

THE PROPOSED VICTIM'S RIGHTS AMENDMENT: TAKING A BITE OUT OF CRIME OR A DOG WITH NO TEETH?

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"Our criminal justice system will never be truly just as long as criminals have rights and victims have none."¹

I. Introduction

The victimization of Collene Campbell and her family began when her son was brutally murdered.² The second victimization of the Campbell family occurred when the criminal justice system

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¹ See 142 CONG. REC. S11998-11999 (Sept. 30, 1996) (statement of Sen. Kyl).

² See *Victims Bill of Rights Amendment: Hearings on S.J. Res. 52 Before the Senate Comm. on the Judiciary*, 104th Cong. 33 (1996) [hereinafter *Senate Judiciary Hearing*] (statement of Collene Campbell). Collene Campbell's son had been strangled and his body was thrown from an airplane over the ocean. See *id.* His body was never recovered. See *id.*

evicted them from the courtroom and then ignored them throughout the trial process.³ As unreal as their experiences may seem to those never touched by crime, this drama is all too familiar to victims of violent crimes and their families.⁴

Patricia Pollard suffered a similar double victimization.⁵ First, her attacker raped her and left her for dead along the side of the road.⁶ Then, equally as injurious, the state did not provide her notice that they paroled her attacker ten years earlier than his minimum sentence required.⁷ Pollard lived in fear that her attacker would seek reprisal, although he was reincarcerated for other non-sexual crimes within a year of his release.⁸

³ See *Senate Judiciary Hearing*, *supra* note 2, at 33 (statement of Collene Campbell). Neither Collene Campbell nor her family were allowed in the courtroom during the three trials of her son's murderers because the defense had subpoenaed her and her husband. See Meridith Cohn, *Victims' Rights Urged in Congress; Lawmakers: Pushing for a Constitutional Amendment*, L.A. TIMES (Orange Cty.), July 12, 1996, at A11. While the family and friends of the defendants were allowed to attend the trial proceedings, Mrs. Campbell and her family were forced to spend the entire trial sitting in the hallway outside of the courtroom. See *Senate Judiciary Hearings*, *supra* note 2, at 33 (testimony of Collene Campbell). Adding to their victimization, the appellate court reversed the jury's verdict and subsequently released the defendants. See *id.* These events greatly shocked and surprised the family since they had never been informed that an appeal was being heard, whereas over 40 friends and family members of the defendants had been notified of the hearing and their subsequent release. See *id.* When Mrs. Campbell called the Deputy Attorney General in charge of the case to express her disappointment at not being notified of such major proceedings, she was told that informing a victim's family is "unimportant because a victim's family just [doesn't] understand the proceedings." *Id.* After having suffering through seven years and nine months of the trial process, Mrs. Campbell strongly disagrees. See *id.*

⁴ See *Senate Judiciary Hearing*, *supra* note 2, at 35-36 (statement of Rita Goldsmith, National Organization of Parents of Murdered Children).

⁵ See *Senate Judiciary Hearing*, *supra* note 2, at 31-32 (statement of Patricia Pollard). See also *id.* at 17 (statement of Jon Kyl); William G. Kleinknecht, *Victims' Rights Advocates on a Roll*, NAT'L L.J., July 15, 1996 at A1.

⁶ See *Senate Judiciary Hearing*, *supra* note 2, at 31 (statement of Patricia Pollard). In July 1974, Eric Mageary kidnapped Patricia Pollard, forced her into a pickup truck and violently assaulted her. See *id.* He slashed and scarred her with the razor edge of a torn beer can, broke her ribs and jaw, raped her, and choked her into unconsciousness. See *id.* Her attacker left her on the side of the road, but later returned to strangle her, hoping to ensure her death. See *id.*

⁷ See *Senate Judiciary Hearing*, *supra* note 2, at 31 (statement of Patricia Pollard). "[N]o one ever told me or gave me any chance to say what I thought about [his release]. The system had silenced me, just like Mageary did that night outside of Flagstaff." *Id.*

⁸ See *Senate Judiciary Hearing*, *supra* note 2, at 31 (statement of Patricia Pollard).

Although many assume that the criminal justice system protects and serves all parties, there are more constitutional amendments protecting those accused of crimes than protecting the victims of crimes.⁹ In response, many states have either enacted victim's rights amendments to their own state constitutions¹⁰ or passed victim's rights statutes.¹¹ In Patricia Pollard's case, just prior to her attacker's early release, Arizona amended its state constitution to provide victims with the right to receive notice of

⁹ See U.S. CONST. amend. V, VI, VII, and VIII.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI. "In Suits at common law . . . the right of trial by jury shall be preserved . . ." U.S. CONST. amend. VII. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

¹⁰ The following states have various forms of victim's rights amendments: ALASKA CONST. art. I, § 24; ARIZ. CONST. art. 2, § 2.1; CAL. CONST. art. 1, § 28(a), (b); COLO. CONST. art. 2, § 16(a); FLA. CONST. art. 1, § 16(b); IDAHO CONST. art. 1, § 22; ILL. CONST. art. 1, § 8.1; KAN. CONST. art. 15, § 15; MD. DECL. OF RIGHTS art. 47; MICH. CONST. art. 1, § 24; MO. CONST. art. 1, § 32; N.J. CONST. art. I, § 22; N.M. CONST. art. II, § 24; OHIO CONST. art. I, § 10(a); R.I. CONST. art. 1, § 23; TEX. CONST. art. 1, § 30; UTAH CONST. art. I, § 8; WASH. CONST. art. I, § 35; WIS. CONST. art. 1, § 9(m). Connecticut, Indiana, Nevada, North Carolina, Oklahoma, Oregon, South Carolina and Virginia all passed Victim's Rights Amendments in the November 1996 elections. See 143 CONG. REC. S561 (daily ed. Jan. 21, 1997); See IND. CONST. art. 1, § 13(b), NEB. CONST. art. 1, § 28; NEV. CONST. art. I, § 8; N.C. CONST. art. I, § 37; OKLA. CONST. art. 2, § 34; VA. CONST. art. I, § 8-A.

¹¹ See N.J. STAT. ANN. § 2C:11-3(c)(6) (West 1995) (providing for Victim Impact Statements at sentencing). Each state has the power to create and modify its own criminal justice system and laws of criminal procedure. See YALE KAMISAR, BASIC CRIMINAL PROCEDURE 2 (8th ed. 1994). Jurisdictions have diverse systems because of their differing political philosophies, their administrative differences, the speed to which the courts and legislatures react to public criticism of the criminal justice system and the lack of pressure to be uniform with other systems. See *id.* at 5.

their attacker's impending release and the opportunity to speak at the parole hearing.¹² Despite these amendments, Ms. Pollard did not receive any notice of her attacker's parole hearing.¹³ After learning secondhand of the parole board's decision to release her attacker, Ms. Pollard, assisted by the county prosecutor, appealed the board's decision to the Arizona Court of Appeals who found that this action violated her new rights.¹⁴ The court stayed the release of Pollard's attacker until the parole board received her testimony.¹⁵

While state constitutional amendments often give victims a greater voice in the trial process, the rights provided to defendants through the Federal Constitution will almost always trump any rights a state may provide to victims.¹⁶ Judges are hesitant about relying on state constitutional amendments or state statutes giving victims a greater role because they feel that these laws violate rules of evidence and contradict due process guarantees pro-

¹² See Kleinknecht, *supra* note 5, at A1; see also ARIZ. CONST. art. II, §§ 2.1(A)(2)-(4). The sections that pertained to Ms. Pollard's case read:

(A) To preserve and protect victims' rights to justice and due process, a victim of crime has a right . . . [t]o be informed, upon request, when the accused or convicted person is released from custody or has escaped . . . [t]o be present at and, upon request, to be informed of all criminal proceedings where the defendant has the right to be present . . . [and t]o be heard at any proceeding involving a post-arrest release decision, a negotiated plea, and sentencing.

ARIZ. CONST. art. II, §§ 2.1(A)(2)-(4).

¹³ See Kleinknecht, *supra* note 5, at A1.

¹⁴ See *Senate Judiciary Hearing*, *supra* note 2, at 31-32 (testimony of Patricia Pollard).

¹⁵ See *Senate Judiciary Hearing*, *supra* note 2, at 31-32 (testimony of Patricia Pollard).

The county attorney in Flagstaff filed an action to stop the release and the court of appeals in Arizona forced the board, because they had denied me my constitutional rights, to hold another hearing and to hear from me. This time, after they heard from me directly and heard first hand the horrible nature of the offense, they voted for public safety and Mageary's release was denied.

Id. at 32. "Without constitutional rights for Patricia, the safety of the community would have been jeopardized again." *Senate Judiciary Hearing*, *supra* note 2, at 17 (statement of Sen. Kyl).

¹⁶ See *Remarks Announcing Support for a Constitutional Amendment on Victims Rights*, 32 WEEKLY COMP. PRES. DOC. 1134, 1135 (June 25, 1996) [hereinafter *Presidential Remarks*]. "When a judge balances defendants' rights in the Federal Constitution against victims' rights' in a statute or a State constitution, the defendants' rights almost always prevail." *Id.* at 1135.

vided in the Federal Constitution.¹⁷ This sentiment is echoed in New Jersey's court system.¹⁸ Although New Jersey has a victim's rights amendment in its state constitution¹⁹ and a state statute allowing for Victim Impact Statements to be read at sentencing hearings in criminal cases,²⁰ a New Jersey Superior Court judge refused to allow the family of a murdered eight-year-old girl to present evidence at a sentencing hearing.²¹ The New Jersey Supreme

¹⁷ See Jennifer P. Himmel, *New Jersey Victim Impact Statute Survives Constitutional Challenge*, 5 N.J. LAWYER 1439 (1996) (analyzing the New Jersey Supreme Court's opinion in *State v. Muhammad*, 145 N.J. 23, 678 A.2d 164 (1996)). See generally Aaron H. Galileo, Casenote, 7 SETON HALL CONST. L.J. 723 (1997) (analyzing whether victim impact evidence violates the Eighth Amendment and whether such evidence may be used in New Jersey capital murder cases).

¹⁸ See Himmel, *supra* note 17, at 1439.

¹⁹ See N.J. CONST. art. 1, § 22. This section reads in part:

A victim of a crime shall be treated with fairness, compassion and respect by the criminal justice system, shall not be denied the right to be present at public judicial proceedings except when properly sequestered in accordance with law or court rule prior to completing his or her testimony as a witness, and shall be entitled to those rights and remedies as may be provided by the legislature. For the purposes of this paragraph, the phrase "victim of a crime" shall mean: a) a person who has suffered physical or psychological injury or has incurred loss of or damage to personal or real property as a result of a crime or an incident involving another person operating a motor vehicle while under the influence of drugs or alcohol, and b) the spouse, parent, legal guardian, grandparent, child or sibling of the decedent in the case of a criminal homicide.

Id. The New Jersey Legislature adopted this amendment on November 5, 1991. See *Muhammad*, 145 N.J. at 32, 678 A.2d at 169.

²⁰ See N.J. STAT. ANN. § 2C:11-3(c) (6) (West 1995).

When a defendant at a sentencing proceeding presents evidence of the defendant's character or record . . . the State may present evidence of the murder victim's character and background and of the impact of the murder on the victim's survivors. If the jury finds that the State has proven at least one aggravating factor beyond a reasonable doubt and the jury finds the existence of a mitigating factor . . . the jury may consider the victim and survivor evidence presented by the State pursuant to this paragraph in determining the appropriate weight to give mitigating evidence

Id.

²¹ See William Glaberson, *Jersey Court to Decide Limits of Victim's Right to Address Jury*, N.Y. TIMES, June 11, 1996, at B1. The judge did not allow the family to make their victim impact statement because "the emotionally powerful nature of victim-impact evidence is unmistakable." *Id.* See also *Muhammad*, 145 N.J. at 32, 678 A.2d at 169 (citing *State v. Rasheed Muhammad*, No. 2285-95 (N.J. Super. Ct. Law Div. 1995)); Kleinknecht, *supra* note 5, at A1. The judge also felt that allowing victim impact statements would violate the defendant's federal constitutional rights. See Jennifer P. Himmel, *supra* note 17, at 1439.

