THE PROPOSED VICTIMS' RIGHTS AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: OPENING THE DOOR OF THE CRIMINAL JUSTICE SYSTEM TO THE VICTIM

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I. INTRODUCTION

In 1997, after more than twenty-five years of increasing public demand for a change in the treatment of crime victims by the American criminal justice system,[1] an amendment was proposed to the Constitution of the United States to protect the rights of victims of crime.[2] The proposed amendment could finally return the victim to the participatory role he once held in a criminal proceeding against one accused of doing him harm. The crime victim could at last be guaranteed some measure of "standing" in a criminal trial. This Note argues that the Victims' Rights Amendment in substantially the form introduced on the Senate floor on January 21, 1997—S. J. Res. 6[3]—should be passed by Congress and ratified by the states.

Part II of this Note reviews the historical role of the victim in American and certain foreign criminal justice systems and argues that denial of standing in a criminal proceeding to the victim is both recent and aberrational.

Section A surveys the ubiquitousness of the concept of restitution in criminal law, both over time and across legal systems, and argues that the concept inherently invests victims with standing to participate in the criminal justice

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* I would like to thank my husband, Dando for his help and encouragement, and my sons, Lorenzo and Pete, for their patience.

1. *See* Frank Carrington and George Nicholson, *The Victims' Movement: An Idea Whose Time Has Come*, 11 PEPP. L. REV. 1-5 (1984). *See generally* Symposium, 11 PEPP. L. REV. xiii (1984) (five articles discussing the origins of the victims' rights movement, victims' perceptions of criminal justice, and suggestions for changes to the criminal justice system); Symposium, 34 WAYNE L. REV. 1 (1987) (eight articles focusing on the pros and cons of Constitutional amendment to protect the rights of victims of crime).

2. S.J. Res. 6, 105th Cong. § 1 (1997) (introduced on Jan. 21, 1997 in the Senate). In the House of Representatives, H.R. J. Res. 71, introduced on April 14, 1997, proposed an amendment to the Constitution to protect the rights of victims of crime. H.R. 1322, 105th Cong. (1997), a bill to implement the Constitutional Amendment, was introduced on April 15, 1997. These 1997 resolutions were preceded by legislation proposed during the second session of the 104th Congress: S.J. Res. 65, 104th Cong. § 2 (1996); S.J. Res. 52, 104th Cong. § 2 (1996); H.R.J. Res. 173, 104th Cong. § 2 (1996); and H.R.J. Res. 174, 104th Cong. § 2 (1996). *See* Appendices 1, 2, and 3 *infra* for the complete texts of S.J. Res. 6, S.J. Res. 65, and S.J. Res. 52.

3. *See* S.J. Res. 6, 105th Cong. (1997).

process. The survey reveals that the current exclusion of the crime victim from the American criminal justice system, rather than the limited participatory role that is proposed in the Victims' Rights Amendment, is the anomaly.

Section B describes the historical context in which the framers of the United States Constitution chose to delineate specific rights of the accused in that document, while not addressing corresponding rights of the victim. This disparity of treatment has subsequently been seized upon—unjustifiably—to exclude the victim from a participatory role in the criminal justice process.

Section C discusses the system that eventually evolved in the United States, which substantially excludes the victim from any participation in the criminal justice process beyond that of a witness. The resulting alienation of the state from the citizens it had contracted to protect and defend led to development of the victims' rights movement.[4] This movement, in turn, provoked extensive state and federal legislation that sought to give victims the standing to participate they once had, and to restore restitution as a principal goal of the criminal justice process.

Part III of this Note considers the hostile response to victims' rights legislation by a court system that evolved without taking victims' rights into account, and concludes that if basic human rights of crime victims are to be protected from infringement by government authorities, Congress must approve a federal Constitutional Amendment guaranteeing limited standing in a criminal proceeding to crime victims.

Section A discusses the courts' invocation of the "standing" doctrine to avoid the "uncomfortable issues" that might arise if a role for the victim were recognized, and sets the stage for the introduction of the Victims' Rights Amendment. Where statutory law has not been sufficient to protect certain basic rights of the individual from infringement by government authorities, the strongest expression of public will—a Constitutional Amendment—is required.

Section B looks at procedures for victim participation in criminal proceedings in certain foreign legal systems and the continued viability in state courts in this country of the private prosecution concept. These examples of effective victim involvement in criminal proceedings suggest that the needs of accused and accuser can be harmonized in the American criminal justice system without significant disruption or prejudicial compromise.

Section C describes the current status of amendment proposals.

This Note concludes that passage of the Victims' Rights Amendment to the United States Constitution, in substantially the form introduced on the Senate

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4. *See* Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515, 517 (1982) (arguing that the interest in victims warrants being described as a "movement" because it is broad-based; has momentum at local, state, and national levels; has a substantial body of literature; and a network of support organizations).

floor on January 21, 1997,[5] should guarantee standing in a criminal proceeding to victims of crime. No longer would crime victims be denied basic human rights of participation in government processes affecting their lives. No longer would courts be able to circumvent the public will by invoking the opaque doctrine of standing to shut the crime victim out of the criminal justice system. The Victims' Rights Amendment should be passed by Congress and submitted to the states for ratification.

II. PASSAGE OF A CONSTITUTIONAL AMENDMENT GUARANTEEING LIMITED STANDING TO VICTIMS IS NECESSARY TO RESTORE PARTICIPATION IN THE AMERICAN CRIMINAL JUSTICE SYSTEM TO CRIME VICTIMS

A. An Overview of Restitutionary Justice and Victim Participation in Criminal Proceedings

The minimal participation presently allowed a crime victim in the American criminal justice system is quite different from the victim's original role and from his current role in many foreign legal systems. The exclusion of the victim in this country can be traced to the development of a system of public prosecution at the same time that restitution to the injured individual declined in importance as a criminal sanction.[6]

In ancient times the victim held a central role in dealing with a crime and restitution to the victim was an important goal of the criminal proceeding.[7] For example, a requirement of restitution to the victim of crime for resulting loss, damage, or injury is found in the oldest known legal code, the 4,000-year-old Code of Hammurabi; in provisions of the Old Testament; in Greek and Roman Penal Codes; and in Anglo-Saxon Law.[8] The victim's entitlement to restitution was accepted as inherently investing him with the right to participate in a criminal proceeding.[9]

Commentators have suggested that the control of criminal prosecution

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

6. *See* Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 PEPP. L. REV. 117, 132 (1984).

7. *See* Paul S. Hudson, *The Crime Victim and the Criminal Justice System: Time for A Change*, 11 PEPP. L. REV. 23, 25-26, & n.14.

8. *See id.*; *see also* Alan T. Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 UCLA L. REV. 52, 52 n.1 (1982) (quoting Exodus 22:1 (Revised Standard Version) "If a man steals . . . [h]e shall make restitution . . . .").

9. *See* Randy E. Barnett, *The Justice of Restitution*, 25 AM. J. JURIS. 117, 118 (1980).

by the state and the common law distinction between crime and tort may have germinated in medieval times with the feudal barons' desire to obtain revenue in the form of fines and forfeitures from law breakers.[10] Fines collected by the government for breach of the peace sometimes replaced restitution to the victim for the injury done him.[11] Later, the state action came to be prosecuted in order to punish the offender, while the remedy sought by the victim was still compensation.[12] This difference in remedy sought is viewed by some legal scholars as the distinguishing factor between a criminal and a civil proceeding.[13] However, the distinction between civil and criminal offenses remained unclear into the eighteenth century in English common law, with an action for multiple damages being a remedy for wrongs now considered criminal.[14]

In fact, in early English common law, a large proportion of criminal prosecution continued to be instigated by private individuals.[15] A victim or his representative as a private prosecutor managed the whole prosecution, just as in a civil case.[16] In this country prior to the American Revolution, because laws and procedures were primarily adaptations of the English common law,[17] the crime victim in the American colonies was the "key decision-maker in the criminal justice system," serving as policeman and prosecutor.[18] A crime was still seen primarily as an injury to the individual rather than to the state.[19]

The concept of a public prosecutor did, however, exist side by side with private criminal prosecution early in the history of the American colonies,[20] although the exact derivation of the American office of public prosecutor remains "an historical enigma"[21]—the subject of several different legal theories.[22] The

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10. *See* Goldstein, *supra* note 4, at 518 (1982); Harland, *supra* note 8, at 52 n.1; Peggy M. Tobolowsky, *Restitution in the Federal Criminal Justice System*, 77 JUDICATURE 90, 90 n.2 (1993).

11. *See* Tobolowsky, *supra* note 10, at 90 & n.2.

12. *See* William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 656-59 & nn.47 & 56 (1976).

13. *See* Bonnie Arnett Von Roeder, *The Right to a Jury Trial to Determine Restitution Under the Victim and Witness Protection Act of 1982*, 63 TEX. L. REV. 671, 676 (1984).

14. *See* McDonald, *supra* note 12, at 653 n.21.

15. *See* Thomas J. Robinson, Jr., *Private Prosecution in Criminal Cases*, 4 WAKE FOREST L. REV. 300 (1968).

16. *See id.* at 302.

17. *See id.* at 307-08.

18. McDonald, *supra* note 12, at 649.

19. *See id.* at 650.

20. *See* Gittler, *supra* note 6, at 126.

21. *Id.* at 127.

22. *See id.* at 127-29 (discussing theories of the origin of the public prosecutor in America from Dutch, English, and French law); *see also* Juan Cardenas, *The Crime*

office was apparently adapted, at least in part, from legal systems other than that of England, because the office came into being in the colonies before its establishment in England.[23] The office of Director of Public Prosecutions was not established under English law until 1879,[24] and acts defining the office specifically allowed private prosecution under certain circumstances.[25] In England today, the police prosecute most criminal cases and the Director of Public Prosecution handles all crimes punishable by death,[26] but a victim is still legally entitled to bring a private criminal prosecution. The police prosecutions are, in fact, a type of private prosecution because police officers are not considered to be legally distinct from the general citizenry.[27] The English continue to regard their system of private prosecution by the citizenry as a necessary protection of liberty.[28]

Students of legal history have suggested that the concept of a public prosecutor in the American colonies may have derived from an official in the Dutch colonial settlements known as the *schout*—a combination of sheriff, public prosecutor, and financial agent for the Dutch West India Company.[29] Another possible source is France and its American settlements.[30] The French *prosecutor de roi* (king's prosecutor) dates back to the fifteenth century and was surely a familiar concept to American colonial legal theorists.[31] However, these legal scholars would have also been aware that state-conducted criminal prosecution in the Netherlands and in France did not shut out the victim or deny his right to restitution. Both systems allowed a victim's private action for damages within the criminal proceeding, and continue to do so today.[32]

In France, for example, the victim has the right to bring a civil action for damages before the same court that is hearing the criminal prosecution; the right

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Victim in the Prosecutorial Process, 9 HARV. J.L. & PUB. POL'Y 357, 369-71 (1986) (discussing colonial experimentation with publicly funded prosecution borrowed from European models such as the Dutch, Scottish, and French); McDonald, *supra* note 12, at 659-61 (discussing development of public prosecutor's office in America and commenting, in n.61, on persuasive argument for Dutch origins); Robinson, *supra* note 15, at 307-11 (discussing theories of Dutch or Scottish origins).

