February 2014

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NOTHING TO FEAR: ESTABLISHING AN EQUALITY OF RIGHTS FOR CRIME VICTIMS THROUGH THE VICTIMS' RIGHTS AMENDMENT

Rachelle K. Hong*

INTRODUCTION

Crime and violence are ever-present concerns in American society, and these concerns are not unfounded. In 1999, a violent crime occurred in the United States once every twenty-two seconds.¹ A murder occurred once every thirty-four minutes, a forcible rape every six minutes and an aggravated assault every thirty-four seconds.² While crime rates are on the decline, these statistics remain startling, and reinforcement of the sad truth occurs every time we read the newspaper or view the evening news. On an international scale, the rate of lethal violence in the United States is inordinately higher than that of nations with comparable social and economic characteristics. The rate of homicide among Group of Seven (G-7) countries,³ for example, is 9.4 per 100,000 people in America, compared to 2.6 in Italy (the second highest rate) and 0.6 in Japan (the lowest rate).⁴ If violence were the result of only a single cause, and that cause could be pinpointed as well as successfully combated, the problem would cease to exist. But realistically, American violence is the result of a combination of factors, which may include, among others, the use of firearms in assaults and robberies, the use and

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² Id.
³ G-7 countries include Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States. The G-7 formed in the early 1970s to respond to the instability of the world’s currencies. G-7 countries have been referred to as “the top industrialized countries of the world.” Joan Veon, Who are the Group of Seven?, at http://www.ninehundred.net/-jveon/G-7REPOR.html (last visited Apr. 7, 2001).
⁴ Franklin E. Zimring & Gordon Hawkins, Crime is Not the Problem: Lethal Violence in America 55, fig. 4.3 (1997).
marketing of illicit drugs and the extensive portrayal of violence by the mass media.\(^5\)

Besides giving rise to the seemingly endless theories about possible preventative measures, American violence spurs scholars, legislators and U.S. citizens to critically analyze how our criminal justice system deals with violence after the fact. The particular focus of this Note is to analyze our criminal justice system and the perspective of the victim, specifically as they relate to the proposed Victims' Rights Amendment ("VRA") to the United States Constitution.

The problem of victim neglect in our criminal justice system is the motivation behind the enactment of the VRA. Victims going through the criminal process feel neglected and further victimized due to a number of factors including sequestration from attending their offenders' trials, not having the option to be heard at proceedings and not being notified by courts and attorneys of criminal proceedings and criminal releases from custody. The following statements by two different crime victims are indicative of the victim's plight: "One morning I woke up, looked out my bedroom window and saw the man who had assaulted me standing across the street staring at me. I thought he was in jail;" and "To be a victim at the hands of the criminal is an unforgettable nightmare. But to then become a victim at the hands of the criminal justice system is an unforgivable travesty. It makes the criminal and the criminal justice system partners in crime."\(^6\)

To be more successful in our pursuits for justice, the voice of the victim needs to be reintroduced to the criminal justice system that so deeply affects the victim's life. The VRA addresses the fundamental right to be free from neglect and further victimization by the criminal justice system. The implementation of this federal amendment would rightfully acknowledge that after a crime occurs, society, through the criminal justice system, faces not only a duty to punish the wrongdoer but also a duty to ensure that victims obtain the role in the punitive process that they deserve.

The goal of this Note is to explain why the VRA is a necessary and positive change for both the crime victim and American criminal law. This Note first provides a background of the victim's rights movement and the VRA. Next, it explains how the respect society should have for victims, the victimization caused

\(^5\) See generally id. Part III of Zimring and Hawkins' book is entitled "Correlates and Causes" and provides an in-depth analysis of each of these factors.

by the criminal justice system itself and the imbalance of rights between the victim and the accused each confirm society's need for the VRA. Finally, this Note illustrates that fears about the VRA are unfounded, and that adding restitutionary and retributive aspects to our criminal justice system through the VRA's federal guarantees will restore the victim's equality of rights, thereby enhancing our punitive process.

I. A BACKGROUND OF VICTIMS' RIGHTS AND THE VICTIMS' RIGHTS AMENDMENT

Victims once had an active participatory role in American criminal proceedings, but over time, this role diminished. Consequently, victims' rights groups formed in the 1970s and 1980s. Their motivation was concern that the criminal justice system neglected victims. This section of the Note presents the history of how these groups fostered victim awareness in society and propelled the current movement for a constitutional amendment protecting victims' rights.

A. Colonial Victims' Rights

While America's victims may feel a sense of neglect in today's criminal system, this was not always the situation. Colonists brought the principles of English common law, including private criminal prosecutions, with them to the New World. Private prosecutions provided victims of felonies the active role of not only initiating, but also prosecuting their offenders on their own, without a public prosecutor. This practice was "widespread" in colonial America, and some legal scholars have debated whether our Founding Fathers purposefully failed to codify victims' rights formally in the Constitution because victims already obtained an active and acknowledged role in the criminal justice system.8

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B. **Modernization of the Criminal Justice System Leads to a Focus on the Accused**

As the criminal system evolved over time, private prosecutions and the victim's role diminished. Public prosecution became the norm and the victim's status faded. Today, victims' advocates strongly voice the opinion that the design of our current system "protect[s] the rights of the criminally accused, while relegating the role of the victim to a procedurally necessary 'evil.'" They also state that "[t]he result is clear—any crime victims feel shut out of the system, often left to fend for themselves." This sense of abandonment makes the victim's role akin to that of an outsider who happened to be present at the scene of a crime. As former Attorney General of the United States, Herbert Brownell, explained:

[A] complainant in the United States has no standing in the criminal action, which is prosecuted solely in the name of the "State" or the "People." In New York a complainant is no more or no less than any other material witness, having no control over the prosecution. He can be jailed for failure to cooperate.

Victims, 68 U. CIN. L. REV. 357, 366–68 (2000), in which King argues that it is debatable whether or not the American criminal system was public or private at the time of our Constitution's creation. King says:

It is true that during colonial times criminal law was handled in part by private prosecution. . . . Instead of asserting that all prosecutions were public or private, it is more accurate to say that during colonial times, criminal law was a combination of both public and private prosecution.

_King_ at 367. King refutes the argument that the drafters would necessarily have included a victims’ rights amendment if public prosecutions existed. _Id._ at 367–68.

9. See Cassell, _supra_ note 7, at 1380 n.24 (referring to Lawrence M. Friedman, _Crime and Punishment in American History_ 21 (1993)). Friedman explains that colonists brought the English common law system with them to the New World, and this system included private prosecution. "English law had no district attorney, no public prosecutor. If you were a shopkeeper, and you caught a thief robbing your store, it was your responsibility to bring him to justice . . . the money for the prosecution would have to come out of your pocket." **Lawrence M. Friedman, Crime and Punishment in American History** 29–30 (1993).

Gradually, the idea of public responsibility for prosecution evolved, largely influenced by the motivation of municipal leaders and religion. Friedman observes that "[t]he commandments of God's justice were too important to be left to the whims, and the pocketbooks, of individual victims." _Id._ at 30.


