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Victims' Rights and the Constitution: Moving from Guaranteeing Participatory Rights to Benefiting the Prosecution Symposium: Thoughts on Death Penalty Issues 25 Years after *Furman v. Georgia*.

Robert P. Mosteller

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VICTIMS' RIGHTS AND THE CONSTITUTION: MOVING FROM GUARANTEEING PARTICIPATORY RIGHTS TO BENEFITING THE PROSECUTION

ROBERT P. MOSTELLER*

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I. INTRODUCTION

In June 1996, during an election year, President Clinton announced his support for a federal constitutional amendment for victims of crime.¹ On July 7, 1998, during another election year, the Senate Judiciary Committee approved and voted to report to the full Senate a victims' rights amendment embodied in Senate Joint Resolution 44.² This vote moved

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1. For the announcement, the President was joined by a number of advocates for a victims' rights amendment. Two of the most prominent individuals present were liberal constitutional scholar Laurence Tribe of Harvard Law School and Mark Klaas, father of murder victim Polly Klaas whose kidnaping and murder was decisive in the enactment of California's harsh Three Strikes provision. See Martin Kasindorf, *Clinton Pushes for Victims' Rights*, *NEWSDAY*, June 26, 1996, at A16; George Rodriguez, *Clinton Backs Amendment to Protect Rights of Victims; Dole Touted Proposal in May, Spokesman Says*, *DALLAS MORNING NEWS*, June 26, 1996, at 1A; Ray Surette, *News from Nowhere, Policy to Follow: Media and the Social Construction of "Three Strikes and You're Out,"* in *THREE STRIKES AND YOU'RE OUT: VENGEANCE AS PUBLIC POLICY* 177, 194 (David Shichor & Dale K. Sechrest eds., 1996) (reporting that "[s]adly, the passage of three strikes was assured on the day Polly Klaas was kidnaped"). Tribe and Klaas may be viewed as representatives of two of the groups described below that support the proposed amendment.

2. See S.J. Res. 44, 105th Cong., 2d Sess. (1998); Darlene Superville, *Victims' Rights Amendment Advances; Senate Committee Approves Measure*, *CINCINNATI ENQUIRER*, July 8, 1998, at A5.

the proposed amendment a significant step closer to becoming part of the United States Constitution.

Supporters of victims' rights can be broadly grouped into three categories according to their basic goals. One category of supporters seeks to guarantee participatory rights in a governmental process—the right to be present and to be heard in the criminal justice process. I term this the “Participatory Rights” dimension of the amendment and identify Professor Laurence Tribe as its best known advocate. A second category of support for the victims' rights amendment comes from those who are more generally animated by a pro-prosecution, anti-defendant perspective on criminal law and criminal procedure and for whom the consequences of victims' rights are disadvantaging defendants in the adjudication process and imposition of harsher sentences. I term this the “Prosecutorial Benefit” category and consider Professor Paul Cassell its most prominent academic proponent.³ A third group supporting victims' rights (but not necessarily for a constitutional amendment) is comprised of those who demand greater protection and support for victims by the government. I term this the “Victim Protection and Aid” dimension of the victims' rights movement and identify commentator Bruce Shapiro⁴ and some battered women's advocacy groups⁵ with this victims' rights category.

This Essay describes the unfortunate shift of the victims' rights movement between the goals of the first two groups—a shift from a focus on victims' participation to an effort to advantage the prosecution. Part II notes the beginning of the effort to amend the Constitution and details the provisions of several of major versions of proposed victims' rights amendments. Part III analyzes the major shifts in goals of the amendment and highlights several of the Prosecutorial Benefits that would result from the current proposal. A state victims' rights amendment shows the movement's recent tendency to embrace an aggressive Prosecutorial

3. For example, in defending the provision of Utah's rule regarding the sequestration of witnesses that allows victims to remain in the courtroom only “where the prosecutor agrees,” UTAH R. EVID. 615(1)(d), Professor Cassell stated: “Such prosecutorial power generally serves victims' best interests because effective prosecution is good for victims.” Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1393. Effective prosecution in this view properly trumps participatory interests.

4. See Bruce Shapiro, *Victims and Vengeance*, THE NATION, Feb. 1997, at 11, 19.

5. See *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearings on S.J. Res. 6 Before the Senate Comm. on the Judiciary*, 105th Cong. 77–82 (1997) (statement of Donna F. Edwards, Executive Director of National Network to End Domestic Violence) (opposing the proposed Victims' Rights Amendment and criticizing the failure of government to provide adequate services and protection for victims of domestic violence).