23. *See* Robinson, *supra* note 15, at 308.
24. *See id.* at 306.
25. *See id.* at 306-07.
26. *See id.* at 307.
27. *See* Cardenas, *supra* note 22, at 364.
28. *See* McDonald, *supra* note 12, at 660 n.60.
29. *See* Robinson, *supra* note 15, at 308.
30. *See* Gittler, *supra* note 6, at 129.
31. *See* Cardenas, *supra* note 22, at 371.
32. *See* Matti Joutsen, *Listening to the Victim: The Victim's Role in European Criminal Justice Systems*, 34 WAYNE L. REV. 95, 115-16 (1987); Jean Larguier, *The Civil Action for Damages in French Criminal Procedure*, 39 TUL. L. REV. 687 (1965).

to participate and be heard through his counsel in the prosecution of the criminal charge;[33] and, if the public prosecutor has chosen not to begin criminal proceedings against an accused, the crime victim may institute an *action civile* for damages before a criminal tribunal, and thereby force the court to conduct the criminal inquiry as well.[34] Bringing the civil and criminal actions before the same tribunal maximizes use of judicial and administrative resources and can be cheaper for the victim: court costs are lower than for a separate civil claim and the results of the official investigation are available for use in documenting the victim's claim.[35] Another advantage of combined penal and civil claims is the assurance of consistency in court decisions.[36]

In the Netherlands, the victim cannot institute criminal proceedings but has the right to a court appeal of a prosecutor's decision not to prosecute an accused offender.[37] The victim is not considered a party to the criminal proceedings but does have the right to be represented by an attorney during the proceedings[38] and to have access, with some limitations, to the records concerning the case.[39]

In the American colonies, building on European legal concepts, the first statutes establishing the office of public prosecutor merely authorized public prosecution, but did not withdraw from the private individual the right to instigate a criminal prosecution if the public official did not.[40] The development of a public prosecution system to represent the state's interest and its gradual replacement of private action as the principal means of instituting and conducting a criminal trial clearly contributed to the injured party's alienation from the criminal proceeding.[41] However, as long as most crimes continued to be viewed as wrongs committed against the individual, even when prosecuted in the name of the sovereign, and restitution in the form of monetary damages remained an

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33. *See* Richard S. Frase, *Comparative Criminal Justice As A Guide To American Law Reform: How Do The French Do It, How Can We Find Out, And Why Should We Care?*, 78 CAL. L. REV. 539, 669-70 (1990); Gittler, *supra* note 6, at 179.

34. The ability of the private individual to force the state criminal action was not clearly established until 1906. *See* C. Howard, *Compensation in French Criminal Procedure*, 21 MOD. L. REV. 387, 392-93 (1958).

35. *See* Frase, *supra* note 33, at 670; Joutsen, *supra* note 32, at 116.

36. *See* Joutsen, *supra* note 32, at 116.

37. *See* Dutch Code of Criminal Procedure, Royal Decree of Dec. 4, 1925, Stb. 465, art. 12 - 1 (as amended).

38. *See id.* at art. 12f - 1.

39. *See id.* at art. 12f - 2.

40. In 1704, Connecticut became the first colony to pass a statute authorizing an "attorney for the Queen" to prosecute criminals. *See* McDonald, *supra* note 12, at 660 n. 62; *see also* Robinson, *supra* note 15 at 308-09.

41. *See* Goldstein, *supra* note 4, at 518.

important consideration,[42] the victim was assured of a right to participate in the criminal process.[43]

In the small societies of the early American colonies, an important goal of the justice system had been reintegration of an offender into the community.[44] Restitution was considered a necessary element of the process both for the rehabilitative benefit to the offender and to address the needs of the injured victim.[45] By making restitution, the offender could mend his relationship with society and with the individual victim.[46] The early colonial system exemplifies what has come to be known as a "restitutive theory of justice."[47] Under this theory, a crime is defined as "an unjust redistribution of entitlements by force that requires for its rectification a redistribution of entitlements by force if necessary from the offender to the victim."[48] Such a criminal justice system recognizes a debt, not just to society, but to the victim, and blurs distinctions between crime and tort.[49]

B. Omission of Constitutionally Guaranteed Rights to Crime Victims Explained in the Historical Context

The preceding history of victim participation and entitlements in the American criminal justice system before the American Revolution offers a

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42. *See* Cardenas, *supra* note 22, at 359-60, 371; *see also* Howard, *supra* note 34, at 388 (stating that the main object of the *action civile* in French criminal proceedings is the award of damages in order to restore the injured party to his position prior to the offense); Larguier, *supra* note 32, at 687; Joutsen, *supra* note 32, at 108-14. (discussing various combinations of private and state criminal prosecutions in European legal systems).

43. *See* Cardenas, *supra* note 22, at 387 (stating that "Anglo-American history clearly reveals that the individual once was the primary force behind the process of redressing private wrongs").

44. *See* Laura Munster Sever, Note, *The Victim and Witness Protection Act of 1982: Who Are the Victims of Which Offenses?*, 20 VAL. U. L. REV. 109, 124 (1985).

45. *See id.* at 124-25.

46. *See id.* at 125.

47. Barnett, *supra* note 9, at 117. Barnett is often cited as a principal interpreter and proponent of restitutive justice.

48. *Id.*; *see also* David A. Starkweather, *The Retributive Theory of "Just Deserts" and Victim Participation in Plea Bargaining*, 67 IND. L.J. 853, 855 n.11 (quoting D. VAN NESS, CRIME AND ITS VICTIMS 117-21 (1986) (discussing the Hebrew system of justice under which a crime was something that broke the *shalom*, defined as "completeness, fulfillment, wholeness—the existence of right relationships among individuals, the community, and God," and observing that the principal sanction used to restore right relationships was restitution).

49. *See* Barnett, *supra* note 9, at 118-19.

possible explanation for the omission of specifically enumerated rights for victims in the Bill of Rights to the Constitution, although rights are enumerated for defendants. At the time the Bill of Rights was drafted, an accused was often "mistreated and abused under the authority of the Crown."[50] By contrast, in the colonial American justice system, a victim could pursue a private criminal prosecution and damages were a principal goal of the criminal proceeding.[51] The Founding Fathers would not have felt a need to delineate a victim's right to attend and participate in a criminal proceeding when the victim could have almost complete charge of the prosecution of one accused of causing him injury.[52] In any case, the victim's rights would surely have been presumed by the drafters of the Bill of Rights to be included in the Ninth Amendment's protection of unenumerated rights.[53] However, the lack of specifically guaranteed rights for crime victims was subsequently seized upon—unjustifiably—to exclude the victim from a participatory role in the criminal justice process.[54]

After the American Revolution, the increasing urbanization and mobility of the population brought about the demise of community kinship.[55] The importance of rehabilitating a law breaker was replaced by an emphasis on punishment and deterrence and, as a consequence, restitution to the victim became less important.[56] The victim's position in the American justice system was radically altered as the purpose of a criminal trial became solely to vindicate the harm done to society, not harm to the individual.[57] While European civil law

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50. Ken Eikenberry, *Victims of Crime/Victims of Justice*, 34 WAYNE L. REV. 29, 33 (1987).

51. *See* McDonald, *supra* note 12, at 649, 651-53.

52. *See* Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 4 UTAH L. REV. 1373, 1380 (1994); *see also* Cardenas, *supra* note 22, at 367 (discussing the importance of forced reparations by the criminal to the victim).

53. U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

54. *See* discussion *infra* Part II.C.

55. *See* McDonald, *supra* note 12, at 653.

56. *See* Gittler, *supra* note 6, at 133 & n.56.

57. *See* Cardenas, *supra* note 22, at 369-71 and accompanying notes. *See also* Robinson, *supra* note 15, at 326 & n.93 (quoting PROSSER, LAW OF TORTS 7 (3d ed. 1964)):

> A crime is an offense against the public at large, for which the state, . . . will bring proceedings in the form of a criminal prosecution. The purpose of such a proceeding is to protect and vindicate the interests of the public as a whole . . . . A criminal prosecution is not concerned in any way with compensation or the injured individual against whom the crime is committed, and his only part in it is that of an accuser and a witness for the state.

systems, as illustrated by France and the Netherlands, continued to assure the crime victim a right to seek restitution within a criminal proceeding, not perceiving any conflict between the victim's interests and those of the state,[58] and the British crime victim retained standing to institute a private criminal prosecution,[59] the American system came to focus upon the "public interest in the enforcement of the criminal law."[60] The duty of the public prosecutor was "to seek justice not merely to convict."[61]

Legal scholars have traced the equation of justice in a criminal proceeding with common rather than individual interests to the "social contract" theories of government that rose to prominence in the eighteenth century.[62] In a social contract philosophy, individuals surrender certain freedoms to the government in exchange for mutual protection.[63] The government assumes principal control of the use of force and acquires the duty to protect the citizenry and punish violators of the social contract.[64] The criminal justice system developed to protect society from those who breached the contract.[65] The goal of such a system was, primarily, deterrence from future breaches and was accomplished by punishment[66]—usually by incarceration.[67] As restitution ceased to be a principal goal of the criminal process, the public prosecutor came to dominate the American criminal justice system.[68] When the victim no longer stood to benefit directly by obtaining damages from the offender, the participatory role formerly guaranteed by his restitutive interest was reduced to

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58. *See* discussion *supra* Part II.A.

59. *See* discussion *supra* Part II.A.

60. Standefer v. U.S., 447 U.S. 10, 25 (1980).

61. Young v. Vuitton, 481 U.S. 787, 803 (1987) (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1982)).

62. *See* McDonald, *supra* note 12, at 654-56 (discussing Beccaria's social contract theory under which the criminal justice system served society's interests, not the individual victim's); *see also* John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 558-66 (1994). Bessler considers several definitions of "public interest" and asserts that the view of the public interest as a moral concept originated with Aristotle, who wrote, "the good in the sphere of politics is justice, and justice consists in what tends to promote the common interest." *Id.*

63. *See generally* Richard L. Aynes, *Constitutional Considerations: Government Responsibility and the Right Not to be a Victim*, 11 PEPP. L. REV. 63, 69-73 & nn.27, 37, 39 (1984). The author postulates that underlying the discontent of victims is a feeling that government has breached its "contract" for protection. *See id.*

64. *See* Hudson, *supra* note 7, at 31 & n.42 (citing J. LOCKE, SECOND TREATISE *passim* (1690)).

65. *See* McDonald, *supra* note 12, at 654.

66. *See id.* at 655-57.

67. *See* Gittler, *supra* note 6, at 133 & n.56.

