Should Not Come*, 34 WAYNE LAW REVIEW 87, 91 (1987); Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARVARD JOURNAL OF LAW AND PUBLIC POLICY 357, 381 (1986).

“accused”, “defendant”, and “guilty” synonymous terms. No process is too quick; no punishment sufficiently severe; acquittals are an injustice.<sup>15</sup>

The balance argument has special relevancy in the context of an amendment to the United States Constitution. No state victims’ rights constitutional amendment or state or federal statute may supersede the rights the United States Constitution affords the criminally accused. No federal statute or state constitutional provision can roll back the demands of due process or any of the other rights granted by the Bill of Rights. An amendment to the United States Constitution can. A federal victims’ rights amendment, if so intended, by definition amends any prior inconsistent provision in the Constitution.<sup>16</sup> Unless the proposed rights are made subordinate to defendant rights in case of conflict, either defendant rights must be subordinate or a prosecution in which they are in conflict must be avoided, abandoned, or adjusted.

## Obligations & the Need for Victim Participation

There seems to be little dispute that shabby treatment of victims makes them less inclined to report crimes, to step forward as witnesses, or to otherwise participate in the process.<sup>17</sup> But here and with respect to the third justification of an amendment — society’s obligation to compensate for its failure to protect its citizenry — the issue is not as much the identification of the problem as the selection of a solution.

## Inadequacy of Alternatives

The adequacy of alternatives, now and in the future, lies at the heart of the dispute. Proponents find present law wanting.<sup>18</sup> Opponents find present law

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<sup>15</sup> E.g., *House Hearing*, 86-7; Abrahamson, *Redefining Roles: The Victims’ Rights Movement*, 1985 UTAH LAW REVIEW 517.

<sup>16</sup> See e.g., Lamborn, *Victim Participation in the Criminal Justice Process: The Proposals for a Constitutional Amendment*, 34 WAYNE LAW REVIEW 125, 182, 185 (1987).

<sup>17</sup> *The Victim’s Veto: A Way to Increase Victim Impact on Criminal Case Dispositions*, 77 CALIFORNIA LAW REVIEW 417 (1989); Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISSISSIPPI LAW JOURNAL 515, 518 (1982).

<sup>18</sup> *House Hearing III* (prepared statement of Rep. Chabot)(“You might then ask why a constitutional amendment is necessary? The answer is simple: a clear pattern has emerged in courthouses around the country that judges and prosecutors are reluctant to apply or enforce existing laws when they are routinely challenged by criminal defendants”); *id.* (prepared statement of Andrea Rehkamp, Mothers Against Drunk Driving)(“As long as defendants’ rights are specified in the United States Constitution and victim rights are specified in state-by-state statutes, the victims’ role in the justice system will always be that of second-class citizen”); see also, S.Rep.No. 106-254 at 8-9; Young, *A Constitutional Amendment for Victims of Crime: The Victims’ Perspective*, 34 WAYNE LAW REVIEW 51, 52 (1987); *The Victims’ Bill of Rights: Are Victims All Dressed Up With No Place to Go?* 8 ST.JOHN’S JOURNAL OF LEGAL COMMENTARY 251, 273-74 (1992); Kyl & Feinstein, *Victims’ Rights: Do We Need a Constitutional Amendment to Ensure Fair Treatment — Yes: Victims Deserve Justice No Less Than Defendants*, 82 AMERICAN BAR ASSOCIATION JOURNAL 82 (Oct.

workable and fear an amendment would make matters worse.<sup>19</sup> The specifics of the proposal provide the specifics for much of the debate. The more robust the amendment, the more civil libertarians and the states are likely to object; the more restrained the amendment, the more victims' rights advocates are likely to question its sufficiency.

## The Need for Uniformity

Victims' rights are different in every jurisdiction in the United States. Some find this diversity a reason for an amendment to the United States Constitution.<sup>20</sup> There is the implication that the presence of many individual standards contributes to the failure of existing provisions. Diversity breeds uncertainty that leads to a failure to comply and a failure to claim.

Critics argue that a victims' rights amendment would essentially federalize the state criminal justice process, denying the people of a particular state and their elected officials the right to decide the range of victim rights and services that should be a part of their state criminal justice systems.<sup>21</sup>

Uniformity obviously would require compliance to a single standard imposed by the amendment to the United States Constitution. Some victims' advocates, however, see the amendment as providing a constitutional minimum beyond which the states remain free to establish more exacting victims' rights.<sup>22</sup>

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1996); *Senate Hearing II* at 12 (prepared statement of Prof. Laurence H. Tribe, Harvard University Law School).

<sup>19</sup> *House Hearing* at 143-45 (prepared statement of Ellen Greenless, President National Legal Aid and Defender Association); *Senate Hearing II* at 99 (prepared statement of Robert J. Humphreys, President of the Virginia Association of Commonwealth's Attorneys); *Senate Hearing II* at 162-63 (prepared statement of the National Clearinghouse for the Defense of Battered Women).

<sup>20</sup> *House Hearing* at 15 (prepared statement of Senator Feinstein) ("Some people question why this needs to be a constitutional amendment. The reasons for this are: . . . to establish consistent, uniform rights for the millions of crime victims in our country").

<sup>21</sup> S.Rep.No.105-409 at 48 (minority views of Sen. Thompson); cf., *Senate Hearing II* at 87 (testimony of James E. Doyle, Wisconsin Attorney General).

<sup>22</sup> *Senate Hearing II* at 64; *House Hearing* at 61. The Senate Report supports this view, S.Rep.No. 106-254 at 29 ("In other words, the amendment sets a national 'floor' for the protecting of victims rights, not any sort of 'ceiling.' Legislatures, including Congress, are certainly free to give statutory rights to all victims of crime, and the amendment will in all likelihood be an occasion for victims' statutes to be re-examined and, in some cases, expanded").

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## Constitutional Rights of Victims

### Overview

The proposed amendment defines the participation of crime victims in state and federal official proceedings generated by the crimes committed against them. It gives them qualified notification, attendance, articulation, and consideration rights. Victims' safety must be considered in bail proceedings, victim restitution must be a consequence of conviction, and victims' interests must be weighed when the time tables for official proceedings are set or reset. Victims must be allowed to speak on questions of bail, plea agreements, sentencing, and pardons. They must be informed of, and not excluded from, crime-related public proceedings. They must be notified of escapes and releases and advised of their rights under the amendment.

### Victims of Crime

The scope of a crime victims' rights amendment begins with who it considers a victim and what it considers a crime. In common parlance, the concept of victim is fairly broad. It encompasses the appealing and not so appealing victim — the rape victim and the “ripped off” drug dealer; the casualties of gang warfare, both bystander and participant; the middleman in a pyramid scheme,<sup>23</sup> the defendant who is acquitted or whose conviction is overturned,<sup>24</sup> and the elderly person defrauded the savings of a lifetime.

The term often contemplates parents and other members of the family of a deceased, incapacitated, or juvenile victim. In the case of property crimes, it may include anyone with an interest in the property, e.g., an owner, a tenant, a mortgage holder, or an insurer. In a commercial setting, it embodies those who are economically disadvantaged by a crime even if they suffered no direct injury to an identifiable property interest. In the case of civil rights violations, hate crimes, and terrorism, any member of the group targeted for intimidation may correctly be counted a victim. In the case of public solicitation for prostitution, public drug trafficking, and other crimes with elements of environmental nuisance, anyone who lives in, does business in, or has occasion to visit any affected geographical area might

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<sup>23</sup> A scheme involving an enterprise whose only income generating activity is the solicitation of successive layers of investors, each layer paid out of the investments of their successors, *United States v. Gold Unlimited, Inc.*, 177 F.3d 472, 475 (6th Cir. 1999).

<sup>24</sup> E.g., Dr. Sam Shepard's conviction for the murder of his wife was only overturned after he had served nine years in prison, *Shepard v. Maxwell*, 384 U.S. 333 (1966); DNA and other evidence, strongly corroborating his innocence, was only fully developed after his death, *Pittsburgh Post-Gazette*, A8 (March 30, 1997).

*House Hearing* at 90 (prepared statement of Elisabeth A. Semel on behalf of the National Association of Criminal Defense Lawyers)(“Just last week, three men were released from Illinois' death row, having spent 18 years in prison for a double murder they did not commit. As one of the men, Kenneth Adams, rightly said: ‘We are victims of this crime too . . . I want people to know that this could happen to anybody and that's a crime’”).

be listed among the victims.<sup>25</sup> The various “Megan’s Law” efforts seem to suggest that at least in the public mind, the concept of victim also may encompass potential victims under some circumstances.<sup>26</sup> The governmental entities that must bear the cost of investigating and prosecuting crime could legitimately be consider its victims. Finally, the concept of criminal law is based upon the premise that a criminal act is a transgression against the social order, against the commonweal, the body politic; a crime is a wrong committed against all of us.

## Contemporary Practices

Most state constitutional amendments do not define the classes of crime victims for whom they establish rights.<sup>27</sup> Statutory definitions are diverse and more than a few jurisdictions recognize different definitions for different purposes. The corporate victim of a crime, for example, may be entitled to restitution but not to notice of the release of an offender.<sup>28</sup> Under some victims’ rights statutes, “victims” may be limited to the victims of felonies or of specific violent crimes.<sup>29</sup> In several instances, states have modified their definitions of “victim” to exclude certain classes of victims, e.g., prisoners, codefendants, and the like.<sup>30</sup>

Under federal law, only victims of violent crimes or of sexual abuse have the right to make a victim impact statement at sentencing, F.R.Crim.P. 32(c)(3) (E), but anyone who incurs direct harm as a consequence of a federal crime is considered a victim for purposes of restitution, trial attendance, and victim notification rights, 18 U.S.C. 3663(a)(2), 3510; 42 U.S.C. 10607((e)(2).

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<sup>25</sup> *Community Input at Sentencing: Victim’s Right or Victim’s Revenge?* 75 BOSTON UNIVERSITY LAW REVIEW 187 (1995).

<sup>26</sup> See also, Abrahamson, *Redefining Roles: The Victims Rights Movement*, 1985 UTAH LAW REVIEW 517, 526 (“The victim has become middle class America. We are all potential victims. Beginning in the 1960s, there has been an increase of crime – or at least a perception of an increase of crime. More and more people began to see themselves and their family members as victims of crime or as potential victims”).

<sup>27</sup> The majority create rights for victims “as defined by law”, e.g., ALA.CONST. Amend.No. 557; CONN.CONST. Art.1, §8[b], but see, N.J.CONST. Art.1, ¶22; N.MEX.CONST. Art.II, §24.

<sup>28</sup> E.g., MINN.STAT.ANN. §611A.01 (“‘Victim’ means a natural person who incurs loss or harm as a result of a crime . . . and for purposes of [restitution] also includes a corporation that incurs loss or harm as a result of crime . . .”).

<sup>29</sup> E.g., W.VA.CODE §61-11A-2 (“‘victim’ means a person who is a victim of a felony); S.D.COD.LAWS ANN. §23A-28C-4 (“victim mean any person being the direct subject of . . . a crime of violence, simple assault [in a domestic context, or drunk driving]”); KY.REV.STAT.ANN. §421.500 (“‘victim’ means an individual who suffers . . . harm as a result of the commission of a crime classified as stalking, unlawful imprisonment, use of a minor in a sexual performance . . .”).

<sup>30</sup> E.g., ILL.COMP.LAWS ANN. ch. 725, §130/3; IND.CODE ANN. §35-40-4-8.

## Past Proposals

The drafters of past victims' rights amendments to the United States Constitution have opted for one of three alternatives: (1) crimes of violence;<sup>31</sup> (2) felonies and crimes of violence;<sup>32</sup> (3) crimes of violence and such other crimes as should be legislatively designated.<sup>33</sup>

The Senate Judiciary Committee Report accompanying S.J.Res.44 in the 105<sup>th</sup> Congress anticipated that Congress and the state legislatures would further define the terms "victim" and "crime of violence" and observed that those terms might include the victims of potentially violent crimes such as burglary, solicitation to commit a crime of violence, unlawful display of a firearm, or stalking.<sup>34</sup>

## Current Proposals

*A victim of a crime of violence, as these terms may be defined by law, shall have the rights to . . . (S.J.Res. 3)*

*Each individual who is a victim of a crime for which the defendant can be imprisoned for a period longer than one year or any other crime that involves violence shall have the rights to. . . (H.J.Res. 64)*

The Senate Resolution, like several of the state victims' rights amendments, covers victims as that "term[] may be defined by law," that is, it leaves the definition of "victim" for legislative and judicial development. The amendment empowers Congress to enact implementing legislation, §3. The Senate Judiciary Committee report asserts that the power to define the class of victims to whom the amendment would apply was by implication to be shared by Congress and the states.<sup>35</sup> Under this

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<sup>31</sup> S.J.Res. 44 (105th Cong.)(“a victim of a crime of violence as those terms may be defined by law”); H.J.Res. 129 (105th Cong.)(“a crime of violence”).

<sup>32</sup> H.J.Res. 71 (105th Cong.)(“victim of a crime for which the defendant can be imprisoned for a period longer than one year or any other crime that involves violence”); H.J.Res. 173 (104th Cong.)(substantively the same).

<sup>33</sup> S.J.Res. 6 (105th Cong.)(“victim of a crime of violence, and other crimes that Congress may define by law”); S.J.Res. 52 (104th Cong.)(“victim . . . of a crime of violence and other crimes as may be defined by [state or federal] law”); H.J.Res. 174 (104th Cong.)(same).

<sup>34</sup> S.Rep.No. 105-409 at 24. At least one member expressed concern that the “crime of violence” classification might prove both too narrow and too inclusive, S.Rep.No. 105-409 at 42 (additional views of Sen. Hatch)(using the elderly victims of an impoverishing fraud and the participants in a barroom fracas as examples).

