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VICTIMS' RIGHTS

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PANELISTS:

HON. JANE BRADY, Attorney General, Delaware

HON. MICHAEL O'NEILL, U.S. Sentencing Commission and Professor, George Mason University School of Law

DR. ROGER PILON, Vice President for Legal Affairs, Cato Institute

MR. STEVEN J. TWIST, General Counsel, National Victims' Constitutional Amendment Project

HON. PAUL G. CASSELL, United States District Court for the District of Utah (moderator)

MR. GEDE: Ladies and gentlemen, welcome to the panel on Victims' Rights sponsored by the Criminal Law and Procedure Practice Group. I'm Tom Gede, the outgoing chair of the practice group, and I want to introduce the incoming Chair of the practice group, Kent Scheideger, right up front here, who will be leading the practice group starting today. It is a privilege to introduce for you today your moderator, who will introduce the panel and, with a tight rein, moderate this great panel on victims' rights.

That moderator is Judge Paul Cassell of the U.S. District Court for the District of Utah. It is a personal privilege for me to introduce him because we had the opportunity to work together over the years on everything from tort reform and victims' rights and Miranda and other issues in the Congress, and can attest to numerous interminable teleconference calls that went into the wee hours as we strategized and worked over legislation, much like sausage, right?

Previously, Paul served as a professor of law at the University of Utah College of Law. He argued recently the *U.S. v. Dickerson* case in the Supreme Court on the Miranda issues and also argued pro bono for the victims of the Oklahoma City

bombing when they were excluded from watching trial proceedings, if they were going to testify in the death penalty phase. He's written numerous articles on Miranda, the death penalty, on crime victims' rights, a graduate in 1981 from Stanford University and earned his J.D. also from Stanford in 1984, and clerked for then-Judge Scalia of the D.C. Circuit and Chief Justice Warren Berger of the United States Supreme Court.

It's a real privilege to have with us today a leader in this particular field. Please welcome Judge Paul Cassell.

JUDGE CASSELL: Thanks, Tom, for the introduction. You mentioned that I argued the Dickerson case a couple years ago—unsuccessfully, as you know. Hopefully, the Supreme Court's going to clean up some of the questions that resulted in the wake of that case. I've been honored, I think, from a number of ACLU chapters, for single-handedly doing more to strengthen Miranda rights in that case than anybody else in the country. So, you never know. I guess we maybe need to strategize a little more in some of those evening calls than when we were working on the case.

I know Kent Scheideger is going to be trying to enlist as many of you as he can into the criminal law practice group, and I certainly want to plug that group. That group's doing a lot of interesting things and Kent, I know, will be here after the program, if you had any interest in signing up for the criminal law practice group. And obviously, you must have some interest in criminal law to have come here, so I encourage you to come here and talk to him about that at the end of the program.

But our topic today is the Victims' Rights Amendment to the U.S. Constitution. Sometimes at the Federalist Society we have debates about constitutional law that go off into some very interesting theoretical issues. Today, I think we have a very concrete and practical issue. Should Congress approve a specific proposal that is pending in front of it? And I think it's interesting to look at the history of that amendment because there is a particular connection to the Federalist Society.

The idea behind a constitutional amendment for crime victims' rights stems back to 1981 when President Reagan came into office and appointed a task force on victims of crime. That task force was chaired by Lois Harrington, who of course is on the Board of Visitors for the Federalist Society. And in 1982, that task force recommended a constitutional amendment to protect crime victims, pointing out that defendants have constitutional rights and, given the inadequacies in the way crime victims were treated, in the task force's view, it was time for a constitutional amendment.

Well, of course, a constitutional amendment is something that is a bit of a daunting prospect, and victims' rights advocates in the wake of that proposal decided to go to a laboratory of the states, to propose amendments to state constitutions that would protect crime victims' rights. And I think by latest count, there are 33 states

that have drafted victims' rights amendments of one form or another. I know Steve Twist worked on his amendment in Arizona; Jane Brady worked on her's, I believe, in Delaware; and a number of other states have these provisions that are essentially a bill of rights for crime victims. They guarantee, in general, the rights of victims to be notified before court proceedings are held; the right to be present at those hearings, an issue in the Oklahoma City bombing case; and a right to be heard at points in the process, such as when bail is going to be granted or when a plea bargain is going to be entered or when a sentence is going to be imposed. Now, in the wake of those state amendments, there have been some problems, I think it's fair to say, and some successes. One of the things the panel will have to look at today is, are those state amendments successful enough or have there been enough problems in administering them that we need a federal amendment.

And so, with that background, I think we're in a position, then, to have a debate. And usually at these Federalist Society conventions, we go outside of friends of the Federalist Society to make sure that we have the opposing views sharply presented. But today, there's been no need to go outside the Society because we have four strong friends of the Society here who are prepared to articulate the competing positions. Let me introduce them in the order that they'll be speaking.

We're first very honored to have with us Jane Brady, who's the distinguished Attorney General for the State of Delaware. General Brady has been the past chair of the Republican Attorneys General Association. She's actively promoted victims' rights in her state and worked on a number of task forces, including task forces on senior victims and child victims. And before serving as attorney general, she served for 14 years as an admired prosecutor for the State of Delaware.

Then, following up on that, Roger Pilon, who's one of the leading scholars on Libertarian thought in our country. He's Vice President for Legal Affairs at the Cato Center for Constitutional Studies, which he founded. His writings have appeared in the *New York Times*, the *Washington Post*, the *Stanford Law Review*, and numerous other popular and academic journals. And, he's testified before Congress a number of times, including testimony on the Victims' Rights Amendment.

He will be followed, then, by Steve Twist, who I guess has been described sometimes as the James Madison of the Victims' Rights Amendment, the person who's —oh, I'm sorry. Steve Twist is going to be going first. I apologize. As long as the panelists know what they're doing, the moderator can be a little more informal.

Steve Twist is going to be speaking first, the James Madison of the Victims' Rights Amendment. He's been working on various drafts that have been introduced. He currently will be describing the proposal, Senate Joint Resolution 1. Is that the number that Senator Kyle and Senator Feinstein have secured for it? He's the General Counsel for the National Crime Victims' Constitutional Amendment Project, and also a special counsel for the National Crime Victims Law Institute. And he teaches a

course on crime victims' rights at Arizona State University, including running a clinic out of the law school there.

And last, but certainly not least, is Michael O'Neill, who's a professor of law at George Mason Law School. He was appointed by the President and confirmed by the Senate to be a member of the United States Sentencing Commission. He previously served as General Counsel to the Senate Judiciary Committee, working with Senator Hatch there. And he's also served as a law clerk to Supreme Court Justice Clarence Thomas and D.C. Circuit Judge David Sentelle.

So, our format will be I think we're going to give each speaker about eight minutes, and then we're going to have some discussion on the panel and plenty of time for questions from the audience.

Steve Twist.

MR. TWIST: Thank you, Judge Cassell. I think with approval of our panelist, I'll speak from here. I've been asked to very briefly to read a statement from Senator Kyle, which, Judge, I hope you count against my—how much time?

JUDGE CASSELL: Eight minutes.

MR. TWIST: Senator Kyle was going to join the panel today, and I've been asked to read a very brief statement.

STATEMENT BY SENATOR KYLE

Greetings to all my friends and colleagues at the Federalist Society National Lawyers Convention. I regret that I cannot be with you today to discuss the Crime Victims' Rights Amendment. So many of my colleagues and I are so indebted to Gene and everyone at the Federalist Society that I cannot thank you enough. I'm grateful that the Society is sponsoring a discussion of the Amendment, and I look forward to receiving a report of this discussion.

Under the able leadership of Judge Paul Cassell, you will have a thoughtful discussion, I have no doubt. It is my hope that after a thorough review, you will conclude, as I have, that the criminal justice system treats crime victims in unfair and unjust ways, and that the only solution is a constitutional amendment.