68. *See id.* at 132-35.

little more than the role of a witness.[69] Crime came to be dealt with entirely as an offense against the state.[70]

The United States Constitution, establishing and defining our government, is an example of the type of social contract described by the Enlightenment theorists, and the Bill of Rights—especially the Due Process provisions of the Fifth and Fourteenth Amendments—"defines the rights of the individual and delimits the powers which the state may exercise."[71] The Constitution is "the ultimate expression of the public interest."[72] Constitutionally guaranteed rights, as delineated by the Article III courts, will always prevail over legislative enactments that are perceived as conflicting with these rights.[73] Although the Ninth Amendment was included specifically to address the concern that where rights were enumerated, unenumerated rights might be presumed not guaranteed, the courts continue to take the position that victims' rights are only statutorily guaranteed and, therefore, secondary to the Constitutionally enumerated rights of an accused.[74]

C. Exclusion of the Crime Victim From the Criminal Justice Process and the Development of the Victims' Rights Movement

69. *See id.* at 135.

70. *See* Cardenas, *supra* note 22, at 371.

71. Bessler, *supra* note 62, at 564 & n.224 (quoting In Re Gault, 387 U.S. 1 (1967) (holding that due process of law had been denied a juvenile by Arizona's juvenile delinquency procedures)).

72. Llewelyn v. Oakland Cty., 402 F. Supp. 1379, 1393 (E.D. Mich. 1975) *quoted in* Bessler, *supra* note 66, at 563 n.221.

73. *See generally* Marlene A. Young, *A Constitutional Amendment for Victims of Crime: The Victims' Perspective*, 34 WAYNE L. REV. 51, 64-65 (1987). The author contends that statutorily established rights for victims are "mere privileges" available "at the sufferance of a sympathetic law enforcement officer, a sensitive prosecutor, or an understanding judge." *Id.* at 64. The author discusses Booth v. Maryland, 482 U.S. 496 (1987), in which the Supreme Court invalidated a Maryland statute permitting a victim impact statement at the sentencing phase of a state capital murder trial, finding such a statement violated the defendant's Eighth Amendment rights. Even though *Booth* was overruled by Payne v. Tennessee, 501 U.S. 808 (1991), the combination of the two cases illustrates the "fragility of legislation enhancing victim involvement." *Id.* at 65. Three justices—Marshall, Stevens and Blackmun—dissented from the majority opinion overruling *Booth*. Clearly, the support accorded a crime victim's rights, as established by state statute or federal statute, is subject to the politically determined composition of the Court.

74. "The right to due process is 'conferred, not by legislative grace, but by constitutional guarantee . . . .'" Cleveland Bd. Of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) (quoting Arnett v. Kennedy, 416 U.S. 134, 167 (1974) (Powell, J., concurring in part and concurring in result in part)).

Over the years, administrative and judicial procedures and extensive case precedent have developed around the constitutionally guaranteed rights of an accused offender.[75] Because crime victims were not specifically mentioned in the Bill of Rights, no comparable body of law has developed for their protection. When the victim's claim of right—such as a request to be present at trial proceedings—appears in any way to impact a fair trial for the defendant, the instinct of the court is to go with the defendant's familiar constitutional trump.[76] The victim can be excluded without any avenue of recourse.[77] In spite of the Ninth Amendment's guarantee of unenumerated rights,[78] law enforcement authorities and the courts have chosen to find that victims do not have a protected interest in the criminal process.[79] The person most directly affected by the commission of a crime can be denied even the access to the trial allowed the general public.[80] Regarding any significant participation in the proceeding, the

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75. *See* U.S. CONST. amend. IV (freedom from unreasonable searches and seizures and probable cause for issue of warrant); U.S. CONST. amend. V (requiring a grand jury indictment for trial on a capital offense, prohibiting double jeopardy, protecting against self-incrimination, guaranteeing due process of law); U.S. CONST. amend. VI (in criminal trials: right to a speedy, public trial, by an impartial jury; to have notice of charges; right to confront witnesses; right to an attorney); U.S. CONST. amend. VII (right to jury trial in civil suits); U.S. CONST. amend. VIII (prohibiting cruel and unusual punishments). Case law has held, for example, that the right to a fair trial includes a presumption of innocence and guilt may be determined only on the basis of evidence admitted in the trial proceeding. *See In re* Winship, 397 U.S. 358, 363 (1970); Coffin v. United States, 156 U.S. 432, 453 (1895); Taylor v. Kentucky, 436 U.S. 478, 485 (1978). Case law has held that procedural due process under the Fifth Amendment banishes "prejudice, passion, excitement and tyrannical power" from the courtroom. *See* Chambers v. Florida, 309 U.S. 227, 237 (1940). Case law has also held that the Sixth Amendment's guaranteed right to counsel applies to states. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

76. *See* United States v. McVeigh, No. 96-CR-68-M, 1996 WL 578525, at *23-25 (D. Colo., Oct. 4, 1996 Trans.). In this pre-trial transcript, Chief District Judge Richard Matsch reaffirmed his ruling of June 26, 1996, excluding victims and survivors of victims of the Oklahoma City bombing, who would give impact statements at sentencing, from attending or viewing the trial proceedings, under Federal Rule of Evidence 615. *See* discussion *infra* Part III.A. and accompanying notes.

77. *See* McVeigh, 1996 WL 578525 at *16 (pre-trial order from the bench denying the motion of Oklahoma bombing victims, survivors and national victims' rights groups asserting standing to raise rights under the Victim's Bill of Rights). *See* also discussion infra Part III.A.

78. U.S. CONST. amend. IX.

79. *See* Aynes, *supra* note 63, at 73 & n.41.

80. *See* Petition for a Writ of Mandamus in the Oklahoma Bombing Case, No. 96-CR-68-M, 11-12-96 WLN 12061 (D. Colo Nov. 11, 1996) ("[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public,"

Supreme Court holding in *Linda R. S. v. Richard D.*, 410 U.S. 614, 619 (1973), that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another," and that "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution,"[81] remains the law. The victim's interest in the criminal trial may not be "judicially cognizable,"[82] but that makes it no less real. A crime victim's perspective on the theory of crime as a wrong against the state and not the individual was succinctly expressed by one such victim in the following testimony given at a public hearing in New York: "The State of New York was not kidnapped, beaten, and raped. I was."[83]

Since the early 1960s, the perception has grown that victims of crime in this country are treated insensitively, unfairly, and unconstitutionally.[84] By the mid-1970s, even government law enforcement agencies acknowledged that "the victim is the subject of fewer rights and fewer programs of service than any other

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citing Richmond Newspapers v. Va., 448 U.S. 555, 581 (1980)).

81. Linda R. S. v. Richard D., 410 U.S. 614, 619 (1973). This case involved the mother of an illegitimate child seeking to enjoin the state of Texas from enforcing a criminal statute that provided for prosecution of parents failing to support their children, only against fathers of legitimate children and seeking to compel the state to prosecute the father of her illegitimate child for non-support. The Court found that the plaintiff lacked standing because she failed to make a sufficient showing of a direct nexus between the vindication of her interest and the enforcement of the State's criminal laws. *Id.* *See* Goldstein, *supra* note 4, at 550-52. Goldstein makes a well-reasoned argument that the Court used overly broad language in denying the plaintiff standing in *Linda R. S.*, with the result that the case could be interpreted to deny a victim *any* standing in criminal cases for *any* type of intervention. As Goldstein points out, *Linda R. S.* involved an attempt to compel prosecution—the situation in which a court has the least authority to confer standing because prosecution is an "inherently executive" function and separation of powers questions could be involved. *See* United States v. Cowan, 524 F. 2d 504, 512-15 (5th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976). Goldstein suggests that courts can and should grant limited standing to victims in collateral proceedings such as sentencing and restitution hearings. *See* Goldstein, *supra* note 4, at 550-52.

82. *See Linda R.S.*, 410 U.S. at 619.

83. Hudson, *supra* note 7, at 34 n.52 (quoting victim testimony from a New York State public hearing held in February, 1981 on a proposed Bill of Rights for Crime Victims).

84. *See* PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT, at 2-13 (Dec. 1982) [hereinafter TASK FORCE] (giving detailed examples of victims' negative experiences with law enforcement authorities and the court system). *See* also S. Rep. No. 97-532, at 12 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2518 (describing testimony from a victim whose case was resolved and a restitution order entered without anyone ever consulting her to learn the extent of her injuries); McDonald, *supra* note 12, at 662 & n.71 (extensive list of examples where legal profession neglected victims' interests).

group coming in contact with the criminal justice system."[85] In 1982, the President's Task Force Report on Victims of Crime[86] concluded that:

> somewhere along the way, the [criminal justice] system apparently lost track of the simple truth that it is supposed to be fair and to protect those who obey the law while punishing those who break it. Somewhere along the way, the system began to serve lawyers and judges and defendants, treating the victim with institutionalized disinterest.[87]

Even though the American criminal justice system must have the cooperation of victims to function properly—the Supreme Court noted that "courts may not ignore the concerns of victims" because such a course could discourage victims from reporting violations to the authorities[88]—government authorities have resisted altering proceedings substantially enough to insure victim participation.[89] Prosecutors, police, and judges share similar agendas of using resources and time as efficiently as justice will allow.[90] Many commentators have noted that the interests of these officials often align more closely with the defendant's and defense attorney's goal of minimizing uncertainty of outcome[91] than with the victim's natural yearning to see justice done—or even the urge for retribution.[92] Studies have shown that negative encounters with the justice system cause victims to opt out of future cooperation.[93] When a legal system ceases to be equitable it cannot survive.[94]

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85. McDonald, *supra* note 12, at 649 n.1 (1976) (quoting the Law Enforcement Assistance Administration of the U.S. Department of Justice).

86. *See* discussion *infra* Part II.C. & nn.103-08.

87. TASK FORCE, *supra* note 84, at vi.

88. Morris v. Slappy, 461 U.S. 1, 14 (1983).

89. *See* TASK FORCE, *supra* note 84, at vi.

90. *See id.* "Although lawyers and judges rely on plea bargaining as a tool of calendar management, victims legitimately view the resolution of and sentencing in a case as an evaluation of the harm done to them." *Id.* at 66; *see also* Goldstein, *supra* note 4, at 555.

91. *See* Aynes, *supra* note 63, at 73.

92. Richmond Newspapers, Inc. v. Va., 448 U.S. 555, 571 (1980).

93. One survey of crime victims revealed that 44% vowed never to become involved with the system again. *See* Hudson, *supra* note 7, at 30 n.35 (citing New York State Crime Victims Compensation Board Report (1982)); CRAIG A. PERKINS, BUREAU OF JUSTICE STATISTICS, U. S. DEPARTMENT OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 1993 at 92 (May 1996) (according to the survey, a majority of crimes were not reported to police—only 35% of all victimizations and only 42% of violent victimizations were reported to law enforcement officials). This same survey reported that "[w]hether victimized by a violent or a property crime, victims rarely received any assistance from either government or private agencies." *Id.* at 93. *See also* S. REP. NO.