Benefits agenda. Part IV concludes that a constitutional amendment supporting the rights of victims should *expressly* guarantee that it will not diminish existing defendants' rights.

II. DEVELOPING A VICTIMS' RIGHTS AMENDMENT

The first serious attempt to amend the United States Constitution on behalf of crime victims emerged from the efforts of former Attorney General Ed Meese who, in 1982, convened the President's Task Force on Victims of Crime. The group's report, which is often cited as the watershed event for the victims' rights movement, inspired Congress to create an Office of Victims of Crime in the Justice Department, and it proposed adding a sentence to the Sixth Amendment that would guarantee victims "the right to be present and to be heard at all critical stages of judicial proceedings."⁶ The Task Force asserted that only through an amendment could victims secure the treatment and respect they deserved.⁷ Certainly in form, the modest proposed amendment is centered on victims' Participatory Rights.

Direct efforts to amend the federal constitution were not begun immediately. Instead, those supporting a victims' rights amendment worked to build political momentum by first encouraging states to amend their constitutions to guarantee victims' rights, and they were very successful.⁸ By the end of 1994, twenty states had adopted victims' rights amendments, with a number of other states actively considering an amendment.⁹ In light of this support, in September 1995, the National Victims Constitutional Amendment Network, an umbrella group representing all major victims' rights organizations, adopted specific language to be added to the Sixth Amendment, and launched the effort to amend the United States Constitution.¹⁰

6. PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 114 (1982).

7. *See id.* at 114-15.

8. *See* LeRoy L. Lamborn, *Victim Participation in the Criminal Justice Process: The Proposals for a Constitutional Amendment*, 34 WAYNE L. REV. 125, 132 (1987) (discussing how the Victims Constitutional Amendment Network sought to organize support for victims by promoting amendments to state constitutions).

9. *See* Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1382-83. Five states adopted victims' rights amendments in 1992, and another six did so in 1994. *See id.* Nine more states adopted victims' rights amendments by the end of the 1996 election cycle. *See Twenty-Nine States Amend Constitution to Benefit Victims*, STATE-FEDERAL JUDICIAL OBSERVER 6 (1997).

10. *See* William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STANFORD J. INT. L. 37, 39 (1996).

A. *The 1995 National Victims Constitutional Amendment Network Draft*

The proposed 1995 amendment began with the sweeping words "to establish, preserve, and protect the rights of the people to liberty, justice, and due process."¹¹ This amendment sought to guarantee victims of serious crimes the following rights:

- to be treated with fairness, respect, and dignity;
- to timely notice of and, unless incarcerated, to be present at all proceedings where the accused has the right to be present;
- to be heard at any proceeding concerning post-arrest release, a negotiated disposition, a sentence, [or] post-conviction release . . . ;
- to confer with the appropriate officials regarding post-charging disposition of a case, sentencing recommendations, and post-conviction supervision decisions posing a significant threat to the safety of the victim;
- to a speedy trial and final disposition free from unreasonable delay;
- to receive prompt and full restitution from the convicted offender;
- to be free from unwarranted release of confidential information;
- to be reasonably protected from the accused or convicted offender;
- and
- to be informed, upon request, when the accused or convicted offender is given any release from secure custody, or has escaped.¹²

Elements of the goals of all three groups described above are reflected in the provisions of this proposed amendment. However, a comparison of this 1995 version of the victim's rights amendment with the 1998 version as contained in Senate Joint Resolution 44 illustrates how the apparent goals of the amendment have shifted over time.

B. *Senate Joint Resolution 44 (1998)*

Senate Joint Resolution 44, which was drafted as a separate amendment rather than one designed to be a part of the Sixth Amendment, would guarantee the following rights:

1. the right to notice of public proceedings;
2. the right not to be excluded from public proceedings;
3. the right to be heard and/or submit a statement regarding the defendant's release from custody;
4. the right to be heard and/or submit a statement regarding acceptance of a plea;

11. *Id.* at 39 n.13.

