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# Revisiting Victim's Rights

Lynne Henderson\*

## I. INTRODUCTION

In a 1982 referendum, the voters of California approved Proposition 8—the first state “victim’s rights”<sup>1</sup> amendment—revising a number of provisions of the California Constitution.<sup>2</sup> I wrote *The Wrongs of Victim’s Rights*<sup>3</sup> in response to that referendum and the Reagan Administration’s *Task Force on Victims of Crime Final Report*.<sup>4</sup> At the time I wrote the article, I had recently been a victim of a violent rape committed by a burglar; I had had two friends murdered in separate killings; and I knew others who had had family members killed, as well as many friends who were victims of other crimes. I had also practiced law briefly as a prosecutor and then for a longer time as a defense attorney. I was concerned that Proposition 8 appeared only incidentally to be aimed at the concerns of victims; its real purpose was to serve crime control, conservative, and prosecutorial interests. As it turned out, Proposition 8 was apparently inadequate to serve crime control interests or to mollify victims. California voters approved yet another amendment in 1991, Proposition 115, The Crime Victims Justice Reform Act.<sup>5</sup>

Other states have followed California’s lead and enacted victim’s rights amendments and statutes. Still, according to the advocates of a federal

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<sup>1</sup>A question arises as to the placement of the apostrophe in the term “victim’s rights.” Most authors treat victims as a plural, but as these rights are individual and not group rights, I chose the singular form to emphasize this fact.

<sup>2</sup>See Lynne Henderson, *The Wrongs of Victim’s Rights*, 37 STAN. L. REV. 937, 938 & n.87 (1985) (discussing 1982 California victim’s rights initiative).

<sup>3</sup>*Id.*

<sup>4</sup>PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME FINAL REPORT (1982).

<sup>5</sup>See Laura Berend, *Proposition 115 Preliminary Hearings: Sacrificing Reliability on the Altar of Expediency?*, 23 PAC. L.J. 1131, 1131 & n.1 (1992) (discussing passage and impact of Proposition 115).

constitutional amendment for victim's rights, these measures remain inadequate.<sup>6</sup>

Over the past three years, the emergence of the effort to amend the United States Constitution has led me to revisit victim's rights issues. Nothing has changed to make me believe I was mistaken in my 1985 assessment. Although I have sympathy for victims of crimes, or victims of any extreme trauma, I continue to believe that crime control conservatives use victims and victim's rights to achieve ends other than helping victims recover.

The opportunity to participate in this Symposium, however, has given me a chance to stand back and consider crime victim's rights proposals in terms of our larger constitutional structure and practice. It has also enabled me to think about intricacies of the relationships between prosecutors and victims. Finally, it has given me an opportunity to discuss the personal experience that was relegated to a footnote in my original article on the subject. Because many proponents use anecdote to "prove" the need for an amendment, the purpose of this Part is to provide a counter-example. That experience led me to question the need for a victim's rights amendment then and now. My experience is by no means determinative, but I include it both as a relevant piece of information about why the subject interested me originally and as an illustration of a "successful" experience under a regime that predated *any* victim's rights amendments.

Although crime victims have hardly been ignored by Congress, state legislatures, voters, courts, and others, the campaign to add a victim's rights amendment to the Constitution of the United States picked up its pace after the "conservative revolution" of the 1994 elections.<sup>7</sup> Because of its attractiveness, the *concept* of an amendment becomes more important than a careful consideration of the effects of such an amendment. Thus, supporters of an amendment make claims based on generalizations about dangerous criminals going free all the time, but they do not provide empirical evidence or studies about what truly benefits victims, or analysis of how such an amendment might affect substantive and procedural criminal law; nor do they seriously consider the State's and the community's interests in crime prevention and prosecution as interests independent of individual victims.

Against an appealing plea from a victim of a horribly violent crime or a grief-stricken family, finding a good sound bite to justify opposition to an

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<sup>6</sup>See, e.g., Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479 *passim* (stating that uniform victim's rights at national level are needed).

<sup>7</sup>See generally Henderson, *supra* note 2, at 949–50 (discussing impact of conservative Congress on development of victim's rights).

amendment is difficult. Opposition to the amendment superficially appears to be "anti-victim." But opposition is not necessarily anti-victim, as many victim organizations are coming to recognize. For example, Victim Services, the largest victim assistance agency in the country, indicated in a 1998 letter to Senator Orrin Hatch, Chair of the Senate Judiciary Committee, "We believe the proposed amendment is premature and inappropriate at this time when existing [state and federal] provisions that aim to address victims' interests have not been evaluated. Rather, what we need is research, discussion and debate."<sup>8</sup> In fact, lack of empirical research and theoretical and practical considerations argue against adoption of a victim's rights amendment at this time. I am not urging caution because no one cares about crime victims, but rather because critical distance is essential before we embrace such a change in our fundamental charter of government.

In this Article, I examine the question of giving victims of crime a formal constitutional role in the criminal justice process. I begin with an overview of possible theoretical justifications for giving crime victims constitutional rights in the context of our constitutional structure and practice. Without an adequately theorized ground for the amendment, there are no compelling justifications for amending the Constitution. I then examine practical concerns with involving victims as co-equal parties in the criminal justice process, focusing on the question of counsel. I am particularly concerned with addressing the frequent assumption of a convergence of state, prosecutorial, and victim interests. I next turn to my own story as a victim of a violent crime and my experience with the criminal justice process. I conclude by stating that adopting a federal victim's rights amendment, given its lack of justification and its potentially harmful effects on victims and the Constitution, would be a terrible mistake.

## II. VICTIM'S RIGHTS IN CONSTITUTIONAL THEORY

The proposed federal victim's rights amendment has undergone a number of revisions since it was first introduced by Senators Jon Kyl and Diane Feinstein, and it is likely to undergo further change.<sup>9</sup> On such shifting

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<sup>8</sup>Letter from Chris Whipple, Acting Executive Director, Victim Services, to Sen. Orrin G. Hatch 3 (June 9, 1998) (on file with Senate Judiciary Committee).

<sup>9</sup>Senator Diane Feinstein's written testimony in the 1997 Hearings states, "We have written forty-two different drafts of this amendment so far, as the language has evolved . . . ." *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearings on S.J. Res. 6, 105th Cong. 24 (1997)* [hereinafter *Hearings on S.J. Res. 6*] (statement of Sen. Diane Feinstein). The 1999 version of the proposed Victim's Rights Amendment, S.J. Res. 3, has dropped some of the provisions of S.J. Res. 44, and undoubtedly future versions will again differ. *Compare* S.J. Res. 3, 106th Cong. (1999), *with* S.J. Res. 44, 105th Cong. (1998).

ground, it is difficult to criticize particular provisions. This does not preclude the necessity for more general criticisms. Critical distance is essential to determinations that could radically change our fundamental charter of government.<sup>10</sup>

While proponents tend to focus their argument in the context of particular provisions of the Bill of Rights dealing with the rights of the accused, they have not yet provided a theoretical constitutional ground for victim's rights. Because the victim's rights amendment seems more related to criminal procedure than constitutional law, no serious scholarly consideration of the implications of the amendment in terms of constitutional law has appeared in law reviews—an omission that I believe is a mistake.<sup>11</sup> In terms of constitutional theory and practice, finding a theoretical ground is quite difficult.

Although academically, and to a degree doctrinally, the Bill of Rights provisions dealing with government conduct and rights in criminal cases have been severed from constitutional theory and practice, Professors Stuntz,<sup>12</sup> Amar,<sup>13</sup> and Bandes<sup>14</sup> have recently argued that the severance is artificial.

<sup>10</sup>The term "radical" is Professor Cassell's. See Cassell, *supra* note 6, *passim*.

<sup>11</sup>This omission may be because the most interested parties in the scholarly debate thus far have been those who study and teach criminal law and procedure, and thus the issues are obviously likely to engage their attention. But the victim's rights movement has captured the support of Professor Laurence H. Tribe, a leading constitutional law scholar, and the opposition of other leading constitutional law scholars, such as Erwin Chemerinsky, William Van Alstyne, and Gerald Gunther. See generally *Proposed Victims' Rights Constitutional Amendment: Hearings on S.J. Res. Before the Senate Comm. on the Judiciary*, 104th Cong. 140–48 (1997) (letter from Professors Erwin Chemerinsky, Lynne Henderson, Robert Mosteller et al., to members of Senate Judiciary Committee) [hereinafter Law Professors' Letter II] (signed by Profs. Chemerinsky, Van Alstyne, and Gunther, among others, stating reasons for Congress to oppose a victim's rights amendment); Law Professors' Letter Regarding the Proposed Victim's Rights Amendment (letter from Lynne Henderson et al., to Sen. Orrin G. Hatch, Chairman, Senate Judiciary Committee, et al. 3 (Sept. 4, 1996) (on file with author) [hereinafter Law Professors' Letter I] (same).

<sup>12</sup>See William J. Stuntz *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 396 (1995) (suggesting that survey of Fourth and Fifth Amendments' history and cases "paint[s] a different picture than the one we usually see").

<sup>13</sup>See AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 115 (1997) (suggesting that "discourse in constitutional criminal procedure has evolved separately, cutting itself off from larger themes of constitutional, remedial, and jurisdictional theory").

<sup>14</sup>Susan Bandes, "*We the People*" and *Our Enduring Values*, 96 MICH. L. REV. 1376, 1376 (1998) (reviewing AMAR, *supra* note 13) ("[C]riminal law has been impoverished by its failure to connect to 'larger themes of constitutional remedial, and jurisdiction theory.'").

These authors and others<sup>15</sup> have argued that constitutional theory applies to these provisions as well as other parts of the Constitution, and I agree. The reintegration of criminal procedure into constitutional law is in its infancy, however, and no single agreed-upon historical or theoretical approach to reincorporating these amendments exists at this time.<sup>16</sup> For that matter, no absolute agreement on the history and theory of the Constitution itself exists; there are several competing theories, although there is a rich literature that centers on basic themes. Thus, understanding, interpretation, and application of constitutional doctrine has many components and competing approaches. Accordingly, while the theoretical and doctrinal approach I set forth below is certainly not the only applicable approach, it does reflect some dominant themes in constitutional analysis, drawing on several strands of theory.

The Constitution of the United States is a basic charter of government. It contains an allocation of rights and responsibilities among branches of government and among the national and state governments, as well as substantive and procedural provisions relating to the rights and relations of government to individual citizens. While the victim's rights amendment raises important concerns regarding substantive criminal law and federal and state relations,<sup>17</sup> my purpose here is to examine the issue of federal relations to individuals.<sup>18</sup>

Courts and scholars have largely interpreted the Constitution in light of determining the relationship of the individual to the government, not the relationship of the individual to other individuals. Although there are good arguments that the Thirteenth and Fourteenth Amendments apply to the acts of individuals<sup>19</sup>—despite the Court's adoption of the "state action"

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<sup>15</sup>See, e.g., Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 301 (1993) (arguing that Fourth Amendment cases illustrate and reflect "larger" issues in constitutional jurisprudence).

<sup>16</sup>See Susan R. Klein, *Enduring Principles and Current Crises in Constitutional Criminal Procedure*, 24 L. & SOC. INQ. (forthcoming May 1999) (reviewing AMAR, *supra* note 13)

<sup>17</sup>See Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1271 (1998) (arguing that absent from discussion is "a theory of process—one that concentrates on the proper constitutional roles of judges and legislators and prosecutors and jurors in criminal law choices, . . . on the significance of federalism, and on the counter-majoritarian difficulties attending judicial review under the capacious concept of due process").

<sup>18</sup>For some arguments against the amendment on federalism grounds, see Law Professors' Letter I, *supra* note 11, *passim*, and Law Professors' Letter II, *supra* note 11, *passim*.

<sup>19</sup>See Akhil Reed Amar, *Remember the Thirteenth*, 10 CONST. COMMENT. 403, 403 (1993) ("[H]owever true generally the notion that the Constitution applies only to actions of the state—the government—the Thirteenth Amendment is an important counter example.").

doctrine<sup>20</sup>—the focus has been on the relation of the individual to the government. Although the Constitution largely defines the relationship of the individual to the State in terms of participation in democratic processes,<sup>21</sup> it also includes certain rights of the individual against the State. Even the Constitution's participation and process allocations cannot be divorced from substantive normative choice about whose participation matters and why.<sup>22</sup>

The Bill of Rights and the Fourteenth Amendment appear to contain both substantive and procedural commitments to, and restraints, on the State's power over individuals. These constitutional rights for individuals are primarily "negative" rights or liberties,<sup>23</sup> which limit the State's power to interfere with the activities of its citizens. Overall, constitutional theory and law have tended to emphasize textual rights and negative liberties over positive rights<sup>24</sup> despite arguments by progressive and liberal constitutional scholars that positive liberties and claims against the government are also part of our constitutional theory and order.<sup>25</sup> Only in rare instances have the courts

<sup>20</sup>See, e.g., ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 386–414 (1997) (discussing state action requirement and exceptions); Frank I. Goodman, *Professor Brest on State Action and Liberal Theory and a Postscript to Professor Stone*, 130 U. PA. L. REV. 1331, 1345 (1982) (questioning Brest's argument that "private conduct involving the exercise of a state-created right is an exercise of state power and therefore 'state action'").

<sup>21</sup>This view is probably best articulated by John Hart Ely in *Democracy and Distrust*. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 148–78 (1980) (discussing court's use of *Carolene Products* footnote to facilitate individuals' involvement in political processes).

<sup>22</sup>Ely himself makes substantive choices in his arguments that African Americans, gays, and other minority groups have superior claims against the majority in terms of participation rights. See Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 137 (1981) (critiquing Ely's process theory); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1037, 1063 (1980) (same).

<sup>23</sup>Isaiah Berlin is largely credited for distinguishing between "negative" and "positive" rights. See ISAIAH BERLIN, *INTRODUCTION AND TWO CONCEPTS OF LIBERTY*, in *FOUR ESSAYS ON LIBERTY* 118, 122–34 (1969) (suggesting that "[t]he defense of liberty consists in the 'negative' goal of warding off interference"); see also RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 147, 184–205 (1978) (suggesting that "men have moral rights against the state"); Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2342–47 (1990) (arguing for recognition of positive rights).

<sup>24</sup>John Hart Ely's acerbic characterization of "fundamental rights" arguments in *Democracy and Distrust* includes the quip that fundamental rights theorists edge towards the door when someone mentions positive rights to food, jobs, and shelter. See ELY, *supra* note 21, at 43–72 (1980) (discussing how Supreme Court discovers fundamental values).

<sup>25</sup>See Frank T. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9 (1969) ("Yet I hope to make clear that in many instances [the Court's] purpose could be more soundly and satisfyingly understood as vindication of a state's duty to protect against certain hazards which are endemic in an unequal society, rather than vindication of a duty to avoid complicity in unequal treatment."); Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 643 (1990)

found that individuals have positive entitlements or claims on the government in order to ensure meaningful exercise of their rights. For example, in *Gideon v. Wainwright*,<sup>26</sup> the Supreme Court determined that the right to counsel under the Sixth Amendment and notions of fairness under the Due Process Clause required states to pay for counsel for indigent criminal defendants.<sup>27</sup> Occasionally, the Court has affirmed positive entitlements under a procedural due process analysis when the government seeks to deprive citizens of liberty or property rights. In *Goldberg v. Kelly*,<sup>28</sup> for example, the Court held that the government must provide a hearing prior to depriving an individual of statutorily authorized welfare payments.<sup>29</sup> In *Boddie v. Connecticut*,<sup>30</sup> the Court held that a state could not charge indigent persons a fee before allowing them to file for divorce, because individuals have fundamental, constitutionally protected rights in making choices about marriage and family.<sup>31</sup> Most of these rulings have involved states trying to deprive an individual of a specific constitutional or statutory right or entitlement rather than individual claims that the government must provide a benefit or assistance.<sup>32</sup> Indeed, the Court has been extremely reluctant to expand the duties of government to provide positive rights or entitlements, no matter how sympathetic the claim.

The victim's rights amendment would be unique in requiring the government to involve private parties in court proceedings that are not aimed

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(suggesting that "progressive constitutionalists . . . view the power and normative authority of some social groups over others as the fruits of illegitimate private hierarchy, and regard the Constitution as one important mechanism for challenging those entrenched private orders").

<sup>26</sup>372 U.S. 335 (1963). The Court required the federal government to provide counsel for indigent defendants in *Johnson v. Zerbst*, 304 U.S. 458, 467–69 (1938).

<sup>27</sup>See *Gideon*, 372 U.S. at 344 (stating that "[t]his noble ideal [of equality before the law] cannot be realized if the poor man charged with a crime has to face his accusers without a lawyer to assist him"). This right does not extend to "petty" offenses or offenses for which a defendant does not face any actual threat of imprisonment. See *Scott v. Illinois*, 440 U.S. 367, 368 (1979) (defendant charged with shoplifting items totaling less than \$150); *Argersinger v. Hamlin*, 407 U.S. 25, 26 (1972) (defendant charged with carrying concealed weapon).

<sup>28</sup>397 U.S. 254 (1970).

<sup>29</sup>See *id.* at 264 (stating that "when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process").

<sup>30</sup>401 U.S. 371 (1971).

<sup>31</sup>See *id.* at 382–83.

<sup>32</sup>Compare *Boddie v. Connecticut*, 401 U.S. 371, 381 (1971) (holding that state cannot charge indigent persons \$60 divorce filing fee), with *Dandridge v. Williams*, 397 U.S. 471, 484–87 (1970) (finding that Maryland AFDC regulation that imposes \$250 monthly maximum per family regardless of size or need does not violate Equal Protection Clause).



at depriving these persons of life, liberty, or property.<sup>33</sup> In the instance of victims who are not witnesses to the offense, primarily surviving relatives and friends of a homicide victim, the amendment gives victims, upon whom the government makes no demands whatsoever, the right to participate and attempt to influence the outcome of the government's case. At first this may seem quite progressive, humane, and unobjectionable, but upon closer examination, it presents a number of problems.<sup>34</sup> The first objection is that government does not owe duties to individuals. Inconsistent with victim's rights arguments that the government owes victims something, in constitutional practice, the government has no constitutional duty to recognize many forms of victimization, including the protection of citizens against private violence.<sup>35</sup> Second, victims of war, whether soldiers killed in battle, soldiers injured and traumatized by war, or civilians wrongly interred or injured by government, have no recognized constitutional claims, although the government arguably has caused the injury. Victims of racism and prejudice have no *constitutional* claims if those who injure them are private parties, despite the injurious effects of these practices. Thus, there must be some very special justification for privileging victims of crimes committed by nongovernmental actors by giving them constitutional rights.