I would like to thank Attorney General Jane Brady for filling in for me. She has been in the front lines fighting for crime victims' rights for many years. Finally, Mike O'Neill, Roger Pilon and I are usually on the same side of issues. And while I regret that that isn't the case here, I reluctantly accept that even they cannot be right all the time.

Again, thank you for everything you are doing to improve our nation's legal system.

(End of statement.)

Well, good morning, and thank you for the opportunity to join the panel. Just over 20 years ago, as Judge Cassell said, after more than a year of hearings across the country, Ronald Reagan's Task Force on Victims of Crime issued its call for constitutional rights for crime victims. In concluding that a federal constitutional amendment was necessary, the Task Force noted, "The guiding principle that provides the focus for constitutional liberties is that the government must be restrained from trampling the rights of individual citizens. Victims of crime have been transformed into a group oppressively burdened," wrote the Task Force, "by a system designed to protect them. This oppression must be redressed."

More than two decades later, crime victims remain oppressively burdened by our justice system. Consider how our system treats victims of domestic or sexual violence. When the accused is arrested, he is given a hearing, usually within 24 hours. This hearing determines whether the accused will be released on his own recognizance or on a bond, the amount of the bond, and what the other conditions of release will be. Routinely, the victim will never be given notice of this proceeding, will be denied any meaningful opportunity to attend, and will be given no voice regarding the release or other matters that may be crucial to her safety. Typically, she will not be informed of the defendant's release or of the conditions of that release. Her safety will not be a factor in determining release conditions.

These failures at the very beginning stages of a criminal case set the tone throughout and are of far more than academic interest. For women who are raped and beaten, these failures are very often fatal. As the case progresses, there will be little, if any, consideration for a victim's interest in a speedy trial. The defendant will ask for, and the court will grant, one continuance after another, without giving the victim a voice in the matter, and without regard to the often harmful effects that the delay will have on her.

In most cases, the defendant will be offered a plea bargain without the victim ever knowing about it. The plea bargain will be presented to the court at a formal proceeding, but the victim will be given no notice of this proceeding, and she will have no right to attend. Even if she finds out about it, and even if she wants to tell the judge what she thinks about the plea bargain before the judge accepts it, she will have to stand silent, having no right to speak to the court. If the case does go to trial, the victim will not be allowed in the courtroom during the trial, except when she testifies, even though the defendant will have the right to be there, along with the defendant's family and friends, and even the state's chief investigator, who is also a witness.

After a conviction, the defendant will be sentenced, but the victim will not be allowed to speak at the sentencing proceeding unless the prosecutor decides to call her as a witness. Typically, the rapist or abuser will not be ordered to pay restitution.

The victim's safety will not be considered when release decisions and probation conditions are established.

The Founders would not recognize this system. At the Founding, private individuals, victims, initiated and pursued virtually all criminal prosecutions. This practice continued well into the 19th century, consistent with the common law that saw the crime a wrong inflicted upon the victim, not as an act against the state. Only when the government began to assert monopoly control over the means of investigating and prosecuting crime were victims marginalized and silenced.

These conditions of injustice persist, despite the best efforts of the victims' rights movement. They persist despite more than two decades of efforts to pass and enforce victims' rights laws in every state. Realizing that only fundamental reform through our most basic law will bring lasting justice and fairness to victims, the mainstream victims' rights movement has forged a bipartisan coalition led by Senator John Kyl that seeks an amendment, a federal victims' rights constitutional amendment.

The Amendment will establish basic rights to justice and fairness that no legislative body or court will be able to deny. The Amendment will establish for victims of violent crime the right to notice of public proceedings in their cases; the right not to be excluded from those proceedings; the right to be heard at release, plea, sentencing, and clemency proceedings. It will require that the victims' interest in restitution, safety, and avoiding unreasonable delay be given due consideration. It will establish for victims standing to enforce these rights in court. The Amendment's provisions are simple and direct. It will profoundly improve the quality of justice for crime victims.

Imagine the importance for a victim of sexual or domestic violence to have her safety considered when release decisions are made. Imagine the importance of giving her a voice at release and plea and sentencing and clemency proceedings, and respecting her right to restitution and her right to a speedy trial. Imagine the importance of our justice system telling her that as a matter of our fundamental law, she has the independent right at crucial stages to a voice, that she is a person of worth and dignity, and that the law will respect that.

There are some who say that giving rights to crime victims will diminish the rights of the accused, as though these rights competed in a zero-sum game. No constitutional right of a defendant prevents a victim from receiving notice of proceedings, from being present at those proceedings, or from being heard at release or plea at sentencing proceedings, or from having the victim's interest in safety or restitution or a speedy trial simply given due consideration.

There are some who say the amendment is unnecessary, that state laws are sufficient. But as long as the rights of the accused and convicted criminals are in the U.S. Constitution and victims' rights are not, victims will remain second-class citizens in our justice system. For 20 years, we have tried statutes and state constitutional

amendments, and they have failed to change the culture of our justice system in any meaningful way.

Amending the Constitution is the right way—indeed, the only way—to secure lasting, meaningful, and enforceable due process rights for victims, rights that are beyond the ability of a legal culture hidebound to its own power to change. This is how it has been throughout the history of our country. There are those who will say the Amendment will violate important principles of federalism, intruding on the power of the states. I need not remind this audience that the goal of federalism is not, in the end, to ensure that states have the power to infringe upon the liberty of the people. The goal of federalism is to preserve liberty itself, yet no victim is free when subjected to the monopoly power of the state, which denies her presence and silences her voice. Indeed, the rights we seek are the very kinds of rights with which the Constitution is typically and properly concerned. Rights of individuals to participate in all those government processes that strongly affect their lives.

The Senate Judiciary Committee concluded that the Amendment was consistent with the great theme of the Bill of Rights: to ensure the rights of citizens against the deprecations and intrusions of government, and to advance the great theme of the later amendments, extending the participatory rights of American citizens in the affairs of government.

The National Governor's Association concluded, that states and the American people, by a wide plurality, consider victims' rights to be fundamental. Protection of these basic rights is essential and can only come from a fundamental change in our basic law: the U.S. Constitution.

Forty-three state attorneys general, of whom General Brady was a leading advocate, wrote, "Despite the best intentions, crime victims are still denied basic rights to fair treatment and due process that should be the birthright of every citizen. Only a federal constitutional amendment will be sufficient to change the culture of the legal systems."

These authorities are a compelling rebuke to the voices of opposition. We seek a constitutional amendment because no government should be allowed to treat crime victims the way they are treated today. No government should refuse to tell a battered woman about the release about her batterer, nor force her into silence about her safety or the offender's plea bargain or the offender's sentence. No government should exclude her from the courtroom during trial, nor force her to endure years of delay or go without restitution. It's time to fulfill this remaining legacy from Ronald Reagan so that no government will be able to treat crime victims with the gross injustice that has come to be the sad hallmark of our system.

JUDGE CASSELL: Next, we have Roger Pilon.

DR. PILON: Thank you, and it's a pleasure to be here, especially to follow Steve Twist, whom I've also followed in congressional testimony. He is certainly a wonderful advocate for his position.

Now, in thinking about how to go about this talk today, I drew upon, initially, Senator Diane Feinstein's press release when the Senate Judiciary Committee voted out the Amendment that is before us today. And I note that she concludes it by saying that the Amendment is supported by the platforms of both the Democratic and Republican parties, by 49 out of 50 states that have called for the Amendment—I don't know who the hold-out was; it was probably Rhode Island still holding out—by Attorney General Reno; Attorney General Ashcroft; by 42 state attorneys general; by Mothers Against Drunk Driving; by all manner of police organizations; even by Larry Tribe. And so, here I am to argue against this—talk about being outside the mainstream.

I want to say, though, at the outset that I am certainly not against the merits of this amendment. In fact, just to be very clear on that, one of my first professional articles, written even before the committee that President Reagan organized, was in defense of the victims of crime, and indeed calling for a rethinking of the whole approach to criminal law with respect to that. So, with respect to the merits, I want to be very clear, I am with Steve on that wholeheartedly.