12. *Id.*

5. the right to be heard and/or submit a statement regarding sentencing;
6. the right to notice, to be present, and to be heard and/or submit a statement regarding parole to the extent afforded to the convicted offender;
7. the right to notice of release of the defendant as a result of a public parole proceeding or escape;
8. the right to consideration for the victim's interest in a trial free from unreasonable delay;
9. the right to an order of restitution from the convicted offender;
10. the right to have the victim's safety considered in determining the defendant's conditional release from custody; and
11. the right to notice of the above rights.¹³

The proposed amendment would give standing to the victim or "victim's lawful representative" to assert the rights.¹⁴ It also grants to Congress the power to enforce the amendment by appropriate legislation and specifies that exceptions to the rights established may be created "only when necessary to achieve a compelling interest."¹⁵

Senate Joint Resolution 44 makes several improvements to the 1995 proposal and to Senate Joint Resolution 6, which was introduced in 1997.¹⁶ It eliminates some of the broader, more ill-defined rights that would otherwise have facilitated the wholesale erosion of defendants' rights and engendered extensive litigation in order to determine the meaning of those rights. It also removes a provision that would have given states, in addition to the United States Congress, the power to enact enforcement legislation. This change eliminates a significant threat of aggressive state enforcement legislation designed to achieve Prosecutorial Benefits.¹⁷ However, the most interesting aspect of Senate Joint Resolution 44, like its immediate predecessor, is its marked divergence from the goals of the Participatory Rights and the Victim Protection and Aid advocates.

13. See S.J. Res. 44, 105th Cong., 2d Sess. § 1 (1998).

14. See *id.* § 2. The term "victim's lawful representative" appeared for the first time in S.J. Res. 44 and is not defined in the text of the amendment.

15. *Id.* § 3.

16. See Robert P. Mosteller, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691, 1714–15 (1997) (showing text of resolution).

17. See *id.* at 1704–09 (describing dangers of Senate Joint Resolution 6 (1997) in also giving power to enact enforcement legislation to the states).

III. FOR THE AMENDMENT AND THE MOVEMENT: VICTIMS' RIGHTS OR PROSECUTORIAL BENEFIT?

Senate Joint Resolution 44 eliminates many of the Participatory Rights and Victim Protection and Aid elements of earlier proposals that would have imposed substantial monetary costs on government. One example is the right to "be reasonably protected from the accused," a direct guarantee of safety that was replaced by the right to have the safety of the victim taken into consideration in determining whether an accused should be conditionally released. Section 2 of Senate Joint Resolution 44 precludes any damage award against the state or federal government as a remedy for violation of the substantive provisions of the amendment. In addition, the "speedy trial" provision of the 1995 proposal was modified due to fears that the provision might make convictions more difficult to obtain by forcing the prosecution's hand before it was ready.¹⁸ Similarly, the right of a victim to be present during trial was altered and made a right not to be excluded from trial because the former might hinder prosecution by requiring delay in order to secure victim attendance.¹⁹ Another justification given for altering the right "to be present" phrasing from earlier versions was that it could have been interpreted to require the government to provide transportation to victims otherwise unable to attend proceedings.²⁰

When one examines the above changes in the victims' rights amendment, a movement away from Victim Protection and Aid and a movement from Participatory Rights to Prosecutorial Benefit are clear. The drafting changes show both this movement and that the proposed constitutional amendment is consistently being modified to minimize its interference with government. Generally, a constitutional amendment's purpose is to protect citizens with respect to governmental action. Thus, the changes reveal serious inconsistencies in the justification for the amendment and bring into question whether goals worthy of an amendment to the United States Constitution are being accomplished in the current resolution.

What is clear from the drafting process is that those who seek substantial services from the government or seek participation in the process, if

18. See Martin Kasindorf, *Clinton Pushes for Victims' Rights*, *NEWSDAY*, June 26, 1996, at A16 (stating that Associate Attorney General John Schmidt believed such a proposal would force dismissals when the prosecution was not ready).

19. See *Proposals for a Constitutional Amendment to Provide Rights for Victims of Crime: Hearings on H.J. Res. 173 and H.J. Res. 174 Before House Comm. on the Judiciary*, 104th Cong., 2d Sess. 171 (1996) (statement of John R. Schmidt, Associate Attorney General).