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<sup>33</sup>The Seventh Amendment right to a jury trial in private ("common law") lawsuits could arguably be characterized as a positive claim on governmental resources similar to the proposed amendment.

<sup>34</sup>Certain problems involve structural issues such as a reordering of state and federal power under the amendment and the effects of victim's rights on substantive criminal law and practice. Such problems are beyond the scope of this Article, but they raise important concerns. There are, for example, substantial federalism concerns. See *Proposals to Provide Rights to Victims of Crime: Hearings on H.R.J. Res. 71 and H.R. 1322 Before the House Comm. on the Judiciary*, 105th Cong. 42, 44 (1997) (prepared statement of Hon. George P. Kazen, Chief Judge, U.S. District Court for the Southern District of Texas, on behalf of Judicial Conference of the United States) (arguing that victims' claims, "almost inevitably filed in federal courts, could cause significant federal court supervision of state criminal justice systems for the purpose of enforcing the amendment"); see also *id.* at 48, 50 (prepared statement of Hon. Joseph R. Weisberger, Chief Justice, Supreme Court of Rhode Island, on behalf of Conference of Chief Justices) ("It is the position of our conference that the protection of victim's rights emanates from the general police power of the States. Since the Federal government does not have this power, it should leave this constitutional issue to the States.").

<sup>35</sup>See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989) (finding that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors"). *DeShaney* has been widely criticized by numerous legal scholars, including this one, but no real changes in law have occurred in response that would make government liable for failures to protect. For a thoughtful defense of the no-duty-to-protect argument, see Barbara F. Armacost, *Affirmative Duties, Systemic Harms, and the Due Process Clause*, 94 MICH. L. REV. 982, 986 (1996).

If the Constitution is concerned with limiting the government's power over individuals, and does not provide for positive claims on governmental resources by individuals, what justification exists for an amendment that grants a certain class of individuals the privilege to demand that the government provide them with positive rights? Advocates of a victim's rights amendment generally offer several possible rationales. The first is based on a kind of social contract analogy: Because the government depends on victims to make law enforcement possible, it owes them something in return. The second rationale is that a majority supports victim's rights. The third rationale is that some kind of basic or fundamental human right entitles crime victims to participate in the criminal process. A fourth and related rationale is that the government somehow retraumatizes victims in the criminal process—that it also victimizes them—and victims ought to have a right not to be traumatized. The fifth rationale is that participation is, in some way, therapeutic, and therefore, the Constitution ought to embody and enforce this therapeutic norm. A sixth rationale is that victims have a right to corrective justice. Finally, proponents argue that such an amendment is necessary to offset the constitutional rights of criminal defendants.

#### *A. The Argument from the Social Contract*

One possible argument for a victim's rights amendment rests on a kind of social contract theory, perhaps captured in the preamble to Louisiana's 1985 victim's rights legislation:

"In recognition of the civic and moral duty of victims . . . of crime to cooperate fully and voluntarily with law enforcement and prosecutorial agencies, and in further recognition of the continuing importance of such citizen cooperation . . . the legislature declares its intent . . . to ensure that all victims . . . of crime are treated with dignity, respect, courtesy, and sensitivity, and that the rights extended . . . to victims . . . of crime are honored and protected by the law enforcement, (sic) agencies, prosecutors, and judges in a manner no less vigorous than the protection afforded the criminal defendants."<sup>36</sup>

This appeal to the duty of victims reflects a belief that members of the polity "owe" cooperation to others as part of their understanding of community membership and that the community in turn owes them. But the

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<sup>36</sup>Cait Clarke & Thomas Block, *Victims' Voices and Constitutional Quandaries: Life After Payne v. Tennessee*, 8 ST. JOHN'S J. LEGAL COMMENT. 35, 61 & n.144 (1992) (quoting LA. REV. STAT. ANN. § 46:1841).

constitutional concern for negative liberties stems in large part from the government's monopoly on the use of force and its ability to use the criminal law to control and punish the population. Whether one grounds the argument for the social contract embodied in the Constitution on Hobbes, Locke, Nozick, Rawls, or other political philosophers,<sup>37</sup> the theory is that we cede our right to exact revenge or restitution to the State and to the law in return for the State's protection and enforcement of the law. Accordingly, the state and federal governments of this country hold a formal constitutional monopoly on the use of force.<sup>38</sup> The criminal law, enacted by legislatures, is part of that monopoly. Crimes are legally defined as offenses against the State and the community, even if those offenses involve individual victims.

The strongest claim that a victim might make on the government under this theory, that the social contract gives them a right to be protected from crime, and to sue if they are not protected, has been rejected by the Supreme Court<sup>39</sup> and by many—although not all—proponents of an amendment.<sup>40</sup> Rather, in its various incarnations, the amendment has emphasized a right to participate in governmental decisions regarding charging, custody, sentencing, and conduct of criminal prosecutions without an enforcement mechanism.

The argument that the social contract creates a duty to report and prosecute crimes lacks support as well. There is no general duty to report crimes in many jurisdictions,<sup>41</sup> although the government does rely on victims

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<sup>37</sup>See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 131–32 (1974) (discussing notion of “social compact”); JACK N. RAKOVE, ORIGINAL MEANINGS 296 (1996) (“Yet Americans had reason to treat their charters as something more than declarations of preexisting entitlements. These were not mythic notions like the social contract or the true original contract of government . . . These charters provided a potent authority to which Americans could appeal whenever the status of their rights within the empire was controverted.”); JOHN RAWLS, A THEORY OF JUSTICE 520 (1971) (exploring “whether the contract doctrine is a satisfactory framework for understanding the values of community and for choosing among social arrangements to realize them”).

<sup>38</sup>However, one could argue that the Second Amendment qualifies that monopoly power. See David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 551–56 (1991).

<sup>39</sup>See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195–96 (1989) (finding that Due Process Clause did not impose affirmative duty upon State to protect child from father's abuse).

<sup>40</sup>Proposed amendments have contained language specifically precluding suits for violations of civil rights since 1996. Professor Cassell makes it clear in his statements that section 1983 does not apply. See Cassell, *supra* note 6, at 526–27.

<sup>41</sup>I am excluding special reporting requirements for professionals in child sexual abuse or domestic abuse cases. The duty to report, closely related to the duty to rescue, has never enjoyed much scholarly support. Among the theoretical and pragmatic reasons for this lack of support is that a duty to report interferes with individual liberty and autonomy—a negative

to report and prosecute criminal offenses. It is true that without individual victim cooperation, the government would be unable to enforce its laws in many instances. Therefore, the argument goes, government has some special obligation to victims. It is generally accepted that a number of crimes—including serious crimes—go unreported.<sup>42</sup> What effect nonreporting has in facilitating criminality is unknown, but to some extent, the dependence on individuals to aid in enforcing the criminal law is empirically true. Many times, the victim is a crucial witness as well. In nonhomicide cases, it is often the victim who reports and is a witness to the crime.

That the government relies on citizens to report crimes is not dispositive of any social contract questions. If the argument proceeds from consent, for example, citizens who report crimes could easily be said to consent to the government's processes and primacy in prosecution. If persons were asked if they would choose such a system *ex ante*, most probably would have no trouble delegating this function to government—indeed, why else have a government?<sup>43</sup> Requiring individuals to bear the costs of prosecution themselves would create a number of inefficiencies as well as increase the probability of inconsistent application of the law. Even if first-party insurance could spread costs, there would still remain major free rider problems. Further, while there has been some trend towards privatization in criminal justice, including private security guards and privately run prisons, it is thus far not at all clear that this is more efficient, helpful to prisoners, or just.

Arguably, by reporting a crime, the individual is choosing, as a moral agent, to invoke the authority of the State and its institutions against another, and is thus consenting to the State's control. One could argue that the individual's consent is either chimerical or uninformed, but the existence of self-help law enforcement suggests that individuals might, in some instances, rationally choose not to involve the government.<sup>44</sup> Further, some communities, particularly minority communities, already provide alternative means for crime victims to seek redress.

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rights argument. Practically, of course, enforcement is difficult because it is hard to detect many omissions, much less find adequate proof to convict someone. There is, however, no absolute bar on legislatures enacting laws that require reporting.

<sup>42</sup>Hence, the difference between figures in the FBI's Uniform Crime Reports and the National Victim Survey. One difference that remains striking is the reporting of rape.

<sup>43</sup>Robert Nozick suggests that this "night watchman" function is the *most* compelling argument for government. See NOZICK, *supra* note 37, at 57–87.

<sup>44</sup>See Donald Black, *Social Control as a Dependent Variable*. in TOWARD A GENERAL THEORY OF SOCIAL CONTROL 1, 7 (Donald Black ed., 1984) (suggesting that "forms of social control divide into two major categories: those involving only the principals, with or without the help of supporters, and those involving also a third side who related to the conflict as an agent of settlement").

Arguments from communitarian concerns suggest alternative framing of the social contract question as well. By using victims to serve the community interest in prevention and punishment of crimes, the government could be said to owe them special treatment requiring recognition of their rights. But on a more communitarian, or civic republican level, it is not so obvious that victims are being unfairly used or intruded upon by government. Many have argued that emphasizing individual rights at the expense of the individual's duties and responsibilities has been a grave error in political and legal terms.<sup>45</sup> Rights without responsibilities, for example, can undermine the polity rather than strengthen it.<sup>46</sup> By contrast, civic virtue and civic republicanism emphasize responsibilities and connections to the community as well as freedoms and duties. Under this view, victims are not individuals exercising rights against the government. Rather, victims of crime, as members of the community, have a responsibility to their community to cooperate in criminal prosecutions in order to protect and safeguard the community's interests.

Whether the dependence on victim participation and cooperation rises to the level of protecting a fundamental right worthy of being enshrined in the Constitution is not disposed of simply because the government relies on individual cooperation. If victims are also to be a part of the process, then either they are state actors or their status as independent parties must be adequately theorized, but before reaching this question, another community-interest-based argument, majority will, bears examination.

### *B. The Argument from Majority Approval*

Another common argument made by advocates of victim's rights is that a majority, or an "overwhelming" majority, "approves" of victim's rights, however defined.<sup>47</sup> If a majority in a democracy supports a certain policy or

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<sup>45</sup>Michael Sandel's work is perhaps the most influential critique of liberal democracy's emphasis on individual, negative rights. See MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE I* (2d ed. 1998).

<sup>46</sup>See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 17 (1991) ("In recent years, we have made great progress in making the promise of rights a reality, but in doing so we have neglected another part of our inheritance—the vision of a republic where citizens actively take responsibility for maintaining a vital political life.").

<sup>47</sup>See *The Victims' Rights Amendment: Hearings on S.J. Res. 44 Before the Senate Comm. on the Judiciary*, 106th Cong. 1 (1998) (statement of Paul G. Cassell, Professor of Law, University of College of Law) ("[N]ational consensus appears to be developing that the rights of crime victims deserve protection."). The success of victim's rights amendments to state constitutions indicates strong public support for "victim's rights," however defined. The argument that consensus justifies creation of fundamental rights rests largely on conventional morality, however, rather than any strong rights theory grounded in individual dignity and

approach, generally there is nothing to prevent it from acting upon that policy. This power that majorities hold over minorities is one of the major reasons why theorists and constitutionalists have concerned themselves with preserving individuals' constitutional rights through negative liberties. Unless the policies violate constitutional constraints, a constitutional amendment is completely unnecessary for a majority to implement victim's rights through legislation.

The democratic process of electing legislators and executives charged with enforcing the law ensures that the State responds to community and individual concerns about crime. Further, there is nothing in the Constitution that prohibits states from electing judges and prosecutors, thereby subjecting them to public scrutiny and participation in their decisions.

Claims that a majority supports victim's rights generally determine which specific rights they ought to have under the Constitution. Popular culture reinforces the majority's *sympathy* for victims and encourages unreflective support for victim's rights. Currently, against horrible images of the Oklahoma City bombing, serial killers, and tearful victims, arguments against victim's rights lack visual and political punch. The news media keeps up a steady drumbeat of crime—"if it bleeds, it leads"—and portrays criminal defendants as unworthy and less than human. Cheap-thrill television shows such as *Cops* leave people with the impression that all police officers are good and all suspects guilty. Television docudramas reinforce a story of duplicitous defense lawyers, miscarriages of justice, and victim revenge. John Walsh, a major supporter of the proposed federal victim's rights amendment, can be seen regularly preaching his gospel of rage and revenge in television

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autonomy. Conventional morality in turn can mean those moral attitudes all people unreflectively approve of or moral claims regarded by a majority as unproblematic. The "Gallup poll" theory of rights, however, rests uneasily with a commitment to strong rights against the State. See ELY, *supra* note 21, at 69 ("It makes no sense to employ the value judgments of the majority as the vehicle for protecting minorities from the value judgments of the majority."); DWORKIN, *supra* note 23, at 240–58 ("A conscientious legislator who is told a moral consensus exists must test the credentials of that consensus. He cannot, of course, examine the beliefs or behavior of individual citizens . . . . The claim that a moral consensus exists is not based on a poll. It is based on an appeal to the legislator's sense of how his community reacts to some disfavored practice.").

Although majorities can improve their moral understanding and enact that improvement as a constitutional amendment—the Thirteenth and Fourteenth Amendments can be characterized as a moral shift in attitude towards African and African-American slaves that was an improvement—even that question is debatable. The Eighteenth Amendment was quickly repealed by the Twenty-First Amendment, as the prohibition of alcohol appealed to have the support of a fragile consensus that quickly broke down.

spots and on *America's Most Wanted*.<sup>48</sup> In this simplistic world, all the victims are innocent, and all who are accused of crimes are guilty. As Mario Cuomo wrote in a law review article, "We must continue to think about crime victims, because they, we, are the mainstream of our society. To ignore the needs of crime victims is to ignore the needs of most of our people—the good, moral, upright, hard-working, social contract abiding majority."<sup>49</sup> To side with victims is to side with the "good people" against the "bad people"—often people of color, the poor, and the disenfranchised. In this simplistic paradigm, politicians and voters find it easy to declare that they are against criminals and for victim's rights without having to think about the practical effects of victim's rights on the Constitution, victims themselves, or individual rights. Because ours is a system concerned in part with protecting individual liberties from majorities, which are able to enact legislation if they so choose, a stronger reason for giving some individuals special rights is necessary.

### C. *Fundamental Rights Argument*

Professor Laurence Tribe, who has long advocated various expansions of rights, has touched upon a kind of fundamental rights concern in his writings in support of an amendment. After initially opposing a victim's rights amendment,<sup>50</sup> Tribe determined that a constitutional amendment granting rights to crime victims ought to be adopted.<sup>51</sup> To my knowledge,

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<sup>48</sup>John Walsh's anger is unmistakable; his recent book, *No Mercy*, boasts on the flyleaf of the book jacket that rage is the proper response to crime. See JOHN WALSH, *NO MERCY* (1998) While we hear much of the success of the television show *America's Most Wanted* in locating fugitives, and that is not a bad thing, it is unclear if people also have been wrongly accused as a result. Moreover, we do not know what effect of such programs has on people's perceptions of crime.

<sup>49</sup>Mario Cuomo, *The Crime Victim in a System of Criminal Justice*, 8 ST. JOHN'S J. LEGAL COMMENT. 1, 19 (1992) (discussing legislation enacted in New York that enhanced victim's rights).

<sup>50</sup>See Letter from Laurence H. Tribe, Professor, Harvard Law School, to Sen. Christopher J. Dodd, U.S. Senate 4 (May 30, 1996) (stating that "it seems to me that the proposed amendment would create a real hornet's nest of problems for law enforcement at all levels, bog the courts down in enormously complex legal conflicts, shift power over resource allocation decisions from legislators and executives to judges, leave unanswered many of the questions in current law that appear to motivate the measure, and achieve no meaningful protection for victims beyond that already attainable without any constitutional change at all").

<sup>51</sup>See Laurence H. Tribe, Position Paper on Victims' Rights I (June 27, 1996) (on file with author) ("[T]he rights in question—rights of crime victims not to be victimized yet again through the processes by which government bodies and officials prosecute, punish, and release the accused or convicted offender—are indisputably basic human rights, rights that any civilized system of justice would aspire to protect and strive never to violate.").

however, Tribe has not yet developed a coherent statement identifying the specific source or nature of these fundamental rights, nor has he clarified the theoretical basis for them. Rather, he has framed his claims on some unarticulated notion of human dignity to argue for rights to participate in criminal proceedings, without identifying why there is an autonomy or dignitary interest unique or strong enough to be recognized by the Constitution, or what that interest actually is.

The argument based on dignity claims that victims have some sort of fundamental right that ought to be enshrined in the Constitution. The interest of the individual is never defined in terms of a grounding for the right, other than a vaguely Kantian notion that all are entitled to equal dignity and respect in their interactions with the government and its courts. But such an argument fails to distinguish crime victims from other victims of wrongs committed by private parties or anyone else who interacts with the government and courts; it therefore proves too much. Obviously, everyone should be given equal dignity and respect.

Doctrinally and historically, fundamental rights involve an individual's liberty and autonomy to make choices that are rooted in the constitutional text (freedom of speech or religion), structure (the right to travel), American history and practice, or in terms of human dignity, autonomy, and personhood (the right to contraceptives).<sup>52</sup> Again, however, fundamental rights, whether explicitly in the constitution's text or implied from that text, tend to be individual rights *against* government.

One doctrinal touchstone for determining fundamental rights is whether such rights are "fundamental to the concept of ordered liberty" or grounded in "our history and traditions."<sup>53</sup> This approach does not justify finding crime victim's rights, as such rights are neither part of our history and traditions nor fundamental to ordered liberty.<sup>54</sup> A more expansive view that advocates recognition of fundamental rights is often based on questions of individual

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<sup>52</sup>See Paul Brest, *Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1064, 1073 (1981) (discussing "fundamental rights controversy" and sources of fundamental rights).

<sup>53</sup>See *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring); *Poe v. Ullman*, 367 U.S. 497, 548–55 (1961) (Harlan, J., dissenting). See generally CHEMERINSKY, *supra* note 20, at 640–42 (explaining various approaches to fundamental rights analysis).