<sup>35</sup> S.Rep.No.106-254 at 28 (“The Committee anticipates that Congress will quickly pass an implementing statute defining ‘victim’ for Federal proceedings. Moreover, nothing removes from the states their plenary authority to enact definitional laws for purposes of their own criminal system. . . . Since the legislatures define what is criminal conduct, it makes equal sense for them to also have the ability to further refine the definition of ‘victim’”).



construction, the states would be permitted to paint the scope of the amendment as broadly or as narrowly as they chose, subject to preemptive federal legislation.<sup>36</sup>

The House Resolution's posture is much the same. It does not use the phrase "as defined by law," but the same result is implicit in its failure to provide a definition and in its grant of implementing authority to Congress. Its distinctive language and origin in the House, however, may remove it from the shadow of the Senate Report. Moreover, its use of the phrase "Each individual who is a victim of a crime" (as opposed to the Senate's "A victim of a crime") may limit the scope of the House Resolution to victims who are human beings.<sup>37</sup>

The House Resolution's definition of "crime" seems at once more specific and more sweeping than that of the Senate Resolution. The Senate Resolution reaches only those who are the victims of "crimes of violence." The term admits to more than few plausible definitions. A "crime of violence" might include only those crimes during which a victim sustained physical injury — murder, manslaughter, rape, assault and battery.<sup>38</sup> A more expansive definition would encompass crimes which include within their elements the use of physical force or the threat of physical force against the person of another — bringing in robbery and, under some statutes, kidnaping, arson, burglary, extortion, conspiracy, attempt, solicitation, and facilitation.<sup>39</sup> A more expansive version yet would embrace crimes which include within their elements the use of physical force or the threat of physical force against the person *or property* of another, adding malicious mischief and other property crimes to the list.<sup>40</sup> Finally, a

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<sup>36</sup> S.Rep.No.106-254 at 41 ("This provision is similar to existing language found in section 5 of the 14th amendment to the Constitution. This provision will be interpreted in similar fashion to allow Congress to 'enforce' the rights, that is, to insure that the rights conveyed by the amendment are in fact respected. At the same time, consistent with the plain language of the provision, the Federal Government and the States will retain their power to implement the amendment. For example, the States will, subject to the Supremacy Clause, flesh out the contours of the amendment by providing definitions of 'victim' of crime and 'crimes of violence'").

<sup>37</sup> But see, *Clinton v. New York*, 524 U.S. 417, 428-29 (1998)(noting that although "individual" ordinarily refers to natural persons, in the context of the statute before it Congress intended a broader meaning).

<sup>38</sup> See e.g. FBI, UNIFORM CRIME REPORTS: 1995 at 5 (1996) that classifies murder, nonnegligent manslaughter, forcible rape, robbery, and aggravated assault as violent crimes.

<sup>39</sup> E.g., 28 U.S.C. 2901(c) ("Crime of violence' includes voluntary manslaughter, murder, rape, mayhem, kidnaping, robbery, burglary or housebreaking in the nighttime, extortion accompanied by threats of violence, assault with a dangerous weapon or assault with intent to commit any offense punishable by imprisonment for more than one year, arson punishable as a felony, or an attempt or conspiracy to commit any of the foregoing offenses").

<sup>40</sup> E.g., 18 U.S.C. 16 ("crime of violence' means — (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"); 18 U.S.C. 924(c)(3) ("crime of violence' means an offense that is a felony and — (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial

“crime of violence” might be described to include those crimes that do not themselves necessarily involve the use or threat of physical force but with which violence is often associated, e.g., drug trafficking, gambling, gun running, or usury.<sup>41</sup> Using much the same language as its predecessor, the Senate Report opines that include any offense which in fact involves an act of violence may properly be considered a crime of violence, i.e., any crime where “the victim is physically injured, is threatened with physical injury, or reasonably believes he or she is being physically threatened by criminal activity of the defendant,” S.Rept. 106-254 at 29.

Whatever the expanse of “crimes of violence,” the coverage of the House Resolution is more inclusive, for it embraces all felonies (“a crime for which the defendant can be imprisoned for a period longer than one year”) as well as any nonfelony that “that involves violence.” Thus for example, the House version would cover victims of most federal fraud laws (and their state equivalents), while its Senate counterpart almost assuredly would not.<sup>42</sup>

Both proposals further confine the amendment’s boundaries by defining the proceedings to which its rights attach. In both cases, “The rights and immunities established by this article shall apply in Federal and State proceedings, including

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risk that physical force against the person or property of another may be used in the course of committing the offense”).

The Senate Report in the 105th Congress thought burglary and sexual offenses against children might reasonably be considered crimes of violence, S.Rept. 105-409, at 24.

<sup>41</sup> E.g., 18 U.S.C. 3156(4)(“crime of violence” means — (A) an offense that has an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another; (B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense; or (C) any felony under chapter 109A [relating to sexual abuse] or chapter 110 [relating to sexual exploitation of children]”); 42 U.S.C. 3796ii-2(“violent offender” means a person who — (1) is charged with or convicted of an offense, during the course of which offense or conduct — (A) the person carried, possessed, or used a firearm or dangerous weapon; (B) there occurred the death of or serious bodily injury to any person; or (C) there occurred the use of force against the person of another, without regard to whether any of the circumstances described in subparagraph (A), (B), or (C) is an element of the offense or conduct of which or for which the person is charged or convicted; or (2) has one or more prior convictions for a felony crime of violence involving the use or attempted use of force against a person with the intent to cause death or serious bodily harm”).

<sup>42</sup> S.Rep.No. 106-254 at 29 (“not all crimes will be violence crimes covered by the amendment. For example, the amendment does not confer rights on victims of larceny, fraud, and other similar offenses”); cf., S.Rep.No.105-409, at 41-2 (additional views of Sen. Hatch expressing discomfort that deserving victims of devastating nonviolent crimes were not covered the language of S.J.Res. 44); the Justice Department expressed the concern that the House language would have an adverse law enforcement impact and “could inhibit the initiation of such prosecutions involving wide-scale harms, such as certain frauds or environmental violations,” *House Hearings III* (prepared statement of Assistant Attorney General Eleanor D. Acheson); the Judicial Conference of the United States voiced comparable fears over the potential impact of the House language on the federal courts, *House Hearings III* (prepared statement of Judge Emmet G. Sullivan).

military proceedings to the extent that the Congress may provide by law, juvenile justice proceedings, and proceedings in the District of Columbia and any commonwealth, territory, or possession of the United States,” §5. As a consequence, the amendment would not apply in tribal courts, whose criminal jurisdiction is admittedly limited. Perhaps of greater significance, it would apply in a court martial context only to the extent Congress subsequently provides by statute.<sup>43</sup>

## Public Proceedings - Notice and Attendance

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

The amendment proposals afford victims a right to notice of and to attend relevant proceedings subject to four facial limitations:

- victims are only entitled to *reasonable* notice;
- they are entitled *not to be excluded*, as opposed to having an absolute right to attend;
- the notice and attendance rights apply only with respect to *public proceedings*; and
- the rights attach to those proceedings *related to the crime* but only those related to the crime.

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<sup>43</sup> Military tribunals already have a victims’ rights regulatory requirement in place, Pischnotte & Quinn, *The Victim and Witness Assistance Program*, 39 AIR FORCE LAW REVIEW 57 (1996), but not all victims’ rights advocates are impressed with its effectiveness, *Senate Hearing II* at 38 (prepared statement of Marlene A. Young, Executive Director, National Organization for Victim Assistance)(“It is time now to address the frustration of victims in the military justice system who still are unable to receive restitution for crimes committed against them”); see also, *Senate Hearing II* at 56 (prepared statement of Beverly Harris Elliot, President, National Coalition Against Sexual Assault)(“The military criminal system is especially in need of radical reform. In this system, victims/survivors may never find out what happens to their case because, unlike civilian procedures, all records in military courts are closed, thus, the victim/survivor has no way to obtain information. Perhaps most disturbing is the fact that if the offender is military personnel, the case may be directed to a commanding officer as a matter of individual discipline rather than criminal prosecution. With the constitutional amendment, a victim/survivor who files a criminal report on a military base would have the right to be informed of decisions relating to the crime. These rights would greatly shift the balance from secrecy to open information and accountability”).

The Senate Judiciary Committee Report explains with respect to similar language in an earlier proposal that the extent of the application was left to Congress because “of the complicated nature of military justice proceedings, including proceedings held in times of war,” S.Rep.No. 106-254 at 42.

## Reasonable notice

Over time, the courts will most likely define what level of effort is necessary to satisfy the amendment's reasonable notice requirement. The Senate Report notes that heroic efforts are not expected but due diligence is, S.Rep.No.106-254 at 30. The purpose for the right to notice is to provide a gateway to the amendment's other rights. What is reasonable might be judged by whether the efforts are calculated to permit meaningful exercise of the amendment's other rights.<sup>44</sup> The Senate Report explains that in rare circumstances notice by publication might be reasonable,<sup>45</sup> although in most instances due process requirements are more demanding.<sup>46</sup>

Under this analysis, notice given after a proceeding has been conducted would seem unreasonable because the want of timely notice might constitute an effective exclusion from the proceedings or might defeat the right to make a victim impact statement.<sup>47</sup> Assuming the amendment contemplates timely notice, it is unclear whether it also anticipates the proceedings must await timely notice if need be.

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<sup>44</sup> The right to notice of hearings at which an individual has a right to be heard is a component of due process under existing law. "The Supreme Court has long made clear that due process requires notice reasonably calculated to provide actual notice of the proceedings and a meaningful opportunity to be heard. In *City of West Covina v. Perkins*, 119 S.Ct. 678, 681 (1999), the Court explained the notice requirement in these words: A primary purpose of the notice required by the Due Process Clause is to ensure that the opportunity for a hearing is meaningful. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)('Th[e] right to be heard has little reality or worth unless one is informed that the matter [affecting one's property rights] is pending and can choose for himself whether to appear or default, acquiesce or contest'), *Nazarova v. INS*, 171 F.3d 478, 482-83 (7th Cir. 1999).

<sup>45</sup> S.Rep.No.106-254 at 30 ("In rare mass victim cases (i.e., those involving hundreds of victims), reasonable notice could be provided by mean[s] tailored to those unusual circumstances, such as notification by newspaper or television announcement").

<sup>46</sup> *Small v. United States*, 136 F.3d 1334, 1336 (D.C.Cir. 1998)("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. at 314. As *Mullane* made clear, the Due Process Clause does not demand actual, successful notice, but it does require a reasonable effort to give notice. '[P]rocess which is mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.' *Mullane*, 339 U.S. at 315. . . . [T]he *Mullane* Court observed that '[c]hance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper.' *Id.* Almost fifty years after *Mullane*, in an increasingly populous and mobile nation, newspaper notices have virtually no chance of alerting an unwary person that he must act now or forever lose his rights").

<sup>47</sup> On a related question, "[i]t has long been established that due process allows notice of a hearing (and its attendant procedures and consequences) to be given solely in English to a non-English speaker if the notice would put a reasonable recipient on notice that further inquiry is required," *Nazarova v. INS*, 171 F.3d at 483. Due process, however, does include the right of a non-English speaker to have interpreter present in order to participate in a proceeding at which the individual has a right to be heard, *Id.* at 484-85.

The issue may be most challenging in the area of bail. The amendment proposals grant both a right to consideration of the victim's safety and a right to reasonable notice and attendance. Under normal circumstances it might not be unusual for an accused to be released on recognizance or bail before authorities could reasonably be expected to provide victims with timely notice. It may be that the amendment contemplates postponement of the accused's initial judicial appearance until after victims can be notified and can be given a reasonable period of time to prepare and present their views. On the other hand, the amendment may anticipate that a failure of timely notice in a bail context can be adequately rectified without postponement by recourse to the provision in the amendment that permits the bail decision to be revisited at the behest of a victim.<sup>48</sup>

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<sup>48</sup> “. . . Nothing in this article shall provide grounds to . . . reopen any proceeding . . . except with respect to conditional release . . .” §2.

Of course, the result may be the same under either approach – an accused is detained longer than would otherwise be the case in the name of victims' rights, S.Rep.No.105-409 at 44 (additional views of Sen. Hatch)(“This provision in particular has perhaps the greatest potential to collide with the legitimate right of defendants. All defendants and convicts have a constitutionally protected liberty interest in conditional release, once such release is granted. Permitting victims to move to reopen such proceedings or invalidate such rulings, would, of course, necessitate the re-arrest and detention of released defendants and convicts, likely implicating their liberty interest”). To the which the sponsors respond, “Chairman Hatch has pointed out that the amendment should not be construed as potentially implicating the ‘liberty’ interest of criminal defendants by allowing victims to reopen bail or other proceedings after a defendant has been released. We agree with the Chairman that defendants are entitled to due process before bail is revoked. . . . The amendment does *not* give victims any unilateral right to revoke bail, for example, but, rather, simply extends to victims the right ‘to *consideration* for the safety of the victim in determining any conditional release from custody.’ That consideration, of course, will be give consistently with due process for the defendant. Today, of course, due process permits a prosecutor to ask a court to reconsider bail decision. The amendment simply follows that well-trodden path in affording victims a similar right,” S.Rep.No. 106-254 at 46 (additional views of Sens. Kyl and Feinstein)(emphasis in the original).

## Not to be excluded

The Constitution promises the accused a public trial by an impartial jury<sup>49</sup> and affords him the right to be present at all critical stages of the proceedings against him.<sup>50</sup> It offers victims no such prerogatives. Their status is at best that of any other member of the general public and, in fact, the Constitution screens the accused's right to an impartial jury trial from the over exuberance of the public.<sup>51</sup>

Moreover, victims are even more likely to be barred from the courtroom during trial than members of the general public. Ironically, the victim's status as a witness, the avenue of most likely access to pre-trial proceedings, is the very attribute most likely to result in exclusion from the trial.

Sequestration, or the practice of separating witnesses and holding outside the courtroom all but the witness on the stand, is of ancient origins and "consists merely in preventing one prospective witness from being taught by hearing another's

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<sup>49</sup> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence," U.S.Const. Amend. VI (emphasis added).

<sup>50</sup> *United States v. Gibbs*, 182 F.3d 408, 436 (6th Cir. 1999), citing, *United States v. Gagnon*, 470 U.S. 522, 526 (1985), and *Faretta v. California*, 422 U.S. 806, 819n.15 (1975).

<sup>51</sup> *Woods v. Dugger*, 923 F.2d 1454, 1459-460 (11th Cir. 1991)(finding a Sixth Amendment violation in a case involving the murder of a prison guard, marked by extensive pretrial publicity, in a community where the prison system employed a substantial percentage of the population, and in which more than half of the members in attendance during the course of the trial were uniformed prison guards); *Norris v. Risley*, 918 F.2d 828, 834 (9th Cir.1990)(finding a Sixth Amendment violation in a kidnapping/rape case in which women wearing "Women Against Rape" buttons permeated the courtroom and its environs)("we find the risk unconstitutionally great that these large and boldly highlighted buttons tainted Norris's right to a fair trial both by eroding the presumption of innocence and by allowing extraneous, prejudicial considerations and cross-examination"). *Norris* also noted a similar view among the state courts, "A decision of the West Virginia Supreme Court is informative regarding the wearing of buttons during trial. *State v. Franklin*, 327 S.E.2d 449 (W.Va. 1985) involved a prosecution for driving under the influence of alcohol, resulting in death. During the trial, various spectators from an organization campaigning under the acronym MADD (Mothers Against Drunk Driving) wore buttons inscribed with the capital letters MADD. Most jurors knew what the initials stood for. In reversing the conviction and remanding for a new trial, the court noted that the trial court's 'cardinal failure . . . was to take no action whatever against a predominant group of ordinary citizens who were tooth and nail opposed to any finding that the defendant was not guilty.' *Id.* at 455," 918 F.2d at 832.

testimony.”<sup>52</sup> The principle has been embodied in Rule 615 of the Federal Rules of Evidence and in state rules that adopt the federal practice.<sup>53</sup>

Victims’ advocates contend that it should be fundamental that individuals may attend the entire trial involving the crime visited upon them. Yet an absolute right to attend all proceedings may sometimes be unfair, and in some instances even a violation of due process or the right to trial by an impartial jury.

