Crime Victims in German Courtrooms:  
A Comparative Perspective on American Problems†

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INTRODUCTION: THE VICTIMS’ MOVEMENT IN THE UNITED STATES AND 
THE NEED FOR A COMPARATIVE PERSPECTIVE

The victims’ movement in the United States is a powerful political 
force that has achieved some significant victories in its fight to improve 
the treatment of victims within the American criminal justice system. In 
1982, for example, Congress passed the Victim and Witness Protection 
Act.¹ This legislation encouraged sentencing judges to impose require- 
ments of restitution on convicted defendants² and required the filing of 
victim impact statements as part of any presentence report supplied by 
the Department of Probation to a sentencing judge.³ While the Act is

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² Id. § 5 (codified as 18 U.S.C. § 3579). Few offenders, except in white collar criminal 
cases, have the skills, earning power, and employment opportunities to make meaningful 
restitution. Consequently, it has been argued that the tough language mandating restitution in 
the Victim and Witness Protection Act, and those state statutes modeled on it, raise false 
expectations in the minds of crime victims. See Emilio Viano, Victim’s Rights and the Constitution: 
³ FED. R. CRIM. P. 52(c)(2)(C).
applicable only in federal courts, it has served as a model for similar reform legislation that has since been passed in most states.\(^4\)

Just two years later, Congress passed another major piece of legislation aimed at improving the treatment of victims in the criminal justice system. The Victims of Crime Act of 1984\(^5\) established a Crime Victims Fund that disburses monies (collected from fines, penalties, and bond forfeitures) to state victim compensation funds and to victim assistance projects throughout the country.\(^6\) As a result of this legislation and the funding it provided, as well as similar legislation at the state level, victim service programs are now almost universal in sizable communities throughout the United States. These programs provide services to victims such as emergency care, crisis intervention, counseling, help with victim compensation and restitution, and victim advocacy.\(^7\)

Over the last several years, however, the victims' movement in the United States has been trying to achieve something much more controversial: recognition of a victim's right to participate at each stage of the criminal process, including the trial. The drive to establish such a right began with the 1982 report of the President's Task Force on Victims of Crime, which proposed adding to the Sixth Amendment a sentence guaranteeing victims "the right to be present and to be heard at all critical stages of judicial proceedings."\(^8\) While this seems a radical proposal, the Task Force report concluded that no alternative short of amending the Sixth Amendment would secure to victims proper treatment and respect in the criminal justice system.\(^9\)

Rather than try initially to amend the U.S. Constitution, which would be controversial and difficult, the victims' rights movement decided that it was politically wiser to push first for the passage of state laws or constitutional amendments that would establish a right for victims to participate at some level in the criminal process.\(^10\) While focusing on amending a majority of state constitutions, the movement remained committed to the ultimate goal of seeking a federal constitutional amendment

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\(^4\) In 1989, 48 states had authorized consideration of victim impact statements at sentencing. Dina R. Hellerstein, The Victim Impact Statement: Reform or Retraction, 27 AM. CRIM. REV. 391, 399 (1989). Victims do not use their statutory rights with frequency. In California, where victims have the right of allocution at sentencing, victims exercise this right in less than three percent of felony cases. Id. at 399-400 (citing to Edwin Villmoare & Virginia V. Neto, Victim Appearances at Sentencing Hearings Under the California Victims' Bill of Rights 42 (National Institute of Justice Executive Summary, 1987)). See also Lynn Weisberg, Victim Appearances at Sentencing in California, 71 JUDICATURE 166, 166 (1987).


\(^8\) See President's Task Force on Victims of Crime, Final Report 114 (1982).

\(^9\) Id. at 114-15.

guaranteeing rights for victims.\textsuperscript{11} Having achieved the adoption of victims’ rights amendments in twenty states since 1986,\textsuperscript{12} the National Victims’ Constitutional Amendment Network, an umbrella group representing all major victims’ rights organizations, unanimously adopted on September 15, 1995 the specific language that it will seek to have added to the Sixth Amendment.\textsuperscript{13} The existing state constitutional amendments\textsuperscript{14} and those statutes enacted pursuant to them vary considerably in their language and content, but they are generally consistent in providing that a victim: (1) be kept informed of the progress of the case as it moves from step to step, (2) receive notice about any hearings in the case, and (3) have the right to be heard on certain issues when the victim has relevant testimony to provide.\textsuperscript{15}

Some aspects of these state amendments ought not to be controversial. It seems entirely proper for a victim to be kept informed about the progress of the case and to have a right to be heard on matters that may directly affect her, such as a reduction of bail or a trial continuance. But what does it mean in these amendments for the victim to be granted the right to be present and to be heard at the trial itself?

These amendments may give victims no more rights to participate at the trial than what they already have: the “right” to observe the trial, like

\textsuperscript{11} See id. at 131-33.

\textsuperscript{12} See Paul G. Cassell, \textit{Balancing the Scales of Justice: The Case for and the Effects of Utah’s Victims’ Rights Amendment}, 1994 \textit{UTAH L. REV.} 1373, 1382 (noting that Alabama, Alaska, Arizona, California, Colorado, Florida, Idaho, Illinois, Kansas, Maryland, Michigan, Missouri, New Jersey, New Mexico, Ohio, Rhode Island, Texas, Utah, Washington, and Wisconsin have all passed victims’ rights amendments). Professor Cassell also reports that at least eight other states are actively considering victims’ rights amendments. \textit{Id.} at 1589.

\textsuperscript{13} The National Victims’ Constitutional Amendment Network proposes that the following paragraph be added to the Sixth Amendment:

Moreover, to establish, preserve, and protect the rights of the people to liberty, justice and due process, a victim of a serious crime shall be informed of and enjoy the following fundamental rights throughout the criminal justice process: to be treated with fairness, respect, and dignity; to timely notice of and, unless incarcerated, to be present at all proceedings where the accused has the right to be present; to be heard at any proceeding concerning post-arrest release, a negotiated disposition, a sentence, post-conviction release, and any other matter where victim participation will serve the ends of justice; to confer with the appropriate officials regarding post-charging disposition of a case, sentencing recommendations, and post-conviction supervision decisions posing a significant threat to the safety of the victim; to a speedy trial and final disposition free from unreasonable delay; to receive prompt and full restitution from the convicted offender; to be free from an unwarranted release of confidential information; to be reasonably protected from the accused or convicted offender; and to be informed, upon request, when the accused or convicted offender is given any release from secure custody, or has escaped. The exercise of any right granted under this paragraph shall not entitle the accused or convicted offender to any relief.


\textsuperscript{15} For an excellent overview of the range of “rights” granted to victims under various state amendments and accompanying legislation, see generally Lamborn, \textit{supra} note 10, at 143-72.
any member of the public, subject to normal sequestration rules; and the "right" to be heard at trial, if the victim is called by either the prosecution or the defense. Clearly, if victims' rights amendments turn out in fact to be much more symbolism than substance, this will provoke the ire of the victims' movement. But what exactly are the problems with the American criminal justice system from the victims' point of view, and how will a right to participate somehow solve these problems?

Unfortunately, the issue of victims' rights in the United States is one on which there is very poor communication between those outside the system—victims and their families; and those inside the system—judges, lawyers, and scholars. While victims are quite articulate in communicating their frustration and anger with the system, their complaints are often expressed at a level of generality that does not indicate the specific structural problems they would like to see remedied. For example, victims complain of being made to feel like "an outsider to the criminal justice system," or like "another piece of evidence." But such complaints, though powerful, communicate very little about any specific changes in the structure of American trials that would make victims feel more included in the process.

At the same time, those within the system who are accustomed to viewing criminal trials as two-sided battles between the state and the defendant, have a great deal of difficulty seeing how a criminal trial can be altered in any significant way to give victims more comfort and visibility in the courtroom without depriving the defendant of a fair trial. So poor is the level of communication that those within the system often seem genuinely bewildered by the victims' rights movement, even to the point of suggesting rather condescendingly that victims are seeking a solace from the criminal justice system that they ought to be seeking elsewhere, or that it might even be harmful to victims to participate in the process.

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16 "My life has been permanently changed. I will never forget being raped, kidnapped, and robbed at gunpoint. However, my sense of disillusionment with the judicial system is many times more painful. I could not, in good faith, urge anyone to participate in this hellish process." Anne M. Morgan, Criminal Law—Victim Rights: Remembering the "Forgotten Person" in the Criminal Justice System, 70 MARQ. L. REV. 572, 572 (1987) (quoting a crime victim's statement at a Senate subcommittee hearing on the Victim and Witness Protection Act of 1982).

17 A good deal of my frustration stemmed from the feeling that, as a crime victim, I was an outsider to the criminal justice system . . . . Like other family members of murder victims, I found myself excluded from the system, unable to participate in the formal proceedings. The criminal justice equation does not include the relatives and friends of victims.


19 See James M. Dollier, Victims' Rights Constitutional Amendment: A Bad Idea Whose Time Should Not Come, 34 WAYNE L. REV. 87, 90 (1987) ("Any attempt to use the Constitution to enhance a victim's rights by placing the victim in direct conflict with the accused in court reverses to a process that history has shown is less than fully civilized."); Goddu, supra note 7, at 271-72 ("To avoid any chance of a miscarriage of justice, victim participation, at the trial level, should be limited to spectator access to the courtroom and nothing more.").