Victims may report criminal activity and serve as a witness at trial, but the criminal system leaves their intimate and often life-altering experiences unacknowledged because fundamental rights such as notice of criminal proceedings, the right to be present at proceedings and the right to be informed when one's offender is released or has escaped from prison have no constitutional guarantee.

C. Contemporary Reform Efforts

Against this backdrop, victims began to garner public attention and support, and the VRA gained momentum. In the 1970s, state and federal legislatures enacted statutes addressing victims' rights, including restitution and the possibility of participating in their offenders' prosecution, sentencing and parole. In 1981, President Ronald Reagan attempted to increase victim awareness by declaring "Victims' Rights Week" the week of April 19th.

A landmark in the victim's right movement happened in 1982, when President Reagan created the President's Task Force on Victims of Crime ("Task Force"). The Task Force issued a final report in December of that year to address our criminal system's treatment of victims and to propose legislation establishing victims' rights. This final report yielded an eye-opening conclusion regarding the neglected victim and the need for sweeping legislative reform to protect victims' rights. The spirit of the Task Force's findings is captured in the words of its Chairman, Lois Haight Herrington, who wrote the following as part of the report:

Victims who do survive their attack, and are brave enough to come forward, turn to their government expecting it to do what a good government should—protect the innocent. The American criminal justice system is absolutely dependent on these victims to cooperate. Without the cooperation of victims and witnesses in reporting and testifying about crime, it is impossible in a free society to hold criminals accountable. When victims come forward to perform this vital service, however, they find little protection. They discover instead that they will be treated as appendages of a system appallingly out of balance. They learn that somewhere along the way the system has lost track of the simple truth that it is supposed to be fair and to protect

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those who obey the law while punishing those who break it. Somewhere along the way, the system began to serve lawyers and judges and defendants, treating the victim with institutionalized disinterest.\(^\text{14}\)

To remedy the startling state of the victim, the Task Force proposed sixty-eight specific recommendations to governmental entities as well as private and community organizations for action on behalf of the victim.\(^\text{15}\) In addition to these recommendations, the Task Force proposed that a sentence be added to the end of the Sixth Amendment to the Constitution. The proposed amendment would provide constitutional protection for a victim's right to testify at court proceedings, an issue that has remained a point of controversy to this day. The modified Sixth Amendment would read:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense. \textit{Likewise, the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings.}\(^\text{16}\)

Today, this proposed modification to the Sixth Amendment has not materialized, but the Task Force's proposal has proven to be a crucial catalyst for the victim's rights movement, planting the seed that created the current push for a VRA. The National Organization for Victim Assistance (NOVA) proposed an entirely new amendment to the Constitution addressing victims' rights shortly after the Task Force.\(^\text{17}\) Following NOVA, citizens formed the National Victims' Constitutional Amendment Network (NVCAN) with the specific goal of obtaining a federal constitutional amendment after first establishing constitutional amendments in each state.\(^\text{18}\) NVCAN proposed the following

\(^{14}\) \textit{Final Report, supra note 6, at vi.}  
\(^{15}\) \textit{See generally id.} The Task Force made proposed recommendations to the following groups, followed in parentheses by the number of recommendations: federal and state level action (12), federal action (6), police (4), prosecutors (8), the judiciary (10), parole boards (4), hospitals (5), the ministry (2), the bar (3), schools (4), the mental health community (5), the private sector (4), proposed constitutional amendment (1). \textit{Id.}  
\(^{16}\) \textit{Id. at 114} (the italicized sentence represents the modification).  
\(^{17}\) \textit{Barajas & Nelson, supra note 10, at 4–5.}  
\(^{18}\) \textit{Cassell, supra note 7, at 1382.}
amendment in November 1987: "The victim of crime or his or her representative shall have the right to be informed of, to be present at, and to be heard at all criminal justice proceedings at which the defendant has such rights, subject to the same rules of evidence which govern the defendant's rights."  

In order for the VRA to become a constitutional amendment, it must be passed by two-thirds of the Senate, two-thirds of the House of Representatives and then ratified by three-fourths of the state legislatures. For the fourteen years after the Task Force's Final Report, a federal VRA remained an issue, but the legislature did not act seriously upon it until 1996, when the Senate and House of Representatives considered a Victims' Bill of Rights Constitutional Amendment. While the 104th Congress adjourned without further pursuing the amendment, its sponsors, Senators Dianne Feinstein (D-Cal.) and John Kyl (R-Ariz.), reintroduced it to the Senate of the 105th Congress on January 21, 1998; Representative Henry Hyde (R-Ill.) reintroduced the House version on April 15, 1997. Repeated hearings, alterations to the proposal and votes occurred in both the Senate and House for three terms (104th, 105th, and 106th Congresses). The version of the VRA before Congress until April 27, 2000, was S.J. Res. 3, and its principal part is Section 1, below.

S.J. Res. 3

Proposing an amendment to the Constitution of the United States to protect the rights of crime victims.

Section 1. A victim of a crime of violence, as these terms may be defined by law, shall have the rights:

to reasonable notice of, and not to be excluded from, any public proceedings relating to the crime;

to be heard, if present, and to submit a statement at all such proceedings to determine a conditional release from custody, an acceptance of a negotiated plea, or a sentence;

to the foregoing rights at a parole proceeding that is not public, to the extent those rights are afforded to the convicted offender;

20. U.S. CONST. art. V.
22. Id. at 46.
23. See generally id. (Stearman provides details of the congressional activity surrounding the VRA during these terms.).
to reasonable notice of and an opportunity to submit a statement concerning any proposed pardon or commutation of a sentence;

to reasonable notice of a release or escape from custody relating to the crime;

to consideration of the interest of the victim that any trial be free from unreasonable delay;

to an order of restitution from the convicted offender;

to consideration for the safety of the victim in determining any conditional release from custody relating to the crime; and

to reasonable notice of the rights established by this article.\textsuperscript{24}

S.J. Res. 3 was under consideration in the Senate in 2000. The Senate began consideration of the VRA on April 25, 2000, but withdrew it two days later.\textsuperscript{25} Prior to the withdrawal, scholars and columnists strongly predicted that the Senate would "overwhelmingly" pass the VRA, the House and state legislatures

\textsuperscript{24} S.J. Res. 3, 106th Cong. (1999). The remaining four sections of S.J. Res. 3 are as follows:

Section 2. Only the victim or the victim's lawful representative shall have standing to assert the rights established by this article. Nothing in this article shall provide grounds to stay or continue any trial, reopen any proceeding or invalidate any ruling, except with respect to conditional release or restitution or to provide rights guaranteed by this article in future proceedings, without staying or continuing a trial. Nothing in this article shall give rise to or authorize the creation of a claim for damages against the United States, a State, a political subdivision, or a public officer or employee.

Section 3. The Congress shall have the power to enforce this article by appropriate legislation. Exceptions to the rights established by this article may be created only when necessary to achieve a compelling interest.

Section 4. This article shall take effect on the 180th day after the ratification of this article. The right to an order of restitution established by this article shall not apply to crimes committed before the effective date of this article.

Section 5. The rights and immunities established by this article shall apply in Federal and State proceedings, including military proceedings to the extent that the Congress may provide by law, juvenile justice proceedings, and proceedings in the District of Columbia and any commonwealth, territory, or possession of the United States.

