Testimony of

Mr. Steven Twist

April 8, 2003

Mr. Chairman and Distinguished Senators:

Thank you for holding this hearing today. I am grateful for the invitation to present the views of the National Victims Constitutional Amendment Project, a national coalition of America's leading crime victims' rights and services organizations. My background in this area is more fully set forth in earlier testimony.

We meet once again to discuss great injustice, but injustice which remains seemingly invisible to all too many. Were it otherwise, the resolution before you would have already passed. Indeed the law and the culture are hard to change, and so they should be; critics are always heard to counsel delay, to trade on doubts and fears, to make the perfect the enemy of the good. Perhaps some would prefer it if crime victims just remained invisible. Perhaps we are so numbed by decades of crime and violence we simply choose to look away, to pass by on the other side of the road. But in America, when confronted with great injustice, great hope abides.

Our cause today is a cause in the tradition of the great struggles for civil rights. When a woman who was raped is not given notice of the proceedings in her case, when the parents of a murdered child are excluded from court proceedings that others may attend, when the voice of a battered woman or child is silenced on matters of great importance to them and their safety - on matters of early releases and plea bargains and sentencing - it is the government and its courts that are the engines of these injustices.

For crime victims, the struggle for justice has gone on long enough. Too many, for too long, have been denied basic rights to fairness and human dignity. Today, you hold it within your power to begin to renew the cause of justice for America's crime victims. We earnestly hope you will do so.

I would like to address two principal areas: A brief history of the amendment, its bi-partisan support, and the history of the language of the resolution before you; and second, a review of the rights proposed. In three appendices to my testimony I have attached excerpts from earlier testimony on why these rights, to be meaningful, must be in the United States Constitution; my answers to questions posed by Senator Leahy after the last Subcommittee hearing, and a more general response to the arguments of those who oppose crime victims' rights.

I. A Brief History Of The Movement For Constitutional Rights For Crime Victims, Their Broad Bi-Partisan Support, And The History Of The Proposed Language

A Brief History of the Movement for Constitutional Rights for Crime Victims

Two decades ago, in 1982, the President's Task Force on Victims of Crime, which had been convened by President Reagan to study the role of the victim in the criminal justice system, issued its Final Report. After extensive hearings around the country, the Task Force proposed, a federal constitutional amendment to protect the rights of crime victims. The Task Force explained the need for a constitutional amendment in these terms In applying and interpreting the vital guarantees that protect all citizens, the criminal justice system has lost an essential balance. It should be clearly understood that this Task Force wishes in no way to vitiate the safeguards that shelter anyone accused of crime; but it must be urged with equal vigor that the system has deprived the innocent, the honest, and the helpless of its protection.
The guiding principle that provides the focus for constitutional liberties is that government must be restrained from trampling the rights of the individual citizen. The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed. To that end it is the recommendation of this Task Force that the sixth amendment to the Constitution be augmented.

In April 1985, a national conference of citizen activists and mutual assistance groups organized by the National Organization for Victim Assistance (NOVA) and Mothers Against Drunk Driving (MADD) considered the Task Force proposal.

Following a series of meetings, and the formation of the National Victims Constitutional Amendment Network (NVCAN), proponents of crime victims' rights decided initially to focus their attention on passage of constitutional amendments in the States , before undertaking an effort to obtain a federal constitutional amendment. As explained in testimony before the Senate Judiciary Committee, "[t]he 'states-first' approach drew the support of many victim advocates. Adopting state amendments for victim rights would make good use of the 'great laboratory of the states,' that is, it would test whether such constitutional provisions could truly reduce victims' alienation from their justice system while producing no negative, unintended consequences."

The results of this conscious decision by the victims' rights movement to seek state reforms have been dramatic, and yet disappointing. A total of 33 States now have State victims' rights amendments, and every state and the federal government have victims' rights statutes' in varying versions. And yet, the results have been disappointing as well, because the body of reform, on the whole, has proven inadequate to establish meaningful and enforceable rights for crime victims.

In 1995 the leaders of NVCAN met to discuss whether, in light of the failure of state reforms to bring about meaningful and enforceable rights for crime victims, the time had come to press the case for a federal constitutional amendment. It was decided to begin.

Senator Kyl of Arizona was approached in the Fall of 1995 and asked to consider introducing an amendment for crime victims rights. He worked with NVCAN on the draft language and also reached across the aisle, asking Senator Dianne Feinstein to work with him. In a spirit of true bi-partisanship the two senators worked in earnest to transcend any differences and, together with NVCAN, reached agreement on the language.

In the 104th Congress, S. J. Res. 52, the first Federal constitutional amendment to protect the rights of crime victims, was introduced by Senators Jon Kyl and Dianne Feinstein on April 22,

1996. Twenty-seven other Senators cosponsored the resolution. A similar resolution (H. J. Res. 174) was introduced in the House by Representative Henry Hyde. On April 23, 1996, the Senate Committee on the Judiciary held a hearing on S. J. Res. 52. Later that year the House Committee on the Judiciary, under the leadership of then Chairmen Henry Hyde held hearings on companion proposals in the House.