In response to the debate, about a third of the states now permit victims to attend all court proceedings regardless of whether the victim is scheduled to testify;<sup>54</sup> another group allows witnesses who are victims to attend subject to a showing as to why they should be excluded;<sup>55</sup> a few leave the matter in the discretion of the trial court;<sup>56</sup> and some have maintained the traditional rule — witnesses are sequestered whether they are victims or not.<sup>57</sup>

Subject to Rule 615 of the Federal Rules of Evidence which permits exclusion of victim/witnesses, the federal statutory victims’ bill of rights recognizes the right of victims “to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial,” 42 U.S.C. 10606(b)(4).

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<sup>52</sup> VI WIGMORE ON EVIDENCE §§1837, 1838 (1940 ed.).

<sup>53</sup> F.R.Evid. 615 (“At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party’s cause”).

<sup>54</sup> A few accomplish this result by requiring the victims who are witnesses to testify first and then be allowed to remain, e.g., VT.R.EVID. 615 (“At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion; after a witness’ testimony has been completed, however, the witness may remain within the courtroom, even if the witness subsequently may be called upon by the other party or recalled in rebuttal, unless a party shows good cause for the witness to be excluded. . .”).

<sup>55</sup> E.g., CONN.CONST. art.I, §8[b.](the victim has the right to attend the trial and all other court proceedings the accused has the right to attend, unless such person is to testify and the court determines that such person’s testimony would be materially affected if such person hears other testimony); FLA.CONST. Art.1, §16(b)(victims have the right to be present at all critical stages of the criminal proceedings to the extent that the victim’s presence does not interfere with the constitutional rights of the accused).

<sup>56</sup> E.g., WASH.R.EVID. 615 (emphasis added)(“At the request of a party the court *may* order witnesses excluded so that they cannot hear the testimony of other witnesses . . .”). The federal rule in contrast declares that the court “shall” order sequestration under such circumstances.

<sup>57</sup> E.g., HAW.R.EVID. 615.

By Bradford Fitch

Includes  
U.S. Constitution and  
Declaration of Independence



# Citizen's Handbook

## To Influencing Elected Officials

Citizen Advocacy in  
State Legislatures and Congress



**TheCapitolNet**



Victims who attend a trial are not disqualified from appearing as witnesses at subsequent sentencing hearings absent a danger of unfair prejudice, jury confusion, of the jury being misled, or as constitutionally required.<sup>58</sup>

It has been suggested that the phrase “not to be excluded” in the amendment was originally used to avoid the claims that the amendment entitled victims to transportation to relevant proceedings or to have proceedings scheduled for their convenience or to free them from imprisonment, S.Rep.No.106-254 at 31. In this it would be unlike the defendant’s right to attend. Yet like the defendant’s right to attend, the use of the phrase in earlier proposals was thought to permit exclusion of the victim for disruptive behavior, excessive displays of emotion, and other forms of impropriety for which a defendant might be excluded, *Id.*

Under existing law, the usual rationale for exclusion is to prevent victim/witnesses from having their testimony colored by the testimony of other earlier witnesses.<sup>59</sup> Victim exclusion is one of the features of existing law that the amendment seeks to overcome. How its command may be implemented is less apparent. In single victim cases, both policies can be honored simply by having the victim testify first. The two policies might also be reconciled by refusing to allow attending victims to testify, since the right not to be excluded does not include the right to testify and the right to be heard does not extend to trial testimony. The issue might be resolved alternatively on victim-defendant equality grounds. The defendant is constitutionally entitled to attend the entire trial even if he is ultimately to be a witness. The amendment may be seen as an equalizer. If so, it may not preclude defense counsel from commenting upon a victim’s opportunity to color his or her testimony.<sup>60</sup>

## Public proceedings

One obvious purpose of limiting the rights to *public* proceedings is to avoid opening the grand jury to victim notice and attendance rights. Victim participation in the investigation or in plea discussions between the prosecutor and defense

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<sup>58</sup> 18 U.S.C. 3510(b). See also, *United States v. McVeigh*, 958 F.Supp. 512, 514-15 (D.Colo. 1997)(permitting victims to attend trial with the observation that the court’s control over any subsequent sentencing hearing would permit protective measures against any prejudicial impact).

<sup>59</sup> “The purpose behind the sequestration of witnesses is to discourage and expose fabrication, inaccuracy and collusion. *see* [F.R.Evid. 615] Notes of Advisory Committee on Proposed Rules, and to minimize the opportunity that each witness will have to tailor his testimony,” *United States v. Hickman*, 151 F.3d 446, 454 (5th Cir. 1998).

<sup>60</sup> Compare, *Portuondo v. Agard*, 120 S.Ct. 1119, 1127 (2000)(“Allowing comment upon the fact that a defendant’s presence in the courtroom provides him a unique opportunity tailor his testimony is appropriate — and indeed, given the inability to sequester the defendant, sometimes essential — to the central function of the trial, which is to discover the truth.”) Some suggest that comments on a victim-witness’ credibility are preferable to exclusion as a means of ensuring a fair trial for the accused, cf., S.Rep.No. 105-409 at 82 (additional views of Sen. Biden).

counsel are similarly beyond the pale, if for no other reason than that such activities lack the tribunal-like characteristics of *proceedings*.

There may be some question as to what standards should be used to determine whether proceedings should be considered “public” for purposes of the amendment and whether the public or confidential character of proceedings is subject to either judicial or legislative adjustments. These questions seem unlikely to arise except for related civil proceedings because the public nature of the criminal proceedings is fairly well defined by existing law.

A public trial is among the rights the Sixth Amendment promises the criminally accused. Even where the accused agrees to closed proceedings, First Amendment free press interests may require open proceedings. When asked whether particular proceedings may be closed to the press, the courts have considered “whether the place and process have historically been open to the press and general public . . . [and] whether public access plays a significant positive role in the functioning of the particular process in question,” *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 8 (1986). When asked to close particular proceedings over the objections of the accused, the courts, using the standards developed in press access cases, have demanded that “the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure,” *Waller v. Georgia*, 467 U.S. 39, 48 (1984)(holding the closure of an entire suppression hearing unjustified under the standards of *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501 (1984)).

Whether victims have notice and attendance rights under the amendment that apply to juvenile proceedings in jurisdictions where those proceedings are not public remains to be seen. Traditionally, such proceedings are not public,<sup>61</sup> although public delinquency proceedings are becoming more common.

It is similarly unclear whether the amendment’s notice and attendance rights apply to historically public events that are now ordinarily held privately. More precisely does the amendment empower immediate family members of a murder victim to be notified of and attend the execution of the defendant? Historically, capital punishment and other types of corporal punishment were publicly administered.<sup>62</sup> Victims and anyone else so inclined might attend.<sup>63</sup> Most state laws

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<sup>61</sup> Federal district courts are authorized to convene the relatively infrequent federal juvenile delinquency proceedings “in chambers or otherwise” (i.e., in private or otherwise), 18 U.S.C. 5032.

<sup>62</sup> *The Executioner’s Song: Is There a Right to Listen?* 69 VIRGINIA LAW REVIEW 373, 375-78 (1983).

<sup>63</sup> At the time of public executions, rape and robbery, as well as murder, were capital offenses in a number of states. As a consequence, direct victims of a capital offense might well be available to witness the execution of the offender. Since it appears that only crimes involving the taking of a human life may today be made punishable by death, only the family

now call for executions to occur in the presence of official witnesses, rather than being conducted publicly. Those who attend are either identified by statute<sup>64</sup> or their selection is left to the discretion of prison authorities.<sup>65</sup> A handful permit two or three members of the victim's immediate family to be present.<sup>66</sup> And in several, although the number of official witnesses may be limited, prison officials enjoy relatively unlimited discretion which they would appear free to exercise to the benefit of victims or their representatives.<sup>67</sup> State law ordinarily determines who may attend federal executions.<sup>68</sup>

## Related to the crime

The breadth of the phrase “related to the crime” evokes similar questions. The phrase clearly contemplates more than trial. Pre-trial and post-trial hearings involving motions to dismiss, to suppress evidence, to change venue, to grant a new trial, and any of the host of similar proceedings that flow to or from a criminal trial

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or friends of a victim would be available to attend.

<sup>64</sup> E.g. CONN.GEN.STAT.ANN. §54-100 (“ . . . Besides the warden or deputy warden and such number of correction officers as he thinks necessary, the following persons may be present at the execution, but no others: The sheriff of the county in which the prisoner was tried and convicted, the commissioner, a physician of a correctional institution, a clergyman in attendance upon the prisoner and such other adults, as the prisoner may designate, not exceeding three in number, representatives of not more than five newspapers in the county where the crime was committed, and one reporter for each of the daily newspapers published in the city of Hartford”).

<sup>65</sup> E.g., ARIZ.REV.STAT.ANN. §13-705 (“The director of the state department of corrections or the director’s designee shall be present at the execution of all death sentences and shall invite the attorney general and at least twelve reputable citizens of the director’s selection to be present at the execution. The director shall, at the request of the defendant, permit clergymen, not exceeding two, whom the defendant names and any persons, relatives or friends, not exceeding five, to be present at the execution. The director may invite peace officers as the director deems expedient to witness the execution. No persons other than those set forth in this section shall be present at the execution nor shall any minor be allowed to witness the execution”).

<sup>66</sup> Only one state, New Jersey, appears to explicitly bar victims’ relatives from the execution, N.J.STAT.ANN. §2C:49-7[d.](“the commissioner shall not authorize or permit any person who is related by either blood or marriage to the sentenced persons or to the victim to be present at the execution. . .”).

<sup>67</sup> COLO.REV.STAT.ANN. §16-11-404 (“ . . . There shall also be present [at the execution of a death sentence] a physician and such guards, attendants and other persons as the executive director or his designee in his discretion deems desirable, not to exceed fifteen persons. . .”).

<sup>68</sup> 18 U.S.C. 3596 (“ . . . the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed. If the law of the State does not provide for implementation of a sentence of death, the court shall designate another State, the law of which does provide for the implementation of a sentence of death, and the sentence shall be implemented in the latter State in the manner prescribed by such law”).

seem to come within the meaning of the term. The Senate Report, for instance, specifically mentions appellate proceedings, S.Rep.No.106-254 at 30-1.

The same Report indicates that the term “release. . . from custody related to the crime” was understood to include “a release [from custody] of a defendant found not guilty of a crime by reason of insanity and then hospitalized in custody for further treatment,” *Id.* at 36. Crime relatedness, understood in such terms, would presumably carry victim notice and attendance rights to a fairly wide range of civil and quasi-civil proceedings, e.g., habeas and civil forfeiture proceedings, deportation and extradition hearings, and administrative disciplinary reviews (if conducted publicly before a tribunal) to name but a few.

There have been suggestions that the phrase may encompass notice and attendance rights for the victims of a defendant’s past crimes, or of charges that have been dropped or dismissed, or of charges resulting in acquittal.<sup>69</sup>

## Right to be heard

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

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

This right to “be heard” and “to submit a statement” in each of three kinds of proceedings might be construed as the right to communicate (right to submit a statement) and the right to have the communication carry determinative weight (the right to be heard). The position of the two components and the interjection of the phrase “if present” seems to make it more plausible to read the clause as creating a right to communicate either in person (to be heard, if present) or otherwise (to submit a statement). The amendment’s later, separate listing of a victim’s right to have his safety considered in the course of bail proceedings also argues against any conclusion that alone the right to be heard contemplates a right to have the message carry determinative weight.

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<sup>69</sup> “Frequently, criminal defendants are suspected to have committed crimes for which they are never charged or for which charges are later dropped, even though significant evidence may exist that the defendant did indeed commit the crime. Do the victims of these crimes have rights under the proposed amendment? If so, are they the same as the rights of the victims of charged counts or of the defendant? Such victims, of course, would have the same rights to notice and allocution relating to conditional release, the acceptance of negotiated pleas (perhaps substantially complicating plea bargains) and sentencing,” S.Rep.No.105-409 at 42 (additional views of Sen. Hatch).

Under existing federal law, sentencing courts must consider “relevant conduct” that is “part of the same course of conduct or common scheme or plan as the offense of conviction,” U.S.S.G. §1B1.3(a)(2), that includes misconduct for which the defendant has never been charged or even for which he may have been acquitted, *United States v. Watts*, 519 U.S. 148 (1997).

Use of the words “if present” and “such proceedings” confirms an intent to read the notice qualifications into the right to be heard, so that the right to be heard only attaches with respect to *public proceedings* involving conditional release, plea bargain, and sentencing.

The right to speak applies at hearings involving sentencing, the acceptance of a plea bargain, or a conditional release from custody. “Proceedings to determine a conditional release from custody” apparently means bail hearings, and possibly a great deal more. Bail hearings seem to be covered since bail is contingent, at a minimum, upon the pledge of the accused to appear for subsequent judicial proceedings. Victims may enjoy a right to be heard and submit a statement at proceedings for pre-trial diversion approval or for release from civil commitment as well.<sup>70</sup>

## Bail

The proposed amendment gives crime victims the right to be notified of, not to be excluded from, to be heard and submit a statement at, and to have their safety considered in, related bail proceedings, as well as the right to notice of the defendant’s actual release on bail.

This represents an expansion of victims’ rights in most jurisdictions. Its promise of the right to be heard in particular is more generous than most, although victims’ rights to have their interests considered, to be notified, to attend, and in some instances to make presentations at bail proceedings appear more frequently in state statutes and court rules than was once the case.

At one time, the victim was not only not considered a legitimate participant in the bail hearing, but neither the safety nor any other interest of the victim was thought to be a relevant consideration. Bail was a guarantee against suspect flight. That was all. The amount of security required and the conditions imposed for pre-trial release were calculated solely to insure the courtroom presence of the accused at the appointed hour.<sup>71</sup> Most states had, and still have, right to bail clauses for

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<sup>70</sup> S.Rep.No.106-254 at 32 (“This phrase encompasses, for example, hearings to determine any pre-trial or post-trial release (including comparable releases during or after an appeal) on bail, personal recognizance, to the custody of a third person, or under any other conditions, including pre-trial diversion programs. Other examples of conditional release include work release and home detention. It also includes parole hearings or their functional equivalent, both because parole hearings have some discretion in releasing offenders and because releases from prison are typically subject to various conditions such as continued good behavior. It would also include a release from a secure mental facility for a criminal defendant or one acquitted on the grounds of insanity”). “Pre-trial diversion is an alternative to prosecution that diverts certain offenders from traditional criminal justice processing into a program of supervision,” *Taylor v. Gregg*, 36 F.3d 453, 455 (5<sup>th</sup> Cir. 1994), citing the United States Attorney Manual, §9-22.400.