20 See Vivian Berger, Paying and Suffering—A Personal Reflection and a Victim-Centered Critique, 20 FLA. ST. U. L. REV. 21, 59(1992) ("The system is not equipped to nurture victims or their
This Article offers no solutions to any of the structural and constitutional questions that seem certain to arise in the years ahead as victims’ rights groups push for some level of participation at trial. It may, however, offer American readers something that is noticeably lacking in the American literature: perspective on the problems that victims face in American courtrooms. The authors hope to bridge the communication gap that exists between those outside and those working within the American system by leaving it entirely and examining how victims are treated at criminal trials in Germany. For a number of reasons, the authors believe that victims of serious crimes fare better in the German trial system than they do in American courtrooms, and this Article will explain why the authors have reached that conclusion.

This Article, however, is not reformist in nature. Germany, like most western countries other than the United States and England, is a civil law country, and many aspects of the treatment of victims at German trials reflect a trial structure grounded in the civil law tradition. For example, because civil law trials in Germany are directed and controlled by trial judges and are not structured as adversarial contests, it is easier to accommodate the interests of victims at trial without disturbing the adversarial balance that is central to American criminal trials. Thus, there are no easy solutions to the difficult problems that lie ahead for the American legal system as it tries to address the concerns of victims within the confines of a rigorously adversarial trial structure.

But the debate over the right of victims to some level of participation at trial will continue to be emotional and unproductive until those within the system acknowledge and better understand the sources of victims’ frustration in their encounters with the American criminal justice system. It is toward that understanding that the authors hope to contribute.

This Article is divided into two parts. Part I explains why certain central features of the German trial system, most of which are common to other countries that share the civil law tradition, offer definite advantages to victims when compared to criminal trials that take place in the American legal system. Part II deals with the right granted victims of certain serious crimes to participate directly in the German criminal trial as Nebenkläger, which translates roughly as permitting the victim to act as a “secondary accuser.” We describe the major reforms made to the Nebenklage procedure in 1986 and show how it works in practice, using as an illustration a rape prosecution in which the victim has chosen to take advantage of the procedure.

The authors have chosen to discuss the Nebenklage procedure in detail partly because it does not provide all crime victims with a general right of participation at trial. Rather, the procedure is available only for representatives.

21 Justice James M. Doliver of the Washington Supreme Court suggests that increased participation in the process by the victim might have a negative psychological and economic effect on victims. See Doliver, supra note 19, at 90.
the most serious crimes, and its major impact, as we shall explain, is on victims of sexual assault. Thus, while the Nebenklage procedure is important and its impact is significant in sexual assault cases, it needs to be kept in perspective: it is only one aspect of a trial tradition that offers victims a number of advantages, both direct and indirect, in comparison to the American adversarial system and the difficulties that victims face in American courtrooms.

I. VICTIMS IN THE CIVIL LAW SYSTEM

A. The German Trial System Prefers Narrative Testimony

One of the biggest differences between German trials and American trials is the way that witnesses—victims, defendants, police officers, experts, etc.—are questioned in court. After the presiding judge has informed the witness of her obligation to testify truthfully and completely about the matter at hand, and has obtained a few pieces of background information from the witness, such as her name and address, the presiding judge will always ask the witness to explain fully and completely what happened. In short, the witness is invited to tell all she knows about the crime and its surrounding circumstances in a narrative fashion.

This preference for narrative testimony, which is embodied in section 69 of the German Criminal Procedure Code (Strafprozeßordnung),\(^{22}\) reflects an important epistemological premise, common in civil law countries,\(^{23}\) that evidence should be presented to the court in as near to its original form as possible. This means that the presiding judge will never try to “control” the examination of a witness who has important evidence to present at trial by using a series of questions to take the witness through the events in question step by step, as is customarily done by attorneys on direct examination in an American criminal trial.

While the presiding judge will ask the witness questions, this will not occur until the witness has had an opportunity to give a detailed narrative of the events in question, in her own words. It is not unusual for the victim of a serious crime, such as a rape or a serious assault, to testify uninterrupted for thirty to forty minutes or longer, as she explains how the crime occurred, what steps she took after the crime occurred, and what happened to her subsequently. Only after the witness has finished giving her account will the judge begin to ask her questions.\(^{24}\)

Because the German system prefers to let witnesses testify relatively freely about the events in question, it is not unusual for a witness at a German criminal trial to mention something that would bring an

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22 See STRAFFPROZEBORDNUNG [SiPO] § 69(1) (F.R.G.).
24 It needs to be emphasized that this preference for narrative testimony applies to all witnesses, and thus a defendant will also be permitted to give his account of the events in a detailed narrative form.
immediate objection in an American courtroom—perhaps because it is hearsay, contains an opinion, or is not directly relevant to the matter at hand, and may even be prejudicial to the defendant. The German system is less worried about evidentiary problems of this nature than is the American system. Chiefly this is because trials in Germany, as in most civil law countries, take place in front of professional judges when the offense is minor, or in front of “mixed” panels of professional and lay judges when the crime is more serious.25 Perhaps because there will always be professional judges among the factfinders, the German system is more optimistic that the factfinders will be able to separate the more probative from the irrelevant evidence.26 Moreover, continental systems tend to be skeptical about the entire intellectual enterprise of erecting elaborate evidentiary structures to distinguish relevant from irrelevant evidence.27 For these reasons, there is no direct analog in Germany to the technical set of rules that tightly controls the production of evidence at trial in most American jurisdictions.28

The German system’s preference for narrative testimony also reflects a desire that judges hear testimony that has not been “shaped” by lawyers’ preparation. While witness preparation is considered ethically proper and even necessary in an important criminal case in the United States, in Germany it is unethical to influence a witness; the shaping of testimony in which both prosecution and defense routinely engage in the United States would be improper.29 The German system would prefer to hear witnesses testify in their own words rather than hear from witnesses who have been coached and rehearsed. The result is a trial that is less technical and less influenced by lawyers than is typical in the American legal system.


26 See Damaška, supra note 23, at 514-15.

27 Id.

28 It is not correct to say that there are no evidentiary rules at German trials. German law embodies a rough analog of the common law hearsay rule, namely, the principle of orality and immediacy which requires that the judges examine in court a witness who has information about a matter of fact rather than simply admitting a prior statement of the witness into evidence. See StPO § 250. StPO § 244(2) obliges the judges to examine and take into consideration all evidence that is relevant to the issue. This requires that the judges investigate and hear the best possible version of evidence. See Damaška, supra note 23, at 516-17. Thus, judges can admit hearsay, but if it relates to an important issue, they would also have to hear direct testimony, if available. Because the judges are under a duty to examine all of the relevant evidence about the matter at hand, the law of evidence is of rather minor importance in Germany compared to the central role it plays in the American trial system. See Mirjan Damaška, Structures of Authority and Comparative Criminal Procedure, 84 YALE L.J. 480, 526 (1975).

In part, of course, this difference reflects the fact that the German system is not an adversarial system in which the prosecution and defense present witnesses to the court. Rather, it is an inquisitorial system in which the judges have an obligation at trial to examine, evaluate, and weigh all relevant evidence in order to reach an accurate determination of the issues. Because the judges have an affirmative obligation to inquire into the charges, it is the judges, not the parties, who have the primary responsibility for deciding which witnesses will be heard at trial, and it is the judges, not the parties, who usually conduct the bulk of the examination of those witnesses.\(^{30}\) If the judges investigate in an incomplete manner and refuse to seek out and examine all available and potentially relevant evidence, an appellate court will be likely to reverse.\(^{31}\)

These differences point to the apparent ambivalence in the American legal system about what exactly it seeks to elicit from victims and other witnesses. Witnesses are sworn to tell "the whole truth," but the system does not seem to want to hear what the victim considers to be the whole truth about the event in question. Certain aspects of the crime that may be important to the victim will be inadmissible at trial. And the testimony of the victim has to be shaped so that it not only comports with our rules of evidence but also has the effect the lawyer is seeking.

Clearly, the United States lies at one extreme in the way that lawyers are free to manipulate evidence for presentation at trial. Even in England, which also has an adversarial trial structure, the sort of pretrial witness preparation that is standard practice in serious American criminal cases would be considered improper.\(^{32}\) The American system fosters an extreme form of advocacy, and it is important to fully understand the impact of this approach on victims. If a primary goal of a criminal trial is to provide a cathartic and beneficial effect for victims, it seems that such benefits will more likely accrue to victims in a system that not only permits them to tell everything they know about the crime in their own words, but actually prefers such testimony to that which has been shaped and prepared. In short, a trial system that encourages a witness to be herself in the courtroom and that demonstrates a willingness to listen to what she has to say offers an advantage to victims that should not be underrated.

\(^{30}\) For an excellent overview of criminal trials in Germany, see Langbein, supra note 25, at 3-60.

\(^{31}\) See StPO §§ 244(2)-(5), 387.


Generally a barrister should not discuss a case or the evidence to be given in a case with any potential witness other than the lay client, a character witness or an expert witness.

... A barrister should not rehearse, practise or coach any witness, in relation either to the evidence itself or to the way in which to give it.

