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# Victims' Rights: Rethinking Our "Adversary System"

William T. Pizzi\*

## I. INTRODUCTION

The Austrian philosopher Ludwig Wittgenstein, describing a certain philosophical problem, wrote that "[a] *picture* held us captive. And we could not get outside it, for it lay in our language."<sup>1</sup> I want to borrow his metaphor, specifically his claim that a picture holds us captive and we have difficulty getting outside it, because I see running through American legal scholarship and judicial opinions a picture of our trial system that holds us captive. It is the picture of a trial as a two-sided contest between the state and the individual.

The Victims' Rights Amendment is important because it challenges our two-sided trial model and forces us to confront some difficult and painful realities about our trial system that we have avoided for too long. The Victims' Rights Amendment carries with it formal acknowledgment that victims of violent crime have a stake in the trial that is different from that of the general public or even the prosecutor. One can see this most clearly in the first part of the amendment, which provides that victims of a crime of violence have the right "not to be excluded from[] any public proceedings relating to the crime."<sup>2</sup> It also is evident in other parts of the amendment, such as the section giving victims of violent crimes the right to be heard on the merits of any proposed plea bargain.<sup>3</sup>

While much that is contained in the Victims' Rights Amendment has already been enacted through state constitutional amendments as well as state and federal statutes, recognition of the interests of crime victims in the Constitution is important because it may encourage us to rethink our trial system. In this Article, I want to use the Victims' Rights Amendment to raise questions about our trial system and the system's priorities because reexamination of our trial system is long overdue. To help provide perspective on the treatment of victims in our trial system, I will contrast with our system the treatment of crime victims in other western trial systems.

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<sup>1</sup>LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 48e (G.E.M. Anscombe trans., MacMillan 12th prt. 1966) (1953).

<sup>2</sup>S.J. Res. 3, 106th Cong. § 1 (1999).

<sup>3</sup>*See id.*

## II. MULTI-SIDED CRIMINAL TRIALS

The picture of criminal trials as two-sided has a powerful hold on us. As a way of representing the fact that we have moved away from a system of private prosecution—like other western countries—to one in which prosecutorial power is vested in a public official, I see nothing wrong with thinking of criminal cases as two-sided. Normally, there are two tables in the front of our criminal courtrooms, one for the prosecution and one for the defense. Also, we caption our criminal cases, “State v. Jones,” or “The People v. Jones,” which seems to suggest a two-sided contest. However, when this generalization about criminal cases is put forward as if it were the metaphysical structure of criminal cases in this country, it becomes inaccurate, artificial, and confining. Hence, the importance of the Victims’ Rights Amendment.

A closer examination of the structure reveals no metaphysical constraint that demonstrates that criminal cases have two, and only two, sides. Take the courtroom, for example. The courtroom is set up for convenience, and there is nothing to stop us from changing it to make it work better or to permit more people to sit in the front of the courtroom. While usually we have two tables, sometimes we put more in the front of the courtroom, particularly when there are two or more defendants on trial. More importantly, when there are two defendants, our system recognizes that the interests of the defendants will almost always differ. The American Bar Association Standards state that because “[t]he potential for conflict of interest in representing multiple defendants is so grave,” ordinarily a lawyer should decline to represent more than one defendant in the same criminal case.<sup>4</sup> Because the potential conflict is so serious, some public defender offices have a policy of never representing more than a single defendant in multiple defendant cases.<sup>5</sup>

However, it is somehow easier to see divergent interests on the defense side of a criminal case than on the prosecution side. Perhaps it is because those supposedly on the prosecution side are masked with a sweeping label, “the State,” or “the People.” But what does it mean to say that “the State” is opposed to the defendant? The prosecutor is usually not even a state employee, but is an employee of a much smaller entity, be it a county, borough, parish, or city. The police who investigate the case may be employees of the same governmental unit, but quite often they may be employees of a different geographical unit, or even employees of the federal

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<sup>4</sup>STANDARDS FOR CRIMINAL JUSTICE: THE DEFENSE FUNCTION § 4-3.5(c) (1993).