Court overturned the lower court's decision by holding that the statute did not burden the defendant since it did not prevent him from introducing mitigating evidence.²² The court further held that the statute did not violate New Jersey's Constitution because it provides crime victims broader rights than the Federal Constitution.²³ Although the New Jersey Supreme Court overturned the lower court's holding, victim's rights advocates point to this type of decision to illustrate the need for action on a federal level.²⁴

The proposed Victim's Rights Amendment to the United States Constitution²⁵ seeks to bring fairness to the criminal justice system by equalizing the constitutional rights between victims and the accused.²⁶ Through this balancing, victim's rights advocates hope to return dignity to the victim and prevent further victimization.²⁷

This note will examine the historical background of the victims rights movement, including the history behind the movement from local and private actions against a defendant to state involvement in criminal cases, as well as the introduction of the

²² See *Muhammad*, 145 N.J. at 38-39, 678 A.2d at 172.

²³ See *id.* at 41-42, 678 A.2d at 173-74.

²⁴ See *id.*; see also President's Remarks Announcing Support for a Constitutional Amendment, 32 WEEKLY COMP. PRES. DOC. 1134, 1135 (June 25, 1996). President Clinton called for a constitutional amendment which would ensure that victims received rights in every federal, state, military and juvenile court within this country. See *id.*; see also Alison Mitchell, *Clinton Calls for Amendment Guaranteeing Victims' Rights*, N.Y. TIMES, June 26, 1996, at A15.

²⁵ See *infra* text accompanying notes 86 and 88 for the most current versions of the amendment. The amendment has undergone several revisions since being introduced. See *infra* text accompanying notes 67-69, 81, 86, 88, 89.

²⁶ See *Victims Rights Constitutional Amendment: Hearings on H.J. Res. 173 and H.J. Res. 174 Before the House Committee on the Judiciary*, 104th Cong. 169 (1996) [hereinafter *House Judiciary Hearing*] (statement of Hon. John R. Schmidt, U.S. Associate Attorney General, Department of Justice).

[W]e have found that judges across the country routinely bar victims of violent crime from attending the trials of the individuals accused of committing those crimes because of the possibility that the victim might be called as a witness. If the victims had a constitutional right to attend, those judges would have to respect that right. We would have a level playing field where each interested party has rights included in the U.S. Constitution.

Id.

²⁷ See 142 CONG. REC. S3795 (daily ed. Apr. 22, 1996) (statement of Sen. Kyl introducing the original version of the Victim's Rights Amendment).

federal legislation.²⁸ This note will then analyze the provisions of the bill and the arguments for and against each element of the amendment.²⁹ It will also look at projected problems with the bill and future prospects for its passage.³⁰ In conclusion, this note will argue that although protecting victims is a laudable goal, the Constitution is not the proper place for an amendment based on emotions and providing no remedies for its violation.³¹

II. *Historical Background of the Victim's Rights Movement.*

The United States Constitution does not explicitly or implicitly contain procedural rights for victims.³² At the time the Founding Fathers drafted the Constitution, no need existed for a special provision protecting victim's rights.³³ In the English legal tradition of private prosecutions, which was in use at the time of the signing of the Constitution, the government took little or no role in legal proceedings.³⁴ The victim or the victim's family would act as their own prosecutor and personally fund the case.³⁵ As this practice declined in use and government participation grew, vic-

²⁸ See *infra* Part II.

²⁹ See *infra* Part III.

³⁰ See *infra* Part IV.

³¹ See *infra* Part V.

³² See *Senate Judiciary Hearing*, *supra* note 2, at 52 (statement of Paul G. Cassel); see also U.S. CONST. amend. V, VI, VII, VIII.

³³ See *Senate Judiciary Hearing*, *supra* note 2, at 52 (statement of Paul G. Cassel). "The Bill of Rights was designed to protect personal liberties from governmental infringement, not to protect private individuals from each other." *House Judiciary Hearing*, *supra* note 26, at 84 (statement of Elisabeth A. Semel, National Association of Criminal Defense Lawyers). However, at that time 43 million crime victims were not victimized by crime every year. See *id.* at 16 (statement of Dianne Feinstein).

³⁴ See *Senate Judiciary Hearing*, *supra* note 2 (statement of Paul G. Cassel).

³⁵ See Richard Shapiro, *Victims and Vengeance: Why the Victims' Rights Amendment is a Bad Idea*, THE NATION, Feb. 10, 1997, at 18. Under this early system, those who were rich and powerful had better access to justice. See *id.* (citing legal historian Lawrence Friedman); see also Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 366-67 (1986) ("At trial, generally, there were no lawyers for either the prosecution or the defense. Victims of crime simply acted as their own counsel, although wealthier crime victims often hired a prosecutor."). In her written statement to the House Judiciary against the amendment, Elisabeth Semel refers to these times as "Mob Rule" and cautions against implementing a Victim's Rights Amendment which she predicts would lead us back to this "private blood feud mentality." See *House Judiciary Hearing*, *supra* note 26, at 88 (statement of Elisabeth A. Semel).

tims took a more passive role in the criminal justice system.³⁶ In turn, the states developed their own constitutions, relying considerably on the federal model.³⁷ However, these constitutions did not recognize the evolution of criminal procedure away from private prosecutions.³⁸

During the years under Chief Justice Earl Warren, the Supreme Court expanded defendants' rights under the Federal Constitution.³⁹ This expansion contributed to an increasing pub-

³⁶ See Paul S. Hudson, *The Crime Victim and the Criminal Justice System: Time for a Change*, 11 PEPP. L. REV. 23, 24 (1984). During this time, the idea began to spread that a crime was an offense against society and government and not just the individual. See *id.* Therefore, the government rather than the victim should prosecute the crime and punish the criminal. See *id.* As a result, substantive participation rights for victims gradually eroded away. See *Senate Judiciary Hearing*, *supra* note 2, at 52 (statement of Paul G. Cassel). Now, the victim's only role in the process is to report crimes to the police and to serve as a witness. See *id.* (citing Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515, 519 (1982)). However, many victims fail to make reports, not wanting to subject themselves to "the difficult and often dehumanizing problems associated" with the criminal justice system. C.J. Richard Barajas & Scott Alexander Nelson, *The Proposed Crime Victims' Federal Constitutional Amendment; Working Toward a Proper Balance*, 49 BAYLOR L. REV. 1, 11 (1997). Furthermore, victims are often treated as mere inconveniences in the court system. See 143 CONG. REC. S560 (daily ed. Jan. 21, 1997) (statement of Sen. Kyl).

³⁷ See *Senate Judiciary Hearing*, *supra* note 2, at 52 (testimony of Paul G. Cassell). Mr. Cassel refers to Utah's use of similar language to the U.S. Constitution. See *id.* at 52 n.13. For example, Utah and many other western states such as Idaho, Montana, North Dakota, South Dakota and Wyoming have in their constitutions similar search and seizure exclusionary rules. See Paul G. Cassell, *The Mysterious Creation of Search and Seizure Exclusionary Rules under the Constitutions: The Utah Example*, 1993 UTAH L. REV. 751, 802 n.319 (1993) (setting forth the differing search and seizure language of the Idaho, Montana, North Dakota, South Dakota, and Wyoming constitution from that of the United States Constitution, article I, § 14).

³⁸ See *Senate Judiciary Hearing*, *supra* note 2, at 52 (statement of Paul G. Cassell).

³⁹ See *Senate Judiciary Hearing*, *supra* note 2, at 52 (testimony of Paul G. Cassell). The Warren Court enlarged the protections of defendants or those convicted by increasing their rights to counsel and access to the courts. See Francis Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L. FORUM 518, 528. See generally *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that counsel must be provided to indigents accused of non-capital felonies); *Douglas v. California*, 372 U.S. 353 (1963) (finding that counsel must be provided to indigents on their first appeal because it was a matter of right and not a discretionary appeal); *Escobedo v. Illinois*, 378 U.S. 478 (1964) (holding Sixth Amendment right applicable when the investigation has focused on a particular suspect who is also in police custody); *Miranda v. Arizona*, 384 U.S. 436 (1966) (opining that suspect must be given notice of his right to an attorney before police may question suspect). The Warren Court also approved and expanded the exclusionary rule. See *Mapp v. Ohio*,

lic concern over the lack of crime victims' rights.⁴⁰ In response to this concern, President Ronald Reagan created the Presidential Task Force on Victims of Crime in 1982 to explore this issue.⁴¹ The Task Force's purpose was to study how policies and programs implemented on a national, state and local level affect crime victims.⁴² The Task Force then submitted recommendations to the President and Attorney General⁴³ on how crime victims might be better assisted by organizations and groups on both the governmental and private levels.⁴⁴ In addition to these recommenda-

367 U.S. 643 (1961) (finding that if evidence is obtained by an illegal search and seizure, it should be inadmissible in court); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965) (applying the exclusionary rule to forfeiture proceedings).

⁴⁰ See *Senate Judiciary Hearing*, *supra* note 2, at 53 (testimony of Paul G. Cassell). Another theory set forth to explain the advent of the victim's rights movement is that growing concerns about crime, sexual assault, domestic violence and child abuse spurred citizens into action. See Katie Long, *Community Input at Sentencing: Victim's Right or Victim's Revenge?*, 75 B.U. L. REV. 187, 190 (1995) (discussing the ramifications and unresolved issues of the Supreme Court's decision in *Payne v. Tennessee*, see, 501 U.S. 808 (1991)).

⁴¹ See President's Task Force on Victims of Crime, 18 WEEKLY COMP. PRES. DOC. 522 (Apr. 23, 1982) (Exec. Order No. 12,360). President Reagan formed this task force by Executive Order No. 12,360 on April 23, 1982. See *id.* The creation of the Task Force appropriately coincided with Crime Victim's Week. See *id.* at 521-22 (remarks on signing Exec. Order No. 12,360). President Reagan stated that "[b]oth the observance of Crime Victims Week and the creation of this task force are entirely consistent with principles that lie at the heart of our Nation's belief in freedom under the law." *Id.* at 522. "Somewhere along the way, the system began to serve lawyers and judges and defendants, treating the victim with institutionalized disinterest." PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT, at vi (1982) [hereinafter TASK FORCE]. Those serving on the Task Force were Lois Haight Herrington, Chairman, Garfield Bobo, Frank Carrington, James P. Damos, Doris L. Dolan, Kenneth O. Eikenberry, Robert J. Miller, Pat Robertson and Stanton E. Samenow. See *id.* at iii.

⁴² See Exec. Order No. 12,360, 47 Fed. Reg. 17,975 (1982).

⁴³ See *id.* Section 2(c) states that the task force "shall advise the President and the Attorney General with respect to actions which can be undertaken to improve our efforts to assist and protect victims of crime." *Id.*

⁴⁴ See TASK FORCE, *supra* note 41, at v. When issued, the report contained over fifty specific recommendations. See *id.* at 17-111. These recommendations were addressed to executive and legislative action at the federal and state levels, criminal justice system agencies, police, prosecutors, judiciary, parole boards, hospitals, the ministry, the bar, schools, the mental health community and the private sector. See *id.* at v. The Task Force pointed out ways in which each area could better serve victims. See *id.* at 17-111. For example, they recommended that both federal and state governments propose and enact comprehensive legislation to better protect victims, and that the police act promptly, attentively and sensitively to victim's needs. See *id.* at 17, 57. They also recommended that hospitals provide more sensitive emergency care service to victims and that schools better report crimes and raise students'

tions, the Task Force proposed that the Sixth Amendment of the United States Constitution be modified to include a victim's rights provision offering enforceable protection to crime victims.⁴⁵

Congress responded to the Task Force proposal in several ways.⁴⁶ First, Congress created the Office for Victim's Assistance.⁴⁷ Congress also passed the Victim and Witness Protection Act of 1982 to implement some of the proposals from the Task Force Report.⁴⁸ In further response to the victim's rights movement, Congress passed the Victims of Crime Act of 1984⁴⁹ and the Victims' Rights and Restitution Act of 1990.⁵⁰ Sections of other bills, such as the Victims of Terrorism Compensation Act,⁵¹ also include specific provisions addressing the rights of victims.

awareness on how to avoid being victimized by crime. *See id.* at 89, 101.

⁴⁵ *See* TASK FORCE, *supra* note 41, at 114. The proposed modification reads as follows:

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defense. *Likewise, the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings.*

Id. (italics in original).

⁴⁶ *See infra* notes 47-51.

⁴⁷ *See White House News Briefing*, Federal News Service - Congressional Hearing Testimonies, June 25, 1996. The Office for Victims of Crime (OVC) was established in 1985 and assists the federal government on issues facing crime victims. *See Office for Victims of Crime* (visited Sept. 11, 1996) <<http://www.ncjrs.org/ovchome.htm>> (on file with the *Seton Hall Legislative Journal*). The OVC encourages state assistance programs, administers funding to victim's groups, sponsors training and provides victim related information. *See id.*

⁴⁸ *See* Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (codified as amended at 18 U.S.C. §§ 1512-1515, 3579-3580 (1984 & Supp. 1996) (making it a crime to tamper with, harass or retaliate against a victim or witness and provides for restitution to victims by the defendant); *see also* FED. R. CRIM. P. 32(c)(2).