At the end of the 104th Congress, Senators Kyl and Feinstein introduced a modified version of the amendment (S. J. Res. 65). As first introduced, S. J. Res. 52 embodied eight core principles: notice of the proceedings; presence; right to be heard; notice of release or escape; restitution; speedy trial; victim safety; and notice of rights. To these core values another was added in S. J. Res. 65, the right of every victim to have independent standing to assert these rights. In the 105th Congress, Senators Kyl and Feinstein introduced S. J. Res. 6 on January 21, 1997, the opening day of the Congress. Thirty-two Senators became cosponsors of the resolution. On April 16, 1997, the Senate Committee on the Judiciary held a hearing on S. J. Res. 6.

On June 25, 1997 the House Committee on the Judiciary held hearings on H. J. Res. 71 which had been introduced by then Chairman Henry Hyde and others on April 15, 1997.

Work continued with all parties interested in the language of the proposal and many changes were made to the original draft, responding to concerns expressed in hearings, by the Department of Justice, and others. S. J. Res. 44 was introduced by Senators Kyl and Feinstein on April 1, 1998. Thirty-nine Senators joined Senators Kyl and Feinstein as original cosponsors. On April 28, 1998, the Senate Committee on the Judiciary held a hearing on S. J. Res. 44. On July 7, after debate at three executive business meetings, the Committee approved S. J. Res. 44, with a substitute amendment by the authors, by a vote of 11 to 6.

In the 106th Congress, Seantors Kyl and Feinstein introduced S. J. Res. 3 on January 19, 1999, the opening day of the Congress. Thirty-three Senators became cosponsors of the resolution. On March 24, 1999, the Senate Committee on the Judiciary held a hearing on S. J. Res. 3.

Rep Steve Chabot (R-OH) introduced H. J. Res. 64 on August 4, 1999.

On May 26, 1999, the Senate Subcommittee on the Constitution, Federalism, and Property Rights approved S. J. Res. 3, with an amendment, and reported it to the full Committee by a vote of 4 to 3. On September 30, 1999, the Senate Committee on the Judiciary approved S. J. Res. 3 with a sponsors' substitute amendment, by a vote of 12 to 5.

Hearings on H. J. Res 64 were held on February 10, 2000 before the Constitution Subcommittee of the Committee on the Judiciary.

On April 27, 2000, after three days of debate on the floor of the United States Senate, Senators Kyl and Feinstein decided to ask that further consideration of the amendment be halted when it became likely that opponents would sustain a filibuster.

A History of the Proposed Language

After S. J. Res. 3 was withdrawn by its sponsors, an active effort was undertaken to review all the issues that had been raised by the critics. I was asked by Senator Feinstein to work with Professor Larry Tribe, the pre-eminent Harvard constitutional law scholar, on re-drafting the amendment to meet the objections of the critics. I traveled to Cambridge, Mass with my colleague John Stein, the Deputy Director of the National Organization for Victim Assistance (NOVA) and together with Prof. Tribe, we wrote a new draft for consideration by the senators and their counsel. Together with Stephen Higgins, Chief Counsel to Senator Kyl, and Matt Lamberti, Counsel to Senator Dianne Feinstein, Prof. Paul Cassell (University of Utah College of Law) and Prof. Doug Beloof (Lewis and Clark College of Law), we reached consensus on a new draft in the Fall of 2000.

With the advent of the new Administration, the revised draft was presented to representatives of the White House and the Department of Justice soon after Attorney General Ashcroft was confirmed. We began to have a series of meetings with Administration officials directed at reaching consensus on language.
The discussions toward consensus were interrupted by the September 11, 2001 attacks on our nation. However, those tragic events and their resulting victimizations focused our attention on the importance of our work and strengthened our resolve to complete it as soon as the Administration was again able to rejoin the discussion. Our talks resumed earlier this year and just before the advent of Crime Victims Rights Week this year (April 21 - 27, 2002) we reached agreement.

Let me say on behalf of our national movement how grateful we are to the President and the Attorney General for committing to this lengthy process and always remaining steadfast in pursuit of the goal of constitutional rights for crime victims. We are also grateful to Viet Dinh, who led the Administration discussion team, and his many fine colleagues within DOJ and the White House.

These efforts have produced the proposed amendment which is now before you. It is the product of seven years of debate and reflection. It speaks in the language of the Constitution; it has been revised to address concerns of critics on both the Left and the Right, while not abandoning the core values of the cause we serve. The proposed language threatens no constitutional right of an accused or convicted offender, while at the same time securing fundamentally meaningful and enforceable rights for crime victims.

Senators Feinstein and Kyl introduced S. J. Res. 35 on April 15, 2002 and the following day President Bush announced his support for the amendment. On May 1, 2002, Law Day, Rep. Chabot introduced a companion House Resolution, H. J. Res. 91. A hearing before the House Judiciary Constitution Subcommittee was held on May 9, 2002. A hearing on S. J. Res. 35 was held on July 17, 2003.

S. J. Res. 1, the measure before you today, was introduced on January 7, 2003. Congressman Chabot will introduce the amendment in the House on April 10, 2003.

The Bi-Partisan Consensus for Constitutional Rights for Crime Victims

That there is a strong bi-partisan consensus that crime victims should be given rights is now beyond dispute, as is the consensus that those rights can only be secured by an amendment to the United States Constitution.