<sup>54</sup>See Henderson, *supra* note 2, at 938–52 (discussing origins and history of victim's rights). Tribe makes a weak argument that the framers "undoubtedly assumed the rights of victims would receive decent protection" in an op-ed piece co-written with Cassell. Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B5. Yet, the framers' intent regarding crime victims is hardly clear in any of the analyses of the founding.



autonomy and principles of “equal concern and respect.”<sup>55</sup> Although the courts have frequently been hostile to expanding the meaning of fundamental rights based on dignity and autonomy arguments,<sup>56</sup> the cases and principles within constitutional jurisprudence might provide a theoretical basis for an argument for victim’s rights.<sup>57</sup> Tribe apparently adopts the position that victims ought to have positive rights because criminal cases involve some kind of basic human right that people widely agree deserves serious and permanent respect.<sup>58</sup>

At one point, Tribe characterizes the relevant right as the “right not to be victimized yet again through the process by which governmental bodies and officials prosecute, punish, and release the accused or convicted offender,” which he sees as “indisputably basic human rights against government, rights that any civilized system of justice *would aspire to protect* and strive never to violate.”<sup>59</sup> However, if the concern is with honoring individual concerns about the positive law, it is hard to see why crime victims alone ought to have special rights in litigation when victims of other wrongs do not, or why legislatures cannot respond to those concerns in changing positive law.

Tribe also has made a strong substantive statement in asserting that “[t]he ultimate concern of the criminal justice system ought to be with the victim.”<sup>60</sup> Tribe’s statement requires a justification as to why the victim’s

<sup>55</sup>The phrase “equal concern and respect” is most associated with Ronald Dworkin’s work, see, e.g., DWORKIN, *supra* note 23, at 181, 199, 273, but the argument that victims deserve to have rights equal to defendants or deserve some form of equality treatment that Tribe, Feinstein, and many victim’s rights advocates assert is very close to a claim that the criminal process somehow denies victims equal concern and respect regarding some right that they hold.

<sup>56</sup>Perhaps one of the best examples of the Court’s hostility can be found in Justice White’s opinion in *Bowers v. Hardwick*. See *Bowers v. Hardwick*, 478 U.S. 186 *passim* (1987). The argument for individual dignity and autonomy is contained in Justice Blackmun’s dissent in the same case, and it is framed in terms of *negative* rights. See *id.* at 199.

<sup>57</sup>Professors Laurence Tribe, Ronald Dworkin, and Kenneth L. Karst, for example, are well-known advocates of dignity-based and autonomy concerns in adjudication of rights. See generally DWORKIN, *supra* note 23, at 205 (suggesting that “[t]he institution of rights is . . . crucial, because it represents the majority’s promise to the minorities that their dignity and equality will be respected”); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1302–1435 (2d ed. 1988) (supporting fundamental rights based on dignity and autonomy); Kenneth L. Karst, *Foreword—Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 9 (1977) (discussing dignity- and autonomy-based rights under Fourteenth Amendment).

<sup>58</sup>See Tribe, *supra* note 51, at 2.

<sup>59</sup>*Id.* at 1.

<sup>60</sup>Online NewsHour, *Victims’ Rights: Making Amends* (statement of Laurence Tribe, Harvard Law School (June 25, 1996) <<http://web-cr05.pbs.org/plweb-cgi/fastweb?getdoc+newshour+newshour+1391+1+wAAA+victim%27%26rights%26amendment>>.

individual interests should trump the community's concerns with crime, including fair process for those accused, equality in the application of the law, and the goals of the criminal sanction—deterrence, retribution, rehabilitation, and protection. If the trump is some right of the victim, it remains to be determined what core right is relevant and why.

As an example of the need for victim's rights, Tribe points repeatedly to the exclusion of victim-witnesses from trials. Tribe argues, based on his participation in *Richmond Newspaper Inc. v. Virginia*,<sup>61</sup> that victims should have a right to attend trials, just as the public has the right to attend.<sup>62</sup> Yet, this matter can be, and indeed has been, handled statutorily, and does not require a constitutional amendment for resolution.<sup>63</sup> Tribe also has stated that "there's a national value that victims ought not to simply be side-lined and marginalized and not even informed when the person convicted of attacking them is released."<sup>64</sup> If this is a national value, there is nothing in the Constitution that prohibits adoption of legislation embodying notice to victims, communication with victims, or various forms of victim participation.

Tribe has asserted that his position does not involve pitting the rights of one individual against another, but rather the rights of the victim against the authorities,<sup>65</sup> presumably adhering to the basic premise that constitutionally recognized rights are negative rights. Tribe's argument seems forced: If the concerns of the victim receive insufficient attention from the government, what are those concerns and why should they enjoy constitutional protection? According to Tribe, whatever the right is, it is insufficiently protected under existing constitutional law, including state constitutions. Yet, it is by no means clear that insufficient concern exists empirically, or even that it cannot be adequately remedied through legislation.<sup>66</sup> Additionally, if insufficient

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<sup>61</sup>448 U.S. 555 (1980).

<sup>62</sup>See Tribe, *supra* note 51, at 2–3 (stating that *Richmond Newspaper* "illustrates so forcefully the way in which victims' rights to observe and to participate . . . may be trampled upon . . . because the Constitution nowhere refers to the rights of victims in so many words"); see also Cassell, *supra* note 6, at 486 (advocating victim's rights to attend and to testify at trial).

<sup>63</sup>See Robert P. Mosteller, *The Unnecessary Victims' Rights Amendment*, 1999 UTAH L. REV. 443 *passim* (making clear that "statutory protections" for crime violations are preferable to constitutional amendment); see also 42 U.S.C. § 10606(b)(4) (1994) (enumerating crime victim's rights).

<sup>64</sup>*Making Amends*, Online Newshour Transcript (June 25, 1996) <<http://www.pbs.org>>.

<sup>65</sup>See Tribe, *supra* note 51, at 1; Tribe & Cassell, *supra* note 54, at B5.

<sup>66</sup>Tribe also argued that giving rights to victims would not distort separation of powers or federalism. See *id.* at 3 ("The fact that the states and Congress . . . already have simple affirmative authority to enact rules protecting these rights . . . is not a reason to oppose amendment altogether."); Tribe & Cassell, *supra* note 54, at B5.

attention to victims exists, as Tribe seemingly asserts, despite state constitutional amendments and a plethora of victim laws, merely adding language to the Constitution will not produce commitment to change either.<sup>67</sup>

Some of Tribe's concerns, as well as those of other advocates of the amendment, are with the *appearance* of fairness and due process for victims. These people argue that victims have been harmed and ought to have some special participatory rights that enable them to tell courts what they think and how they feel about their cases. Professor Mosteller has labeled this the "participatory" rationale for creating constitutional rights for victims.<sup>68</sup> Puzzlingly, if victims have a fundamental right to participate, they ought to have a right not to participate as well. A victim can be traumatized and denied autonomy and choice when forced to prosecute, which, under current law, can and does occur.<sup>69</sup> Yet, Tribe nowhere addresses a right not to be coerced into cooperating.

Further, in terms of participation in the formation and adoption of laws, including legal rights and remedies, victims are hardly in need of special constitutional protection. The success of victim interest groups in changing law through the democratic process cannot be denied: No one can argue with a straight face that legislatures and representatives have been deaf to victims' concerns about sentencing, probation, parole, and defining substantive offenses. Victims are hardly a persecuted group or a discrete and insular minority whose participation in the process has been blocked.

To give victims a meaningful, rather than a symbolic, right to participate further as individuals in criminal proceedings requires more justification than has been offered. An extremely individualized criminal justice process, in which we create fundamental rights for individuals to use the power and resources of the State to pursue their own ends, would require greater justification and thought than Tribe or anyone else has provided. No serious scholar or practitioner would advocate a return to reliance on private prosecution and enforcement of the criminal law for a number of reasons, not the least of which is the need for consistency, certainty, coherence, and equal application of the criminal law. The privatization of criminal law seems ill-advised, as it would introduce more, not less, discretion into the system.

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<sup>67</sup>See Tribe & Cassell, *supra* note 54, at B5. This is true since most versions of the proposed amendment do not provide victims with meaningful ways to enforce their rights.

<sup>68</sup>See Mosteller, *supra* note 63, at 458-63 (suggesting that victims already often participate to some extent in criminal proceedings).

<sup>69</sup>See *infra* Part IV (discussing author's personal experience with prosecution of rape incident).

*D. The "Avoiding Trauma to Victims" Argument*

Another reason given by victim's rights advocates to justify a constitutional amendment has been that the process often "retraumatizes" them. This assumes that all crime victims suffer from trauma. While the current limitation of the proposed amendment to victims of violent crime<sup>70</sup> seems facially to include only those who have suffered extreme trauma, the degree of trauma even violent crime produces is quite variable. Moreover, to the extent that having to talk about the crime causes trauma, it is unclear how one could structure the legal process to avoid trauma.

A developing body of research indicates that many victims of extreme trauma, whether directly or indirectly, as with those who survive the killing of a loved one, *do* face the sometimes-overwhelming task of recovering from the trauma. Some never recover. Others recover quite rapidly. It is the case that feelings of anger, fear, betrayal, loss, mourning, guilt, shame, helplessness and hopelessness, isolation from others, numbness, and denial are all common reactions to violence and extreme trauma generally.<sup>71</sup> No one single feeling or emotion necessarily predominates in most victims—that is, victims may feel rage at one moment and terrible grief or fear the next. Trauma also can affect a victim's perceptions and behaviors *after* the event. The effects of trauma can render victims, particularly close to the time of the trauma, exquisitely sensitive to the reactions and actions of others, including police, prosecutors, defense lawyers, and judges. After a traumatic event, a victim's perceptions of and sensitivities to danger and betrayal are magnified, so that victims may perceive even the best-intentioned actions or statements from others as betrayals or assaults; anything that is less than sensitive to the individual's experience can be perceived as a major problem with "the system." In the context of criminal prosecutions, where the adversary process emphasizes winning and losing, anything, no matter how neutral, can be perceived as helping the offender at the victim's expense.

Trauma might lead victims to want to speed up the process—to get it over with—in the hope that somehow this will make the anguish go away. Conversely, victims may want to slow down the process in order to gain some

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<sup>70</sup>See S.J. Res. 3, 106th Cong. § 1 (1999) (limiting constitutional amendment to "victim of a crime of violence").

<sup>71</sup>See generally JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* 237–44 (2d ed. 1997) (discussing physiological and social effects of violence against women); see also DEBORAH SPUNGEN, *HOMICIDE: THE HIDDEN VICTIMS* 17–61 (1998); Henderson, *supra* note 2, at 956–64 (describing psychological impact of violent crime on victims); Lynne Henderson, *Co-Opting Compassion: The Federal Victim's Rights Amendment*, 10 ST. THOMAS L. REV. 579, 589–90 (1998) [hereinafter Henderson, *Co-Opting Compassion*] (stating that violent crimes "cause a number of psychological harms").

distance and relief from pressure. For some victims, notice about hearings may rekindle trauma. For others, notice may provide feelings of predictability and control that offset the feeling of helplessness many experience. While legal procedures might indeed be triggers for reliving the trauma, other things also can trigger such flashbacks—a sound, a sight, a place, a smell. Thus, it is not particularly easy to attribute trauma to the legal process alone.

Building a criminal process around these difficulties, particularly because we still lack empirical information on how the legal system can best avoid increasing the trauma victims suffer, seems ill-advised, in light of other important concerns. For example, according to one author, many families and friends of murder victims transfer their anger to the defense attorney.<sup>72</sup> Surely the rage at defense lawyers ought not be the basis of depriving defendants of effective assistance of counsel, even if it is entirely understandable. Moreover, it is not only the criminal process that is traumatic for victims—natural disasters and torts can produce extreme trauma.<sup>73</sup> Both involve interactions with government agencies and, in some instances, courts, that “retraumatize” victims through unresponsiveness, bureaucratic delay, criticisms of, or attacks on, the victim’s character and claims, and so forth.<sup>74</sup> Again, we are left with the question of what is so special about crime victims, who exactly is traumatized by the process, and how.

### *E. The Therapeutic Rationale for Victim’s Rights*

One of the humane impulses behind the victim participation rationale is that the victim’s trauma ought not be made worse by inattention. Another claim is that giving victims rights is somehow therapeutic. While telling the story of victimization may be part of recovering from trauma, this does not relate to many of the proposals for victim’s rights, and therapeutic uses of narratives may not easily translate for legal proceedings.

After I testified against the adoption of a constitutional amendment in 1997,<sup>75</sup> several supporters of the amendment approached me. They wanted to tell me the stories of their loved ones’ murders and murderers, of prosecutorial errors, of beliefs the killings should have never happened but for failures

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<sup>72</sup>See SPUNGEN, *supra* note 71, at 47 (stating that many victims, or friends and relatives of victims, feel anger toward police).

<sup>73</sup>See *id.* at 99–100, 110.

<sup>74</sup>For a stunning example of loss, wrongdoing that was covered up, threats, legal malfeasance and bungling, and trauma to survivors in a toxic torts case, see JONATHAN HARR, *A CIVIL ACTION* (1995).

<sup>75</sup>See *Hearings on S.J. Res. 6. supra* note 9, at 75 (statement of Lynne Henderson). The prepared statement, although properly placed in the record, does not appear in the first printing of these hearings.

in the system, and their support of the amendment. They seemed like nice people who wanted the public to know of their suffering. But these mothers of murder victims were from California, a state that has twice amended its constitution in the name of victim's rights.<sup>76</sup> Indeed, California has been far from neglectful of victims' concerns in the past fifteen years. In California, victims have rights to notice, participation at sentencing, consultation on plea bargains, restitution, and so on.<sup>77</sup> Preventive detention exists, as do harsh sentencing laws. Yet, at least these victims were no "happier" for it—perhaps because law alone cannot take away the trauma, and identifying rights invites the question of which individuals are to enjoy these rights by virtue of their status as "victims."

Identifying who should be able to tell their stories is not easy. Both the trauma argument and the therapeutic rationale assume that the status claim of crime victim and trauma is noncontroversial. As self-evident as this initially appears, particularly if the amendment remains applicable only to victims of violent crime, it is not really so obvious. If harm is the deciding factor, then drawing lines becomes difficult, and pressures on legislatures to expand the definition of a "victim of a crime of violence" may be strong.<sup>78</sup> The line between an individual victim and the larger community blurs when the issue of what Spungen terms "co-victimization"<sup>79</sup> arises. The expansion of victim impact statements to include testimony of family members and people who were close to the deceased in death penalty cases—testimony that includes the effects of the murder on the survivors—ought to make it clear that lines cannot easily be drawn in other cases where the impact of the crime affects others close to the victim or who witnessed the offense. Co-victimization occurs when a violent crime has a traumatic effect on one other than a statutorily defined victim and undermines community safety and security.

Even identifying "family members" in homicides as those who count as victims is not self-evident: changing concepts of families, extended family relationships in some subcultures, house mates, lesbian and gay couples, and intimate friends all render a simplistic limitation on the claim of harm to

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<sup>76</sup>See Henderson, *supra* note 2, at 937–38. 953 n.87 (citing CAL. CONST. art. 1 §§ 12, 28(c)).

<sup>77</sup>See CAL. CONST. art. 1 §§ 12, 28(c).

<sup>78</sup>S.J. Res. 3, 106th Cong. § 1 (1999). For example, residential burglary is an offense that requires no personal violence whatsoever. Yet, it is considered a very serious felony, and the intrusive and invasive aspects of the crime produce considerable trauma for many victims.

<sup>79</sup>See SPUNGEN, *supra* note 71, at 8–10. "Co-victim" is the term Spungen applies to people traumatized by a homicide, primarily immediate family and friends. *Id.* at 9. Spungen takes careful note of the myriad circumstances of homicide beyond our stereotypes, recognizing that co-victims may also include co-workers, witnesses, neighbors, and entire communities. See *id.*

members of the immediate, so-called nuclear family difficult to justify. Neither is co-victimization limited to homicides nor a homicide victim's survivors. *Witnesses* to terrible crimes suffer trauma, and family, friends, co-workers, and partners suffer trauma when a loved one is raped, robbed, seriously assaulted, or kidnaped. Children growing up in homes where domestic violence occurs can suffer harm even if they are not themselves physically assaulted.<sup>80</sup> Should they all count as victims entitled to speak their minds? And what of the effects of crime on many communities, as in those "high crime" areas where people suffer from living in the equivalent of a war zone?

The lines blur even more in cases of victims who are also offenders. The example most often cited recently is that of the battered woman who fights back and is charged with assault or murder of the batterer.<sup>81</sup> Battered or abused children are victims but can also become perpetrators against other children or against their parents. Gang members can be almost simultaneously perpetrators and victims, as are prostitutes, drug dealers, drug addicts, alcoholics, and anyone who fights back with more than necessary force against an assault. Many of these scenarios involve individuals who qualify both as victims who would be entitled to rights and as defendants against whom rights could be asserted by their victimizers in order to continue abusing and controlling them.

The stark delineation between who does and does not count as a real victim becomes even more complicated: At what point should victim status attach? At the time the crime is reported, or only when charges are filed? Under the current amendment, victim's rights come into being upon the arrest of an offender, leaving a number of victims' and co-victims' interests unaffected. Under the current proposal, it is not all clear that rights continue once the prosecution determines not to proceed. Rape provides an illustration that this can undermine whatever promise the amendment holds out to victims. While several proponents of the victim's rights amendment have

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<sup>80</sup>Some argue that the effects of "child witnessing" can be as damaging to children as physical abuse of children. *See, e.g.,* Alan J. Tomkins et al., *The Plight of Children Who Witness Woman Battering: Psychological Knowledge and Policy Implications*, 18 *LAW & PSYCHOL. REV.* 137, 144 (1994).