The question, though, is whether we should do that through a constitutional amendment. It seems to me that that is the issue that we need to take very seriously. In doing so, I'm going to draw from some of the testimony I've given on this.

And, I want to invoke an even earlier document and an even more seminal document than the Constitution to suggest that it is not for light and transient reasons that we amend the Constitution. Not that the reasons here are light and transient, but amending the Constitution is a very serious business. We know that we have had difficulties in the past—the 18th Amendment in particular, in amending the Constitution—and we want to think long and hard about that, especially when we think about the actual structure of the Constitution and why it is structured as it is. That's going to be my main focus in my remarks here.

Regarding the rights of victims, the government says we've already provided for the rights of crime victims in the form of 33 state constitutional amendments and 17 state statutes. So, every state in the nation has provisions for the protection of the very rights that this amendment calls for protecting through a federal constitutional amendment. And so, it leaves us with the question, what is the problem with these? Steve has alluded to problems but he hasn't given us any details. Maybe in the course of the discussion afterward, we will get some details about that. But I, for one, have found no compelling reason to elevate this to a constitutional amendment. I do, however, see some compelling reasons to avoid doing this through a constitutional amendment, and they fall into two categories: theoretical and practical. I'll take those in order.

On the theoretical side, the proponents of this amendment often speak of constitutional imbalance between the rights of the defendant and the rights of the victim. The Constitution lists numerous rights of defendants and says nothing about the rights of victims. There's a fundamental reason for that imbalance, and it has to do with the very purpose and structure of the Constitution. As the Declaration tells us, the basic purpose of the government is to secure our rights, but it's got to do that in a right-respecting way. The protections the Constitution affords defendants are clear examples of the limitations that are erected by the Constitution to satisfy the need that the means be right-respecting.

On one hand, the framers wanted government to be strong enough to carry out its functions, but they also wanted it to be strained in doing so. And they were especially concerned to limit the police powers of government and the power to secure our rights, for they knew from experience that in the name of so basic and worthy an end, great abuse might occur. That's why they left the police power almost entirely in the hands of the states, where it's closer to the people.

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

Thus, the framers' constitutional approach was essentially guarded. They wanted to make it very clear in our organic law that government was limited to certain ends, and was limited further in how it might pursue those ends. There's no place in that approach for government benefits, for the modern welfare state. It's lean, limited government empowered to do a few things in limited ways, leaving the individual citizen free to pursue happiness, provided he respects the rights of others in the process.

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

Moreover, such benefits as the Constitution, does confer in the criminal law context arises entirely because the government is the moving party in an adversarial matter. The benefits or rights of due process or trial by jury, for example, arise only because the government has placed the accused in an adversarial relationship, at which time such rights kick in to limit the means government may employ.

The situation is entirely different with respect to crime victims. They stand in no adversarial relationship with the government, such that the means available to the government must be restrained for their protection. What this amendment provides,

rather, is closer to a true benefit from government, and therefore the proposal has about it something of the air of certain European, even Eastern European, constitutions, which list rights not as liberties that government must respect as it goes about its assigned functions but as entitlements the government must affirmatively provide. Indeed, Steve spoke of these as being participatory rights of American citizens. And it would be unfortunate, I submit, if we were to have this new kind of entitlement rights come into the Constitution through the back door, as it were.

But if the absence of any general federal police power makes this amendment anomalous, still other implications for federalism are even more clear. By constitutionalizing certain minimal standards in this area, for example, the Amendment would preclude states from experimenting in ways that might fall below the minimum. Moreover, the Congress would have the power, as I read the Amendment, to constitutionalize certain unfunded mandates, which should be of concern to members of this organization.

Finally, as a structural matter, such rights as are found in the Constitution, either enumerated or unenumerated, are invoked ordinarily when governmental action either proceeds without authority—*Lopez* and *Morrison*—or in violation of a recognized right. Thus, the punitive authority of the government is pitted against the punitive right of the individual or organization to be free from such action or from such an application of an otherwise authorized action.

Here, however, we have a three-way relationship, which raises havoc with our traditional adversarial system. How, for example, do we resolve the potential conflicts among the authority of the state to prosecute the right of the accused to a speedy but fair trial and the right of the victim to adjudicative decisions that duly consider the "victim's interest in avoiding unreasonable delay", that last being a quote from the Amendment. If judicial balancing poses serious jurisprudential problems in our adversarial system today, and it does from time to time, then those problems will only be exacerbated under this three-way relationship.

In the larger context, then, the rights of defendants that we find in the Constitution make perfectly good sense. There are restraints on government power. Federal government may pursue an end if it's authorized to pursue it, but it must respect the rights in the process. Thus, given the basic defensive way we constitute ourselves, it's not surprising that the rights of crime victims are not mentioned in the Constitution. That doesn't mean that they don't have rights.

In fact, the primary way in which crime victims satisfy their rights, the way they're vindicated, is not through the criminal but through the civil procedure. That vindication may be achieved in part through the criminal proceeding, to be sure, for most victims have an interest, and even a right, in seeing a criminal get his come-uppance.

But the criminal proceeding belongs primarily to the people whose interests and rights may be identical to those of the victim, but may also be at variance with

those of the victim. Sometimes, the prosecutor will want to put the criminal away, for example, but at other times he may want to strike a deal with the criminal to reach other, more dangerous criminals, criminals that are of no concern to the victim, who wants this particular perpetrator punished. In such cases, the crucial question is whose forum is it? Under our system where we delegated law enforcement for the most part to the state, it's the people's forum, with a prosecutor representing the interests of the people.

It's crucial, therefore, that there be two forums—criminal and civil—for there are two sets of interests to be pursued and they are not always in harmony. It's for that reason, however, that it's crucial also to recognize that an uncritical concern for victims' rights may muddy the water. More precisely, when rights that belong properly in the civil forum are transported to the criminal forum, confusion and conflict are likely to ensue. It's a very real risk with this amendment.

Consider, for example, the victim's right to adjudicative decisions that "duly consider the victim's just and timely claims to restitution from the offender" —again, language from the Amendment. Perhaps such details as would constitute a restitution order could be incorporated into the prosecutor's case against the defendant, aimed at determining his guilt or innocence, but that kind of concern rests properly with the victim, not with the people or their representative, the prosecutor. When representing separate parties, there's always the potential for conflict of interest, of course. That is clear here—the victim's interest in restitution may vitiate punishment; the people's interest in punishment may vitiate restitution. Which interest should prevail under this amendment, and would that failure to convict, perhaps of the higher standard of proof for a criminal conviction, undermine any right of the victim to a restitution order, which might have been obtained in a civil action against the defendant?

Thus, when we cloud the theory of our system of justice with an amendment of this kind, we give rise to all manner of practical problems. The provision for adjudicative decisions regarding victim safety, speedy trial, and restitution, for example, would seem to guarantee victims a right simply to be present and heard at all criminal proceedings, but to a separate victim's hearing on those matters. If that's how the provision is to be read, and surely there are courts that will read it that way, then we can imagine how many such hearings will arise in an already overburdened criminal justice system that plea-bargains over 90 percent of the cases.

More generally, however, practical questions surround the very nature of the victim's claim. In the proposed amendment, they are called rights. But it's unclear to me, at least, how those rights would operate, and just how remedies for the violation would work. The Amendment provides, for example, that the victim shall have the right to adjudicative decisions that duly consider the victim's safety. That right is either so vague as to be all but meaningless, or it is not. If not, then what does it mean? Do not most prosecutors now take matters of victim safety into account when

they make decisions? How would things change under the Amendment? More importantly, would the victim have a claim against the prosecutor who was sufficiently inconsiderate of the victim's safety.

The Amendment purports to establish the rights at issue, but it also reads, "Nothing in this article shall be construed to authorize any claims for damages." Are we to understand by that the victim has no remedy when the rights established by this amendment are ignored or violated? Rights like those are no rights at all.