20. See *id.*

that participation conflicts with governmental priorities, are losing, or have lost, the battle. Also, the amendment may support Participatory Rights but not at any real monetary cost to the government, and if a conflict is perceived between Participatory Rights and effective prosecution, effective prosecution prevails.²¹

Indeed, this shift in focus undercuts the need for an amendment as the vehicle to give rights to victims. Unless the amendment is imposing significant restraints on governmental action or requiring significant governmental action, which is not even being proposed, the rights that fall in the Participatory Rights and the Victim Protection and Aid categories do not require federal constitutional status to be effective. The federal government and the states currently have the power to provide these rights through legislation. Proposing a constitutional amendment should not be a way to substitute symbolism for substantive action to aid victims—action that would require an exercise of political will and a commitment of substantial resources.

In general, rather than taking power or resources from government and giving it to victims, the taking is from defendants. The right of victims is “not to be excluded” by defendants rather than a right to require the government to afford presence, and the right is to have victims’ safety considered in denying the defendant bail rather than a right against the government to provide protection for the victim.²² By contrast with most participatory rights, expanding such so-called victims’ rights, which fall within the Prosecutorial Benefit category, *does* require constitutional ac-

21. An example of how one conflict between the Participatory Rights and Prosecutorial Benefit categories has been resolved in favor of the latter involves a victims’ rights amendment and enabling legislation implemented by Utah. In the words of Professor Cassell, the amendment and enabling legislation “give victims an unqualified right to attend all important criminal justice proceedings, with one exception. . . .” Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah’s Victims’ Rights Amendment*, 1994 UTAH L. REV. 1373, 1391. The exception is Utah’s Rule 615(1)(d), which “gives victims an absolute right to attend trial, provided that the prosecutor agrees.” *Id.* at 1392. Victims thus have participatory rights unless a government agent opposes them, hardly the typical definition of either a constitutional or an “absolute” right.

22. Confinement of the defendant is the only way the proposed amendment proposes to protect the victim’s safety. Other methods of protecting safety would likely require provision of services for victims, such as secure shelters. Using confinement of the defendant as the method of protecting safety presumes the defendant’s guilt. It also permits easier denial of liberty based on a preliminary determination of who is the victim.

Taking rights away from defendants and giving them to the prosecution ought not to be done under the guise of an amendment process that was begun in an effort to give voice and aid to victims. Victims are not truly benefitted if fairness is undercut and, if in that process, the innocent are sometimes convicted.

tion when they conflict with guarantees already granted by the Constitution to defendants.²³

More generally, adoption of Senate Joint Resolution 44 may have the lasting effect of reconceptualizing and recasting the battle in criminal litigation. If enacted, the contest would no longer be between a powerful sovereign and individual defendant, with the confident and generous sovereign giving special protections against erroneous convictions to its citizen charged with a crime. Instead, the battle would be between citizen-victims and citizen-defendants with the sovereign unable to benefit one group without disadvantaging the other.²⁴ Such a consequence has already been realized in the capital sentencing scheme by the admission of victim impact evidence. The admission of victim impact evidence has turned the sentencing phase of a criminal trial into a contest wherein the relative worth of the victim is weighed against that of the defendant. Although the admission of victim impact evidence appears to emerge from the Participatory Rights category, it is actually an enormous benefit to the prosecution because the defendant will almost certainly lose this sort of contest.²⁵

Another Prosecutorial Benefit of the proposed amendment is that it would have a direct effect on the admissibility of victim impact evidence in death penalty cases. In *Payne v. Tennessee*,²⁶ the Supreme Court held that the Eighth Amendment's prohibition against cruel and unusual punishment did not bar admission during the penalty phase of a capital trial of evidence showing the impact of a murder on survivors or of arguments

23. Several Prosecutorial Benefits would likely flow from enactment of Senate Joint Resolution 44. First, the right "not to be excluded" from public proceedings may invite excessive victim emotion into the courtroom. Also, in the particularly difficult cases of police violence against criminal suspects, the provision makes it easier for the police to coordinate falsification of a frequently used cover story that the defendant resisted arrest and provoked the resort to police violence. See Robert P. Mosteller, *Victims' Rights and the Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 Geo. L.J. 1691, 1698-1704 (1997). Second, the right "to consideration for the safety of the victim in determining any release from custody" may allow expansive preventive detention systems to deny bail to defendants charged, but not yet convicted, systems that might not have been constitutional otherwise. *Id.* at 1707-08. Third, the right to "consideration of the interest of the victim that any trial be free from unreasonable delay" may, for example, be used on behalf of the prosecution to require trial before the effects of prejudicial publicity have dissipated following a particularly notorious crime. *Id.* at 1708-09.