<sup>81</sup>*See, e.g.,* *Hearings on S.J. Res. 6, supra* note 9, at 77-78 (statement of Donna F. Edwards) (stating that victim's rights amendment would adversely affect battered women who are themselves charged with crimes); *id.* at 168, 170 (statement of NOW Legal Defense Fund) (stating that constitutional guarantees afforded to criminal defendants are just as important—if not more—to battered women accused of striking back because batterers can use the amendment to retaliate); Letter from Chris Whipple, *supra* note 8, at 3 (expressing concern that Victim's Rights Amendment may affect personal safety of domestic violence victims when prosecuting offenses against abusers).

opined that rape victims will be better off under the amendment because they will be treated more sensitively,<sup>82</sup> there is absolutely no ground for this assertion. What it takes to remain a real rape victim is not influenced at all by this amendment. Rape cases remain very difficult to prosecute even under the best of circumstances. Given the skepticism that exists about the veracity of rape charges—and the mixed evidence as to whether the rate of false reporting of rape is higher than other offenses—a woman who is a rape victim may not be able to persuade authorities that she is indeed a victim, much less see her case reach the point where a constitutional right attaches.<sup>83</sup> Moreover, nothing substantive in the amendment does anything to change the bias against rape or child sexual abuse victims that permeates the law and reality of these cases.<sup>84</sup>

There is some evidence that participation in court and legal proceedings may enhance a victim's evaluation of her experience. Professor Tyler's work suggests that people feel the legal system is legitimate if they are listened to by authorities. But perceptions of fairness are complex; moreover, Tyler's study did not focus on criminal law per se.<sup>85</sup> Nevertheless, being responded to in a positive way seemed to affect perceptions of fairness. Part of positive responding includes an authority's listening to the person's complaint, explanation, or story. A right to tell one's story to decision makers whose decisions have emotional and personal effects on the individual does seem only fair, if the criminal process is the only opportunity the victim has for speaking to legal authorities. It would appear to be a humane gesture, as Tribe believes, at least at first glance.<sup>86</sup> But when victims ought to tell their stories and why may not relate to the current scheme of the amendment, which

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<sup>82</sup>See William T. Pizzi, *Victim's Rights: Rethinking Our "Adversary System,"* 1999 UTAH L. REV. 349, 355–56.

<sup>83</sup>See generally David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194 *passim* (1997) (discussing screening of rape complaints and evidence supporting rape myths in certain situations).

<sup>84</sup>See STEPHEN J. SCHULHOFER, UNWANTED SEX 17–46 (1998) (stating that despite reforms, rape victims still face discrimination in criminal justice system); Lynne Henderson, *Without Narrative: Child Sexual Abuse*, 4 VA. J. SOC. POL'Y & L. 479 *passim* (1997) (describing difficulties of bringing child abusers to trial and evidentiary problems at trial); Lynne Henderson, *Getting to Know: Honoring Women in Law and In Fact* 2 TEX. J. WOMEN & L. 41 *passim* (1993) (describing history of sexual stereotypes and its contribution to sex bias in rape law); see also Bryden & Lengnick, *supra* note 83, *passim* (discussing bias in rape law assumptions and situations in which bias may evidence support).

<sup>85</sup>See TOM R. TYLER, WHY PEOPLE OBEY THE LAW 143 (1990) (stating that people's perceptions of fairness depend on how decisions affect their interests and how legitimate they believe system to be).

<sup>86</sup>See Tribe, *supra* note 22, at 1068–71 (noting constitutional value of allowing individuals to seek redress from courts as persons rather than objects).



focuses primarily—although not exclusively—on custodial hearings. Senate Joint Resolution 3 gives victims the right to be heard and to submit a statement in bail hearings, plea hearings, sentencing hearings, and parole hearings.<sup>87</sup> None of these proceedings necessarily invites the telling of the whole story, and it is absolutely unclear how many times in the criminal process it would be necessary for victims to be allowed to tell their stories for therapeutic value. Related to this is the question of the weight that authorities ought to give such statements.

The provisions of the current version of the Amendment are mostly silent on the reasons for victims presenting statements in court at—that is, what the relevance and substantive effects of those statements should be—and what procedures ought to be followed in permitting those statements. It seems doubtful—or remains to be proved—that victims would be content to make statements knowing that they would have very little, if any, legal effect. Without proper grounding for victim's rights, knowing what substantive meaning they should have becomes difficult. Without substance, the rights become meaningless and merely symbolic.<sup>88</sup>

The one substantive factor provided for in some versions of the amendment involving custody determinations is “consideration for the safety of the victim in determining any conditional release.”<sup>89</sup> This provision may mean that the victim's story is relevant only as far as it concerns evidence of direct threats or possible retaliation by the accused, but it also could encompass a victim's statements of psychological or emotional distress if the accused is released, even if the accused presents no danger to the victim or the community. On the other hand, victims might state that they feel completely safe. The proposed amendment does not indicate the weight courts should give the victim's opinion, unless the weight derives from other portions of the amendment. If the victim opposes release of an accused before trial, ought that be determinative in denying bail? Section 3 of Senate Joint Resolution 3 indicates that exceptions to victim's rights may exist only if

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<sup>87</sup>See S.J. Res. 3, 106th Cong. § 1 (1999).

<sup>88</sup>Professor Robert Mosteller has documented a trend in the various formulations of the proposed amendment away from victim participation towards enhancement of prosecutorial concerns. See Mosteller, *supra* note 63, at 454 & n.29 (suggesting that amendment's focus is on prosecutorial issues and that amendment is likely to be of merely symbolic import to victims); Robert P. Mosteller, *Victims' Rights and the Constitution: Moving From Guaranteeing Participatory Rights to Benefitting the Prosecution*, 29 ST. MARY'S L.J. 1053, 1058–64 (1998) [hereinafter Mosteller, *Victims' Rights and the Constitution*] (stating that, under Amendment, “rather than taking power or resource from government and giving it to victims, the taking is from defendants”).

<sup>89</sup>S.J. Res. 3, 106th Cong. § 1 (1999).

there is a "compelling interest."<sup>90</sup> Given the usual constitutional application of the compelling interest test, virtually no justification for denying victim's rights will likely pass muster. If a victim's safety is a compelling state interest, then virtually no defendant would be released from custody if the victim objected. Whether the State had to demonstrate compelling reasons *not* to release offenders when victims advocate their release is not obvious either.

Some of the amendment's proponents suggest that victim impact statements are cathartic and healing. Further, a narrative of pain and suffering, of rage and terror, of life before and life after is something many victims—although hardly all—may want to tell courts and juries. For example, Professors Pizzi and Perron argue that in Germany, victims can have their own attorneys and participate both as witnesses and co-prosecutors in a narrow category of serious offenses.<sup>91</sup> Pizzi and Perron note that few victims avail themselves of the right except, interestingly, in sexual assault cases.<sup>92</sup> They go on to observe that a primary goal of a criminal trial may be "to provide a cathartic and beneficial effect for victims,"<sup>93</sup> presumably sexual assault victims, as few others avail themselves of the opportunity. If so, "such benefits will more likely accrue to victims in a system that not only permits them to tell everything they know about the crime in their own words, but actually prefers such testimony to that which has been shaped and prepared" by lawyers.<sup>94</sup> They cite no support, however, for the claim of catharsis.

Pizzi and Perron acknowledge that the German system is quite different from the American one, but the suggested inference that the German system is "better" for crime victims is inescapable. It is not clear, however, that the authors present a convincing empirical argument that German procedure is less stressful<sup>95</sup> or that victims are happier with the way their cases proceed and are resolved in Germany than in the United States. First, the authors do not discuss victim satisfaction with the process. In addition, the German civil law system combines the tort action with the criminal case, is nonadversarial, does not involve juries, and uses judges as investigators as well as decision makers, making comparisons difficult. Given the enormous differences in the laws and practices of the two countries, it would, of course, be very difficult to make absolute cross-cultural comparisons of this type. Yet, one could at least design studies of victim attitudes, experiences, and emotional well-being

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<sup>90</sup>*Id.* § 3.

<sup>91</sup>See William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37, 54–59 (1996).

<sup>92</sup>See *id.* at 58–59. They do not explain or speculate as to why this is so.

<sup>93</sup>*Id.* at 44.

<sup>94</sup>*Id.*

<sup>95</sup>See *id.* at 45–47.

in the United States and Germany to determine if trauma is higher and satisfaction lower in the United States than in Germany. Only then could we say with any assurance that the system is less traumatizing to victims.

The persistence of the notion that testimony is cathartic is utterly unsupported by empirical evidence. In fact, some disagree that telling a trauma narrative aids victims of extreme trauma to heal at all.<sup>96</sup> Claiming that allowing victims to tell their stories in full without interruption or questioning mistakes the purpose and reason for trauma narrative in therapeutic contexts as fungible with the purpose and reason for trauma narrative in a legal and fact-finding setting. The purpose of narrative in therapy is to enable people to understand the experience, come to terms with the loss, anger, grief, fear, and isolation caused by trauma, and integrate the experience into their lives. Telling the story over and over may be required as the victim integrates the experience over time, and the narratives might change substantially as old issues are resolved and new ones surface.<sup>97</sup> Therapists should not be detectives demanding proof or verification of factual statements, nor ought they sit in judgment of a client or the perpetrator. Therapists ought not tell clients what they ought to do in most instances, although they can offer advice and support in helping the client make decisions about responses. Similarly, the role of support groups for victims is not to tell victims what

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<sup>96</sup>See Stevan M. Weine et al., *PTSD symptoms in Bosnian refugees 1 year after resettlement in the United States*, 155 AM. J. PSYCHIATRY 562, 562–64 (1998) (stating that “common wisdom is that it is not helpful to tell trauma story, but study of ‘testimony therapy’ found helpful to twenty Bosnian survivors of ethnic cleansing”). Testimony therapy involves a long and careful process of telling the trauma narrative. See HERMAN, *supra* note 71, at 176–87. The persistent Hollywood version of the one cathartic telling that produces complete recovery is completely inaccurate. The most recent version of this may be illustrated in the film *Good Will Hunting*; after a breakthrough and admission that he had been horribly abused as a foster child, we are led to presume that the hero will no longer be violent or act out as he drives into the sunset to “see about a girl.” *GOOD WILL HUNTING* (Miramax 1997). Herman writes,

This image of catharsis, or exorcism, is also an implicit fantasy in many traumatized people who seek treatment. It is understandable for both patient and therapist to wish for a magic transformation, a purging of the evil of the trauma. Psychotherapy, however, does not get rid of the trauma. The goal of recounting the trauma story is integration, not exorcism.

*Id.* at 181. Dr. Lenore Walker notes that

it is dangerous to make any unilateral conclusions about how testimony impacts on women violence victims. Clinical data from the field makes it clear that for some women, testifying is a horrendous experience and sets back their healing but for others it is wonderful and saves several years of psychotherapy. It seems to depend on the attorneys, the court, the victim herself, and the opportunity to feel empowered no matter what the outcome of the legal case.

Personal communication from Lenore Walker (Mar. 3, 1999) (on file with author).

<sup>97</sup>See HERMAN, *supra* note 71, at 214–36 (recounting various group therapy sessions).

they ought or ought not feel, think, or do. Rather, support groups should provide a safe place to share their stories, experiences, and strategies for coping and healing with others who have like experiences.<sup>98</sup> Law demands a quite different approach to narrative—even trauma narrative.

The essence of law includes judgment, and reaching judgment involves normative evaluations as well as factual ones. In legal settings, the purpose of the victim's narrative is not to provide therapy or catharsis, but to aid understanding and evaluation of facts and circumstances relevant to the legal matter. Even a free-form narrative of the type Pizzi describes is open to interruption, questioning, and evaluation.<sup>99</sup> What may be emotionally very relevant to the victim, the victim's story, or the victim's experience may not hold any particular legal importance to the issues at hand. The anguish of the trauma narrative does not seem relevant to many hearings that might effect a defendant's release from custody, such as suppression motions which in theory could lead to suppression of evidence and release of the offender. The fear or rage the victim may feel toward the defendant does not mean that the defendant's rights should be denied.<sup>100</sup> In addition, it may be harmful to encourage victims to speak of trauma in an unstructured way in court: Empathic listening is of course part of good judging, but judges neither are nor should be therapists.<sup>101</sup>

Accommodating victim narratives to lessen trauma in telling would require radical changes in the law of crime, criminal procedure, and evidence, constructing a proceeding in which an uninterrupted free-form statement may take place. Under current law, at a minimum, the proceeding must be one in which the guilt of the defendant is not at issue and the rules of evidence do not apply. Otherwise, the Sixth Amendment's Confrontation Clause should apply, as should the rules of evidence.<sup>102</sup> Grand jury proceedings might provide one possible vehicle for telling of the trauma story without interruption. The defense is not present and cannot cross-examine the victim-witness.

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<sup>98</sup>See *id.* at 218 (stating that group therapy can provide sense of safety during early stages of recovery from traumatic events); SPUNGEN, *supra* note 71, at 159–64 (stating that group therapy's purpose is to provide safe haven for freely discussing feelings).

<sup>99</sup>See Pizzi & Perron, *supra* note 91, at 42–44 (noting narrative style of testimony taken by German courts).

<sup>100</sup>See Henderson, *Co-Opting Compassion*, *supra* note 71, at 581–89, 597–601 (discussing role of rage in victim's rights movement).

<sup>101</sup>See Lynne Henderson, *Legality and Empathy*. 85 MICH. L. REV. 1574, 1575–77 (discussing importance of empathy for judges and lawyers). Empathic listening should not necessarily trump other concerns of justice and fairness, or even empathy with defendants. See *id. passim*; ROBIN WEST, CARING FOR JUSTICE 205–07 (1997).

<sup>102</sup>Of course, if the victim's interest in making a statement can only be limited by a compelling interest, it is unclear how the balance against the defendant's right to confront and cross-examine adverse witnesses would be struck. See *infra* Part II.G.

But one must be cautious here, too: If the prosecution in a given jurisdiction learns exculpatory evidence through the victim's testimony, it must disclose this to the defense. Indeed, in some jurisdictions, the grand jury transcript may be available to the defense in future proceedings. Moreover, grand jury members may question witnesses. In doing so, they may ask things the victim-witness finds hurtful. For example, since rape shield laws would not apply, a victim could be asked intrusive questions about her sexual history and behavior; a victim might find such questioning traumatic.

Another possible point in the process for the free-form narrative is at sentencing.<sup>103</sup> Most states and the Federal government already allow victims to appear and participate at sentencing and at parole hearings, and *all* states allow victim impact statements. Sentencing hearings formally give a victim the chance to tell at least some of her story and to share with officials the nature of the experience and the degree of impact it has had or is having to the extent that it is relevant to the imposition of the sentence. All states provide for restitution to victims, and the harms they suffer may be relevant to the extent restitution is defined. At the same time, the role of the victim in determining an offender's sentence remains open to challenge.<sup>104</sup> Further, if the victim (or the victim's family) puts her character into issue, the defense can and should challenge the characterization, if possible, when it can affect the sentence or the amount of restitution.<sup>105</sup>

The relevance of victim impact statements to most issues of sentencing still presents difficulties with the free-form narrative approach. Under current practice, the individual does not determine the sentence of the offender; the judge (or jury) does under sentencing rules adopted by the state legislature. Of course, nothing precludes taking the victim's concerns into account in determining sentences if a legislature so chooses, but what concerns ought to be relevant and why remains to be determined. If we wish some degree of consistency of punishment—a major reason for the enactment of the Federal

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<sup>103</sup>See Paul Gewirtz, *Victims and Voyeurs at the Criminal Trial*, 90 NW. U. L. REV. 863, 864, 878–79 (1996) (examining use of victim impact statements at sentencing).

<sup>104</sup>See GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS 198–201 (1995) (“[T]here is a danger that informal testimonials by the angry and aggrieved could generate excessive sentences serving primarily the need for revenge.”); Donald J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AM. CRIM. L. REV. 233 *passim* (1991) (discussing benefits and disadvantages with victim's role in sentencing, and proposing limitations on victim's role); Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361 *passim* (1996) (arguing against use of victim impact statements in capital cases).

<sup>105</sup>See Randall Coyne, *Avoiding Payne: An Analysis of Victim Impact Evidence*, 8 ST. JOHN'S J. LEGAL COMMENT. 65, 76–80 (1992) (discussing defense obligation to investigate victim's character and family in capital cases).

Sentencing Guidelines—then standards for what harms to the victim are relevant must be consistent as well, and not subject to the whim of a particular victim or judge. As Donald Hall's research suggests, the use of victim impact statements could "result in uneven sentences for similarly situated defendants."<sup>106</sup> Vague standards, such as California's use of "vulnerability of the victim" as an aggravating factor under determinate sentencing, invite normative evaluations of victim worthiness that we may not wish to promote.<sup>107</sup>

### *F. The Right to Corrective Justice Argument*

Assuming that we can properly identify who is a victim and who is not for purposes of legal claims, surely those identified victims can assert a right to corrective justice. Victims have been harmed in some way by an offense, and the person who harmed them ought to be held accountable. Putting aside the complexities of determining the nature and applications of corrective justice, currently we have two basic legal mechanisms for achieving it. The tort system is supposed to provide for correction and compensation for harms to individuals. Tort law usually only requires proof of harm and proof that the defendant caused the harm. The victim controls the litigation and the trial as the plaintiff; her story, injuries, and damages are the focus. Perhaps because civil litigation is expensive and time consuming, and few have the resources to sue their assailants, together with the fact that many—but hardly all—who are guilty of criminal offenses are essentially judgment-proof, the focus of corrective justice has shifted to the criminal process. While frustration with the tort system is understandable, these practical realities do not necessarily justify victim participation in criminal prosecution under current theory and practice in the United States.

There are many differences between the concerns of tort and those of the criminal process. The State and the community are negatively affected by crime, and the criminal law is the community's response.<sup>108</sup> In criminal cases,

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<sup>106</sup>Hall, *supra* note 104, at 257; *see also id.* at 246–47 (stating that victims have different view of effectiveness of victim impact statements than judges and others in criminal justice system).

<sup>107</sup>*See* Bandes, *supra* note 104, at 362–82 (arguing that "[v]ictim impact statements permit, and indeed encourage, invidious distinction about the personal worth of victims"); Henderson, *supra* note 2, at 992–94 (stating that assessing victim's behavior in sentencing would put victim on trial). *But see* David D. Friedman, *Should the Characteristics of Victims and Criminals Count?: Payne v. Tennessee and Two Views of Efficient Punishment*, 34 B.C. L. REV. 731, 741–43 (1993) (asserting that microeconomic and moral arguments of victim worthiness are relevant and desirable).

<sup>108</sup>*See* Henderson, *supra* note 2, at 1009–10.

it is the State and the community that bear the burden and expense of identifying, prosecuting, punishing, imprisoning, and executing offenders. Individuals do not bear these expenses beyond their contributions as taxpayers to the funds that support all prosecutions. (The individual victim or victims may, however, bear the costs of missed work, child care, and transportation to attend court or meet with authorities.) The criminal process is more concerned with whether a defendant ought to be held culpable and be punished for committing the offense, and the reason for that emphasis is largely one involving moral calibrations of blameworthiness and concerns with rationales for inflicting pain or punishment on the offender. These considerations have little to do with the actual effects on the victim.