In tracing the victims' rights movement, observers have emphasized as a principal cause of dissatisfaction the confluence of soaring crime rates in the early 1960s through the 1980s[95] with implementation of the expanded rights for defendants developed under the Warren Court.[96] Although the exact origins of

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97-532, *supra* note 84, at 37, 1982 U.S.C.C.A.N. at 2543. "I will never forget being raped, kidnapped, and robbed at gunpoint. However, my sense of disillusionment with the judicial system is many times more painful. I could not, in good faith, urge anyone to participate in this hellish process." *Id.* (quoting a subcommittee witness).

The National Victims Center and the National Institute of Justice Statistics recently completed a survey to assess the impact of victims' experiences in the justice system on their willingness to cooperate with the system. *See* DAVID BEATTY ET AL., NATIONAL VICTIM CENTER, STATUTORY AND CONSTITUTIONAL PROTECTION OF VICTIMS' RIGHTS: IMPLEMENTATION AND IMPACT ON CRIME VICTIMS, SUBREPORT: CRIME VICTIM RESPONSES REGARDING VICTIMS' RIGHTS (1997). The survey, begun in February of 1993, studied more than 1300 crime victims in four states (two states with broad victims' rights protection, two with limited rights). *Id.* at 1. The results of the study, published April 15, 1997, revealed that crime victims from the strong protection states were much more likely to rate as "more than adequate" each aspect of the criminal justice system, while victims from weak protection states were far more likely to rate the criminal justice systems as "completely inadequate." *Id.* at 5. However, the study found that even in the states with strong legal protections for victims' rights, "many victims are denied their rights." *Id.* at 2. For example, even in strong protection states, nearly two-thirds of crime victims were not notified that the accused offender was out on bond and almost half of the victims were not notified of the sentencing hearing. *Id.* The *Victims' Rights Study* supplies concrete proof of the need for an amendment to the United States Constitution, where strong state statutes and state constitutional amendments protecting crime victims' rights "have been insufficient to guarantee the rights of crime victims." *Id.*

94. *See* TASK FORCE, *supra* note 84, at 16.

95. *See* Hudson, *supra* note 7, at 26-27 & n.18 (noting that one in three Americans is victimized by crime each year—a rate three to five times the crime rate of the mid-1950s). Hudson's observation is borne out by a comparison of the number of serious crimes and frequency of violent crimes at ten-year intervals from 1960 to 1990, as reported in the F.B.I. series of annual reports on crime in the United States. In 1960 there were 1,861,300 serious crimes, UNIFORM CRIME REPORTS, U.S. DEPT. OF JUSTICE, CRIME IN THE UNITED STATES 1960, at 1 (1961) and one violent crime every three minutes. *Id.* at 4. The crime index total of serious crimes in 1970 was reported as 5,568,197, UNIFORM CRIME REPORTS, U.S. DEPT. OF JUSTICE, CRIME IN THE UNITED STATES 1970, at 64 (1971), with one violent crime every 43 seconds. *Id.* at 31. UNIFORM CRIME REPORTS, U.S. DEPT. OF JUSTICE, CRIME IN THE UNITED STATES 1980, at 38 (1981) reported a crime index total of 13,295,400, with one violent crime every 24 seconds. *Id.* at 6. In 1990 the crime index total rose to 14,475,613, UNIFORM CRIME REPORTS, U.S. DEPT. OF JUSTICE, CRIME IN THE UNITED STATES 1990, at 51 (1991), and the "crime clock" showed one violent crime every 17 seconds. *Id.* at 7.

96. The Warren Court years spanned 1953 to 1969. *See* Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U.

the victims' rights movement are still obscure,[97] numerous commentators have suggested that the "women's rights" efforts to protect rape victims were central to the beginning of the movement.[98] At the same time that the number of crime victims rose, their vivid accounts of "revictimization"[99]—reports of indignities inflicted by law enforcement authorities and insensitivity on the part of courts[100]—reached the media. State and federal legislators began to respond with legislation acknowledging the victim's interest in justice and fair treatment in a criminal proceeding, and seeking to restore restitution as a goal of the criminal justice process.

In 1965, California led the way for state protection of crime victims with a statute providing compensation to innocent victims of violent crime.[101] Programs for restitution or compensation, special protections for child victims and victims of sex crimes, and provisions allowing certain limited participation in the justice process—such as delivering an impact statement at sentencing—were gradually enacted into law in virtually all the states.[102]

Action at the federal level included President Reagan's creation in 1982 of a Task Force on Victims of Crime "to 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."[103] The Task Force's image of a criminal

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ILL. L. FORUM 518. Allen considers the judicial activism of the Warren Court and concludes that the decisions may have exacerbated the problems of a criminal justice system staggering under the number of crimes and persons for processing–"[i]ts role is better adapted to review than to initiation." *Id.* at 542. *See also* Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L.R. 937, 943 n.32 (1985) (stating that "the Warren Court's concern for the rights of the accused and its selective incorporation of provisions of the Bill of Rights amounted to a 'revolution' in criminal procedure."). *See generally* Stephen A. Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151, *passim* (1980) (discussing the expansion of Constitutional rights of a criminal defendant).

97. *See* Carrington, *supra* note 1, at 1.

98. *See* Aynes, *supra* note 63, at 65 n.2.

99. *See* Gittler, *supra* note 6, at 117 (stating "The victims of crime are truly the forgotten people in the American criminal justice system and are all too often victimized twice — first by the crime and then by the system.").

100. *See id.* at 121 n.11.

101. *See* Carrington, *supra* note 1, at 2 n.3 (citing 1965 Cal. Stat. 3641, repealed by 1967 Cal. Stat. 3707). The California victim compensation program is now codified at CAL. GOVT. CODE §§ 13959-74 (West 1992 & 1997 Electronic update).

102. *See Hudson, supra* note 7, at 26 nn.15, 17; William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37, 62 n.117 (1996) (noting that all states now permit the participation of victims at sentencing).

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

justice system whose "scales of justice are out of balance"[104] gave form to the victims' perception of the system, and still remains an emblem of the victims' rights movement.[105] The Task Force recommended that "an essential change must be undertaken,"[106] and concluded that nothing short of a constitutional change would guarantee the victim a place in the criminal justice process.[107] The Task Force suggested adding a sentence to the Sixth Amendment guaranteeing a victim "the right to be present and to be heard at all critical stages of judicial proceedings."[108] Congress, at the same time, responded to public concern by passing the Victims and Witness Protection Act of 1982 [hereinafter VWPA], which contained provisions for restitution to crime victims and inclusion of a victim impact statement as part of a presentence report.[109] Two years later, the Victims of Crime Act of 1984 established a Crime Victims' Fund to distribute criminal fines and penalties to victims' compensation and assistance programs.[110] The Victims' Rights and Restitution Act of 1990[111] restates the victim's right to restitution,[112] while adding other rights, such as the right to be notified of [113] and be present at all public court proceedings unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial,[114] and the right to confer with an attorney for the Government in the case.[115] Legislation providing for victim impact testimony in capital punishment hearings was enacted in 1994.[116] Provisions of the Antiterrorism and Effective Death Penalty Act of 1996 reaffirmed Congress' intent that restitution be granted to victims[117] and increased felony conviction fines used to provide

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104. TASK FORCE, *supra* note 84, at vi.

105. *See* Cassell, *supra* note 51, at 1457; *see also* 142 CONG. REC. S3795 (daily ed. Apr. 22, 1996) (statement of Sen. Kyl: "[t]he recognized symbol of justice is a figure holding a balanced set of scales, but in reality the scales are heavily weighted on the side of the accused.").

106. TASK FORCE, *supra* note 84, at 115.

107. *See id.*

108. *See id.* at 114.

109. *See* Pub. L. No. 97-291, 96 Stat. 1253 (codified in 18 U.S.C. §§ 1503, 1505, 1510, 1512-15, 3146, 3579, 3580 (1982) and FED. R. CRIM. P. 32(c)(2) (presentence reports).

110. *See* 42 U.S.C. §§ 10601-03 (West 1984).

111. Victims' Bill of Rights, part of Crime Control Act of 1990, Pub.L. No. 101-647, 104 Stat. 4820 (codified in 42 U.S.C. § 10606 (1994)).

112. *See* 42 U.S.C. § 10606 (b) (6) (1994).

113. *See* 42 U.S.C. § 10606 (b) (3) (1994).

114. *See* 42 U.S.C. § 10606 (b) (4) (1994).

115. *See* 42 U.S.C. § 10606 (b) (5) (1994).

116. *See* 18 U.S.C. § 3593 (1994).

117. *See* Mandatory Victims Restitution Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (codified in various sections of Title 18 U.S.C.). *See* 18 U.S.C. § 3556 (inserting a reference to the Act's mandatory restitution provision in the statute

funding for victim compensation and assistance programs.[118] Another provision of the Antiterrorism Act, providing for closed circuit television viewing of proceedings by victims when a trial is relocated, reemphasized the importance of permitting victims to be included in the criminal proceedings.[119]

Interest in victim assistance programs and expanded victim participation in criminal proceedings has not only grown nationally, but globally as well. The victims' rights movement received international recognition in 1985 when the UN General Assembly adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which provided, among other entitlements, that victims should have "access to the mechanisms of justice and to prompt redress . . . for the harm which they have suffered;" that "judicial and administrative mechanisms should . . . enable victims to obtain redress through formal or informal procedures . . ."; and that "the views and concerns of victims [should] be presented and considered at appropriate stages of the proceedings . . . ."[120] Recently, heightened awareness in Britain of victims' concerns has led to a number of statutory reforms and policy changes designed to further emphasize the central role of the victim in the English criminal justice system.[121] In 1990, a Victims' Rights Charter was issued by the Home Office, officially acknowledging that crime victims are entitled to receive information on their cases, on their right to seek compensation, on volunteer victims' support groups, and on certain rights related to their presence in court.[122] Because of widespread complaints that the commitment to victims' rights manifested in the Charter had not yet been carried

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authorizing a restitution order by a federal sentencing court); 18 U.S.C. § 3563 (adding compliance with a mandatory restitution order, payment of a special assessment, and notification to the court of changes in circumstances to the conditions that must be part of any federal court order granting probation); 18 U.S.C. § 3663A (requiring mandatory restitution for violent felonies and certain felonies against property); 18 U.S.C §§ 3663, 3664 (providing one consistent set of procedures for the issuance and enforcement of all orders of restitution in criminal cases). *See also* S. Rep. No. 104-179, at 14-15, 19-21 (1995); 18 U.S.C. § 3572, §§ 3611-3614 (providing for post-conviction enforcement of restitution orders and changes to strengthen ability of government to collect fines and restitution).

118. *See* 42 U.S.C. § 10601 (1995 & 1996 Westlaw electronic update).

119. *See* 42 U.S.C. § 10608 (1996 Westlaw electronic update) (calling for closed circuit television coverage of any criminal trial held more than 350 miles from and in a state other than that in which the crime occurred).

120. G. A. Res. 40/34, U.N. GAOR 3d Comm., 40th Sess., Annex at 213-215, U.N. Doc. A/40/53 (1986), *cited in* Martin Wright, *Victims, Mediation and Criminal Justice*, CRIM. L. REV., Mar. 1995, at 187, 188 (book review).