⁴⁹ *See* Victims of Crime Act of 1984, 42 U.S.C. §§ 10601-10604 (1984) (encouraging state-created compensation programs and establishing a crime victim's fund used to make annual grants to eligible crime victim compensation programs).

⁵⁰ *See* Victims' Rights and Restitution Act of 1990, 42 U.S.C. §§ 10606-10607 (1990) (providing specific rights and services to victims including notice of proceedings and protection from the offender).

⁵¹ *See* Victims of Terrorism Compensation Act, Pub. L. No. 99-399, 100 Stat. 879 (1986) (codified in scattered sections of 5 U.S.C., 37 U.S.C. and 10 U.S.C.).

In addition to congressional action, several interest groups have formed in order to address this issue at a grassroots level.⁵² These interest groups have gathered immense strength and support in implementing and enforcing laws designed to protect victims of crime.⁵³ In 1985, the National Organization for Victim's Assistance (NOVA) and Mothers Against Drunk Driving (MADD) organized a national conference bringing together assistance groups and citizen activists to consider the proposals of the Task Force.⁵⁴ The group organized out of this conference became known as SHARE.⁵⁵ This SHARE conference became, in part, a networking opportunity for victim interest groups to collaborate with similar groups on reforming public policies.⁵⁶ This conference also enabled the creation of a steering committee, its main goal being the passage of the amendment the Presidential Task Force proposed.⁵⁷ One year later, NOVA, with the help of this

⁵² See *Senate Judiciary Hearing*, *supra* note 2, at 54 (statement of Paul G. Cassel).

⁵³ See *Senate Judiciary Hearing*, *supra* note 2, at 54 (statement of Paul G. Cassel).

⁵⁴ See *Senate Judiciary Hearing*, *supra* note 2, at 53-54 (statement of Paul G. Cassel). NOVA was formed in 1975 as an organization that is a national advocate of victim's rights, provides services to victims and educates and supports professionals assisting victims. See *The National Organization for Victim Assistance* (last modified on Oct. 3, 1997) <<http://www.access.digex.net/~nova/>> (on file with the *Seton Hall Legislative Journal*).

Candy Lightner of California founded Mothers Against Drunk Driving in 1980 after a hit and run driver killed her 13-year-old daughter. See Naftali Bendavid, *Victims Strike Back; Support is Growing for a Constitutional Amendment on Crime Victims Rights*, THE RECORDER (D.C.), July 3, 1996, at 1. "The mission of Mothers Against Drunk Driving is to stop drunk driving and to support the victims of this violent crime." *Mothers Against Drunk Driving* (last modified Apr. 15, 1996) <<http://www.gran-net.com/madd/>> (on file with the *Seton Hall Legislative Journal*). It is a non-profit grassroots organization designed to promote public awareness through community programs and newsletters, to provide victim services and to support legislation providing solutions to the problem of drunk driving. See *id.* MADD has over 3.5 million contributors and boasts a \$46 million budget. See Bendavid, *supra* at 1. Examples of legislation that MADD has supported include higher drinking ages, lower blood alcohol levels and over 2000 drunk driving laws. See *id.*

⁵⁵ See *Senate Judiciary Hearing*, *supra* note 2, at 39 (statement of Robert E. Preston, Co-Chairman of the National Victim Constitutional Amendment Network). SHARE is an acronym for "Self-Help Associations Relating Experiences." See *id.*

⁵⁶ See *Senate Judiciary Hearing*, *supra* note 2, at 39 (statement of Robert E. Preston). A short list of attending groups includes Parents of Murdered Children, Protect the Innocent in Indiana, and New Mexico Crime Victim's Organization. See *id.* at 40.

⁵⁷ See *Senate Judiciary Hearing*, *supra* note 2, at 53 (statement of Robert E. Preston). This steering committee was called "Coalition for Victim's Rights." See *id.*

steering committee, organized another national meeting which passed a resolution proposing an amendment to the Federal Constitution.⁵⁸

After this meeting, the initial steering committee reorganized as the Victim's Constitutional Amendment Network (VictimsCAN).⁵⁹ VictimsCAN recognized the impracticality of convincing Congress to amend the Constitution to include a victim's rights amendment and decided instead to concentrate their efforts on motivating states to pass their own victims rights amendments.⁶⁰ Victim's advocates utilized this approach, reasoning that the states would prove to be a good testing ground in preparation for an amendment at the federal level.⁶¹ With the tremendous support and lobbying efforts of these organizations, since 1982 more than half the states have adopted victim's rights amendments.⁶²

Encouraged by the successful results achieved in the states,⁶³

⁵⁸ See *Senate Judiciary Hearing*, *supra* note 2, at 40 (statement of Paul G. Cassell).

⁵⁹ See *Senate Judiciary Hearing*, *supra* note 2 (statement of Robert E. Preston). Membership also included NOVA, Sonny Von Bulow National Victims Advocacy Center, Parents of Murdered Children, MADD, Childhelp USA, Protect the Innocent Victims Advocate Foundation, Justice for Crime Victims of America, Justice for Surviving Victims, Victims of Crime Advocacy League, Crime Victims Committee of the American Bar Association, and Campaign California. See Betty Jane Spencer, *A Crime Victim's Views on a Constitutional Amendment for Victims*, 34 WAYNE L. REV. 1, 5 (1987).

⁶⁰ See *Senate Judiciary Hearing*, *supra* note 2, at 40 (statement of Robert E. Preston).

⁶¹ See *Senate Judiciary Hearing*, *supra* note 2, at 40 (statement of Robert E. Preston). Testing such legislation at a state level also enabled supporters to observe whether any harmful consequences would result from providing rights to victims. See *id.* Since the purpose of such legislation was to lessen a victim's alienation, doing a test run would keep any harmful effects to either the system or a victim to a minimum. See *id.*

⁶² See *supra* note 10 (listing states with some form of victim's rights amendment in their constitution). See also 142 CONG. REC. S11999 (daily ed. Sept. 30, 1996) (testimony of Sen. Feinstein).

⁶³ See 142 CONG. REC. S11999 (daily ed. Sept. 30, 1996) (testimony of Sen. Feinstein). Since 1982, 21 state amendments have been adopted with five more expected to be adopted by the end of 1996. See *id.* These amendments passed with an average electoral support of 78%. See 142 CONG. REC. S3796 (daily ed. Apr. 22, 1996). Examples of actual numbers are: Alabama, 80%; Alaska, 87%; Idaho, 79%; Maryland, 92%; Ohio, 77%; Utah, 68%. See *id.* The most recently passed state constitutional amendments also had these landslide numbers: Connecticut, 78%; Indiana, 89%; Nevada, 74%; North Carolina, 78%; Oklahoma, 91%; Oregon, 57%; South Carolina, 89%; Virginia, 84%. See 143 CONG. REC. S561 (daily ed. Jan. 21,

VictimsCAN met several times in 1995 to consider the steps necessary to implement a federal constitutional amendment.⁶⁴ After the first of these meetings, VictimsCAN formed a new group called the National Victims Constitutional Amendment Network (NVCAN) to aggressively pursue placing a Victim's Rights Amendment into the Federal Constitution.⁶⁵ Suggestions from VictimsCAN, NVCAN and congressional staff slowly evolved into the language of a proposed amendment.⁶⁶

On April 22, 1996, Senator Jon Kyl (R-Ariz.) and Senator Dianne Feinstein (D-Calif.) formally introduced Senate Joint Resolution 52.⁶⁷ On that same day, Representative Henry Hyde (R-Ill.)

1997). Also, almost all states have passed victim's rights legislation providing for a larger role for victims in the criminal justice system. See *Senate Judiciary Hearing, supra* note 2, at 41 (statement of Robert E. Preston).

⁶⁴ See *Senate Judiciary Hearing, supra* note 2, at 43 (statement of Robert E. Preston). The main issue debated at these meetings was "[w]hat are the core values that victims and their advocates want to elevate to constitutional status?" *Id.*

⁶⁵ See *Senate Judiciary Hearing, supra* note 2, at 43 (statement of Robert E. Preston). By using the feedback gathered at the VictimsCAN brainstorming sessions, the group drafted an amendment and model statutes to encourage further discussion on the topic. See *id.*

⁶⁶ See *Senate Judiciary Hearing, supra* note 2, at 43 (statement of Robert E. Preston). NVCAN met several other times including August 16, 1995, where they again talked about the core values they wanted to include in the amendment and how they should be expressed in the proposed text. See *id.* NVCAN met soon after to discuss the language of the amendment. See *id.* NVCAN held their last meeting on March 2 and 3, 1996, to refine the language decided upon at the earlier meetings. See *id.*

⁶⁷ 142 CONG. REC. S3795 (daily ed. Apr. 22, 1996) (statement of Sen. Kyl). Senate Joint Resolution 52 reads as follows:

SECTION 1. To ensure that the victim is treated with fairness, dignity, and respect, from the occurrence of a crime of violence and other crimes as may be defined by law pursuant to section 2 of this article, and throughout the criminal, military, and juvenile justice processes, as a matter of fundamental rights to liberty, justice, and due process, the victim shall have the following rights: to be informed of and given the opportunity to be present at every proceeding in which those rights are extended to the accused or convicted offender; to be heard at any proceeding involving sentencing, including the right to object to a previously negotiated plea, or a release from custody; to be informed of any release or escape; and to a speedy trial, a final conclusion free from unreasonable delay, full restitution from the convicted offender, reasonable measures to protect the victim from violence or intimidation by the accused or convicted offender, and notice of the victim's rights.

SECTION 2. 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 implement further the rights established in this article by appropriate legislation.

introduced the companion House Joint Resolution 173⁶⁸ and 174.⁶⁹ Each of these bills proposed an amendment to the United

Id.

⁶⁸ H.R. Res. 173, 104th Cong. (1996). House Joint Resolution 173 reads as follows:

SECTION 1. To insure that victims of crime are treated with fairness, dignity, and respect, in each prosecution by the United States or a State, for a crime either involving violence or for which the defendant can be imprisoned for a period longer than one year, any victim of the crime shall have the right to receive notice of, and to be present at, every stage of the public proceedings, unless the court determines there is good cause for the victim not to be present; to comment at any such proceeding involving the possible release of the defendant from custody, the acceptance of any plea agreement with the defendant, or the sentencing of the defendant; to be informed of any release or escape of the defendant; to receive reasonable protection from physical harm or intimidation relating to the proceedings; to have the proceedings resolved in a prompt and timely manner; and to have the court order restitution from the defendant upon conviction.

SECTION 2. The rights established in section 1 shall be made available to victims upon request to the prosecuting authority and in the manner provided by law under section 3.

SECTION 3. The legislatures of the 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.

Id.

⁶⁹ H.R. Res. 174, 104th Cong. (1996). House Joint Resolution 174 reads as follows:

SECTION 1. To ensure that the victim is treated with fairness, dignity, and respect, from the occurrence of a crime of violence and other crimes as may be defined by law pursuant to section 2 of this article, and throughout the criminal, military, and juvenile justice processes, as a matter of fundamental rights to liberty, justice, and due process, the victim shall have the following rights: to be informed of and given the opportunity to be present at every proceeding in which those rights are extended to the accused or convicted offender; to be heard at any proceeding involving sentencing, including the right to object to a previously negotiated plea, or a release from custody; to be informed of any release or escape; and to a speedy trial, a final conclusion free from unreasonable delay, full restitution from the convicted offender, reasonable measures to protect the victim from violence or intimidation by the accused or convicted offender, and notice of the victim's rights.

SECTION 2. 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 implement further this article by appropriate legislation.

Id.

States Constitution providing for victim's rights.⁷⁰

Following the introduction of the bill in the Senate, the Senate Committee on the Judiciary heard testimony on the bill from victims' advocates and professors of law.⁷¹ The House Committee on the Judiciary held similar hearings and testimony from victims' advocates, criminal defense lawyers, and the National Association of Attorneys General.⁷² The weight of each of these hearings leaned heavily in favor of the amendment.⁷³

During the 1996 presidential race, candidates were quick to endorse the bill.⁷⁴ Presidential candidate Robert Dole was the first to formally endorse the bill during a campaign stop.⁷⁵ President

⁷⁰ See *supra* notes 67-69.