<sup>71</sup> At both state and federal law, the presumption of bail was so strong that even after conviction when the defendant sought bail pending appeal most shared the opinion of Justice

noncapital offenses in their state constitutions.<sup>72</sup> Those jurisdictions that did not have a right to bail clause had and have a prohibition against excessive bail,<sup>73</sup> like that found in the United States Constitution, that some read to include or herald a constitutional right to bail even where none was explicitly granted.<sup>74</sup>

In many jurisdictions, this view slowly gave way to a recognition that public and individual safety are legitimate concerns for a judicial officer to consider when deciding whether an accused should be released on bail, or more often, the conditions placed upon the release of the accused. In some instances, the right to bail clause has been amended;<sup>75</sup> in some, the state courts have interpreted the right to bail to include a witness protection and judicial integrity exception;<sup>76</sup> courts in still other states have held that the right to bail clauses permitted imposing victim or public safety conditions<sup>77</sup> and allowed revocation of bail if the conditions have been broken.<sup>78</sup>

Finally, the United States Supreme Court removed the cloud formed by the contention that a refusal to grant pretrial bail, because of the threat to public or individual safety posed by the accused, might violate either the United States Constitution's excessive bail clause or its due process clauses or both. The Court

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Jackson, who sitting on the circuit with a court of appeals panel, declared, "Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loathe to resort to it, even as a discretionary judicial technique to supplement conviction of such offenses as those of which defendants stand convicted," *Williamson v. United States*, 184 F.2d 280, 282-83 (2d Cir. 1950), quoted in National Conference on Bail and Criminal Justice, *BAIL IN THE UNITED STATES*: 1964, 5 (1964).

<sup>72</sup> E.g., ALA.CONST. art.I, §16; ALASKA CONST. art.I, §11; ARIZ.CONST. art.2, §22; ARK.CONST. art.2, §8; CAL.CONST. art.1, §12.

<sup>73</sup> E.g., GA.CONST. art.I, §1 ¶17; HAW. CONST. art.I, §12.

<sup>74</sup> *Huihui v. Shimoda*, 64 Haw. 527, 530-39, 644 P.2d 968, 971-76 (1982).

<sup>75</sup> E.g., ILL.CONST. Art.1, §9 ("All persons shall be bailable by sufficient sureties, except for the following offenses where the proof is evident or the presumption great: capital offenses; offenses for which a sentence of life imprisonment may be imposed as a consequence of conviction; and felony offenses for which a sentence of imprisonment, without conditional and revocable release, shall be imposed by law as a consequence of conviction, when the court, after a hearing, determines that release of the offender would pose a real and present threat to the physical safety of any person").

<sup>76</sup> *People ex rel. Hemingway v. Elrod*, 60 Ill.2d 74, 79-80, 322 N.E.2d 837, 840-41 (1985); *State v. Mecier*, 136 Vt. 336, 339, 388 A.2d 435, 438 (1978); *In re Humphrey*, 601 P.2d 103, 106 (Okla. Crim.App. 1979).

<sup>77</sup> *Henley v. Taylor*, 324 Ark. 114, 115-16, 918 S.W.2d 713, 714 (1996).

<sup>78</sup> *State v. Dodson*, 556 S.W.2d 938, 945 (Mo.App. 1977); *Mello v. Superior Court*, 117 R.I. 578, 583-85, 370 A.2d 1262, 1264-265 (1977).

declared that neither clause bars legislative creation of a system that conditions pretrial release upon public safety as well as preventing flight.<sup>79</sup>

Only a few states expressly grant the victim the right to be heard at the defendant's bail hearing either specifically or under a general right to be heard at all proceedings.<sup>80</sup> A few more permit consultation with the prosecutor prior to the bail hearing.<sup>81</sup> Most allow victims to attend.<sup>82</sup> And virtually all provide either that victims should be notified of bail hearings or that victims should be notified of the defendant's release on bail.<sup>83</sup>

Under federal law, victims of alleged acts of interstate domestic violence or interstate violations of a protective order have a right to be heard at federal bail proceedings concerning any danger posed by the defendant.<sup>84</sup> In other federal cases, victims' prerogatives seem to be limited to the right to confer with the prosecutor, notification of, and attendance at, all public court proceedings.<sup>85</sup>

Similar past proposals — to be heard, to submit a statement, and to have victim safety weighed — were considered subject to the defendant's bail rights

<sup>79</sup> *United States v. Salerno*, 481 U.S. 739, 755 (1988) (“The Act [being challenged on excessive bail and due process grounds] authorizes the detention prior to trial of arrestees charged with serious felonies who are found, after an adversary hearing, to pose a threat to the safety of individuals or to the community which no condition of release can dispel. The numerous procedural safeguards detailed above must attend this adversary hearing. We are unwilling to say that this congressional determination, based as it is upon that primary concern of every government — a concern for the safety and indeed the lives of its citizens — on its face violates either the Due Process Clause of the Fifth Amendment or the Excessive Bail Clause of the Eighth Amendment”).

<sup>80</sup> E.g., S.D.COD.LAWS ANN. §23A-28C-1 (“Consistent with §23A-28C-4 [defining victims], victims of the crime, including victims of driving under the influence vehicle accidents, have the following rights: . . . (3) to testify at scheduled bail or bond hearings regarding any evidence indicating whether the offender represents a danger to the victim or the community if released”).

<sup>81</sup> E.g., VT.STAT.ANN. tit.13 §5308 (“If practicable the victim of a listed crime shall be given notice of the defendant's arraignment by the law enforcement agency that issued the citation or made the arrest. The victim of a listed crime shall have the right to be present at the defendant's arraignment. The prosecutor's office shall inform the victim about the issues concerning bail and the prosecutor shall advise the court of the victim's position regarding bail”).

<sup>82</sup> E.g., OHIO REV.CODE ANN. §2930.09.

<sup>83</sup> E.g., ALA.CODE §15-23-75 (4) (“If the terms and conditions of a post-arrest release include a requirement that the accused post a bond, the sheriff or municipal jailer shall, upon request, notify the victim of the release on bond of the defendant”); NEB.REV.STAT. §81-1848 (“Victims as defined in section 29-119 shall have the following rights: . . . (b) to receive from the county attorney advance reasonable notice of any scheduled court proceedings and notice of any changes in that schedule”).

<sup>84</sup> 18 U.S.C. 2236.

<sup>85</sup> 42 U.S.C. 10606(b).

under the excessive bail and due process clauses in the United States Constitution, S.Rep.No.105-409 at 32. That is the still the view, S.Rep.No. 106-254 at 38.

## Other Forms of Conditional Release

The amendment's notice, attendance, and statement rights apply to other forms of conditional release as well. Exactly what forms are covered may be a matter of some dispute. The Senate Report identifies pre-trial diversion, work release, home detention, release from civil commitment as forms of conditional release, *Id.* at 27. The rights only attach to public proceedings which might result in a conditional release. They have no application where the conditional release in whatever form occurs as a matter of right or in any other manner other than pursuant to "public proceedings." The Report would also exclude those proceedings where the prospect of conditional release is the indirect result rather than the focus of the proceedings, e.g., "a hearing to determine the jurisdiction of the court or compliance with the governing statute of limitations, even though a finding in favor of the defendant of these points might indirectly and ultimately lead to the 'release' of the defendant," *Id.*

## Plea bargains

Negotiated guilty pleas account for over ninety percent of the criminal convictions obtained.<sup>86</sup> Plea bargaining offers the government convictions without the time, cost, or risk of a trial, and in some cases a defendant turned cooperative witness; it offers a defendant conviction but on less serious charges, and/or with the expectation of a less severe sentence than if he or she were convicted following a criminal trial,<sup>87</sup> and/or the prospect of other advantages controlled, at least initially by the prosecutor — agreements not to prosecute family members or friends, or to prosecute them on less serious charges than might otherwise be filed;<sup>88</sup> forfeiture

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<sup>86</sup> Karmen, *CRIME VICTIMS: AN INTRODUCTION TO VICTIMOLOGY* 189 (3d ed. 1996)(out of every 100 felony arrests, 54 result in convictions, 52 of those 54 by guilty plea, citing a 1992 Department of Justice study of 30 jurisdictions); Administrative Office of the United States Courts, *Judicial Business of the United States Courts*, 228 (1999)(only 3,629 of 59,885 of the defendants convicted of federal crimes in the fiscal year ending in September, 1998 were found guilty by a judge or jury following a criminal trial; the rest pled guilty or nolo contendere).

<sup>87</sup> In addition to extraordinarily broad discretion to initiate or abandon a prosecution, *Wayte v. United States*, 470 U.S. 598 (1985); *Town of Newton v. Rumery*, 480 U.S. 386 (1987), prosecutors play an important role in sentencing, see e.g., 18 U.S.C. 3553(b)(federal court may depart from the federal sentencing guidelines upon the motion of the prosecutor); 18 U.S.C. 3553(e)(federal court may sentence a defendant below an otherwise mandatory minimum term of imprisonment upon the motion of the prosecutor).

<sup>88</sup> See e.g., *Miles v. Dorsey*, 61 F.3d 1459 (10th Cir. 1995); *United States v. Pollard*, 959 F.2d 1011 (D.C.Cir. 1992).



concessions;<sup>89</sup> testimonial immunity;<sup>90</sup> entry into a witness protection program;<sup>91</sup> and informant's rewards,<sup>92</sup> to mention a few.

For the victim, a plea bargain may come as an unpleasant surprise, one that may jeopardize the victim's prospects for restitution, one that may result in a sentence the victim finds insufficient,<sup>93</sup> and/or one that changes the legal playing field so that the victim has become the principal target of prosecution.<sup>94</sup>

Some states victims' rights provisions are limited to notification of the court's acceptance of a plea bargain.<sup>95</sup> More often, however, the states permit the victim to address the court prior to the acceptance of a negotiated guilty plea<sup>96</sup> or to confer with the prosecutor concerning a plea bargain.<sup>97</sup>

The amendment assures crime victims of the right to be heard and submit a statement before a plea bargain is accepted. The right only attaches to the acceptance of plea bargains in open court (i.e., at public proceedings).<sup>98</sup> It remains

<sup>89</sup> Cf., *Libretti v. United States*, 116 S.Ct. 356 (1995)(government agreed to limit charges and make a favorable sentencing recommendation in exchange for the defendant's guilty plea and his agreement to transfer all property that would have been subject to criminal forfeiture upon his conviction).

<sup>90</sup> See e.g., 18 U.S.C. 6001-6005 (witness immunity).

<sup>91</sup> E.g., 18 U.S.C. 3521 (witness relocation and protection).

<sup>92</sup> See e.g., 18 U.S.C. 3059 (rewards); 18 U.S.C. 3059A (rewards for crimes against financial institutions); 18 U.S.C. 3071-3077 (rewards for information relating to terrorism).

<sup>93</sup> "The victim has two interests in the plea bargain decision. One interest is financial: the victim is interested in restitution being imposed as part of the sentence. Thus in a charge bargaining, the victim wants to insure that the defendant pleads to a charge sufficiently serious to allow restitution; and in a sentence bargain, the victim wants to advocate an award of restitution. The victim's second interest is retribution, or revenge: the victim feels he or she has been violated and that the criminal's punishment should be severe. Therefore, in a charge bargain, the victim would want the defendant to plead guilty to a serious charge, and in a sentence bargain, the victim would want a significant sentence imposed," Walling, *Victim Participation in Plea Bargains*, 65 WASHINGTON UNIVERSITY LAW QUARTERLY 301, 307-8 (1987).

<sup>94</sup> See e.g., *The Proper Standard for Self-Defense in New York: Should People v. Goetz Be Viewed as Judicial Legislation or Judicial Restraint*, 39 SYRACUSE LAW REVIEW 874 (1988)(discussing prosecution of subway rider who shot the four young men he claimed attempted to rob him; Goetz was subsequently prosecuted and convicted for unlawful possession of a handgun).

<sup>95</sup> E.g., IOWA CODE ANN. §915.13; WYO.STAT. §1-40-204.

<sup>96</sup> E.g., R.I.GEN.LAWS §12-28-4.1(a); MO.ANN.STAT. §595.209.

<sup>97</sup> E.g., DEL.CODE ANN. tit.11 §9405; KY.REV.STAT.ANN. §421.500.

<sup>98</sup> Cf., S.Rep.No. 106-254 at 30 ("Victims' rights under [the notice] 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

to be seen what impact a victim's right to be heard prior to the acceptance of a plea bargain would have on the inclination of the court to close the proceedings.

## Sentencing

At common law, victims had no right to address the court before sentence was imposed upon a convicted defendant. The victim's right to bring the impact of the crime upon him to the attention of the court was one of the early goals of the victim's rights efforts. The Supreme Court has struggled with the propriety of victim impact statements in the context of capital punishment cases, ultimately concluding that they pose no necessary infringement upon the rights of the accused.<sup>99</sup> It is said that permitting victim impact statements serves several beneficial purposes: (1) to protect the victim's interest in having the court order the defendant to make restitution,<sup>100</sup> (2) to increase the possibility that the sentence imposed will reflect the damage done and therefore the seriousness of the crime,<sup>101</sup> (3) to balance the pleas for the defendant that have traditionally been heard at that point,<sup>102</sup> and (4) to restore some level of dignity and respect for the victim.<sup>103</sup>

Critics counter that the use of victim impact statements introduces irrelevancies into the sentencing process,<sup>104</sup> distorts the rationale for sentencing thereby leading to disparate results,<sup>105</sup> leads to putting the victim on trial,<sup>106</sup> and in cases where the

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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").

<sup>99</sup> In *Booth v. Maryland*, 482 U.S. 496 (1987), the Supreme Court held the Eighth Amendment did not permit the presentation of victim impact evidence to a sentencing jury in a death penalty case; in *Payne v. Tennessee*, 501 U.S. 808 (1991), it repudiated *Booth* and declared that victim impact statements were not inherently suspect.

<sup>100</sup> Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 PEPPERDINE LAW REVIEW 117, 172-3 (1984).

<sup>101</sup> *Id.*

<sup>102</sup> *Booth v. Maryland*, 482 U.S. at 520 (Scalia, J., dissenting); *Payne v. Tennessee: The Supreme Court Places its Stamp of Approval on the Use of "Victim Impact Evidence" During Capital Sentencing Proceedings*, 1992 BRIGHAM YOUNG UNIVERSITY LAW REVIEW 841, 852.