<sup>5</sup>See Gary Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 VA. L. REV. 939, 950 (1978) (discussing how some public defender officers have policy of never representing more than one single defendant in multiple defendant cases).

government. The prosecutor does not represent the police and sometimes the police and the prosecution would handle a criminal matter differently before trial and even at trial.

One example of differences between police and prosecution occurred during the murder investigation of JonBenet Ramsey in Boulder, Colorado. There have been indications throughout the investigation that the police and the district attorney's office were having trouble cooperating.<sup>6</sup> Eventually, one of the lead detectives resigned from the investigation and submitted an angry resignation letter alleging that the district attorney's office was crippling police efforts and compromising the case.<sup>7</sup>

Importantly, even if the investigators and the prosecutors are employees of the same governmental unit, is it not clear that the police and the prosecutor ought to have different responsibilities in a strong criminal justice system? It is certainly true that in a serious criminal case the police and the prosecution will want to see the person who committed the criminal act convicted and sentenced appropriately. That will often be true of the trial judge as well, and perhaps even of the defense attorney where the crime is particularly horrendous. Yet, each has a distinct professional role to play in the system, and they need to perform that role whatever their personal feelings about the crime and the desirable outcome of the criminal case.

Nonetheless, our system tends to see the police and the prosecutor as working together "on the same side" against the defendant. But if the police are part of the prosecution team, who is supposed to seek out evidence at the crime scene that may be important for the defense? In those cases in which the perpetrator may not be apprehended for several weeks after the crime, the police must see themselves as duty-bound to do a complete and thorough investigation that considers possible exculpatory evidence as well as incriminating evidence. When a criminal justice system fails to emphasize the need for thorough and objective investigators, the results of an investigation can more easily become slanted and biased against the defendant. We should be shocked that a once-prestigious entity such as the FBI laboratory began to shade its reports and distort its findings to favor the prosecution.<sup>8</sup> However, it is not surprising that it would occur in a system that often fails to distinguish between the police and the prosecution. Instead of driving them closer

<sup>6</sup>See Hector Gutierrez, *Assistant DA apologizes to Boulder cops*, ROCKY MTN. NEWS, Feb. 15, 1997, at 4A.

<sup>7</sup>See Hector Gutierrez, *Detective blasts DA's handling of JonBenet Ramsey slaying*, PITT. POST GAZETTE, Aug. 8, 1998, at A4; *Thomas Resignation Letter*, BOULDER DAILY CAMERA (Aug. 7, 1998) <<http://www.insideboulder.com/extra/ramsey/1998/07thomle.html>>.

<sup>8</sup>See Roberto Suro & Pierre Thomas, *Justice Dept. Cites Failures of FBI Lab: Evidence Was Flawed In Several Major Cases*, WASH. POST, Apr. 16, 1997, at A1 (discussing how FBI crime laboratory produced flawed reports and inaccurate testimony).

together, as our system does, and conceptualizing the police and prosecution as a single entity, the "State," which is trying to convict the defendant, our system should encourage the police to see themselves as having responsibilities independent of the prosecution.

The relationship between the victim and the prosecutor is similar to that between the police and the prosecutor. The prosecutor does not represent the victim and cannot give the victim the same advice that a private attorney might give. A victim may, for example, want advice from the prosecutor as to whether to meet with the defense investigator who is trying to interview trial witnesses. A victim's attorney, who knows what a good defense attorney can do at trial with even minor inconsistencies in prior statements, would often advise the victim not to meet with the investigator. However tempting it may be to a prosecutor to give the same advice, it would be unethical for a prosecutor to do so. The American Bar Association Standards state that it "is improper for a prosecutor . . . to suggest to a witness that the witness not submit to an interview by opposing counsel."<sup>9</sup>

While the interests of the victim and the prosecutor will converge in many cases, there will sometimes be cases in which the interests of the victim and the prosecutor sharply diverge. This will often reflect the fact that the victim's focus is on the particular criminal case while a prosecutor often has to see the same case in broader terms that may be influenced by limited resources, prosecutorial priorities, and even political considerations. An obvious example of diverging interests would be a relatively serious case where the prosecutor believes the chances of conviction are not sufficiently high to merit prosecution while the victim feels that the crime should be prosecuted even if conviction is unlikely. No one is right or wrong in this situation; rather, both the victim and the prosecutor are looking at the case from different perspectives. A prosecutor, these days, usually has no choice but to make difficult decisions about how limited prosecutorial resources are to be invested. At the same time, a victim may not agree with the prosecutor's priorities or the decision about the way the case involving the victim is to be handled.