\textsuperscript{25} 146 \textsc{Cong. Rec.} 2,820 (2000) (introducing the VRA to the Senate floor); 146 \textsc{Cong. Rec.} 2,966 (2000) (withdrawing the VRA from consideration by the Senate).
would follow, and that "[t]he long and winding road to passage of [the VRA] [was] finally nearing an end. However, the Clinton Administration's Department of Justice had four objections to S.J. Res. 3, three of which the VRA advocates agreed with, and one that remains a bitter point of contention: the administration wanted to add the language that "Nothing in this article shall be construed to deny or diminish the rights of the accused guaranteed by the Constitution." The VRA advocates disagreed with this request and proposed alternative language that "[i]n cases of conflict, the rights of the accused or convicted offender and the victim shall be reasonably balanced." The administration rejected this proposal. This disagreement was the most recent roadblock for VRA advocates and came at a time when the amendment was the closest it has ever been to being passed by Congress. Senator Kyl voiced his frustration and explained:

It eventually boiled down to one thing that [the administration] wanted that we simply couldn't give them—and that was a statement that the defendant's rights would prevail over the victim's rights in the event of a conflict. The whole point of a crime victims rights amendment is to elevate the crime victims' rights to the same constitutional status as the defendant's rights.

Today, the push for a VRA is still strong and Senators Kyl and Feinstein are continuing their vigorous fight for its enactment. Kyl and Feinstein have drafted a revised VRA, not yet in its final form, which reads as follows:

SECTION 1. The rights of victims of violent crime being vital to a system of ordered liberty and being capable of protection without abridging the rights of those accused or convicted of victimizing them, the rights of any such victim to full consideration and fair treatment in the prosecution

29. Letter from Roberta Roper, Co-Chairperson, NVCAN, to President Clinton, at http://www.nvcan.org/docs/clintonletter.htm (May 2, 2000) [hereinafter NVCAN Letter to President Clinton] (on file with author); Senate Sponsors Pull Victim Rights Amendment, supra note 28.
30. Id.
and punishment of crime shall not be abridged by any State or the United States.

SECTION 2. Victims of violent crimes shall have the rights to timely notice of any release, escape, and public proceeding involving the crime; not to be excluded from such proceedings; to be heard at release, plea, sentencing, commutation, and pardon proceedings; and not to be subjected to undue delay, or to decisions that disregard their safety or their just claims to restitution; nor shall these rights be restricted, except when, and to the degree that, compelling necessity dictates.

SECTION 3. Nothing in this article shall be construed to provide grounds for a new trial or to authorize any claim for damages.

SECTION 4. Congress shall have the power to enforce this article by appropriate legislation.  

Since this new version of the VRA guarantees essentially the same victims' rights as S.J. Res. 3, but adds language in sections one and three to clarify how these rights will affect new trials, claims for damages and the rights of the accused, it is likely to elicit the same widespread support of the previous version. This support includes the backing of thirty-nine state Attorneys General, as well as national organizations including Mothers Against Drunk Driving (MADD), the National Governor's Association (NGA), the National Criminal Justice Association (NCJA) and the International Union of Police Associations/AFL-CIO.  

Kyl and Feinstein will most likely present their final version of the revised VRA to Congress during its winter session, 2001-2002. Steven Twist, Executive Committee member for NVCAN and former Chief Attorney General of Arizona, believes this new version's "chances of ultimate enactment are very good." An advantage for the passage of the amendment is that President Bush "strongly supports" the VRA, as he articulated during the 2000 Presidential election. Bush's appointment of John Ashcroft to Attorney General is consistent with his campaign rheto-


33. NVCAN VRA Supporters, at http://www.nvcan.org/endorse.htm (last updated May 29, 2000). Visit this website for a list of national organizations, national public officials, and State Attorneys General that support a VRA.

34. E-mail from Steven Twist to author (Sept. 13, 2001, 19:13:26 EST) (on file with author).

ric. Ashcroft helped enact a state crime victims' rights amendment in Missouri, that he believes "would be enhanced by a federal victims rights amendment." According to Ashcroft:

[I]f the Justice Department is to be focused on justice for all Americans, there is a need for justice for those who have been offended, as well as those who are the offenders. And the victims rights amendment and the victims rights movement is designed to help us have balance in this respect.

With a new Congress and Presidential administration to work with, Senators Kyl and Feinstein have a fresh start and renewed hopes on working towards the enactment of their revised version of the VRA. If the Senators can maintain and enhance the momentum of the support enjoyed by the previous version of the VRA, their goal has a legitimate chance of materializing.

II. Why We Need a VRA

This section analyzes why we need a VRA. First, it explains that victims deserve a VRA because of the harm they have suffered and the benefits they can provide the legal and law enforcement communities. Second, it illustrates the problem that the criminal justice system itself is causing victims to undergo a second form of victimization. Lastly, this section explains that constitutional protection of victims' rights is an effective and proper way to restore balance between victims and their offenders.

A. Respect for Victims

In an analysis of eighteen countries in the late 1980s and early 1990, researchers found that the United States has the second highest rate of victimization for all property offenses, and it also ranks second in robbery rates and fourth in assault rates. Besides the fears associated with personal assaults, thefts and burglaries, a fear of tragedies on a larger scale is also legitimate. American society was stunned by the aftermath of the Oklahoma

37. Id.
38. ZIMRING & HAWKINS, supra note 4, at 35, 38, 39. The eighteen countries included in the survey were Australia, Belgium, Canada, Czechoslovakia, England, Finland, France, Italy, the Netherlands, New Zealand, Northern Ireland, Norway, Poland, Scotland, Spain, Sweden, the United States, and West Germany.
City bombing, the Columbine High School shooting, the Rodney King police beating, the Nicole Brown Simpson and Ronald Goldman murders and rioting after sporting events such as the Los Angeles Lakers' 2000 NBA Championship victory.

We learn about these tragic events, and soon they become memories in the backs of our minds. We refer to them, but they do not always conjure up as strong emotions as they once did. From the standpoint of a victim, however, these feelings remain longer and are felt more deeply. As one victim's parents said, "Our daughter's killer will be eligible for parole when he's 29. For us there is no parole. Our family has been given—with no due process of law—a life sentence of loss and grief." In addressing the American system of justice, it is important to keep the victim in mind because the harm he or she suffers is the very reason that a case is at trial in the first place. The victim's experience should be intimately tied into the administration of justice.

Besides providing attention to victims because of the personal interests they have at stake, focusing on victims is beneficial from both legal and law enforcement perspectives. Victims are invaluable from a legal perspective because they serve as key witnesses that are often crucial help to seeking justice at trials. From a law enforcement perspective, evidence suggests that helping victims may also help prevent crime. A study by the National Council on Crime and Delinquency concluded that "the single greatest factor in predicting criminal behavior on the part of teenagers . . . [was] whether they had been a victim of crime." As stated by Susan Herman, Executive Director of the National Center for Victims of Crime:

It is in our interest as a nation to help victims of crime not only because it's the right thing to do—not only because our country would be healthier and more productive—but because helping victims may turn out to be one of the most effective ways to prevent further crime and violence.