121. *See generally* PAUL ROCK, HELPING VICTIMS OF CRIME (1990) (discussing the development of English and Welsh law and policy concerning victims).

122. *See* JO10368 RP2/93, *cited in* Helen Fenwick, *Rights of Victims in the Criminal Justice System: Rhetoric or Reality?*, CRIM. L. REV., Nov. 1995, at 843; Wright, *supra* note 120, at 189.

out in practice—particularly that there were no legally enforceable remedies when Charter rights were breached[123]—steps were taken to make the Charter provisions effective. For example, statutory authorization of a previously informal victims' compensation program was finally enacted in 1995.[124] In addition, according to Director of Public Prosecutions Barbara Mills, QC, victims of violent crime are now to be consulted on whether their attackers should be prosecuted or granted bail: "Their voices cannot dictate but they must be heard if we are to avoid them feeling doubly victimised, once by the criminal and once by the criminal justice system."[125]

In the United States, however, despite extensive state and federal legislation authorizing victim participation at several stages of a criminal proceeding, victims continue to be "doubly victimised" because they are denied any forum to protest a judicially decreed denial of their statutory rights.

III. THE HOSTILE RESPONSE BY THE JUDICIAL SYSTEM TO VICTIMS' RIGHTS LEGISLATION REQUIRES CONGRESSIONAL APPROVAL OF A CONSTITUTIONAL AMENDMENT GRANTING LIMITED STANDING TO CRIME VICTIMS

A. In Spite of State and Federal Legislation, Victims Are Still Excluded By the Judicial System From the Criminal Justice Process On the Basis of Lack of Standing

While treatment of the victim has generally improved, the victim's actual participation in the criminal justice process is still very limited. In spite of Congress' clear intent to assure restitution to the victim, awards of restitution continue to be problematic and a victim has no avenue for complaint.[126]

The device the courts have turned to in order to foreclose victims from

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123. *See* Fenwick, *supra* note 122, at 844-45. Though charters may have some quasi-legislative status, they do not create enforceable rights. *See id.* at 844 n.10 (citing G. GANZ, QUASI-LEGISLATION, Chaps. 1 and 2 (1987)). Fenwick concludes that "[T]he current scheme carries an appearance of commitment to victims' rights that is seriously misleading." *Id.* at 852.

124. Criminal Justice Compensation Act, 1995, ch. 53 (Eng.); *see also* Desmond S. Greer, *A Transatlantic Perspective on the Compensation of Crime Victims in the United States*, 85 J. CRIM. L. & CRIMINOLOGY 333, 335-36 (1994) (describing the British scheme for victim compensation).

125. Lucy Berrington, *Victims to Have a Say Over Prosecution*, TIMES (London), Feb. 22, 1995, *available in* 1995 WL 7650493.

126. *See* discussion *infra* Part III.A. and accompanying notes (discussing various circuit courts of appeals decisions refusing victims the right to contest denial of restitution under the VWPA).

participating in the criminal justice system is the doctrine of standing. Wright, Miller, & Cooper define standing as a doctrine "employed to refuse to determine the merits of a legal claim, on the ground that even though the claim may be correct the litigant advancing it is not properly situated to be entitled to its judicial determination. The focus is on the party, not the claim itself."[127]

While today standing is often discussed as if it were a concept fundamental to the division of powers delineated by the Constitution,[128] the historical use of the term is not nearly so venerable:

> The word *"standing"* is rather recent in the basic judicial vocabulary and does not appear to have been commonly used until the middle of our own century. No authority that I have found introduces the term with proper explanations and apologies and announces that henceforth *standing* should be used to describe who may be heard by a judge. Nor was there any sudden adoption by tacit consent. The word appears here and there, spreading very gradually with no discernible pattern. Judges and lawyers found themselves using the term and did not ask why they did so or where it came from.[129]

In this comparatively brief time span, the standing doctrine has developed a reputation for ambiguity and complexity that is virtually unrivaled among modern legal concepts. The Fifth Circuit has observed that "[d]espite the relatively recent spate of Supreme Court standing decisions the doctrine remains opaque and does not admit of easy application."[130] The Seventh Circuit has said it is "among the most amorphous concepts in the domain of public law."[131] In an oft-quoted phrase, Justice Douglas described generalizations about standing as being "largely worthless."[132] And finally, Wright, Miller & Cooper cite a long string of commentators in support of the view that the "standing doctrine is no more than a convenient tool to avoid uncomfortable issues or to disguise a surreptitious ruling on the merits."[133]

Nothing to contradict that assessment can be found in the cases denying standing to victims. They are marked by invocation of a rigid formalism to avoid

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127. *See* 13 WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531, at 338-39 (1984).

128. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60 (1992).

129. JOSEPH VINING, LEGAL IDENTITY 55 (1978).

130. O'Hair v. White, 675 F.2d 680, 685 (5th Cir. 1982).

131. Marshall & Ilsley Corp. v. Heimann, 652 F. 2d 685, 690 (7th Cir. 1981), *cert. denied* 455 U.S. 981 (1982).

132. Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 151 (1970).

133. *See* WRIGHT ET AL., *supra* note 127, at 348.

the "uncomfortable issues"[134] that might arise if a role for the victim in the criminal law process were to be recognized. The cases involving restitution orders under the VWPA are illustrative. In *United States v. Grundhoefer*,[135] the Second Circuit decided for the first time that a victim lacks standing under Article III of the Constitution to challenge the terms of a restitution order entered pursuant to the VWPA. The court held that "[i]t is the defendant and he alone that suffers the direct consequences of a criminal conviction and sentence. Collateral individuals to the proceedings—like the present [victim]—have not suffered an Article III direct injury sufficient to invoke a federal court's jurisdiction to rule on their claim."[136]

This ruling was wholly unnecessary because the court did in fact choose to address the merits of the victim's case. The opinion is divided into two parts, the second of which commences with this observation: "Because our conclusion that appellant lacks standing to contest the restitution orders entered by the district courts against Grundhoefer and Hausman is one of first impression, prudence dictates that we touch briefly upon their propriety."[137] The court then went on to weigh the arguments made against and in support of the restitution orders, and to conclude that their entry did not constitute an abuse of discretion. So the victim here actually got his day in court, even though the Second Circuit ultimately concluded that the trial court's actions were well within its authority, and rejected the victim's arguments. The same result could have been obtained without making the sweeping pronouncement that, under Article III of the Constitution, victims lack standing in criminal proceedings.

Thus the *Grundhoefer* court needlessly elevated to constitutional proportions the issue of the scope of victims' rights under the VWPA—and caused much mischief in the process. Other circuits have since adopted the constitutional bar as a ready answer to all victims who assert standing with respect to VWPA restitution orders.[138] In *United States v. Mindel*,[139] the Ninth Circuit summarily denied standing to a group of crime victims who sought to appeal a district court's rescission of a criminal restitution order, by observing that "the policy of criminal restitution is penal and not compensatory."[140] Under this rationale, the penal nature of any criminal proceeding would necessarily deny standing to all victims on the ground that they are, in the words of the *Grundhoefer* court, "collateral individuals to the proceeding,"[141] who cannot as a

134. *Id.*

135. United States v. Grundhoefer, 916 F. 2d 788 (2d Cir. 1990).

136. *Id.* at 791.

137. *Id.* at 793.

138. *See* United States v. Johnson, 983 F. 2d 216 (11th Cir. 1993); United States v. Kelley, 997 F. 2d 806 (10th Cir. 1993).

139. United States v. Mindel, 80 F. 3d 394 (9th Cir. 1996).

140. *Id.* at 397.

141. United States v. Grundhoefer, 916 F.2d 788, 793 (2d. Cir. 1990).

matter of law suffer an "injury in fact" sufficient to satisfy the requirements of Article III by reason of anything that occurs or could occur during the course of a criminal proceeding.

It is certainly true, as a general matter, that "the interest in the just administration of the laws, including the interest in nondiscriminatory criminal enforcement, is presumptively deemed nonjusticiable even if invoked by persons with something beyond a generalized bystander's concern."[142] In *Mindel*, however, this general principle was carried so far as to hold that a group of victims who were still owed $245,000 under a restitution order had no justiciable interest in appealing a district court decision to rescind the order.[143] If the victims in *Mindel* could be deemed, as a matter of constitutional law, to have suffered no "injury in fact" when a court order directly deprived them of the right to receive $245,000, it is difficult to imagine what manner of showing victims could ever make that would give them Article III standing in a criminal proceeding.

Perhaps the most extreme manifestation of the judicial system's hostility toward recognition of standing for crime victims can be found in the recent fruitless efforts of the victims of the Oklahoma City terrorist bombing to be accorded standing in the trial and appellate court proceedings conducted under the caption *United States v. McVeigh*.[144] The district court judge presiding over the case ruled that victims or survivors of victims who chose to attend the trial proceedings or watch the closed circuit telecast of the trial would be barred from presenting "victim impact" statements at any subsequent sentencing hearing.[145] The victims and the National Organization for Victim Assistance (NOVA) sought to appear in the proceedings to assert their rights under the Victims' Bill of Rights[146] and the Closed Circuit Televised Proceedings for Victims Provision[147] to view trial proceedings, whether or not they will testify as victim impact witnesses at sentencing. However, the district judge ruled that, while victims may have certain rights under these statutes, they lacked standing to appear in the proceedings to assert those rights. The judge only granted the victims' motion in the alternative to file a brief as *amici curiae*.[148]

The victims prosecuted an appeal and the defendants filed motions to dismiss the appeal for lack of standing. They also contended the order was not

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142. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 3-16 at 124 (2d ed. 1988).

143. *Mindel*, 80 F.3d at 394.

144. United States v. McVeigh, No. 96-CR-68-M (D. Colo. Feb. 27, 1996).

145. *See* McVeigh (Pre-Trial Trans.), *supra* note 76, at *25.

146. 42 U.S.C. § 10606 (b)(4) (1995).

147. 42 U.S.C. § 10608(a)(2) (1996 Westlaw Electronic Update current through Pub. L. No 104-316).

148. *See* United States v. McVeigh, No. 96-CR-68-M, 1996 WL 578525, at *16 (D. Colo., Oct. 4, 1996 Trans.).

final within the meaning of 28 U.S.C. § 1291.[149] The opposition papers filed by the victims in response to the motions to dismiss contained the following succinct summary of the defendants' argument: "The crux of appellees' motions is the disturbing proposition that victims of crimes may never—under any circumstances—seek review of their treatment in criminal proceedings."[150]

On February 4, 1997, a panel of the Tenth Circuit Court of Appeals rendered a *per curiam* opinion dismissing the victims' appeal, on the ground that "the excluded witnesses lack Article III standing to seek review of the sequestration order entered by the district court."[151] The opinion specifically relied upon the Tenth Circuit's prior holding in the case of *United States v. Kelley,*[152] where, the panel noted, "we joined a line of authority holding that crime victims do not have standing under the Victim and Witness Protection Act (VWPA), 18 U.S.C. § 3663, to appeal unfavorable restitution orders."[153] *United States v. Kelley* involved a victim's attempt to appeal a trial court's decision not to enter a restitution order in the victim's favor. The government moved to dismiss the appeal on the grounds that the victim lacked standing, but it also briefed the merits of the trial court's decision. The Tenth Circuit never addressed the merits. Instead, it relied on the *Grundhoefer* case discussed above and on *United States. v. Johnson*[154] to hold that the victim had no standing, and it dismissed the appeal. Similarly, the *McVeigh* panel stated that "we find it necessary to address only the issue of standing," and dismissed the victims' appeal.[155]

The victims sought rehearing *en banc* before the entire Tenth Circuit Court of Appeals.[156] Their petition was supported by *amici curiae* briefs submitted by all six of the Attorneys General within the Tenth Circuit[157] and by

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149. "The courts of appeal . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ." 28 U.S.C. § 1291 (1993).

