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Exploiting Trauma: The So-Called Victim's Rights Amendment

In this month's Nevada Lawyer, Professor Lynne Henderson, who joined the UNLV faculty this academic year from Indiana (with stops at Florida, Cleveland State, and Stanford) discusses the issue of victim's right considerations in criminal law.

by Lynne Henderson

In 1982, the President's Task Force Final Report on Victims of Crime advocated adopting a victim's rights amendment to the Constitution of the United States. Little action to adopt such an amendment occurred until the mid-1990's, however. In 1996, a version sponsored by Senators Diane Feinstein (CA) and John Kyl (AZ) came close to a vote in both Houses of Congress. Every year since then, there have been renewed efforts to adopt some version of a "victim's rights" amendment. In 2000, the amendment came very close to a vote on the floor in the Senate. Approval by the Senate would have probably sent the amendment to the States for ratification; as it was an election year, a two-thirds vote in the House seemed certain. Given the determination of its supporters, and the statements of both President Bush and former Vice President Gore supporting a "victim's rights" amendment, we may expect renewed efforts this spring to have it approved. Sometimes said to have the "best chance" to become the Twenty-Eighth Amendment to the Constitution, this proposed amendment is gravely flawed and unnecessary.

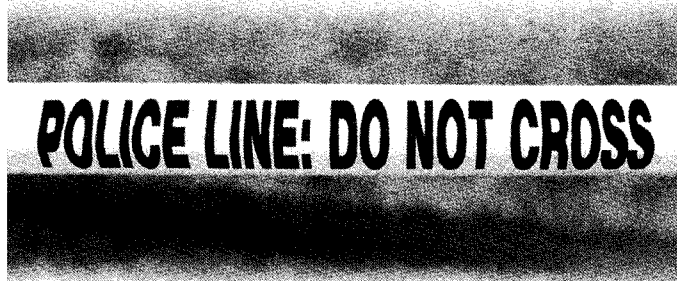
"Victim's Rights" are a seemingly irresistible and just cause—after all, who could be anti-victim? But while some crime victims organizations such as NOVA advocate the adoption of this amendment, many others, such as Victim Services (the largest victim services agency in the U.S.) and the National Network to End Domestic Violence, do not support the amendment, because it

actually provides little assistance, if any, to victims; in some instances the amendment could harm them. Although Congressional committees have held numerous hearings on the amendment and fiddled with the precise wording of its provisions, leading to over 60 differing versions, the amendment still is riddled with problems. In the meantime, precious little has been done by Congress to pass proposed legislation that would actually

should be amended only when necessary. There is no pressing need for this amendment, as legislation can accomplish most of what the amendment provides: state and federal laws already provide for restitution (in fact all 50 states and the federal law already require restitution), victim participation in plea bargaining, sentencing, and parole decisions, and consideration of victim safety in bail and parole cases. Federal law now provides that victim-witnesses cannot be excluded from federal trial proceedings simply because they are potential witnesses. Crime victims have had a strong voice in the legislatures; they need no special constitutionally protected voice.

Section 3 gives Congress the power to enact "appropriate" legislation to enforce the amendment. Thus Congress would have jurisdiction over state criminal law under the guise of victim's rights. Federal law could eventually determine prosecutorial, judicial, and legislative practices regarding both substantive and procedural criminal law matters. The amendment provides that only a "compelling state interest" can justify abridgement of the victim's rights by the state, further subjecting the states to federal control.

Worse, the amendment gives virtually nothing to victims: First, it does nothing to help crime victims unless a suspect is identified and charged. In some recent mass murder cases, such as the Columbine School killings, the perpetrators killed themselves; the survivors would have no rights under the amendment. S. J. Res. 3, Section 2, specifically provides that victims or their representatives have no right to sue for damages for violations of their rights. Nor may victims obtain stays of proceedings, obtain orders to reopen proceedings, or sue to invalidate rulings, except in cases of restitution or "conditional release" (if



help victims – legislation that is within its power to pass without any amendments.