24. See Robert P. Mosteller, *Victims' Rights and the Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 Geo. L.J. 1691, 1710-11 (1997).

25. See Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 401-02 (1996) (arguing that victim impact evidence has the effect of making it very difficult, if not impossible, for jurors to evaluate fairly evidence regarding the human value of the defendant).

26. 501 U.S. 808 (1991).

by the prosecution about that impact.²⁷ However, the opinion was limited in at least two respects. First, the Court did not require admission of such testimony; it merely permitted admission.²⁸ Second, the Court did not decide whether “victim’s family members’ characterizations and opinions about the crime, the defendant, and the appropriate sentence” were admissible because those questions were not presented.²⁹ The proposed victims’ rights amendment would go beyond *Payne* by not only permitting admission of victim impact evidence but by requiring it. The amendment would thus permanently incorporate into the virtually unchangeable language of the Constitution the current view that relatives of homicide victims must be given a chance to speak during the sentencing phase in death penalty cases—a perspective that in a few years may be understood to be a serious mistake.³⁰

The admission of such victim impact evidence would be effectuated by the language of the proposed amendment giving victims the right to “be heard . . . at a public . . . proceeding to determine . . . a sentence.”³¹ As a result, states, which have traditionally determined the content of criminal law, would no longer be able to exclude victims’ statements from sentencing proceedings. The proposed amendment would probably also eliminate most restrictions on victims’ ability to express opinions about appropriate sentences, although this issue cannot be definitively resolved. Its language broadly protects a right to be heard at sentencing, a grant that may nevertheless be limited by basic concepts of relevancy and may also be controlled by explicit contradictory guarantees in other portions of the Constitution. Nonetheless, neither of these limitations is likely to entirely bar victims from stating what sentence they believe should be imposed.³² For example, during hearings in the Senate Judiciary Com-

27. See *PAYNE*, 501 U.S. at 827.

28. See *id.* at 831 (O’Connor, J., concurring) (stating “[W]e do not hold today that victim impact evidence must be admitted, or even that it should be admitted. We hold merely that if a State decides to permit consideration of this evidence, ‘the Eighth Amendment erects no per se bar’”).

29. *Id.* at 830 n.2 (noting that the question was addressed in *Booth v. Maryland*, 482 U.S. 496 (1987)).

30. See Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 401-02 (1996).

31. S.J. Res. 44, 105th Cong., 2d Sess., § 1 (1997).

32. The Oklahoma Court of Criminal Appeals has ruled that victim impact evidence in which a survivor gives his or her opinion of the appropriate sentence does not violate the Eighth Amendment and is not irrelevant. See *Ledbetter v. State*, 933 P.2d 880, 890-91 (1997). The same court, in *Connor v. State*, 933 P.2d 904 (1997), noted that some characterizations of the crime made by survivors might be so prejudicial as to violate the Due Process Clause. See *id.* at 920. Due process protections of the type suggested by *Connor* might be diminished by enactment of a broad right to be heard, but that result is certainly not inevitable.

mittee in 1997, Marsha Kight, a well-know survivor of the bombing of the Murrah Federal Building in Oklahoma City, testified in favor of the proposed amendment precisely so other victims of crime would be able to state their opinions about the appropriate sentence of a defendant.³³ As an opponent of the death penalty, Kight stated that she had been told by the prosecution team that she would be ineligible to be an impact witness under current law, but she believed that her views should be considered and that the constitutional amendment would permit that consideration.³⁴

A state constitutional amendment enacted in 1996 offers some insight into the future use of the victims' rights label as a means of advancing a Prosecutorial Benefit agenda. As noted previously, twenty-nine states had enacted victims' rights amendments by the end of 1996. These state amendments generally do little more than implement a set of Participatory Rights. As such, they are not subject to criticism on the ground that they would diminish defendants' rights other than an illegitimate argument that giving victims greater respect and dignity in the criminal process may result in fewer acquittals for defendants. However, a second-generation model of a very different and more aggressive character has emerged in the form of the Oregon Crime Victims' Rights Amendment, adopted in 1996.³⁵

While the Oregon Victims' Rights Amendment contains Participatory Rights, it is largely a prosecutor's document, bestowing an extraordinary set of Prosecutorial Benefits. In fact, the preamble to the amendment recites that it "is designed to preserve and protect crime victims' rights to justice and due process and to ensure the prosecution and conviction of persons who have committed criminal acts."³⁶

In some respects, the Oregon Amendment resembles California's "Victims' Bill of Rights,"³⁷ adopted in 1982, but the Oregon amendment is far more aggressive as an aid to effective prosecution.³⁸ Styled as rights

33. See *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearings on S.J. Res. 6 Before the Senate Comm. on the Judiciary*, 105th Cong. 71-72 (1997) (statement of Marsha A. Kight).