⁷¹ See 142 CONG. REC. D354 (daily ed. Apr. 23, 1996). The witness list at this hearing included "Representative Hyde; Katherine Prescott, Mothers Against Drunk Driving (MADD), Greenville, North Carolina; Ralph Hubbard, Parents of Murdered Children of New York State, Inc., Brooklyn; Rita Goldsmith, Sedona, Arizona, on behalf of the National Organization of Parents of Murdered Children, Inc.; Steve Twist, Dial Corporation, Phoenix, Arizona, and Robert E. Preston, Denver, Colorado, both on behalf of the National Victim Constitutional Amendment Network (NVCAN); Paul G. Cassell, University of Utah College of Law, Salt Lake City; Jamin Raskin, American University, Washington, D.C.; John Walsh, Miami, Florida; Patricia Pollard, California; Collene Campbell, San Juan Capistrano, California; and Bruce Fein, Great Falls, Virginia." *Id.*

⁷² See 142 CONG. REC. D730 (daily ed. July 11, 1996). The witness list at the House Judiciary Hearing included "Senators Kyl and Feinstein; Representative Royce; John R. Schmidt, Associate Attorney General, Department of Justice; and public witnesses." *Id.* Those public witnesses who gave testimony are Roberta Roper, Stephanie Roper Committee and Foundation, Inc.; Christine Long-Wagner, Law Enforcement Alliance of America; Chet Hodgins, North Carolina Victim Assistance Network; Honorable Jeffrey Pine, Attorney General of Rhode Island on behalf of the National Association of Attorneys General; Elisabeth A. Semel, Esq., Semel & Feldman, on behalf of the National Association of Criminal Defense Lawyers; Ellen Greenlee, Esq., Chief Defender, Defender Association of Philadelphia, on behalf of National Legal Aid and Defender Association. See *House Judiciary Hearing, supra* note 26, at III (listing names of those who submitted letters and statements for the hearing).

⁷³ See generally *Senate Judiciary Hearing, supra* note 2, at 96, 100 (discussing the few not in support of the Senate's version of the amendment, such as James Raskin and Bruce Fein); *House Judiciary Hearing, supra* note 26, at 80, 141 (detailing the few not in support of the House's version of the amendment, such as Elisabeth A. Semel and Ellen Greenlee).

⁷⁴ See *infra* notes 75-76 and related text.

⁷⁵ See *House Judiciary Hearing, supra* note 26, at 2 (testimony of Chairman Henry J. Hyde). On May 28, 1996, Bob Dole endorsed the amendment in a speech he gave in Colorado. See *id.*; see also 142 CONG. REC. S5866 (daily ed. June 5, 1996). On June 5, 1996, Bob Dole's name was listed as a co-sponsor of S. J. Res. 52. See *id.* Bob Dole

Bill Clinton followed by submitting his own version to the debate in a Rose Garden Ceremony on June 25, 1996.⁷⁶ The Department of Justice also voiced its support for the bill at the same ceremony.⁷⁷

Despite the broad popular support,⁷⁸ the proposed amendment was not without problems.⁷⁹ Concerns over the language led Senator Kyl and Senator Feinstein to continuously redraft and refine the amendment.⁸⁰ On September 30, 1996, both Senators introduced a revised version of the amendment, Senate Joint Reso-

was the Senate's former Majority Leader. See 142 CONG. REC. S6060-6061 (daily ed. June 11, 1996) (statement of Sen. Kempthorne).

⁷⁶ See Mitchell, *supra* note 24, at A15. President Clinton stated that the victim's participation of the victim in the criminal justice process is important and should no longer be overlooked. See President's Remarks Announcing Support for a Constitutional Amendment on Victims Rights, 32 WEEKLY COMP. PRES. DOC. 1134 (June 25, 1996). President Clinton listed several rights that he felt should be included in the amendment. See *id.* They are:

to be told about public court proceedings and to attend them; to make a statement to the court about bail, about sentencing, about accepting a plea if the victim is present; to be told about parole hearings to attend and to speak; notice when the defendant or convict escapes or is released; restitution from the defendant; reasonable protection from the defendant; and notice of these rights.

Id.

⁷⁷ See *House Judiciary Hearing*, *supra* note 26, at 169-70 (statement of John R. Schmidt). When still a prosecutor in Dade County Florida, Attorney General Janet Reno took an active role in providing legal and emotional support to victims involved in her cases. See *id.* at 169. In that position, Attorney General Reno also supported passing a victim's rights amendment to the Florida State Constitution. See *id.*

⁷⁸ See *House Judiciary Hearing*, *supra* note 26, at 16 (statement of Dianne Feinstein). Among the supporters are the following groups: "National Center for Missing and Exploited Children; the Honorable Bob Miller, Governor of Nevada, Vice-Chairman, National Governors' Association; Mothers against Drunk Driving (MADD); Los Angeles County Sheriff Sherman Block; Victim Assistance Legal Organization; Citizens for Law and Order; Parents of Murdered Children; National Organization for Victim Assistance; National Coalition Against Sexual Assault; National Victim Center; Alaska State Legislature; Doris Tate Victims Bureau; Law Enforcement Alliance of America; National Victims' Constitutional Amendment Network." *Id.*

⁷⁹ See 142 CONG. REC. S11999 (daily ed. Sept. 30, 1996) (statement of Sen. Kyl). Since the introduction of S.J. Res. 52, Senator Kyl and Senator Feinstein have been continuously working on the language of the proposed amendment with the help of the Department of Justice, the White House, law enforcement and interest groups to address the concerns of those who do not support the amendment. See *id.*

⁸⁰ See *id.* During this redrafting stage, Senator Feinstein and Senator Kyl went through 41 different drafts of the amendment. See *id.*; see also *infra* Part III and Part IV for further discussion of the specific problems with the amendment.

lution 65,⁸¹ but cautioned their colleagues that it existed as a work-in-progress which would require further modification.⁸²

The Senators did not push for Senate action in the remaining weeks of the 104th Congress, but instead, decided to wait until the start of a new session for tactical reasons.⁸³ Senators Kyl and Fein-

⁸¹ 142 CONG. REC. S11999 (daily ed. Sept. 30, 1996) (statement of Sen. Kyl). The text of Senate Joint Resolution 65 reads as follows:

Section 1. Victims of crimes of violence and other crimes that Congress and the States may define by law pursuant to section 3, shall have the rights to notice of and not to be excluded from all public proceedings relating to the crime; to be heard if present and to submit a statement at a public pre-trial or trial proceeding to determine a release from custody, an acceptance of a negotiated plea, or a sentence; to these rights at a parole proceeding to the extent they are afforded to the convicted offender; to notice of a release pursuant to a public or parole proceeding or an escape; to a final disposition free from unreasonable delay; to an order of restitution from the convicted offender; to have the safety of the victim considered in determining a release from custody; and to notice of the rights established by this article.

Section 2. The victim shall have standing to assert the rights established by this article; however, nothing in this article shall provide grounds for the victim to challenge a charging decision or a conviction, obtain a stay of trial, or compel a new trial; nor shall anything in this article give rise to a claim of damages against the United States, a State, a political subdivision, or a public official; nor shall anything in this article provide grounds for the accused or convicted offender to obtain any form of relief.

Section 3. The Congress and the States shall have the power to enforce this article within their respective federal and state jurisdictions by appropriate legislation, including the power to enact exceptions when required for compelling reasons of public safety.

Section 4. The rights established by this article shall be applicable to all proceedings occurring after ratification of this article.

Section 5. The rights established by this article shall apply in all federal, state, military, and juvenile justice proceedings, and shall also apply to victims in the District of Columbia, and any commonwealth, territory, or possession of the United States.

Id.

⁸² See 142 CONG. REC. S12000 (daily ed. Sept. 30, 1996) (statement of Sen. Feinstein). In particular, Senators Feinstein and Kyl were concerned about three issues left unresolved in their revised text. See *id.* The first issue was what remedy a crime victim would have should their newly created right be violated. See *id.* The second issue concerned the vagueness of the term "victim" and whether it should be limited to victims of violent crime or give victims of non-violent crimes the same rights. See *id.* The third issue was whether to provide the victim with the right to a "final disposition free from unreasonable delay." *Id.*

⁸³ See 142 CONG. REC. S12000 (daily ed. Sept. 30, 1996) (statement of Sen. Feinstein).

stein welcomed the delay for a vote on the amendment in order to encourage advocates of the bill to continue lobbying their elected officials.⁸⁴ Meanwhile, the Senators continued to refine the language of the amendment and accumulate further support among their colleagues.⁸⁵

On Tuesday, January 21, 1997, the first day of Senate legislative business, Senator Kyl reintroduced the bill as S.J. Res. 6.⁸⁶ Re-

⁸⁴ See *id.* The NVCAN web page also encouraged interested private persons to lobby their own state senators and representatives to vote for the bill who would be home to campaign for the November elections. See *Proposed Federal Constitutional Amendment* (visited Dec. 22, 1996) <<http://www.nvc.org/hdir/amendment.htm>> (on file with the *Seton Hall Legislative Journal*).

⁸⁵ See 142 CONG. REC. S12000 (daily ed. Sept. 30, 1996) (statement of Sen. Feinstein). Before the 104th Congress ended, 29 Senators were already co-sponsors of the amendment. See 143 CONG. REC. S560 (daily ed. Jan. 21, 1997) (statement of Sen. Kyl).

⁸⁶ See 143 CONG. REC. S163 (daily ed. Jan. 21, 1997) (statement of Sen. Kyl). The Victim's Rights Amendment as contained in S.J. Res. 6 now reads:

SECTION 1. Each victim of a crime of violence, and other crimes that Congress may define by law, shall have the rights to notice of, and not to be excluded from, all public proceedings relating to the crime - to be heard, if present, and to submit a written statement at a public pretrial or trial proceeding to determine a release from custody, an acceptance of a negotiated plea, or a sentence; To the rights described in the preceding portions of this section at a public parole proceeding, or at a non-public parole proceeding to the extent they are afforded to the convicted offender; To notice of a release pursuant to a public or parole proceeding or an escape; To a final disposition of the proceedings relating to the crime free from unreasonable delay; To an order of restitution from the convicted offender; To consideration for the safety of the victim in determining any release from custody; and To notice of the rights established by this article; however, the rights to notice under this section are not violated if the proper authorities make a reasonable effort, but are unable to provide the notice, or if the failure of the victim to make a reasonable effort to make those authorities aware of the victim's whereabouts prevents that notice.

SECTION 2. The victim shall have standing to assert the rights established by this article. However, nothing [in] this article shall provide grounds for the victim to challenge a charging decision or a conviction; to obtain a stay of trial; or to compel a new trial. Nothing in this article shall give rise to a claim for damages against the United States, a State, a political subdivision, or a public official, nor provide grounds for the accused or convicted offender to obtain any form of relief.

SECTION 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.

SECTION 4. The rights established by this article shall apply to all pro-

iterating the point that victims need constitutional protection to fully ensure their rights, Senator Kyl also reminded the Senate of the tremendous ground support for the amendment.⁸⁷ On April 15, 1997, Representative Henry Hyde provided support from the House by introducing House Joint Resolution 71, a similar bill to the Senate's version of the amendment.⁸⁸ In addition to the

ceedings that begin on or after the 180th day after the ratification of this article.

SECTION 5. The rights established by this article shall apply in all Federal and State proceedings, including military proceedings to the extent that Congress may provide by law, juvenile justice proceedings, and collateral proceedings such as habeas corpus, and including proceedings in any district or territory of the United States not within a State.

143 CONG. REC. S561 (daily ed. Jan. 21, 1997) (statement of Sen. Kyl) (quoting S.J. Res. 6, 105th Cong. (1997)).

⁸⁷ See 143 CONG. REC. S561 (daily ed. Jan. 21, 1997). Senator Kyl announced that 29 states have some sort of victim's rights amendment in their state constitution, including eight new state amendments made within 1996, passed by an average of 80% of the popular vote. See *id.* Further, in February 1997, the National Governors' Association endorsed the amendment. See Cheryl Wetzstein, *Governors Back Victims' Rights*, WASH. TIMES, Feb. 5, 1997, at A4.

⁸⁸ See 143 CONG. REC. H1541 (daily ed. Apr. 15, 1997) (statement of Rep. Hyde). H.J. Res. 71 reads:

SECTION 1. 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 right to notice of, and not to be excluded from, all public proceedings relating to the crime; to be heard, if present, and to submit a written statement at all public proceedings, relating to the crime, to determine a release from custody, an acceptance of a negotiated plea, or a sentence; to the rights described in the preceding portion of this section at a parole proceeding that is not public, to the extent those rights are afforded to the convicted offender; to notice of any release or escape from custody relating to the crime; to seek relief from an unreasonable delay of the final disposition of the proceedings relating to the crime; to an order of restitution from the convicted offender; to consideration for the safety of the victim in determining any release from custody; and to notice of the rights established by this article; however, the rights to notice under this section are not violated if the proper authorities make a reasonable effort, but are unable to provide the notice, or if the failure of the victim to make a reasonable effort to make those authorities aware of the victim's whereabouts prevents that notice.