And so, I'm going to conclude by saying there is, in short, a disturbing air of aspiration about this proposal, like the generous legacy in a pauper's will, it promises much, but in practice it could deliver little. Clearly, rights without remedies are worse than useless; they're empty promises that in time undermine confidence in the very document that contains them; the Constitution, in this case. But a remedy is ordinarily realized through litigation.

Before this amendment goes any further, therefore, it's incumbent upon those who support it to show how victims will or might litigate to realize their rights, and what they're doing so implies for other rights in our constitutional system. I can imagine several scenarios under this amendment, none of which is clear, all of which by virtue of being constitutionalized will make the plight of victims not better, but worse. We owe more than empty promises to those for whom the system has failed already once.

Thank you.

JUDGE CASSELL: Next, we'll hear from General Brady.

GENERAL BRADY: Thank you. Well, I am here as a career prosecutor proud to support the federal constitutional amendment for victims' rights. I should note that in Delaware the attorney general is the D.A. We don't have elected county prosecutors. There are only two other states like that, and I was a prosecutor in my office for over 12 years.

For literally two centuries, defendants have enjoyed the protection of the highest law of the land, the U.S. Constitution. Through decades of judicial activism, defendants' rights have been defined, refined, and expanded. The concept is that it is appropriate to restrain a powerful and resource-laden government to the benefit of an individual, and that has been strongly cited by those who have expanded those defendants' rights. That reasoning is equally appropriate to the status of the victim. A large, unfamiliar, and bureaucratic government has, for too long, made decisions regarding these individuals' basic human interests without regard to their views, and indeed their very existence at times. In many ways, they hold no status at all in government practice and in the law.

Victims of crime are, in fact, and should be in the law, as unique as the offenders who brutalize them. They have special and distinct interests in how the

justice system responds to them, just as the defendant. It is time that we recognize that appropriately. There are those who say that we can and should recognize those rights through confidence in the system to do the right thing, or in state government bills, state constitutional protection, or statutory provision. Shame on those who would either default or defer this responsibility from the national forum.

Consistently, when it has been perceived that the interests of a significant group of citizens are inadequately or ineffectively represented by the legal structure of this nation, a national response has been deemed appropriate. We would not and did not tolerate a variable and inconsistent patchwork of practices with regard to the principles that formulate the constitutional rights of defendants in this country. We should not tolerate such a structure when dealing with the interests of the victims of crime.

While I'm being critical of my peers, I must acknowledge that there is a significant body of evidence that anything less than a national response will result in ineffective and inadequate system responses to victims by and on behalf of their interests. Major research findings by the National Institute of Justice and others show weak enforcement of existing laws with regard to victims' rights, essentially giving them no rights at all.

What can we do to change that in the world of prosecution? Well, most significantly, the leadership of those in Congress and the stature of the Constitution will create a climate throughout this nation in which victims will be recognized as having the special and unique interests they possess as a result of their victimization. I am a prosecutor who does notify victims of proceedings, who encourages them to be present, who discusses the resolution of cases in advance with them, and who assures that the prosecutors who work for me follow those practices and policies. I am very comfortable that we seek, and I believe mostly succeed, in technical compliance with our law and the proposed amendment.

But I am still left hollow, and I am still left anxious, that there are those, perhaps among my successors, who will not embrace the substance and priority that this issue deserves and requires. Incorporating concerns for victims, accommodating the interests of victims, and promoting advocacy for victims within my office has made it stronger. My prosecutors feel a different urgency and share a better sense of purpose with the interests of the victim as a component in their considerations. The confidence that we are truly doing justice is stronger.

Discussing case resolutions, the differing procedures, and the terminology of the justice system with victims has not made resolution of our cases either more difficult or less timely. Indeed, in very difficult cases when the victim understands the reasoning for the particular resolution, their support for the office and the result is very effective in meeting the criticism of those less informed -- mostly in the media. And when you talk about "timely," it certainly takes longer for my prosecutors to write me a memo about why they didn't do the things that they are supposed to do

under the law and practice in my state than it would have to make the two-minute phone call.

There are costs associated with the protection of the constitutional rights of defendants, and not once have I heard someone argue that we should suspend some of those rights because it is too expensive to comply with them. And yet, in the course of the debate on this amendment, we have been called upon to justify the cost of compliance. This aspect of the debate speaks more loudly than nearly any other about how different the climate would be if victims' rights were constitutional rights. Our discussion would be regarding the substance and the cost of implementation would be considered honorable remuneration in support of important principles.

Finally, much of the statutory and case law has addressed the practical application of constitutional rights for defendants. So, too, will that occur with regard to victims' rights. This amendment provides nothing more than that which a reasonable person involved in a legal proceeding should expect. It recognizes that victims deserve respect and consideration in the law. It does not prevent the exercise of judgment, discretion, or decision-making by prosecutors.

The public's confidence in the justice system is measured as much by how we treat victims as by how we treat defendants. It's time that we put victim justice in the criminal justice system. Equivalent in importance; equivalent in consideration; and equivalent in the law.

Thank you.

JUDGE CASSELL: Finally, we'll hear from Michael O'Neill.

PROFESSOR O'NEILL: Thank you. I'd like to thank the Federalist Society for inviting me to participate on this panel. I've actually long been a member of the Federalist Society. I think it extends back to my second semester of my first year of law school. I'd like to say it's because of the magazine discounts and the low introductory rate credit cards that the Society offers, but I think that's another professional association. Rather, I'm a Federalist Society member because I share the organization's fundamental vision of the Constitution. I believe that text, history, and structure are the appropriate tools by which to interpret the Constitution. I suppose I'm the odd man out here, as I come neither to praise nor to bury the Victims' Rights Amendment, but instead simply to raise a few cautions. In fact, when Dean Reuter had originally said, “We'd like you to participate in the Victims' Rights Amendment panel,” I thought “I'm probably a better moderator in those circumstances because I don't really take a strong position particularly either way.” But I do have a couple of concerns that I'd like to raise. In fact, as both a former prosecutor in the Department of Justice and as a fairly recent crime victim myself, I can certainly appreciate the frustration that victims encounter in obtaining justice. So, I'd like to offer three basic observations with respect to the Victims' Rights Amendment.

First, the Constitution is difficult to amend for very good reason. Thus, the burden on anyone proposing an amendment is high. One must demonstrate both that a problem exists and that the proposed amendment is the best means of remedying that problem. Second, the Constitution's structure is such that it arranges rights between individuals and the government; not generally between individuals. The proposed amendment seems to run somewhat counter to this tradition in that it establishes positive rights somewhat different than those we generally think about in constitutional law. Finally, I'm not convinced the proposed amendment strikes the core of the perceived problem, namely that victims are unfairly excluded from the criminal justice process.

I have, instead, a slightly different recommendation with respect to victim-centric prosecutions, and it's the kind of recommendation that only a wacky academic can offer.

The framers made the Constitution difficult to amend for a very good reason: namely, to prevent the popular passions of the day from being translated into constitutional law. James Madison, whose profile is well known to Federalist Society members—in fact, at dessert the other night, I got to actually ingest his profile on a very tasty piece of chocolate —explained that the Constitution's cumbersome amendment process was designed so that our founding charter could be altered only on great and extraordinary occasions. Thus, the Constitution has only been amended 17 times since the original Bill of Rights was ratified. Of course, one of those amendments was adopted to repeal prohibition.

I would like to see compelling evidence that victims truly are systematically excluded from the criminal justice process in ways that are actually deleterious to the criminal justice system. In other words, I'd like the problem specifically to be identified and have some indication that the proposed amendment will remedy that alleged problem. I understand, and I think as Roger pointed out, some 33 states have ratified amendments to their own constitutions to protect victims' rights, and the remaining states have adopted statutory provisions to protect victims' interests. Of course, the federal government has enacted a mandatory victim restitution provision. Before we ratify a federal constitutional amendment effectively permanently enshrining victims' rights, we ought to do some serious empirical work both determining whether problems still exist and analyzing the efficacy of existing victims' rights provisions.