Thus, victims cannot avoid being affected by the criminal justice system, and due to their unique role in crimes and criminal trials, they deserve not to be marginalized by the system. We should ensure justice for these people and treat them with the utmost respect, not only because of the violence committed against them, but also for their roles in helping courts reach just results and in helping communities become safer places to live.

41. Id.
The very fact that a victims' rights movement has gained such strong momentum and widespread bipartisan support illustrates that the victim is not being treated in the manner that he or she deserves, and this fact is disturbing.

B. A Victim Twice Over

In 1988, Christine Long was raped. Her personal testimony puts into perspective what VRA advocates are fighting to remedy.

This attacker invaded my most personal and sacred space when he broke into my home and brutally raped me, destroying every shred of my dignity and my notions of personal security. My subsequent experience with the criminal justice system left me feeling violated again by placing greater value on the rights of the accused versus my rights. I was treated not as a victim but instead as a mere witness, as if I had only seen from afar the inhumane brutality inflicted against me.

The system saw me as a piece of evidence, like a fingerprint or a photograph, not as a feeling, thinking human being.42

Long's experience as a victim of violent crime was followed by further victimization by the criminal justice system itself. She explains, "My ordeal impressed upon me the total lack of crime victims' rights. I had no right to be apprised of the plea bargain negotiated with my assailant. And I had no right to voice my objections at subsequent parole hearings."43 Because of the gross neglect she perceived going through the criminal justice system, Long has made it her life's goal to fight for victims' rights and the VRA, speaking for the benefit of future victims as well as for those who have also suffered from being a victim twice over.

The man who raped Long had previously been convicted of rape and incarcerated. Had the VRA been enacted before Long's rape, it is possible that her attack could have been prevented. The rapist's earlier victims would have had a constitutional guarantee to be heard through testimony or written statements at proceedings determining the attacker's release from custody, acceptance of negotiated pleas or sentencing. They would also have had a constitutional right to consideration for their safety, should their offender be released from custody.44

Granted, the assumption cannot be made that Long's rape would

42. Long Testimony, supra note 8.
43. Id.
44. S. J. Res. 3, supra note 24; see Kyl/Feinstein to Introduce Revised Victims' Rights Amendment, supra note 32 (provides the most recent version of the VRA).
necessarily have been prevented had the VRA been enacted, but the possibility of its positive influence is certainly a viable one. If the VRA would not have prevented Long's attack, it would at least have provided her with a sense of peace in knowing that she had an adequate say in the process and had done all she could to see that justice was served in regards to the event that changed her life. Long should not have to experience the feeling of being a victim twice over.

The personal experience of Collene Campbell is an additional vivid and disturbing example of our need to prevent double victimization. Campbell's son was murdered, and her treatment throughout the criminal process resulted in her second victimization. The defense subpoenaed her and her husband to testify at trial, so they were evicted from the court proceedings and sat in the hallway outside the courtroom throughout the proceedings. The case subsequently reached the appellate court, which released the defendants. Unlike more than forty of the defendants' friends and family members, no one informed the Campbells that an appeal was in process or that the defendants had been released.\textsuperscript{45} The Deputy Attorney General's response to Campbell's lack of notification was that notification to a victim's family is "unimportant because a victim's family just doesn't understand the proceedings."\textsuperscript{46}

Experiences of victims like that of Christine Long and Collene Campbell need to be prevented. Victims do not deserve to feel like mere witnesses to their attacks or as pieces of evidence at trial. Their input and society's respect for their situation are integral to the determination of justice. For these basic reasons, the VRA is worthy of serious consideration.

C. Restoring Balance

Legislative attention to the victim has indeed improved in the last decade, but it has not reached the point where the victim's rights are on par with the defendant's. This is a major argument that VRA advocates stress. After President Reagan's Task Force presented its sixty-eight proposals for change, positive advancements were made on behalf of governments and private and community organizations for victims. In May 1986, the Department of Justice's Office of Justice Programs published


\textsuperscript{46} Id. at n.2 (citing Victims Bill of Rights Amendment: Hearings on S.J. Res. 52 Before the Senate Comm. on the Judiciary, 104th Cong. 33 (1996)).
President's Task Force on Victims of Crime: Four Years Later. This report by the Task Force was a very positive one. While Chairman Herrington's remarks in the 1982 Final Report rang with frustration and an urgent call to action for the neglected victim, her remarks in Four Years Later were quite the contrary. Herrington commended President Reagan, stating that after the creation of the Task force, "the Nation began to listen and respond" and after the Final Report, "[t]here is much progress to celebrate" because of changes at the local, state and federal levels of government.47

The Task Force listed eighteen laws advancing the rights of victims and reported that before 1982, only Washington, Nebraska and Oklahoma had passed a majority of these laws. After 1982, twenty-seven more states met this standard.48 In her address to the President, Herrington was positive and praiseworthy but noticeably did not concede that reform for the victim was complete. Rather, Herrington explained that it was progressing

48. Id. at iv, v, 4. See pages iv–v for a map of states creating legislative mandates for crime victims. The following is the Task Force's list of eighteen laws. Each is followed first by the number of states that had implemented it pre-1982, and then the number of states that had implemented it as of July 1985:

- Enacting comprehensive laws that include a majority of the reforms below, 4, 31;
- Requiring a victim impact statement at sentencing, 8, 39;
- Victim allocation at sentencing, 3, 19;
- Permitting victim input into key prosecutorial decisions, 1, 10;
- Opening parole hearings, 6, 19;
- Abolishing parole, 5, 8;
- Requiring that victim be notified of crucial developments in case, 2, 27;
- Keeping victim counseling records confidential, 6, 20;
- Not disclosing addresses and phone numbers of victims, 0, 5;
- Allowing hearsay at preliminary hearings, 23, 26;
- Assuring prompt property return, 4, 20;
- Protecting victims from intimidation and harassment, 4, 27;
- Providing separate and secure waiting rooms, 1, 17;
- Checking people who work with children for a history of sex offense convictions, 1, 20;
- Mandating restitution to victims as part of sentence, 8, 29;
- Providing funds for services to all victims of crime, 7, 28;
- Preventing criminals from profiting from the sale of their stories, 14, 32; and
- Victim compensation, 37, 43.

Of the eighteen laws, implementing the requirement of victim impact statements at sentencing created the most change, from eight states pre-1982 to thirty-nine states as of July 1985; abolishing parole received the least change, from five states pre-1982 to eight states as of July 1985. Id. at 4.
and remained a crucial priority, especially in light of the fact that "[in 1985] more than 35 million Americans were victims of crime" and "[a]lthough crime has decreased, the chance of being a victim of violent crime is still greater than that of being injured in a traffic accident." 49 Additionally, in 1999, an analysis of the expansion of victim participation in the criminal justice system during the fifteen years after the President's Task Force on Victims of Crime found that while the victim has indeed been reintroduced in a participatory role, the victim once had a more dominant role and VRA advocates feel that the victim's role is still not broad enough. 50

The fact that Herrington urged for the continual progression of victims' rights fifteen years ago, and that today the VRA remains a subject of debate in Congress, illustrates how long the struggle for victims' rights has taken place. The balance between the victim and defendant remains skewed, and methods alternative to a federal VRA have inadequately attempted to remedy this problem.