The different interests and concerns of the State and the victim in criminal law may be the reason that George Fletcher's view of victim's rights suggests a severance between the victim and the State in terms of determining moral culpability.<sup>109</sup> Drawing on the German approach to criminal law, he argues that the victim only ought to have a right to see her assailant declared guilty of perpetrating the crime in terms of the act. According to Fletcher, the State's interest in the criminal sanction takes precedence over victims in the second stage of the trial, which decides issues of moral culpability.<sup>110</sup> I have argued elsewhere that the German approach would probably satisfy neither victims nor victim's rights advocates in the United States.<sup>111</sup> The approach certainly guarantees neither perfect nor better results from the perspective of victim's rights advocates. For example, the light sentence given to the man who stabbed Monica Seles<sup>112</sup> may have been an anomaly, but the failures of the criminal process in the United States so frequently cited by victim's rights advocates are likewise anomalous.

Although the public (and perhaps many victim advocates) focuses on the harm caused by a criminal defendant's conduct, harm is not necessarily the basis for punishment.<sup>113</sup> Generalized concerns of deterrence, retribution, incapacitation, and rehabilitation are not necessarily tied to actual harm to victims. The criminal process is concerned with harm only so far as the

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<sup>109</sup>See FLETCHER, *supra* note 104, at 180–88, 245–47 (suggesting that juries clarify acquittal by stating whether defendant's act is criminal because it violated victim's right and whether defendant is accountable for act).

<sup>110</sup>See *id.*

<sup>111</sup>See Lynne Henderson, *Whose Justice? Which Victims?*, 94 MICH. L. REV. 1596, 1605–06 (1996) (reviewing FLETCHER, *supra* note 104).

<sup>112</sup>See Johnette Howard, *Home Alone: Her Attacker Walks Free, But Monica Seles Still Lives in Troubled Isolation*, SPORTS ILLUSTRATED, Apr. 10, 1995, at 44.

<sup>113</sup>See Stephen J. Schulhofer, *Harm and Punishment: A Critique of the Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1498–1507 (1974) (arguing that harm focus overlooks important concerns in criminal law).

definition of the crime includes a harm; we punish many offenders even when the substantive crime does not involve physical harm to a victim, and even though the crime might entail an emotional harm such as fear and might further be classified as a violent crime. For example, the crime of robbery generally does not depend on the use of force, but the threat of force that places a victim in fear. In other crimes, the force may not be aimed at the victim at all—picking pockets is forcible, but only in the sense that physical action is required to take the wallet from the unsuspecting victim. The current amendment's term, "crime of violence,"<sup>14</sup> would probably include attempted murder or other attempted violent crimes; yet, attempts do not require that any harm occur. Assault with a deadly weapon does not require a resulting physical harm. Burglary requires no harm whatsoever, although it is traditionally considered a very serious crime.

The effect of a serious crime on an individual often ought not be used to determine the degree of punishment. For example, the fact that a rape survivor copes well with her experience and suffers little or no post-traumatic stress is not a reason to say that the crime is not among one of the most serious offenses against the person and ought to be punished accordingly. Similarly, a robbery victim may not be physically injured and may be quite resilient emotionally, but that does not mean that robbery is a trivial offense, or that the victim is less a victim than one who suffers from severe post-traumatic stress disorder as a result.

### *G. Offsetting the Rights of Defendants*

Another argument for victim's rights is that the victim's rights can be balanced against, or, better yet, trump, the defendant's constitutional rights. By trotting out a list of rights enjoyed by the accused, supporters of a victim's rights amendment gain a politically effective and graphic argument for such an amendment. A list of rights for the accused (usually including only the hated Bill of Rights provisions of the Fourth, Fifth, Sixth, and Eighth Amendments, but not the ex post facto, bill of attainder, or habeas corpus clauses in the Constitution) is held up and juxtaposed against the absence of any specific rights for crime victims. Senator Diane Feinstein, a co-sponsor of the amendment in the Senate, frequently refers to this list. The injustice of granting rights to criminals who do great harm and not to victims is rhetorically and visually powerful. Lost in the picture is the notion that the Bill of Rights provisions exist because of our commitment to a liberal-rights-based democracy rather than an authoritarian system, that the provisions may

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<sup>14</sup>S.J. Res. 3, 106th Cong. § 1 (1999).



serve as brakes against governmental abuse of citizen's rights,<sup>115</sup> and that such rights may exist to protect minorities against majority tyranny.<sup>116</sup> If rights are not to be merely fanciful abstractions or symbolic tokens, some form of recognizing these rights is essential.<sup>117</sup>

The amendment's advocates, however, argue that the "rights of the victim" are at a minimum to be "balanced" against the defendant's rights to be free from unreasonable searches and seizures, to receive *Miranda* warnings, bail, a jury trial, and the right to confront adverse witnesses. How this balance is to be struck is left unclear—"courts balance rights all the time" is hardly an answer to concerns about the effects of the amendment on the defendant's rights. At least some Justices and judges are adverse to any balancing of rights.<sup>118</sup> Further, the argument that victim's rights are necessary for balancing fails to recognize that courts already balance the rights of defendants against the interests of the State in criminal procedure, often to the State's benefit.<sup>119</sup> Finally, the most current version of the amendment provides that the government can abridge victim's rights only if there is a compelling state interest. This suggests, at a minimum, a desire to place a thumb on the scale against defendants when balancing does occur.

Two aspects of the victim's rights proposals suggest that victim's rights are meant to trump defendant's rights as well as governmental interests in criminal cases. First, the addition of requiring a compelling interest to override a victim's rights shows an intent for victims to trump defendant's

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<sup>115</sup>See *Hearings on S.J. Res. 6*, *supra* note 9, at 45 (statement of Roger Pilon) (stating that Constitution's purpose was to limit federal government).

<sup>116</sup>The "Madisonian paradox" of individual rights in a majority rule society has, of course, been discussed at length. See *supra* notes 12–32 and accompanying text; Donald J. Hall, *Victims' Rights Amendments to Constitutions: Proceed with Caution*, 27 VAND. LAW., Jan. 6, 1997, at 14–15 (quoting Justice Hugo Black's statement that constitutional rights are aimed at "protect[ing] the weak and the oppressed from punishment by the strong and the powerful").

<sup>117</sup>See Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289 *passim* (1995) (proposing that constitutional rights should be enforceable irrespective of state law or congressional authorization).

<sup>118</sup>See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–80 (1989) (arguing that while balancing factors may have appeal it is "[m]uch better . . . to name a clear, previously enunciated rule that one can point to in explanation of the decision"); Kathleen M. Sullivan, *Foreword—The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 24–27, 60–62 (1992).

<sup>119</sup>Although the State has no "right" to a fair trial, this does not mean that the Court does not take the State's interests seriously in balancing those interests against the rights of the accused. For example, in *United States v. Leon*, 468 U.S. 897 (1984), the majority noted that "[t]he substantial social costs exacted by the exclusionary rule . . . have long been a source of concern" in balancing, while holding that there is a "good faith" exception to the warrant requirement. *Id.* at 897–907.

rights. Second, the drafters' refusal, thus far, to add language providing that the amendment shall *not* detract from a defendant's constitutional rights also indicates an intent for victim's rights to trump. The argument that victim's rights are meant to undermine the rights of defendants is well developed elsewhere.<sup>120</sup> Thus, this discussion presents only a brief summary of those arguments. On the other hand, no one, to my knowledge, has examined the possible effects of the proposed victim's rights amendment on the First Amendment, and this section will briefly examine possible First Amendment concerns.

### 1. *The Fourth, Fifth, and Sixth Amendments*

Much of the support for the victim's rights amendment comes from those who decry the Warren and Burger Courts' decisions interpreting the Fourth and Fifth Amendments. Particularly vexing to many are the exclusionary rules that prevent introduction of evidence obtained in violation of a defendant's constitutional rights under the Fourth, Fifth, and Sixth Amendments. Cassell has long waged a battle against the *Miranda*<sup>121</sup> rule, which occasionally leads to the suppression of evidence of confessions.<sup>122</sup>

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<sup>120</sup>See Henderson, *supra* note 2, at 968–86 (stating that victim's rights reforms may only deprive defendants of rights without satisfying needs of victims); Robert P. Mosteller, *Popular Justice*, 109 HARV. L. REV. 487, 487–88 (1995) (reviewing FLETCHER, *supra* note 104); see also Jeff Brown, *Origins and Impacts—Proposition 8: A Public Defender's Perspective*, 23 PAC. L.J. 881, 881–87 (1992) (stating that California's reforms “nullified a long standing body of California law painstakingly crafted to protect the rights of the accused”).

<sup>121</sup>*Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>122</sup>Compare Paul Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—and from Miranda*, 88 J. CRIM. L. & CRIMINOLOGY 497, 503 (1997) (arguing that *Miranda* does nothing to protect innocent accused, but only may help “career criminals . . . to avoid interrogation”), and Paul Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1059 (1998) (stating that after *Miranda*, police solved cases at lower rates), with Richard Leo & Richard J. Ofshe, *Using the Innocent to Scapegoat Miranda: Another Reply to Paul Cassell*, 88 J. CRIM. LAW & CRIMINOLOGY 557, 558 (stating that Cassell's argument that *Miranda* hurts innocent has “no empirical foundation”), Stephen Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 506–15 (1996) (criticizing Cassell's reliance on old, flawed studies), Stephen Schulhofer, *Miranda and Clearance Rates*, 91 NW. U. L. REV. 278, 280–87 (1998) (arguing that “*Miranda*'s burden on law enforcement is much lower now than in immediate post-1966 period” and that *Miranda*'s costs, “if any, are justified by the constitutional mandate”), and John J. Donohue III, *Did Miranda Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147, 1153–71 (1998) (criticizing Cassell and showing that *Miranda* has post-1966 statistical significance only for larceny and overall crime clearance rates).

Professors Pizzi, Amar, and others likewise condemn exclusionary rules and the adversary system more generally.<sup>123</sup>

Hatred of the Warren Court's criminal procedure jurisprudence (or the adversary system) masked as support for victim's rights is cynical in the extreme,<sup>124</sup> as are the claims made about how these precedents and protections of defendants' rights lead to massive injustice.<sup>125</sup> In these arguments, empiricism plays no role: Evidence that the reasons for the rules are sound or that the effect of the exclusionary rule on most cases is minimal or nonexistent does not fit with the belief system that criminals are regularly turned loose on legal technicalities.<sup>126</sup> Critics of constitutional criminal procedure believe it impedes what should be the primary purpose of criminal

<sup>123</sup>See AMAR, *supra* note 13, at 158 (stating that presumption of innocence "dip[s] heavily in favor of the defendant"); Henderson, *supra* note 2, at 982–86 (discussing both sides of debate about benefits and costs of exclusionary rules); Pizzi, *supra* note 82, at 356–63 (stating that adversary system creates problems because its goal is to find winner, not truth); see also J. Clark Kelso & Brigitte A. Bass, *The Victims' Bill of Rights: Where Did It Come From and How Much Did It Do?*, 23 PAC. L.J. 843, 843–45 (1992) (decrying failure of California's Proposition 8 because of criminal justice establishment).

<sup>124</sup>See Henderson, *supra* note 2, at 1020–21 (stating that nonvictims are unable to hear a victim's story without "translat[ing] . . . the anguish of victimization into a condemnation of the offender"); Henderson, *Co-Opting Compassion*, *supra* note 71, at 591 (noting that victim's rights supporters channel victim's rage "into an attack on judges, defense lawyers and defendants"); Kelso & Bass, *supra* note 123, at 942–53 (explicitly stating that California's Proposition 8 meant to overturn California Supreme Court's interpretations); Grover C. Trask II & Timothy Searight, *Proposition 8 and the Exclusionary Rule: Towards a New Balance of Defendant and Victim Rights*, 23 PAC. L.J. 1101, 1105 (1992) (stating that California's Proposition 8 showed that voters perceived courts as "over-protective . . . of criminal defendants").

<sup>125</sup>See Henderson, *supra* note 2, at 942–53 (discussing agenda of recent victim's rights supporters); Richard A. Leo, *The Impact of Miranda Revisited*, in *THE MIRANDA DEBATE: LAW, JUSTICE & POLICING* 208, 208 (Richard A. Leo & George C. Thomas III eds., 1998) (1996) [hereinafter *THE MIRANDA DEBATE*]; Steven J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishing Small Social Costs*, in *THE MIRANDA DEBATE*, *supra*, at 191, 194 (stating that studies showing injustice of *Miranda* are flawed); George C. Thomas, *Plain Talk About the Miranda Empirical Debate: A "Steady State" Theory of Confessions*, in *THE MIRANDA DEBATE*, *supra*, at 236, 237 (arguing that *Miranda* had little effect on confessions).

<sup>126</sup>"Cassell's readers are accustomed to a steady stream of speculative accusations that *Miranda* causes tens of thousands of suspects to escape conviction every year. See Leo & Ofshe, *supra* note 122, at 558.

proceedings: the search for truth.<sup>127</sup> This view, of course, overlooks the valid and competing concerns that are embodied in the Bill of Rights.<sup>128</sup>

Several scholars who advocate victim's rights in the United States have a distinct preference for the civil law system of criminal procedure. For example, Fletcher roundly condemns the adversary system, including various defense tactics and jury trials.<sup>129</sup> Yet, some evidence exists that individuals in civil law societies would prefer an adversary system,<sup>130</sup> that exclusionary rules operate in those systems,<sup>131</sup> and that victims can be and are questioned sharply and harshly at times.<sup>132</sup> Without massive changes in our constitutional law and practice, eliminating juries, cross-examination, rules of evidence, and defense lawyers is impossible. Before we ditch our traditions, we would need a great deal more information than has been provided thus far.

Victims and victim groups are also beginning to recognize that fair procedures and honoring constitutional rights are important to victims as well as defendants.<sup>133</sup> Beth Wilkinson, one of the prosecutors in the Oklahoma City bombing cases testified that the victims' families and surviving victims

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<sup>127</sup>This "search for the truth" rationale is one that has gained ground in the literature about constitutional criminal procedure, particularly from conservatives generally skeptical of exclusionary rules. For example, Akhil Amar makes the argument that the Bill of Rights provisions were only intended to aid the search for truth in criminal trials. *See* AMAR, *supra* note 13, *passim*.

<sup>128</sup>*See* Bandes, *supra* note 14, at 1372 n.5, 1391 (stating that "the presumption of innocence, evidentiary protections, . . . judicial integrity, and the control of governmental misconduct are all societal interests"); Henderson, *supra* note 2, at 983 (stating that "knock on the door at night [by police] is just as threatening to existence as the nighttime burglar"); Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109 *passim* (discussing value of *Miranda* to individual autonomy, judicial and prosecutorial integrity, and law enforcement).

<sup>129</sup>*See* FLETCHER, *supra* note 104, at 177-258.

<sup>130</sup>*See* TYLER, *supra* note 85, at 156 (stating that "American legal procedures seem very responsive to people's desires" when compared to European procedures).

<sup>131</sup>*See* CRAIG M. BRADLEY, *Overview*, in *COMPARATIVE CRIMINAL PROCEDURE* xv, xix (1999) ("A right against self-incrimination at trial, and against involuntary confessions, is now generally enforced, and the use of an exclusionary rule to force police to obey rules governing searches and interrogations is increasingly being used in most of the countries discussed in this book. *Miranda*-type warnings are also widely required.") (footnotes omitted); Craig Bradley, *The Exclusionary Rule in Germany*, 96 HARV. L. REV. 1032, 1036-37 (1983) (noting that American exclusionary rule is no mere aberration because it exists, albeit in different form, in Germany as well).

<sup>132</sup>*See* Pizzi & Perron, *supra* note 91, at 63 (stating that rape cases in Germany often entail "demanding and sustained questioning of the victim by the defense attorney").

<sup>133</sup>*See* Letter from Chris Whipple, *supra* note 8, at 2-3 (stating that victim's rights amendment is premature because it could compromise protections to victims that were also defendants').

uniformly asked me and the rest of the prosecution team to do two things on their behalf. First, prove to them and the jury that the defendants were guilty beyond a reasonable doubt . . . . Second, they asked us to prosecute the cases in a fair and just manner so that the convictions would be upheld on appeal.<sup>134</sup>

Victims are also often citizens, and as citizens, all have an interest in limiting governmental intrusion and abuse of power. A victim one day may be a defendant the next, and thus has an interest in fairness and due process that extends beyond the immediacy of the case in which she is a victim. While “winning at all costs” may be part of the American psyche, so is a concern for fairness. While resentment of criminals being turned loose on technicalities is very real, for vast numbers of us, constraints on government intrusions are equally important.<sup>135</sup> Ask African Americans how many times they have been stopped by police solely for the crime of “driving while black.” Ask any Latino or Latina who is a citizen how he or she feels about the demand for a green card from authorities, and a more complex picture of attitudes emerges.<sup>136</sup>

Another myth that operates throughout the victim’s rights literature is that criminal cases are endlessly delayed, usually but not always by wily defense counsel, and the victim “cannot heal” or “put the matter behind her” until there is a final judgment of guilt. This assertion is questionable, because healing takes place whether or not an offender is ever located, much less convicted. Nor does the healing process necessarily end with the successful resolution of a case. Nevertheless, numerous versions of the amendment have contained a right for the victim to have a “final resolution” of the case “free

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<sup>134</sup>*Testimony of Beth A. Wilkinson Before the Senate Judiciary Comm. on the Proposed Victims’ Rights Amendment* (Mar. 24, 1999) <<http://www.senate.gov/~judiciary/32499bw.htm>> [hereinafter *Wilkinson Testimony*].

<sup>135</sup>When I was in private practice, I noted that my upper-middle-class clients arrested for driving under the influence were often incensed that they were not immediately given a *Miranda* warning. When I pointed out to them that the officers had not yet asked them any questions, and therefore did not have to *Mirandize* until they did, they were baffled.