I believe that we all do want to help victims. In fact, I admire Senator Kyl in particular for making this such an important issue and bringing it to the floor of the Senate, and in Congress particularly. But if the current protections haven't been effective, we need to understand why they have failed victims' interests. I would like to then see hard evidence first that even in the face of the states' efforts, significant problems remain that may only be addressed through ratification of a federal constitutional amendment.

While anecdotal accounts of the indignities suffered by crime victims are doubtless powerful, they should not be used to imply a systemic problem, if in fact no problem exists. It is my view that we ought to let the states act as laboratories and work out whatever problems may currently exist before we ratify a constitutional amendment that may at the end of the day do very little to assist victims.

Second, I am concerned that the Victims' Rights Amendment breaks with historical precedent and establishes positive rights in a manner inconsistent with traditional constitutional structure. The Constitution allocates rights and responsibilities among branches of government and between the national and state governments. The Bill of Rights further defines that relationship between citizens and the government. Its core constitutes a code of criminal procedure designed to ensure fair treatment for the defendant and to make it difficult for the government to secure criminal conviction. These constitutional rights for individuals, however, are primarily negative rights which limit the state's power to interfere with the activities of its citizens. They do not, by and large, create affirmative obligations on the government. Instead, the Constitution defines the relationship of the individual to the state in terms of participation in the democratic process.

By and large, the Constitution refrains from either defining relationships between individuals or from establishing affirmative rights or entitlements. Only in rare instances have courts found that individuals enjoy positive entitlements or claims on the government in order to ensure the meaningful exercise of their rights. In *Gideon v. Wainright*, for example, as we're all well familiar with, the Supreme Court determined that the Sixth Amendment established an affirmative duty on the state to pay for counsel for indigent defendants.

Now, it's true, occasionally the Court has affirmed positive entitlements under procedural due process analysis when the government seeks to deprive a citizen of liberty or property rights. In *Goldberg v. Kelly*, for example—not one of the more popular cases, I would imagine, in the Federalist Society pantheon, or certainly my own personal pantheon—the Court held that the government must provide a hearing prior to depriving an individual of statutorily authorized welfare payments. In *Boddi v. Connecticut*, the Court held that the state could not charge indigent persons a fee before allowing them to file for a divorce.

Most of these rulings, however, have involved the state's trying to deprive the citizens of a specific constitutional or statutory right, rather than individual claims that the government must provide a benefit or render assistance to citizens. Indeed, the Court, and I think rightly so, has been reluctant to expand the duties of government to provide entitlements, no matter how sympathetic the claim may be.

A victim' rights amendment, it seems to me, or at least the different iterations I've seen, would be rather unique in requiring the government to involve private parties in court proceedings that are not aimed at depriving persons of life, liberty, or property. The proposed 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. Well, this may be entirely appropriate, at least in some circumstances, but it certainly runs afoul of the traditional way in which we view the Constitution and the way the Constitution divines and structures relationships between the government and individuals.

Historically, victims are owed no constitutional duty. Although the federal government was created as a preamble to states to provide for domestic tranquility, the government generally does not owe a duty to individuals when that order breaks down. Even victims of war, whether soldiers killed in battle or citizens and civilians wrongly injured by government, have no recognized constitutional claims, despite the fact that one could argue that the government, in effect, caused those injuries.

Similarly, victims of racism or prejudice have no constitutional claims if those who injure them are private parties. Thus, there must be a particularly compelling justification for privileging victims of violent crime committed by non-governmental actions by giving them constitutional rights. If the Constitution is concerned with limiting government's powers over citizens 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 against other citizens? I think that's a legitimate question. It has to be considered in this debate.

This brings me to perhaps the greatest difficulty I have with the proposed Victims' Rights Amendment. Namely, I think it fails to resolve the core problem.

Historically, as has been pointed out, crime victims in the criminal justice process were intimately linked. Because crime often entailed the existence of a victim, it was believed that the victim had a right to compensation for her losses. The victim's entitlement to restitution was accepted as inherently investing her with the right to initiate a criminal proceeding. Restitution was considered a necessary element of the process, both for the rehabilitative benefit to the offender and to address the needs of the injured victim. By making restitution, the offender could mend his relationship with society and also with the injured victim.

Eventually, however, the law of self-help became subordinated to public interests—I would say so-called public interests. As kings became more powerful, government begun regarding criminal activity both as an offense against the victim and an offense against the crown. Kings, thus, sought rents through the imposition of fines. Although the victim forfeited some discretion to the crown, he nevertheless maintained a key role in the criminal justice process through a system of private prosecution. Under the English system, victims of felonies often initiated and prosecuted criminal cases against offenders. The victim or his representative, more commonly, managed the entire prosecution, just as we do now in civil cases.

In fact, the first colonists in America brought with them this English common law tradition of private prosecution. As a consequence, the colonists had no need for

separate rights because the victims had the possibility of acting on their own. Gradually, however, the system of public prosecution displaced the system of private prosecution. As the state grasped control of the criminal justice process and society began to believe that injury was both to the victim and to the state, crime victims lost control of the prosecutorial process, and there ensued this government monopoly that's been discussed.

The minimal role presently allowed a crime victim in the American criminal justice system is thus quite different from the historical perspective of a victim's role, and even from his current role in many other foreign legal regimes. England, for example, did not establish an Office of Public Prosecutions until 1879, and the act creating that office continued to allow for private prosecution. In England today, while the police prosecute most criminal cases, victims are still legally entitled to bring a private criminal prosecution. In fact, in England at least, police prosecutions are a type of private prosecution because police officers are not considered to be legally distinct from the general population. The English continue to regard their system of private prosecution as a necessary protection of liberty.

Other European nations have similar systems. In France, which not only gave us freedom fries, the victim has the right to bring a civil action for damages before the same court that's hearing the criminal prosecution; the right to participate and to be heard through counsel in the prosecution; and if the public prosecutor chooses not to bring a criminal prosecution, the crime victim may institute an action for damages before a criminal tribunal and therefore force the court to conduct a criminal, as well as a civil, inquiry. In fact, by bringing the civil and criminal proceedings together, it actually saves substantial administrative costs to the judiciary, as well as to the crime victim.

In America, the first statutes authorizing public prosecution did not eliminate the private individual's right to initiate a criminal proceeding. The development of a public prosecution system and its gradual replacement of private actions as the means to initiating a criminal trial clearly contributed to the victim's alienation from the criminal process.

Thus, what I might suggest is that the goals of the various iterations of the Victims' Rights Amendment that I've seen are simply too meager. Perhaps we need to rethink the victim's role in the criminal justice system altogether. After all, should crime victims' financial interests, having been affected by the crime itself, play second-fiddle to the government's desire for revenue through fees. Moreover, in terms of cost, should the government pay when Microsoft is injured by a crime, when there are financially folks out there or organizations out there that are financially able to bring a prosecution themselves?

Currently in civil disputes the government provides the forum and the rules of trial, but the litigants press the claims and hire the attorneys. True victims' rights might mean that we once again permit victims the right to control the prosecution of

individuals who've wronged them. Several states, believe it or not, continue to authorize private prosecutions, even in capital cases. And perhaps this form of criminal prosecution ought to be reinvigorated. In my view, at the end of the day that might be the best means of securing victims' rights. Regardless, victims' rights should certainly be paramount in any criminal prosecution.

JUDGE CASSELL: At this point, what we've agreed to do is have a little bit of discussion among our panel members, and then of course we'll have the traditional questions from the audience. So, be thinking of your stumpers, and we'll get to them shortly.