See also Michael M. Graham, Tightening the Reins of Justice in America 66-67 (1983).
B. **German Trials Determine the Sentence as Well as the Issue of Guilt**

Another major difference between German and American criminal trials is that the factfinders at a German trial will determine the defendant’s sentence should they find the defendant guilty.\(^{33}\) There is no separate sentencing procedure.\(^{34}\)

This has direct and indirect implications for the victim. The direct implication is that the court will always inquire into the impact the crime has had on the victim. In fact, such information is always relevant because it is a sentencing factor under the German Penal Code.\(^{35}\) Thus, crime victims not only have more freedom to describe the crime in question, as explained in the previous subsection, but also have the ability to complete the picture by explaining the impact that the crime has had on them in the period since it occurred. The result is testimony that, from the victim’s perspective, is a coherent whole: “here is where I was and what I was doing when the crime occurred; here is what happened to me during the crime; here is what I did following the crime; and here is how the crime has affected me.”

There are also at least two indirect benefits for victims that result from addressing sentencing at a German criminal trial. First, the stress on the victim and the victim’s family is reduced to the extent that the whole criminal matter is resolved in a single trial. By contrast, in the United States the trial and sentencing are very different in tone and function, and often are separated by a significant amount of time to permit a presentence investigation to take place. Because in the United States the victim frequently is an important prosecution witness at trial, the victim’s credibility, and sometimes also the victim’s character, may come under sustained attack. But it would be considered not only irrelevant but prejudicial for the victim to dwell on the impact of the crime at trial.\(^{36}\) It is only at the sentencing hearing, if the defendant is convicted, that the victim will have the opportunity to explain the crime’s impact on her and her family.\(^{37}\) Sentencing hearings also differ from

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\(^{34}\) This dual inquiry at trial into guilt and possible sentence is not unusual among civil law countries. See *Comparative Law 479* (Rudolph B. Schlesinger et al. eds., 5th ed. 1988). However, the system of dual inquiry is not without its critics. In fact, German academics have suggested that the issues of guilt and sentencing should be decided separately. See Arbeitskreis deutscher und schweizerischer Strafrechtshörer (Arbeitskreis AE), *Alternativen-Entwurf, Novelle zur Strafprozessordnung, Reform der Hauptverhandlung* 4 ff., 53 ff. (Tübingen 1985). However, such calls for reform have not yet resulted in any changes to the German trial structure.

\(^{35}\) *Strafgesetzbuch* (StGB) § 46(2).


\(^{37}\) Sometimes the victim is only allowed to do this in writing and not in person. See Lamborn, *supra* note 10, at 151-52.
trials in that they are usually inquisitorial in format, with the judge, armed with the presentence report, controlling the proceeding.\textsuperscript{38}

A second indirect consequence of resolving guilt and possible sentencing in one proceeding is that it tends to make trials in the civil law system somewhat less adversarial in tone. In the United States, because the defendant will get another opportunity to present mitigating evidence prior to sentencing, he has more freedom to deny responsibility for the crime and to attack the credibility of prosecution witnesses in an effort to gain acquittal or a hung jury. For example, the defense can insist at trial that the victim brought the charges against the defendant out of spite or anger. If that defense fails, at the sentencing hearing the defense can offer as mitigating evidence an entirely different theory, such as alcohol-induced poor judgment, or genuine remorse on the defendant's part. At German trials, in order for the court to consider mitigating evidence in sentencing, the defense must present it at trial, which makes arguing two such disparate approaches very difficult. Thus, in Germany the defense must make some hard choices about the arguments that it will raise. It should also be noted that German factfinders will be aware of the defendant's prior convictions and his character to the extent that they bear on sentencing. As a result, the defense strategy of attacking the victim’s character while keeping the defendant's prior record away from the jury, used in certain cases in the United States, is simply not available in Germany.

Another aspect of continental criminal procedure worth mentioning in connection with the dual inquiry of German trials is the opportunity given to the defendant to respond to the charges at the very beginning of the case, a right which is almost universally exercised.\textsuperscript{39} This allows the defendant to give her version of the events before any witnesses have been called to give evidence.\textsuperscript{40} This initial step, coupled with the dual nature of the trial inquiry, makes it very clear at the outset what the defense will and will not contest, both of which are important to the judges and the other witnesses. Once the defendant has addressed the charges, and the issues are more focused, the victim may find it somewhat less stressful to testify.

The dual inquiry of the German trial, as well as the timing of the defendant's evidence,\textsuperscript{41} offer definite advantages for victims compared to the American system, in which defendants are somewhat more free to concede nothing and attack all elements of the prosecution's case. This is certainly not to say that the credibility of victims is never attacked at

\textsuperscript{38} See William T. Pizzi, Lessons from Reforming Inquisitorial Systems, 8 FED. SENT. REP. 42 (1995).

\textsuperscript{39} Almost all continental defendants choose to respond to the charges when asked to do so, the only refusals occurring in political trials where they are used to signify defiance of the legal system as a form of political protest. See Damaška, supra note 23, at 527 n.42.

\textsuperscript{40} See id. at 528-29.

\textsuperscript{41} The defendant is permitted to respond to the charges, but is not a witness at the trial in that he is not put under oath. It is considered unfair in continental systems to force a defendant to give testimony at a trial charging him with a crime and yet threatening him with perjury. See Damaška, supra note 23, at 519 n.15.
German trials. Indeed, sometimes the credibility of a crime victim is viciously attacked. Still, the risks to the defense of an abusive examination strategy coupled with the relevance of the defendant’s character and background at trial make the entire proceeding less stressful for the victim in comparison to the American system.

C. Trials Are Controlled by the Professional Judges

As mentioned earlier, Germany, like most civil law countries, uses “mixed” panels of judges, composed of both professional and lay judges. In the case of a serious crime, such as murder or sexual assault, the trial will take place in front of three professional judges and two lay judges. Though lay judges are considered an important safeguard in the system, control over the trial rests as a practical matter in the hands of the professional judges. In preparation for trial, two of the professional judges carefully study the entire investigative file and take the lead in deciding what evidence they need to examine at trial and who they should call to testify. This power is not absolute, as both the state’s attorney and the defense attorney may suggest to the judges that additional evidence be examined or that other witnesses be called to testify. Because these requests are rarely rejected, they serve as an important check on the power of judges. In most criminal cases, however, there are few or no such motions because the issues in the case are clear, and the judges will have done a thorough job of reviewing the files to see which witnesses should be called.

The judges’ primary control over witness selection and the production of evidence at trial extends to the questioning of witnesses as well. While the lay judges, state’s attorney, defense attorney, and even the defendant will each have an opportunity to ask questions of any witness, that opportunity will arise only after the presiding judge and the second professional judge have finished examining the witness. However, because the professional judges are usually very well prepared and very thorough in their questioning, it is normally the case that the bulk of the

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42 See text accompanying note 25, supra.
43 See GERICHTSVERFASSUNGSGESETZ (GVG) § 76(1)-(2) (1974).
44 LANGBEIN, supra note 25, at 62-63. Lay judges are not permitted to read the dossier. Id. at 67.
45 The power that the state’s attorney and the defense attorney can wield by filing motions for additional evidence or to request that additional witnesses be called is considerable because the judges can reject these motions only in very limited circumstances. See StPO §§ 244(3)-(5), 245 (1974). There is high risk of reversal on appeal if such a motion is denied. This has considerable importance in white-collar criminal cases where motions for additional evidence filed by the defense can prolong the trial significantly. Thus this power is considered not only a check on the system, but also a powerful defense weapon. See WALTER PERRON, DAS BEWEIS­SANTRAGSRECHT DES BESCHULDIGTEN IM DEUTSCHEN STRAFFREINER, 30 (1994). See, e.g., Heinrich Kinzi, Möglichkeiten der Vereinfachung und Beschleunigung von Strafverfahren de lege ferenda DEUTSCHER RICHTERBUND 325 (1994); Walter Perron, Beschleunigung des Strafverfahrens mit rechtssstaatlichen Mitteln, JURISTEN ZEITUNG, 823 (1994). Helmut Frieter, Beschleunigung der Hauptverhandlung durch Einschränkung von Verteidigungsrechten?, STRAFVERTEIDIGER 445 (1994).
testimony given by a witness is elicited by the presiding judge or the second professional judge.\footnote{See Damaška, supra note 28, at 525; Langbein, supra note 25, at 64.}

This procedure presents certain advantages to victims in comparison to the more partisan examination and cross-examination that takes place in American courtrooms. It is often easier for victims to answer questions concerning painful, distasteful, or embarrassing events when these questions come from professional judges who are expected to be both impartial and fair. Yet, this advantage should not be overvalued, as defense attorneys in Germany will eventually have the opportunity to question the victim and may be quite aggressive in attacking the victim’s credibility or character in appropriate cases. Nevertheless, because the system relies to a considerable extent on professional factfinders at trial, certain arguments or attacks on the victim made by defense lawyers in front of American juries are less likely to be made at a corresponding German trial. In the United States, a defense attorney may find it advantageous to attempt to shift the jury’s attention to issues that may be peripheral or even irrelevant to the alleged crime. For example, an American defense lawyer at a rape trial may feel compelled to argue to the jury that the victim put herself at risk by being out alone at night or dressing provocatively. In contrast, such arguments are unlikely to be raised at a German rape trial because the professional judges know well what issues are relevant to the case at hand.\footnote{There is also perhaps a bit more freedom on the part of German judges to intervene to restrict certain irrelevant or unfair questions. StPO § 241(2) gives judges the authority to reject questions which are clearly irrelevant or which are unlikely to produce relevant evidence from the witness. See Lutz Meyer-Goßner, in Kleineknecht/Meyer/Meyer-Goßner, Strafprozeßordnung, Gerichtsverfassungsgesetz, Nebengesetze und Ergänzende Bestimmungen, 42. Auflage, § 241 Nr. 6-15 (1995). In addition, StPO § 68a prohibits questions which could do harm to the witness’ honor unless they are absolutely necessary. But because the German system is nonadversarial in conception, to a large extent the system requires a consensus among the lawyers and the judges as to how a trial should properly be conducted and when a lawyer does not conform to the expectations of the system, judges are not well-equipped to control such behavior. For that reason there is now discussion in Germany about whether certain broad procedural rights accorded to the defendant should be limited to prevent the abuse of those rights. See, e.g., Heinrich Kintzi, Möglichkeiten der Vereinfachung und Beschleunigung von Strafverfahren de lege ferenda, Deutscher Richterbund 325 (1994); Walter Perron, Beschleunigung des Strafverfahrens mit rechtstaatlichen Mitteln, Juristenzeitung, 823 (1994); Helmut Frister, Beschleunigung der Hauptverhandlung durch Einschränkung von Verteidigungsmöglichkeiten, Strafverteidiger 445 (1994).}