Support for a constitutional amendment for victims' rights is found in the platforms of both the Democratic National Committee and the Republican National Committee. Former President Clinton understood the need for a constitutional amendment for crime victims rights and President Bush has recently issued a strong endorsement of the proposal before you. Former Attorney General Janet Reno supported a constitutional amendment for victims rights and Attorney General John Ashcroft recently announced his support for the proposed amendment. Each proposal for a constitutional amendment has received strong bi-partisan support in the United States Senate. The National Governors' Association, by a vote of 49-1, passed a resolution strongly supporting the need for a constitutional amendment for crime victims. In the last Congress, a bipartisan group of 39 State Attorneys General signed a letter expressing their "strong and unequivocal support for an amendment. Finally, among academic scholars, the amendment has garnered the support from both conservatives and liberals.

II. The Rights Proposed

SECTION 1. The rights of victims of violent crime, being capable of protection without denying the constitutional rights of those accused of victimizing them, are hereby established and shall not be denied by any State or the United States and may be restricted only as provided in this article.

The rights of victims of violent crime, being capable of protection without denying the constitutional rights of those accused of victimizing them . . .

This preamble, authored by Professor Tribe, establishes two important principles about the rights established in the amendment: First, they are not intended to deny the constitutional rights of the accused, and second, they do not, in fact, deny those rights. The task of balancing rights, in the case of alleged conflict, will fall, as it always does, to the courts, guided by the constitutional admonition not to deny constitutional rights to either the victim or the accused.

are hereby established

For a fuller discussion of why true rights for crime victims can only be established through an Amendment to the U. S. Constitution, and why it is appropriate to do so, see Appendix A. The arguments presented are straightforward: twenty years of experience with statutes and state constitutional amendments proves they don't work. Defendants trump them, and the prevailing legal culture does not respect them. They are geldings.

The amendment provides that the rights of victims are "hereby established." The phrase, which is followed by certain enumerated rights, is not intended to "deny or disparage" rights that may be established by other federal or state laws. The amendment establishes a floor and not a ceiling of rights and States will remain free to enact (or continue, as indeed many have already enacted) more expansive rights than are "established" in this amendment. Rights established in a state's constitution would be subject to the independent construction of the state's courts

and shall not be denied by any State or the United States and may be restricted only as provided in this article.

In this clause, and in Section 2 of the amendment, an important distinction between "denying" rights and "restricting" rights is established. As used here, "denied" means to "refuse to grant;" in other words, completely prohibit the exercise of the right. The amendment, by its terms, prohibits such a denial. At the same time, the language recognizes that no constitutional right is absolute and therefore permits "restrictions" on the rights but only, as provided in Section 2, in three narrow circumstances. This direction settles what might otherwise have been years of litigation to adopt the appropriate test for when, and the extent to which, restrictions will be allowed.

SECTION 2. A victim of violent crime shall have the right to reasonable and timely notice of any public proceeding involving the crime and of any release or escape of the accused; the rights not to be excluded from such public proceeding and reasonably to be heard at public release, plea, sentencing, reprieve, and pardon proceedings; and the right to adjudicative decisions that duly consider the victim's safety, interest in avoiding unreasonable delay, and just and timely claims to restitution from the offender. These rights shall not be restricted except when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity.

A victim of violent crime

Concern has been expressed by some over the amendment's limitation to victims of "violent crime." In a perfect world the amendment would extend to victims of all crimes. Nonetheless, we have acceded to the insistence of others that the amendment be limited in this fashion because we believe strongly that the rights proposed, once adopted, will benefit all crime victims. The rights will usher in an era of cultural reform in the criminal justice system, moving it to a more victim-oriented model.

Moreover, we are confident that the scope of the "violent crime" clause will be broadly applied to effectuate the purpose of extending rights to crime victims, and not be limited as it might in more narrow contexts. The Senate Report addressed this issue at some length and it is worth inserting those views for your consideration:

The most analogous Federal definition is Federal Rule of Criminal Procedure 32(f), which extends a right of allocution to victims of a "crime of violence" and defines the phrase as one that "involved the use or attempted or threatened use of physical force against the person or property of another * * *." (emphasis added). The Committee anticipates that the phrase "crime of violence" will be defined in these terms of "involving" violence, not a narrower "elements of the offense" approach employed in other settings. See, e.g., 18 U.S.C. 16. Only this broad construction will serve to protect fully the interests of all those affected by criminal violence. "Crimes of violence" will include all forms of homicide (including voluntary and involuntary manslaughter and vehicular homicide), sexual assault, kidnaping, robbery, assault, mayhem, battery, extortion accompanied by threats of violence, carjacking, vehicular offenses (including driving while intoxicated) which result in personal injury, domestic violence, and other similar crimes. A "crime of violence" can arise without regard to technical classification of the offense as a felony or a misdemeanor.

It should also be obvious that a "crime of violence" can include not only acts of consummated violence but also of intended, threatened, or implied violence. The unlawful displaying of a firearm or firing of a bullet at a victim constitutes a "crime of violence" regardless of whether the victim is actually injured. Along the same lines, conspiracies, attempts, solicitations and other comparable crimes to commit a crime of violence should be considered "crimes of violence" for purposes of the amendment, if identifiable victims exist.

Similarly, some crimes are so inherently threatening of physical violence that they could be "crimes of violence" for purposes of the amendment. Burglary, for example, is frequently understood to be a "crime of violence" because of the potential for armed or other dangerous confrontation. See United States v. Guadardo, 40 F.3d 102 (5th Cir. 1994); United States v. Flores, 875 F.2d 1110 (5th Cir. 1989).