<sup>103</sup> *Sentencing Criminals: The Constitutionality of Victim Impact Statements*, 60 MISSOURI LAW REVIEW 731, 735 (1995).

<sup>104</sup> *Booth v. Maryland*, 482 U.S. 496, 502-3 (1987).

<sup>105</sup> *Booth v. Maryland*, 482 U.S. at 505-6; Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AMERICAN CRIMINAL LAW REVIEW 233, 259-60 (1991).

<sup>106</sup> *Booth v. Maryland*, 482 U.S. at 507; Berger, *Payne and Suffering – A Personal Reflection and a Victim-Centered Critique*, 20 FLORIDA STATE UNIVERSITY LAW REVIEW 21, 50 (1992).

jury determines or recommends the sentence to be imposed, may be unfairly inflammatory.<sup>107</sup>

Nevertheless, one of the most prevalent of victims' rights among the states is the right to have victim impact information presented to sentencing authorities. There is, however, tremendous diversity of method among the states. Many call for inclusion in a presentencing report prepared for the court in one way or another,<sup>108</sup> often supplemented by a right to make some kind of subsequent presentation as federal law permits.<sup>109</sup> Some are specific as to the information that may be included;<sup>110</sup> some permit the victim to address the court directly; others do not.<sup>111</sup>

The amendment guarantees crime victims the right to submit a statement to the court prior to sentencing and, if present, to address the court. The language of the amendment does not specify what form the statement may or must take nor any length, content or other limitation on either the statement or in person presentation. Nor does it expressly identify any limitation activated by a conflict with rights of the defendant. Drafters may envision a legislative definition of these limitations, but section 3 may confine such efforts to those "necessary to achieve a compelling interest."

The Senate Judiciary Committee, however, finds considerably more flexibility in this language. It notes the language's dual function of giving sentencing authorities more complete information and of providing victims with "a powerful catharsis," S.Rept.106-254 at 33. In light of this second purpose, "a victim will have the right to be heard even when the judge has no discretion in imposing a mandatory prison sentence," *Id.* It adds immediately thereafter that Congress and the states would nevertheless have the prerogative to limit victim statements to relevant testimony, to define relevancy as they chose, and to otherwise limit the length and content of victims' statements.<sup>112</sup>

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<sup>107</sup> Cf., *Payne v. Tennessee*, 501 U.S. at 827, and 501 U.S. at 831.

<sup>108</sup> E.g., F.R.Crim.P. 32(b).

<sup>109</sup> E.g., TENN.CODE ANN. §40-35-209(b) ("At the sentencing hearing, the court shall afford the parties the opportunity to be heard . . . and may afford the victim of the offense or the family of the victim the opportunity to testify relevant to the sentencing of the defendant. . .").

<sup>110</sup> E.g., FLA.STAT.ANN. §921.143.

<sup>111</sup> E.g., PA.STAT.ANN. tit. 18 §11.201 ("Victims of crime have the following rights: . . . (5) To have opportunity to offer prior comment on the sentencing or a defendant to include the submission of a written victim impact statement detailing the physical, psychological and economic effects of the crime on the victim and the victim's family, which statement shall be considered by the judge when determining the defendant's sentence").

<sup>112</sup> "Congress and the states remain free to set certain limits on what is relevant victim impact testimony. For example, a jurisdiction might determine that a victim's views on the desirability or undesirability of a capital sentence is not relevant in a capital proceeding. Cf. *Robison v. Maynard*, 943 F.2d 1216 (10th Cir. 1991) (concluding that victim opinion on death penalty not admissible). The Committee does not intend to alter or comment on laws existing in some States allowing for victim opinion as to the proper sentence. . . . Nor does [the victims' right] give victims any right to 'filibuster' any hearing. As with defendant's

## Parole hearings

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

The debate on the victim's opportunity to be heard on parole is an extension of the debate involving victim participation in sentencing — to what extent is the seriousness of the crime (weighed by its impact on its victims) a relevant, valid factor in determining how long an offender should be imprisoned. There are some differences between initial sentencing and parole. The venue for parole hearings is less likely to be victim convenient,<sup>113</sup> the objections of parole and prison officials based on concerns of enlarged case loads are mentioned more often,<sup>114</sup> and the “truth-in-sentencing” trend has increased the number of jurisdictions that have established sentencing guidelines and/or abolished parole.<sup>115</sup> But as with sentencing, in most jurisdictions victims are permitted to make their views known to parole authorities.<sup>116</sup>

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existing rights to be heard, a court may set reasonable limits on the length and content of statements,” S.Rep.No. 106-254 at 34.

*Robison* held that the opinion of a murder victim's family that the defendant should not be sentenced to death was not relevant mitigating evidence because it did “not relate to the harm caused by the defendant,” 943 F.2d at 1218.

At the time the report was written, the Committee knew that federal prosecutors in the Oklahoma City bombing case had advised the families of victims that they could not be heard at sentencing if they were opposed to imposition of the death penalty as a matter of principle, *Senate Hearings* at 71-2 (statement of Marsha A. Kight).

<sup>113</sup> *Victims' Roles in the Criminal Justice System: A Fallacy of Victim Empowerment*, 8 ST.JOHN'S JOURNAL OF LEGAL COMMENTARY 225, 242 (1992).

<sup>114</sup> *Id.* at 243; McLeod, *Something New Has Been Added: Parole Boards Are Turning to Victims Before Making Their Decisions*, 4 CRIMINAL JUSTICE 12, 15 (Spring, 1989).

<sup>115</sup> “Truth-in-Sentencing” is a characterization of the approach reflected in the 1984 federal Sentencing Reform Act under which most federal offenders actually serve a substantial percentage of the time to which they are sentenced, i.e., judicial discretion to suspend sentences or grant probation is limited; sentences guidelines limit the range of sentences that may be imposed for a particular offense; parole and extensive good time allowances are abolished, 98 Stat. 1987 (1984). Each of these changes limits sentencing discretion on behalf of the victim or otherwise — either the sentence the court may impose or the discretion of prison and parole authorities to set and adjust release dates.

<sup>116</sup> E.g., ORE. REV.STAT. §144.120(7)(“The State Board of Parole and Post-Prison Supervision must attempt to notify the victim, if the victim requests to be notified and furnishes the board a current address, and [to notify] the district attorney of the committing county[,] at least 30 days before all hearings by sending written notice to the current addresses of both. The victim, personally or by counsel, and the district attorney from the committing jurisdiction shall have the right to appear at any hearing or, in their discretion to submit a written statement adequately and reasonably expressing any views concerning the crime and the person responsible. The victim and the district attorney shall be given access to the information that the board or division will rely upon and shall be given adequate time to rebut the information. Both the victim and the district attorney may present information or evidence at any hearing, subject to such reasonable rules as may be imposed by the officers conducting

Parole has been abolished in the federal system. It is available only with respect to crimes committed prior to November 1, 1987, 18 U.S.C. 4201 note. For parole of prisoners convicted of such crimes, victim impact information must be considered.<sup>117</sup>

The amendment's clause affording victim-defendant equality of right in parole cases seems to be driven by the fact that parole decisions may not be made pursuant to public proceedings in every jurisdiction, S.Rep.No.105-409 at 29-30, and may be intended to apply not only in parole cases but in any conditional release situation where the right to be heard would be unavailable because release occurs other than pursuant to public proceedings.<sup>118</sup>

## Pardons

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

The separate clause covering pardons and commutations of sentence can presumably be explained by the fact that in many jurisdictions, the exercise of the pardoning power or executive clemency is administrative and occurs without any "proceedings" as such. Nevertheless, in close to half of the states victims must be notified that the defendant's pardon or commutation of sentence is under consideration, and in the vast majority of these victims have a right to submit a statement on the question.<sup>119</sup>

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the hearing. For the purposes of this subsection, 'victim' includes the actual victim, a representative selected by the victim, the victim's next of kin or, in the case of abuse of corpse in any degree, an appropriate member of the immediate family of the decedent").

<sup>117</sup> 18 U.S.C. 4207 (1982 ed.)("In making a determination under this chapter [relating to release on parole] the Commission shall consider. . . (5) a statement, which may presented orally or otherwise by any victim of the offense for which the prisoner is imprisoned about the financial, social, psychological, and emotional harm done to, or loss suffered by such victim. . .").

<sup>118</sup> "The term 'parole' is intended to be interpreted broadly. Many jurisdictions are moving away from 'parole' but still have a form of conditional release. The term also encompasses comparable hearings on conditional release from secure mental facilities," S.Rep.No.105-409 at 30.

<sup>119</sup> ALA.CODE §§15-23-36, 15-23-79; ALASKA STAT. §33.20.080; ARK.CODE ANN. §16-93-204; CONN.GEN.STAT.ANN. §18-27a; DEL.CODE ANN. tit.11 §4361; IND.CODE ANN. §11-9-2-2 (notice of pardon consideration); IOWA CODE ANN. §915.19; KAN.STAT.ANN. §22-3701 (notice of pardon consideration); LA.REV. STAT.ANN. §46:1844; MD.CORR.SERV.CODE ANN. §7-805; MICH.COMP.LAWS ANN. §791.244; MINN.STAT.ANN. §§638.04, 638.06; MISS.CODE ANN. §99-43-43; NEV. REV.STAT. §213.010; N.C.GEN.STAT. §15A-838; N.D.CENT.CODE §12.1-34-02; OHIO REV.CODE ANN. §2967.12; OKLA.STAT.ANN. tit.57 §332.2; ORE.REV.STAT. §167.730 (Governor may request victim statements and must include them required reports); PA.STAT.ANN. tit.18 §11.201; S.D.COD.LAWS ANN. §§24-14-4, 24-14-6 (publication notice with statement opportunities to anyone who feels aggrieved);

The Justice Department has objected to the proposals as “an unprecedented incursion on the President’s power to grant executive clemency requests” and in some states upon similar powers vested in the governor.<sup>120</sup>

## Release or Escape Notification

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

Most states give victims the option of being notified when an offender is to be released or has escaped from custody.<sup>121</sup> Existing federal law, extends the notification option only to the release of offenders, 42 U.S.C. 10605(b)(7).

The Senate Report on the same language found in an earlier proposal noted that “reasonableness” must be judged by the circumstances of an individual case. Thus, “[w]hile mailing a letter would be ‘reasonable’ notice of an upcoming parole release date, it would not be reasonable notice of the escape of a dangerous prisoner bent on taking revenge on his accuser,” S.Rep.No. 105-409 at 30.<sup>122</sup>

The most vexing reasonableness questions may not involve individual circumstances but general conditions. In some jurisdictions, the amendment may require notification of a host of victims who would not previously have been entitled to notification and whose identity and location is therefore unknown to correctional authorities.<sup>123</sup> Would publication notice be considered reasonable in such cases? Would the existence of an online or other automated system available to the general

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UTAH CODE ANN. §§77-27-9, 77-27-9.5; WIS. STAT. ANN. §§304.09, 304.10; WYO. STAT. §1-40-204 (notice of pardon consideration).

<sup>120</sup> *House Hearings III* (prepared statement of Assistant Attorney General Eleanor D. Acheson); the statement later declares that “[a]lthough other provisions of the resolution would give victims rights in proceedings in which defendants have rights, the pardon provision would grant victims rights in a setting in which no one — including defendants — has ever possessed rights. The Framers assigned this power to the President, and we oppose any amendment that would encroach upon it,” *id.*

<sup>121</sup> E.g., W.VA. CODE §61-11A-8; WYO. STAT. §1-40-204.

<sup>122</sup> The Report also expressed the Committee’s view that the term “related to the crime” would encompass release or escape from mental institutions to which the inmate was committed following a verdict of not guilty by reason of insanity or of guilty but insane, *Id.*

<sup>123</sup> Not every state has both a release and escape notification statute, many have only one or the other. Some may limit the victims entitled to notice more narrowly than the amendment. The amendment grants victims of violent crimes the right to notice; some offer the right only to victims of certain violent crimes, e.g., Wis.Stat. Ann. §304.063 (victims of homicide, sexual assault, and child molestation). The amendment applies to escapes and releases occurring after its effective date regardless of when the underlying crime occurred; many jurisdictions apply the right with respect to self-identifying victims of prisoners sentenced after the effective date of the statutory provision creating or implementing the right, e.g., N.Y.Crim.Pro.Law §380.50 (notice is provided certified mail to victims who have submitted notification cards distributed to them shortly after the defendant is sentenced).

public and containing release and escape dates retrievable by prisoner name, without more, constitute reasonable notice?

## Speedy Trial

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

The United States Constitution guarantees those accused of a federal crime a speedy trial;<sup>124</sup> the due process clause of the Fourteenth Amendment makes the right binding upon the states,<sup>125</sup> whose constitutions often have a companion provision.<sup>126</sup> The constitutional right is reenforced by statute and rule in the form of speedy trial laws in both the state and federal realms.<sup>127</sup>

“Ironically, however, the defendant is often the only person involved in a criminal proceeding without an interest in a prompt trial. Delay often works to the defendant’s advantage. Witnesses may become unavailable, their memories may fade, evidence may be lost, changes in the law may be beneficial, or the case may simply receive a lower priority with the passage of time.”<sup>128</sup>

Until recently, victims had no comparable rights, although their advocates contended they had a very real interest in prompt disposition. Some victims sought to put a traumatic episode behind them; some wanted to see justice done quickly; some hoped simply to end the trail of inconveniences and hardship that all too often fell to their lot as witnesses.<sup>129</sup>

A few states have since enacted statutory or constitutional provisions establishing a victim’s right to “prompt” or “timely” disposition of the case in one form or another.<sup>130</sup>

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<sup>124</sup> “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . . U.S.Const. Amend. VI.

<sup>125</sup> *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

<sup>126</sup> E.g., R.I.CONST. art.1, §10; S.C.CONST. art.I, §14.

<sup>127</sup> E.g., *State*: CONN.SUPER.CT.R. §§956B to 956F; DEL.SUPER.CT.CRIM.R. 48 (b); FLA.R.CRIM.P. 3.191; GA.CODE ANN. §§17-7-170 to 17-7-171. *Federal*: 18 U.S.C. 3161-3174.

<sup>128</sup> Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah’s Victims’ Rights Amendment*, 1994 UTAH LAW REVIEW 1373, 1402.

<sup>129</sup> See e.g., Kelly, *Victims’ Perceptions of Criminal Justice*, 11 PEPPERDINE LAW REVIEW 15, 19-20 (1984); *contra*, Henderson, *The Wrongs of Victim’s Rights*, 37 STANFORD LAW REVIEW 937, 974-77 (1985).