MR. TWIST: Some very brief comments. First of all, Professor O'Neill asks what justifies giving a class of citizens the right to demand positive rights in the Constitution. And this notion—let me just comment on this notion that the rights of defendants in the Constitution are negative rights. The truth is the defendants are a class of citizens who are given the right to demand positive rights. If you think about rights in the Constitution, the right to a jury trial, the right to a lawyer, the right to notice of proceedings, the right to be heard at proceedings, the right to confront witnesses, the right to a speedy trial—these are in the nature, I think, of what both Roger and Mike have commented on as being perfectly within the confines of the Constitution to protect for defendants. But when you talk about protecting some of those rights for victims, it's completely outside the realm of what the Constitution should address.

Clearly, I think the position is unsupportable. Let me comment briefly on some of the points raised. First of all, Roger asks what are the problems. Eight minutes did not give us time to talk about the results of two decades of experience with state constitutional amendments and state statutes, but the problems are profoundly catalogued at the beginning of the President's Task Force on Victims of Crime. Then only a few years ago the Justice Department's study, a two-year study throughout the country, shows how these laws were not working. The uniform conclusion of these studies is that laws simply don't work to change the culture. I can talk about lots of specific examples of cases in which I've been involved litigating on behalf of crime victims. And what's the fundamental reason? Because crime victims' rights always exist in the shadow of the defendants' constitutional rights and there is no fair way for the jurisprudence to develop so that victims' rights will be given fair accord when they always exist in the shadow of the defendants' rights.

Roger talks about the imbalance between defendants' rights and the silence of the Constitution, and the victims part of the purpose of the Constitution, to restrain government, and that's why it deals only with defendants. But the truth is, the same should apply to victims. Government should be restrained so that it does not conduct

its monopoly prosecutions in a way that does injustice to innocent victims, even while it can protect the rights of defendants.

The truth is that there are three legitimate concerns in a criminal trial: the state's; the defendant's; and the victim's. And there's no need for our system of justice to ignore the legitimate interests of the victims as it protects the rights of the state and the rights of the defendant.

And very briefly, Roger's suggestion that we allow victims to resort to the civil system, the idea that a rape victim is going to get justice by hiring a lawyer and suing her rapist, is simply not the real world. Because there are these legitimate interests for victims who are raped or beaten or mugged, or the parents of a murdered child, there's no reason we can't accommodate their rights to due process. Roger calls them "entitlements," but they're entitlements, if anything, just to due process. Notice and the right to be heard are not too much to ask of our criminal justice monopoly that the government tries to exercise when it seeks justice.

And finally, Roger says, how would we litigate these rights? I can give you an example. We have a cert. petition pending in front of the United States Supreme Court, *Lynn v. Reinstein*. In Arizona, a victim has a right to be heard under the Constitution at any proceeding involving sentencing, and the statute further amplifies that by saying the victim has the right to make a recommendation on what the sentence should be.

I represent Duane Lynn. Under this constitutional language in Arizona and the state statutes, he wanted the right to make a recommendation before the sentencing jury who was going to sentence his wife's murderer. The Arizona courts, up through the Arizona Supreme Court, have said that for him to exercise that right denies the defendant his Eighth Amendment rights against cruel and unusual punishment.

The O'Henry ending—and this is part of the cert. now pending before the court—is that Mr. Lynn wanted to ask for life imprisonment and not the death penalty, and the state Constitution protected his right to do that, and yet the Arizona courts say even now it denies to the defendant his Eighth Amendment rights against cruel and unusual punishment. These victims' rights exist, I say, in the shadow of the defendant's rights and the culture will never change until we get them in the Constitution.

Let me close with Madison's words because you've heard it said here today basically that this amendment is ineffective, is unnecessary, and maybe even dangerous. Well, when Madison took to the floor and—

PANELIST: And it gives you cancer.

MR. TWIST: And it gives you cancer. Only if taken in large doses, though.

In *From Parchment to Power* by Professor Goldwyn at AEI, when Madison took to the floor of the first Congress and proposed the Bill of Rights, there were

critics. And Madison set out to respond to the critics. "Taken together—" this is Professor Goldwyn writing —"the criticisms added up to an indictment that the Bill of Rights in the Constitution would be ineffective, unnecessary, or dangerous. The indictment that the Bill of Rights is unnecessary was especially unnecessary in the Constitution, his critics said, and especially so because states have bills of rights. Madison then gave a brief response. He said, "Not all states have bills of rights, and some of those that do are inadequate and even absolutely improper ones.'"

That's the same situation that we have today, was that Madison's insight that once the Bill of Rights got into the U.S. Constitution, they would take on—and this was a quote from his speech on the floor—"[t]hey would have a tendency to impress some degree of respect for the rights to establish the public opinion in their favor, and rouse the attention of the whole community. It may be one means to control the majority from those acts to which they might otherwise be inclined."

This is exactly the situation in which we find ourselves. Victims' rights need to be in the U.S. Constitution so they will take on the character of fundamental maxims and have the power to change the culture of our justice system, which hasn't changed in two decades.

DR. PILON: Let me make three quick points in response both to General Brady and Steve. General Brady complained that there is weak enforcement of existing laws. She then went on to say, however, that she enforces those laws. Well, what that suggests, then, is that we've got an enforcement problem, not a problem with the law. And to be sure, there are prosecutors around the country who probably are inattentive to the rights of victims that are even set forth in their state constitutions or statutes. That is a problem of enforcement, however; it is not a problem of the law itself.

Now, it is said in response that we need to elevate these to the stature of a constitutional amendment because only so will they be taken seriously.

Well, I remember that issue came up at the hearings where Steve and I spoke a couple of years ago. It came up in the form of Senator Feingold of McCain-Feingold fame, who was on my side in chairing the hearings. The Democrats were controlling the Senate at that time. And I had occasion to tweak Senator Kyle on them, or rather to give him a little pleasure and tweak him at the same time. I said, "Well, you know, elevating rights to the constitutional level does not guarantee that they're going to be respected. Indeed, the First Amendment speaks very clearly about the right of political speech, and we know very well, Senator Kyl, from our own chairman here, that the Congress sees no problem passing campaign finance reform that utterly ignores the protections of the First Amendment. So, just because you elevate a right to a constitutional level does not mean it's going to be enforced."

Finally, I would pick up on the point that Mike O'Neill developed toward the end of his remarks. It's true that early in the end of our western history, most of these criminal prosecutions were brought by the victim because, after all, the victim is the

person with the interests most at issue; not the public. Virtually, however, the King took over the prosecution of crimes, especially breaches of the King's peace.

What we have was a slow transition from private prosecution to public prosecution of crimes, and of course when you do that, you've got two separate sets of interests. And I haven't heard the other side give us a real clear picture of how those separate interests are to play out, if you enfold the interests of the victim into the criminal proceeding. So, you see, it's sort of a reverse that they're calling for from the original. The original was the victim carrying out the prosecution; then we had gradually the King taking over and two sets of prosecutions, namely the criminal proceeding attending primarily to the public's interests and the civil proceeding attending primarily to the victim's interests. Think of O.J. as an example, where the prosecution failed to carry out its burden of proof, yet the victims were able to get their compensation in the second civil proceeding.

Now the argument is, apparently, that we are to fold this, for example, restitution claim into the criminal proceeding. Does that mean that there still will be a separate civil proceeding available to the victim? That hasn't been made clear. Is it the case that this restitution request that is to be made on behalf of the victim by the prosecutor is to be adjudicated under a standard beyond a reasonable doubt or by a preponderance of the evidence? I mean, after all, the victim will get a better shake on the civil proceeding on that matter. This hasn't been discussed either.

And so, it seems to me that Mike was on the right track that we might want to rethink this because this really doesn't get to the core of the matter. The core of the matter is the principal victim in all of this is not the people. Maybe we ought to think about allowing the victim to take over the prosecution more than we do today, since the victim's interests are paramount and he has suffered the loss. Obviously, with many judgment-proof criminals, there isn't much to get from them. But the question is, in many other cases it seems to me, that a more humane and victim-oriented remedy can be reached by allowing some kind of a remedial restitution remedy to take precedence over a punitive remedy.