Similarly, sexual offenses against a child, such as child molestation, can be "crimes of violence" because of the fear of the potential for force which is inherent in the disparate status of the perpetrator and victim and also because evidence of severe and persistent emotional trauma in its victims gives testament to the molestation being unwanted and coercive. See United States v. Reyes-Castro, 13 F.3d 377 (10th Cir. 1993). Sexual offenses against other vulnerable persons would similarly be treated as "crimes of violence," as would, for example, forcible sex offenses against adults and sex offenses against incapacitated adults.

Finally, an act of violence exists where the victim is physically injured, is threatened with physical injury, or reasonably believes he or she is being physically threatened by criminal activity of the defendant. For example, a victim who is killed or injured by a driver who is under the influence of alcohol or drugs is the victim of a crime of violence, as is a victim of stalking or other threats who is reasonably put in fear of his or her safety. Also, crimes of arson involving threats to the safety of persons could be "crimes of violence."

It should be noted that the States, and the Federal Government, within their respective jurisdictions, retain authority to define, in the first instance, conduct that is criminal. The power to define "victim" is simply a corollary of the power to define the elements of criminal offenses and, for State crimes, the power would remain with State Legislatures.

shall have the right to reasonable and timely notice of any public proceeding involving the crime

Reasonable and timely notice is the irreducible component of fairness and due process. Each of the participatory rights established in the amendment depend first on the receipt of notice. Notice here must be "reasonable." As was noted in the Senate Judiciary Report:

To make victims aware of the proceedings at which their rights can be exercised, this provision requires that victims be notified of public proceedings relating to a crime. `Notice' can be provided in a variety of fashions. For example, the Committee was informed that some States have developed computer programs for mailing form notices to victims while other States have developed automated telephone notification systems. Any means that provides reasonable notice to victims is acceptable.

`Reasonable' notice is any means likely to provide actual notice to a victim. Heroic measures need not be taken to inform victims, but due diligence is required by government actors. It would, of course, be reasonable to require victims to provide an address and keep that address updated in order to receive notices. 'Reasonable' notice is notice that permits a meaningful

opportunity for victims to exercise their rights. In rare mass victim cases (i.e., those involving hundreds of victims), reasonable notice could be provided to means tailored to those unusual circumstances, such as notification by newspaper or television announcement.
Victims are given the right to receive notice of 'proceedings.' Proceedings are official events that take place before, for example, trial and appellate courts (including magistrates and special masters) and parole boards. They include, for example, hearings of all types such as motion hearings, trials, and sentencings. They do not include, for example, informal meetings between prosecutors and defense attorneys. Thus, while victims are entitled to notice of a court hearing on whether to accept a negotiated plea, they would not be entitled to notice of an office meeting between a prosecutor and a defense attorney to discuss such an arrangement.
Victims' rights under this provision are also limited to 'public' proceedings. Some proceedings, such as grand jury investigations, are not open to the public and accordingly would not be open to the victim. Other proceedings, while generally open, may be closed in some circumstances. For example, while plea proceedings are generally open to the public, a court might decide to close a proceeding in which an organized crime underling would plead guilty and agree to testify against his bosses. Another example is provided by certain national security cases in which access to some proceedings can be restricted. See 'The Classified Information Procedures Act,' 18 U.S.C. app. 3. A victim would have no special right to attend. The amendment works no change in the standards for closing hearings, but rather simply recognizes that such nonpublic hearings take place. Of course, nothing in the amendment would forbid the court, in its discretion, to allow a victim to attend even such a nonpublic hearing.

"Timely" notice would require that the victim be informed enough in advance of a public proceeding to be able reasonably to organize his or her affairs to attend. Oftentimes the practice in the criminal courts across the country is to schedule proceedings, whether last minute or well in advance, without any notice to the victim. Even in those jurisdictions which purport to extend to victims the right to not be excluded or the right to be heard, these proceedings without notice to the victim render meaningless any participatory right. Of course, it goes without saying, the defendant, the state, and the court always have notice; failure to provide notice to any of the three would render the ensuing action void. Victims seek no less consideration; indeed, principles of fairness and decency demand no less.

Witnesses before both the full House and Senate Judiciary Committees have given compelling testimony about the devastating effects on crime victims who learn that proceedings in their case were held without any notice to them. What is most striking about this testimony is that it comes on the heels of a concerted efforts by the victims' movement to obtain notice of hearings. In 1982, the Task Force Report recommended that victims be kept appraised of criminal justice proceedings. Since then many state provisions have been passed requiring that victims be notified of court hearings. But those efforts have not been fully successful. The New Directions Report found that not all states had adopted laws requiring notice for victims, and even in the ones that had, many had not implemented mechanisms to make such notice a reality.

To fail to provide simple notice of proceedings to criminal defendants would be unthinkable; why do we tolerate it for crime victims?

The right to notice of public proceedings is fundamental to the notions of fairness and due process that ought to be at the center of any criminal justice process. Victims have a legitimate interest in knowing what is happening in "their" case. Surely it is time to protect this fundamental interest of crime victims by securing an enduring right to notice in the Constitution.

of any release or escape of the accused

Reasonable and timely notice of releases or escapes is a matter of profound importance to the safety of victims of violent crime. Twenty years after the President's Task Force report victims are still learning "by accident" of the release of the person accused or convicted of attacking them. This continuing threat to safety must be brought to an end.