SECTION 2. The victim shall have standing to assert the rights established by this article. However, nothing in this article shall provide grounds for the victim to overturn a charging decision, a conviction, or a sentence; to obtain a stay of trial; or to compel a new trial. Nothing in this article shall give rise to any claim for damages, nor provide grounds for the accused or convicted offender to obtain any form of relief.

SECTION 3. The Congress and the States shall have the power to enforce

House's version of the amendment, Representative Hyde also introduced House Resolution 1322,⁸⁹ a bill which contained legislation designed to implement the Victim's Rights Amendment.⁹⁰

Following the introduction of these new bills, the Senate and House held public hearings on April 16, 1997 and June 25, 1997, as they had done one year earlier.⁹¹ Notably at the Senate Judiciary Hearing, the National Clearinghouse for the Defense of Battered Women opposed the proposed amendment, claiming that the protections that it offered to victims could all too easily be used against battered women accused of crimes.⁹²

this article within their respective jurisdictions by appropriate legislation, including the power to enact exceptions when required by the public interest.

SECTION 4. The rights established by this article shall apply to all proceedings that begin on or after the 180th day after the ratification of this article.

SECTION 5. The rights established by this article shall apply in all Federal and State criminal proceedings, including military proceedings, juvenile justice proceedings, and collateral proceedings such as habeas corpus, and including similar proceedings in any district or territory of the United States not within a State.

H.J. Res. 71, 105th Cong. (1997)

⁸⁹ 143 CONG. REC. H1541 (daily ed. Apr. 15, 1997) (statement of Rep. Hyde).

H.R. 1322 reads:.

SECTION 2. CRIME VICTIM RIGHTS. . . (4) JUDICIAL REMEDIES - This section does not create a cause of action or defense in favor of any person arising out of the failure to accord to a victim a right provided in subsection (a), and nothing in this section (A) provides grounds for the victim to overturn a charging decision, a conviction, or a sentence; to obtain a stay of trial; or to compel a new trial; or (B) provides grounds for the accused or convicted offender to obtain any form of relief.

SECTION 5. DEFINITIONS. For purposes of this Act: . . . (2) the term 'victim' means a person (but not including any governmental entity) that has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime, including (A) in the case of a victim that is an institutional entity, an authorized representative of the entity; and (B) in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, one of the following (in order of preference): (i) A spouse. (ii) A legal guardian. (iii) A parent. (iv) A child. (v) A sibling. (vi) Another family member. (vii) Another person designated by the court.

H.R. 1322, 105th Cong. §§ 2, 5 (1997).

⁹⁰ See 143 CONG. REC. H1541 (daily ed. Apr. 15, 1997) (statement of Rep. Hyde).

⁹¹ See 143 CONG. REC. D354 (daily ed. Apr. 16, 1997) (Senate Judiciary Hearings); 143 CONG. REC. D679-80 (daily ed. June 25, 1997) (House Judiciary Hearings).

⁹² See *Victims Rights Amendment: Hearings on S.J. Res. 6 Before the Senate Committee on the Judiciary*, 105th Cong. (1997) [hereinafter 1997 Senate Judiciary Hearing]

III. Analysis of the Proposed Amendment

A. Notice of and Inclusion in the Proceedings

The Victim's Rights Amendment is a comprehensive bill which provides notice to victims of their attacker's criminal proceedings, notice of their attacker's parole hearings or release dates, and the right to be present and to be heard at these proceedings.⁹³ The first right accorded to victims is the right to notice of proceedings associated with the crime and the right to attend those proceedings.⁹⁴ These rights are the most basic rights a victim could receive.⁹⁵ However, these rights do not give the victim a chance to participate in the plea bargaining process.⁹⁶ The result of this arms-length participation keeps the victim as a mere observer in the criminal process.⁹⁷ Although most trial proceedings are already part of the public record, procedural formalities often lead to the exclusion of victims or their families.⁹⁸ This ex-

(testimony of Sue Osthoff, Director of the National Clearinghouse for the Defense of Battered Women).

⁹³ See *infra* notes 94 through 183 (discussing in depth the Act's notice and inclusion provisions). In addition, the Act includes the right to have the victim's safety considered when determining whether to release a felon and the requirement that victims receive notice of these rights. See S.J. Res. 65, 105th Cong. (1997). By considering a victim's safety, a victim's anxiety could be greatly alleviated. See Ken Eikenberry, *The Elevation of Victims' Rights in Washington State: Constitutional Status*, 17 PEPP. L. REV. 19, 29 (1989). If the victim is given a right to either speak at the parole proceedings or have his or her safety considered before an early release, repeat offenses may be decreased. See generally *Senate Judiciary Hearing*, *supra* note 2, at 31-32 (statement of Patricia Pollard). Further, no matter how many rights a victim is given, none of them will have significance if a victim is not told what they are. See *Senate Judiciary Hearing*, *supra* note 2, at 92 (testimony of Steve Twist). Often, failing to provide any kind of information to the victim or the victim's family members may arise because of indifference to the victim's situations or a feeling that a victim should not have a right to the information. See *id.* at 36 (statement of Rita Goldsmith, National Spokesperson for POMC).

⁹⁴ See S.J. Res. 6, 105th Cong. (1997); H.J. Res. 71, 105th Cong. (1997); H.R. 1322, 105th Cong. (1997).

⁹⁵ See *House Judiciary Hearing*, *supra* note 26, at 171 (testimony of John R. Schmidt).

⁹⁶ See Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301, 305 (1987).

⁹⁷ See *id.* at 305.

⁹⁸ See *id.* at 305-06. For example, the time and location of plea bargain hearings are public information and once the terms of the plea bargain are given to the court they are entered into the public record, which the victim may view. See *id.* However,

clusion results in the victim's second victimization.⁹⁹ For example, it is often a victim's responsibility to investigate for themselves when court proceedings will occur.¹⁰⁰

While this right may keep the victim as an observer, it will at least ensure a victim, not just an accused, the right to be accorded due process and fair treatment.¹⁰¹ A requirement of notice would place the burden of informing a victim of his attacker's upcoming parole hearings upon the state.¹⁰² Along with the defendant, the

while the time and place of court proceedings may be public, they are often not known in time for the victim to be informed. *See id.* at 306 n.16.

⁹⁹ *See Senate Judiciary Hearing, supra* note 2, at 42 (statement of Robert E. Preston, Co-chairman of NVCAN, commenting on the difficulty of finding out about court dates).

Before the Florida Victims Rights Amendment passed, I did not have a formal right to receive notice of those hearings. Along with my wife, we worked informally with friends to try to monitor when hearings would be held. One time, I was at the National Victim Center in Fort Worth where I was delivering a speech. A friend of mine saw a printout of who was up for parole the next morning and was startled to see my daughter's murderer on the list. She tracked me down in Texas and placed an urgent phone call to me. I was literally called off the podium to take this call . . . I quickly returned to Tallahassee and spoke in opposition to parole. Parole was denied, but it was a fortuity that I received notice and was able to attend.

Id. at 42. *See also supra* note 3 (describing the double victimization). "To be a victim at the hands of the criminal is an unforgettable nightmare. But to then become a victim at the hands of the criminal justice system is an unforgivable travesty. It makes the criminal and the criminal justice system partners in crime." TASK FORCE, *supra* note 41, at iii.

¹⁰⁰ *See* 142 CONG. REC. S11999 (daily ed. Sept. 30, 1996) (statement of Sen. Feinstein). Senator Feinstein cites the case of Mrs. Carlson whose husband was bludgeoned to death by an intruder who then raped Mrs. Carlson, slit her wrists, broke some of her bones, used a telephone cord to try to strangle her and then set her house on fire. *See id.* Mrs. Carlson often called then Mayor Feinstein to inform her that her attacker was up for parole. *See id.* Incredibly, despite all the abuse this woman endured, she was the one responsible for discovering her attacker's parole hearing date. *See id.* "All too often, such calls have to be made when victims' families are still in a state of shock or are grieving from the loss of their loved one. Victims' families should not have to bear the added burden of trying to obtain information." *Senate Judiciary Hearing, supra* note 2, at 36 (statement of Rita Goldsmith).

¹⁰¹ *See Senate Judiciary Hearing, supra* note 2, at 88 (statement of Steve Twist, Assistant General Counsel, The Dial Corporation). This theory of due process stems from the idea that when someone becomes a victim, their rights to due process have been violated. *See* Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 1004 (1987). Since victims are used as witnesses by the government, the government should ensure that they be accorded their due process rights to life and liberty. *See id.*

¹⁰² *See* 142 CONG. REC. S11999 (daily ed. Sept. 30, 1996) (statement of Sen. Fein-

victim would be given notice of all trial proceedings.¹⁰³ Therefore, despite its seemingly insignificant nature, this notification may alleviate a victim's anxiety and fears of reprisal.¹⁰⁴

There is concern, however, that administering the notice requirement would be too costly and burdensome.¹⁰⁵ Since these rights would attach at the commencement of police proceedings and remain until the defendant is released from prison, the states may be tremendously burdened with notifying every victim any time the most minor of proceedings occurred.¹⁰⁶

However, victim's rights advocates contend a notice provision may be implemented with little financial or administrative burden.¹⁰⁷ It has been suggested that form letters or computer-generated postcards containing information of upcoming trial dates could be sent to interested parties with little cost.¹⁰⁸ Programs, such as these, are already effectively in place to subpoena victims as witnesses.¹⁰⁹ Advocates contend that the cost is small in comparison to the amount of money spent to protect the accused.¹¹⁰

This provision would ensure that a victim could attend all trial proceedings.¹¹¹ Proponents argue that victims have a legitimate interest in the trial process and should be allowed to attend the entire proceeding.¹¹² However, defense attorneys are adept at

stein).

¹⁰³ See *Senate Judiciary Hearing*, *supra* note 2, at 90 (statement of Steve Twist).

¹⁰⁴ See Eikenberry, *supra* note 93, at 29. "Notice Requirements are seen as the victims due process counterpart to the notification rights of the accused which are so freely available and strictly enforced by the criminal justice system." Hudson, *supra* note 36, at 56.

¹⁰⁵ See *House Judiciary Hearing*, *supra* note 26, at 98 (statement of Elisabeth A. Semel).

¹⁰⁶ See *Senate Judiciary Hearing*, *supra* note 2, at 97 (statement of James Raskin). Presumably this would extend from the trial, to probation appeals, to even disciplinary hearings, no matter how minor, as long as it is a public proceeding. See *id.*

¹⁰⁷ See Welling, *supra* note 96, at 306.

¹⁰⁸ See *Senate Judiciary Hearing*, *supra* note 2, at 83 (statement of Paul G. Cassel).

¹⁰⁹ See *Senate Judiciary Hearing*, *supra* note 2, at 83 (statement of Paul G. Cassel). This practice is already performed in Utah with nominal fiscal burden. See *id.*

¹¹⁰ See Barajas, *supra* note 36, at 23-24.

¹¹¹ See *supra* note 88 (setting forth the most current version of the bill which provides that victims shall not be excluded from public proceedings concerning the crime.)

¹¹² See TASK FORCE, *supra* note 41, at 80. When a person is victimized, it is often the most significant event in their life. See *id.* They should not be kept out of pro-

excluding victims from the courtroom by arguing that their presence may unfairly influence a jury.¹¹³ An additional defense tactic used to keep victims out of the courtroom is to subpoena a victim as a witness and then intentionally not call them to the stand.¹¹⁴ If the victim is called to testify, they will be excluded from the courtroom during the remainder of the trial to ensure independent, unfabricated testimony.¹¹⁵

Notably, a victim's rights amendment will overturn all existing witness exclusion rules presently used to keep the victim out of the courtroom.¹¹⁶ Problems caused by this new right may be solved by having victims on witness lists testify first or having their testimony videotaped before the trial to alleviate any concerns that they may change their testimony at a later time.¹¹⁷

ceedings where responsibility is being assigned to the person who victimized them. *See id.*

¹¹³ See Ken Eikenberry, *Victims of Crime/Victims of Justice*, 34 WAYNE L. REV. 29, 41 (1987). See also Susan Bandes, *Empathy, Narrative and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 392 (1996) (arguing that a jury's ability to deliberate objectively is harmed when inappropriate emotions are allowed in the judicial context).