This discussion of the factfinding role of German judges illuminates systemic differences between the German and American systems. European countries believe that factfinding is an art, and that having professional factfinders among those who will decide the defendant’s fate is important because professionals will generally do a better job of sorting and evaluating the evidence.\footnote{See Damaška, supra note 28, at 507-08.} Obviously, vesting strong power in the judiciary entails risks of abuse, but European systems try to protect against such abuse through a variety of means: (1) spreading factfinding authority among more than one judge,\footnote{Except for the most minor cases, continental trial systems are always multi-judge panels. See Damaška, supra note 23, at 510.} (2) giving the defense and the
state's attorney the right to participate actively in all evidentiary proceedings, including the right to request the examination of additional witnesses, requiring that verdicts be fully explained and justified by the law and the evidence, and providing for far broader appellate review of the trial judgment than is permitted in the United States.

In contrast, the American criminal justice tradition places less emphasis on official power and thus American judges play a more passive role at criminal trials. Even commenting on the evidence by the judge at the end of the case—a practice that is viewed as desirable and necessary in other common law countries—is disfavored in most American jurisdictions. The notable exception is the federal system, where comment on the evidence is permitted, but even here most federal judges choose not to exercise the right to comment. The American legal system places the issue of guilt before a body of nonexperts, who come entirely from outside the system and are expected to draw conclusions based only on what they hear at trial, with no additional review of the investigative file. As a result, the system is open to a broader range of arguments and more aggressive treatment of witnesses than is the case in German criminal trials, making the procedure more emotionally trying for victims of serious crimes.

D. Verdicts Must Be Explained and Justified at German Trials

At any trial—whether in the United States or in Europe—the rendering of the decision is often a tense and dramatic moment. But the conclusion of criminal trials in the United States is fundamentally different from the conclusion of criminal trials in Germany and other continental countries. In the United States, the verdict for each count of the charging document is limited to one or two words: guilty or not guilty. While the trial may have taken a substantial period of time, the conclusion is swift. The jury is never required to provide any formal explanation of how or why it reached the verdict in question.

50 See text accompanying note 45, supra.
51 Continental systems view appellate review as simply an extension of the trial process and not an additional step, so that reconsideration of what happened at trial is considered a normal part of the process. See Damaśka, supra note 28, at 490-91.
52 See GRAHAM, supra note 32, at 94-95.
54 See Jack B. Weinstein, The Power and Duty of Federal Judges to Marshall and Comment on the Evidence in Jury Trials and Some Suggestions on Charging Juries, 118 F.R.D. 161, 169 (1988) (citing statistics showing that federal judges summarize the evidence in only 27 percent of their cases and comment on the evidence in only 18 percent of their cases).
55 While special verdicts that include the jury's answers to a series of questions are possible in civil trials in the United States, they are generally frowned upon and rarely used in criminal trials. See Heald v. Mullaney, 506 F.2d 1241, 1245 (1st Cir. 1974); United States v. Spock, 416 F.2d 165, 181-82 (1st Cir. 1969).
Trials in Germany conclude in a similarly dramatic fashion: the panel of judges enters the courtroom and the presiding judge announces the judgment, which will also indicate the sentence, if the defendant has been found guilty. However, the presiding judge also gives an oral explanation of how the judges reached their verdict, as well as how they decided upon the particular sentence. The judges' reasoning will later be incorporated into a formal written account of the verdict that reviews the evidence at trial and, depending on the nature of the trial, explains: (1) which legal issues were raised by the evidence and how each was decided by the judges, (2) what the factual evidence was and how the judges resolved any issues of credibility, and (3) how the judges determined the sentence, if appropriate.

Depending on the complexity of the case, the judges usually draft this document within a few weeks of the conclusion of the trial. Once completed, it serves as the basis for an appeal. Such a document, which may take ten or fifteen pages in even a fairly straightforward criminal case, is possible only because the factfinding panel includes professional judges, who understand the requirements of the law and have the legal sophistication to draft it. The judgment is drafted to conform with the statement of the trial decision announced in court, and it is then signed by the professional judges.

A trial that results in a written verdict with well-articulated reasons for the judges' decision offers victims (and defendants) important advantages. First, it is easier to accept a verdict as fair and just when there is a written document demonstrating that the judges have done their job fairly, conscientiously, and in conformity with the law. One can be disappointed with a verdict, yet conclude after listening to the reasoning behind it that it is, nonetheless, understandable or even justifiable.

No better example contrasts an unexplained and an explained verdict than the acquittal of a defendant. Such a verdict, in the American criminal justice system, is often highly ambiguous. For example, in an acquaintance-rape trial, did the jury acquit because it found the victim's testimony not worthy of belief, thus concluding there was no crime, or did the jury find that although the evidence was very strong, it was not sufficient to establish guilt beyond a reasonable doubt?

When such a trial takes place in a civil law system it is possible for the factfinders to say some things that might be of considerable consolation to the victim, but which would remain hidden behind a two-word verdict

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56 A criminal judgment (Urteil) at a German trial contains both (1) a dispositive judgment (Urteilsformel), which explains what action the court took, and (2) a statement of the reasons for the judgment (Gründe, Urteilsgründe). LANGBEIN, supra note 25, at 56.

57 The court is required to disclose the grounds of its decision in a general way when it announces the dispositive judgment in court within four days after the close of trial. See StPO § 268(2). The court must file a written judgment thereafter. See StPO § 275(1). See Ellen Schüchter, in SYSTEMATISCHER KOMMENTAR ZUR STRAFPROZEBORDNUNG UND ZUM GERICHTSGESetz, § 260 Nr. 98 (Neuwied, Kriftel, Berlin 1994); LANGBEIN, supra note 25, at 56.

58 See LANGBEIN, supra note 25, at 56-57.

59 Id. at 57.
at an American trial. For example, the judges might explain that they found the testimony of the victim to be entirely credible but, because the issue was the defendant's mens rea, they concluded that there was not enough evidence to convict. Or the judges might explain that it was not possible to resolve a conflict of credibility between the victim and the defendant and, for that reason, they had no choice but to return a verdict acquitting the defendant of the crime.

An American criminal trial seems more and more to be about winning and losing, and verdicts absent justification or explanation seem to say that if you are not the winner, you must be the loser. Because it is very difficult to prove a defendant guilty beyond a reasonable doubt, we have to expect that in any credible criminal justice system there will be cases where the evidence is very strong, but still insufficient to support a conviction. In such a case, an explanation that sums up the evidence fairly and accurately, and explains why the evidence was strong, yet insufficient, is much more likely to be accepted as just by the victim and the defendant as well as the public. It also prevents the press from claiming, as sometimes happens in the United States after a verdict of not guilty, that the jury “found the defendant innocent,” when that is not what the jury had intended by its verdict.

E. German Judges Have the Duty to Seek the Truth

Because the structure of criminal trials in civil law systems differs from that in adversarial systems, the issues to be determined at trial are different as well. At a European trial, the factfinders must determine whether or not the defendant committed the crime in question and, if so, what sentence is appropriate for that defendant for that crime. A German criminal trial is structured as a search for the truth; the system believes that the best way to reach the truth is to place responsibility on a panel of judges to examine and weigh all relevant evidence in order to determine whether the defendant is guilty of the alleged crime.60

An American trial operates on different epistemological assumptions and has a completely different structure. The issue at an American criminal trial is whether or not the state can prove the defendant's guilt beyond a reasonable doubt. Neither the judge nor the jury in an American courtroom has the duty to seek out the truth about the charges against the defendant. Instead, the trial is a testing of the state's case to see if the state has sufficient evidence and sufficient skill to prove the defendant guilty beyond a reasonable doubt. In this trial structure, the professional judge's role is to be a neutral referee between the opposing parties, and the judge, consequently, is not expected to play an active role in the production of evidence. The jury also has a passive role: questions from the jury are discouraged by the trial setting, and it is

60 Professor Mirjan Damaška connects the reluctance of continental systems to embrace exclusionary rules of various sorts to the higher commitment such systems make to the search for truth. See Damaška, supra note 23, at 578-87.
practically unheard of for the jury to ask to hear additional witnesses or to call for the production of additional evidence.