Because of technological advances, automatic phone systems, web-based systems, and other modern notification systems are all widely and reasonably available. As the Senate Judiciary Report noted, "New technologies are becoming more widely available that will simplify the process of providing this notice. For example, automated voice response technology exists that can be programmed to place repeated telephone calls to victims whenever a prisoner is released, which would be reasonable notice of the release. As technology improves in this area, what is `reasonable' may change as well."

not to be excluded from such public proceeding

This right parallels the language that had been reported out of the Senate Judiciary Committee in April, 2000. The comments from the Senate Judiciary Report remain instructive:

Victims are given the right `not to be excluded' from public proceedings. This builds on the 1982 recommendation from the President's Task Force on Victims of Crime that victims `no less than the defendant, have a legitimate interest in the fair adjudication of the case, and should therefore, as an exception to the general rule providing for the exclusion of witnesses, be permitted to be present for the entire trial.' President's Task Force on Victims of Crime, `Final Report,' 80 (1982).

The right conferred is a negative one--a right `not to be excluded'--to avoid the suggestion that an alternative formulation--a right `to attend'--might carry with it some government obligation to provide funding, to schedule the timing of a particular proceeding according to the victim's wishes, or otherwise assert affirmative efforts to make it possible for a victim to attend proceedings. `Accord,' Ala. Code Sec. 15-14-54 (right `not [to] be excluded from court or counsel table during the trial or hearing or any portion thereof * * * which in any way pertains to such offense'). The amendment, for example, would not entitle a prisoner who was attacked in prison to a release from prison and plane ticket to enable him to attend the trial of his attacker. This example is important because there have been occasional suggestions that transporting prisoners who are the victims of prison violence to courthouses to exercise their rights as victims might create security risks. These suggestions are misplaced, because the Crime Victims' Rights Amendment does not confer on prisoners any such rights to travel outside prison gates. Of course, as discussed below, prisoners no less than other victims will have a right to be `heard, if present, and to submit a statement' at various points in the criminal justice process. Because prisoners ordinarily will not be `present,' they will exercise their rights by submitting a `statement.' This approach has been followed in the States. See, e.g., Utah Code Ann. 77-38-5(8);

Ariz. Const. art. II, 2.1.

In some important respects, a victim's right not to be excluded will parallel the right of a defendant to be present during criminal proceedings. See Diaz v. United States, 223 U.S. 442, 454-55 (1912). It is understood that defendants have no license to engage in disruptive behavior during proceedings. See, e.g., Illinois v. Allen, 397 U.S. 337, 343 (1977); Foster v. Wainwright, 686 F.2d 1382, 1387 (11th Cir. 1982). Likewise, crime victims will have no right to engage in disruptive behavior and, like defendants, will have to follow proper court rules, such as those forbidding excessive displays of emotion or visibly reacting to testimony of witnesses during a jury trial.

Few experiences in the justice system are more devastating than an order to a victim that he or she may not enter the courtroom during otherwise public proceedings in the case involving their own victimization.

Collene and Gary Campbell of San Juan Capistrano, California still remember the pain and injustice of being forced to sit, literally, on a hard bench outside the courtroom during the trial of their son's murderer, while the murderers' family members were allowed entry and preferential seating in the courtroom. Collene and Gary were excluded as a tactical ploy by the defense, who listed them as witnesses, never intending to call them, but rather intending only to invoke "the rule" excluding witnesses. Such exclusion happens every day in courtrooms across the country. And yet exceptions are made to the rule of exclusion. Of course, it does not apply to defendants, who may take the stand to testify in their own defense, nor does the rule apply, in most jurisdictions, to the government's chief investigator, who although a witness, often sits at counsel table throughout the trial, assisting the prosecutor. Simple principles of fairness demand that we do no less for victims. This will ensure that Collene and Gary's wait will not have been in vain.

reasonably to be heard at public release, plea, sentencing, reprieve, and pardon proceedings

The right to be "heard," along with "notice," and the right "not to be excluded" form the bedrock of any system of fair treatment for victims. The right established here is to be heard before the relevant decision-maker at five critical public proceedings, first at "public release proceedings." The language extends its reach to both post-arrest and post-conviction public release proceedings. Thus the victim of domestic violence would have the right to tell a releasing authority, for example before an Initial Appearance Court, about the circumstances of the assault and the need for any special conditions of release that may be necessary to protect the victim's safety. The right would also extend to post-conviction public release proceedings, for example parole or conditional release hearings. In jurisdictions that have abolished parole in favor of "truth in sentencing" regimes, many still have conditional release. Only if the jurisdiction also has a "public proceeding" prior to such a conditional release would the right attach. The language would extend however, to any post-conviction public proceeding that could lead to the release of the convicted offender.

When a case is resolved through a plea bargain that the victim never knows about, until after the fact, there is a deeply impactful wound caused the justice system itself. One of the more famous quotes reported by the President's Task Force was from a woman in Virginia. "Why didn't anyone

consult me? I was the one who was kidnapped, not the State of Virginia." This cry for justice, for a voice not a veto, is heard throughout the country still.