<sup>130</sup> E.g. LA.REV.STAT.ANN. §46:1844 [J.] (“The victim shall have the right to a speedy disposition and prompt and final conclusion of the case after conviction and sentencing”); N.H.REV.STAT.ANN. §21-M:8-k.

The federal statutory victims' bill of rights, 42 U.S.C. 10606, does not include a speedy trial provision, but Congress has encouraged the states to include a right to a reasonably expeditious trial among the rights they afford victims.<sup>131</sup>

In the absence of further development either in its legislative history or in implementing legislation, courts called upon to construe such a provision might well find guidance in the Supreme Court's identification of the factors to be weighed when testing for unacceptable delay under the speedy trial and due process clauses: "length of delay, reasons for the delay, defendant's assertion of his right, and prejudice to the defendant."<sup>132</sup>

## Restitution

### *to an order of restitution from the convicted offender*

Every jurisdiction authorizes its courts to order convicted defendants make restitution. Each jurisdiction, however, addresses distinctly questions of when if ever restitution is mandatory; the extent to which restitution orders are properly the subject to plea agreements; whether restitution is available for injuries caused by acts of juvenile delinquency; which victims are entitled to restitution; what priority, if any, restitution takes over forfeiture of the defendant's assets or his payment of criminal fines; and more.

The amendment appears to make restitution orders mandatory as a matter of right. The scope of the right is unstated. Although the amendment applies to juvenile proceedings, the use of the term "convicted offender" might be construed to limit the amendment's command to criminal convictions and therefore not reach findings of delinquency.<sup>133</sup>

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<sup>131</sup> 42 U.S.C. 10606 nt. ("It is the sense of Congress that the States should make every effort to adopt the following goals of the Victims of Crime Bill of Rights: . . . (4) Victims of crime should have the right to a reasonable assurance that the accused will be tried in an expeditious manner").

<sup>132</sup> *Barker v. Wingo*, 407 U.S. 514, 530 (1972)(speedy trial); *United States v. \$8,850*, 461 U.S. 555, 564 (due process concerning delays between the seizure of property and the initiation of in rem forfeiture proceedings); S.Rep.No.106-254, at 36 ("In determining what delay is 'unreasonable,' the courts can look to the precedents that exist interpreting a defendant's right to a speedy trial").

<sup>133</sup> This construction may draw some support from the observation in the Senate Report that, "[t]he right is, of course, limited to 'convicted' defendants, that is, those who pled guilty, are found guilty, or enter a plea of no contest," S.Rep.No. 106-254 at 37. Unless they are prosecuted as adults, juveniles do not plead guilty, are not found guilty, nor do they enter nolo pleas. They confess to being or are found delinquent, or in need of supervision, or neglected, but they are not convicted. The Committee also declared that it had "previously explained [its] philosophy in some detail in connection with the Mandatory Victim Restitution Act, codified at 18 U.S.C. §§3663A and 3664, and intends that this right operate in a similar fashion," *id.* (emphasis added). Even though the Mandatory Victim Restitution Act applies to juveniles tried and convicted as adults, it does *not* apply to findings of delinquency or other



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Senate Classes: Terms of Service

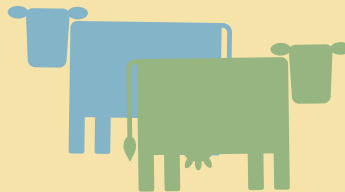
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Restitution orders in a nominal amount or subject to priorities for criminal fines or forfeiture or other claims against the defendant's assets might seem inconsistent with the decision to elevate mandatory victim restitution to a constitutional right. Yet the Senate Report concluded that the "amendment does not confer on victims any rights to a specific amount of restitution, leaving the court free to order nominal restitution . . . . The right conferred on victims is one to an 'order' of restitution. With the order in hand, questions of enforcement of the order and its priority as against other judgments are left to the applicable Federal and State law," S.RepNo.106-254 at 37.

The Senate Report, however, suspected that the right might include the right to a pre-trial restraining order to prevent an accused from dissipating assets that might be used to satisfy a restitution order, *id.* The right might also extend to dissipation in the form of payment of attorneys' fees for the accused, since the accused has only a qualified right to the assistance of counsel of his choice.<sup>134</sup>

## Victim Safety

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

The victims' participation rights — notification, attendance, and comment — have already been mentioned. This right appears to run deeper. At a minimum, it would seem to require that an official, called upon to establish the dictates under which an individual will be released from custody, must reflect upon whether the mandates accompanying release should include demands designed to ensure victim safety.

Most states still recognize a state constitutional right to bail in noncapital cases. The amendment sweeps away any suggestion that these state constitutional rights dictate that pre-trial release decisions be based solely on the risk of flight.

## Notification of Rights

*to reasonable notice of the rights established by this article*

This general right of notice is similar to those found in more than a few state codes and constitutions, either in the form of a victims' right or of a governmental

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dispositions following juvenile proceedings.

<sup>134</sup> *Wheat v. United States*, 486 U.S. 153, 159 (1988); *United States v. Monsanto*, 491 U.S. 600, 616 (1989) ("if the Government may, post-trial, forbid the use of forfeited assets to pay an attorney, then surely no constitutional violation occurs when, after probable cause is adequately established, the Government obtains an order barring a defendant from frustrating that end by dissipating his assets prior to trial").

obligation.<sup>135</sup> Nevertheless, it represents a departure from the cast of most constitutional rights and has in the past given at least one member of the Senate Judiciary Committee pause.<sup>136</sup>

## Enforcement

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

Experience among the states suggests that enforcement may be a stumbling block for the amendment proposals, for there seem to be few palatable alternatives. It is possible to draft an amendment to the United States Constitution so that victims' rights enforcement is paramount. Legal proceedings conducted without honoring victims' rights could be rendered null; parole hearings rescheduled and conducted anew; plea bargains rejected; trials begun again; unfaithful public servants exposed to civil and criminal liability; inattentive governmental entities made subject to claims and court orders. The proposals and state practices have been far less sweeping.

The amendment proposals, however, are more victim-generous than most of their state predecessors in several respects. Unlike several of the state constitutional

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<sup>135</sup> E.g., TENN.COST. art.II, §2 (“victims shall be entitled to the following basic rights . . . 8. The right to be informed of each of the rights established for victims”); ARK.CODE ANN. §16-90-1107 (“After initial contact between a victim and a law enforcement agency responsible for investigating a crime, the agency shall promptly give in writing to the victim: (1) an explanation of the victim’s rights under this subchapter and (2) Information concerning the availability of [various victims’ assistance, compensation, protection and other services]”).

<sup>136</sup> S.Rep.No. 105-409 at 43-4 (additional views of Sen. Hatch) (“No other constitutional provision mandates that citizens be provided notice of the rights vested in the Constitution — not even the court-created *Miranda* warnings are constitutionally required. [The clauses of the Bill of Rights are ordinarily] written in terms of what the Government cannot do to the individual, not in terms of what the individual can exact from the Government. This clause in the proposed victims’ rights amendment would create an affirmative duty on the Government to provide notice of what rights the Constitution provides, turning this formulation on its head. . . . I fear that this provision might generate a body of law which will make fourth amendment jurisprudence simple by comparison. Finally, Congress will be empowered by section 3 of the proposed amendment to enforce its provisions, presumably including the question of how governmental entities must provide victims notice. Will this permit Congress to micro manage the policies and procedures of our State and local law enforcement agencies, prosecutors, and courts?”). The sponsors disagree, arguing that the Sixth Amendment carries with it a defendant’s right to notification and that victims should be accorded similar treatment, S.Rep.No. 106-254 at 45 (additional views of Sens. Kyl and Feinstein).

amendments, there is no disclaimer concerning any intrusion into the rights the accused.<sup>137</sup> Moreover, they explicitly authorize victims to assert the rights through representatives, and expressly empower the courts to revisit otherwise final decisions in the name of victims' rights.

## Standing

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

Absent a victims' rights amendment or some other adjustment in the law, a victim like any other "private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another," *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). This clause confirms an intent to create judicially enforceable rights notwithstanding the "no-claim-for-damages" language that appears later in the section.<sup>138</sup>

The reference to victims' representatives can be construed in a number of ways. It might refer to those authorized to claim the rights for victims who for reasons of death, infirmity, or age are unable to claim them for themselves. It might refer to victims' lawyers. It might refer to the prosecutor or to state officials appointed to represent victims' interests. It might refer to victims' rights advocates generally. Or it might refer to all or some combination of these.

The Senate Report favors a broad reading, although it recognized that the task of defining who may be considered a "lawful representative" is a legislative and judicial chore, S.Rep.No. 106-254 at 39. It also emphasizes the importance of preventing the designation of representatives whose interests may be in conflict with those of the victim.<sup>139</sup> Finally, it gives no hint of whether indigent victims are entitled to appointment of counsel to serve as the victim's representative, because the Committee believed dispositive language later in the section that precluded a claim for damages.<sup>140</sup>

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<sup>137</sup> E.g., OHIO CONST. art.I, §10a("This section . . . does not abridge any other right guaranteed by the Constitution of the United States or by this constitution . . ."); VA.CONST. art.1, §8-A (same).

<sup>138</sup> *United States v. McVeigh*, 106 F.3d 325 (10th Cir. 1997) evidences the dangers of creating the rights without a specific grant of standing. In *McVeigh*, the court held that the federal Victim's Rights Act was insufficient to create standing in victims who wished to contest the trial court's refusal to allow them to both attend the trial and testify at any subsequent sentencing proceeding, 106 F.3d at 334-36.

<sup>139</sup> "In all circumstances involving a representative, care must be taken to ensure that the 'representative' truly reflects the interests — and only the interests — of the victim. In particular, in no circumstances should the representative be criminally involved in the crime against the victim," S.Rep.No. 106-254 at 39.

<sup>140</sup> S.Rep.No. 106-254 at 40-1 ("This provision imposes the conventional limitations on victims' rights, providing that the amendment does not give rise to any claim for money damages against governmental entities or their employees or agents. . . . The limiting language

The observation is significant because without it the courts might easily reach the opposite conclusion. Without it, the evidence seems to bespeak an intent to supply indigents with a legal representative at public expense. The Committee's citation to *Gideon* appears designed to point out that without the limitation victims, like the accused, would be entitled to the assistance of counsel during proceedings related to the crime.<sup>141</sup> Without the observation, the due process and equal protection clauses might seem to require the appointment of counsel for indigent victims. Even the presence of the damage claim limitation alone might have been considered insufficient, since attorneys' fees are not ordinarily considered an element of damages.<sup>142</sup> Moreover, if an egalitarian right to representation were embedded in the victims' rights amendment it could be enforced by invoking the injunctive or other equitable powers of the courts. This would be so even though the prospect of damages (with or without attorneys' fees) had been foreclosed. On the other hand, only a few of the states have seen the necessity to explicitly announce that their comparable victims' rights laws do not include the right to appointed counsel.<sup>143</sup>

## Finality

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

Section 2 addresses two concerns reflected in various shades in state victims' rights provisions. One is the worry that defendants will use victims' rights to

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in the provision also prevents the possibility that the amendment might be construed by the courts as requiring the appointment of counsel at State expense to assist victims. *Cf. Gideon v. Wainwright*, 372 U.S. 335 (1963)(requiring counsel for indigent criminal defendants”).

<sup>141</sup> *Gideon* held that the Fourteenth Amendment's due process clause precludes treatment of the Sixth Amendment right to the assistance of counsel as a white collar privilege available only to men of means, “From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. . . . [For the] right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel,” 372 U.S. at 344-45.

<sup>142</sup> *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975); *Bausch & Lomb Inc. v. Utica Mutual Ins. Co.*, 355 Md. 566, 590, 735 A.2d 1081, 1094 (1999); *Woollen v. State*, 256 Neb. 865, 887, 593 N.W.2d 729, 744 (1999).

<sup>143</sup> E.g., IDA.CONST. art.I, §22 (“Nothing in this section shall . . . be construed as creating a cause of action for money damages, costs or attorney fees against the state. . .”); LA.CONST. art. I, §25 (“Nothing in this section shall be the basis for an award of costs or attorney fees, for the appointment of counsel for a victim, or for any cause of action for compensation . . .”).

obstruct their prosecutions or overturn their convictions.<sup>144</sup> The second, less frequently found in state law, is that — without defendant intervention — litigation over the scope of victims’ rights will delay or undo criminal proceedings against the defendant.<sup>145</sup> The amendment proposals address the first concern when they declare that only victims and their lawful representatives have standing to claim rights under the amendment.

Their treatment of the second concern is more complicated. Once a criminal trial has begun, its schedule is beyond the amendment’s control. Before a criminal trial begins and after it has ended, the amendment cannot be used to “reopen any proceeding or invalidate any ruling” with three exceptions — bail decisions, restitution decisions, and matters involving future practices, performance, and proceedings. The clause imposes no limitation upon stays or other victim-related litigation activities before or during proceedings other than trial. Questions of bail, restitution and future proceedings can be revisited to enforce victims’ rights at any time as long as to do so does not interrupt the defendant’s trial. The Senate Report offered as examples of permissible victim enforcement intervention (1) the challenge of “a decision made to release a defendant on bail without consideration of the victim’s safety,” (2) “a victim improperly excluded from a trial . . . seek[ing] immediate expedited review . . . seeking admission . . . to upcoming days of the trial,” or (3) the challenge of a decision that a victim was “not entitled to notice of a release or escape of a prisoner” up to the point when the defendant is no longer in custody, S.RepNo. 106-254 at 40.

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

State victims’ rights provisions often disclaim any intention to create a cause of action for disappointed victims and/or grounds for a defendant to overturn criminal proceedings against him.<sup>146</sup> The perceived inadequacy of state provisions

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<sup>144</sup> MISS.CODE ANN. §99-43-49 (“The failure to provide a right, privilege or notice to a victim under this chapter shall not be grounds for the defendant to seek to have the conviction or sentence set aside”); TEX.CONST. art.I §30(e)(“The failure or inability of any person to provide a right enumerated in this section may not be used by a defendant in a criminal case as a ground for appeal or post-conviction writ of habeas corpus”).

<sup>145</sup> E.g., IND.CODE ANN. §35-40-2-1 (“ . . . this article does not do any of the following: (1) Provide grounds for a victim to challenge a charging decision or a conviction, obtain a stay of trial, or compel a new trial. . . .”); MD.CONST. DECL.RTS. art.47(c)(“Nothing in this article . . . authorizes a victim of crime to take any action to stay a criminal justice proceeding”).