<sup>136</sup>The question of racial bias via police “profiling” has created a controversy recently as well as calls for empirical studies of a practice that appears to have strong anecdotal support as well as law enforcement denials of ethnic and racial bias. See, e.g., Jodi Wilgoren, *Police Profiling Debate: Acting on Experience, or on Bias*, N.Y. TIMES, April 9, 1999, at A21 (“Profiling—the use of race and ethnicity as clues to criminality—is at the heart of Federal and state investigations . . . . It is the subject of bills pending in Congress and dozens of state legislatures . . . .”); Venise Wagner, *ACLU sues to ban race-based traffic stops*, S.F. EXAMINER, June 4, 1999, at A6 (discussing action by ACLU on behalf of Latino attorney stopped along with other Latino drivers by California Highway Patrol as part of federally funded drug-interdiction program).

from unreasonable delay.”<sup>137</sup> At a minimum, the vision driving this provision is that defense lawyers routinely obstruct and delay the process by asking for frivolous continuances, filing frivolous motions, and being out-and-out lazy. Although the current proposed victim's rights amendment provides for consideration of the interest of the victim that any *trial* be free from unreasonable delay, the term “trial” could include retrials, if necessary, in the (unlikely) event of a reversal of a conviction on appeal. In addition, given that occasional reversals necessitate retrials, does “any trial without unreasonable delay” cover post-conviction appeals and habeas corpus actions, or does it simply apply to the initial adjudication of the offense?

The impact of the “freedom from unreasonable delay” clause on defendants' rights is far from clear. If it applies only to proceedings leading to initial conviction and sentence, it remains unclear whether it means that victims can oppose all defense requests for continuances. There are at least perceived tactical advantages for the defense in delaying a case: wearing down the other side, allowing evidence to grow stale, and allowing witnesses to forget or disappear. Nonetheless, there are legitimate reasons for delay as well: proper investigation and preparation of serious felony cases take time. When public defenders stagger under sixty to one hundred or more felony cases a year, the choice is either inadequate representation or allowing time to prepare and investigate on a shoestring budget. The same can be said for many district attorneys' offices:<sup>138</sup> inadequate investigation and preparation can lead to pressure to deal, which can lead to losing cases that perhaps could have been won. Forcing a case to trial can also lead to hasty prosecution and conviction of innocent people. Lazy lawyers exist, and perhaps the “reasonableness” language would allow judges to ferret out instances of dilatory tactics while recognizing the genuine need for time. Yet, judges already have great authority over granting continuances and extensions, and, in my experience, most seem to have no trouble exercising that authority. We do not need a constitutional amendment to enhance that power.

Another important individual right, the right to freedom of expression, and a “group” right, freedom of the press, may also be affected by the proposed amendment. Even if it is not obvious initially, the proposed amendment does raise First Amendment concerns, to which this Article now turns.

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<sup>137</sup>See, e.g., S.J. Res. 6, 105th Cong. § 1 (1997); *Proposal for a Constitutional Amendment to Provide Rights for Victims of Crime, Hearings on H.J. Res. 173 & 174 Before the House Committee on the Judiciary*, 104th Cong. 7 (1996).

<sup>138</sup>I am grateful to Professor George Fischer for reminding me of the fact that many district attorney's offices have inadequate resources.

## 2. *The First Amendment*

The First Amendment and its protection of freedom of speech and of the press seldom appear as villains in arguments for victim's rights. Deborah Spungen, who in her book on working with the survivors of homicide victims gives short shrift to the importance of other Bill of Rights provisions—much less any explanation for why victims ought to appreciate the value of those provisions—devotes an entire chapter to the media. She states, “The media are responsible for inflicting a second wound on the co-victim almost as often as is the criminal justice system.”<sup>139</sup> Nevertheless, the chapter indicates that the importance of media interests outweighs almost any victim concerns with intrusion, mischaracterization, harassment, and pain, not only in terms of existing law, but also in the author's apparent normative vision of the First Amendment. But if retraumatizing victims is a strong reason for giving them constitutional rights, then victims ought to have rights to prevent the media from intruding in their lives, “mischaracterizing” them or their loved ones, publishing their names and addresses, and so on.

Although Governor Cuomo expressed outrage at the Supreme Court decision striking down New York's “Son of Sam” Law, which would have mandated that all profits from a high profile killer's published account of his crime be paid to the victim's survivors,<sup>140</sup> and although at least some rape crisis workers and rape victims vigorously oppose disclosure of rape victims' names, despite the Supreme Court's decision to the contrary,<sup>141</sup> to my knowledge, everyone apparently concedes some primacy of the First Amendment. Perhaps this is because the “public's right to know” about crime is considered to outweigh victim's privacy concerns, although the public's interest in public prosecutions would seem an equally strong concern. Perhaps because the amendment doesn't concern defendant's rights directly—and, realistically, the press is usually not sympathetic to anyone accused of a crime—advocates of the amendment have not argued for a balancing of victim's rights against the rights of the press or free speech rights of others. Nevertheless, balancing is a method used in First Amendment jurisprudence, and throwing victim's rights onto the scale arguably could create an argument that a victim's concerns with privacy and escaping

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<sup>139</sup>SPUNGEN, *supra* note 71, at 224.

<sup>140</sup>See Cuomo, *supra* note 49, at 15–17 (calling *Simon & Schuster v. New York State Crime Victim's Board*, 502 U.S. 105 (1991), “a setback to the Progressive enhancement of victims' rights”).

<sup>141</sup>See *The Florida Star v. B.J.F.*, 491 U.S. 524, 525 (1989) (holding that Florida law prohibiting publication of sexual offense victim might be constitutional in some instances, but truthful publication of victim's name obtained lawfully protected by First Amendment).

trauma justify a balance against freedom of the press or freedom of speech. This might be true in the case of "Son of Sam" laws, where the victim's constitutional right to restitution could be used to sue those few defendants who publish their stories, as well as authors who work with offenders to write "true crime" articles and books for profit.

The realization of the victim's rights amendment depends in large part, of course, on substantive and procedural legal changes that would have to be instituted after the amendment's passage. Realization of those rights also depends on whether there is any meaningful enforcement mechanism, an issue that Susan Bandes discusses in this Symposium<sup>142</sup> and that others have addressed elsewhere.<sup>143</sup> However, another important factor to consider is whether victims will have a right to counsel under the amendment, as representation in legal proceedings affecting constitutional rights would appear to be of vital concern in our legal system. Issues of representation raise real theoretical and practical concerns, to which I now turn.

### III. THE PRACTICALITIES OF REPRESENTATION FOR VICTIMS

Both George Fletcher and William Pizzi have dismissed any major concern that victims ought to have a right to counsel by noting that in Germany most victims choose not to have counsel but rather allow the prosecution to represent their interests.<sup>144</sup> In the United States, where lawyers play a much more central role in our conception of fair legal process, it is not clear that victims would *not* seek representation. If victim's rights are indeed meant to be a corrective to the rights of defendants, then there must be a meaningful way to exercise those rights. If victims are to have constitutional rights specific to being crime victims, questions of who should represent them ought to be resolved. Victims who are indigent or poor are unlikely to receive private legal representation, and many middle-class victims are unlikely to have the resources to hire lawyers. Independent legal representation of some victims and not others would increase the lottery aspect of the criminal justice process generally and might exacerbate differences in how

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<sup>142</sup>See Bandes, *supra* note 40, at 335.

<sup>143</sup>See, e.g., *Hearings on S.J. Res. 6*, *supra* note 9, at 76 (statement of Lynne Henderson) (arguing that statutes providing funding for victim programs are better than constitutional amendment); *id.* at 166–67 (statement of National Network to End Domestic Violence) (stating that amendment would require significant implementing legislation); Mosteller, *Victims' Rights and the Constitution*, *supra* note 88, at 1053 (arguing that amendment provides only prosecutorial benefit).

<sup>144</sup>See FLETCHER, *supra* note 104, at 167–69 (discussing Sixth Amendment protections); Pizzi & Perron, *supra* note 91, at 54 n.76 (stating that only 20% of eligible victims choose to participate in German trials).



victims are treated. As defendants have the court-created right to counsel, surely if victim's rights are to be a corrective to defendant's rights, victims should be entitled to counsel to represent them in court.

Proponents seem to assume that prosecutors can and will adequately represent victims, but the potential for conflicts of interest and additional burdens on prosecutors is great. For example, the State has interests that may diverge from the victim's in criminal cases, and it is not altogether clear whether it is desirable to require the State to assume representation of a victim's interests. This is true even if it is the case that in most instances prosecutors have strong incentives to work with victims and attend to their concerns. Before we allow an expansion of discretion in the criminal justice system by means of an ad hoc, unpredictable emphasis on the individual victim's demands and concerns, we ought not to assume that, in Cassell's words, "the Victims' Rights Amendment assumes a prosecution-directed system and simply grafts victims' rights onto it."<sup>145</sup>

For example, Beth Wilkinson testified that the prosecutors in the Oklahoma City bombing cases against struck a plea bargain with Michael Fortier—a man who knew of the defendants' plans and failed to take steps to prevent the bombing—despite the fact that many victims probably would have opposed the deal.<sup>146</sup> The prosecutors felt that his testimony was critical to the case, but because of grand jury secrecy rules, they could not tell the victims why they determined to make a deal for his cooperation.<sup>147</sup> Under the proposed amendment, the judge would have had to hear objections to such a bargain; if the judge agreed with the victims' objections, "[s]ignificant prosecutorial resources would have been diverted . . . to pursue the case against Fortier and [prosecutors] would have risked losing the evidence . . . that only Fortier could have provided."<sup>148</sup>

Prosecutors represent the community's concerns and interests in deterring and punishing crime. Prosecutors have an ethical duty as well to ensure that justice is served. As Wilkinson's statement suggests, justice in a given case does not always mean charging a defendant with the most serious offense, proceeding without being able to prove a case beyond a reasonable doubt, or demanding the most severe sentence. Similarly, justice does not mean dropping charges or arguing for light sentences, no matter what the victim wants. Rather, a balancing of resources, factual issues, and experience comes into play in prosecutorial decision making.

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<sup>145</sup>Cassell, *supra* note 6, at 502.

<sup>146</sup>See *Wilkinson Testimony*, *supra* note 134.

<sup>147</sup>See *id.*

<sup>148</sup>*Id.*

Coordinating prosecutorial efforts with victim concerns is, of course, part of good lawyering, but to the extent we consider representation to be client-centered, prosecutors have neither the duty nor the ability to represent a victim independently of the demands of the State. Rather, the prosecution is likely to try to sway the victim to its side and to cooperate with its version of the case, not the other way around. As a tactical matter, the prosecutor may not want the victim to tell authorities about certain things or open up avenues for the defense. A victim may not understand the prosecutor's desire not to provide the defense with free discovery, and may resent it, but if the prosecutor is to be successful, the victim's interests may have to be subordinated to the State's.

Some advocates of the amendment point to feminist law reforms as examples of the need to have a federal victim's rights amendment. These advocates argue that until the needs of rape and battering victims were brought to public attention, violence against women was ignored by the public and prosecutors.<sup>149</sup> For example, they take the feminist insight that rape trials frequently "revictimized," or at least placed the victim on trial, and then generalize to a "need" for victim's rights.<sup>150</sup> Yet, massive rape law reform accomplished by feminists in alliance with crime control conservatives has in no way been dependent on whether victims have constitutional rights, nor can the failure of law reform to expand the prosecution of rape be attributed to a lack of rights.<sup>151</sup> In rape cases, law enforcement, prosecutors, juries, and courts, together with cultural norms, determine whether a woman is a rape victim or not.<sup>152</sup> Further, rape survivors and prosecutors may frequently be at odds with one another about whether and how to prosecute. If controlling prosecutorial discretion in rape cases—or in any serious felony case—is a goal of victim's rights, it would be more logical to regulate that discretion directly in order to have consistency and coherence. Yet,

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<sup>149</sup>See SUSAN ESTRICH, *REAL RAPE* 8–26 (1987) (discussing evolution of public and prosecutorial responses to rape); see also *supra* notes 83–84 and accompanying text.

<sup>150</sup>The classic article arguing that rape trials unnecessarily revictimize rape survivors is Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1 (1977).

The feminist concern with gender bias and crimes against women does not necessarily entail endorsement of eliminating procedural protections for defendants or crime-control-supported evidentiary changes. For two strong feminist critiques of changes in the Federal Rules of Evidence allowing past bad acts evidence in sexual abuse trials, see Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevance in Rape Law*, 110 HARV. L. REV. 563 (1997); Aviva Ovenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663 (1998).

<sup>151</sup>See *id.* at 81–91.

<sup>152</sup>See *id.* at 8–26; Henderson, *supra* note 84, *passim*.

prosecutors face serious conflicting demands and constraints on time and resources.<sup>153</sup>

The complexities of requiring prosecutors to honor victim's rights while representing important state interests are well illustrated by the clash of values and interests in relationship violence cases.<sup>154</sup> Feminists have worked long and hard to have legislatures and judges understand that relationship violence is serious and treat relationship crimes no differently from other assaults, rapes, batteries, kidnappings, and similar crimes of violence. At the same time, there has been much work to have women in abusive relationships take actions to end the violence, either by leaving, obtaining restraining orders, or prosecuting offenders. Individual victims, however, often do not want their assailants to be prosecuted; in the past, police and prosecutors used the victim's recantation as a reason not to treat these cases seriously. Now, many jurisdictions require arrests and have some form of mandatory prosecution policy. Although I do not condone forcing victims to cooperate with the prosecution in most instances, if only because of real questions concerning further trauma and loss of control, it is nevertheless important to take account of arguments in favor of such mandatory cooperation.

A thoughtful article by Cheryl Hanna, a former prosecutor, argues for mandatory prosecution of batterers and highlights the tensions and conflicts between desirable state policy and the individual victim's desires.<sup>155</sup> Hanna found that in the cases she handled as a prosecutor, the battered woman

wants the abuse to stop, and to that extent, she may cooperate with the state, but she may not want to see the batterer punished for his behavior. She will often resist contributing to a criminal record, jail, fines, and other punitive results for her partner. Her fear and mistrust of the criminal justice system may be even greater than her fear of the batterer.

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<sup>153</sup>Prosecutors in the United States enjoy enormous discretion in deciding which cases to prosecute. Some of this discretion results because prosecutors are faced with high numbers of cases, and time and cost constraints. This discretion also results from the managerial and organizational structure of any given office and some with the individualistic nature of the justice system. See generally DAVID HEILBRONER, *ROUGH JUSTICE: DAYS AND NIGHTS OF A YOUNG D.A. passim* (1990) (discussing conflicting issues in prosecutor divisions); Bryden & Lengnick, *supra* note 83, at 1246–54, 1315–51 (same); David T. Johnson, *The Organization of Prosecution and the Possibility of Order*, 32 L. & SOC'Y REV. 247 *passim* (1998) (same).

<sup>154</sup>I prefer the term "relationship violence" to "domestic violence" for several reasons. First, it has always struck me that the term domestic violence is oxymoronic. Second, violence between intimates or partners occurs outside of state-sanctioned marriage: It occurs in dating relationships, cohabitant relationships, and lesbian and gay relationships.

<sup>155</sup>See Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849 *passim* (1996).

Thus, given the freedom to fashion outcomes, most women would choose counseling and diversion before punishment.<sup>156</sup>

Hanna suggests several reasons why female victims of relationship violence do not wish to prosecute their assailants. Financial considerations, such as dependency on the man for economic support, affect the woman's wish to prosecute.<sup>157</sup> She may be reluctant to prosecute because she feels responsible for the punishment or the abuse. She may be subject to controlling behavior and threats from the abuser, or she might fear his retaliation.<sup>158</sup> Fear of losing custody of children may also be a factor. As Hanna notes, the tendency to drop prosecutions of batterers reinforces marginalization of women's concerns, thereby perpetuating gender bias.<sup>159</sup>

Another important reason for reluctance to prosecute cannot be overlooked and has nothing to do with additional coercive behavior by the man. Victims of battering may love their partners and want safe connection to them.<sup>160</sup> Maintaining connection to others, hope that things will improve, and genuine care can lead to wanting the behavior to stop without much desire to punish the person who has behaved badly. It is easy to call this "false consciousness," but anyone who has been in a close relationship or marriage to someone they have loved finds it difficult to separate, even if the relationship is irreparably damaged, whether it be by adultery, alcoholism, the death of a child, or other tragedies or difficulties. Even so, it still may be the case that the prosecution should proceed with the criminal case, regardless of the victim's interests and concerns.

Hanna observes that prosecutors do not let other victims refuse to testify even if the victims believe that they have more to lose than gain by testifying in cases involving gangs, organized crime, and rape.<sup>161</sup> She asserts that prosecutors similarly ought not allow battered women to refuse to cooperate.<sup>162</sup> Thus, if necessary, a battered woman should be forced to

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<sup>156</sup>*Id.* at 1884.

<sup>157</sup>*See id.*

<sup>158</sup>*See id.* at 1884–85.

<sup>159</sup>*See id.* at 1885.

<sup>160</sup>*See* Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23, 29, 52–56 (1989) (noting that "[w]omen who have been battered tell stories that include fear . . . , love . . . , desire for connection . . . and absence of options," and that law should assist in maintaining safe connections); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 20–24, 52 (1991) (describing ways in which women in battering relationships seek to preserve connection as part of answer to question, Why didn't she leave?).

<sup>161</sup>*See* Hanna, *supra* note 155, at 1867–68.

<sup>162</sup>*See id.*

cooperate with the prosecution, up to and including being jailed herself for refusing to appear after she has been subpoenaed.<sup>163</sup>

Hanna argues that aggressive prosecution of domestic violence cases could be effective in signaling the seriousness of the offense, leading to deterrence and proper punishment.<sup>164</sup> Allowing battered women to refuse to participate in prosecutions undermines the State's important interests in prosecuting violent criminals, preventing revictimization of women and any children involved,<sup>165</sup> and ending the cycle of violence that may occur in these relationships.<sup>166</sup> If batterers know that prosecutors will not prosecute, women may be in more danger than if they are forced to cooperate.<sup>167</sup> Police will not investigate cases carefully or take relationship violence seriously if prosecutors will not pursue the cases.<sup>168</sup> Failure to prosecute leads the State back to being a silent partner in condoning relationship violence as well,<sup>169</sup> something that reformers have worked hard to eliminate.

The goal in these cases, therefore, is not necessarily "to put the victim at the center"<sup>170</sup> or to make the victim the ultimate concern of the process.<sup>171</sup> Rather, as Hanna contends, the goal of mandatory prosecution "is to punish the batterer in order to protect potential victims via deterrence and, presumably, incapacitation."<sup>172</sup>

Other difficulties with victim representation are more subtle. District attorneys are not likely to be forthcoming about their biases and cynicism towards victims, at least not to the general public. Yet, biases in judgment about victims exist. Being only human, many prosecutors—even those who are not burned out or incompetent—care for some victims more than others, do not see all victims as sympathetic, and do not work effectively with all victims. Victims may be ambivalent about prosecution, they may oppose prosecution, or they may not care to prosecute, leading prosecutors to feel frustrated or at odds with victims.