The Senate Judiciary Report provides further background in understanding the meaning and intent of the language:

This gives victims the right to be heard before the court accepts a plea bargain entered into by the prosecution and the defense before it becomes final. The Committee expects that each State will determine for itself at what stage this right attaches. It may be that a State decides the right does not attach until sentencing if the plea can still be rejected by the court after the presentence investigation is completed. As the language makes clear, the right involves being heard when the court holds its hearing on whether to accept a plea. Thus, victims do not have the right to be heard by prosecutors and defense attorneys negotiating a deal. Nonetheless, the Committee anticipates that prosecutors may decide, in their discretion, to consult with victims before arriving at a plea. Such an approach is already a legal requirement in many States, see `National Victim Center, 1996 Victims' Rights Sourcebook,' 127-31 (1996), is followed by many prosecuting agencies, see, e.g., Senate Judiciary Committee hearing, April 28, 1998, statement of Paul Cassell, at 35-36, and has been encouraged as sound prosecutorial practice. See U.S. Department of Justice, Office for Victims of Crime, `New Directions from the Field: Victims' Rights and Services for the 21st Century,' 15-16 (1998). This trend has also been encouraged by the interest of some courts in whether prosecutors have consulted with the victim before arriving at a plea. Once again, the victim is given no right of veto over any plea. No doubt, some victims may wish to see nothing less than the maximum possible penalty (or minimum possible penalty) for a defendant. Under the amendment, the court will receive this information, along with that provided by prosecutors and defendants, and give it the weight it believes is appropriate deciding whether to accept a plea. The decision to accept a plea is typically vested in the court and, therefore, the victims' right extends to these proceedings. See, e.g., Fed. R. Crim. Pro. 11(d)(3); see generally Douglas E. Beloof, `Victims in Criminal Procedure,' 462-88 (1999).

The right to be heard also extends to "public sentencing proceedings." Professor Paul Cassell, in his March 24, 1999 testimony before the U. S. Senate Committee on the Judiciary wrote movingly of the importance of this right. In replying to the assumption that a judge or jury can comprehend the full harm caused by a murder without hearing testimony from the surviving family members, Prof. Cassell wrote:

That assumption is simply unsupportable. Any reader who disagrees with me should take a simple test. Read an actual victim impact statement from a homicide case all the way through and see if you truly learn nothing new about the enormity of the loss caused by a homicide. Sadly, the reader will have no shortage of such victim impact statements to choose from. Actual impact statements from court proceedings are accessible in various places.[42] Other examples can be found in moving accounts written by family members who have lost a loved one to a murder. A powerful example is the collection of statements from families devastated by the Oklahoma City bombing collected in Marsha Kight's affecting Forever Changed: Remembering Oklahoma City April 19, 1995.[43] Kight's compelling book is not unique, as equally powerful accounts from the family of Ron Goldman,[44] children of Oklahoma City,[45] Alice Kaminsky,[46] George Lardner Jr.,[47] Dorris Porch and Rebeca Easley,[48] Mike Reynolds,[49] Deborah

Spungen,[50] John Walsh,[51] and Marvin Weinstein[52] make all too painfully clear. Intimate third party accounts offer similar insights about the generally unrecognized yet far- ranging consequences of homicide.[53]

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

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

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

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

this country and elsewhere by a careful scholar concludes "sentence severity has not increased following the passage of [victim impact] legislation."[69] It is thus unclear why we should credit Bandes' assertion that victim impact statements seriously hamper the defense of capital defendants.

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

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

Given that our current system allows almost unlimited mitigation evidence on the part of the defendant, an argument for equal justice requires, if anything, that victim statements be allowed. Equality demands fairness not only between cases, but also within cases.[81] Victims and the public generally perceive great unfairness in a sentencing system with "one side muted."[82] The Tennessee Supreme Court stated the point bluntly in its decision in Payne, explaining that "[i]t is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant . . . . without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims."[83] With simplicity but haunting eloquence, a father whose ten- year-old daughter Staci was murdered, made the same point. Before the sentencing

phase began, Marvin Weinstein asked the prosecutor to speak to the jury because the defendant's mother would have the chance to do so. The prosecutor replied that Florida law did not permit this. Here was Weinstein's response to the prosecutor:

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

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

These arguments sufficiently dispose of the critics' main contentions.[88] Nonetheless, it is important to underscore that the critics generally fail to grapple with one of the strongest justifications for admitting victim impact statements: avoiding additional trauma to the victim. For all the fairness reasons just explained, gross disparity between defendants' and victims' rights to allocute at sentencing creates the risk of serious psychological injury to the victim.[89] As Professor Doug Beloof has nicely explained, a justice system that fails to recognize a victim's right to participate threatens "secondary harm" - that is, harm inflicted by the operation of government processes beyond that already caused by the perpetrator.[90] This trauma stems from the fact that the victim perceives that the system's resources "are almost entirely devoted to the criminal, and little remains for those who have sustained harm at the criminal's hands."[91] As two noted experts on the psychological effects of crime have concluded, failure to offer victims a chance to participate in criminal proceedings can "result in increased feelings of inequity on the part of the victims, with a corresponding increase in crime-related psychological harm."[92] On the other hand, there is mounting evidence that "having a voice may improve victims' mental condition and welfare."[93] For some victims, making a statement helps restore balance between themselves and the offenders. Others may consider it part of a just process or may want to communicate the impact of the offense to the offender.[94] This multiplicity of reasons explains why victims and surviving family members want so desperately to participate in sentencing hearings, even though their participation may not necessarily change the outcome.[95]

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

It should be noted that the victim's right to be heard at sentencing is not the right to be a witness. Rather, it is an independent right of allocution not dependent on the victim being called to the witness stand. In this way the right parallels the right of the defendant. The victim is given the right to address the sentencing authority (judge or jury).