The American criminal justice system is also more ambitious in terms of what it attempts to accomplish from within. It is much more willing than the German system to suppress reliable evidence at trial in order to punish police for violating the rules of search and seizure, even at the cost of a false acquittal. In addition, the United States is also proud of its tradition of jury nullification which permits a jury to nullify the law and acquit a defendant if it believes that the law or the prosecution is unfair. The concept of a group of factfinders—lay factfinders at that—rejecting the law in order to follow its own conception of what is fair and just would never find a home in the German system, which places much greater emphasis on accurate fact finding and on the uniform application of the law.

The American political tradition is much more distrustful of governmental power generally, and public officials in particular, than is the German system, and thus would find it difficult to accept the dominant trial role that is accorded professional judges in the civil law tradition. Some of that distrust is evident in the fact that many of our judges are elected to their position, and attempts to move states away from the partisan election of judges are usually soundly defeated. American

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61 While Germany has a constitutionally based exclusionary rule, it is considerably narrower than the American version and the idea of excluding all the fruits of an illegal search for the purpose of deterrence has never been accepted in Germany. CLAUS ROXIN, STRAFVERFAHRENSCHRECHT § 24, at 155-65 (1995). On the philosophical difficulty that exclusion of reliable and probative evidence presents to continental lawyers and judges because it conflicts with the duty to find the truth, see Damaška, supra note 23, at 522-24.

62 Rather than requiring that a verdict be justified and explained, the American system goes in the other direction, permitting juries to temper the law in a particular case to fit their own conception of fairness and justice. In Duncan v. Louisiana, in which the Supreme Court held that the Sixth Amendment right to a jury trial applied to the states, Justice White referred to the power that juries have to disagree with the law and to nullify it in appropriate cases. Duncan v. Louisiana, 391 U.S. 145, 156-58 (1968). But the American system is clearly ambivalent about jury nullification. Most courts refuse to instruct juries on their power to nullify the law. See United States v. Dougherty, 475 F.2d 1113 (D.C. Cir. 1972).

63 See Damaška, supra note 28, at 491-92.

64 See ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 346-47 (Henry Reeve trans., New York, Century Co. 1898) (1835). This aversion to strong centralized governmental power runs deep in the American political tradition. See GRANT MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY 5 (1966).

65 Professor Mirjan Damaška describes the relationship between the state and the individual in continental systems as one that borders on the "mutual love" that a parent has for a child. Damaška, supra note 28, at 190. Professor Damaška believes that the continental tolerance of strong centralized authority has its roots in the feudal period, when the emergence of a strong centralized governmental authority provided relief to citizens from the constant strife among local feudal lords that had preceded that period, and which had been a barrier to stability and economic development. See id. at 539-41.

66 In Ohio there have been four attempts to reform its judicial system by moving away from the partisan election of judges. See John D. Felice & John C. Kilsein, Strike One, Strike Two..., in The History of and Prospect for Judicial Reform in Ohio, 75 JUDICATURE 193, 194 (1992). The latest attempt lost by a two to one margin despite endorsement of the reform by the Ohio Bar Association and the Ohio League of Women Voters. Id. at 193.

In Texas, the partisan election of judges has directly affected the development of tort law in that state. See Christ Harlan, Texas Supreme Court Race Pits Lawyers Against Business Interests, WALL ST. J., Nov. 2, 1992, at B4. Proposals for reform have gone nowhere in Texas, despite campaign contributions totaling over four and one-half million dollars spent in the 1986 elections for four
distrust of public officials is also evident in the reluctance to permit judges to comment on the evidence at trial, even though such comment was permitted at common law. Instead of vesting control of the trial in judges, the American trial tries to balance control among the prosecutor, the defense attorney, the judge, and even the jury. This system of shared power over the trial naturally requires a much more complicated set of procedures if the balance is to be maintained and truth is to be discovered. Yet at the same time, these procedures often need to be subtle and indirect precisely because power in the system is shared and must be balanced carefully. Thus, even procedures that are independent of the production and examination of evidence at trial, such as discovery, or the selection of the jury, have adversarial aspects and can be time consuming and quite complicated.

The problem with a system as complicated as the American trial system is that, at some point, the complexity can itself become a weakness. Breaking up testimony too often with sidebar conferences, or shuttling juries in and out of the courtroom so lawyers can argue evidentiary points of law, can easily distract juries from the task at hand. It can also be alienating to victims (and other witnesses) when they feel they are in a system in which the lawyers and judges seem to be talking among themselves, rather than to the victim or the public at large. Because the German system vests so much power in the judges to control the trial, it is less likely to get mired in technical evidentiary issues than the American system, increasing the likelihood that victims will feel comfortable within the system. Trials are generally stressful events, but the American system exacerbates the situation by placing victims in the middle of seats on the state supreme court. See Anthony Champagne, Judicial Reform in Texas, 72 JUDICATURE 146, 149, 158-59 (1988).

67 See Weinstein, supra note 54, at 163-64. Weinstein suggests that American restrictions on judicial comment began as a result of the low regard for judges that existed in colonial times because such judges were often appointed not for their legal skills but because they could be relied upon to be loyal to the crown. Id.

68 In federal court, for example, the defense does not have a right to examine witness statements prior to trial nor does the defense even have a right to a list of the prosecution’s witnesses in advance of trial. See FED. R. CRIM. P. 16(a)(2). But under due process the Court has ruled that a prosecutor must turn over to the defense exculpatory material. See Brady v. Maryland, 378 U.S. 83 (1968). But what exactly constitutes exculpatory evidence is not always clear. See Weatherford v. Bursey, 429 U.S. 545 (1977). In turn, the defense does not have to indicate the nature of its defense or any of its witnesses to the government, unless the defense is that of alibi, insanity or mental condition, or public authority. However, these enumerated defenses trigger a responsibility on the part of the government to then turn over possible rebuttal evidence to the defense, which then has the option of not putting on such a defense at all. See FED. R. CRIM. P. 12.1-12.3.

69 See William T. Pizzi, Batson v. Kentucky: Curing the Disease But Killing the Patient, 1987 SUP. CT. REV. 97, 139-42 (describing a survey which found that jury selection in New York state took forty percent of the trial time and often took longer than the trial itself). Because the selection of the jury is thought to be nearly as important as the evidence that is presented, there are books that aim at helping lawyers pick juries. See, e.g., WALTER E. JORDAN & JAMES J. GOBERT, JURY SELECTION: THE LAW, ART AND SCIENCE OF SELECTING A JURY (2d ed. 1990). For wealthy defendants there are consultants available to assist lawyers in the selection itself by conducting surveys of the community in advance of trial or by assisting in the courtroom during the selection process. See Stephen J. Adler, Consultants Dope Out the Mysteries of Jurors for Clients Being Sued, WALL ST. J., Oct. 24, 1989, at A1.
Heated battles between the prosecution and the defense that victims may not fully understand.

There is another aspect of the American trial system that underlies the matters discussed in this subsection but needs to be discussed directly: that is, it appears to be somewhat easier to convict the guilty in continental systems than in the American criminal justice system. One can argue this on several levels—that lay factfinders tend to be more inclined to acquit than professionals;\textsuperscript{70} that continental systems admit more evidence than the American system;\textsuperscript{71} that European systems tend not to have broad exclusionary rules on the model of the Fourth Amendment exclusionary rule in the United States;\textsuperscript{72} that decisionmakers in the complex American system have more freedom to make decisions than their European counterparts whose findings of fact can be directly reviewed on appeal;\textsuperscript{73} and, finally, that continental decisionmakers need not be unanimous.\textsuperscript{74} To the extent that trials are more certain propositions in the German system and conviction of the guilty is easier, victims are certainly favored—especially in those cases pitting the victim's testimony against that of the defendant.

II. THE RIGHT OF THE VICTIM TO PARTICIPATE AS SECONDARY ACCUSER AT CRIMINAL TRIALS IN GERMANY

A. The Nebenklage Procedure in Perspective

The German Nebenklage procedure permits victims to participate through counsel at trial on nearly equal footing with the state's attorney and the defense. Since the purpose of this Article is to provide perspective on current efforts of the victims' rights movement in the United States to secure a right to participate and to be heard at critical stages of the criminal process, one might ask why the authors did not begin with an examination of the Nebenklage procedure. There are several reasons for which the authors believe that discussion of the Nebenklage procedure should follow a more general and thorough discussion of the treatment of victims at German criminal trials.

In the first place, the Nebenklage procedure has to be understood as only one difference, among several, in the way victims are treated in the German criminal justice system. Second, the Nebenklage procedure is limited in its availability. It is not a general right of victims to participate in all criminal trials, but rather is available only in the case of serious crimes that have a very personal impact on the victim (or the victim's

\textsuperscript{70} See Damaška, supra note 23, at 538-39.

\textsuperscript{71} See William T. Pizzi, Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform, 54 OHIO ST. L.J. 1325, 1359 (1993); Damaška, supra note 23, at 513-25.

\textsuperscript{72} See Damaška, supra note 23, at 522-24.

\textsuperscript{73} See Id. at 528-29.