Prosecutorial biases and judgments against victims can lead to unequal representation of their interests. For example, Professor Abbe Smith relates

<sup>163</sup>*See id.* at 1894.

<sup>164</sup>*See id.* at 1890.

<sup>165</sup>*See id.* at 1895.

<sup>166</sup>*See id.* at 1896.

<sup>167</sup>*See id.*

<sup>168</sup>*See id.* at 1893.

<sup>169</sup>*See id.* at 1897.

<sup>170</sup>FLETCHER, *supra* note 104, at 188–201 (stating that victim ought to be at center of prosecutions during guilt determination process).

<sup>171</sup>*See* Tribe, *supra* note 22, at 1067–72 (discussing different concerns of adjudicative process system).

<sup>172</sup>Hanna, *supra* note 155, at 1870.

the difficulties of finding a lawyer to represent a lesbian victim of a horrific crime in a case she eventually took.<sup>173</sup> She found that locating a knowledgeable criminal lawyer in the jurisdiction with appropriate feminist sensibilities who also could deal with victims of extreme trauma was not easy.<sup>174</sup> She writes: "One prospective lawyer burst into tears upon seeing the surviving victim in her hospital room. This behavior was not helpful. It did not engender confidence."<sup>175</sup> Although Professor Smith's account involved a search for private counsel, prosecutors faced with a victim of extreme violence might very well do the same thing. Many prosecutors would be uncomfortable working with a lesbian woman or a gay man. At the other extreme are lawyers or prosecutors who are so disenchanted with the profession, harshly judgmental, or unaffected by the pain of others that they denigrate or dismiss victims out of hand.<sup>176</sup>

Even well-trained prosecutors can do more harm than good if they become over-identified with the victim. An impulse to rescue, for example, can lead to a sacrifice of critical judgment and loss of perspective, and therefore such sympathy is not necessarily good for the victim. By taking over for the victim, prosecutors can console themselves as heroes, but in the process deprive the victim of autonomy and choice. To see oneself as a champion of victims is dangerously self-righteous and can lead to promises that cannot be fulfilled. Outside of the context of the world prosecutors know—what evidence they need, what the legal issues are, who the defense lawyer is, what judges they will be working with, and so on—they are ill-equipped to deal with trauma victims except as any conscientious attorney would.

I am no saint, and perhaps that is why I feel so strongly that one must be very careful in working with victims. In my formal and informal contacts with victims, I have found that there are some who bring out an urge to attack them for no apparent reason. (Often, these are persons who have been severely traumatized.) This urge, an identification with the perpetrator, is not uncommon in those who work with the trauma victims. The invitation to impatience, anger, or blame that I perceive or project is, of course, one that

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<sup>173</sup>See Abbe Smith, *On Representing a Victim of Crime*, in *LAW STORIES* (Gary Bellow & Martha Minow eds., 1996).

<sup>174</sup>See *id.* at 149.

<sup>175</sup>*Id.* at 154.

<sup>176</sup>Distancing oneself from the pain of victims is not exclusive to prosecutors. This phenomenon is not unknown among those who are caregivers who deal with death and horror on a regular basis. I once heard the reaction of Stanford Medical School residents to the stresses of long days and nights and human suffering in the emergency room captured by their refrain: "Hang 'em high, let 'em die, let God sort 'em out." See also HERMAN, *supra* note 71, at 133–54.

I try to resist when I become aware of it. Yet, this commitment to resist such anger does not mean that I have noble thoughts or that I do not sometimes communicate a message of impatience or hostility. I have found that there are others whose rage overpowers me and still others whose passivity makes me want to scream, "Do something! *Anything!*" In other instances, the urge to rescue and take over the victim's choices and experience is very strong. Additionally, the stories of other victims often trigger my own memories and issues. I am much more comfortable seeking refuge in my role as a law professor or lawyer than in facing stark pain; working with victims even in short-term crisis counseling is demanding work.

The same phenomena I have experienced have been observed in care givers working with trauma victims, and it is probably the exceptional layperson or therapist who does not escape these episodes of what is termed "countertransference."<sup>177</sup> The skills of a therapist or counselor working with victims of extreme trauma require training, study, and practice. Therapeutic, empathic listening is not an easy skill to master when faced with extreme trauma. Therapists, as all others, can become overwhelmed by the horrors that the client relates or may identify with the perpetrator in a way that further damages the client. Sometimes working with people who have suffered extreme trauma traumatizes the counselor. For instance, Judith Lewis Herman and others who specialize in treating trauma victims are adamant in emphasizing the point that therapists cannot do the work without support. The same is true for crisis counselors or anyone who works with trauma: One can easily become overwhelmed and may need others to consult with and provide support.<sup>178</sup> Prosecutors or attorneys who are not aware of the phenomenon or who avoid the trauma victim in order to avoid the painful feelings involved can do considerable damage to victims, to themselves, or to cases. Further, the duty of prosecutors to ensure that justice is done—that a case be effectively prosecuted—can create a role conflict between being a lawyer representing the State and a caregiver to victims.

Many prosecutors are socially conservative and reflect the attitudes and biases of the larger society. As elected officials, district attorneys may reflect the biases of the electorate towards those considered deviant, and, as trial lawyers, deputy district attorneys may argue that there are cases that will fail because of perceived social and juror bias. They may not identify with, understand, or be willing to credit crime victims who are not white and/or middle-class, who are immigrants, or who are female. The devaluation of

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<sup>177</sup>*Id.*

<sup>178</sup>See HERMAN, *supra* note 71, at 153 ("[N]o one can face trauma alone. If a therapist finds herself isolated in her professional practice, she should discontinue working with traumatized patients until she has secured an adequate support system.").

African-American victims even in serious cases is well documented, and the role of prosecutorial discretion in permitting this devaluation cannot be overlooked.<sup>179</sup> The devaluation of female victims is also well documented, and prosecutorial discretion and lack of zeal for cases involving female victim-witnesses exists as well. And as members of middle- or upper-middle-class culture, prosecutors are likely to hold certain assumptions based on class and culture that do not apply to many of the victims of crimes they prosecute.

Assigning prosecutors the role of victim advocate is likely to cause stress as they deal with the competing demands of their responsibilities to others, the requirements of their jobs, and their own feelings about victims. We need far more information about how district attorneys interact with victims—what helps and what hurts—and providing them with training before we ask that they represent the victim as well as the State. This is not to say that prosecutors ought not treat victim-witnesses well, but treating victim-witnesses with respect is part of being an effective lawyer, not part of being an advocate for conflicting interests.

#### *A. Independent Representation of Victims*

Because of state victim's rights amendments, some attorneys are now beginning to specialize in representing crime victims. Not surprisingly, the nature of the practice, and the role that private attorneys should play in criminal cases, are not yet clear. Different state victim's rights amendments and different laws giving victims standing in state proceedings will, of course, shape the way in which the victim's attorney participates. Thus far, a victim's attorney can assist the victim in understanding the process and occasionally act as a liaison with the prosecution or media. Financial rewards, however, appear primarily to be gained in any civil action that exists. We still have little empirical information about the way in which such attorneys practice, the contributions they can or should make, their impact on the criminal justice system and on their clients, and how they are paid. What follows, then, are a few anecdotes about victim representation as well as some cautionary words about this budding industry.<sup>180</sup>

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<sup>179</sup>See, e.g., RANDALL KENNEDY, RACE, CRIME, AND THE LAW 12–28 (1997) (discussing assumptions about African-Americans and their effect on processes of criminal trials).

<sup>180</sup>In my more cynical moments, I think of the proposed victim's rights amendment as a lawyer's full employment act, as the need to litigate issues and to develop a whole new field of practice will arise if the amendment passes.



Judith Rowland, a former prosecutor in California, began to specialize in representing crime victims after having been a prosecutor.<sup>181</sup> Author of a book on using rape trauma syndrome in rape prosecutions,<sup>182</sup> Rowland first opened a California Center on Victimology. The center dispensed counseling, walked victims and their families through administrative remedies, such as applying for compensation, and kept them informed about court proceedings.<sup>183</sup> Eventually, "Rowland began to make regular court appearances, filing friend-of-the-court briefs on behalf of crime victims, speaking up at bail hearings, and attending sentencing hearings."<sup>184</sup> Rowland believes in intervening both before trial and after, usually in support of the prosecution, but there are times when she "does battle with prosecutors,"<sup>185</sup> although she does not indicate the nature of those battles. Rowland likened her representation in court as "my laboratory,"<sup>186</sup> and it is unclear what direction her practice ultimately will take.

At times, as Rowland's story suggests, victim representation may actually enhance prosecutorial efforts. Prosecutors can make mistakes that cause unnecessary anguish, and experienced criminal lawyers representing victims can sometimes rectify or reverse those mistakes. For example, an experienced prosecutor in a case in which I was tangentially involved called the victim's family and announced that some important evidence against the accused would probably be suppressed. The prosecutor was wrong on the suppression issue; I never knew what prompted her to call the victim's family and tell them this erroneous interpretation. We found a tactful way to intervene to point out that the evidence was almost certainly admissible under the applicable case law, but of course, the matter never should have arisen.

As mentioned earlier, Professor Abbe Smith represented the victim of an attempted murder by an assailant who killed her lesbian lover.<sup>187</sup> The two women were camping in central Pennsylvania when a man apparently followed them and shot them when they were lovemaking far away from other people.<sup>188</sup> The survivor, Claudia, was shot five times; she did her best to rescue her mortally wounded friend, Rebecca, but failed.<sup>189</sup> The killer, who had been abused as a child, had been on his own as a teenager, and lived in

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<sup>181</sup>State Bar of California, *State Bar Report: Voice in the Wilderness*, CALIFORNIA LAWYER, May 1993, at 68.

<sup>182</sup>*See id.* at 68-69.

<sup>183</sup>*See id.*

<sup>184</sup>*Id.*

<sup>185</sup>*Id.* at 70.

<sup>186</sup>*Id.*

<sup>187</sup>*See Smith, supra* note 173, at 149.

<sup>188</sup>*See id.* at 150.

<sup>189</sup>*See id.* at 151.

the woods, was charged with murder.<sup>190</sup> The prosecution sought the death penalty.<sup>191</sup> Smith describes the district attorney as “a nice guy, open and nonterritorial,” happy to have assistance with the case, and undisturbed by the homosexuality aspect.<sup>192</sup> Claudia also had many supporters in law enforcement and supportive friends, something not all victims have.<sup>193</sup>

At the preliminary hearing, the defense lawyer pursued a line of questions suggesting that the surviving victim had taunted the man with her sexuality, apparently in an attempt to develop a provocation theory of the case.<sup>194</sup> The prosecutor did not object to the line of questioning despite Smith's notes urging him to object to “plainly irrelevant, highly inflammatory, and downright insulting questions.”<sup>195</sup> Claudia, the victim, “held up” under the questioning. In explaining his failure to object to the questions, the prosecutor later indicated that as it was a capital case, that he wanted to give the defense some leeway.<sup>196</sup> Many prosecutors would not give the defense an inch in such a case, but others would, knowing that death penalty cases are, indeed, “different”<sup>197</sup> and that courts may scrutinize such cases more carefully on appeal. This may lead to a conflict with victim desires, but pursuing the death penalty also can pose conflicts with victims who oppose capital punishment, as in Claudia's case.

Smith suggested and wrote a supporting brief for a motion *in limine* “to prevent the defendant from cross-examining Claudia about her sexual conduct with Rebecca before the shooting and from introducing other evidence about their sexuality. Under the facts of the case, she argued, there simply was no provocation as a matter of law.<sup>198</sup> I do not know the applicable interpretation of provocation and passion voluntary manslaughter law in Pennsylvania at that time, but certainly in an “extreme emotional disturbance” jurisdiction, or a common law jurisdiction that emphasizes subjective factors in voluntary manslaughter, such a defense could not be precluded as

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<sup>190</sup>See *id.* at 157–58.

<sup>191</sup>See *id.* at 161.

<sup>192</sup>*Id.* at 158.

<sup>193</sup>See *id.*

<sup>194</sup>See *id.* at 159–60.

<sup>195</sup>*Id.* at 160.

<sup>196</sup>See *id.*

<sup>197</sup>If one wanted to limit prosecutorial discretion to object to defense questioning in capital cases, a statute or administrative policy would be more even-handed than reliance on the abilities of victim's counsel. Perhaps, however, a victim's constitutional rights would offset the Supreme Court's limited imposition of the death penalty or the setting of standards for penalty phase trials under the Due Process Clause.

<sup>198</sup>Smith, *supra* note 173, at 162.

a matter of law.<sup>199</sup> Smith concludes that “[a] criminal defendant’s ‘rights’ are not compromised by an insistence that the defense be based on more than deep-seated bigotry. No injustice is caused by prohibiting a defense that gives legitimacy to homophobic violence.”<sup>200</sup> Although I agree that there is no legal prohibition on such defenses, the defense has been successful in some cases, and the issue of disturbance might be very relevant to the penalty phase of the trial, should the defendant be found guilty of capital murder.

The defendant pled guilty to avoid being sentenced to death. If the defendant had not pled guilty in exchange for a life sentence instead of going to trial, being convicted, and having a penalty phase, it is unclear what Smith ought to have done, given her client’s opposition to capital punishment. Indeed, Claudia was steadfast in her opposition to the death penalty:

She wanted Carr to understand the pain he had caused. She figured killing him wouldn’t do that. . . . She knew imprisonment would be a terrible punishment for someone who had lived out in the wild. She wanted Carr to be shunned and isolated and caged for the rest of his days . . . She wanted him to have to live with himself.<sup>201</sup>

If Smith objected to evidence of extreme emotional disturbance based on homophobia as a factor in mitigation during a penalty phase, it is unclear whether her client’s interests would have been served or contradicted.

Opposition to the death penalty suggests the potential for victim conflict with prosecutorial duties and goals. Thus far, victims who have wanted to testify against imposition of capital punishment have not been allowed to do so in cases of which I am aware. For example, Marsha Kight, an advocate of the victim’s rights amendment and mother of a young woman killed in the Oklahoma City bombing case, was not only distressed by the trial judge’s initial order excluding victim’s families from the guilt phase of the McVeigh trial. She also testified before the Senate Judiciary Committee that she was opposed to the death penalty, and it upset her when the prosecution informed her that she could not testify because of her opposition.<sup>202</sup> Further, at least one circuit court of appeals has held that the *defendant* has no right to introduce evidence that a murder victim’s family members oppose the death

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<sup>199</sup>See Victoria Nourse, *Passion’s Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1345–46 (1997) (suggesting that subjective standard in extreme emotional disturbance defense jurisdictions would allow such evidence when applicable).

<sup>200</sup>Smith, *supra* note 173, at 163.

<sup>201</sup>*Id.* at 161–62.

<sup>202</sup>See *Hearings on S.J. Res. 6, supra* note 9, at 70–71 (statement of Marsha A. Kight).

penalty in the penalty phase of a capital case.<sup>203</sup> Under the victim's rights amendment, it would appear that victims would have a right to make statements opposing the death penalty, unless the courts determine that the State has a compelling interest in imposing the death penalty. And if capital punishment becomes a compelling interest, the rights of defendants in death cases would vanish.

I now turn to an example of successful prosecution that involved no victim's rights amendments, but that exemplifies many of the positive elements that victims appreciate in the process.

#### IV. DIGNITY WITHOUT AMENDMENTS

A number of critics of the amendment have pointed to the fact that there is no proof that such an amendment is necessary to insure that crime victims be treated with dignity and respect or that victim's interests cannot be protected by legislation.<sup>204</sup> In this Part, I discuss my own personal experience of being a victim-witness in a rape case. The purpose is to provide at least one account as a counter to the many anecdotes of mistreatment proffered in support of the amendment. It also may strike readers as containing information "irrelevant" to the issue of victim's rights: those readers should simply turn to the Conclusion, although I might note that this very question renders much of the victim-oriented argument for an amendment irrelevant as well.<sup>205</sup> Another point in weaving in personal feelings, the effects of trauma, and the effects on my life is to illustrate how irrelevant issues of victimization may be to determinations of guilt in criminal cases. In part, this anecdote illustrates that many of the things victim's rights advocates say only a federal constitutional amendment can accomplish actually existed before there were any such amendments, even in the states.

Although my case is only one among many, I have no reason to believe I was treated specially or better than victims in cases supported by strong

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<sup>203</sup>See *Robinson v. Maynard*, 829 F.2d 1501, 1503–05 (10th Cir. 1987) (finding that testimony concerning murder victim's survivors' opposition to death penalty "was calculated to incite arbitrary response, [and] thus was properly excluded").

<sup>204</sup>See, e.g., Mosteller, *supra* note 63, *passim*; Cassell, *supra* note 6, at 507–15.

<sup>205</sup>One of the readers of an early draft of this Article suggested that this Part was unnecessary unless it was written for "cathartic" (or perhaps exhibitionistic?) effect. I am skeptical of claims of "catharsis" and certainly experienced none in writing this. In telling my version of the formal process and its effects, I hope that I am not being exhibitionistic, but rather as honest as I can be in providing a positive illustration of a process that "worked." Because I have extensive notes from the time I was assaulted and have recounted the events numerous times, I have had some control over accuracy in recounting the story that might otherwise be subject to criticism for faulty memory.

evidence. The one advantage I did have was that, as a lawyer, I knew the system. Yet even so, I experienced most of what happened as a human being who was a victim of a violent crime, not as a person who was a lawyer and in her role as such. Other victims I have talked with also have related positive experiences with "the system."<sup>206</sup> This does not mean that there is no need for improvement in many cases. Rather, it suggests that the objective of decent treatment can be and is met without a federal constitutional amendment.

In the fall of 1981, I began to feel that I was singled out for a crime wave. In the course of a little over a month, I was a victim of a number of crimes. In the first instance, I was standing in court gathering my papers after a hearing when I was struck in the back by the outraged mother of my client.<sup>207</sup> A while later, my wallet was stolen, presumably when a strange man bumped into me. Next, someone tried to break into my home at night while I was there. I filed police reports in all of these cases, but in the instance of the mother punching me, the district attorney's office indicated they did not charge batteries "unless there's blood."<sup>208</sup> It was impossible to locate the person guilty of stealing my wallet,<sup>209</sup> and the police reported that they did not find the person who tried to break in.<sup>210</sup> I had a sheriff's deputy help me

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<sup>206</sup>In April 1999, I appeared on a panel with two other victims at a training session for judges and prosecutors in Indiana. One was a victim of horrendous abuse by her husband, and the other was a victim of kidnaping and rape. When I asked what, if anything, in their experience with the legal process helped, both mentioned caring responses from law enforcement. The kidnap-rape victim emphasized that the prosecutor kept her notified and stayed in touch throughout the process. She also emphasized the helpfulness of the prosecutor's victim-witness coordinator. The offender in her case was convicted and given a very long sentence.

