

**STATEMENT OF PROFESSOR ROBERT P. MOSTELLER ON H. J. RES.
40 BEFORE THE HOUSE SUBCOMMITTEE ON THE CONSTITUTION,
APRIL 25, 2013**

I wish to thank Chairman Franks and the members of the Subcommittee on the Constitution for this opportunity to testify on House Joint Resolution 40. I am here to urge that this Subcommittee not adopt the resolution.

The subject of this hearing is extremely important. It is about victims of crime, who deserve society's support. I have been involved in the debate over proposed federal Victims' Rights Amendments for over fifteen years. I have tried to make clear throughout that my opposition is to adding unnecessary and damaging provisions as an amendment to the United States Constitution, not to providing support for and giving respect to victims.

The Mismatch between the Need for Constitutional Amendment and Legitimate VRA Concerns

We have amended the Constitution of the United States only very rarely in over 220 years as a nation. It should only be done for compelling reasons. There are no compelling reasons to adopt the proposed Victims' Rights Amendment (VRA). Indeed, there is almost an exact mismatch between the legitimate goals of the amendment and when a federal constitutional amendment is needed.

I have written a number of articles about proposals for a VRA.¹ The provisions have varied in different versions, but they have three main goals. First, some of the provisions establish Participatory Rights, such as notice of hearings. Second, provisions may provide services and aid to victims from government, such as protecting victims from violence and providing financial assistance (Providing Support). Third, some provisions have the effect of damaging defendants' rights (Defendant Damage).

While at one time they were not, the first set of provisions—Participatory Rights—are broadly embraced and protected through state constitutions and legislation. Legislation and

¹ Robert P. Mosteller & H. Jefferson Powell, *With Disdain for the Constitutional Craft: The Proposed Victims' Rights Amendment*, 78 N.C. L. REV. 371 (2000); Robert P. Mosteller, *The Unnecessary Victims' Rights Amendment*, 1999 UTAH L. REV. 443; Robert P. Mosteller, *Victims' Rights and the Constitution: Moving from Guaranteeing Participatory Rights to Benefiting the Prosecution*, 29 ST. MARY'S L.J. 1053 (1998); Robert P. Mosteller, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691 (1997).

These articles are attached.

resources are principally what are needed to afford these rights. The rights to notice of hearings aren't "trumped" by defendant's rights. They may not be fully enforced, but that is through ineptitude, lack of resources, or difficulty of accomplishing the task. Constitutionalizing the right does not solve any problems with full enjoyment and enforcement of these provisions.

The second set of provisions—Providing Support—has largely disappeared from later generation versions of the VRA. Earlier versions and current federal legislation gave victims the right to be protected.² Later versions of the VRA focus the right toward the defendant's release rather than the government's guarantee of safety, providing that safety is to be given consideration. Damage awards against the government have been eliminated from the VRA. The one potentially problematic provision of the VRA, which runs counter to this trend and will be discussed later, is the apparently extraordinarily broad guarantee of restitution. Constitutionalizing these right is a non-issue.

The third and quite controversial set of effects is those that damage defendant's rights. Indeed, while it is implicitly part of the language of the victims' rights movement of balancing the scales, it is generally disavowed by many proponents of the VRA. However, of the three purposes of victim rights provisions—Participatory Rights, Providing Support, and Defendant Damage—only provisions that damage defendants' rights require a federal constitutional amendment. Only when a due process right or a specific right in the Bill of Rights is infringed by a right given to victims is a constitutional right for victims necessary. If no effect to damage defendants' rights is anticipated, there is no need for a constitutional amendment.

What is an example of a provision that denies defendant's rights, for example, to a fair trial? The Crime Victims' Rights Act (CVRA) implicitly recognizes one of these in the right not to be excluded from trial. It modifies that right by recognizing that victims who are witnesses can be excluded if their testimony might be materially altered.³ The danger of damage is real, and serious damage could be done by the unequivocal guarantee of the proposed VRA.

Who is a Victim?

The infamous police brutality cases of Abner Louima in New York and Rodney King in Los Angeles provide examples of the problematic nature of giving special trial rights to victims. But for medical evidence of the unspeakable acts done to Louima while he was in the police station and the videotape shot by a neighbor of the beating administered by the police to King, both Louima and King were on their way to being charged with assault on police officers. In this prosecution, the true perpetrators would have been labeled as victims of that crime and would

² Mosteller, 29 St. Mary's L. Rev. at 1056 (describing 1995 proposed amendment); 18 U.S.C. § 3771(a)(1).