GENERAL BRADY: The real flaw in that argument is that the victims may get restitution, but they don't get justice. And that's what the system is supposed to be about. You know, I have to, just as an aside, laugh when somebody said there's no general federal police power. I hope you would tell Congress that. We've been trying to argue with them about that for some time.

I want to talk about the use by Roger of the term "entitlement rights." You know, I thought there were entitlements and I thought there were rights, and I've never heard of entitlement rights. It's the difference between driving a car, which is a privilege, and the right to counsel at trial, which is a right. And what we have is a discrepancy in the value that government places on your ability to secure certainty as to your ability to do those two things. The certainty with which you can drive an

automobile, which is a privilege under almost every state law, is that you can do it as long as you obey certain rules, or you're not going to be able to do it. And of course, rights are there regardless of your conduct. You have rights that protect your interests with regard to the large bureaucracy that we call government.

And so, what you have is entitlements or rights, but you don't have entitlement rights. And right now, victims have some entitlements. They have some rights under state laws, but you know, when you talk about how the experiment has worked, and you talk about using the states as a laboratory, Mike, in fact, for 20 years we've been using the states as a laboratory.

In the study that was done by the National Institute of Justice, only just over 50 percent of victims were informed about the sentencing proceeding in the cases, where the court was going to decide what happened to the person who brutalized them. Only a little over 50 percent knew about the proceeding. If they don't know about it, they can't attend it. If they can't attend it, they can't be heard. If they aren't heard, has the judge really considered what justice requires, the full impact of the case, and the appropriate resolution in terms of sentencing?

And when you talk about not wanting to deal with relationships between individuals, this is not about relationships between individuals. This is not about relationships between individuals. This is about the function that government presently has. We can look at history; we can look at the future. But if we look at the present, government has for some long period of time now taken on the responsibility of enforcing the criminal laws of our state as the principal party by which that is done. And this is about relationships between the government and its citizens, and respect and dignity that government will show its citizens in the manner in which it acts with accord to their interests.

And it does, in fact, make demands on victims because we make victims come into court who don't want to come to court. We make demands on them. They have special and unique opportunities to assist the state in their prosecution, and they're given the responsibility of complying, regardless of their willingness on occasion. But they also have separate and distinct special interests. And so, it's important, I think, that we recognize that without the constitutional assurances of rights that we can give through S.J.R. 1, we are not treating victims with the appropriate respect and dignity to which they're entitled.

I had one quote when talking about whether statutes or state issues are going to address this effectively, that I wanted to make just as a suck-up to the moderator. Rules to assist victims frequently fail to provide meaningful protection when they come into conflict with bureaucratic habit, traditional indifference, shear inertia, or the mere mention of an accused right, even when those rights are not genuinely threatened. I wish I were so eloquent, as James Madison had been, but I think what I've tried to say here today is that, unless or until we provide the leadership and the

climate in which we give to victims the rights and the stature with regard to those rights to which I believe they are entitled, we will not change their experience.

JUDGE CASSELL: I'm going to give Michael the last word, but I just want to give everybody a heads-up that then we'll go to questions from the audience. We have about 10 or 15 minutes left, and I'm going to exercise the moderator's prerogative by making sure we have lots of time for questions.

PROFESSOR O'NEILL: I'll try to be brief. Basically, just one point on the right-versus-entitlement question. Most of the structure of the Constitution is about making sure the government can't interfere with out rights. Even something like a right to a jury trial has not been historically construed as an affirmative right that we have, but rather a limitation on the power and the ability of government to throw you into prison or exact a fine from you without first having a jury trial.

Even the right to assistance of counsel, if one looks at that from an originalist perspective or an historical perspective, remember, originally the right to assistance of counsel was just that. The government couldn't prevent you from bringing counsel to your criminal trial, but the government did not have to, until Gideon v. Wainright, affirmatively fund counsel for you. So, there's very much a difference when one looks at rights in terms of rights of entitlement that creates an obligation on the government to provide you with a service or some tangible thing, and rights that really are about being able to express oneself or participate in the democratic process free from governmental interference.

And for the most part, the Constitution of 1789 and the Bill of Rights of 1791 are really all about structurally limiting the ability of government to withhold things from you and to interfere with your rights and your abilities to exist as a citizen and participate fully in the democratic process.

I want to say a couple of other things. There really are two critical parts—sort of the tail ends on this rights discussion. There are two critical parts to the criminal justice trial. There's before you're convicted, when you're presumed innocent—you'll all recognize that's only a legal term, presumed innocent; then, there's after the trial, after you've been convicted.

Before a conviction is entered, most of the rights that you enjoy as a defendant are rights against the government that limit the government's power that says you've got to have a jury trial, assistance of counsel, the right to bail, those sorts of things. Once you've been convicted, however—I can be fully supportive of some victims' rights legislation or some sort of a Victims' Rights Amendment. But then, Steve mentioned during his rebuttal about then, at that point, providing victims with a limitations-on-the-government right. Namely, a limitation to make sure the government doesn't parole somebody without notifying the victim; to make sure that if the government's going to release somebody or change somebody's sentence, at that

point the victim is going to be notified. That, I think, fits more with the historical tradition of the Constitution and the Bill of Rights being a limitation upon governmental authority.

Finally, I think it's absolutely right that we ought to break the government's monopoly on prosecution. Perhaps we ought to be able to empower victims to be able to bring criminal prosecutions themselves. Leave prosecutions that are for victimless crimes, where there really is a clear state interest, to the government to prosecute, but perhaps provide alternate means for victims to be able to bring their own prosecutions to control the nature and the scope of the prosecution itself.

I was first introduced to this concept—it's something I'm writing about now, in fact—in Pennsylvania in a fairly famous Pennsylvania capital case, where the initial district attorney had effectively bungled the case in Pennsylvania. Well, it's not really bungling; I'm being too harsh. It was a fairly complex case. But ultimately, the victim was allowed to privately prosecute the capital case, the victim's lawyer was effectively deputized as a deputy district attorney in Pennsylvania, and paid by the victim's family. The victim's attorney ultimately successfully obtained a capital conviction. It was then, that a petition was filed before the Supreme Court that that was somehow unconstitutional. The Supreme Court denied cert. in the case.

But there is a means and there is a mechanism to allow victims to control prosecution. And if one truly wants to provide victims with justice, one should see the prosecution process itself as primarily being for and about the victim, with the victim's rights paramount, and perhaps the state's right and the state's interest being secondary.

JUDGE CASSELL: If you have any questions, this would be a good time to come forward. Please tell us where you're from and throw a question out for the panel.

CLINT BOLICK: Clint Bolick from the Institute for Justice, though this does not represent the Institute for Justice. My questions are to my friend Roger Pilon, who on this very rare occasion is misguided, though I invite others to answer.

First, Roger, do you not agree with most Libertarians that the first duty, the entirety, the essence of government, the purpose of government, is to protect individual rights, including individual safety, and that's why we formed governments? And if so, why is that too trivial a matter to be addressed in the organic law?

Second --

DR. PILON: Yes, I am aware of that, and here is a case where the government failed.

CLINT BOLICK: Second, if there is a bifurcated system of civil and criminal law, doesn't the victim have an interest in the criminal aspects of the prosecution, including removal of the criminal from society?

And finally, the Supreme Court has already trenched on victims' rights that the states have established. How on earth do you protect them in those circumstances without a federal constitutional amendment?

DR. PILON: The answer to your second question is yes. And the last question, again? I don't understand.

AUDIENCE PARTICIPANT: The Supreme Court has already struck down some state sanctioned victims' rights protections. How do you then protect them?

DR. PILON: Such as what?

AUDIENCE PARTICIPANT: Such as some rights to participate in the criminal prosecution, to recommend a particular penalty, and so forth.

DR. PILON: What you've got in this three-way situation is a classic balancing problem. And so, it hasn't struck them down; it has qualified them and limited them in deference to other rights. I mean, this is your paradigmatic conflicting right situation, and when you get a three-way conflict, you should certainly expect that. I agree, so I don't see the problem between us.