The right to be heard at sentencing includes the right to make a recommendation regarding the appropriate sentence to be imposed, including in capital cases.

the right to adjudicative decisions that duly consider the victim's safety

As used in this clause, "adjudicative decisions" includes both court decisions and decisions reached by adjudicative bodies, such as paroles boards. Any decision reached after a proceeding in which different sides of an issue would be presented would be an adjudicative decision. Again the clause should be interpreted to achieve the purposes inherent in an amendment that extends rights to crime victims.

The requirement to "duly consider" is a requirement to fully and fairly consider the interest at issue. The language would not require that the interest at issue always control a decision. Hence, decisions that implicate the victim's safety, for example, release and sentencing decisions, would not be forced, by the language, to any particular result, (e.g., jail vs. no jail or high bond vs. no bond pending trial, or longer rather shorter prison sentences after conviction). Rather the constitutional mandate would simply be to hear and consider the victim's interest and to demonstrate that the interest was factored into the final decision. It is expected that records of decisions would reflect consideration of the victim's interest.

For women and children who are the victims of domestic violence, the right to have safety considered as a factor before any release decision is made, or before any sentence is imposed is a right of life and death importance.

interest in avoiding unreasonable delay

Had this provision already been the law it would have been welcome news for Sally Goelzer and her brother Jim Bone from Phoenix, Arizona. Sally and Jim's brother, Hal Bone was murdered on Thanksgiving Day, 1995. Hal had been the victim of an attempted robbery by a gang member in Phoenix, had summoned the courage to report the offense and help the police track down the suspect so that he could not hurt others. Hal was scheduled to testify against the defendant the following January, 1996. His good citizenship got him killed. The defendant and another member of the same gang murdered Hal so he could not testify.

Arizona is one of 32 states that have enacted a state constitutional amendment for victims rights. Arizona's is one of the stronger amendments. Three of the guarantees for victims are the "rights" to "due process" and to a "speedy trial," and to "a prompt and final conclusion of the case after conviction." Arizona victims even have standing to assert their rights in court.

Unfortunately for Sally and Jim, these rights, on behalf of their murdered brother, were hollow promises. The murderers' trial did not begin until January 1999, more than four years after the murderers had been arrested. Continuances were constantly granted without notice to Jim and Sally and without any consideration for their rights. The two murderers were convicted of First Degree Murder when the trial concluded the same month it had begun. By the late summer of 2000 the murderers had not yet been sentenced. Again, despite their state constitutional rights, continuances were granted without notice to them and without respecting their rights to be heard. Finally the ordeal came to an end when the two murderers were sentenced in July and August of 2001, five and one-half years after Hal's murder, and two and one-half years after the convictions.

Such is the state of victims' rights in the States. Sally and Jim were cloaked in all the majesty that the law of the State of Arizona could muster. Regrettably for those interested in fair play and

balance for crime victims in the criminal justice system it was not enough. Month after month, for close to six years, they summoned the strength to go to court, schedule time off work, and re-live the murder of their brother, over and over again, while the defendants sought tactical advantage through endless delays. The years of delay exacted an enormous physical, emotional, and financial toll.

The Senate Judiciary Report provides more insight into the meaning of the victim's interest in avoiding unreasonable delay:
Just as defendants currently have a right to a `speedy trial,' this provision will give victims a protected right in having their interests to a reasonably prompt conclusion of a trial considered. The right here requires courts to give `consideration' to the victims' interest along with other relevant factors at all hearings involving the trial date, including the initial setting of a trial date and any subsequent motions or proceedings that result in delaying that date. This right also will allow the victim to ask the court to, for instance, set a trial date if the failure to do so is unreasonable. Of course, the victims' interests are not the only interests that the court will consider. Again, while a victim will have a right to be heard on the issue, the victim will have no right to force an immediate trial before the parties have had an opportunity to prepare. Similarly, in some complicated cases either prosecutors or defendants may have unforeseen and legitimate reasons for continuing a previously set trial or for delaying trial proceedings that have already commenced. But the Committee has heard ample testimony about delays that, by any measure, were `unreasonable.' See, e.g., Senate Judiciary Committee hearing, April 16, 1997, statement of Paul Cassell, at 115-16. This right will give courts the clear constitutional mandate to avoid such delays.

In determining what delay is `unreasonable,' the courts can look to the precedents that exist interpreting a defendant's right to a speedy trial. These cases focus on such issues as the length of the delay, the reason for the delay, any assertion of a right to a speedy trial, and any prejudice to the defendant. See Barker v. Wingo, 407 U.S. 514, 530-33 (1972). Courts will no doubt develop a similar approach for evaluating victims' claims. In developing such an approach, courts will undoubtably recognize the purposes that the victim's right is designed to serve. Cf. Barker v. Wingo, 407 U.S. 514, 532 (1972) (defendant's right to a speedy trial must be `assessed in the light of the interest of defendant which the speedy trial right was designed to protect').

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

The Committee also anticipates that more content may be given to this right in implementing legislation. For example, the Speedy Trial Act of 1974 (Public Law 93-619 (amended by Public Law 96-43), codified at 18 U.S.C. 3152, 3161) already helps to protect a defendant's speedy trial right. Similar legislative protection could be extended to the victims' new right.

just and timely claims to restitution from the offender

The language requires the court to consider the victim's claim to restitution. The nature of the claim will be governed by State or Federal law, as appropriate to the jurisdiction.