1. Alternative Methods of Protection are Inadequate

Providing victims with rights through the form of a constitutional amendment is necessary not only because protecting victims is inherently good, but also because it is the only way to create a balance of rights between victims and their offenders. Federal statutes do not carry the same weight as constitutional amendments, and different state constitutions and statutes protect victims' rights to varying degrees. A VRA would remedy these inadequacies, creating floor requirements for victims' rights.

The imbalance between victims' and defendants' rights persists despite the fact that all states statutorily protect victims' rights in some manner, and state constitutional victims' rights amendments exist in more than half of states. 51 While these amendments are helpful to the victim's cause, they are insufficient to equate the victim's rights with the defendant's. Not only is the effectiveness of state mandates questionable, but as long as defendants have federal constitutional guarantees and their vic-

49. Id. at iii.
tims do not, the victim is not on an equal playing ground. As one victim who has experienced this disadvantage articulated, "They explained the defendant's constitutional rights to the nth degree. They couldn't do this and they couldn't do that because of his constitutional rights. And I wondered what mine were. And they told me, I haven't got any."52

VRA critics argue that a federal amendment is not necessary because states can provide for victims rights in their constitutions. Wisconsin Senator Russell Feingold, for example, argues that it is unnecessary to amend the Constitution to protect victims when we can accomplish the same goal through state constitutions and federal statutes.53 Feingold explains that twenty-nine states have victims' rights amendments, all states have statutes protecting victims, and while others disagree, he believes these provisions are adequate and effective means of protecting victims.54

The problem with Feingold's assertion is that even despite state provisions or federal statutes enacted for the protection of crime victims, these provisions are not strictly followed, so the imbalance of rights persists. Former U.S. Attorney General Janet Reno reinforced the existence of this problem in her statement that "efforts to secure victims' rights through means other than a constitutional amendment have proved less than fully adequate."55 The floor requirements created by a VRA would provide adequate protection of victims' rights no matter what state a victim was in when he or she was attacked.

An example of the inadequacy of state provisions is provided by the Department of Justice (DOJ) on the issue of notice, and also by the enforcement of the Utah Rights of Crime Victims Act. The DOJ reported that "[w]hile the majority of states mandate advance notice to crime victims of criminal proceedings and pre-trial release, many have not implemented mechanisms to make such notice a reality."56 Similarly, the Utah Rights of Crime Victims Act, which ensures victims "the right to be heard at all important hearings related to criminal cases," also has not mate-

52. Final Report, supra note 6, at 114.
54. Id.
55. Twist, supra note 7.
56. Id.
rialized.57 According to Professor Paul Cassell, Utah's act has proven to be "a meaningless paper promise."58

A research project by the National Center for Victims of Crime came to a similar conclusion. It analyzed state statutory protection of victims' rights in two states with strong protection and two with weak protection. The study consisted of gathering information from victims including whether they were afforded and informed of their rights, whether they were adequately notified of victim services, whether they received restitution, what losses they suffered because of the crime committed against them and how they rated their satisfaction with the criminal justice procedures and their representatives.59 The researchers concluded that strong legal protection produces positive results for victims, but even in states with this strong protection, "some victims are not afforded their rights."60 This illustrates that state statutes and constitutional amendments alone are insufficient in guaranteeing victims' rights.

Even if state provisions proved effective, the imbalance in federal constitutional rights would remain a tremendous obstacle for victims. For this reason, VRA advocates such as NVCAN Co-Chairperson, Roberta Roper, promote the argument set forth by President Clinton in June, 1996, when he announced his support for the VRA:

When a judge balances defendants' rights in the Federal Constitution against victims' rights in a statute or state constitution, the defendants' rights almost always prevail. That's just how the law works today. We need to level the playing field. This is not about depriving people accused of crimes of their legitimate rights, including the presumption of innocence; this is about simple fairness. When a judge balances the rights of the accused and the rights of the victim, we want the rights of the victim to get equal weight.61

When President Clinton stated that the VRA is not about depriving the accused of their rights but merely equalizing their rights with that of the victims, he synthesized a key point. The VRA does not diminish defendants' rights. It ensures that both

58. Id.
59. KILPATRICK ET AL., supra note 51.
60. Id.
61. NVCAN Letter to President Clinton, supra note 29 (In this May 2, 2000 letter to President Clinton, Roberta Roper quotes what President Clinton said in June 1996).
victims and defendants have rights, so courts can reach just results. Preserving the rights of the accused against powers of the state, along with the practice of public prosecution, are two important principles of American criminal justice that should not be compromised. As Steven Twist explains, however, these two "good and perfect" things must be tempered, lest their excess destroy balance. Twist refers to the rights of the accused and public prosecution as possible "seeds of destruction" because they have resulted in the diminished role of the victim, neglecting the victim’s pain and treating victims like pieces of evidence. The VRA would help prevent this result.

2. Victims’ Rights Properly Belong in the Constitution

No one denies the sacredness of the Constitution and our need to respect it. Opponents of the VRA argue that the amendment lowers the integrity of the Constitution. Russell Feingold, for example, asserts that his "great respect for the Constitution" is further motivation not to support the VRA because "it trivializes the great and historic governing document of our democratic system when we so easily turn to the amendment process to address contemporary and often transient policy problems." The VRA advocates’ response to this argument is that victims’ rights rise to the same level of importance as constitutionally guaranteed rights, so rather than "watering down" the Constitution, they are being placed where they properly belong.

While Feingold’s point has merit in that numerous amendments are probably proposed for political posturing, the VRA should not be categorized as one of them. The problem of victims lacking constitutional protection of their rights has existed for decades since the extinction of private prosecutions so it cannot properly be characterized as a "transient" political problem. Furthermore, the VRA addresses basic human rights and is therefore more akin to amendments related to slavery and suffrage, as asserted by Chief Justice Barajas and Scott Alexander Nelson.

62. Twist, supra note 7.

63. Id.

64. Feingold, supra note 53. Feingold argues that the VRA contributes to the "disturbing trend" of an increase in the number of proposed amendments to the Constitution. He points out that "[i]n the 207 year history of the US Constitution, only 27 amendments have been ratified—just 17 since the Bill of Rights was ratified in 1791." In light of these facts, Feingold laments that the past few Congresses have introduced hundreds of amendments, illustrating a lessening of our regard for the Constitution. Id.

