SYMPOSIUM APPENDIX: COLLECTED STATEMENTS ON VICTIMS' RIGHTS LEGISLATION

The following materials are reprinted by permission of their authors, Lawrence H. Tribe, Ralph S. Tyler, Jr. Professor of Constitutional Law, Harvard University Law School, and Paul G. Cassell, Professor of Law, S.J. Quinney College of Law at the University of Utah. They are collected here arranged in chronological order for scholars' convenience.

-Eds.

IN SUPPORT OF A VICTIMS' RIGHTS CONSTITUTIONAL AMENDMENT*

by
Laurence H. Tribe

Beginning with the premise that the Constitution should not be amended lightly and should never be amended to achieve short-term, partisan, or purely policy objectives, I would argue that a constitutional amendment is appropriate only when the goal involves (1) a needed change in government structure, or (2) a needed recognition of a basic human right where (a) the right is one that people widely agree deserves serious and permanent respect, (b) the right is one that is insufficiently protected under existing law, (c) the right is one that cannot be adequately protected through purely political action such as state or federal legislation and/or regulation, (d) the right is one whose inclusion in the U.S. Constitution would not distort or endanger basic principles of the separation of powers among the federal branches, or the division of powers between the national and state governments, and (e) the right would be judicially enforceable without creating open-ended or otherwise unacceptable funding obligations.

I believe that a properly drafted victims' rights amendment would meet these criteria. The rights in question—rights of crime victims not to be victimized yet again through the processes by which government bodies and officials prosecute, punish, and release the accused or convicted offender—are indisputably basic human rights against government, rights that any civilized system of justice would aspire to protect and strive never to violate. To protect these rights of victims does not entail constitutionalizing the rights of private citizens against other private citizens; for it is not the private citizen accused of crime by state or federal authorities who is the source of the violations that victims' rights advocates hope to address with a constitutional amendment in this area. Rather, it is the government authorities themselves—those who pursue (or release) the accused or convicted criminal with insufficient attention to the concerns of the victim—who are sometimes guilty of the kinds of violations that a properly drawn amendment would prohibit.

Pursuing and punishing criminals makes little sense unless society does so in a manner that fully respects the rights of their victims to be accorded dignity and respect, to be treated fairly in all relevant proceedings, and to be assured a meaningful opportunity to observe, and take part in, all such proceedings.

* *Reprinted with the author's permission from* Laurence H. Tribe, *In Support of a Victims' Rights Constitutional Amendment*, 8 THE RESPONSIVE COMMUNITY 53 (Center for Policy Research, Inc. 1997). Citations have been left as they appeared in the original material.

These are the very kinds of rights with which our Constitution is typically and properly concerned. Specifically, our Constitution's central concerns involve protecting the rights of individuals to participate in all those government processes that directly and immediately involve those individuals and affect their lives in some focused and particular way. Such rights include the right to vote on an equal basis whenever a matter is put to the electorate for resolution by voting; the right to be heard as a matter of procedural due process when government deprives one of life, liberty, or property; and various rights of the criminally accused to a speedy and public trial, with the assistance of counsel, and with various other participatory safeguards including the right to compulsory process and to confrontation of adverse witnesses. The parallel rights of victims to participate in these proceedings are no less basic, even though they find no parallel recognition in the explicit text of the U.S. Constitution.