150. Brief of the Oklahoma City Bombing Victims In Opposition to Defendants' Motions to Dismiss at 3, United States v. McVeigh, No. 96-1475 (Nov. 13, 1996).

151. *See* United States v. McVeigh, 106 F.3d 325, 336 (10th Cir. 1997), *reh'g denied* Mar. 11, 1997.

152. *See* United States v. Kelley, 997 F. 2d 806 (10th Cir. 1993).

153. *McVeigh*, 160 F. 3d at 335.

154. United States v. Johnson, 983 F. 2d 216 (11th Cir. 1993).

155. *McVeigh*, 160 F. 3d at 334.

156. *See* Petition for Rehearing and Suggestion for Rehearing En Banc of the Oklahoma City Bombing Victims, United States v. McVeigh, 106 F.3d 325 (10th Cir. 1997) (No. 96-1475).

157. *See* Brief of *Amici Curiae* States of Oklahoma, Colorado, Kansas, New Mexico, Utah, and Wyoming Supporting the Suggestion for Rehearing and the Suggestion for Rehearing En Banc by the Oklahoma City Bombing Victims and the United States, United States v. McVeigh, 106 F.3d 325 (10th Cir. 1997) (No. 96-1469).

many leading crime victims' organizations, including the National Crime Victim Center,[158] as well as a brief filed by forty-nine members of Congress.[159] The latter pointedly interpreted the panel's ruling as meaning that "the victims of federal crimes will never be heard in court concerning violations of *their* rights under the Victims' Bill of Rights."[160] However, on March 11, 1997, the Tenth Circuit chose to let the panel decision stand by refusing to rehear the case.[161]

By this time, the victims had already commenced efforts to reverse the effect of the panel decision through new legislation. H.R. 924, the Victim Allocution Clarification Act of 1997, was approved by the House Subcommittee on Crime in early March.[162] It provided that a federal district court "shall not order any victim of an offense excluded from the trial of a defendant accused of that offense" because such victim may subsequently offer victim impact testimony.[163] This bill was sent to the full House on March 17, 1997, together with a House Judiciary Committee Report[164] that contained the following comment on the issue of victim standing:

> The committee assumes that both the Department of Justice and *victims will be heard* on the issue of a victim's exclusion, should a question of their exclusion arise under this section. The Committee intends that an allegedly erroneous ruling by a district court excluding a victim in violation of this section *be reviewable on appeal*, both by the government and *by the victim.* The Committee points out that it has not included language in this statute that bars a cause of action by the victim, as it has done in other statutes affecting victims'
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> rights (*see, e.g.*, 42 U.S.C. § 10606(c); 42 U.S.C. § 10608(e))

158. *See* Brief of *Amici Curiae* National Victims Center, Mothers Against Drunk Driving, the National Victims' Constitutional Amendment Network, Justice for Surviving Victims, Inc., Concerns of Police Survivors, Inc., and Citizens for Law and Order, Inc., in Support of Rehearing, United States v. McVeigh, 106 F.3d 325 (10th Cir. 1997) (No. 96-1469).

159. *See* Brief of *Amici Curiae* Washington Legal Foundation and U.S. Senators Don Nickles, et al, and U.S. Representatives Frank D. Lucas, et al, Supporting Petition for Rehearing of the Oklahoma City Bombing Victims and the United States, United States v. McVeigh, 106 F.3d 325 (10th Cir. 1997) (No. 96-169).

160. *See id.* at 11.

161. *See* Order, United States v. McVeigh, 106 F.3d 325 (10th Cir. 1997) (No. 96-1469).

162. *See* H.R. Rep. No. 105-28, at 7 (1997).

163. *See* 18 U.S.C. § 3510 (a) & (b) (1997).

164. *See* H.R. Rep. 105-28, at 7 (1997).

(emphasis added).[165]

On March 18, the House passed H. R. 924.[166] The bill passed the Senate on March 19,[167] and on March 20, the measure was signed into law by President Clinton, as the Victim Rights Clarification Act of 1997.[168] When President Clinton signed the Act, he observed that the victim "should be at the center of the criminal justice process, not on the outside looking in."[169]

Immediately thereafter, the Oklahoma City victims filed a motion based upon the new law with the federal district court in *U.S. v. McVeigh*.[170] Once again, the victims argued they had standing to be heard in the pending criminal proceeding.[171] The district judge declined to address this argument. Instead, he interpreted the new law "as simply reversing the presumption of a prejudicial effect on victim impact testimony of observation of the trial proceedings."[172] The judge accordingly reversed his prior order barring all victims who attended or viewed the trial proceedings from giving victim impact testimony, and instead reserved ruling on the admissibility of the testimony of such victims until the penalty phase of the trial, assuming a guilty verdict.[173] He then declared that, in view of this interpretation, the victims' motion to be heard in the criminal proceeding was "moot."[174]

It was not until after a guilty verdict had been returned in *U.S. v. McVeigh*,[175] and the victims had submitted yet another motion contending they

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165. *See* H.R. Rep. 105-28, at 10 (1997).

166. *See* 143 CONG. REC. H1048-05 (daily ed. Mar. 18, 1997).

167. *See* 143 CONG. REC. S2507-01 (daily ed. Mar. 19, 1997).

168. Statement on Signing the Victims' Rights Clarification Act of 1997, 33 WEEKLY COMP. PRES. DOC. 386 (Mar. 19, 1997) [hereinafter Statement of President Clinton].

169. *Id.*

170. Motion of the Victims of the Oklahoma City Bombing and the Natl. Org. For Victim Assistance Seeking a Hearing on the Application of the Victims' Rights Clarification Act of 1997, United States v. McVeigh, No. 96-CR-68-M (D. Colo. Mar. 21, 1997), *available in* 1997 WL 144564.

171. Memorandum of Points and Authorities in Support of the Motion of the Victims of the Oklahoma City Bombing, United States v. McVeigh, No. 96-CR-68-M (D. Colo. Mar. 21, 1997) *available in* 1997 WL 144590, at *2.

172. *See* United States v. McVeigh, 958 F. Supp. 512, 515 (1997); Order Amending Order Under Rule 615, United States v. McVeigh, No. 96-CR-68-M (D. Colo. 1997).

173. *Id.*

174. Order Declaring Motion Moot, United States v. McVeigh, No. 96-CR-68-M (D. Colo. Mar. 25, 1997), *available in* 1997 WL 136344.

175. Official Trial Transcript: Verdict, United States v. McVeigh (D. Colo. 1997), *available in* 1997 WL 28677.

had a right to be heard by the court,[176] that the district judge squarely rejected the victims' standing argument once again.[177] On June 3, 1997, the trial court held a hearing on, *inter alia*, the effect of the Victim Rights Clarification Act of 1997.[178] During the course of that hearing, Judge Matsch stated that "it is not my view . . . that the statute creates standing" for the victims.[179] As he had done when the victim standing issue was first presented to him in the fall of 1996,[180] before the battles in the Tenth Circuit[181] and before the passage of purportedly remedial legislation,[182] the Judge relegated the victims' motions and briefs to *amicus curiae* status.[183] Thus, despite the President's pronouncement, *U.S. v. McVeigh* firmly establishes the judiciary's determination to keep victims "on the outside looking in."[184]

There are in fact no rights putatively conferred by the Victims' Bill of Rights or the Televised Proceedings for Victims Provision or the Victim Rights Clarification Act of 1997 that are vindicable by victims if the broad proposition that victims lack Article III standing to participate in any way in a criminal proceeding continues to be accepted by the courts, as it has been so far. This proposition has its genesis in the Supreme Court case of *Linda R. S. v. Richard D.*[185] There it was held that the unwed mother of a child lacked standing to enjoin prosecutorial refusal to institute criminal proceedings against the child's father for nonsupport. The majority opinion by Justice Marshall observed that: "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."[186]

The case's holding only addresses the issue of a victim's standing to compel prosecution. The exercise of prosecutorial discretion has traditionally been regarded as an inherently executive function, which should not be judicially

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176. Motion of the Victims of the Oklahoma City Bombing to Reassert the Motion for a Hearing on the Application of the Victim Rights Clarification Act of 1997, United States v. McVeigh, No. 96-CR-68-M (D. Colo. 1997), *available in* 1997 WL 312104.

177. Official Trial Trans.: Hearings on Motions, United States v. McVeigh, No. 96-CR-68-M (D. Colo. June 3, 1997), *available in* 1997 WL 290019, at *7.

178. *Id.*

179. *Id.*

180. *See* United States v. McVeigh, No. 96-CR-68-M, 1996 WL 578525, at *16 (D. Colo. Oct. 4, 1996).

181. *See* discussion *supra* Part II.A. and accompanying notes.

182. *See* discussion *supra* Part II.A. and accompanying notes.

183. *See* Official Trial Trans.: Hearings on Motions, United States v. McVeigh, No. 96-CR-68-M (D. Colo. June 3, 1997), *available in* 1997 WL 290019.

184. Statement by President Clinton, *supra* note 168.

185. Newman v. United States, 410 U.S. 614 (1973); *see* discussion *supra* Part II.C. and note 81.

186. *See Newman*, 410 U.S. at 619.

disturbed unless clearly contrary to manifest public interest.[187] As Chief Justice Burger, then a judge of the Court of Appeals for the District of Columbia, observed in *Newman v. United States*: "Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings . . . ."[188] Accordingly, *Linda R. S.*[189] could fairly have been read narrowly to hold only that victims lack standing to compel review of the exercise of prosecutorial discretion. In *Grundhoefer*, however, *Linda R. S.* was cited in support of the sweeping proposition that victims' interests are, by constitutional definition, not justiciable in criminal proceedings.[190] Every federal appellate court that has confronted the issue since then has adopted the rule laid down in *Grundhoefer*.[191] Moreover, the proceedings in *McVeigh* have vividly illustrated the lengths to which the judiciary is willing to go to repudiate standing for victims. As professor Paul Cassell, a leading victims' rights scholar,[192] noted recently in testimony before the Senate Judiciary Committee, "the Oklahoma City bombing victims have been mistreated when the media spotlight has been on, when the nation was watching."[193]

This line of cases compels consideration of the question whether anything less than a constitutional amendment delineating victims' rights and giving them standing to assert these rights in criminal proceedings would be sufficient to ensure victims a role in the criminal justice system. The answer would appear to be no. *Grundhoefer* and its progeny make it clear that statutes merely declaring victims have certain rights[194] do not give victims a justiciable interest in vindication of those rights in a criminal proceeding. With unwavering uniformity, the courts have consistently converted each such legislative effort into a hollow statutory promise of a right without a remedy.