Crime victims have often expressed frustration with our trial system because they are, to a considerable extent, invisible in the system.<sup>10</sup> They have a legitimate interest in the way a criminal case is handled, but it has

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<sup>9</sup>STANDARDS FOR CRIMINAL JUSTICE: THE PROSECUTION FUNCTION § 3-3.1(d) (1993) (stating that "[a] prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel").

<sup>10</sup>See, e.g., Steve Baker, *Justice Not Revenge: A Crime Victim's Perspective on Capital Punishment*, 40 UCLA L. REV. 339, 340 (1992) (stating that "[t]he criminal justice equation does not include the relatives or friends of victims").

been a battle to get prosecutors, judges, and defense attorneys to respect that interest. The Victims' Rights Amendment represents formal acknowledgment that victims have a role in the system that can be different from the prosecutor or the police.

This is not to say that the interests of the victim should be paramount to those of the prosecutor, but the victim's interest should be understood and considered before an important decision affecting the victim is reached. One circumstance ripe for application of this principle is the plea bargain. The Victims' Rights Amendment gives victims the right "to be heard, if present, and to submit a statement at all such proceedings to determine . . . an acceptance of a negotiated plea."<sup>11</sup> There will be cases in which the victim is completely supportive of the proposed plea agreement and may desire to tell this to the court. Nonetheless, there will be cases in which the victim is strongly opposed to the plea agreement, perhaps because the victim believes that the charge to which the defendant wishes to plead guilty or the sentence to be imposed does not adequately reflect the seriousness of the crime. It is important that the victim have the right to be heard on the proposed plea bargain.

Permitting the victim to express opposition to the agreement provides a check on plea bargains that do not serve the public interest. However, one would suspect that in the vast majority of cases where the victim is opposed to the proposed bargain, the prosecutor's view of the public interest ought to lead to acceptance of the bargain by the court. But even if it is a rare case in which the victim's opposition to a plea agreement is likely to alter the proposed plea bargain, it is still very important that the victim be heard. We have a criminal justice system in which lawyers and judges spend a great deal of their time talking to each other. Nevertheless, the system does a very poor job of *listening* to citizens, and that includes not only victims but defendants as well. Sometimes it is easier to accept decisions with which one disagrees if one feels that one's views are heard and considered before the decision is made. This is what the Victims' Rights Amendment provides for victims.

### III. VICTIMS IN THE COURTROOM

Defense attorneys understand that constitutional recognition of a status for victims of serious crimes, independent of the prosecutor, has a tremendous symbolic value, and they do not want to see it accorded victims. Gerald Lefcourt, a leading criminal defense attorney and then-president of the National Association of Criminal Defense Lawyers ("NACDL"), wrote an

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<sup>11</sup>S.J. Res. 3, 106th Cong. § 1 (1999).

article in *The Champion*, the magazine of the NACDL, attacking the Victims' Rights Amendment in extreme terms.<sup>12</sup> One of the first worries that he expresses is that such an amendment "would give victims equal standing in what amounts to a place at their own counsel table."<sup>13</sup>

I want to reply to this remark by considering his worry that victims might be permitted to sit in the front of the courtroom at their own counsel table. To Lefcourt, this seems so clearly wrong as to need no further explanation for why it is wrong. I think he is correct that the Victims' Rights Amendment might encourage more states to rethink where the victim should be seated at criminal trials, but this is exactly the sort of question about which we ought to be thinking. While states rarely permit victims to sit in the front of the courtroom at criminal trials,<sup>14</sup> it is not unusual among western countries to find victims in the front of the courtroom, even occasionally participating in the trial. In Belgium,<sup>15</sup> France,<sup>16</sup> and Italy,<sup>17</sup> victims have long had a right to participate in the criminal trial on a rather equal basis with the state's attorney and the defense attorney. One of the reasons why victims often choose to participate at the criminal trial is that the victim may be awarded civil damages at the criminal trial. It is cheaper for the victim to join in the criminal case and seek damages, rather than later having to bear the expense of a separate civil case.