\textsuperscript{74} See Id. at 537.
family), including murder, assault, kidnapping, and sexual assault.\textsuperscript{75} Third, even where the Nebenklage procedure is available, victims do not frequently choose to participate at criminal trials as Nebenkläger, with the exception of sexual assault victims whose participation as Nebenkläger is much more common.\textsuperscript{76} Finally, the Nebenklage procedure can only be understood against the background of a trial system that is structured very differently from that of the American adversarial tradition, as was explained in Part I. Where a criminal trial is conceived of as a battle between the prosecution and the defense in front of a neutral judge, and where the victim will often be the prosecution’s “key witness,” it is harder from a structural perspective to understand how the victim’s independent interests fit into what will usually be a pitched, two-sided battle.\textsuperscript{77} By contrast, in German criminal trials, where the judges are obligated to examine all the relevant evidence in the case, and where judges play the central role in both the production and examination of witnesses,\textsuperscript{78} no such structural problem exists. Evidence is not divided into the prosecution’s case to be followed by “the defense case,” and the examination of a witness in a German trial is not broken down into a direct examination to be followed by a cross-examination as it is in American trials. In short, the nonadversarial structure of civil law trials makes it easier to accommodate questions from the victim as Nebenkläger without seeming to create an imbalance at trial.

Given this background, it is not surprising that a willingness to grant victims a right to intervene and participate at various stages of the criminal process is common today among countries that share the civil law tradition.\textsuperscript{79}

\textsuperscript{75} See StPO § 395.

\textsuperscript{76} In 1989 in the district of Baden-Württemberg there was participation by a Nebenkläger in only 3.21\% of the criminal trials, and in only 19.2\% of the cases in which a Nebenklage was possible did the victim actually choose to participate. See Michael Kaiser, Die Stellung des Verletzten im Strafverfahren 224, 251 (1992).

In an empirical study by Dr. Staiger-Allroggen of the years 1988-1990, about 20\% of the victims having the legal option of participating in the trial as a Nebenkläger did actually choose to participate. See Peony Staiger-Allroggen, Auswirkungen des Opferschutzgesetzes auf die Stellung des Verletzten im Strafverfahren 99-100 (1992) (unpublished dissertation, Göttingen University). But in sexual assault cases the numbers are much higher. The study by Staiger-Allroggen found that 67\% of the victims of sexual assault chose to use the Nebenklage procedure. Id. at 99. Today that number appears to be even higher. In the Freiburg area, for example, it is estimated that close to 100\% of the victims of sexual assault participate at trial as Nebenkläger, due in part to a well-known rape crisis center, contacted in all cases by the police, which makes sure that victims have information about the Nebenklage procedure. Interview with Silvia Fodor, State’s Attorney, in Freiburg, Germany (June 23, 1993) (on file with the Stanford Journal of International Law).

\textsuperscript{77} There is considerable force in the argument that, unless the American system is prepared to accept major structural changes, victims’ rights cannot be grafted onto the existing system without remaining largely cosmetic. See Deborah P. Kelly, Victim Participation in the Criminal Justice System, in Victims of Crime: Problems, Policies, and Programs, supra note 6, at 172, 189-84.

\textsuperscript{78} See supra text accompanying notes 49-47.

\textsuperscript{79} For an overview of a victim’s right in France to participate at a criminal trial as “partie civile,” see R.L. Jones, Victims of Crime in France, 158 JUST. PEACE & LOC. GOV’T LAW 795 (1994).
B. The Nebenklage Procedure Today

Although the Nebenklage procedure has been a part of German criminal procedure since 1877, a major reform of the Nebenklage procedure took place in 1986. It had become clear by the early 1980s that the procedure needed reform, and there was considerable discussion and debate at that time over possible changes. Part of the impetus for reform came from the unsatisfactory way in which the Nebenklage procedure was working in practice. For example, the category of crimes that permitted victim participation seemed at the same time to be too broad and too narrow. It was too broad in that it allowed injured traffic accident victims to intervene as Nebenkläger, which they frequently did. In such cases, victim participation was driven by the desires of the insurance companies, rather than the wishes of the victims, because the Nebenklage procedure permitted insurance companies to obtain discovery about the accident more efficiently and without the costs that would be involved if the insurance company had to use the civil process to obtain such information. The use of the Nebenklage procedure to further the private interests of insurance companies was certainly not the objective of the procedure, and it was generally recognized that the Code needed reform to prevent this.

At the same time, the category of crimes for which victims were permitted to participate as secondary accusers at trial was too narrow in that sexual assault was not specifically included. Sexual assault victims had been able to use the Nebenklage procedure on the theory that sexual assault involved an assault (which was a listed crime) and also had the sort of personal impact on the victim that justified the use of the procedure. Nonetheless, women’s groups argued that the Nebenklage procedure needed to be improved to give victims of sexual assault greater rights to participate at trial; without these rights, such victims arguably

Recent Italian efforts to modify its criminal procedure illustrate how deep the notion of victim participation runs in civil law countries. In 1989, Italy attempted to reform its civil law system of criminal procedure by instituting an adversarial trial system which shifted responsibility for the production of evidence from the judges to the parties and thus restricted the powers of the judges. See generally, William Pizzi & Luca Marafioti, The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation, 17 YALE J. INT’L L. 1, 14 (1992). But the new Code of Criminal Procedure did not touch the tradition of permitting victim participation at trial, so that a victim’s attorney participates on an equal basis with the pubblico ministero (the equivalent of the state’s attorney in Germany) and the defense attorney.


80 The origins of the Nebenklage procedure in Germany go back to Germany’s creation of a code of criminal procedure in 1877. See THOMAS WEIGEND, DELIKTSSOPFER UND STRAFVERFAHREN, 191-94 (1989). There was apparently no historical precedent for the Nebenklage concept, and it is unknown from where the drafters of the German code developed it. Up until the adoption of the code the victim had been excluded from the trial process in Germany. Id.


83 See Reinhard Böttcher, Das neue Opferschutzegesetz, 1987 JURISTISCHE RUNDSCHAU 133, 135.
were being victimized a second time by the system.\textsuperscript{84} Opposition to broadening the \emph{Nebenklage} procedure came primarily from the defense
bar, which argued that adding a secondary accuser, who would stress the
victim's point of view at trial, would strengthen the position of the state's
attorney in a dispute over procedure or evidence, making it more
difficult for the defense attorney to prevail in such confrontations.\textsuperscript{85}

The upshot of the debate was a number of important changes to the
\emph{Nebenklage} procedure.\textsuperscript{86} First, in order to stop abuse of the \emph{Nebenklage}
procedure by insurance companies interested only in obtaining discov-
ery for civil purposes, assault victims must now allege serious physical
injury, or some other damage to themselves or their reputation,\textsuperscript{87} in
order to join the trial as \emph{Nebenkläger}. A second important change was the
addition of sexual assault to the list of \emph{Nebenklage}-eligible crimes. This
means that sexual assault victims no longer have to justify their participa-
tion indirectly using the theory that sexual assaults involve assaults,\textsuperscript{88} but
now can participate based on the sexual assault itself. Because sexual
assault is the category of crime in which victims overwhelmingly elect to
participate in the trial, the decision to list sexual assault specifically
among the crimes in the \emph{Nebenklage} statute was an important recognition
of the special problems that rape victims face in court.

The third change was to broaden the \emph{Nebenklage} procedure to permit
a lawyer representing the victim to participate at pretrial proceedings as
well as at trial.\textsuperscript{89} This extension has given the victim's lawyer the oppor-
tunity to examine the investigative file in advance of trial and to suggest
further factual investigations to the state's attorney if the file appears
incomplete from the victim's point of view. Psychologically, it has placed
the victim's attorney on a more even footing with both the state's attor-
ney and the defense attorney throughout the criminal process.\textsuperscript{90}

\textsuperscript{84} See Felicitas Selig, \emph{Opferschutzgesetz - Verbesserung für Geschädigte in Sexualstrafverfahren?},
\emph{Strafverteidiger} 1988, 498, 499.

\textsuperscript{85} See Eberhard Kempf, \emph{Opferschutzgesetz und Strafverfahrensänderungsgesetz 1987},
Gegenreform durch Teilgesetze, \emph{STRAFVERTEIDIGER} 1987, 215, 216-20; Bernd Schönemann, Zur
Stellung des Opfers im System der Strafrechtspflege, \emph{NEUE ZEITSCHRIFT FÜR STRAFRECHT} 1986,
193, 196-99; Hans-Joachim Weider, \emph{Pflichtverteidigerbestellung im Ermittlungsverfahren und
Opferschutzgesetz}, \emph{STRAFVERTEIDIGER} 1987, 317-18.

\textsuperscript{86} See \emph{Opferschutzgesetz} (BOB11 1986, 2496).

\textsuperscript{87} For example, if it were alleged that the victim had contributed to a traffic accident
through his own unlawful or negligent behavior, and the judges needed to inquire into such
contributory negligence in order to pronounce a just sentence, then the victim would have a
sufficient interest to permit participation at trial. See \textsuperscript{supra} note 47, § 395 Nr.
11.

\textsuperscript{88} Nevertheless, prior to the 1986 reform, in most rape cases the victim could also partici-
pate as a \emph{Nebenkläger} because the German courts saw in every sexual assault a personal insult
and, frequently, a physical assault as well (which both qualified for the \emph{Nebenklage}). See \textsuperscript{supra}
accompanying note 83, supra.

\textsuperscript{89} See \emph{StPO} §§ 406g(1)-(2), 406e (1988).