¹¹⁴ See Eikenberry, *supra* note 113, at 41. This also serves as a way to prevent the jury from being influenced in favor of the victim by keeping the victim a faceless name in the cold proceedings. *See id.*

¹¹⁵ See Eikenberry, *supra* note 113, at 41. The Federal Rules of Evidence 615 provides:

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.

FED. R. EVID. 615.

¹¹⁶ See *Senate Judiciary Hearing*, *supra* note 2, at 90 (statement of Steve Twist).

¹¹⁷ See *Senate Judiciary Hearing*, *supra* note 2, at 90 (statement of Steve Twist). Mr. Twist addressed concerns that victims will tailor their testimony to fit that of other witnesses:

[I]f in pre-trial hearings it appears to the court that the victim might tailor his or her testimony to fit those of other prosecution witnesses — an improbable event, given that most victims already know what those witnesses are expected to say — the court could exercise its discretion to require the victim to testify before the others.

Id. Advocates have also pointed out that if FBI case agents may attend trial proceedings before testifying, as they currently do, then allowing victims in the courtroom should not be a problem. See *House Judiciary Hearing*, *supra* note 26, at 146 (testimony of Ellen Greenlee).

B. A Voice At Trial

Another provision in the Victim's Rights Amendment would allow a victim to speak or to submit a statement at a public proceeding where a defendant's release from custody, a negotiated plea, or a sentence is being considered.¹¹⁸ This provision would extend rights to victims at these proceedings to the same extent that they are afforded to the defendants.¹¹⁹ This offers crime victims a basic right to participation.¹²⁰ According to Senator Kyl, victims should be given the opportunity to have a voice, not a veto, and to stand up for those who abide by the law in their communities.¹²¹ Often, this opportunity arises through the use of a victim impact statement.¹²² Victim impact statements allow victims to voice their accounts of the crime, their sentencing opinions, and the type and amount of restitution they are seeking.¹²³

Pursuant to the Federal Rules of Criminal Procedure, victims of violent crime are currently afforded the right to speak at sentencing proceedings.¹²⁴ However, many judges are uncertain

¹¹⁸ See S.J. Res. 6, 105th Cong. § 1 (1997); H.J. Res. 71, 105th Cong. § 1 (1997).

¹¹⁹ See S.J. Res. 6, 105th Cong. § 1 (1997).

¹²⁰ See generally *House Judiciary Hearing*, *supra* note 26, at 170-71 (statement of John R. Schmidt).

¹²¹ See 142 CONG. REC. S3796 (daily ed. Apr. 22, 1996) (statement of Sen. Kyl).

¹²² See Hudson, *supra* note 36, at 51-52. Victim impact statements allow information to be presented to the court about employment changes caused by the crime, psychological or physical injuries, and economic losses brought about because of the crime. See *id.*

¹²³ See Hudson, *supra* note 36, at 51-52. The victim impact statement can be written or oral. See *id.* at 52. In the case of a written statement, it will be given to the court before the offender is sentenced. See *id.* If it is an oral statement (or a "right of allocution") it will be made to the sentencing court or parole board. See *id.* at 51-52. Victim Impact Statements are described as "a vehicle through which otherwise silenced voices may be heard in the judicial process." Bandes, *supra* note 113, at 392.

¹²⁴ See FED. R. CRIM. P. 32(c)(3). The rule provides in part that:
Before imposing sentence, the court must:

(D) afford the attorney for the Government an opportunity equivalent to that of the defendant's counsel to speak to the court; and

(E) if sentence is to be imposed for a crime of violence or sexual abuse, address the victim personally if the victim is present at the sentencing hearing and determine if the victim wishes to make a statement or present any information in relation to the sentence.

Id.

about this existing procedure.¹²⁵ Perhaps confusion has arisen from two recent Supreme Court decisions.¹²⁶ In *Booth v. Maryland*, the United States Supreme Court held that victim impact statements were inadmissible because a jury's sentencing decision must rest on a defendant's character and the particular facts of a crime, and not on the victim's character.¹²⁷ However, four years later the Supreme Court, in *Payne v. Tennessee*, reversed its prior decision, holding that the use of victim impact statements was constitutionally permissible and not barred by the Eighth Amendment.¹²⁸ Thus, if a State could conclude that a jury would find the information in the Victim Impact Statement relevant, it may choose to allow it.¹²⁹

Although the Supreme Court has upheld the use of victim impact statements, courts are still wary of giving victims a voice in trial proceedings because it may interfere with the defendant's constitutionally protected rights.¹³⁰ While many lower court deci-

¹²⁵ See Heimmel, *supra* note 17, at 1439.

¹²⁶ See *infra* notes 127 and 128.

¹²⁷ 482 U.S. 496, 507-09 (1987). In its opinion, the Court found the prospect of having a "mini-trial" on the character of the victim unappealing since any evidence presented about the character of the victim would be difficult to rebut and the evidence would distract the jury from its "constitutionally required task." See *id.* at 506-07.

¹²⁸ 501 U.S. 808, 827 (1991). Contrary to *Booth*, the Court felt that "the assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of the offense and in determining the appropriate punishment." *Id.* at 819.

¹²⁹ See *id.* at 827.

¹³⁰ See *Presidential Remarks*, *supra* note 16, at 1135.

Last year in New Jersey, Jakiyah McClain was sexually assaulted and brutally murdered. She had gone to visit a friend and never came home. Police found her in the closet of an abandoned apartment; now, her mother wants to use a New Jersey law that gives the murder victims' survivors the right to address a jury deciding on the death penalty. She wants the jury to know more about this fine young girl than the crime scene reports. She wants them to know that Jakiyah was accepted into a school for gifted children the day before she died. But a New Jersey judge decided she can't testify even though the state law gave her the right to do so. He ruled that the defendant's constitutional right to a fair trial required him to strike [the] law down.

Id. "The New Jersey Supreme Court, on June 28, struck down this unfair lower court decision." *House Judiciary Hearing*, *supra* note 26, at 170 (statement of John R. Schmidt). "[R]egardless of the New Jersey Supreme Court decision, for the mother of Jakiyah McClain, there is no second chance to speak at the sentencing of her

sions prohibiting impact statements have been struck down, victim's rights advocates contend that judges will continue to overlook victim's rights laws at the state level until victims are afforded these rights in the Federal Constitution.¹³¹

Besides victim participation in the criminal process, there are additional compelling reasons for allowing a victim's statement.¹³² For example, allowing a victim to attend and speak at a parole hearing would make the parole board more accountable for their actions.¹³³ Often, a prisoner's behavior in prison may not reflect his or her behavior at-large.¹³⁴ Allowing a victim to speak at a parole hearing would give the parole board insight into the ruthlessness of a prisoner's crime.¹³⁵ Furthermore, victims would also receive the satisfaction that their attacker is being punished and is unable to harm others.¹³⁶

Despite the opinions of victim's advocates who insist that these provisions will enhance the healing of a victim's wounds, critics disagree.¹³⁷ For instance, it has been questioned whether it is appropriate or even legal for a jury or a judge to make sentenc-

daughter's killer." *Id.* (discussing *New Jersey v. Rasheed Muhammad*, 145 N.J. 23, 678 A.2d 164).

¹³¹ See *House Judiciary Hearing*, *supra* note 26, at 170 (statement of John R. Schmidt).

¹³² See *infra* text accompanying notes 133-136.

¹³³ See *TASK FORCE*, *supra* note 41, at 83-84.

The local parole board has resisted our legitimate attempts to voice our position at initial parole hearings involving dangerous and repeat offenders. Undoubtedly, if the parole board [was] more concerned with the plight of crime victims, the streets would be safer and the need for witness protection would be reduced.

Id. at 84 (quoting Stanley S. Harris, United States Attorney).

¹³⁴ See *TASK FORCE*, *supra* note 41, at 84.

¹³⁵ See *TASK FORCE*, *supra* note 41, at 84. Katherine Prescott, a victim-witness assistant, noted the urgency for victims to be permitted to have their voices heard. See *Senate Judiciary Hearing*, *supra* note 2, at 25 (statement of Katherine Prescott). For example, Ms. Prescott assisted a domestic violence victim facing a civil restraining order hearing who told Ms. Prescott that she feared that her husband was going to murder her. See *id.* The judge settled the case in his chambers with the lawyers, out of the victim's presence and without hearing from the victim. See *id.* The woman never got the opportunity to tell the judge how scared she was of her husband. See *id.* That evening, while walking to her car after her shift [ended] at the hospital, the woman's ex-husband killed her. See *id.* Had the woman been afforded the right to speak to the judge, this tragedy might have been averted. See *id.* at 26.

¹³⁶ See *TASK FORCE*, *supra* note 41, at 84.

¹³⁷ See Bendavid, *supra* note 54, at 1.

ing decisions based on emotional reactions revealed through victim impact statements.¹³⁸ Critics note that if trials are the place for neutral examinations of fact to determine guilt or innocence, then a court should refuse to admit evidence devoid of legal relevance.¹³⁹ They argue that victim testimony has no legal merit and admitting emotional statements at trial may separate defendants into two categories.¹⁴⁰ For instance, there will be those defendants not facing as harsh a sentence because the person they killed left no survivor to speak on their behalf.¹⁴¹

Furthermore, critics posit that if victims are to be heard at pretrial and trial proceedings, a line should be drawn barring their participation in the plea bargain process.¹⁴² It has been suggested that victims are too intimately connected to the case and would be too biased to participate in a plea proceeding.¹⁴³ It is also argued that victims do not understand the systemic benefits of plea bargaining.¹⁴⁴ If victims are given a voice in a defendant's

¹³⁸ See Glaberson, *supra* note 21, at B1 (citing Jean D. Barrett, Attorney for the New Jersey State Association of Criminal Defense Lawyers). Allowing the use of victim impact evidence almost always increases the likelihood that the jury will choose the death penalty. See Paul Gewirtz, *Victims and Voyeurs at the Criminal Trial*, 90 NW. U.L. Rev. 863, 870 (1996). See also Bandes, *supra* note 114, at 401 (arguing against the use of victim impact statements because they evoke inappropriate emotions in the judicial context and harm a jury's ability to deliberate objectively).

¹³⁹ See Bandes, *supra* note 114, at 401.

¹⁴⁰ See Bandes, *supra* note 114, at 401.

¹⁴¹ See Bandes, *supra* note 113, at 401 (quoting Stephen W. Kirsch, Rasheed Muhammad's public defender). This is "at odds with the principle that every person's life is equally precious, and that the criminal law will value each life equally when punishing those who grievously assault human dignity." *Id.* at 406. See also *Booth*, 482 U.S. at 506 n.8 (suggesting that the American justice system does not accept the idea that "defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy").

¹⁴² See *House Judiciary Hearing*, *supra* note 26, at 88-90 (testimony of Elisabeth A. Semel).

¹⁴³ See *House Judiciary Hearing*, *supra* note 26, at 89-90 (testimony of Elisabeth A. Semel). Ms. Semel feels that allowing a victim a quasi-prosecutorial role would detract from the "democratic professionalism" of prosecutors developed in the last 25 years and lead back to a confrontational "private blood feud mentality." See *id.*; see also James M. Dolliver, *Victims' Rights Constitutional Amendment: A Bad Idea Whose Time Should Not Come*, 34 WAYNE L. REV. 87, 90 (1987) (discussing the historical deficiencies, functional deficiencies, and legal deficiencies of a victim's rights amendment).

¹⁴⁴ See *House Judiciary Hearing*, *supra* note 26, at 144 (statement of Ellen Greenlee). Ms. Greenlee discusses several benefits of plea bargaining including lessening of court caseloads by pre-trial resolutions and encouraging offenders to cooperate with the police against their accomplices. See *id.*

plea bargain, their participation may interfere with a prosecutor's duty not to prosecute if there is insufficient evidence.¹⁴⁵ Victim participation could also make the plea bargaining process confrontational and diminish the chances of a quick disposition.¹⁴⁶ Further, victim participation may dissuade defendants from pleading guilty if they perceive that a victim's involvement may inhibit the opportunity to obtain a favorable plea bargain.¹⁴⁷

The purpose of a victim's rights provision is not to interfere with the efficient administration of justice, but rather to ensure that victims receive notice and participation in the defendant's plea bargain.¹⁴⁸ The concern that defendants will reject the option to plea bargain because of the risk that they will not receive a lenient offer is unfounded because defendants may always reject the plea.¹⁴⁹ Further, a speedy disposition will not be affected if both sides accept the plea bargain and evidence has shown that victim participation did not interfere with the plea bargaining process.¹⁵⁰ Moreover, the structure of the criminal justice system should not be dictated by judicial and administrative efficiency at the expense of fairness and justice.¹⁵¹

¹⁴⁵ See *House Judiciary Hearing*, *supra* note 26, at 89-90 (statement of Elisabeth A. Semel). "[T]he prosecutorial function . . . would be substantially diminished if untrained laypersons suffering emotional trauma are allowed to second-guess and effectively dictate the policy decisions made by lawyers accountable to the public." *Id.* at 88.