<sup>146</sup> E.g., ALA.CONST. Amend. 557(b)(“Nothing in this amendment or in any enabling statute adopted pursuant to this amendment shall be construed as creating a cause of action against the state or any of its agencies, officials, employees, or political subdivisions. . . .”); ID.CONST. Art.I, §22(“ . . . Nothing in this section shall be construed to authorize a court to dismiss a case, to set aside or void a finding of guilt or an acceptance of a plea of guilty, or to obtain appellate, habeas corpus, or other relief from any criminal judgment, for a violation of the provisions of this section; nor be construed as creating a cause of action for money damages,

has helped fuel the drive for a federal constitutional amendment, but the commentators have only infrequently addressed how a federal constitutional right might be most appropriately enforced. Some have noted that if a victims' rights amendment were silent on the question its demands would be enforceable against the state officials under section 1983 of the civil rights laws, 42 U.S.C. 1983, and against federal officials under the *Bivens* doctrine.<sup>147</sup> Presumably the equitable powers of the courts — mandamus and injunctive relief claimed in a declarative action — remain available to enforce rights under the amendment.<sup>148</sup>

It might be considered somewhat curious that the amendment immunizes public officials from civil liability but not from criminal liability for denial of the civil rights established by the amendment.<sup>149</sup>

## Legislative Authority

*SECTION 3. The Congress shall have the power to enforce this article by appropriate legislation.*

The grant of legislative implementing authority may shield against the appearance of the unexpected and undesirable consequences discovered after ratification of a constitutional amendment. The difficulty of amending the Constitution argues for a legislative safety valve. Of course, this argument loses considerable force when one of the principal reasons for enacting a constitutional

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costs or attorney fees against the state, a county, a municipality, any agency, instrumentality or person; nor be construed as limiting any rights for victims previously conferred by statute. . .”).

<sup>147</sup> E.g., *The Victims' Bill of Rights: Are Victims All Dressed Up With No Place to Go?* 8 ST. JOHN'S JOURNAL OF LEGAL COMMENTARY 251, 273 (1992). The minority views expressed in the Senate Report accompanying S.J.Res. 44 suggested that the Committee majority at one time felt that state violations of the amendment would give rise to action for damages under 42 U.S.C. 1983, S.Rep.No.105-409 at 74.

<sup>148</sup> *House Hearing* at 172 (prepared statement of Associate Attorney General John R. Schmidt). Not everyone considers this a positive result, S.Rep.No.105-409 at 49 (minority views of Sen. Thompson)(“While S.J.Res. 44 does not offer victims the opportunity to sue for damages to vindicate their rights, it does allow them to seek injunctive or declarative relief, and perhaps writs of mandamus. There also could be large class actions against State authorities. This could lead to disruptive and costly Federal court intrusion[s] into State criminal justice systems”).

<sup>149</sup> S.Rep.No. 105-409 at 61 (minority views of Sens. Leahy, Kennedy and Kohl)(“There can be no doubt that prosecutors would feel personally constrained by the proposed amendment. S.J.Res. 44's express prohibition on claims for damages only increases the likelihood that courts would find other ways to vindicate its newly-minted rights. Just last year, the U.S. Supreme Court confirmed that the Federal civil rights laws permit criminal prosecutions in Federal court of any State official who willfully and under color of law deprived any person of any rights secured or protected under the Federal Constitution. *United States v. Lanier*, 520 U.S. 259 (1997)”).

amendment rather than merely enacting a statute is to ensure that the rights it grants are not easily denied or diluted.

One of the perils implicit in opting for extensive legislative powers is the prospect of unfulfilled promises. It is certainly possible to draft a very generally worded constitutional amendment in anticipation of future legislative refinements. And these may be forthcoming. But it may also happen that the refinements must be laboriously crafted through the courts because legislative resolution proves either unattainable or less than universally appealing.

Early proposals granted Congress and the state legislatures the power to enact implementing legislation within their respective jurisdictions.<sup>150</sup> Over time, some of the proposals began to expand the explicit legislative authority of Congress<sup>151</sup> and then to constrict the explicit legislative authority of the states.<sup>152</sup>

The Committee Report explains, however, that the loss of state legislative authority is less sweeping than it might appear. It asserts that the power to define the class of victims to whom the amendment would apply is by implication to be shared by Congress and the states.<sup>153</sup> Subject to preemptive federal legislation, the states would be permitted to paint the scope of the amendment as broadly or as

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<sup>150</sup> E.g., S.J.Res. 52, §2 (104th Cong.)(“The several States, with respect to a proceeding in a State forum, and the Congress, with respect to a proceeding in a United States forum, shall have the power to enforce this article by appropriate legislation”); H.J.Res. 71, §3 (105th Cong.)(“The Congress and the States shall have the power to enforce this article within their respective jurisdictions by appropriate legislation, including the power to enact exceptions when required by public interest”).

<sup>151</sup> S.J.Res. 6, §3 (“The Congress and the States shall have the power to enforce this article within their respective jurisdictions by appropriate legislation, including the power to enact exceptions when required for compelling reasons of public safety or for judicial efficiency in mass victim cases”), §1 (“Each victim of a crime of violence and *other crimes that Congress may define by law*, shall have the rights to . . . .”)(emphasis added), §5 (“The rights established by this article shall apply in . . . military proceedings *to the extent that Congress may provide by law* . . . .”)(emphasis added).

<sup>152</sup> S.J.Res. 44, §3 (“The Congress shall have the power to enforce this article by appropriate legislation. Exceptions to the rights established by this article may be created only when necessary to achieve a compelling interest”).

H.J.Res. 129, §3 (“The Congress shall have the power to enforce this article by appropriate legislation”). The questions involving impact on the states are less vexing in the case of H.J.Res. 129 which only applies to federal proceedings, §5 (“The rights established by this article shall apply in all Federal proceedings. . . .”).

<sup>153</sup> S.Rep.No. 106-254 at 28 (“The Committee anticipates that Congress will quickly pass an implementing statute defining ‘victim’ for Federal proceedings. Moreover, nothing removes from the states their plenary authority to enact definitional laws for purposes of their own criminal system. . . . Since the legislatures define what is criminal conduct, it makes equal sense for them to also have the ability to further refine the definition of ‘victim’”).



narrowly as they chose.<sup>154</sup> Some Committee members were troubled by this resolution;<sup>155</sup> some skeptical that it could hold sway.<sup>156</sup>

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

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<sup>154</sup> S.Rep.No. 106-254 at 41 (“This provision is similar to existing language found in section 5 of the 14th amendment to the Constitution. This provision will be interpreted in similar fashion to allow Congress to ‘enforce’ the rights, that is, to insure that the rights conveyed by the amendment are in fact respected. At the same time, consistent with the plain language of the provision, the Federal Government and the States will retain their power to implement the amendment. For example, the States will, subject to the Supremacy Clause, flesh out the contours of the amendment by providing definitions of ‘victim’ of crime and ‘crimes of violence’”).

<sup>155</sup> “Unlike previous versions of the proposed amendment, which permitted States to enforce the amendment in their jurisdictions, S.J.Res. 44 gives Congress exclusive power to ‘enforce this article by appropriate legislation.’ I believe that granting Congress sole power to enforce the provisions of the victims’ rights amendment and thus, *inter alia*, to define terms such as ‘victim’ and ‘violent crime’ and to enforce the guarantees of ‘reasonable notice’ of public proceedings and of the rights established by the amendment will be a significant and troubling step towards federalization of crime and the nationalization of our criminal justice system. . . . It is possible that the victims’ rights constitutional amendment will lack [the] flexibility that is the hallmark of our Federal system, and perhaps in the process invalidate many State victims rights provisions. Such a prospect should give us pause,” S.Rep.No. 105-409 at 44-5 (additional views of Sen. Hatch). Senators Kyl and Feinstein countered with the contention that, “The bigger danger to federalism is passing no amendment. . . . States have had difficulty extending rights to victims of crime through State statutes and constitutional amendments precisely because courts are used to considering , first and foremost, Federal constitutional rights. By extending Federal right to victims throughout the States, it will then become easier for State criminal justice systems to protect the rights of victims. Perhaps for this reason the National Governor’s Association, whose members include some of the fiercest defenders of federalism, endorsed the proposed amendment as long as ago as 1997,” S.Rep.No. 106-254 at 46.

<sup>156</sup> “More likely, however, is that the majority’s interpretation, while politically expedient, is legally untenable. The notion that S.J.Res. 3 empowers States to pass implementing legislation is flatly inconsistent with the plain language of the proposed amendment. It states, ‘*The Congress* shall have the power to enforce this article by appropriate legislation’ (emphasis added ). Identical language in earlier constitutional amendments have been read to vest enforcement authority exclusively in the Congress. In the case of S.J.Res. 3, moreover, the text is illuminated by the legislative history. Earlier drafts of the amendment expressly extended enforcement authority to the States. These drafts drew fire from constitutional scholars, who expressed doubt that constitutionally-authorized State laws could be supreme over State constitutions or even over Federal laws, and concern that for the first time, rights secured by the Federal constitution would mean different things in different parts of the country. The Committee then amended the text to its current formulation. Faced with this history and text, courts will surely conclude that S.J.Res. 3 deprives States of authority to legislate in the are of victims’ rights. Indeed, both Chairman Hatch and the States’ Chief Justices have already interpreted the proposed amendment in precisely this way,” S.Rep.No. 106-254 at 77-8 (minority views of Sens. Leahy, Kennedy, Kohl, and Feingold).

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# Persuading Congress



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This intriguing sentence has appeared in one form or another in several proposed amendments in the past.<sup>157</sup> Departure from the requirement of earlier versions that exceptions be “enacted,” implies that exceptions may be crafted either legislatively or judicially.

The use of the term “compelling interest,” on the other hand, suggests that the authority to create exceptions may be fairly limited. The Senate Committee Report seems to confirm both suggestions.<sup>158</sup> Although the Report identifies one unusual<sup>159</sup> and two commonplace situations<sup>160</sup> under which exceptions might be warranted, several Committee members found the “compelling interest” standard too restrictive.<sup>161</sup> The Justice Department raised the same objection with respect to the

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<sup>157</sup> S.J.Res. 65 (104th Cong.)(“The Congress and the States shall have the power to enforce this article . . . by appropriate legislation, *including the power to enact exceptions when required for compelling reasons of public safety*”); H.J.RES. 71 (105th Cong.)(“The Congress and the States shall have the power to enforce this article . . . by appropriate legislation, *including the power to enact exceptions when required by public interest*”); S.J.Res. 6 (105th Cong.)(“The Congress and the States shall have the power to enforce this article . . . by appropriate legislation, *including the power to enact exceptions when required for compelling reasons of public safety or for judicial efficiency in mass victim cases*”)(emphasis added).

<sup>158</sup> S.Rep.No. 106-254 at 41 (“Constitutional rights are not absolute. There is no first amendment right, for example, to yell ‘Fire!’ in a crowded theater. Courts interpreting the Crime Victims’ Rights Amendment will no doubt give a similar, common sense construction to its provisions. The amendment does not impose a straightjacket that would prevent the proper handling of unusual situations. The exceptions language in the amendment explicitly recognizes that in certain rare circumstances exceptions may need to be created to victims rights”).

<sup>159</sup> S.Rep.No. 106-254 at 41 (“in mass victim cases, there may be a need to provide certain limited exceptions to victims rights. For instance, for a crime perpetrated against hundreds of victims, it may be impractical or even impossible to give all victims the right be physically present in the courtroom”).

<sup>160</sup> S.Rep.No. 106-254 at 41-2 (“in some cases of domestic violence, the dynamics of victim-offender relationships may require some modification of otherwise typical victims’ rights provisions. . . [and] situations may arise involving intergang violence, where notifying the member of a rival gang of an offenders’ impending release may spawn retaliatory violence”).

<sup>161</sup> S.Rep.No. 105-409 at 45 (additional views of Sen. Hatch) (“The compelling interest test is itself derived from existing constitutional jurisprudence, and is the highest level of scrutiny given a government act alleged to infringe on a constitutional right. The compelling interest test and its twin, strict scrutiny, are sometimes described as ‘strict in theory but fatal in fact.’ I truly question whether it is wise to command through constitutional text the application of such a high standard to all future facts and circumstances”); S.Rep.No. 106-254 at 85-6 (minority views of Sens. Leahy, Kennedy, Kohl, and Feingold). Sponsors contend the “compelling interest” standard strikes the appropriate balance, S.Rep.No. 106-254 at 46-7 (additional views of Sens. Kyl and Feinstein).

proposals in this Congress.<sup>162</sup> Others may question whether the standard's amorphous nature makes it unsuitable.<sup>163</sup>

## Preemptive and Amending Impact

The question of the legislative power to implement the victims' rights amendment suggests another question. How much, if any, of existing victims' rights and defendants' rights law does the amendment amend or preempt?

Under the present state of the law, statutory and state constitutional provisions are confined by the Bill of Rights, U.S.Const. Art. VI, c.2. When their advocates have said nothing in them imperils defendant's rights under the United States Constitution, they are right; nothing could. But an amendment to the United States Constitution stands on different footing. It amends the Constitution. Its very purpose is to make constitutional that which would otherwise not have been.<sup>164</sup> It may uniformly subordinate defendants' rights to victims' rights. It may require any conflicting law or constitutional precept, state or federal, to yield. Even in the absence of a conflict, it may preempt the field, sweeping away all laws, ordinances, precedents, and decisions — compatible and incompatible alike — on any matter touching upon the same subject.

The principles used to interpret preemptive impact under the Supremacy Clause are fairly well developed. "[P]re-emption of state law [may occur] either by express provision, by implication, or by a conflict between federal and state law. And yet, despite the variety of these opportunities for federal preeminence, [the Court has] never assumed lightly that Congress has derogated state regulation, but

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<sup>162</sup> *House Hearings III* (prepared statement of Assistant Attorney General Eleanor D. Acheson)("We believe that the authority to create exceptions should exist where necessary to promote a `significant' government interest, rather than the `compelling' interest required by the current resolution").

<sup>163</sup> There may be a concern that the standard changes form depending upon nature of the right at issue or more precisely that the standard in Fourth Amendment and other law enforcement contexts may be less demanding than would otherwise be the case, see e.g., *Vernonia School District v. Acton*, 515 U.S. 646, 661 (1995)("It is a mistake, however, to think that the phrase `compelling state interest,' in the Fourth Amendment context, describes a fixed minimum quantum of governmental concern, so that one can dispose of a case by answering in isolation the question: Is there a compelling state interest here? Rather, the phrase describes an interest that appears important enough to justify the particular search at hand in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy"); *Wilcher v. City of Wilmington*, 139 F.3d 366, 377 (3d Cir. 1998)("`compelling interest' does not have the same meaning in [a Fourth Amendment] context as it does in other areas of constitutional law").