Courts have sometimes recognized that the Constitution's failure to say anything explicit about the right of the victim or the victim's family to observe the trial of the accused should not be construed to deny the existence of such a right—provided, of course, that it can be respected consistent with the fair-trial rights of the accused. In *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), for example, the plurality opinion, written by Chief Justice Burger, noted the way in which protecting the right of the press and the public to attend a criminal trial—even where, as in that case, the accused and the prosecution and the trial judge all preferred a closed proceeding—serves to protect not only random members of the public but those with a more specific interest in observing, and right to observe—namely, the dead victim's close relatives. As Chief Justice Burger wrote, "Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural yearning to see justice done—or even the urge for retribution." (*See* 448 U.S. at 571.) Although the Sixth Amendment right to a public trial was held inapplicable in *Richmond Newspapers* on the basis that the Sixth Amendment secures that right only to the accused, and although the First Amendment right to free speech was thought by some (*see, e.g.*, 448 U.S. at 604-06 (Rehnquist, J., dissenting)) to have no direct bearing in the absence of anything like government censorship, the plurality took note of the Ninth Amendment, whose reminder that the Constitution's enumeration of explicit rights is not to be deemed exclusive furnished an additional ground for the plurality's conclusion that the Constitution presupposed, even though it nowhere enumerated, a presumptive right of openness and participation in trial proceedings. Wrote Chief Justice Burger: "Madison's efforts, culminating in the Ninth

Amendment, served to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding others." (*See* 448 U.S. at 579-80 & n.15.)

I discuss *Richmond Newspapers* in some detail here not just because I argued that case but because it illustrates so forcefully the way in which victims' rights to observe and to participate, subject only to such exclusions and regulations as are genuinely essential to the protection of the rights of the

accused, may be trampled upon in the course of law enforcement simply out of a concern with administrative convenience or out of an unthinking assumption that, because the Constitution nowhere refers to the rights of victims in so many words, such rights may and perhaps even should be ignored or at least downgraded. The happy coincidence that the rights of the victims in the *Richmond Newspapers* case overlapped with the First Amendment rights of the press prevented the victims in that case—the relatives of a hotel manager who had been found stabbed to death—from being altogether ignored on that occasion. But many victims have no such luck, and there appears to be a considerable body of evidence showing that, even where statutory or regulatory or judge-made rules exist to protect the participatory rights of victims, such rights often tend to be honored in the breach, *not* on the entirely understandable basis of a particularized determination that affording the victim the specific right claimed would demonstrably violate some constitutional right of the accused or convicted offender, but on the very different basis of a barely-considered reflex that protecting a victim's rights would represent either a luxury we cannot afford or a compromise with an ignoble desire for vengeance.

As long as we do so in a manner that respects the separation and division of powers and does not invite judges to interfere with law enforcement resource allocation decisions properly belonging to the political branches, we should not hesitate to make explicit in our Constitution the premise that I believe is implicit in that document but that is unlikely to receive full and effective recognition unless it is brought to the fore and chiseled in constitutional stone—the premise that the processes for enforcing state and federal criminal law must, to the extent possible, be conducted in a manner that respects not only the rights of those accused of having committed a crime but also the rights of those they are accused of having victimized.

The fact that the states and Congress, within their respective jurisdictions, already have ample affirmative authority to enact rules protecting these rights is a reason for not including new *enabling* or *empowering* language in a constitutional amendment on this subject, but is not a reason for opposing an amendment altogether. For the problem with rules enacted in the absence of such a constitutional amendment is not that such rules, assuming they are enacted with care, would be struck down as falling outside the affirmative authority of the relevant jurisdiction. The problem, rather, is that such rules are likely, as experience to date sadly shows, to provide too little real protection whenever they come into conflict with bureaucratic habit, traditional indifference, sheer inertia, or any mention of an accused's rights regardless of whether those rights are genuinely threatened.

Of course any new constitutional language in this area must be drafted so that the rights of victims will not become an excuse for running roughshod over the rights of the accused. Any constitutional amendment in this field must be written so that courts will retain ultimate responsibility for harmonizing, or balancing, the potentially conflicting rights of all participants in any given case. But assuring that this fine-tuning of conflicting rights remains a task for the judiciary should not be too difficult. What is difficult, and perhaps impossible, is assuring that, under the existing system of rights and rules, the constitutional

rights of victims—rights that the Framers of the Constitution undoubtedly assumed would receive fuller protection than has proven to be the case—will not instead receive short shrift.

