

Testimony of
Mr. Roger Pilon

July 17, 2002

Mr. Chairman, distinguished members of the committee:

My name is Roger Pilon. I am vice president for legal affairs at the Cato Institute and director of Cato's Center for Constitutional Studies. I want to thank the committee for inviting me to testify on S.J. Res. 35, proposing a victims rights amendment to the United States Constitution.

Although I am opposed to amending the Constitution for the purpose of protecting the rights of crime victims, I want to make it very clear at the outset that I fully support the basic aims of this proposal. Too often when a prosecutor takes over the prosecution of a crime, the victim is all but forgotten. We need to do more than we sometimes do to help the victims of crime. For both constitutional and practical reasons, however, I believe that this amendment is not the best way to accomplish that end.

Amending the Constitution is a serious matter. Clearly, the provisions of Article V that enable us to do so were put there to be used. But just as clearly, experience has taught us that those provisions are to be used only when circumstances plainly warrant it. When other, more flexible means are available to accomplish the same ends--especially when we may need to refine what we do in light of experience--prudence alone suggests that we employ such means, that we not lock ourselves inflexibly in our basic law, the Constitution.

On the subject at hand, federal, state, and local governments already provide for the victims of crime. Through ordinary legislation or state constitutions they are achieving every aim of this proposal more quickly and with equal effect and greater flexibility. Thus, there is no compelling reason to pursue such ends by amending our basic charter of government.

But if there is no compelling reason to amend the Constitution to provide for victims' rights, there are compelling reasons for not amending the Constitution for that end. Some of those reasons are theoretical, others are practical.

On the theoretical side, proponents of this amendment often speak of a constitutional "imbalance" between the rights of defendants and the rights of victims. The Constitution lists numerous rights of defendants, they say, but is silent regarding victims.

There is a fundamental reason for that "imbalance." It has to do with the very purpose and structure of the Constitution. As the Declaration of Independence makes clear, the basic purpose of government is to secure our rights--against both domestic and foreign threats. To pursue that end, the founding generation wrote and ratified the Constitution. Through it they authorized, established, and empowered the institutions of government. But in the process they also limited the exercise of the power they had just authorized and established.

The protections the Constitution affords defendants are clear examples of such limitations. On one hand the Framers wanted a government strong enough to carry out the functions they had assigned it. On the other hand they did not want government to exercise its powers in ways that would violate our rights. They were especially concerned to limit the police powers of government, the power to secure our rights; for they knew from experience that in the name of so basic and worthy an end, great abuse might occur. That is why they left the police power almost entirely in the hands of the states, where it was closer to the people. And that is why such power

as they gave to the national government was constrained both by enumeration and by the provisions of the Bill of Rights. The federal government had only those powers that the people, through the Constitution, had delegated to it, as enumerated in the document. And the exercise of that power was further restrained by the rights of the individual, enumerated and unenumerated alike.

Thus, the Framers' constitutional approach was essentially guarded. They wanted to make it very clear, in our organic law, that government was limited to certain ends and was limited further in how it might pursue those ends. There is no place in that approach for "government benefits," for the modern welfare state. It is lean, limited government, empowered to do a few things, in limited ways, leaving the individual citizen free to pursue happiness however he wishes, provided only that he respect the equal rights of others to do the same, which government is there to ensure.

It is not a little anomalous, therefore, to have an amendment to the Constitution addressing the rights of victims of crime when there is so little federal power to begin with to address the problem of crime. It would be one thing if the federal government, as at the state level, were required to attend to the rights of victims in connection with its general police power. But there is no general federal police power, as the Supreme Court has repeatedly said.

Moreover, such "benefits" as the Constitution does confer in the criminal law context arise entirely because the government is the moving party in an adversarial matter. The benefits or rights of due process or trial by jury, for example, arise only because the government has placed the accused in an adversarial relationship, at which time such rights kick in to limit the means government may employ. The situation is entirely different with crime victims. They stand in no adversarial relationship with the government such that the means available to the government must be restrained for their protection. What this amendment provides, rather, is closer to a true benefit from government.

This proposal has about it, then, the air of certain European, especially Eastern European, constitutions, which list "rights" not as liberties that government must respect as it goes about its assigned functions but as "entitlements" that government must affirmatively provide. We have thus far resisted that tradition in this nation. It would be unfortunate if we should begin it through this "back door," as it were.

But if the absence of any general federal police power makes this amendment anomalous, still other implications for federalism are even more clear. By constitutionalizing certain minimal standards in this area, for example, the amendment would preclude states from experimenting in ways that might fall below the minimum. Moreover, it appears from the language of Sections 1 and 5 of the amendment that Congress would have the power to mandate states to take measures to implement the provisions of Section 2, which amounts to nothing less than constitutionalizing a number of "unfunded mandates." If Congress has no such power, however, then the amendment may amount to an empty promise.

Finally, as a structural matter, such rights as are found in our Constitution, either enumerated or unenumerated, are invoked ordinarily when some governmental action either proceeds without authority (e.g., *Lopez*, *Morrison*) or in violation of a recognized right (e.g., any authorized action that implicates rights of speech or religion). Thus, the putative authority of the government is pitted against the putative right of the individual or organization (to be free from such action, or from such an application of an otherwise authorized action).