<sup>164</sup> S.Rep.No. 106-254, at 76 (minority views of Sens. Leahy, Kennedy, Kohl, and Feinstein)(quoting former Deputy Attorney General Philip Heymann)("If it is not intended to free the States and Federal Government from restrictions found in the Bill of Rights — which would be a reckless tampering with provisions that have served us very well for more than 200 years — it is unclear what purpose the amendment serves").

instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law. Indeed, in cases . . . where federal law is said to bar state action in fields of traditional state regulation, [the Court has] worked on the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress,” *New York Conference of Blue Cross v. Travelers Insurance Co.*, 514 U.S. 645, 654-55 (1995). Conversely, by virtue of the Supremacy Clause, where the subject matter is one which the Constitution relegates to the federal domain, the vitality of state law is dependent upon the largess of Congress and the Constitution, *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 800-802 (1995).

A victims’ rights amendment to the United States Constitution that relegates the area to the federal domain, confines state authority to that which the amendment permits or allows Congress to permit.

Few advocates have explicitly called for “king-of-the-hill” victims’ rights amendment, but the thought seems imbedded in the complaint that existing law lacks uniformity. How else can universal symmetry be accomplished but by implementation of a single standard that fills in where pre-existing law comes up short and shaves off where its generosity exceeds the standard?

Neither the present proposals nor any of their predecessors have addressed the amendment/preemption question. Some, although certainly not all, of the state constitutions disclaim any attempt to supersede defendants’ rights.

The Senate Committee Report offered support for the argument that S.J.Res. 44 was not intended to preempt more generous victims’ rights provisions: “many States have already extended rights to victims of such offenses and the amendment in no way restricts such rights. In other words, the amendment sets a national ‘floor’ for the protection of victims’ rights, not any sort of ‘ceiling.’ S.Rep.No.105-409, at 24. The remarks accompanying the introduction of the present proposal might be read to either support or undermine the argument.”<sup>165</sup>

Questions of the amendment’s impact on the rights afforded the accused may be even more difficult to discern. The principles of construction called into play in the case of a conflict between a victims’ rights amendment and rights established elsewhere in the Constitution are similar those used to resolve federal-state conflicts.

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<sup>165</sup> Compare, “A victims’ rights constitutional amendment is the only legal measure strong enough to rectify the current inconsistencies in the victims’ rights laws that vary significantly from jurisdiction to jurisdiction on the State and Federal levels” with, “a Federal amendment would establish a basic floor of crime victims’ rights for all Americans . . . . Rather than a minimum baseline of protections, the state provisions have produced a hodgepodge of rights that vary from jurisdiction to jurisdiction. Rights that are guaranteed by the Constitution will receive greater recognition and respect and will provide a national baseline,” 145 *Cong.Rec.* S708 (daily ed. Jan. 19, 1999); see also, *House Hearing III* (prepared statement of Rep. Chabot)(“a national constitutional amendment is needed to help facilitate a balance between the rights of victims and those of defendants. It would also establish uniformity in the criminal system and create a standard below which no state or federal victim’s rights law could go”).

Intent of the drafters is paramount. The courts will make every effort to reconcile apparent conflicts between constitutional provisions, cf., *Vimar Seguros Y Reasdeguros v. Sky Reefer*, 515 U.S. 528, 533 (1995). In the case of unavoidable conflict between provisions of equal dignity, the latest in time prevails, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). If there is an unavoidable conflict between a right granted by an adopted victims' rights amendment and some other portion of the Constitution, the most recently adopted provision will prevail.

S.J.Res. 6 was designed to eliminate the unfair treatment that results because the criminal justice "system . . . permits the defendant's constitutional rights always to trump the protection given to victims," yet to do so in a manner that "will not deny or infringe any constitutional right of any person accused or convicted of a crime," 143 *Cong.Rec.* S560-61 (daily ed. Jan. 21, 1997)(remarks of Sen. Kyl). In instances of unavoidable conflict between victim and defendant rights, this seems to mean the prosecution must yield. The text of S.J.Res. 6 hardly defeats this interpretation with the assurance that the amendment is not to "provide grounds for the accused or convicted offender to obtain any form of relief," since the rights of the accused come not from the victims' rights amendment but from the Sixth Amendment or some other source within the Constitution.

S.J.Res. 44 was left in a somewhat different posture in the 105<sup>th</sup> Congress, when the Committee explicitly rejected a change in the amendment that would have stated that "[n]othing in this article shall be construed to deny or diminish the rights of an accused as guaranteed by this Constitution," S.Rep.No. 105-409 at 38.<sup>166</sup> S.J.Res. 3 followed the same path. Senator Feingold offered the same amendment, which the Committee declined to accept, S.Rep.No. 106-254 at 43. The refusal to accept the amendment might be read to mean that in the case of unavoidable conflict victims' rights should prevail over defendants' rights. The text of the report, however, appears to repudiate such an interpretation by rejecting the later-in-time analysis and by using a fair-trial-free-press example in which the defendant's rights prevail in the case of unavoidable conflict.<sup>167</sup>

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<sup>166</sup> The Justice Department urged that similar language be added to proposals under consideration during the 106th Congress, *House Hearing III* (prepared statement of Assistant Attorney General Eleanor D. Acheson)("However, on rare occasions where, after a serious and searching analysis of the claim, it is clear that the vindication of a victim's rights will indeed violate a defendant's right to a fair trial, the Attorney General has stated that 'we must as a society ensure that fair trial is not jeopardized.' To that end, we urge that the following language be added: 'Nothing in this article shall be construed to deny or diminish the rights of the accused as guaranteed by the Constitution'").

<sup>167</sup> S.Rep.No. 106-254, at 27-3 ("The Crime Victims' Rights Amendment creates rights, not in opposition to those of defendants, but in parallel to them. The parallel goal in both instances is to erect protections from abuse by State actors. Thus, just as defendants have a sixth amendment right to a 'speedy trial,' the Crime Victims' Rights Amendment extends to victims the right to consideration of their interest 'in a trial free from unreasonable delay.' These rights cannot collide, since they are both designed to bring criminal proceedings to a close within a reasonable time. '[I]f any conflict were to emerge, courts would retain ultimate responsibility for harmonizing the rights at stake.' . . . In this respect, the Committee found unpersuasive the contention that the courts will woodenly interpret the later-adopted Crime Victims' Rights Amendment as superced[ing] provisions in previously-adopted ones. Such

The remarks accompanying introduction of the present proposals assert the need to prevent victims' rights from being trumped by defendants' rights. Yet they give no hint whether in case of unavoidable conflict victims' rights are to trump those of the accused or whether both are to be honored at the expense of the prosecution. Some witnesses spoke as if the proposals would expect the government to bear the burden of dissipating conflicts between victims' and defendants' rights.<sup>168</sup> Perhaps to avoid this implication, the Justice Department, as noted above, recommended clarifying language to require victims' rights to yield to defendants' rights in areas of unavoidable conflict. This was further than the sponsors of S.3 apparently felt they could and was the point at which debate in the Senate essentially ended.<sup>169</sup>

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a canon of construction can be useful when two measures address precisely the same subject. . . . But no rigid rule of constitutional interpretation requires giving unblinking precedence to later enactments on separate subjects. Instead, the Committee trusts the courts to harmonize the rights of victims and defendants to ensure that both are appropriately protected. The courts have, for example, long experience in accommodating the rights of the press and the public to attend a trial with the rights of a defendant to a fair trial. The same sort of accommodations can be arrived at to dissipate any tension between victims' and defendants' rights").

Although critics may have questioned whether the courts would always be able to "dissipate any tension between victims' and defendants' rights," the fair-trial-free-press area may indicate how infrequently truly unavoidable conflicts are likely to occur, for a general discussion see, *Twenty-Eighth Annual Review of Criminal Procedure — Public Access*, 87 GEORGETOWN LAW JOURNAL 1641 (1999).

<sup>168</sup> *House Hearing III* (prepared statement of Professor Douglas E. Beloof) ("To protect these rights of victims does not entail constitutionalizing the rights of private citizens against other citizens; for it is not the private citizen accused of crime by state or federal authorities who is the source of the violations that victim's rights advocates hope to address with a constitutional amendment in this area. Rather, it is the Governmental authorities themselves, those who pursue or release the accused or convicted criminal with insufficient attention to the concerns of the victim. . ."); *id.* (prepared statement Steven J. Twist)("While some have argued that a victim's exclusion [from trial proceedings] is needed to avoid the possibility of tailored testimony, this concern can be addressed in other ways such as having the victim testify first or relying on pre-trial statements to police officers or the grand jury [rather than on trial testimony of the victim]").

<sup>169</sup> 146 *Cong.Rec.* S 2977 (daily ed. April 27, 2000)(remarks of Sen. Feinstein)("This issue goes down . . . on one phrase. That one phrase is the addition of language that would say nothing in this Constitution [amendment] would abridge the right of a defendant as provided by this Constitution. That is a paraphrase of what it is. The Department of Justice insists on that language. We will not get administration support, I believe, without that language. The victims movement believes they would not have sufficient standing in these rights to really assert them in a meaningful way unless they were able to be balanced against the rights of the defendant"); *id.* (remarks of Sen. Kyl)("We are perfectly willing to make it crystal clear in our language that the enumeration of these rights for victims does not abridge any rights guaranteed in the Constitution for defendants or those accused of crime. We are unwilling to say, if there has to be any balancing, the defendant always wins. That would deny exactly what we are trying to achieve for the victims, which is some equal consideration under the Constitution for their fairness given all of the things we have rightly done for defendants").

## Effective Date

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

The rights and powers of the victims' rights amendment become effective 180 days after ratification regardless of how much earlier a particular victimizing crime occurred. The right to a restitution order, however, is limited to instances where the victim-creating offense was committed after the 180-day waiting period. The Senate Report's somewhat cryptic explanation for the special treatment for restitution orders points to the split of authority over whether the ex post facto clauses preclude retroactive restitution adjustments.<sup>170</sup> Some may find an equally weighty argument in the fact that but for the limitation every pre-amendment conviction in the nation would be ripe for revisitation under section 2 of the amendment. ("Nothing in this article shall provide grounds to . . . reopen any proceeding or invalidate any ruling, except with respect to . . . restitution. . .").

## Proceedings Covered

*SECTION 5. The rights and immunities established by this article shall apply in Federal and State proceedings, including military proceedings to the extent that the Congress may provide by law, juvenile justice proceedings, and proceedings in the District of Columbia and any commonwealth, territory, or possession of the United States.*

Section 5 supplies the foundation for the amendment. The amendments' victim notification and participation rights are related to the proceedings it describes. It is more inclusive than some of the earlier proposals and less than others. All but one of the earlier proposals included juvenile proceedings;<sup>171</sup> the resolutions in the 104th Congress covered military prosecutions without reservation;<sup>172</sup> some of the

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<sup>170</sup> S.Rep.No. 106-254 at 42 ("A few courts have held that retroactive application of changes in standards governing restitution violates the Constitution's prohibition of ex post facto laws. See, e.g., *United States v. Williams*, 128 F.3d 1239 (8th Cir. 1997). The Committee agrees with those courts that have taken the contrary view that, because restitution is not intended to punish offenders but to compensate victims, ex post facto considerations are misplaced. See, e.g., *United States v. Newman*, [144 F.3d 531] (7th Cir. 1998). However, to avoid slowing down the conclusion of cases pending at the time of the amendment's ratification, the language on restitution orders was added"). Without the added language, courts might have to stop to consider whether the victims' rights amendment superseded any ex post facto limitation on the application of the amendment's restitution provisions.

<sup>171</sup> H.J.Res. 173 (104th Cong.)(" . . . victims . . . in each *prosecution* by the United States or a State. . .")(emphasis added).

<sup>172</sup> H.J.Res. 173 (104th Cong.)(" . . . victims . . . in each prosecution by the United States or a State. . ."); H.J.Res. 174/S.J.Res. 52 (104th Cong.)("To ensure that the victim is treated with fairness. . . throughout the criminal, military, and juvenile justice processes. . .").



proposals contained explicit reference to habeas proceedings;<sup>173</sup> several lack any explicit reference to the territorial courts;<sup>174</sup> and one applied only to federal proceedings.<sup>175</sup>

The Senate Judiciary Committee explained the military exception with the observation that “[b]ecause of the complicated nature of military justice proceedings, including proceedings held in times of war, the extension of victims rights to the military was left to Congress. The Committee intends to protect victims’ rights in military justice proceedings while not adversely affecting military operations,” S.Rep.No. 106-254 at 42.<sup>176</sup>

The Committee also endorsed the Justice Department’s belief that “the rights of victims of juvenile offenders should mirror the rights of victims of adult offenders,” S.Rep.No. 106-254 at 42.<sup>177</sup> This may be the most difficult of the amendment’s commands to translate, first because it marks a dramatic departure from existing state practice<sup>178</sup> and second because the juvenile justice procedures differ substantially from the adult criminal procedures upon which the amendment’s language and rationale are primarily focused.

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<sup>173</sup> H.J.Res. 71 (105th Cong.); S.J.Res. 6 (105th Cong.).

<sup>174</sup> H.J.Res. 173 (104th Cong.); H.J.Res. 174/S.J.Res. 52 (104th Cong.).

<sup>175</sup> H.J.Res. 129 (“The rights established by this article shall apply in all Federal proceedings, including military proceedings to the extent that Congress may provide by law, juvenile justice proceedings, and *proceedings in any district or territory of the United States not within a State*”)(emphasis added). The italicized language in H.J.Res. 129 might have been sufficient to extend the amendment’s coverage to victims of crimes tried in tribal courts. If so, it would be the only one to do so.

<sup>176</sup> Military tribunals already have a victims’ rights regulatory requirement in place, Pischnotte & Quinn, *The Victim and Witness Assistance Program*, 39 AIR FORCE LAW REVIEW 57 (1996), but not all victims’ rights advocates are impressed with its effectiveness, *Senate Hearing II* at 38 (prepared statement of Marlene A. Young, Executive Director, National Organization for Victim Assistance); *id.* at 56 (prepared statement of Beverly Harris Elliot, President, National Coalition Against Sexual Assault).

<sup>177</sup> Quoting, U.S.Department of Justice, Office for Victims of Crime, *New Directions From the Field: Victims’ Rights and Services for the 21st Century* 22 (1998).

<sup>178</sup> United States Department of Justice, Office of Justice Programs, Office for Victims of Crime, *New Direction From the Field: Victims’ Rights and Services for the 21st Century* at 22 (“Although some state victims’ bill of rights and constitutional amendments include rights for victims of juvenile offenders, most states have extended only selected rights to these victims”). Only three of the thirty-three state constitutional amendments expressly afford similar breadth of coverage for the victims of juvenile misconduct, ALASKA CONST. Art.1, §24; ORE.CONST. Art.I, §42; S.C.CONST. Art.I, §24; two others empower their state legislatures to bestow comparable treatment, ARIZ.CONST. Art.2, §2.1; UTAH CONST. Art.1, §28(3).

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