To redress this imbalance, and to do so without distorting the Constitution's essential design, it may well be necessary to add a corrective amendment on this subject. Doing so would neither extend the Constitution to a purely policy issue, nor provide special benefits to a particular interest group, nor use the heavy artillery of constitutional amendment where a less radical solution is available. Nor would it put the Constitution to a merely symbolic use, or enlist it for some narrow or partisan purpose. It would instead, if the provision were properly drafted, help solve a distinct and significant gap in our existing legal system's arrangements for the protection of basic human rights against an important category of governmental abuse.

PERSPECTIVE ON THE LAW; EMBED THE RIGHTS OF VICTIMS IN THE CONSTITUTION; A PROPOSED AMENDMENT PROTECTS VICTIMS, WITHOUT RUNNING ROUGHSHOD OVER THE RIGHTS THAT ARE DUE THE ACCUSED[*]

by
Laurence H. Tribe and Paul G. Cassell

The Supreme Court has instructed that "in the administration of criminal justice, courts may not ignore the concerns of victims." Sadly, those noble sentiments have yet to be translated into day-to-day realities in the administration of our nation's criminal justice system.

Fortunately, a remedy lies at hand. The Senate Judiciary Committee is expected to vote shortly on the Victims' Rights Amendment. The amendment enjoys unusually widespread, bipartisan support. We hope this Congress will approve it and send it to the states for consideration and ratification.

We take it to be common ground that the Constitution should never be amended merely to achieve short-term, partisan or purely policy objectives. Apart from a needed change in governmental structure, an amendment is appropriate only when the goal involves a basic human right that by consensus deserves permanent respect, is not and cannot adequately be protected through state or federal legislation, would not distort basic principles of the separation of powers among the federal branches or the division of powers between the national and state governments or the balance of powers between government and private citizens with respect to their basic rights.

The proposed Victims Rights Amendment meets these demanding criteria. It would protect basic rights of crime victims, including their rights to be notified of and present at all proceedings in their case and to be heard at appropriate stages in the process. These are rights not to be victimized again through the process by which government officials prosecute, punish and release accused or convicted offenders.

These are the very kinds of rights with which our Constitution is typically and properly concerned—rights of individuals to participate in all those government processes that strongly affect their lives. "Participation in all forms of government is the essence of democracy," President Clinton concluded in endorsing the amendment.

Congress and the states already have passed a variety of measures to

[*] *Reprinted with the authors' permission from* Laurence H. Tribe & Paul G. Cassell, Perspective on the Law; Embed the Rights of Victims in the Constitution; A Proposed Amendment Protects Victims, Without Running Roughshod over the Rights that Are Due the Accused, L.A. TIMES, July 6, 1998, at B5.

protect the rights of victims. Yet the reports from the field are that they have all too often been ineffective. Rules to assist victims frequently fail to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indifference, sheer inertia or the mere mention of an accused's rights—even when those rights are not genuinely threatened.

Moreover, because we lack the resources to provide victims the guiding hand of appointed legal counsel in the criminal process, victims are largely left to stumble on their own through a "haphazard patchwork" of rules "not sufficiently consistent, comprehensive or authoritative to safeguard victims' rights," the Justice Department concluded after careful study. Empirical confirmation of this failure comes from a National Institute of Justice study reporting that today "large numbers of victims are being denied their legal rights." The same study found that victims' rights are more frequently denied to racial minorities and presumably other disfavored groups who are unable to assert their interests effectively. Only an unequivocal constitutional mandate will translate paper promises into real guarantees for all victims.

A Victims' Rights Amendment must, of course, be drafted so that the rights of victims will not furnish excuses for running roughshod over the rights of the accused. The current Senate resolution is such a carefully crafted measure, adding victims' rights that can coexist side by side with defendants'. For example, paralleling a defendant's constitutionally protected right to a "speedy" trial, the amendment would confer on victims the right to consideration of their interest "in a trial free from unreasonable delay." By definition, these rights could not collide, since they are both designed to bring matters to a close within a reasonable time. And if any conflict were to emerge, courts would retain ultimate responsibility for harmonizing the rights at stake.