34. See *id.*

35. OR. CONST. art. I, § 42. In 1998, the provision was declared unconstitutional on procedural grounds under the state constitution because it contained more than one constitutional provision and had to be voted on separately. See *Armatta v. Kitzhaber*, 959 P.2d 49 (Or. 1998). The opinion striking down the amendment provides no basis for objection if provisions are separated and readopted.

36. OR. CONST. art. I, § 42(1). (emphasis added).

37. CAL. CONST. art. I, § 28.

38. For example, subsection (d) of the California amendment states that relevant evidence shall not be excluded, but the provision explicitly continues to allow exclusion of prejudicial evidence under CAL. EVID. R. 352, and it allows for a legislative override by a

“granted to victims,” the amendment creates a broad system of preventive detention. Beginning with the general guarantee of the “right to be reasonably protected from the criminal defendant or the convicted criminal throughout the criminal justice process,” the provision states that “any person arrested for a crime for which the People have set a mandatory minimum sentence shall not be released prior to trial unless a court determines by clear and convincing evidence that the person will not commit a new criminal offense while on release.”³⁹

The Oregon amendment eliminates all restraints other than those imposed by the United States Constitution and state rules of privilege and hearsay on the admissibility of evidence when offered against a criminal defendant.⁴⁰ In one provision, it guarantees to victims “[t]he right to have all relevant evidence admissible against the criminal defendant,”⁴¹ and through another provision, it defines “relevant evidence” as evidence “having any tendency to prove the charge against the criminal defendant or establish the proper sentence for the criminal defendant.”⁴² The Oregon amendment further grants the victim “[t]he right to refuse an interview, deposition or other discovery request by the defendant, the defendant’s attorney, or other person acting on behalf of the defendant.”⁴³ This provision duplicates a portion of the Arizona Victims’ Bill of Rights,⁴⁴ which puts the prosecution in control of most contact between the defense and the survivors and victims. The Arizona provision has been enforced by legislation that requires the defense to contact the victim exclusively through the prosecutor, who is entitled to be present at any interview granted by the victim unless the victim directs otherwise.⁴⁵

The Oregon constitutional amendment presents a concrete example of what can happen if the federal amendment relaxes existing protections of defendants’ rights. States can be expected to claim for the prosecution any ground arguably relinquished when provisions of the Bill of Rights are compromised by the federal victims’ rights amendment. A good example of this is Oregon’s preventive detention provision that “any person

two-thirds majority. *See* CAL. CONST. art. I, § 28(d). The Oregon provision recognizes neither exception. *See* OR. CONST. art. I, § 42(1), (3), (6). Similarly, subsection (e) of the California amendment recognizes that public safety shall be the primary consideration in bail, but it falls far short of the preventive detention aspects of the Oregon provision. *Compare* CAL. CONST. art. I, § 28(e), *with* OR. CONST. art. I, § 42(1)(a).

39. OR. CONST. art. I, § 42(1)(a).

40. *See id.* art. I, § 42(3).

41. *Id.* art. I, § 42(1)(f).

42. *Id.* art. I, § 42(6).

43. *Id.* art. I, § 42(1)(d).

44. *See* ARIZ. CONST. art. II, § 2.1(5) (providing the same rights to victims, including the right to refuse an interview, deposition or other discovery request by the defendant).

45. *See* ARIZ. REV. STAT. ANN. § 13-4433 (West Supp. 1997).

arrested for a crime for which the People have set a mandatory minimum sentence shall not be released prior to trial unless a court determines by clear and convincing evidence that the person will not commit a new criminal offense while on release."⁴⁶ Barring a change in the federal constitution, this provision is probably unconstitutional.⁴⁷ However, if the language from Senate Joint Resolution 44 guaranteeing "consideration for the safety of the victim in determining any conditional release from custody" were adopted, then the constitutionality of Oregon's preventive detention provision would be far less suspect.