These rights shall not be restricted except when and to the degree dictated

Clearly no one of the Bill of Rights is absolute; restrictions have been applied, in varying conditions, based on varying standards, throughout the history of the nation. As noted above, the amendment sets up a distinction between "denying" a right, which may not be done, and "restricting" a right, which may only be done in three narrowly drawn circumstances. In order to justify a restriction there must be a finding ("except when ... dictated") of one of the three circumstances. If found, the restriction must be narrowly tailored ("to the degree dictated") to meet the needs of the circumstance. The proposed restriction language settles what might otherwise be years of vexing litigation over what the proper standard would be for allowing restrictions.

by a substantial interest

The "substantial "interest" standard is known in constitutional jurisprudence and is intended to be high enough so that only "essential" interests in public safety and the administration of justice will qualify as justifications for restrictions of the enumerated rights.

in public safety

In discussing the "compelling interest" standard of S. J. Res. 3, the Senate Judiciary Report noted, "In cases of domestic violence, the dynamics of victim-offender relationships may require some modification of otherwise typical victims' rights provisions. This provision offers the ability to do just that.... [Moreover] situations may arise involving intergang violence, where notifying the member of a rival gang of an offenders' impending release may spawn retaliatory violence. Again, this provision provides a basis for dealing with such situations."

"Public safety" as used here includes the safety of the public generally, as well as the safety of identified individuals.

the administration of criminal justice

It is intended that the language will address management issues within the courtroom or logistical issues arising when it would otherwise be impossible to provide a right otherwise guaranteed. In cases involving a massive number of victims notice of public proceedings may need to be given by other means, courtrooms may not be large enough to accommodate every victim's interest, and the right to be heard may have to be exercised through other forms. The phrase is not intended to address issues related to the protection of defendants' rights.

The term "administration of criminal justice," as used by the United States Supreme Court is a catch-all phrase that encompasses any aspect of criminal procedure. The term 'administration' includes two components: (1) the procedural functioning of the proceeding and (2) the substantive interest of parties in the proceeding. The term 'administration' in the Amendment is narrower than the broad usage of it in Supreme Court case-law and refers to the first description: the procedural functioning of the proceeding. Among the many definitions available for the term 'administration' in Webster's Third New International Dictionary of the English Language (1971), the most appropriate definition to describe the term as used in the Amendment is: "2b.

Performance of executive [prosecutorial and judicial] duties: management, direction, superintendence." (Brackets added).

The potential for atypical circumstances necessitates giving courts and public prosecutors the flexibility to find alternative methods for complying with victims rights when there is a substantial necessity to do so. Thus, where compliance with the exact letter of the right is either impossible or places a very heavy burden on the judiciary or the public prosecutor, the amendment allows for limited flexibility. For example, in a case such as the Oklahoma City bombing, it may be impossible to comply with the right to attend the trial simply because all the victims will not fit in the courtroom. It may be necessary for victims to view the trial in some other fashion, such as by closed circuit television. Courts also may need to exclude a disruptive victim from the court in order to manage the courtroom appropriately, but only to restrict the right in this way until the victim again cooperates. It may also be that the prosecution cannot, due to unusual circumstances, comply with a particular mandate in the Amendment. For example, in an unusual case like the Twin Towers bombing there are so many victims it might be necessary to notify all the victims of their rights through the media, as tracking down every address might be impossible or places too heavy a burden on the public prosecutor.

or compelling necessity.

The Senate Judiciary Report noted, "The Committee-reported amendment provides that exceptions are permitted only for a `compelling' interest. In choosing this standard, formulated by the U.S. Supreme Court, the Committee seeks to ensure that the exception does not swallow the rights. It is also important to note that the Constitution contains no other explicit `exceptions' to rights. The 'compelling interest' standard is appropriate in a case such as this in which an exception to a constitutional right can be made by pure legislative action."

SECTION 3. Nothing in this article shall be construed to provide grounds for a new trial or to authorize any claim for damages. Only the victim or the victim's lawful representative may assert the rights established by this article, and no person accused of the crime may obtain any form of relief hereunder.

Nothing in this article shall be construed to provide grounds for a new trial to authorize any claim for damages.

The proposed language in no way limits the power to enforce the rights granted. Rather it provides two narrowly tailored exceptions to the remedies that might otherwise be available in an enforcement action. The language creates the limitations as a matter of constitutional interpretation.

Only the victim or the victim's lawful representative

It is intended that both the word "victim" and the phrase "victim's lawful representative" will be the subject of statutory definition, by the State Legislatures and the Congress, within their respective jurisdictions. No single rule will govern these definitions, as no single rule governs what conduct must be criminal. In the absence of a statutory definition the courts would be free

to look to the elements of an offense to determine who the victim is, and to use its power to appoint appropriate lawful representatives.

may assert the rights established by this article

With the adoption of this clause there will be no question that victims have standing to assert the rights established.

no person accused of the crime may obtain any form of relief hereunder.

This clause makes it clear, even as does the foregoing clause ("Only the victim..."), that the accused or convicted offender may obtain no relief in the event that a victim's right is violated.

SECTION 4. Congress shall have power to enforce by appropriate legislation the provisions of this article. Nothing in this article shall affect the President's authority to grant reprieves or pardons.

Congress shall have power to enforce by appropriate legislation the provisions of this article.

Congress' power to "enforce" established by this section carries limitations that are important for principles of federalism. The power to enforce is not the power to define.