The framers of the Constitution undoubtedly assumed the rights of victims would receive decent protection. Because experience has not vindicated this assumption, it is now necessary to add a corrective amendment. Doing so would neither extend the Constitution to an issue of mere policy, nor provide special benefits to a particular interest group, nor use the heavy artillery of constitutional amendment where a simpler solution is available. Nor would it put the Constitution to a merely symbolic use or enlist it for some narrow partisan purpose. Rather, the proposed amendment would help bridge a distinct and significant gap in our legal system's existing arrangements for the protection of basic human rights against an important category of government abuse.

A BLACK HOLE FOR VICTIMS' RIGHTS*

by
Lawrence H. Tribe

A case set for argument on Monday before the Massachusetts Supreme Judicial Court dramatizes the need to take victims' rights more seriously than we do now—and the fallacy of the argument that victims' rights must come at the expense of defendants' rights or of prosecutorial flexibility.

Over 16 years ago, James Kelly brutally raped Debra Hagen in Leominster.

A jury convicted Kelly on two counts of rape and one count of indecent assault and battery, and in April 1988 the trial judge sentenced him to serve two 10-year jail terms and one five-year term, to run concurrently.

Fourteen years have passed; we've lived through recession and boom, two Bush presidencies, the rise of the Internet, and Sept. 11. Through all that time Kelly has yet to serve a single day in jail.

First the court granted him a stay for health reasons. Later in 1988, Kelly filed a new trial motion. The state claims it simply forgot to respond, apparently losing some of the trial transcripts along the way. The case lay dormant until 1992, when Hagen wrote to ask the trial judge for an explanation.

The district attorney's office responded by urging that she be satisfied with a deal that would revoke Kelly's prison sentence and put him on probation. The odds were good that he would receive a new trial, she was told. Kelly was aging rapidly and in poor health. Wouldn't she prefer not to relive the attack by having to take the witness stand? Wouldn't she prefer closure?

In fact, the new trial motion was denied, but the state still did nothing to take Kelly into custody. Hagen—who finally left Massachusetts to avoid crossing paths with her attacker—desperately wanted to put the attack behind her. But consenting to a "get out of jail free" card for a rapist who had served not one day of his sentence provided anything but comfort. And escorting Kelly to prison to begin serving his term while appealing the denial of his new trial motion would have violated none of his rights and imposed no undue burden on the state.

After nine more years of state resistance, Hagen sought relief under the Massachusetts victims' rights statute. One provision said victims "shall be afforded . . . a prompt disposition of the case in which they are involved." But Worcester County District Attorney John Conte calls that nothing more than a suggestive guide and claims that because he represents the people, his word on

* *Reprinted with the author's permission from* Laurence H. Tribe, *A Black Hole for Victims' Rights*, Boston Globe, March 29, 2002, at A19.

what constitutes a prompt disposition is final and unreviewable.

In legal jargon, the district attorney's argument is that—despite what the victims' rights statute calls "basic and fundamental rights"—victims lack "standing." They have no power to enforce their rights in the courts. In fact, they have no right to be heard at all. Besides, he adds, the "disposition" in this case occurred more than promptly enough: It was disposed of, as far as he's concerned, when the rapist was sentenced back in 1988.

To put it bluntly, no disinterested reader of the Commonwealth's statutes, which say the victim's rights last "until the final disposition of the charges, including . . . all postconviction . . . (and) appellate proceedings," could possibly find Conte's argument convincing. It's an argument more worthy of Franz Kafka or George Orwell than of a self-respecting law enforcement officer.

One can only hope that the SJC, guided by the light of reason, will let Debra Hagen's voice be heard through her own lawyer, not through her supposed surrogate in the person of the district attorney.