³ 18 U.S.C. § 3771(a)(3).

have been beneficiaries of this constitutional amendment.⁴ Imagine four officers who beat King having the constitutional right to be present during the testimony of each other as they made certain that all the details of their bogus story of King's attack and their necessary reaction coincided. The brilliance of the sequestration rule in evidence as recognized by ancient writers and evidence scholar Wigmore is its simplicity and its benefit in catching liars, particularly catching them in the small details of their fabrications.⁵ The Victims' Rights Amendment provides no exception for presence even in highly contested cases where the alleged victims are effectively the only evidence that the defendant is guilty. It potentially obliterates this important protection to a fair trial.

The Abner Louima and Rodney King cases, hundreds of DNA exonerations, and a case I saw firsthand in North Carolina—the Duke Lacrosse case⁶—demonstrate a major problem with the amendment. We know conclusively at the beginning of a case when charges are brought who is the accused. That is a legal status in the process. However, we do not know at that point who is a victim of a crime and more frequently whether the victim was harmed by the defendant or someone not yet apprehended. The effect of the amendment is to write into the Constitution the error that critics accused some in the Duke University community of doing – rushing to judgment. Simply because of a charging decision, the VRA allocates rights potentially affecting the outcome of the defendant's trial, and it can be wrong.

Talk with anyone now in the Duke University community of giving rights that might affect a trial's outcome to the victim in the case and you are likely to be interrupted mid-sentence with the correction that the accuser was not a victim. False claims are rare. DNA exonerations tell us, however, that mistaken charges are not nearly as rare as we had hoped. Victims deserve support, respect, and assistance. However, in deciding whether the defendant is guilty of a crime against the victim, nothing should be done that rushes the judgment and potentially alters the fairness and accuracy of the trial.

The Duke Lacrosse case illustrates another area where fairness can be affected by the VRA. The prosecution and the prosecutor were undone by exculpatory DNA contained within

⁴ Mosteller, 1999 Utah L. Rev. at 466–67.

⁵ See 6 WIGMORE, EVIDENCE § 1837 (Chadbourn rev. 1976) (tracing the origin of witness sequestration rule to the Book of Susanna in the Apocrypha, which recounts Susanna's vindication when falsely accused of adultery through Daniel's insistence on questioning her accusers separately and thereby revealing their fabrication).

⁶ Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257 (2008); Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice,"* 76 FORDHAM L. REV. 1337 (2007).

discovery material. It took months and numerous motions by superb defense counsel to finally force this information from the prosecutor, who appeared to have delayed the discovery process as long as possible. Under the VRA, the victim has a right to a trial free of unreasonable delay. Delay is not always the exclusive fault of the defendant, but under the VRA, the victim is to be protected against such delay regardless of who caused it. The time needed for preparation of an effective defense may be sacrificed if the victim's interest in a speedy resolution of the case forces proceedings forward.

The language in the preamble, "The rights of a crime victim to fairness, respect, and dignity, being capable of protection without denying the constitutional rights of the accused . . ." does not eliminate the problem of damage to defendant rights. It has at least three plausible meanings. First, it can be read as a declaration of the drafters' intent that no conflict exists between victims' rights and defendants' rights as the amendment has been drafted. Second, it can be read that when conflicting the rights of both victims and defendants will be balanced or "harmonized." Third, it can be read that whenever a conflict is found between the two sets of rights, the constitutional rights of the defendant will prevail.

While conflict at the level of infringing on defendant's right may be rare, conflicts and damage can occur as illustrated by the Louima and King cases. So the first interpretation may be used and is sometime argued, but it is erroneous. Indeed, rather than eliminating the potential for damage to defendants' rights, it authorizes that damage. The second interpretation of balancing defendant's rights against victim's rights is simply an indirect way to say that defendant rights are been reduced and thereby denied. The second interpretation thus also authorizes rather than eliminates damage to defendants' rights.

Only the third interpretation eliminates the potential that the VRA will diminish the protections currently afforded to defendants. If the intent is not to undermine defendant's rights clear language that defendant's rights will prevail when conflict is found must be added to the text. Instead, significantly different and inadequate language has been used.

The Extraordinarily Broad Definition of Victim and Crime

The proposed VRA defines victim as including "any person against whom the criminal offense is committed or who is directly and proximately harmed by the commission of an act, which, if committed by a competent adult, would constitute a crime."⁷ This provision draws no distinction between felonies and misdemeanors and no distinction between crimes of violence and crimes that do harm to property. Earlier versions had a far more constrained definition of victims generally and specifically limited coverage to crimes of violence.⁸

⁷ H.J. Res. 40 (2013).

⁸ S.J. Res. 3 (1999).