\textsuperscript{90} One difference between the defendant and the victim—and one restriction on the
rights of \emph{Nebenkläger} enacted in 1986—is that the victim is not permitted to appeal in order to
seek a harsher sentence for the defendant. See \emph{StPO} § 400(1). But given the fact that victims and
their attorneys usually do not see it as their function to get involved in the specifics of
sentencing—since it is more a matter for the state's attorney (see \textsuperscript{supra} accompanying note 121,
A fourth major change in the *Nebenklage* procedure has made it easier for indigent victims to receive legal advice by providing for the payment of their legal fees, including those for pretrial consultation between the victim and an attorney. Such fees will be paid even if the victim ultimately decides not to participate at trial as *Nebenkläger*. This encourages victims to explore their legal options by assuring them that their indigence will not stand in the way of obtaining legal representation. In fact, the extension of legal fees to cover a victim’s pretrial consultations with counsel gives an indigent victim some advantages over even an indigent defendant: because the defendant will be responsible for the victim’s legal fees should she be convicted, the defendant’s financial burden could be considerably greater than the victim’s.

This last reform might seem to threaten the German system with a heavy financial burden. However, the provision of legal counsel to indigent victims so that they can participate at trial as *Nebenkläger* is not as costly as it may appear for two reasons. The primary reason is that, as explained earlier, most victims do not choose to participate in the process as *Nebenkläger*, with the important exception of those who have been victims of sexual assault. A second reason is that legal fees for *Nebenkläger* are not nearly as high as they would be in the United States. Because professional judges have the main burden of preparing the case for trial in the German system, pretrial preparation on the part of lawyers is much more limited than it would be for a similar case in the United States. It is not the function of the victim’s lawyer (or the defense lawyer or even the state’s attorney) to seek out witnesses and to interview such witnesses prior to trial; indeed, the system prefers that lawyers not conduct such interviews. If the victim (or the defendant) tells her lawyer that a certain witness can corroborate her story, the attorney’s function is to bring the name of that witness to the attention of the state’s attorney, who will then see that the witness is interviewed by

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92 While a victim’s indigency will usually be determined quickly, no victim will be responsible for those legal fees incurred prior to the determination of indigency in the event that the victim is later determined not to be indigent. *See* StPO § 406g(4) (1988).

93 *See* Weider, *supra* note 85, at 318.

94 *See* text accompanying note 76, *supra*.

95 This is true of fees both for victims’ attorneys and for defense attorneys. For a typical rape case, the minimum fee set by the bar association in 1993 was DM 1000 or approximately $650. Interview with Regina Schaaber, *Rechtsanwältin*, in Freiburg, Germany (June 15, 1993) (on file with the Stanford Journal of International Law). This is the same for both the victim’s lawyer and the defense lawyer in such a case. *Id.* A defendant could, of course, choose to pay more for an attorney.

96 Even the state’s attorney does not prepare witnesses to testify at trial as would an American prosecutor. The state’s attorney is more of a judicial figure. Also, a state’s attorney who interviewed such a witness might well be recused from the case on the ground that he or she had become biased. Interview with Silvia Fodor, *supra* note 76.

97 *See* Part I A *supra* (describing the German system’s strong preference for narrative testimony).
the police and that the interview is made a part of the file.98 Thus, pretrial preparation by the victim’s attorney usually entails a careful review of the file and a discussion of its contents with the victim to make sure that it is complete from her point of view; not much more is required in the way of preparation for trial.99

C. The Nebenklage Procedure and Sexual Assault Cases

As stated earlier, it is only in a relatively small percentage of those cases in which the victim is eligible to participate through the Nebenklage procedure that she chooses to do so.100 Presumably, most crime victims in Germany do not think their participation at trial is likely to benefit them directly; instead, they may be content to leave the investigation and the adjudication of the criminal case in the hands of the judges. The exception to this is the category of sexual assault crimes, where there has been a considerable increase in the percentage of victims who wish to participate in the criminal process as secondary accusers.101 In the area around Freiburg, for example, virtually all adult victims of sexual assault choose to exercise their right to participate at trial using the Nebenklage procedure because they feel a personal stake in the trial and want their own lawyer present.102 Sexual assault victims’ desire for legal representation may be due to the highly personal and demeaning nature of the crime, as well as the nature of such trials, where it is not unusual for the character or reputation of the victim to come under attack.

Because sexual assault cases have become so closely linked with the Nebenklage procedure, this part of the article will use the crime of sexual assault as an example to show how the procedure works in practice.

There are two main avenues whereby a sexual assault victim will learn about the Nebenklage procedure. The first is through the German police, for whom it is now standard practice to inform rape victims about their right to participate at the trial as Nebenkläger.103 The other avenue by which victims learn of this right is through rape crisis centers, to which

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98 In Germany, there is a highly professional police force that has specialized units for crimes such as murder and rape. It is the job of the police to handle the investigation. This includes making sure that any laboratory or crime scene tests are undertaken, that all witnesses who may have relevant evidence have been interviewed, and that these interviews have been reduced to detailed statements that have been read and signed by the witnesses. Interview with Silvia Fodor, supra note 76.

99 Interview with Regina Schaaber, supra note 95.

100 See supra text accompanying note 76.

101 Id.

102 Interview with Regina Schaaber, supra note 95; interview with Silvia Fodor, supra note 76. With respect to children who have been sexually assaulted or abused, in some cases by a family member, the percentage of those choosing to participate at trial is much lower, but is estimated to be slightly more than half. Interview with Regina Schaaber, supra.

103 Interview with Silvia Fodor, supra note 76; see also Staiger-Allroggen, supra note 76, at 81. A copy of the standard notice provided by the German police to crime victims informing them of their right to avail themselves of the Nebenklage procedure is on file with the Stanford Journal of International Law.
rape victims will often obtain referrals. Such centers will inform victims of their rights under the *Nebenklage* statute, and will usually be able to provide a list of lawyers who customarily represent victims in such cases.\textsuperscript{104} In a typical case, where counsel is contacted by the victim or the victim's family shortly after the crime was reported to the police, the attorney will meet with the victim soon thereafter to discuss what will follow procedurally.\textsuperscript{105} After the investigation of the case is complete and trial has been set, the attorney for the victim will examine the investigative file to make sure that it is complete from the victim's perspective. The inspection of the investigative file is an important step in the process because it provides an idea of what evidence will be presented at the trial and how the trial may affect the victim.\textsuperscript{106} Usually counsel for the victim will meet with her briefly prior to trial, unless the case is very straightforward, to explain the trial procedures and to give her some idea of what is likely to happen.\textsuperscript{107}

A victim who chooses to participate at trial as a secondary accuser becomes, in essence, a party at the criminal trial and receives treatment equal to that afforded the defendant in the courtroom. What this means as an initial matter is that the victim is entitled to remain in the courtroom throughout the proceedings and can participate through counsel much like the defendant. The majority of rape victims choose to remain in the courtroom because they view the trial as "their" trial.\textsuperscript{108} If a victim wishes to remain in the courtroom throughout the trial, she will sit next to her attorney at one of the tables in the front of the courtroom, just as the defendant sits next to his attorney. But it is not necessary for the victim to remain in the courtroom in order to use the *Nebenklage* procedure. For those victims who find it too painful and stressful to remain in the courtroom throughout the trial, the *Nebenklage* procedure ensures that they will nonetheless have an attorney present to represent their interests and to keep them informed of the progress of the trial.\textsuperscript{109}

The primary function of the victim's attorney is to represent her interests at trial. Generally, this means that the victim's attorney functions rather like the attorney for the state or the defense. All three will be consulted on any scheduling matters and each, in turn, will have an opportunity to question witnesses, bring appropriate motions, and present a closing argument at the end of the trial.\textsuperscript{110}

Victims of sexual assault in Germany have certain testimonial protections—protections which are somewhat broader than those granted rape

\textsuperscript{104} Interview with Silvia Fodor, supra note 76; interview with Regina Schaaber, supra note 95.

\textsuperscript{105} Interview with Regina Schaaber, supra note 95.

\textsuperscript{106} Id.

\textsuperscript{107} Id.

\textsuperscript{108} Id.

\textsuperscript{109} Id.

\textsuperscript{110} See StPO § 897(1).
victims in the United States—\(^{111}\) that would normally be asserted by the victim's attorney at the appropriate point in the trial. A rape victim at a German trial can seek to have the public removed from the courtroom when she is testifying, and this motion will be granted unless the judges determine that the public interest in hearing the victim's testimony outweighs the interest of the victim.\(^{112}\) Such motions are generally granted and thus provide some privacy for the victim by permitting her to testify with the public gallery cleared of spectators.\(^{113}\)

The victim may also move to have the defendant removed from the courtroom while she testifies. Such a motion may be granted if the victim is under the age of sixteen, and the judges fear that she will suffer additional damage from having to testify in the presence of the defendant.\(^{114}\) If the defendant is removed from the courtroom during the victim's testimony, his defense attorney will remain in the courtroom and will be able to question the witness. After the victim has finished giving her account of the crime and answering questions, she will then leave the courtroom. At that point, the defendant will be brought back in and the presiding judge will relate to the defendant the substance of the victim's testimony. If the defendant has questions for the victim, the presiding judge will again remove the defendant from the courtroom, recall the victim, and put those questions to her.\(^{115}\) This process will continue until the defendant has no more questions for the victim.