Indeed, this 14-year-long procedural black hole by itself demonstrates a compelling need to empower victims with a meaningful voice in the criminal justice system—through an amendment to the federal Constitution if necessary.

Some questions in this field are doubtless difficult. Exactly what remedy to order for the inexcusable delay in this case remains to be debated. Other questions are painfully simple: "Justice should be denied or delayed to no one," the Magna Charta proclaimed many centuries ago. The SJC should heed those words.

Ours is the Commonwealth that proclaimed, long before our nation's Constitution was written, that its government was one of laws, not men. When its laws assure all citizens that their fundamental rights as victims of crime to a prompt disposition shall be secure, let no man tell them they lack standing to redeem that guarantee. Otherwise, that guarantee will, to quote Justice Jackson, be but "a promise to the ear to be broken to the hope, like a munificent bequest in a pauper's will."

[*]Dear Senators Feinstein and Kyl:

I think that you have done a splendid job at distilling the prior versions of the Victims' Rights Amendment into a form that would be worthy of a constitutional amendment—an amendment to our most fundamental legal charter, which I agree ought never to be altered lightly. I will not repeat here the many reasons I have set forth in the past for believing that, despite the skepticism I have detected in some quarters both on the left and on the right, the time is past due for recognizing that the victims of violent crime, as well as those closest to victims who have succumbed to such violence, have a fundamental right to be considered, and heard when appropriate, in decisions and proceedings that profoundly affect their lives.

How best to protect that right without compromising either the fundamental rights of the accused or the important prerogatives of the prosecution is now always a simple matter, but I think your final version of January 7, 2003, resolves that problem in a thoughtful and sensitive way, improving in a number of respects on the earlier drafts that I have seen. Among other things, the greater brevity and clarity of this version makes it more fitting for inclusion in our basic law. That you achieved such conciseness while fully protecting defendants' rights and presidential authority is no mean feat. I happily congratulate you both on attaining it.

A case argued in Spring 2002 in the Supreme Judicial Court of Massachusetts, in which a woman was brutally raped a decade an a half ago but in which the man who was convicted and sentenced to a long prison term had yet to serve a single day of that sentence, helps make the point that the legal system does not do well by victims even in the many states that, on paper, are committed to the protection of victims' rights. Despite the Massachusetts Victims' Bill of Rights, solemnly enacted by the legislature to include an explicit right on the part of the victim to a "prompt disposition" of the case in which he or she was victimized, the Massachusetts Attorney General, who had yet to take the simple step of seeking the incarceration of the convicted criminal pending his on-again, off-again motion for a new trial—a motion that had not been ruled on during the 15 years that this convicted rapist had been on the streets—took the position that the victim of the rape did not even have legal standing to appear in the courts of this state, through counsel, to challenge the state's astonishing failure to put her rapist in prison to begin serving the term to which he was sentenced so long ago. And the Supreme Judicial Court's ruling on the case left the victim a quintessential outsider to the State's system of

[*] *Reprinted with the author's permission from* Letter from Laurence H. Tribe, Ralph S. Tyler, Jr. Professor of Constitutional Law, Harvard University Law School, to Senator Dianne Feinstein & Representative Jon Kyl (April 8, 2003) (on file with Lewis & Clark Law Review).

criminal prevention and punishment.

If this remarkable failure of justice represented a wild aberration, perpetuated by a state that had not incorporated the rights of victims into its laws, then it would prove little, standing alone, about the need to write into the United States Constitution a national commitment to the rights of victims. Sadly, however, the failure of justice of which I write here is far from aberrant. It represents but the visible tip of an enormous iceberg of indifference toward those whose rights ought finally to be given formal federal recognition.

I am grateful to you for fighting this fight. I only hope that many others can soon be stirred to join you in a cause that deserves the most widespread bipartisan support.

Sincerely yours,

Laurence H. Tribe