Obviously, this is a different model from the United States where civil damages would have to be pursued separately from the criminal case. However, my point is not that these countries are a model for us. Rather, I use these countries simply to point out that permitting some form of victim

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<sup>12</sup>See Gerald B. Lefcourt, *Of Danger To All, Of Benefit to None*, THE CHAMPION, July 1998, at 5 (stating that Victims' Rights Amendment has "fundamental defects" and "pervert[s] the Constitution").

<sup>13</sup>*Id.*

<sup>14</sup>See, e.g., ALA. CODE § 15-14-54 (1995) (stating that "[a] victim of a criminal offense shall not be excluded from court or counsel table during the trial or hearing or any portion thereof conducted by any court which in any way pertains to such offense"). The Alabama Court of Criminal Appeals upheld this statute in *Pierce v. State*, 576 So. 2d 236, 251 (Ala. Crim. App. 1990).

<sup>15</sup>See Christine Van Den Wyngaert, *Belgium*, in CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY 17-18 (Christine Van Den Wyngaert ed., 1993) [hereinafter CRIMINAL PROCEDURE SYSTEMS].

<sup>16</sup>See R.L. Jones, *Victims of Crime in France*, 158 JUST. PEACE & LOC. GOV'T L. 795-96 (1994).

<sup>17</sup>See William T. 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) (stating that in Italy injured persons are entitled to participate as parties to criminal case from pretrial to appeal).



participation in a criminal trial may seem radical to American lawyers, but it is not at all radical among western countries.

Another country with a somewhat different model of victim participation at trial is Germany.<sup>18</sup> Damages are not a possibility at a German criminal trial so victim participation at trial is not generally permitted, except for a small category of serious crimes.<sup>19</sup> Among the crimes permitting such participation are murder, kidnapping, and rape.<sup>20</sup> Victims rarely wish to participate in the trial, feeling that they can rely on the state's attorney and the judges to reach a fair verdict and sentence.<sup>21</sup> However, this reluctance is not the case in crimes involving sexual assault, where a high percentage of victims wish to participate in the trial.<sup>22</sup> Victims feel they have a stake in the trial and want to be present and be represented.

That most sexual assault victims would wish to participate at trial through counsel, while victims of other serious crimes rarely wish to do so, should not be surprising. For one thing, the victim's character and credibility are likely to come under a much more severe attack in a sexual assault case. Often, for example, in acquaintance-rape cases the attack on the victim includes the allegation that no crime ever took place because the victim consented to have sex with the defendant. The defense may attack the victim on almost every aspect of her testimony in an attempt to suggest that she is lying and trying to convict the defendant for corrupt reasons. Additionally, it is not unusual in such cases for issues having to do with the prior relationship between the victim and the defendant to be raised, which may mean delving into very private events separate from the crime in question. When one considers the nature of the crime and the likelihood that the victim may be "put on trial," it is easy to see why sexual assault victims in Germany tend to see the trial as "their trial" and want to participate in the trial through counsel.

If some continental countries think that it is appropriate for victims of serious crimes to participate in criminal trials, why is the Victims' Rights Amendment so controversial? Notice that the Victims' Rights Amendment is very modest in what it provides victims with regard to the trial. It gives victims no right of participation at trial, nor even a right to sit in the front of

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<sup>18</sup>See generally William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37 *passim* (1996) (comparing Germany's treatment of crime victims with that of United States).

<sup>19</sup>See *id.* at 54-55 (stating that participation is allowed only in crimes that have very personal impact on victim or victim's family).

<sup>20</sup>See *id.* at 55 (citing StPO § 395).

<sup>21</sup>See Pizzi & Perron, *supra* note 18, at 55 n.76 (stating that in 1989, victim participation was only 19.2% in cases in which victim was eligible to participate).