Harvard Law School Professor Laurence Tribe articulates well the argument that the VRA relates to fundamental human rights:

I've been very reluctant to see the Constitution amended. I'm one of those people who thinks it should be amended only in very rare circumstances, but we're dealing here with a fundamental principle of human rights, unlike just a policy preference, and we're dealing with something that isn't just like a wish list, you know, wish the budget to be balanced. We're dealing with a thing that can be written, and it has to be written with care so that it is enforceable in a practical way, without distorting the structure of our government or trampling on other people's rights. So I do think it belongs in our fundamental national law.66

The victim's point of view coincides with this scholar's. Christine Long also explains that the rights stipulated in the VRA are fundamental, and as the supreme law of our land, the federal Constitution is the proper place for these rights to be guaranteed.67 The VRA provides for rights as basic as notice. Why should victims be denied a constitutional guarantee for notice of public proceedings relating to the crime committed against them, or of their offender's release or escape from custody? Even in 1976, former U.S. Attorney General Herbert Brownell voiced the need for a “Miranda-type” program for victims in order to address their plight and to ensure the integrity of our judicial system.68 Brownell asserted that anyone who interacts with victims would be unsurprised that the victim has difficulty being informed by criminal courts.69 He noted that the criminal system is “failing to provide the complainant with the most basic service of all,” which includes an explanation of his rights, a contact person for information or simply directions on how to recover property in police custody or navigate his way through the courthouse. Furthermore, Brownell said, “No one thanks [the complainant] for being a good citizen and withstanding what he has endured.”70 The VRA provides for these fundamental rights, and by equalizing victims' rights with defendants', it adds an important human aspect to the justice system, helping to prevent people from becoming victimized twice. The benefits

67. Long Testimony, supra note 8.
68. See generally BROWNELL, supra note 11.
69. Id. at 24.
70. Id. at 21–22.
the VRA would provide outweigh the burdens its opponents fear, and this argument is enhanced by evidence that VRA opponents' primary fears are unfounded.

III. Fears Unfounded

Based on studies, fears that increased attention on victims' participation in the criminal process will detract from defendants' rights prove unfounded. An example of this is a study conducted on the effect of victim-impact statutes in thirty-six states. The study led to the conclusion that the statutes' effect on criminals' sentence type and duration were only negligible.\(^7\) This coincides with the U.S. Supreme Court's 1991 decision in \textit{Payne v. Tennessee,} where the Court held that the defendant's Eighth Amendment protection from cruel and unusual punishment did not prohibit the presentation of victim-impact evidence to a capital sentencing jury.\(^7\) In this case, Pervis Payne stabbed a woman and her two-year-old daughter to death and severely wounded the woman's three-year-old son, Nicholas. Payne had four witnesses testify before the capital sentencing jury (his parents, girlfriend, and psychologist) and their testimonies did not provide insight on the brutality of his crime. The Court noted that in contrast to Payne's witnesses' testimonies, Nicholas' grandmother's testimony provided the only victim-impact evidence during Payne's sentencing phase.\(^7\) The Court further stated that the grandmother's descriptions "illustrated quite poignantly some of the harm that Payne's killing had caused," and that "there is nothing unfair about allowing the jury to bear in mind that harm at the same time as it considers the mitigating evidence introduced by the defendant."\(^7\)

The study of state victim-impact statutes, as well as the Supreme Court's decision in \textit{Payne,} illustrate that the victim's participation in a case does not interfere with the defendant's rights. This speaks to the viability of a federal VRA. It also rein-

\begin{itemize}
\item 71. Barajas & Nelson, \textit{supra} note 10, at 18.
\item 73. \textit{Id.} at 826.
\item 74. \textit{Id.} The court also noted the Supreme Court of Tennessee's finding that:
\begin{quote}
It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims.
\end{quote}
\textit{Id.} (citing State v. Payne, 791 S.W.2d 10, 19 (Tenn. 1990)).
\end{itemize}
forces the results of a study on how legislation has affected the victim's right to be heard at sentencing. The results showed that legislation "[has] neither matched the highest expectations of its advocates nor realized the worst fears of its critics." 75

The fears voiced by opponents of the VRA are similar to those voiced regarding state victims' rights amendments. An extensive survey on state victims' rights amendments illustrates that state appellate courts have effectively dealt with the fear that the victims' rights will hinder that of the defendant. In light of the defendant's constitutionally guaranteed rights and the victim's lack thereof, the survey revealed that "[w]hen faced with legitimate conflicting rights, state appellate courts have consistently acknowledged that the liberty rights of defendants are paramount." 76

*Gore v. State,* 77 for example, addressed the issue of a victim's right not to be excluded from a public proceeding. In this case, a defendant appealed on grounds that the court should have sequestered a homicide victim's stepmother from the court proceedings. The court found that the defendant was not prejudiced but warned that victims' relatives' general right to attend trials "must yield to the defendant's right to a fair trial." 78 This case illustrates two important concepts. First, it exemplifies how the current system places defendants' rights above that of the victim. Second, it also shows that a victim can be present without infringing upon a defendant's rights or compromising our criminal procedure.

The VRA provides victims with the right not to be excluded from public proceedings. Therefore, a conflict of interest arises when the victim is also a sequestered witness. The defense may fear that the victim's presence in the courtroom will unfairly influence the jury, but this problem can be solved by implementing practical solutions. For example, courts can plan for victims to testify before other witnesses, or they can have the testimonies of victim-witnesses videotaped prior to the trial. 79

Another fear VRA opponents have is that victims are too emotional, so their input in the criminal process will negatively affect the prosecutor by "second-guessing" him and dictating his

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75. Tobolowsky, *supra* note 50, at 81.
77. 599 So.2d 978 (Fla. 1992).
78. Id. at 986. Four years after *Gore,* in *Martinez v. State,* 664 So.2d 1034 (Fla. 1996), the Florida District Court of Appeal held that a victim's presence in court during opening statements should not have been allowed, but it resulted in a harmless error. The court affirmed the conviction. *Id.*
policy decisions. In reality, the VRA does not lend victims freedom to be heard when they should not. The victim’s right to be heard can be restricted if “compelling necessity dictates” and cannot “be construed to provide grounds for a new trial or to authorize any claim for damages.” In other words, as Steven Twist relates, the VRA “extends victims the right to be heard where they have useful information to provide.” Victims may attend the trial, talk to the judge or testify before the parole board at specified sentencing procedures and conditional releases, and the only time a victim will speak to a jury is when he is a witness who can provide evidence through testimony. This participation is fair.

Likewise, the fear that providing victim’s rights will essentially lead to the addition of a second prosecutor, or third party, to the criminal system that will “[raise] havoc with our traditional adversarial system” is also unfounded. It is true that our criminal justice system is bipolar, with a plaintiff and defendant as parties, and it is also based on the presumption that crimes are committed against the public. However, who is to say that adding a stronger role for the victim will so interfere with our criminal process that the accused will find themselves at an increased and unfair disadvantage? VRA opponents argue that the amendment will convert our system into one that serves as a victim’s tool for private vengeance. One opponent said the VRA “replaces the healthy attitude of ‘get over it and get on with

80. King, supra note 8, at 359.
81. See Kyl/Feinstein to Introduce Revised Victims’ Rights Amendment, supra note 32 (sections 2 and 3 of the most recent version of the VRA).
82. Twist, supra note 7.
83. U.S. Senator Jon Kyl (R-AZ) Holds Media Availability, FDCH Political Transcripts LEXIS (July 18, 2000).
84. But see A Proposed Constitutional Amendment to Protect Crime Victims: Hearings on S.J. Res. 3 Before the Senate Comm. on the Judiciary, 106th Cong. (Mar. 24, 1999) (statement of Beth A. Wilkinson, federal prosecutor). Beth Wilkinson was a prosecutor in the Oklahoma City bombing case, where the prosecution accepted the plea bargain of a key witness, Michael Fortier. This helped to convict Timothy McVeigh and Terry Nichols, who were most responsible for the bombing. Wilkinson claims that the VRA would have hindered the conviction. She said that if the victims had had the right to be heard by the court at the time of the plea bargain, “many would have vigorously and emotionally” challenged it. The problem in this case was that the prosecutors could not explain the importance of Fortier’s plea to the victims because of the secrecy rules regarding grand juries. Id. at 19.
86. Ed Quillen, The Victims Rights Amendment: Fashionable but Stupid, DENVER POST, Sept. 10, 2000, at H-03.
your life' with the unhealthy view that 'until I get closure on this, I have an absolute right to whine on national network news every night.' But VRA advocates are not seeking a means of vengeance. They are looking for balance. If defendants already have constitutionally guaranteed rights, providing victims with the same will place the two on equal ground, rather than maintaining the status quo of favoring one over the other.