¹⁴⁶ See Welling, *supra* note 96, at 310.

¹⁴⁷ See Welling, *supra* note 96, at 310. Prosecutors worry that allowing victims to participate in plea bargaining will make this option less attractive to defendants; thus, more cases will go to trial causing increased demand and workload on the court system. See *id.* However, there is empirical evidence that allowing victims a part in plea bargaining does not render it less attractive to defendants, and does not decrease the amount of plea bargains negotiated. See *id.* at 311. The evidence also does not show definitively whether this would reduce the number of guilty pleas entered. See *id.*

¹⁴⁸ See *Senate Judiciary Hearing*, *supra* note 2, at 90 (statement of Steve Twist). For the court to make a fully informed decision whether to accept the plea bargain requires that a victim be accorded a chance to speak. See *id.*

¹⁴⁹ See *Senate Judiciary Hearing*, *supra* note 2, at 91 (statement of Steve Twist). In this instance, the defendant has veto power, not the victim. See *id.*

¹⁵⁰ See Welling, *supra* note 96, at 311.

¹⁵¹ See Welling, *supra* note 96, at 311.

C. Notice

The proposed amendment also gives victims a right to receive notice of the defendant's release, either pursuant to a parole proceeding or as a result of the defendant's escape.¹⁵² This right is similar to the notification right of trial proceedings and is already provided for in federal statutes.¹⁵³ Due to the similarity, critics do not believe that there is a need to provide for this right in an amendment if it is already contained within a statute.¹⁵⁴ Also, there are concerns over the cost and systemic burden mirroring those concerns over the right to notice.¹⁵⁵ However, violent crime victims often live in fear that their attackers will seek revenge after their release or escape from prison.¹⁵⁶ Thus, informing victims of their attacker's release will allow victims to take protective steps against further attack.¹⁵⁷

D. Speedy Trial

Under the Victim's Rights Amendment, a victim would also be given a right to a swift trial.¹⁵⁸ Defendants already maintain the right to a speedy trial¹⁵⁹ because of their incarceration pending the trial and the hardship of having unresolved criminal charges.¹⁶⁰ However, it is often advantageous to the accused criminal to delay trial proceedings.¹⁶¹ Defendants may do so in order to obtain a

¹⁵² See S.J. Res. 6, 105th Cong. § 1 (1997); H.J. Res. 71, 105th Cong. §1 (1997).

¹⁵³ See Hudson, *supra* note 36, at 56 (citing the Victim and Witness Protection Act of 1982); see also *supra* note 48 (discussing the Victim and Witness Protection Act of 1982).

¹⁵⁴ See *Senate Judiciary Hearing, supra* note 2, at 100 (statement of Bruce Fein).

¹⁵⁵ See *House Judiciary Hearing, supra* note 26, at 98 (statement of Elisabeth A. Se-mel); *Senate Judiciary Hearing, supra* note 2 (statement of James Raskin).

¹⁵⁶ See *Senate Judiciary Hearing, supra* note 2 (statement of John R. Schmidt).

¹⁵⁷ See TASK FORCE, *supra* note 41, at 84. "Violent crime victims who are not informed of the release of their assailants can hardly be expected to take precautions for their protection." Hudson, *supra* note 36, at 55.

¹⁵⁸ See S.J. Res. 6, 105th Cong. § 1 (1997); H.J. Res. 71, 105th Cong. §1 (1997).

¹⁵⁹ See U.S. CONST. amend. VI. The Framers added the right to a speedy trial to the Constitution to guard against previous practices by governments who used it to detain individuals without articulable reason and for long periods of time before any legal proceeding. See *Senate Judiciary Hearing, supra* note 2, at 91 (statement of Steve Twist).

¹⁶⁰ See TASK FORCE, *supra* note 41, at 75.

¹⁶¹ See *Senate Judiciary Hearing, supra* note 2, at 91 (statement of Steve Twist).

preferred judge, or to allow the media's portrayal of the facts in a well-publicized case, and any public sentiment of anger to fade from the jurors' minds.¹⁶² Victims and relatives of victims suffer as a result of these delays.¹⁶³ Until a case is finalized, advocates argue that victims cannot have closure.¹⁶⁴

A problem arises, however, with respect to guaranteeing a speedy trial within a certain time limit.¹⁶⁵ A time limit puts strain on a prosecutor to go to trial, often before a case is thoroughly investigated and prepared.¹⁶⁶ Opponents argue that by providing victims with the right to a speedy trial, victims gain too much power over criminal proceedings.¹⁶⁷ Adversaries contend that if victims are able to push the trial forward because of their own interests, rather than waiting for thorough preparation, not only will the defendant's rights be jeopardized, but the victims will be hurt as well.¹⁶⁸ Further, if victims are given a voice in all proceedings, including the ability to refuse plea bargains, the entire trial process may become even longer and fewer cases will settle.¹⁶⁹

E. Restitution

The proposed amendment also provides victims with orders for restitution.¹⁷⁰ Often, victims do not pursue civil lawsuits against their attacker because of the associated costs and burdens.¹⁷¹ The court then has the choice between awarding restitu-

¹⁶² See Hudson, *supra* note 36, at 58.

¹⁶³ See House Judiciary Hearing, *supra* note 26, at 11 (statement of Sen. Kyl). In 1984, New York City's average felony case took at least seven appearances before reaching a disposition. See Hudson, *supra* note 36, at 57.

¹⁶⁴ See TASK FORCE, *supra* note 41, at 75. "People have to realize that emotional scabs are constantly being scraped off as you appear time after time in court." *Id.*

¹⁶⁵ See House Judiciary Hearing, *supra* note 26, at 85-87 (statement of Elisabeth A. Semel) (describing her mob rule theory).

¹⁶⁶ See House Judiciary Hearing, *supra* note 26, at 88 (testimony of Elisabeth A. Semel).

¹⁶⁷ See House Judiciary Hearing, *supra* note 26, at 88 (testimony of Elisabeth A. Semel).

¹⁶⁸ See House Judiciary Hearing, *supra* note 26, at 90 (testimony of Elisabeth A. Semel).

¹⁶⁹ See House Judiciary Hearing, *supra* note 26, at 144 (testimony of Ellen Greenlee). Currently, courts have an overwhelming caseload, which would only be magnified by allowing victims to block pleas. See *id.*

¹⁷⁰ See S.J. Res. 6, 105th Cong. § 1 (1997); H.J. Res 71, 105th Cong. §1 (1997).

¹⁷¹ See House Judiciary Hearing, *supra* note 26, at 172 (testimony of John R.

tion to the victim from the outcome of the criminal proceedings or not realistically leaving the victim any chance to receive damages from the defendant.¹⁷²

The concept of restitution rests on the idea that a convicted individual must be held accountable for the harm caused to a victim.¹⁷³ Therefore, while some may view restitution as another form of punishment, it may also be considered an amends for wrongdoing.¹⁷⁴ Many victims have stressed the point that by seeking restitution, they are not seeking revenge, but merely a means of being made whole.¹⁷⁵ Restitution also relieves the victim of some of the debt incurred in recovering emotionally and physically from the crime.¹⁷⁶

However, restitution has been criticized for crossing the line between the public and private sphere of justice.¹⁷⁷ Some feel that there is a conflict between criminal sanctions imposed on the defendant and restitution for the victim.¹⁷⁸ Awarding restitution to a victim contradicts the idea that a criminal is being prosecuted for his crime against society and not just his crime against a single person.¹⁷⁹ Also, most defendants are indigent and will not likely

Schmidt).

¹⁷² See *House Judiciary Hearing*, *supra* note 26, at 172 (testimony of John R. Schmidt).

¹⁷³ See *House Judiciary Hearing*, *supra* note 26, at 172 (testimony of John R. Schmidt). "It does indeed seem odd that if I hit you with my automobile I am . . . required to make you whole again, whereas if I hit you with a club or with a bullet from my gun I go to jail, leaving you to fend for yourself." Hudson, *supra* note 36, at 45.

¹⁷⁴ See Henderson, *supra* note 101, at 1012. Ordering restitution makes it clear to the convicted individual that he has hurt a real person. See Goldstein, *supra* note 36, at 521. Restitution has increasingly been seen as an alternative that is more cost-effective than years of incarceration. See Hudson, *supra* note 36, at 45. Not only has restitution been shown to be a fraction of the cost of incarceration, but it also is seen as providing correctional value. See *id.* at 46.

¹⁷⁵ See Hudson, *supra* note 36, at 38. One study found that while 33% of complainants sought restitution and protection, 31% sought punishment. See *id.* at 38 n. 67.

¹⁷⁶ See TASK FORCE, *supra* note 41, at 79. "It is simply unfair that victims should have to liquidate their assets, mortgage their homes, or sacrifice their health or education or that of their children while the offender escapes responsibility for the financial hardship he has imposed." *Id.*

¹⁷⁷ See Henderson, *supra* note 101, at 1007. It is said that the proper forum where victims should claim their damages is in the civil courts. See *id.*

¹⁷⁸ See Henderson, *supra* note 101, at 1007.

¹⁷⁹ See Henderson, *supra* note 101, at 1008-09.

be able to satisfy their financial obligations.¹⁸⁰ Opponents of the amendment argue the possibility that defendants may commit further crimes in order to satisfy their debt.¹⁸¹ Further, imposing an order of restitution on the convicted person may be contradictory to the defendant's right to be free of excessive fines, as guaranteed by the Eighth Amendment.¹⁸² These theories, however critical, will most likely be defeated by the popular appeal of the low cost of restitution and victim satisfaction.¹⁸³

IV. Concerns over the Bill

A. The "Victim"

Before members of Congress proposed the Victim's Rights Implementation Act to accompany the amendment, the amendment failed to provide clarification as to who would be afforded protection.¹⁸⁴ In a criminal context, it was unclear whether the term *victim* would apply only to an actual victim or would extend further to include a victim's family.¹⁸⁵ If the definition was extrapolated, clarification would have been necessary to help decide whether the amendment should extend only to blood relations or also to those who are in close relation to the victim.¹⁸⁶ However, the recently proposed Amendment Implementation Act includes a definition of *victim*.¹⁸⁷ The term *victim* under the Implementation Act includes only the person actually victimized and close relatives.¹⁸⁸ It does not include close personal friends, boyfriends or girlfriends, or live-in partners unless specifically allowed by the

¹⁸⁰ See Shapiro, *supra* note 35, at 18. The U.S. Attorney's Office in Chicago collects only four cents on every dollar owed for fines and restitution. See *id.*

¹⁸¹ See Shapiro, *supra* note 35, at 18.

¹⁸² See U.S. CONST. amend. VIII.

¹⁸³ See Shapiro, *supra* note 35, at 16-18.

¹⁸⁴ See S.J. Res. 65, 104th Cong. § 1 (1996).

¹⁸⁵ See House Judiciary Hearing, *supra* note 26, at 92-93 (statement of Elisabeth A. Semel).

¹⁸⁶ See Senate Judiciary Hearing, *supra* note 2, at 101 (statement of Bruce Fein). "If the crime is murder, would victims include close friends or a gay partner of the deceased, or cousins, uncles, and aunts, or great grandparents, or business partners?" *Id.*

¹⁸⁷ See H.R. 1322, 105th Cong. § 2, at 5.

¹⁸⁸ See *id.*

court.¹⁸⁹

Concern has also been expressed that the definition of a victim may extend to those who are wrongfully convicted or wrongfully accused.¹⁹⁰ Such an extension of the amendment is clearly an unanticipated result of the statute.¹⁹¹ The proposed Amendment Implementation Act does not provide a cure to this application of the amendment.¹⁹² For example, not only could the amendment be used against the government by wrongfully accused criminals later exonerated, but it could also be used against battered women, once themselves victims, who have defended themselves against their abusers.¹⁹³ However, if a line is drawn between such innocent and guilty victims, there is a risk that a deserving victim may be excluded.¹⁹⁴

There is also a question of whether the amendment would apply in a non-violent context.¹⁹⁵ The legislative history does not address who would qualify for victim status in this situation.¹⁹⁶

¹⁸⁹ See *id.*

¹⁹⁰ See *House Judiciary Hearing*, *supra* note 26, at 92 (statement of Elisabeth A. Semel). Those wrongfully accused move from being a victim one day, to a defendant the next. See *id.* at 93. Ms. Semel cites the case of Kenneth Adams who along with two others, was wrongfully convicted and imprisoned for 18 years on death row and only recently released. See *id.* at 92. Ms. Semel is also concerned about domestic violence victims who kill their abusers and then become defendants. See *id.* These examples further illustrate the complications arising from the use of the ambiguous term "victim." See *id.* at 92-93.