A definition of this breadth in a federal constitutional provision is likely to have serious consequences when applied across a nation. In the federal system, misdemeanors play a minor role. In states and localities, the number of misdemeanors is enormous and the volume that prosecutors' offices and courts must handle with dispatch is daunting. In some jurisdictions, such as North Carolina, many traffic offenses are misdemeanors.⁹ In defining victim for purposes of the North Carolina Crime Victims' Rights Act,¹⁰ the statute is very precise and carefully limits the crimes in the lower categories of felonies and misdemeanors are covered. Indeed, for misdemeanors, the focus is primarily on domestic violence. The VRA would obliterate these careful definitions.

I suggest that writing the extraordinarily broad definition of victim in the VRA into the federal Constitution would add greatly to administrative cost and harm efficiency of an over-worked and under-funded state criminal justice system without off-setting benefits. Criminal justice systems are far from uniform across the country. Features that work well in the much more generously funded, hierarchical, and big-case oriented federal system will not necessarily work in the states.

The opposite is sometimes true as well with provisions that work well in state systems but would cause difficulties in federal prosecutions. As James Orenstein testified before this Committee in 2002 on a different version of the VRA, notice provisions, and rights to be present and to be heard may have dangerous or unintended consequences when federal prosecutors handle cases involving organized crime and prison gangs in which perpetrators and masterminds, witnesses, and victims are intertwined.¹¹ The careful exceptions available through legislation are not possible for broad constitutional language that must apply throughout all criminal justice systems.

The Broad Right to Restitution

Without qualification, the VRA gives all crime victims, under the extraordinarily broad definition of victims discussed above, the right "to restitution." This is not the carefully defined right of earlier versions of the VRA to "an order of restitution from the convicted offender."¹² The provision appears to guarantee restitution, not just an order of restitution, and it does not

⁹ For example, reckless driving and speeding more than fifteen miles above the speed limit are Class 2 misdemeanors. *See* N.C. GEN. STAT. §§ 20-140(d) (reckless driving); 20-141(j1) (speeding).

¹⁰ N.C. GEN. STAT. § 15A-830 (a)(7). Section 15A-830 (a)(7)(g) states that the act applies to a specified group of misdemeanors "when committed between person who have a personal relationship," giving reference to the domestic violence statutory definition in N.C. GEN. STAT. § 50B-1(b).

¹¹ Hearing on H.J. Res. 91 (2002), at pp. 42-45.

¹² S.J. Res. 6 (1997).

limit the party or entities subject to paying or funding restitution to a convicted defendant. Moreover, it does not use narrow wording such as that contained in the North Carolina Constitutional provision of the right “as prescribed by law to receive restitution”¹³ or similar wording of federal legislation (CVRA) of the “right to full and timely restitution as provided in law.”¹⁴ The VRA mandates restitution even if not contemplated under existing statutes.

This provision would appear to force upon states the requirement to develop restitution litigation systems whenever either personal or economic harm is done to a person as the result of a criminal offense. As noted earlier, in North Carolina many traffic offenses are misdemeanors. These include some speeding violations and reckless driving. Apparently as a matter of federal constitutional mandate, traffic court judges in North Carolina, when the speeding or reckless driving offense involves damage to person or property, would now be required to develop and enter orders of restitution in all these cases. These injuries to person and property are presently handled as actions for damages in the civil system, which the criminal justice system must now replicate whenever harm results from criminal conduct regardless of the judgment of the state legislature regarding the appropriate way to compensate those suffering injury or economic harm.

The VRA’s Potential Damage to the Criminal Justice System

I believe that the enactment of the VRA will have damaging unintended consequences to the effective operation of our criminal justice systems and will be financially costly, without materially increasing participatory rights and support for victims of crime. Moreover, it can undercut bedrock, enduring protections in the criminal justice system.

William Blackstone stated that “[i]t is better that ten guilty persons escape than that one innocent suffer.”¹⁵ In the criminal litigation where a powerful government is pitted against an individual defendant with life and liberty at stake, the Bill of Rights provides protections to the accused that help guard against wrongful convictions. After the hundreds of DNA exonerations, it is absolutely clear that these protections have critical importance in our imperfect system of determining guilt. The VRA can effectively place a new weight on the scales of justice on the side of conviction and write into the Constitution a “rush to judgment” based on a designation by the charging authority. Blackstone’s conception has stood the test of time and should endure.

¹³ N.C. CONST. art. 1, § 37.

¹⁴ 18 U.S.C. § 3771(a)(6).

¹⁵ 4 WILLIAM BLACKSTONE, COMMENTARIES * 358.