IV. A Change of Perspective

Implementing the VRA presents issues about how this change will affect the character of the American criminal justice system as a whole. This section illustrates that the VRA's effect would be an increased focus on restitutary principles as well as the retributivist theory of punishment. This influence has important meaning and positive aspects to offer. Meanwhile, it neither represents drastic change to our current penal theory nor inconsistency with Christian values.

A. Restitutionary Principles

It is a serious matter that the VRA contributes to offering a modification of our view of the criminal justice system by focusing more on restitutary principles and less on punishment and deterrence. However, in light of the current emphasis on defendants' rights, this change in perspective deserves serious consideration. Paul Cassell explains that "over time, . . . attention to the rights of criminal suspects has turned into a preoccupation, an all-consuming task that left courts and others little time or inclination to consider other competing interests." He also notes that the problem is compounded by "a philosophy that society's interests in prosecution are different from the victims' interests, which has further shifted attention away from victims." This shifting of attention or denial of standing for the victim is "recent and aberrational" to American as well as foreign criminal procedure, suggesting that a return towards a more restitutary-oriented system is a viable means of providing victims with the rights they deserve.

Originally, American colonists followed English common law traditions that included private prosecutions and the philoso-

87. Id.
88. Cassell, supra note 7, at 1457.
89. Id.
phy that crimes were injuries to individuals rather than the state. Reintegrating criminals into society was an important philosophy, and restitution was thought to have the positive effects of both encouraging offenders' rehabilitation and simultaneously providing relief to victims. Over time, the concept of a public prosecutor evolved in colonial society, and its origin has been described as "an historical enigma." The introduction of public prosecution, as we see today, replaced the practice of private prosecution that existed at the time of America's first settlers.

In foreign countries, the transition from private to public prosecution did not occur. In England, private prosecution remains essential to the British concept of protection of liberty. In France, victims may seek the civil action of damages in criminal courts, thereby efficiently lowering costs and assuring consistent court decisions. This is the most common method by which countries provide restitution for crime victims. In the Netherlands, victims do not have the right to initiate criminal trials, but they may appeal to the court if prosecution does not take place. They may also be represented by counsel and have the general right to records.

So, while the American criminal process began with restitutionary aims akin to that of its European counterparts, America broke away from this philosophy after its revolution and replaced it with a system that focuses on punishment and deterrence. This change has been attributed to the "the increasing urbanization and mobility of the population [that] brought about the demise of community kinship." If a victim in the United States seeks damages, he must endure the burden and high costs of civil law, while maintaining a very limited participatory role in

91. Id. at 841. See also Friedman, supra note 9, at 20–30.
92. Cellini, supra note 90, at 845.
93. Id. at 842. The concept of a public prosecutor did not have roots in English law. Two theories of its derivation are that it is an adaptation of the Dutch colonial settlements' schout ("a combination of sheriff, public prosecutor, and financial agent for the Dutch West India Company") or the French procureur de roi (king's prosecutor). Both of these offices, in their native lands, did not deny the victim the right to restitution or the right to bring civil claims in criminal proceedings. Id.
94. Id. at 843.
95. Id. at 843–44. See also Dr. Stephen Schafier, Restitution to Victims of Crime 21 (1960). Greece and Canada share this same characteristic of allowing claims for restitution to be brought simultaneously with criminal offenses. Id. at 57, 60.
96. Id. at 103.
97. Cellini, supra note 90, at 844.
98. Id. at 846.
the criminal proceedings related to the same case. Today, U.S. federal law, along with the legal systems of India, Pakistan, and New Zealand, is among the few that "completely separate restitution to victims of crime from the criminal law, leaving the question of restitution to be dealt with entirely as a problem of the civil law."\textsuperscript{99}

Allowing the victim a role in the criminal justice process will reapply restitutinary principles to American criminal law. Criminology scholar Stephen Schafer explains that restitution and the idea of addressing victim neglect bear a relationship with one another, and that merging victimology with penology can refine the concept of punishment in a positive manner:

\textit{[I]t does seem to be possible to establish a close relation between \ldots the criminal and his victim. Not pity towards the victim, but appreciation of his claim is needed. Not thirst for revenge against the criminal, but a clearer understanding of his deed would help his reform and rehabilitation. Restitution might give emphasis to the fact that crime construes a relation not only between the criminal and society, but also between the criminal and his victim. The victim is not just simply the cause of the criminal procedure, but has a major part to play in the search for criminal justice.}\textsuperscript{100}

\section*{B. Theories of Punishment}

Besides introducing restitutinary principles to the American criminal justice system, the VRA further shapes the theoretical framework of our system of punishment in terms of utilitarianism and retribution—the two major perspectives of punishment that have influenced our system of justice. Analyzing these theories illustrates that implementing the VRA advances the retributivist theory, and this shift in perspective can be a healthy one for our criminal justice system.

1. A Brief History on the Development of American Theories of Punishment

The American criminal justice system is based in utilitarianism but has retributivist influences. Today's criminal system is the product of utilitarian theory that gained permanence in the late eighteenth and early nineteenth centuries.\textsuperscript{101} Utilitarianism

\textsuperscript{99} Schafer, supra note 95, at 103.
\textsuperscript{100} Id. at viii.
focuses on future consequences, viewing crime prevention as an ultimate goal of punishment that is realized by rehabilitation, deterrence and incapacitation.\textsuperscript{102} The utilitarian perspective views punishment as justifiable as long as it effectively advances the best interests of society.\textsuperscript{103} Retributivist theory came to the forefront in America in the 1970s, when society became frustrated with the failure of utilitarianism's preventionist strategies.\textsuperscript{104} Contrary to utilitarianism, retributivism represents "the idea that criminals should be punished because they deserve it."\textsuperscript{105} Retributivist theory is often explained in terms of the benefits and burdens associated with complying with or violating rules. Scholar Herbert Morris, for example, explains that retributivism is reasonable and just because punishing an offender equalizes the distribution of benefits and burdens between the victim and the offender.\textsuperscript{106} The results of the retributivist influence in America included more determinate sentencing that was also less discretionary and less focused upon rehabilitation.\textsuperscript{107} These changes often yielded overly harsh and ineffective sentencing.\textsuperscript{108}