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187. *See* United States v. Cowan, 524 F.2d 504, 513 (5th Cir. 1975), *cert. Denied*, 425 U.S. 971 (1976).

188. Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967).

189. 410 U.S. at 614.

190. Grundhoefer v. United States, 916 F.2d 788, 791-92 (2d Cir. 1990).

191. *See* United States v. Johnson, 983 F. 2d 216, 218 (11th Cir. 1993); United States v. Kelley, 997 F. 2d 806, 808 (10th Cir. 1993); United States v. Mindel, 80 F.3d 394, 397 n.2 (9th Cir. 1996).

192. *See Constitutional Amendment to Protect the Rights of Crime Victims: Hearing on S.J. Res. 6 Before the Senate Comm. on the Judiciary*, 105th Cong. (Apr. 16, 1997) (statement of Paul G. Cassell), *available in* 1997 WL 186123, at *66.

193. *Constitutional Amendment to Protect the Rights of Crime Victims: Hearing on S.J. Res. 6 Before the Senate Committee on the Judiciary*, 105th Cong. 14 (Apr. 16, 1997) (statement of Paul G. Cassell).

194. *See* Victims' Rights and Restitution Act of 1990, Pub. L. No. 101-647, 104 Stat. 4820 (codified at 42 U.S.C. §§ 10601, 10606, 10607 (1990)); Closed Circuit Televised Court Proceedings for Victims of Crime Provision, Pub. L. No. 104-132, 110 Stat. 1214 § 235 (codified at 42 U.S.C. § 10608(a)(2) (1996)).

Even if these statutes were amended to specifically grant victims standing to assert their rights in criminal proceedings, the current state of the law offers the courts a convenient avenue for circumventing such a congressional mandate. In *Lujan v. Defenders of Wildlife*,[195] an action was instituted against the Secretary of the Interior pursuant to the so-called "citizen-suit" provision of the Endangered Species Act of 1973. That provision authorizes any person to commence a civil action to enjoin the United States from violation of the Act.[196] Declaring that "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III,"[197] the Supreme Court held that it was beyond the power of Congress to confer standing by statute upon those who cannot satisfy constitutional standing requirements. Writing for the majority, Justice Scalia stated that:

> The question presented here is whether the public interest in proper administration of the laws (specifically, in agencies' observance of a particular, statutorily prescribed procedure) can be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue. If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: to permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take care that the laws be faithfully executed."[198]

A court following *Grundhoefer* could therefore dismiss any statutory attempt to confer standing on victims as exceeding constitutional limitations upon the separation of powers. The following line of reasoning could be employed to reach this conclusion: there is an "undifferentiated public interest"[199] in the prosecution of criminal proceedings, and victims as a class are "collateral individuals" to such proceedings who "have not suffered an Article III direct injury sufficient to invoke a federal court's jurisdiction to rule on their claim";[200]

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195. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).
196. *See* 16 U.S.C. § 1540(g) (1985).
197. *Lujan*, 504 U.S. at 560.
198. *Id.* at 576-77 (quoting U.S. CONST. art. II, § 3).
199. *Id.* at 577.
200. Grundhoefer v. United States, 916 F.2d 788, 791 (2d Cir. 1990).

it is beyond the power of Congress to change this. Given the uniformly hostile treatment the judiciary has so far accorded to victim standing, such a result is entirely conceivable and perhaps even likely.

The argument could even be carried to the constitutional level. If a constitutional amendment were enacted that gave victims certain specified rights but did not give them standing to assert those rights in criminal proceedings, a court might well conclude that harmonization of Article III standing concepts with the new constitutional amendment requires recognition of a cause of action to enforce the enumerated victims' rights but denial of standing to do so in a criminal proceeding. Given that the rights guaranteed by the proposed amendment can only be secured by public officials administering the criminal justice system, and that the current draft of the proposed amendment contains language barring damage actions against public officials for violations of these rights,[201] it is unclear where such a ruling would leave the victim in terms of enforcing his cause of action. Wherever the victim is left, however, it would once again be outside of the criminal justice system.

It would thus appear that nothing short of a constitutional amendment granting victims certain rights and standing to assert those rights *in criminal proceedings* can guarantee victim participation in the criminal justice system.

B. Procedures for Victim Participation in Criminal Proceedings in Certain Foreign Legal Systems and the Continued Viability in this Country of the Private Prosecution Concept Suggest That the Needs of Accused and Accuser Can Be Harmonized in the American Criminal Justice System

The proposal to constitutionally expand victims' rights has provoked criticism that the justice system will be unduly burdened or disrupted, just as did the recommendation of the 1982 Presidential Task Force for modifying the Sixth Amendment to allow the victim the right in every criminal prosecution "to be present and to be heard at all critical stages of judicial proceedings."[202] Following the introduction of House and Senate versions of federal victims' rights amendments in April of 1996,[203] opponents of the amendment warned

201. *See* S.J. Res. 6, 105th Cong. (1997).

202. TASK FORCE, *supra* note 84, at 114-15. For arguments against a federal constitutional amendment, see James M. Dolliver, *Victims' Rights Constitutional Amendment: A Bad Idea Whose Time Should Not Come*, 34 WAYNE L. REV. 87 (1987). Justice Dolliver believes victim participation in a criminal proceeding "places the victim in direct conflict with the accused" and is "less than fully civilized." *Id.* at 90. *See also* Christopher R. Goddu, *Victims' "Rights" or a Fair Trial Wronged?*, 41 BUFF. L. REV. 245, 246 (1993) (discussing problems that a victims' constitutional amendment could create, such as the "potentially prejudicial role" of victims in criminal trials).

203. *See* S.J. Res. 52, 104th Cong. § 2 (1996); H.J. Res. 173, 104th Cong. § 2

against potentially "staggering" court costs, a "litigation debacle," and "distortion of the courts [that] undermines impartiality, judicial administration and the rule of law to the risk of us all."[204] However, successful inclusion of victims in the criminal proceedings of civil code systems,[205] and some surviving instances of the "private prosecutor" concept in common law criminal proceedings, reveal that victim participation can be achieved without disruptive results or compromise of the goals of the criminal justice system.

In Germany, for example, the victims of certain serious crimes, particularly sexual assault, are able to participate directly in a prosecution as *Nebenklager* or "secondary accusers."[206] A victim who chooses this role becomes, in effect, a private co-prosecutor, and receives party status equal to that of the defendant.[207] The victim may be represented by an attorney and may be present throughout the entire proceeding.[208] At least in the context of a German criminal prosecution, victim participation has not proven to be a problem. A 1985 study revealed that ten percent of all criminal proceedings made use of the *Nebenklage* process.[209] The German criminal justice system's support of victim participation was confirmed by reform measures adopted in 1986 to expand the right of subsidiary prosecution.[210] A subsequent study of the years 1988-90 showed twenty percent of victims legally entitled to participate as co-prosecutors chose to do so and, moreover, sixty-seven percent of sexual assault victims used the *Nebenklage* procedure. The participation rate is now estimated to be even higher in many jurisdictions. For example, Freiburg has almost one hundred percent participation by sexual assault victims as co-prosecutors.[211]

In the United States, proof that victim involvement can be harmonized with justice system goals and defendant rights is found in the continued survival of the private prosecution concept in state case law and statutes.[212] Indeed, the

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(1996); H.J. Res. 174, 104th Cong. § 2 (1996).

204. *Proposed "Victims' Rights" Amendment, Hearing on H.J. Res. 173 and H.J. Res. 174 Before the Judiciary Comm. of the United States House of Representatives*, 104th Cong., 104-91 (1996) (written statement of Elisabeth A. Semel on behalf of the Nat'l Assn. of Criminal Defense Lawyers).

205. *See* discussion *supra* Part II.A. and accompanying notes (discussing the role of crime victims in criminal proceedings in France and the Netherlands).

206. Pizzi & Perron, *supra* note 102, at 41.

207. *Id.* at 60.

208. *See* Joutsen, *supra* note 32, at 119.

209. *Id.* at 114 n.56.

210. *Id.* at 119 & n.80.

211. *See* Pizzi & Perron, *supra* note 102, at 55 n.76.

212. *See* Bessler, *supra* note 62, at 529-39 (citing extensive case law and statutes in jurisdictions that permit private prosecution and discussing the range of participation allowed); Gittler, *supra* note 6, at 168-69 & n.156 (citing extensive state case law permitting private prosecution and noting that only five states specifically prohibit

use of private prosecutors is much more widespread than might be expected.[213] A majority of states continue to permit at least some modified form of private prosecution—that is, some limited participation in a criminal proceeding by an attorney retained by a victim.[214] Recent decisions include *Kansas v. Baker*,[215] wherein the state supreme court affirmed a first-degree murder conviction in which the attorney retained by the victims' families assisted the district attorney by handling the voir dire of the jury, the examination of his client, the examination of the expert psychiatric witnesses, and the second half of the State's closing argument. In *Tennessee v. Bennett*,[216] a second-degree murder conviction was upheld in a case where attorneys hired by the victim's family actively participated in all phases of the prosecution. In both cases, the courts relied on state statutes authorizing participation by attorneys retained by victims or their survivors to assist the public prosecutor.[217] Even with displacement of restitution as the primary goal of a criminal proceeding, the victims' "natural yearning to see justice done—or even the urge for retribution"[218] has refused to allow the complete disappearance of the private prosecutor.

C. The Current Status of Amendment Proposals

Companion joint resolutions proposing an amendment to the Constitution of the United States to protect the rights of victims of crime were introduced in the Senate and in the House of Representatives of the United States Congress on April 22, 1996.[219] On September 30, a revised draft of the Senate resolution was submitted to supersede the original Senate version.[220] The revised amendment addressed some of the questions and criticisms that were raised in response to the earlier proposals[221] and was the product of more than forty

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private prosecution).

213. *See* Cardenas, *supra* note 22, at 373-74.

214. Case law in 34 states upholds some form of participation in a criminal proceeding by an attorney representing the victim or his survivors. *See* McDonald *supra* note 12, at 665 n.78.

215. Kan. v. Baker, 819 P. 2d 1173 (Kan. 1991).

216. Tenn. v. Bennett, 798 S.W.2d 783 (Tenn. Crim. App. 1990).

217. *See* Kan. Stat. Ann. § 19-717 (1995); Tenn. Code Ann. § 8-7-401 (1996 Supp.).

218. Richmond Newspapers Inc. v. Va., 448 U.S. 555, 571 (1980).

219. *See* S.J. Res. 52, 104th Cong. § 2 (1996); H.J. Res. 173, 104th Cong § 2 (1996); H.J. Res. 174, 104th Cong. § 2 (1996).

220. *See* S.J. Res. 65, 104th Cong. § 2 (1996).