<sup>207</sup>My client—a mentally ill person who was challenging both his commitment and having his mother as guardian—had been saying for years that his mother was violent. His psychiatrists had dismissed his claims because, after all, he was mentally ill, even though he always "decompensated" when he was sent home from the hospital. At least the attack gave the psychiatrists reason to believe my client's assertions.

<sup>208</sup>I found the assault quite frightening, but the district attorney indicated that as there was no blood or bruising, the office didn't usually prosecute such simple assaults. I probably could have insisted on filing charges, but my goal—protecting my client from his mother—had been accomplished, and I didn't see much value in prosecuting her either.

<sup>209</sup>A number of my clients, who were prostitutes in the area in which the theft occurred, were angry that this had happened and spent considerable time looking in dumpsters and trash cans for the wallet, which, ironically, had the business cards of some of the area's most outstanding criminal defense lawyers in it.

<sup>210</sup>They stopped one possible suspect but said he looked "too straight." I couldn't have identified him anyway, as I did not get a close look at him before calling the police. I have often wondered, given the "straight" appearance of the man who raped me a week later, whether it was the same person.

secure the windows and doors of my home after that scare. Then, on November 15, 1981, I was beaten, raped, and robbed by a burglar.<sup>211</sup>

A stranger broke into my home sometime around 3:00 a.m. I awoke to find him on top of me; when I asked, "What are *you* doing here?" he replied, "I'm going to fuck you." "The hell you are," was my response, as I awakened and struggled against him. During the brief struggle, he snarled, "You bitch." He broke my nose, dislocated my jaw, and used a screwdriver to poke at my face. The rapist started demanding, "Spread your legs, spread your legs!" I had bruises and cuts on my legs as a result of trying to resist. I then worried he might use the screwdriver to rape or kill me. My cat started crying, and he threatened to kill her. I suddenly thought that if I did not cooperate, he'd kill me, and I wouldn't survive to "get him." Somewhere in the course of the events, he put a pillow over my face, but I did have an opportunity to see him before that happened, because after the attempted break in, I had kept a lamp on in my bedroom.

After he raped me, he threatened to kill me if I moved. He demanded my jewelry—"Where's your jewelry? Where's your diamonds? Where's your jewelry?"—over and over again. I said something rude in response. I moved once to be able to breathe, and he was right back, jabbing with the screwdriver: "I'll kill you! I'll kill you!" When I finally felt he was gone, I took a chance, got up, locked my bedroom door and dialed 911. I said I wanted to report a rape and gave my address. The dispatcher replied "Are you sure it was a rape?" I remember saying "Look, it was a righteous 261,<sup>212</sup> there was penetration." To this day, I do not remember the rest of that conversation. The prosecutor and the defense lawyer later indicated that I gave a description of the rapist during the call. (I have never heard the tape, but later it became clear that my descriptions had been consistent throughout.) I am aware I stayed on the phone until there was a knock on the bedroom door and the dispatcher told me it was the police. The police<sup>213</sup> arrived only a few minutes after the call, if that.

I became properly hysterical when the police arrived, hugging one of the officers, and then went into a controlled mode in order to help apprehend the rapist. I was also frantic when I realized my cat had gotten out. She was an indoor cat who had been declawed and knew nothing of cars or unfriendly

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<sup>211</sup>Some of this narrative first appeared in Lynne Henderson, *What Makes Rape a Crime?*, 3 BERKELEY WOMEN'S L.J. 193, 221–24 (1987–88) (reviewing SUSAN ESTRICH, *REAL RAPE* (1987)).

<sup>212</sup>The California Penal Code section for forcible, nonmarital rape. Technically, it was section 261(2) at the time.

<sup>213</sup>In my speaking and writing, I have referred to the law enforcement officers as "the police," a general term for such officers. The officers who responded, investigated, and assisted in the case were, to be perfectly accurate, sheriff's deputies and detectives.

dogs, and I am eternally grateful to the officer who went out, searched for her, and found her. (As upset as I was about my cat, it would hardly have been relevant to any issues at trial, any more than the fact that my mother had given me the nightgown that I was wearing that was torn in the assault. But these are little things that hurt and haunt.)

After the police interviewed me, they let me make some telephone calls and asked if I wanted them to contact someone from rape crisis. (I did.) Very quickly, it seemed, they got a call, and we went to a show-up for an in-field identification. I immediately told the police that he was the wrong man. When we returned to my home, I noticed that my car was missing from the carport.<sup>214</sup> Then we were off again, lights and siren, for another show-up. This time I identified the person—I had to be restrained from getting out of the car and going after him. And although I knew the research about inaccurate eyewitness identification, I definitely knew he was the rapist.

We drove to a substation. I could have felt victimized by the delay in getting me to the hospital, but the police were trying to do their job. The only uncomfortable thing was that I was left outside, sitting alone in the patrol car; it was still dark, and I was scared, so I wandered into the station. They apologized.<sup>215</sup> It seemed like forever before I was taken to the hospital. I could have felt victimized by both lapses, but I understood that in order to catch the man who had done this, I had to help.

At the hospital, I was fortunate enough to encounter a very sensitive and caring doctor in the emergency room. It was a long wait—Saturday nights and early Sunday mornings tend to be extremely busy times in emergency rooms—but the rape crisis advocate was there, and a friend had driven thirty miles to be there with me. One of the officers remained at the hospital with me as well, patiently discussing my concerns about the developing case, and providing support. I was at the hospital for a seeming eternity—roughly only five hours—concerned about my cat, exhausted, numb, in pain, and intermittently hysterical.

The police held a line-up at which I failed to identify the rapist. The accused had changed his appearance; there were thirteen other women there who had been assaulted; I was in physical pain because of my nose; and it was an excellent line-up. I could not really be sure which man it was, although I did mention the defendant as a possible match. The police worked long hours on the case, and the forensic evidence was very strong. Indeed, it

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<sup>214</sup>My distressed exclamation, “He took Bubbles!” led to some confusion and embarrassment: I had to explain that “Bubbles” was my car. I perhaps made up for this by knowing my license plate number.

<sup>215</sup>They also told me the suspect was “not talking.” I replied, “Good, if he wants a lawyer, get—or give—him a lawyer. I want the statement to be clean.”

was what district attorneys called a “cold case”—a sure winner. Nevertheless, I had to testify at both the preliminary hearing and at a jury trial, presumably because the district attorney made no offers to the defendant. (He told me the offer was “as charged.”) I also testified at a pretrial hearing to suppress any in-court identification of the defendant.<sup>216</sup>

The man was arrested within an hour of my 911 call; his bail was set at an amount he never could have paid; the preliminary hearing was roughly ten days later. The trial was held within three months of the crime. The deputy district attorney met with me briefly, and both the investigating detective and the same deputy district attorney stayed in touch, asking me if I wished to continue at each stage of the proceedings. Even though the district attorney clearly wanted to prosecute and the police were celebrating the evidence and arrest, I felt that they would respect my wishes about going forward. I did not receive “special” treatment—no one helped me walk through my testimony or asked me much after the initial interviews—but I was treated courteously. The officers were friendly and supportive. I was on standby for motions and trial and was called to court when needed. When I fretted about the initial detention of the defendant, police assured me that he had been found standing near my car holding my television, which was quite enough to establish reasonable suspicion under then-existing California law. I cannot remember the circumstances under which he eventually made a statement, and I am not sure I ever knew them. Yet, I do remember being told that he was given the *Miranda* warnings.

It could be argued that, because I was a criminal defense attorney who had tried a number of cases, I did not need anyone to explain anything to me or walk me through my testimony, although I certainly would have appreciated it. I may have communicated and connected well with the police and prosecutor in that I spoke their language easily—the kind of shorthand that develops to hasten meaning, such as the use of penal code sections for crimes, etc. “Two-sixty-one” is so much easier to say than rape. Yet, I felt almost paralyzed with fear before I took the stand to testify in front of a jury, having

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<sup>216</sup>The defense argued that the show-up was impermissibly tainted because the suspect was handcuffed when I saw him. I honestly perceived no handcuffs. At the time, I was concentrating on his hair, face, clothes and upper body, the things I had seen best during the attack. The judge denied the motion, but he instructed me not to give my “expert” opinion on the circumstances and quality of the line-up. At trial, on cross examination, the defense “opened the door” to my giving such testimony: I remember staring at the district attorney when counsel asked the question, fearing that if I answered without a ruling, the case would mistry. The district attorney probably only took a few moments before he said “May we approach?” although it felt like hours. I was allowed to testify about the conditions of the line-up and later, when the defense lawyer showed me a photograph of the line-up, I identified the defendant—and then whispered, “It was a good line-up.”



tortured myself with every possible question that I could think of that the defense could ask. It was also true that at that time, many district attorneys did not do much to prepare their victim-witnesses for testifying and cross-examination, perhaps because of time constraints.<sup>217</sup> I was grateful that California had a rape shield law and that the defense didn't even try to ask about my sexual history.

"My" case was joined with another case which was similar but did not involve a rape. The other victim testified before me. After I testified at trial, I was discouraged, but not barred, from attending the remainder of the trial. I believe that staying away was better for me than attending the trial, because it would have been painful for me,<sup>218</sup> and there was really nothing to be gained by my presence. The rapist was convicted on all counts in both cases, and the jury came back hunting for more charges.<sup>219</sup> He was sentenced within a month of the verdict to a very long prison term, with even more time suspended.

I did attend the sentencing hearing, but I did not speak or offer a statement. The sentencing judge had heard my testimony; I felt the damage to me was done; my revenge fantasies had faded. It was in some ways sad to see a nineteen-year-old's life ruined—California prisons, at least the ones I have visited, are not nice places by any stretch of the imagination—although he did seem to be very dangerous and incapacitating him would protect others. I very much doubted—and still doubt—that he had any opportunity for rehabilitation. In other words, my reactions were mixed, and I felt little satisfaction or as if I could "now put it all behind me."

My experience with the criminal justice system in this case was in many ways perfectly in line with the model of victim's rights advocated by supporters of a federal constitutional amendment. I had notice every step of the way and was treated with respect. There was little, if any, delay between the crime, preliminary hearing, trial, conviction, and sentencing. The rapist received a long prison term. Even the appeal was written and decided quickly. I had two opportunities to testify about the substance of the offense. I had support from the rape crisis people, the police, and the prosecutor. The judge was unbiased, neutral, and formally courteous to me, as he should have been.

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<sup>217</sup>I do know that Detective Bryan Cassandro indicated that he had provided another victim of the same man with a great deal of support and transportation to and from court; her case was severed for trial, and, as it was an acquaintance rape, I am sorry to say that the prosecution dropped the case after obtaining convictions in my case and the one that remained joined.

<sup>218</sup>The deputy district attorney may not have wanted another lawyer breathing down his neck, either—and I knew myself well enough to know that I might leap to my feet and shout "objection" if the occasion arose.

<sup>219</sup>An error in the Superior Court information omitted the auto theft charge.

(Of course, I wanted him to be totally on my side, whatever that means, but I also knew that I was hardly objective.) The defense lawyer did not try to “slime” me or ask inappropriate questions.<sup>220</sup> I had friends in the courtroom to whom I could look for support at the preliminary hearing, the trial, and the sentencing, and friends who attended the trial at other times let me know what had happened. (Some of the information I could have done without, such as being told about the “heavy breather” in the public audience who watched my testimony.)

Despite the success of the criminal trial, I learned very early that recovery takes place regardless of the criminal process. I still had a life to put back together. The process of healing started after I was raped and continued for years. Immediately after the rape, I was exhausted, stiff, sore, and uncomfortable. My first “healing” project was to recover physically, which involved many trips to the doctor, having my nose set, dealing with the horrors of crab lice, and facing the fears of pregnancy and AIDS.<sup>221</sup>

Emotionally, I dealt with anger and terror from the beginning as well. For months after the rape, I was easily startled and frightened—at the least little noise, I would jump and sometimes scream. I was in pain. I was furious with men and my vulnerability. I had nightmares. I felt guilty because I had not resisted “enough.” For a year, I did not get over a kind of perpetual state of panic, a state probably not helped by being asked to testify in another case against the rapist. (That case was similar in every respect except there was no rape, “only” the burglary, assault, coverage of the victim’s face with a pillow, and robbery. I should note that my experiences with the district attorney—one from a different county—were “creepy”; he seemed to have an almost prurient interest in the details of my experience.)<sup>222</sup>

It took about three or four years for the “anniversary” nightmares to stop. It took even more time for me to overcome occasional flashbacks—reading

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<sup>220</sup>I admit my reaction to the defense lawyer was one most victims probably have, even when the defense is being perfectly courteous. I became irritated with him a few times and probably resented his asking me anything. I also thought he could have done a better job for his client; he made the mistake that “opened the door” to my giving my professional opinion of the line-up and another when, in frustration, he threw a photo of the line-up at me, causing me inadvertently to jump back in my chair, startled. Of course, by that time it was easy to pick the defendant (and from my point of view after the trial, it was a stupid mistake).

<sup>221</sup>As I have written elsewhere, my main words to medical staff at the hospital were “Give me DES!” (the “morning after” pill). See Lynne Henderson, *Whose Nature? Practical Reason and Patriarchy*, 38 CLEVE. ST. L. REV. 169, 184 (1990). No test for HIV existed at the time; five years later I tested negative to my great relief, but the shame and grief resurfaced when I went to be tested.

<sup>222</sup>This feeling later was confirmed by rape crisis workers who counseled victims in cases upon which he had worked; eventually, they succeeded in having him removed from prosecuting sexual assault cases.

or hearing about another's experience still can bring me back to that horrible morning. I also lost my home—I was attacked in the first home I had ever owned, and although I tried hard to live there after the rape, I was too terrified to remain. This is not an uncommon reaction: many victims move from the place where they were attacked, although many do not. I was *very* lucky because I could afford to move without selling the house first, even if it resulted in some financial strain, an option many victims do not have. Even so, the grief of losing my home remained.

I was fortunate in other ways—the State of California paid for the emergency room and medical care arising from my injuries; the victim's compensation fund paid for my psychotherapy after some mild bureaucratic hassles. (At that time, victim's compensation was underfunded in California. When I called to inquire why my claim had not yet been reimbursed, the man with whom I spoke said, "Oh, you're the lawyer"—as if that meant I was less deserving in some way. The local victim-witness program man with whom I had been in touch assisted in moving the process along.) I had other resources, and my law firm was kind enough to let me, a new associate who was supposed to have started the day after I was raped, take time off, including time off for the trial and a trip immediately before the trial, taken to get away from the stress. The local newspaper carried a fair amount of coverage of the rape, including mention of the street on which I lived and my profession, enough information for anyone who knew me to realize who I was. No reporters bothered me, however.

I was in a jurisdiction where the police and prosecutors had training and knowledge about rape and its effects and were sensitive as a result. Unbelievably, in 1999, there are still many jurisdictions where this is not true. But this is not because there are no victim's rights amendments; rather, it is because of inadequate resources and lack of commitment to training, victim-witness assistance programs, and rape crisis groups. I was also fortunate because I understood and knew the law and the process, and was therefore not confused about the meaning of proceedings or rulings. But I want to emphasize again that I only was "in role" as an attorney a few times. Most of the time I was a frightened, needy victim—just as so many others. I could have taken offense at some of the remarks made to me, but I was well aware of the real concern and assistance that the district attorney and officers gave me.<sup>223</sup>

My experience is only my own, but nothing I have heard or read in the stories of other survivors leads me to believe that my experience and attempts

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<sup>223</sup>When I asked the district attorney what I should wear for the prelim—something of which perhaps women are more conscious but something that relates to the general staging of a trial by any good lawyer—he cracked "Don't wear consent defense clothes." I was not amused, but he was undoubtedly talking lawyer to lawyer, not lawyer to scared-needy-me.

to recover from the trauma are “unique.”<sup>224</sup> Certainly, having the perpetrator found accountable and responsible provides some relief to victims, but the primary issues of trauma remain. Even if the offender is found guilty of all serious charges, as in my case, it does not necessarily make the victim happy.

My experience with “the system” was ideal from the perspective of the vision of many victim’s rights advocates. However, this ideal occurred *without* any victim’s rights amendment. In many cases where the evidence is strong, things move along rapidly and victims have decent experiences. We do not hear about them, perhaps because they do not feel particularly aggrieved by the process.

Although I have great sympathy for victims whose cases do not go well, who see their actual assailants acquitted or given light sentences—as in many rape and battering cases—and also for those whose offenders are never found, I know that healing is possible and independent of a guilty verdict.<sup>225</sup> I realize that the criminal justice system does not exist to make us happy or to make it all go away. Rather, the system serves the community’s interests in deterring and punishing crime without brutalizing victims in the process.

## V. CONCLUSION

No general law or legal system can sensitively address or provide nuanced responses to all the issues raised by extreme trauma. Rather than adopting a constitutional amendment dealing with a very narrow category of victims and situations—those in which someone is labeled a relevant victim of a violent crime, someone is charged with the crime, and someone is convicted of the crime—to deal with victims compassionately, we need to concentrate on things that aid recovery.

Congress and the states are currently experimenting with different formulations of victim’s rights and entitlements. We do not know yet which are effective and which are not, which are helpful and which are not. We do not yet even have information from victims who are not part of the “victim’s rights movement,” who might provide insight into the process, giving us information about what helped and what hurt. In light of this lack of knowledge, it is far too early to enact a constitutional amendment without

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<sup>224</sup>Almost immediately after the rape, the victim-witness person working with me asked if I would talk to another victim of a terrible rape to help her understand the process; I did so. Later she told me that she had as good an experience as possible and was feeling positive about the process. For a while, I was certified as a rape crisis counselor in California, and I did a bit of formal work in Bloomington. I have also had many informal contacts with victims.

<sup>225</sup>For a superbly written account of healing from a blitz rape where the perpetrator was never found, see NANCY VENABLE RAINE, *AFTER SILENCE: RAPE AND MY JOURNEY BACK* (1998).

knowing how it will affect the law of criminal procedure, the law of evidence, and substantive criminal law. The issues are not simple ones of cops and robbers, good guys and bad guys, and to enact a constitutional amendment on that basis would be a grave error.