¹⁹¹ See *Senate Judiciary Hearing*, *supra* note 2 (statement of James Raskin).

¹⁹² See H.R. 1322, 105th Cong. § 2, at 5.

¹⁹³ See *1997 Senate Judiciary Hearing*, *supra* note 92 (testimony of the National Clearinghouse for the Defense of Battered Women.). "The Amendment refers to victims and criminal defendants as though they were mutually exclusive and designates someone a victim solely by virtue of the fact that another person has been charged with a crime." *Id.*

¹⁹⁴ See *House Judiciary Hearing*, *supra* note 26, at 146 (statement of Ellen Greenlee). If the line between innocent and guilty victims is drawn so that the class of guilty victims is narrow, excluding from protection only those who have prior criminal convictions, then there is a lot of room for unconvicted, but guilty characters to claim victim status just to waste the government's time or slow down the process. See *id.* However, if the line is drawn too widely, excluding anyone with a minor criminal record from victim status, then many with minor unrelated offenses who may otherwise deserve victim status may be unprotected. See *id.* Should no line be drawn, then many will go unprotected altogether simply because they were placed in the guilty class. See *id.*

¹⁹⁵ See *Senate Judiciary Hearing*, *supra* note 2, at 97-98 (statement of James Raskin).

¹⁹⁶ See *Senate Judiciary Hearing*, *supra* note 2, at 97-98 (statement of James Raskin).

Most felonies under federal law are non-violent.¹⁹⁷ For example, in an embezzlement case, the victim may be the board of directors, the investors or the depositors.¹⁹⁸ In this instance, it would be unreasonable to think that the previously described group of people should be notified and given the chance to participate in the proceedings.¹⁹⁹ In the situation of an institutional entity, the Amendment Implementation Act limits the term *victim* to include only an authorized representative from the entity.²⁰⁰ By narrowing the definition of the term *victim*, even supporters of the amendment complain that it would be ineffective since it would affect less than one percent of American crime victims.²⁰¹

Not only must it be decided *who* is a victim, but it will also be important to decide *when* someone should be considered a victim.²⁰² In a system where one is innocent until proven guilty, there can be no victim until there is a determination that a crime occurred and that the defendant committed the crime.²⁰³ By labeling a person a victim at the very beginning of the criminal proceedings, the government lightens its own burden of proof.²⁰⁴

¹⁹⁷ See *Senate Judiciary Hearing*, *supra* note 2, at 97 (statement of James Raskin). Most felonies under federal law are political or economic rather than violent. See *id.* Some examples are "mail fraud, wire fraud, tax evasion, environmental crimes, false statements, obstruction of justice, food and drug violations, OSHA violations, [and] bribery and extortion." *Id.*

¹⁹⁸ See *Senate Judiciary Hearing*, *supra* note 2, at 98 (statement of James Raskin). The whole public may be victims if the embezzlement occurred to a federally insured bank. See *id.*; see also *House Judiciary Hearing*, *supra* note 26, at 146-47 (statement of Ellen Greenlee). "In a toxic discharge, is everybody downstream or downwind a victim? In obscenity, drug dealing, treason, or election fraud, isn't the entire public victimized?". *Id.*

¹⁹⁹ See *Senate Judiciary Hearing*, *supra* note 2, at 98 (statement of James Raskin).

²⁰⁰ See H.R. 1322, 105th Cong. §2, at 5.

²⁰¹ See *NVCAN Recent News/Chronology* (visited on Oct. 26, 1997) <<http://www.nvc.org/nvcn/news.htm>> (on file with the *Seton Hall Legislative Journal*).

²⁰² See *House Judiciary Hearing*, *supra* note 26, at 93 (statement of Elisabeth A. Semel).

²⁰³ See *House Judiciary Hearing*, *supra* note 26, at 93 (statement of Elisabeth A. Semel).

²⁰⁴ See *House Judiciary Hearing*, *supra* note 26, at 93 (statement of Elisabeth A. Semel). When a "victim" is seated at the counsel's table, the person across from her is automatically labeled a "perpetrator." See *id.* When this occurs, the prosecutor is then one step ahead since "the government's burden of proof has been lightened." *Id.*

B. Remedies

In drafting the Amendment, Senators Kyl and Feinstein recognized that there would be a problem in providing remedies to victims whose new rights were violated.²⁰⁵ Currently, when the government violates a person's constitutional rights, the remedy is provided for under Section 1983 of the Civil Rights Statute.²⁰⁶ However, allowing a victim to bring a civil action for monetary damages against a governmental agency for its violation of a person's constitutional rights is impractical.²⁰⁷ Not only would it be a misdirected remedy to allow victims to be able to recover against a government trying to assist them, but it would also be an inappropriate remedy burdening the already overcrowded legal system.²⁰⁸

²⁰⁵ See 142 CONG. REC. S12000 (daily ed. Sept. 30, 1996) (statement of Sen. Feinstein). "Courts regularly bar, on grounds of sovereign immunity, negligence actions by victims against governmental entities for the most egregious official negligence and resulting victim injuries." Hudson, *supra* note 36, at 35 (citations omitted). Also, common law holds that police do not owe a duty of protection to individual citizens absent a special relationship with that individual. See *id.* at 42 n.88. If police do not owe a duty of protection to an individual, then that individual cannot recover damages from the police for failing to carry out this duty. See *id.*

²⁰⁶ See *House Judiciary Hearing, supra* note 26, at 144 (testimony of Ellen Greenlee). Section 1983 of the federal statute provides that:

[e]very Person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C.A. §1983 (West 1994). While this section only applies to state law, the Supreme Court applied this section to federal officials with respect to violations of a person's Fourth Amendment right. See *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971) (holding that individual who was arrested on narcotics charges after federal agents made a warrantless entry and search of his apartment had a federal cause of action under the Fourth amendment).

²⁰⁷ See WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 3.1, at 122 (2d ed. 1992). Injunctions may not be any better of a remedy since they cannot cure constitutional violations that have already occurred. See also *House Judiciary Hearing, supra* note 26, at 94 (testimony of Elisabeth A. Semel).

²⁰⁸ See *House Judiciary Hearing, supra* note 26, at 94 (testimony of Elisabeth A. Semel). "[A] 'victims' rights amendment would surely produce an increasingly litigious society—carrying with it economic costs; and on this scale of 'private prosecution' by 'victims,' very significant ones at that." *Id.* at 94-95. Ms. Semel is also concerned that allowing 1983 actions to be brought by victims would overturn *Deshaney v. Winnebago County Dept. of Social Serv.* See *id.* at 94 (citing *Deshaney*, 489 U.S. 189, 196 (1989)). *Deshaney* held that "the Due Process Clauses generally

Furthermore, not only would victims bring more suits, but trial lawyers, who stand to profit from this new source of litigation, might encourage such litigious behavior.²⁰⁹ Furthermore, as the proposed amendment stands, a victim would not have a remedy if their new rights were violated.²¹⁰

C. *The Populist Movement*

Another problem with the amendment is not with the legislation itself, but with its incredible ground support.²¹¹ Not many legislators would characterize themselves as anti-victim, searching to limit victims' rights.²¹² However, the populist momentum which carried this legislation to the federal level and into the national spotlight may turn out to be harmful if it pushes the legislation too far ahead of the inquiry into and understanding of its consequences.²¹³

As of yet, an analysis of the amendment's impact on the criminal justice system has not been conducted,²¹⁴ nor has any serious inquisition into the economics of the amendment.²¹⁵ Critics note that the movement relies on emotional language and lacks verifiable data.²¹⁶ As a result, opponents urge legislators to try

confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." 489 U.S. at 196.

²⁰⁹ See *House Judiciary Hearing*, *supra* note 26, at 145-46 (statement of Ellen Greenlee). Trial lawyers stand to benefit at the taxpayers' expense when they are compensated with one third of every favorable judgment from either "big-money" cases such as "failure-of-police-protection" cases or from a steady stream of income from "failure-to-notify" cases. See *id.*

²¹⁰ See H.J. Res. 71, 105th Cong. § 2; H.R. 1322, 105th Cong. § 2, at 4(d)(2).

²¹¹ See *House Judiciary Hearing*, *supra* note 26, at 82 (statement of Elisabeth A. Semel). Semel notes that crime victims "have the ear of our law makers to the near-exclusion of experienced judges, defense lawyers and even prosecutors." *Id.*

²¹² See *House Judiciary Hearing*, *supra* note 26, at 82 (statement of Elisabeth A. Semel).

²¹³ See *House Judiciary Hearing*, *supra* note 26, at 143 (statement of Ellen Greenlee).

²¹⁴ See *House Judiciary Hearing*, *supra* note 26, at 143 (statement of Ellen Greenlee).

²¹⁵ See *House Judiciary Hearing*, *supra* note 26, at 143 (statement of Ellen Greenlee) (defining cost "in terms of dollars, personnel, or the system's basic ability to process criminal cases and protect the public").

²¹⁶ See Shapiro, *supra* note 35, at 18. Mr. Shapiro believes that the Presidential task force set the tone for the movement by using emotional language without any

other means to achieve the same result before tinkering with the Constitution.²¹⁷

V. *Analysis and Conclusion*

The aim of the Victim's Rights Amendment is to end victim's double victimization by equalizing the constitutional rights between victims and defendants. Certainly, protecting victims from further harm is a laudable goal. However, the means to the attainment of this goal may need to be more closely scrutinized than they have been up to the present time because the amendment is still too problematic to be effective if passed by Congress and ratified by the states.

First, there are important concerns over the mere definition of the term *victim*, despite its many revisions. The amendment will impact less than one percent of all victims since it would apply mostly to victims of violent crimes that occur under federal jurisdiction and it would not assist victims of such crimes as drunk driving, sexual offense, or stalking.²¹⁸

Second, while the amendment provides for victims to receive notice of their rights and notice of proceedings, there are no remedies for a victim if these rights are violated. In fact, the proposed Amendment Implementation Act precludes suits brought by victims against government officials who deprive victims of their rights.²¹⁹ Unable to sue or to obtain any form of relief when their newly-created rights are violated, victims will remain as helpless as they were before the amendment. The amendment would therefore be toothless in its application. Without effective enforcement procedures, officials will not be deterred from ineffective law enforcement.

Third, the Constitution may not be the proper place for such an emotional bill. While victims may need more protection in the American legal system, the Founding Fathers designed the Consti-

solid evidence. See *id.* An example of this emotional language would be the nine-page, undocumented composite of an imaginary 50-year-old woman who is raped and then ignored by various governmental and social institutions. See *id.* at 13. Mr. Shapiro believes the movement is still dependent on "the politics of the anecdote" which "masks some irrational and counterproductive consequences." *Id.* at 13-18.

²¹⁷ See Shapiro, *supra* note 35, at 18.

²¹⁸ See *NVCAN Recent News/Chronology*, *supra* note 201.

²¹⁹ See H.R. 1322, 105th Cong. §2, at 5.

tution to ensure due process to those accused of crimes. Defendants already face a tremendous disadvantage in the criminal justice system and they require guaranteed protections from the vengeance sought by the majority. On the other hand, victims have no need to be protected against the majority and have an easier time finding a sympathetic ear in their own communities. Victims also have the opportunity to bring civil suits against their perpetrators. In the civil arena, victims can more personally control the proceedings and receive a pecuniary settlement from the defendant.

Finally, not enough information is available to properly judge the long-term ramifications and impact of such an amendment on the victims themselves. If the amendment should pass and it is not able to afford the protections it is intended to provide, victims may feel further victimized by the system. Additionally, the amendment may reinforce a victim's status. By labeling a person a *victim*, she will inappropriately be encouraged to rely on the legal system to provide her with the healing she seeks.²²⁰

Although the Victim's Rights Amendment has presented many positive ideas on protecting victims of crime, it has too many faults to be viable. Fortunately, in the tremendous effort of devising a constitutional amendment, many problems were identified, remedies proposed and debated, and actions taken. Certainly at this point there exists a greater awareness and degree of protection than existed at the beginning of the movement more than fifteen years ago. Whether or not the proposed amendment is made a part of the Constitution, the victim's rights movement has managed to bring about an enormous amount of change. However, any further changes must be closely scrutinized so that the ramifications of a potential amendment are known and understood before they become solidified in the Federal Constitution.

²²⁰ See Shapiro, *supra* note 35, at 19.