German trials reverse the order in which the defendant and victim give their testimony from that in which they give it in the United States. At an American criminal trial, the defendant does not testify until the state's case has been completed; thus the defendant, who cannot be sequestered, will give his version of the events after the victim has testified and after all the state's evidence has been presented. The opposite is true in Germany: the defendant will typically respond to the charges at the start of the trial before any witnesses have testified, so that

\(^{111}\) Exclusion of the public at an American trial would require a hearing and showing that injury to the victim would be likely. See Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607-09 (1982). There is no parallel to the removal of the defendant from the courtroom during the examination of the victim. The furthest the Court has gone has been to uphold a conviction where a rape victim who was six at the time was permitted to testify from outside the courtroom but the victim's testimony was broadcast into the courtroom so that the defendant could see the witness as the witness testified. See Maryland v. Craig, 497 U.S. 836 (1990).

\(^{112}\) See GVC § 171b.

\(^{113}\) See Böttcher, supra note 88, at 139-40; Regina Schaaber, Strafprozessuale Probleme bei Verfahren wegen sexuellem Mißbrauchs, STREIT 1993, 143, 151-52; Staiger-Allroggen, supra note 76, at 90-93.

\(^{114}\) See StPO § 247. If the victim of the sexual assault is under 16, the court has discretion to remove the defendant from the courtroom where there is reason to fear substantial damage to the victim's general welfare from the confrontation. Id. Such motions will usually be granted. If the victim is 16 or older, there is also the possibility of removing the defendant if there is reason to fear that the victim might not tell the truth or if there is a high risk of severe damage to the victim's health, such as a situation where the victim is receiving psychotherapy as a consequence of the crime. See Böttcher, supra note 88, at 138-39; Schaaber, supra note 115, at 150-53. As a statistical matter, it is not often that courts remove the defendant while the victim is testifying. See KAISER, supra note 76, at 193; Staiger-Allroggen, supra note 76, at 90-93.

\(^{115}\) See Schaaber, supra note 113, at 151
the victim's testimony will follow the defendant's response to the charges.\textsuperscript{116} Since the victim who participates at the trial as \textit{Nebenkläger} has a right to remain in the courtroom and is not subject to sequestration before she testifies, she will have heard the defendant's account of the events in question before giving her evidence.

A primary concern about victim participation in criminal trials in the United States is that it might destroy the adversarial balance and force the defendant to respond to pressure from both the prosecutor and the victim's attorney.\textsuperscript{117} This appears not to be a problem in the less adversarial German trials because the judges do the bulk of the questioning of the witnesses, and lawyers play more of a supplemental role. In addition, as mentioned earlier, it is easier to accommodate questions from the victim's attorney when others who have a certain perspective on the evidence are also permitted to ask witnesses questions.\textsuperscript{118} For example, a forensic or psychiatric expert who gives testimony during the trial will usually remain in the courtroom to ask a witness questions if the testimony touches on her area of expertise.

There remains, of course, the possibility that a victim's attorney will be overly aggressive at the trial, pursuing a line of questioning that the defendant believes to be very unfair and overly hostile. In such a situation, however, the defendant and his attorney have an easy solution: the defense attorney can advise her client to stop answering questions from the victim's attorney.\textsuperscript{119} Unlike in the United States where, having testified on direct examination at trial, a defendant must answer relevant questions on cross-examination, the defendant at a German trial always has a right to refuse to answer any questions and would be likely to do so if he believes that the victim's attorney is being unfair.\textsuperscript{120}

While the victim's attorney participates at the trial on rather an equal basis with the state's attorney in questioning the witnesses and addressing the judges, their roles remain distinct and the function of the victim's attorney is limited to representing the victim. For example, there is an almost unwritten rule that victims' attorneys do not request or recom-

\textsuperscript{116} See Damaška, supra note 23, at 527-29.

\textsuperscript{117} It has been argued that even permitting the victim to sit at the prosecution table during trial is "inherently prejudicial" because it poses "an unacceptable risk" that the defendant's right to a fair trial will be compromised. See Goddu, supra note 7, at 266-67. Even the participation of victims at sentencing, which all states now permit, has been strongly attacked as inappropriate and prejudicial. See, e.g., Henderson, supra note 36, at 996, 1002; Abraham Abramovsky, Victim Impact Statements: Adversely Impacting upon Judicial Fairness, 8 ST. JOHN'S J. LEGAL COMMENT 21 (1992).

\textsuperscript{118} See StPO §§ 240, 80 (1), 243 (4); Meyer-Goßner, supra note 47, at 240 Nr. 3.

\textsuperscript{119} Interview with Ulf Köpcke, Rechtsanwält, in Freiburg, Germany (June 18, 1993) (on file with the \textit{Stanford Journal of International Law}); interview with Regina Schaaber, supra note 95.

\textsuperscript{120} There is an important difference between the defendant and others who give evidence at a criminal trial: the defendant is never considered to be a witness. See StPO § 80 (2). While the defendant is asked to respond to the charges at the start of the trial, and usually does give his version of the facts, the defendant may refuse to answer any question precisely because he is not a witness. See Damaška, supra note 23, at 526-58. Thus, unlike other witnesses, who may be put under oath and who are required to answer relevant questions (assuming no privilege exists), the defendant in civil law systems is never required to take an oath and is always free to exercise his right to remain silent. \textit{Id.}
mend a specific length of sentence in their closing argument to the court.\textsuperscript{121} That is considered a matter more properly the responsibility of the state's attorney.\textsuperscript{122} In the United States, by contrast, the role of the victim seems to center on the sentencing phase.\textsuperscript{123}

D. Victims of Sexual Assault in the Courtroom: A Final Caveat

The danger that readers may get a misimpression of the nature of sexual assault trials in Germany based upon the above account warrants a final caution. While victims of sexual assault in German courtrooms have a number of advantages over their counterparts in American courtrooms—such as the ability to give testimony in narrative form, the fact that the professional judges will usually conduct the bulk of the questioning, and the option of participating at trial through their own counsel—one should not conclude that trials in Germany are necessarily “easy” on the victim. Although the system is not structured as an adversarial trial system, trials in Germany do have adversarial features and safeguards. This means that in cases involving a battle of credibility between the defendant and the victim over what occurred at the time of the alleged crime, as is common in “acquaintance rape” cases, there will often be demanding and sustained questioning of the victim by the defense attorney. Where directly relevant to issues in the trial, aspects of the victim’s character may also be called into question and attacked aggressively.\textsuperscript{124}

In short, while the structure of German trials offers rape victims many procedural advantages over the more highly adversarial trial system in the United States, there are adversarial aspects to the German system that must not be overlooked in evaluating the treatment of victims in that system.

\textsuperscript{121} Interview with Ulf Köpcke, \textit{supra} note 119; interview with Regina Schaaber, \textit{supra} note 95.

\textsuperscript{122} Interview with Ulf Köpcke, \textit{supra} note 119; interview with Regina Schaaber, \textit{supra} note 95.

\textsuperscript{123} The statutory right of victims in the United States to file victims’ impact statements is a subject of heated controversy. \textit{See supra} text accompanying notes 3-4; Berger, \textit{supra} note 20.

\textsuperscript{124} In June of 1993 the authors watched a trial in the Große Strafkammer (the highest state trial court) in Freiburg, Germany, in which two defendants stood charged with rape. Both the victim and the defendants admitted that they drove out of town and injected themselves with heroin. The victim claimed that she was then raped by both defendants, while the defendants maintained that the victim had wanted to have sex with both of them and had expected them in return to try to procure more drugs for them to share the following day. The defendants insisted that the victim prostituted herself for drugs regularly to support her drug addiction, and some of their friends testified that she was even doing so during the trial. Each time that a witness came forward and alleged that he had seen the victim acting as a prostitute, the victim was recalled to give testimony about the incident (always denying either that the incident took place or that she was prostituting herself). This meant that during the three-week trial, the victim had to give testimony on several different occasions. A copy of the judgment in this case is on file with the \textit{Stanford Journal of International Law}. 
CONCLUSION

This Article concludes that victims of serious crimes have a number of advantages in the German system, due to the nature of civil law criminal proceedings, and the availability of the Nebenklage procedure. However, this does not mean that the German criminal justice system is preferable to or stronger than the American one; how a criminal justice system treats victims is only one of many important measures by which it can be evaluated. This Article is limited in scope to the victim's perspective within the German system. Any system that treats, or strives to treat, victims with dignity and respect must not risk tolerating false convictions or the abuse of citizens by the police. Thus, a thorough examination of the German system and a blueprint for specific reforms of the American one would have to take these broader concerns into account. Moreover, victims' rights in the German system may not be directly translated into the American adversarial system due to the different political and epistemological assumptions on which the two systems are based.

Nevertheless, this Article's examination of the differences in the ways that victims are treated in the two trial systems should further the goal of encouraging productive discussion between victims of crime and those within the American criminal justice system over the frustrations that victims feel. Such discussion has been painfully lacking in this country for a long time. While it is often difficult for victims to explain exactly what it is about the system that makes them feel excluded or mistreated, and those educated in the American adversarial tradition seem equally at a loss to understand what can be done for victims beyond the state constitutional amendments now in place, bridging this communication gap becomes increasingly important as the victims' rights movement continues to grow. It is the authors' hope that this Article's comparative perspective will add depth and understanding to the debate.

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125 See text accompanying notes 17-18, supra.
126 See text accompanying notes 19-21, supra.