Here, however, we have a three-way relationship, which raises havoc with our traditional adversarial system. How, for example, do we resolve the potential conflicts among the authority

of the state to prosecute, the right of the accused to a speedy but fair trial, and the right of the victim to "adjudicative decisions that duly consider the victim's ... interest in avoiding unreasonable delay"? If judicial "balancing" poses serious jurisprudential problems in our adversarial system today--and it does--then those problems will only be exacerbated under this amendment.

In the larger context, then, the rights of defendants that we find in the Constitution make perfectly good sense. They are restraints on government power. The federal government may pursue the ends it is authorized to pursue, but it must respect our rights in the process. The government may enact and enforce customs laws, for example, but it may not engage in warrantless searches of our homes or businesses in the process. And if it prosecutes us in the course of enforcing those laws, it must respect the rights of defendants as set forth in the Constitution and the Bill of Rights.

Thus, given the basic defensive way we constituted ourselves, it is not surprising that the rights of crime victims are not mentioned in the Constitution. That does not mean that there are no such rights, however, for the Seventh Amendment invokes the common law, and that law entails the rights of victims to bring actions against those who victimize them. We must not forget, that is, that the primary way in which victims have their rights vindicated is not through the criminal but through the civil law. It is the business of the state to protect us from each other, as much as it can, and to punish those who injure us. It is our business to seek redress from those who injure us, to vindicate the rights that have been violated by the criminal.

That vindication may be achieved in part through the criminal proceeding, to be sure, for most victims have an interest and even a right in seeing the criminal get his comeuppance. But the criminal proceeding belongs primarily to "the people," whose interests and rights may be identical to those of the victim, but may also be at variance with those of the victim. Sometimes the prosecutor will want to put the criminal away, for example, but other times he may want to strike a deal with the criminal in order to reach other, more dangerous criminals, criminals that are of no concern to the victim, who wants this particular perpetrator punished. In such cases, the crucial question is, whose forum is it? Under our system, where we delegated law enforcement for the most part to the state, it is the people's forum, with the prosecutor representing the interests of the people.

It is crucial, therefore, that there be two forums--criminal and civil--for there are two sets of interests to be pursued, and they are not always in harmony. It is for that reason, however, that it is crucial also to recognize that an uncritical concern for "victims' rights" may very well muddy the water. More precisely, when rights that belong properly in the civil forum are transported to the criminal forum, confusion and conflict may ensue. That is a very real risk with this proposal. Consider, for example, the victim's right "to adjudicative decisions that duly consider the victim's ... just and timely claims to restitution from the offender," as set forth in Section 2 of the proposed constitutional amendment. Perhaps such details as would constitute a restitution order could be incorporated into the prosecutor's case against the defendant, aimed at determining his guilt or innocence, but that kind of concern rests properly with the victim, not with the people or their representative, the prosecutor. When representing separate parties, there is always the potential for conflict of interest, of course. That is clear here. The victim's interest in restitution may vitiate punishment. The people's interest in punishment may vitiate restitution. Which interest should prevail under this amendment? And would the failure to convict--perhaps because of the higher standard of proof for a criminal conviction--undermine any right of the victim to a restitution order--which might have been obtained in a civil action against the defendant?

Thus, when we cloud the theory of our system of justice with an amendment of this kind, we give rise to all manner of practical problems. Section 2's promise of "adjudicative decisions" regarding victims' safety, speedy trial, and restitution, for example, would seem to guarantee victims a right not simply to be present and heard at all criminal proceedings but to a separate victim's hearing on those matters. If that is how the provision is to be read--and surely there are courts that will read it that way--then we can only imagine how many such hearings will arise in an already overburdened criminal justice system that plea bargains over 90 percent of its cases. More generally, however, practical questions surround the very nature of the victim's claims. In the proposed amendment they are called "rights," but it is unclear to me, at least, just how those rights would operate, just how they are invoked, and how remedies for their violation would work. Section 2, for example, says the victim shall have "the right to adjudicative decisions that duly consider the victim's safety." That "right" is either so vague as to be all but meaningless, or it is not. If not, then what does it mean? Do not most prosecutors now take such matters as the victim's safety into account when they make decisions? How would things change under this amendment? Most important, would the victim have a claim against a prosecutor who was insufficiently considerate of the victim's safety? Section 1 purports to "establish" the rights at issue. But Section 3 says, "[n]othing in this article shall be construed to ... authorize any claim for damages." Are we to understand by that that the victim has no remedy when the "rights" "established" by this amendment are ignored or violated? "Rights" like those are no rights at all. There is, in short, a disturbing air of "aspiration" about this proposal. Like the generous legacy in a pauper's will, it promises much but delivers little. Clearly, rights without remedies are worse than useless: they are empty promises that in time undermine confidence in the very document that contains them--the United States Constitution, in this case. But a remedy is ordinarily realized through litigation. Before this amendment goes any further, therefore, it is incumbent upon those who support it to show how victims will or might litigate to realize their rights, and what their doing so implies for other rights in our constitutional system. I can imagine several scenarios under this amendment, none of which is clear, all of which--by virtue of being constitutionalized--will make the plight of victims not better but worse. We owe more than empty promises to those for whom the system has already failed once.