IV. CONCLUSION

On July 7, 1998, the Senate Judiciary Committee approved Senate Joint Resolution 44 and sent it to the Senate for consideration, moving the proposed amendment another step closer to possible ratification. Beside the extremely unfortunate impact that enactment of the amendment would have in changing the basic conception of criminal litigation, the proposed amendment has a discrete flaw that should be corrected, if it is to be enacted, to help minimize the damage to be done to our existing system of criminal procedure protections. The amendment's provisions must make clear that its purpose is to guarantee victims of crime Participatory Rights in an important governmental process affecting them, not to provide Prosecutorial Benefits by diminishing the rights afforded to defendants when those rights conflict with the new rights of victims.

In a colloquy between Senator Russell Feingold and Attorney General Janet Reno at the 1997 Senate Judiciary Committee hearings on Senate Joint Resolution 6, both Feingold and Reno expressed interest in adding language to the amendment to make explicit that it was not intended to diminish defendants' rights.⁴⁸ Despite this suggestion, the drafters of Senate Joint Resolution 44 did not offer any provision to accomplish this

46. OR. CONST. art. 1, § 42(1)(a).

47. See *United States v. Salerno*, 481 U.S. 739 (1987) (setting out, *inter alia*, a general framework for determining the constitutionality of preventive detention legislation).

48. See *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearings on S.J. Res. 6 Before the Senate Comm. On the Judiciary*, 105th Cong., 1st Sess. 62 (1997) (statement of Attorney General Janet Reno).

An important difference exists between such a provision and apparently similar guarantees in several state amendments, which state that their provisions "shall not reduce a criminal defendant's rights under the United States Constitution." OR. CONST. art. 1, § 42(3). Because the United States Constitution is supreme, such a provision in a state constitution is ineffectual; the significant statement would be that the state victims' rights amendment is not intended to diminish any protection for defendants under the state's constitution. The type of provision discussed by Senator Feingold and Attorney General Reno would maintain guarantees of the federal Bill of Rights.

purpose or to explain how the proposed amendment was intended to interact with the existing defendants' rights.

Two proposals were made regarding the impact of the proposed amendment on the rights of criminal defendants. One was contained in Professor Paul Cassell's written statement submitted to the Committee at its April 1998 hearings. In it he proposed adding to the amendment the following language: "In case of conflict, the rights of the accused or convicted offender and the victim shall be reasonably balanced."⁴⁹ Clearly, this language does not accomplish the purpose supported by Senator Feingold and Attorney General Reno of insuring that defendant's rights not be diminished. To state that an existing right will be balanced with a new right is not to preserve the pre-existing right but to diminish it if there is a conflict, probably diminishing the existing right in direct relationship to the extent of the conflict.⁵⁰

A second proposal was offered by Senator Richard Durbin of Illinois during Judiciary Committee debate on the proposed amendment shortly before the committee voted its approval. Senator Durbin proposed that a new Section 6 be added to the amendment, which would read: "Nothing in this article shall be construed to deny or diminish the rights of the accused as guaranteed by this Constitution."⁵¹ His proposal was not adopted.⁵² Although some detrimental recasting of the conflict in criminal litigation will inevitably occur if the amendment is enacted almost regardless of its specific language, a provision like that offered by Senator Durbin is vital if the amendment is to be ratified. Such a provision would help to direct the amendment toward serving the legitimate function of enhancing Participatory Rights and inhibit excessive damage to our existing constitutional structure in service of the inappropriate goal of providing Prosecutorial Benefits under the politically and emotionally powerful label of victims' rights.

49. Statement of Professor Paul G. Cassell Before the Senate Judiciary Committee, Apr. 28, 1998, at 30 (on file with the *St. Mary's Law Journal*).

50. Indeed, the language proposed by Professor Cassell would be affirmatively damaging to the concept of preserving existing rights of defendants. If the proposed amendment were passed without this language, a conscientious judge would attempt first to enforce both the victim's right and that of the defendant without finding any conflict and second would employ various substantive concepts of constitutional interpretation directing resolution of conflicting rights. Professor Cassell's language suggests that the first move of the judge is to engage in some sort of free-form balancing of interests between the two sorts of rights that I fear will first of all invite finding conflicts and then will suggest that the defendant's right should be diminished to accommodate the more popular interests of victims.

51. Exec. Comm. Meeting, Senate Comm. on the Judiciary, 105th Cong., 2d Sess., at 109 (July 7, 1998) (on file with the *St. Mary's Law Journal*).

52. *See id.* at 109-11.