By the 1980s, a new educative theory of punishment emerged as retributivists considered whether their ideals wrongly exploited offenders for the sake of making a political statement of respect for victims.\textsuperscript{109} Consequently, they adopted the idea that punishment included rehabilitative principles and that society should make efforts to reintegrate offenders. The educative theory includes a paternalistic aspect in its view that the purpose of punishment is to teach lessons in morality.\textsuperscript{110}

\textsuperscript{102} Id. at 35–38.
\textsuperscript{103} Id. at 35.
\textsuperscript{105} Id. at 37.
\textsuperscript{107} See Braithwaite & Pettit, supra note 104, at 38.
\textsuperscript{108} Id.
\textsuperscript{109} \textit{KAPLAN ET AL.}, supra note 101, at 91.
\textsuperscript{110} Jean Hampton, \textit{The Moral Education Theory of Punishment}, in \textit{KAPLAN ET AL.}, supra note 101, at 92; Herbert Morris, \textit{A Paternalistic Theory of Punishment}, in \textit{KAPLAN ET AL.}, supra note 101, at 93. \textit{See also DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY} 292 (1990) (Garland suggests that punishment should be viewed as "a work of social justice and moral education rather than penal policy. And to the extent that punishment is deemed unavoidable, it should be viewed as a morally expressive undertaking rather than a purely instrumental one."
2. The VRA, Retributivism and the American Criminal Justice System

The VRA is retributivist in nature because it relates to the idea of equalizing the benefits and burdens between victims and their offenders and also to the idea of punishing offenders for just deserts. The primary aim of the VRA is to provide a balance of constitutionally protected rights between victims and their offenders, and in this sense, it represents an equalization of benefits and burdens. The VRA relates to punishing offenders for just deserts by allowing victims participatory roles in the criminal process. This participatory role includes victim testimony at court proceedings. Since the jury may consider the victim testimony in its assessment of the offender's punishment, the VRA relates to offenders receiving just deserts for the harm they caused.

However, simply because it is retributivist in nature does not mean the VRA can be characterized as a tool that serves vengeful purposes, as some opponents claim. Professor Jean Hampton articulates this point well. Hampton endorses retribution, finding that it "is importantly different from the vengefulness that emanates from malice." Hampton acknowledges that people confuse retribution and revenge, but that the two are critically distinct:

The vengeful hater does not respect but aims to diminish the worth of the offender . . . in order to elevate herself, a strategy that I have argued is self-defeating. The retributivist, on the other hand, aims to defeat the wrongdoer in order to annul the evidence provided by the crime of his relative superiority. The retributivist is interested in asserting moral truth; hence he is always mindful of, and respectful towards, the value of his wrongdoer. Indeed, the retributivist who accepts an egalitarian theory of worth has no interest in doing anything to change the value of either the wrongdoer or the victim. Instead, he is interested in using his domination to deny the wrongdoer's prior claim or superiority.

As Hampton asserts, retribution is associated with moral truth and equal worth. The VRA's retributivist influence on the American criminal justice system includes these values. Victim participation in the criminal process acknowledges that the vic-

111. See Quillen, supra note 86, at H-03; King, supra note 8, at 359.
113. Id. at 137–38.
tim has "value" that his or her offender diminished, and that the victim's true "worth" must be restored to reach justice. By allowing victims the right to be heard, a vital perspective on a crime is included in the totality of evidence presented at court, increasing the probability that courts will reach results that are just to the victim, offender and society. If a "compelling necessity dictates" that a victim not testify, the VRA provides for this exception.\textsuperscript{114}

By allowing victims to reestablish their "value" in order to assert a "moral truth," the VRA communicates a message to the offender that his or her claim to superior worth is harmful and wrong. In this respect, the VRA reflects the educative theory of criminal punishment, which is the combination of the retributivist and rehabilitative theories that can be used to characterize American punitive theory today. The educative theory "bring[s] the criminal to understand the nature and implications of her crime; to repent that crime and thus, by willing her own punishment as a penance which can expiate her crime, to reconcile herself with the Right and with her community."\textsuperscript{115} Because the VRA has an educative theory influence, it is consistent with the current American theory of punishment and will not materially alter the country's penal theory as a whole.

Furthermore, the VRA's retributivist nature is reconcilable with Christian values of love and forgiveness. Professor Hampton explains that "retribution is not a form of hatred at all, so that (as Jesus may have been trying to say) the claims of love need not be violated by the claims of justice, or vice versa."\textsuperscript{116} Hampton goes on to say that a victim can seek retribution and still forgive his or her offender because "[f]orgiveness is a change of heart towards the wrongdoer in which one drops any emotions of hatred or resentment towards him and his deed, takes a pro-attitude towards him and is disposed (under most conditions) to make the offer of reconciliation."\textsuperscript{117} In light of this explanation, a victim can participate in the criminal justice process and be at peace with the Christian doctrines to "love your enemies" and "forgive others."\textsuperscript{118}

\begin{flushright}
114. See Kyl/Feinstein to Introduce Revised Victims' Rights Amendment, supra note 32 (most recent version of the VRA).
116. Murphy & Hampton, supra note 112, at 122.
117. Id. at 157.
CONCLUSION

As related in this Note, constitutionally guaranteeing fundamental victim's rights through the enactment of the VRA is a valid solution to improving the status of the victim in our criminal justice system. Over the years, the VRA advocates have fought through repeated revisions and garnered continual widespread, bipartisan support for the materialization of this amendment. The momentum of the victims' rights movement has led to positive advancements for victims, raising the public consciousness of their status. In light of the need to respect victims of violence in our society and the fact that victims are being victimized a second time by the criminal process itself, efforts for the victims' cause must persist.

The nature of the VRA merits a constitutional amendment because the rights it affords are basic, fundamental human rights. Furthermore, as Cassell notes, criminal procedure has been "nationalized" so that "the coin of the criminal justice realm is constitutional rights. Without such rights, victims inevitably become second-class citizens in the courts." Considering that alternative methods of protection for victims' rights have proven inadequate and many of the fears surrounding the VRA are unfounded, reintroducing the victim to the criminal process through the VRA is a logical solution.

While the VRA does affect the theoretical framework of the American criminal justice system by providing restitutionary and retributive influences, this effect is neither drastic nor detrimental, especially since it coincides with the current educative theory of punishment. Adding a restitutionary slant to our criminal procedure will be a healthy change, benefiting victims and tempering our stress on defendants' rights without unjustly infringing upon them. The retributive aspects of the VRA contribute to our society obtaining justice by reaching moral truths related to just deserts and what Professor Hampton describes as an equalization between the value of the victim and the offender.

In the words of Chief Justice Richard Barajas and Scott Alexander Nelson, the change the enactment of the VRA will create "is not revolutionary. It is simply a move toward reestablishing a proper balance between the rights of the accused and the rights on Law as a Tool for Building Justice, 46 CATH. U.L. REV. 1163, 1172 (1997) (explaining that love defines justice, echoing Christ’s teachings “that the entire law is satisfied in the love of God and the love of neighbor.”).

120. MURPHY & HAMPTON, supra note 112, at 137–38.
of the crime victim."121 This straightforward goal of creating balance is a worthwhile and necessary one that our criminal justice system can and should strive to achieve.