221. The revised version of the amendment declared, for example, that no grounds were provided for victims to challenge charging decisions or convictions, or to compel new trials. The amendment also stated that none of the provisions would give

drafts.[222]

On January 21, 1997, as the 105th Congress began its first session, Republican Senator Jon Kyl of Arizona, on behalf of himself and Democratic Senator Dianne Feinstein of California, introduced a new bipartisan resolution proposing a Victims' Rights Amendment to the Constitution.[223] In introducing the resolution, Senator Kyl noted that the amendment is the "product of extended discussions with [House Judiciary Committee] Chairman Henry Hyde, Senators Hatch and Biden, the Department of Justice, the White House, law enforcement officials, major victims' rights groups, and such diverse scholars as Professors [Laurence] Tribe and Paul Cassell."[224]

Republican Representative Hyde of Illinois introduced a House companion resolution for a Victims' Rights Amendment, H. J. Res. 71, and a proposed federal implementing statute, H. R. 1322, on April 15, 1997.[225]

Although the amendment language is likely to change before final Congressional approval, three core principles should remain. These core guarantees to the crime victim are: (1) the right to notice of, and not to be excluded from, all public proceedings relating to the crime; (2) the right to be heard, if present, and to submit a written statement at a public pre-trial or trial proceeding to determine a release from custody, an acceptance of a negotiated plea, or a sentence; and (3) the right to an order of restitution from the convicted offender.[226]

Most significantly, S. J. Res. 6 states specifically that victims will have "standing to assert the rights established" in the amendment.[227] This language must be incorporated in any final draft. To be certain that the victim will have a forum to assert the newly decreed rights, it is strongly recommended that the words "in civil or criminal proceedings" be added to the language guaranteeing standing. H. R. 1322, the proposed implementing statute, states that "[t]he victim shall have standing *in the proceeding* to assert the rights established by this section [emphasis added]."[228] However, this note argues that the guarantee of

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rise to a claim for damages against the government or public officials.

222. 142 CONG. REC. S11998 (daily ed. Sept. 30, 1996) (statement of Sen. Kyl).

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

224. 143 CONG. REC. S560 (daily ed. Jan. 21, 1997).

225. H.R. 1322, 105th Cong. § 1 (1997)

226. *See* S.J. Res. 6, 105th Cong. (1997). The other guarantees to a victim include: the rights of notice, attendance and allocution, as described above, at a public parole proceeding, or at a non-public parole proceeding to the extent they are afforded to the convicted offender; the right to be notified of the offender's release or escape; the right to a final disposition of the proceedings free from unreasonable delay; the right to have the safety of the victim considered in determining a release from custody; and the right to be notified of these rights. *See id.*

227. *See id.*.

228. H.R. 1322, 105th Cong. § 2(c)(1) (1997).

standing in the criminal proceeding must be a part of the Constitutional Amendment itself, not just included in the implementing legislation, in order to ensure that current case law on standing cannot be invoked to launch another attack against victim participation in the criminal justice process.

To become law, a proposed amendment to the United States Constitution is subjected to one of the most rigorous approval processes of our legal system.[229] After passing both Houses of Congress by a two-thirds vote, a Victims' Rights Amendment must then be submitted for ratification by thirty-eight or more state legislatures.[230] An amendment surviving this approval process should be seen as a clear mandate from the people, not only for procedural guarantees to crime victims, but for support of the policies underlying the procedural changes. Passage of the amendment should revitalize discussion on the role of the victim in the criminal justice system. By guaranteeing the crime victim an order of restitution from the convicted offender and assuring him a right to be present and to be heard in the criminal proceeding, the Victims' Rights Amendment constitutionally recognizes that the criminal proceeding vindicates the injury done to the private individual. Passage should lead to a reevaluation of the objectives of our criminal justice system[231] and its present focus on the harm done to society rather than on the harm done to the individual.[232]

Both Houses of Congress should pass the Victims' Rights Amendment and submit the proposal to the states for ratification. Congressional recognition of the public's concern about victims' rights is reflected in the bipartisan support for the resolutions proposing amendment, as well as by the considerable legislation already passed by Congress for protection of a crime victim's rights. Additionally, both President Clinton and Attorney General Janet Reno have declared their support for a federal constitutional amendment protecting the fundamental rights of victims of crime[233] and, primarily, for a guarantee to crime

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229. *See* U.S. CONST. art. V. (defining amendment process).

230. *See* U.S. CONST. art. V.

231. "[N]o longer will our system take a myopic view only of the defendant's half of the scales of justice." Cassell, *supra* note 52, at 1457.

232. "The idea that the criminal law, unlike other branches of the law such as contracts and property, is designed to vindicate public rather than private interests is now firmly established." Bessler, *supra* note 62, at 602 n.207 (quoting ABA STANDARDS FOR CRIMINAL JUSTICE, Std. 3-2.1 cmt. (1979)).

233. On June 25, 1996, President Clinton stated:

> I am now convinced that the only way to fully safeguard the rights of victims in America is to amend our Constitution and guarantee these basic rights: 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;

victims of the "opportunity to participate in proceedings related to the crimes committed against them."[234] Reservations of the Executive branch as to certain language in the original amendment proposal—particularly that the amendment should not give rise to civil damages remedies against state, local or public officials[235]—have been largely dealt with in the revised version introduced September 30, 1996.[236]

Existing support at the state level is manifest in the number of states adding amendments protecting victims' rights to their state constitutions. Prior to the November 1996 elections, twenty-one states had already approved state constitutional amendments protecting victims' rights and extending limited participation in criminal proceedings to victims. Most of these amendments were passed with large margins of voter approval.[237] In the November 1996 elections, eight additional states approved constitutional amendments,[238] bringing the total

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> notice when the defendant or convict escapes or is released; restitution from the defendant; reasonable protection from the defendant; and notice of these rights.

Remarks Announcing Support for a Constitutional Amendment on Victims Rights, 32 WEEKLY COMP. PRES. DOC. 1134 (June 25, 1996).

See Constitutional Amendment to Protect the Rights of Crime Victims: Hearing on S.J. Res. 6 Before the Senate Committee on the Judiciary, 105th Cong. § 1 (Apr. 16, 1997) (statement of Attorney General Janet Reno) [hereinafter Statement of Janet Reno]. Speaking before the Senate Committee on the Judiciary on April 16, 1997, concerning S.J. Res. 6, Attorney General Janet Reno noted that her advocacy of rights for crime victims dates back to her service as State Attorney in Dade County, Florida. *Id.* at 2-3. Attorney General Reno stated that "the Administration believes that a constitutional amendment provides the best means to protect the rights of violent crime victims," *Id.* at 2, and that a victims' rights amendment would ensure that "a permanent, uniform baseline of rights for crime victims will be in force in each and every state." *Id.* at 5.

234. *See* Statement of Janet Reno, *supra* note 233, at 5.

235. *See* Briefing on Proposed Victim Rights Amendment, *available in* 1996 WL 350226 (White House) (6/25/96).

236. *Compare* S.J. Res. 65, 104th Cong. § 2 (1996) *with* S.J. Res. 52, 104th Cong. § 2 (1996) (earlier proposal).

237. *See* Mary Dieter, *Polly Klaas' Father Promotes Victims' Rights Amendment,* COURIER-JOURNAL (Louisville), Oct. 15, 1996, at 1A, *available in* 1996 WL 6365767. According to the National Victim Center in Arlington, Va., the states, the year passed, and the percentage of electoral support are: Ala., 1994, 80%; Alaska, 1994, 87%; Ariz., 1990, 58%; Cal., 1982, 56%; Colo., 1992, 86%; Fla, 1988, 90%; Idaho, 1994, 79%; Ill., 1992, 77%; Kan., 1992, 84%; Md., 1994, 92%; Mich., 1988, 84%; Mo., 1992, 84%; Neb., 1996, 78%; N.J., 1991, 85%; N.M., 1992, 68%; Ohio, 1994, 77%; R.I., 1986, passed by Const. Convention; Tex., 1989, 73%; Utah, 1994, 68%; Wash., 1989, 78%; Wis., 1993, 84%.

238. Jonathan Kerr, *Victims' Rights Initiatives Sweep Slate in Eight States,* WEST'S LEGAL NEWS, Nov. 11, 1996, *available in* 1996 WL 649531. The states passing

of states with constitutional protection for victims' rights to twenty-nine. Predicated on all of these states also supporting a federal constitutional amendment, amendment ratification would require the approval of only nine additional states.

IV. CONCLUSION

Because a defendant's rights are backed by Constitutional guarantees, they will always trump any state or federal statutorily guaranteed rights of a victim. Because the federal courts have decreed that a victim has no standing in a criminal proceeding, a victim has no forum to even effectively protest a denial of his statutory rights. Where the fundamental right of an individual to participate in the governmental processes directly affecting his life is being denied to a class of citizens by government authorities, and where legislation has proven inadequate to protect that right, the only remaining course of action is to seek to amend the Constitution of the United States.

The Victims' Rights Amendment attempts to restore a balance of fairness and due process in the criminal justice system's dealings with the individuals most directly affected by the commission of a crime—the victim and the accused offender. As Justice Cardozo said, "[j]ustice, though due to the accused, is due to the accuser also. . . . We are to keep the balance true."[239]

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victims' rights constitutional amendments on Nov. 5 were Indiana, Nevada, Oklahoma, Oregon, South Carolina, Virginia, Connecticut, and North Carolina. *Id.*

239. Snyder v. Commonwealth of Mass., 291 U.S. 97, 122 (1934).

APPENDIX 1

S. J. RES. 6, 105TH CONGRESS 1ST SESSION

Proposing an amendment to the Constitution of the United States to protect the rights of victims of crime.

IN THE SENATE OF THE UNITED STATES
January 21, 1997

Mr. KYL (for himself, Mrs. FEINSTEIN) introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

JOINT RESOLUTION
Proposing an amendment to the Constitution of the United States to protect the rights of crime victims.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid for all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:
ARTICLE.—

"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 pre-trial 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 of 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 be applicable 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 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."

APPENDIX 2

S. J. RES. 65, 104TH CONGRESS 2D SESSION

Proposing an amendment to the Constitution of the United States to protect the rights of victims of crime.

IN THE SENATE OF THE UNITED STATES
September 30, 1996

Mr. KYL (for himself, Mrs. FEINSTEIN, and Mr. EXON) introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

JOINT RESOLUTION
Proposing an amendment to the Constitution of the United States to protect the rights of victims of crime.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid for all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:
ARTICLE.—

"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."

APPENDIX 3

S. J. RES. 52, 104TH CONGRESS 2D SESSION
Proposing an amendment to the Constitution of the United States to protect the rights of victims of crime.

IN THE SENATE OF THE UNITED STATES
April 22, 1996

Mr. KYL (for himself, Mrs. FEINSTEIN, Mr. HATCH, and Mr. CRAIG) introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

JOINT RESOLUTION
Proposing an amendment to the Constitution of the United States to protect the rights of victims of crime.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission for ratification:
ARTICLE.—

"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."