JUDGE CASSELL: All right. To get a lot of questions and answers in, I'm going to try to ask for quick questions and then reasonably quick answers.

JOHN MALCOLM: Sure. I'm John Malcolm. I'm with the Criminal Division with the Department of Justice and I have a very practical question. It's directed to General Brady and Mr. Twist. General Brady, of course, just pointed out that sometimes the desires of the victim conflict with those of the state, such as when a rape victim or a battering victim decides she no longer wishes to testify, and she's forced to do so by the state.

I was intrigued. Roger Pilon pointed out, quite correctly, that sometimes the state's interests work on the other side in granting somebody immunity or plea bargain, and a lot of times, those take place in secret so that somebody can cooperate in ongoing investigations. And I am wondering in Victims' Rights Amendment in which victims are entitled to notice prior to immunization and plea bargain and given a right to assert that interest, how you square that in the case of ongoing cooperating individuals who have worked out their deal with the government?

GENERAL BRADY: Actually, it's in the Amendment. There's a provision in the Amendment. I'm looking for it.

MR. TWIST: The Amendment, as I recall, talks about public proceedings. Cooperation, then, would not be a public proceeding, as I understand it.

JOHN MALCOLM: Though at some point, it would be envisioned to be a public proceeding.

DR. PILON: Still, it's a matter of there are these rights and then these qualifications of these rights, and then it raises the question, who's going to do the balancing of this. And suppose the victim says, "Look, I don't care about your going after others; this is the guy that did me in. I want him put away." And the state comes back and says, "Well, we have larger interests." You know, that's not an uncommon situation.

MR. TWIST: Two quick comments. First of all, the right attaches to public proceedings. And in the case of your hypothetical, it was a closed proceeding, and so the right wouldn't attach. And secondly, the Amendment is written to accommodate what we all know, and that's that no right is absolute. And there is written in the text of the Amendment an accommodation, when necessary, to protect the interests of justice; the administration of justice, for example.

Senator Kyl and others have understood that concern and addressed it, which is why the Justice Department believes now it can support the Amendment and does.

DR. PILON: So why don't we then do this through statute, where these kinds of adjustments we've learned from experience can be made far more easily than through a constitutional amendment, which is written in stone?

GENERAL BRADY: You know what? The constitutional amendment, though, is going to give the stature to these rights that they should get, just like the Voting Rights Act, just like the Civil Rights Act, there may be other statutory implementations of the principles. But these are statements of principle and priority that should be made as a matter of the components of our justice system.

PROFESSOR O'NEILL: Why limit it to criminal proceedings and violent crimes, then?

JUDGE CASSELL: Why don't we get another question, so I make sure I get through some of our questions.

AUDIENCE PARTICIPANT: Tom Gede, Criminal Law Practice Group. One quick comment and one quick question. The comment is that I'm a little nervous about private prosecutions for the very reason General Brady said. This is about justice and the greater interests of society. We moved toward the public prosecutions, away from private prosecutions, for a reason, I think.

And the question is, Mr. Pilon, you made it sound like this is just an enforcement problem. How is it an enforcement problem if it is state courts or federal courts which then enter orders based on their balancing of interests, in which they deprive victims of the very rights we're talking about in the VRA that are enumerated in court orders or in court decisions, notwithstanding the efforts of an attorney general, for example, to enforce them.

DR. PILON: You mean, how do you answer the problem that is posed by the fact that the courts don't always go with the prosecution and reach the same result the prosecution would like to see? That's the everyday stuff of litigation, is it not? Ultimately, the court's going to do that. I don't see how an amendment like this is going to change anything because, as we said, and as General Brady just said, these are general principles and there are going to be statutes written under them and statutes that I assume are going to recognize the need for courts to do the kind of balancing that you just spoke of. And so, it will be to that extent an enforcement problem.

But of course, the other enforcement problem I was referring to is that I'm sure that there are prosecutors who do simply ignore and are indifferent. And you know, that's a human problem. We have bad cops and bad judges.

JUDGE CASSELL: Hopefully not too many bad judges.

MR. TWIST: Very brief comment. The reason these have to be in the U.S. Constitution is because the defendants' rights are in the U.S. Constitution, and that's the only way that victims are going to be truly recognized in the system. If defendants' rights weren't in the Constitution, I think we'd all be here talking about Senate 1191 or whatever the number would be, as opposed to S.J.Res. 1.

JESSICA GOLDEN: Hi. My name's Jessica Golden. I'm a career prosecutor. I've been a prosecutor in California for 11 years for the state, and I care a lot about victims' rights, and I think California's pretty advanced when it comes to victims' rights. I know we've got guarantees for restitution in the Constitution of our state that I've worked on appellate cases and a lot of other things.

But what worries me about this—and my question is directed at General Brady and Mr. Twist, primarily—is we have a lot of victims who are indigent, as well as defendants being indigent. A lot of times, the victims are poor, too. And if these rights are taken so seriously that they're in our Constitution, I worry that the day will come

when they will get counsel, too. And when we have victims with lawyers, you know, that is a nightmare. A lot of times they do not want to testify; the domestic violence victims do not want to be there. The daughter whose dad has been molesting her does not want to come to court. They can play games with subpoenas. They can do all kinds of things, and if you've been a prosecutor, you know exactly what I'm talking about.

And when everyone has lawyers, it becomes really unworkable, not to mention the possibility of them using restitution as a bargaining chip with the defendant, as happened with Michael Jackson, where the kid got the money and prosecution was out of court. I really worry about the right to counsel attaching. And while I definitely think victims should be heard at sentencing, and in California they are, and all these other things like the notice part, I worry about the right to counsel. So, speak to that.

JUDGE CASSELL: All right. We have about three minutes remaining.

GENERAL BRADY: I defer to Steve because I think his state statute provides for counsel.

MR. TWIST: Well, first of all, I think the fear that this amendment will lead to that is unfounded. The reason defendants have counsel is because the right to counsel is written into the Constitution.

Now, we might all agree that the Court's current interpretation of the original intent goes too far. But there is actually written into the Constitution the right to counsel. This does not propose a right to counsel, a black letter right to counsel.

DR. PILON: This bill has the potential of being a lawyer's full employment bill.

MR. TWIST: Well, you could say that about any law.

DR. PILON: Well, this one especially.

JUDGE CASSELL: Yes, sir.

PETER SCHLOM: My name is Peter Schlom, and I was the Executive Assistant to the United States Attorney in New York, and currently and for many years have been in private practice. My reaction to this is that it doesn't sound realistic to me in terms of the premise of this discussion, as I understand it, which is that victims' rights are ignored. I find that to be antithetical to my own experience. From the very first appearance, what the prosecutor is talking about is, to the extent that that can be

factually demonstrated, how the rights of the victim have been violated by this nasty defendant, etc., etc.

And, with respect to Mr. O'Neill's bailiwick, with respect to the federal cases, the federal guidelines take specific account of the rights of victims, both in the loss calculations, in the number of victims, etc., etc. With respect to the notification issue brought up by General Brady, that's the obligation of the prosecutor. The prosecutor should notify the victim of every important event in the case.

So, my question is why, as a practical matter, do we need a victim rights amendment?

MR. TWIST: Because the history around the country remains. In the last 20 years, despite our best efforts, victims -- it's not just notice, but victims don't get notice of proceedings, and it's not at all clear that the prosecutor should be the one to provide the notice, but whether or not they should, if they don't, courts should. But victims don't get notice today of proceedings. They're not allowed to be heard at proceedings. The parents of a murdered child are still kicked out of the courtroom during the trial of the murderer, despite the fact that the defendant's family and friends are ushered in to seats in the front. Victims don't have a right to speak at sentencing. They don't have a right to notice about parole. These things still happen today despite our best efforts to change them. That's the problem.

JUDGE CASSELL: I'm advised that we have a tight time schedule, so we're going to have to have Mr. Twist's words as the last words.