Because it is constantly changing, it is difficult to criticize the precise language of the amendment. But the 2000 version, Senate Joint Resolution 3, is quite representative of the amendment over time; accordingly, the following commentary is based on "S. J. Res. 3." Briefly, Sen. J. Res. 3 provides that victims of a "crime of violence as defined by law" have the right to notice and to be heard or to submit statements on all matters potentially affecting the custody of the accused or of a convicted offender. Victims must have notice of escape, parole, or release of convicted offenders, and have a right to consideration of their safety in any determination of "conditional" release of an offender or accused. Victims also have a right to receive notice of any proceeding "relating to the crime", to "consideration of their interests", "that any trial be free from unreasonable delay," and a right to an order of restitution.

Even if one agrees with all these provisions, there are problems with this amendment. First, the Constitution

no stay is involved). Restitution orders are often meaningless when an offender is given a long prison sentence or the death penalty. Giving crime victims so-called constitutional rights without any meaningful remedy is a cruel joke and an exploitation of sympathy for the trauma victims suffer in order to accomplish other goals. One of those goals is to eliminate court protection of a defendant's rights.

The amendment's sponsors have continually rejected any language stating that a defendant's rights cannot be abrogated by the victim's rights. In fact, the "compelling state interest" test is intended to provide that a victim's rights trump a defendant's rights under the original Bill of Rights. If a suppression motion based on a defendant's violation of his Fourth or Fifth Amendment rights could plausibly determine custody issues, a victim would have a right to be heard on the matter and have her safety considered. If the defendant's right to a defense or to a fair trial clashes with the victim's right to a trial free from "unreasonable delay," the defendant will most likely have his rights subordinated to the victim's under the compelling interest test. The amendment does not provide victims with a right to counsel.

Sponsors claim prosecutors can represent victims, but there is potential for conflicts of interest. There have been and will continue to be conflicts of interest between prosecutors and the survivors of murder victims on issues of capital punishment, for example. Prosecutors may enter into plea arrangements to obtain crucial testimony against a more culpable offender, even though victims may heatedly oppose such "deals." Battered women may not wish to punish their assailants, while prosecutors and society may want to signal that battering is a serious crime by prosecuting and punishing batterers. Moreover, if the courts do not imply a right to counsel from the amendment, the inarticulate, the unsophisticated, the poor, and even middle class victims would have no independent assistance in exercising their rights.

The proposed amendment raises other problems as well, including who properly is a victim. As Professor Robert Mosteller of Duke Law School

observed, without the video tape, Rodney King would have been the criminal and Los Angeles Police officers Koon and Powell the victims, who might claim rights against King. A battered woman who "fights back" could be the defendant; her batterer could use his rights to track her down or control her.

I was raped in California by a burglar in 1981, before any victim's rights amendments or laws existed. I was treated with dignity and respect throughout the proceedings. The defendant was convicted and given a long sentence. "Victim's rights" were not necessary to ensure that I was treated decently. And despite two victim's rights initiatives amending the California Constitution since then—initiatives that give even more "rights" to crime victims than the proposed amendment—victims remain traumatized by crime, not because of the Constitution of the United States, but because violent crime causes trauma. The amendment cannot make police, prosecutors and judges more sensitive to the issues of trauma, and it does not ensure adequate resources to help crime

victims. It only gives Congress a cheap and easy way to look "tough on crime" without giving victims any meaningful assistance.

The author is a Prof. of Law at Boyd School of Law-UNLV where she teaches Criminal Law, Constitutional Law, and Feminist Jurisprudence. She has also taught seminars of Violence Against Women. A graduate of Stanford and Stanford Law School, she is a member of the California Bar, the author of The Wrongs of Victims Rights (1985), Co-Opting Compassion: The Federal Victim's Rights Amendment (1997), and Revisiting Victims Rights (1999).

Additionally, she is the sole author of the first Law Professor Letter Regarding the Proposed Federal Victim's Rights Amendment (1996) and is co-author (with Chemerinsky and Mosteller) of the second Law Professor Letter Concerning the Proposed Victim's Rights Amendment. She appeared on the Victim Panel at the 1997 Hearings before the Senate Committee on the Judiciary.



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