<sup>22</sup>See *id.* at 59 (stating that 67% of victims of sexual assault chose to participate in trial).

the courtroom. In fact, the Amendment does not even give victims "a right to be present" at the trial. Instead, it provides victims only the right "not to be excluded from[] any public proceedings relating to the crime."<sup>23</sup> Presumably, this provision would allow the victim of a violent crime, who is a witness, to resist a motion for sequestration and to remain in the back of the courtroom. Given the fact that some states already exempt victims from sequestration orders and permit them to remain in the courtroom at trial,<sup>24</sup> what is being sought with respect to trial for victims in the Victims' Rights Amendment is very limited. In addition, when one compares being able to remain in the courtroom with the participatory role that victims have at trial in the European countries just mentioned, the change proposed becomes even more modest.

#### IV. OUR "ADVERSARY SYSTEM"

In the previous Part, I described some European trial systems that give victims a participatory role in the courtroom in some cases. If those countries think it appropriate to recognize an active role for victims in some criminal cases, why is the Victims' Rights Amendment so wrong in thinking that the interests of victims of violent crime deserve some formal recognition in our Constitution? One argument that American lawyers are likely to raise is that European trial systems and the American trial system are fundamentally different. Under the traditional dichotomy, the United States is supposed to have "an adversary system" and European countries are supposed to have "an inquisitorial system."<sup>25</sup>

I think this distinction has become blurred over time and that all western trial systems are adversarial to a degree today.<sup>26</sup> Obviously, "to a degree" means that there are considerable differences from system to system, with some systems not very adversarial and others more adversarial. To try to make this point, I want to explore briefly what it might mean when American lawyers say that our trial system is "an adversary system" and that this is supposed to distinguish our trial system from European trial systems.

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<sup>23</sup>S.J. Res. 3, 106th Cong. § 1 (1999).

<sup>24</sup>See, e.g., ARIZ. R. CRIM. P. 9.3(a) (1998) (providing that victim has right to be at all proceedings at which defendant has such right); ALA. R. EVID. 615(4) (1996) (providing that victim should not be excluded from trial when victim is witness); OR. EVID. CODE 615 (1999) (same).

<sup>25</sup>Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAPMAN L. REV. 57, 84-85 (1998) (discussing debate about whether European countries actually have inquisitorial system).

<sup>26</sup>I make this point at some length using the countries of the Netherlands, Germany, Norway, and England in WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH 89-116 (1998).

Recently, Professor Monroe Freedman has written an article in which he argues that our adversary system is built into our Constitution.<sup>27</sup> I think he is wrong in making that claim but I do not intend to dispute that point here. What I want to do is use his definition of the adversary system as a basis for trying to understand what distinguishes it from the supposedly inquisitorial systems on the continent. He begins his article with the following definition: "In its simplest terms, an adversary system resolves disputes by presenting conflicting views of fact and law to an impartial and relatively passive arbiter, who decides which side wins what."<sup>28</sup> Working with this definition, which aspects of the definition distinguish American trials from those that occur on the continent?

*A. Hotly Contested Factual and Legal Issues?*

Surely, it is not the presentation of conflicting views of fact and law that distinguishes the American System from the Continental System as there are often hotly contested factual or legal issues in all trial systems. To follow up with the acquaintance-rape example from the previous section, such trials will often be bitterly contested in any country and in any trial system, with the victim insisting that she did not give consent and the defense insisting that the victim consented and is not telling the truth. Several years ago, I witnessed a rape trial in a courtroom in Freiberg, Germany, where the victim, an admitted drug addict, claimed that she had been raped by the two defendants.<sup>29</sup> They, in turn, insisted that she had agreed to have sex with them on the promise that they would give her heroin the following day.<sup>30</sup> The defendants and their lawyers launched a major assault on the victim's credibility and her character.<sup>31</sup> They brought in witnesses who testified that the victim had prostituted herself for heroin on past occasions.<sup>32</sup> In each case, the victim was recalled to the stand to answer the allegations.<sup>33</sup> It was a bitterly contested trial, yet it took place within a trial system that is supposedly nonadversarial. In short, "hotly contested" does not serve to distinguish among western trial systems those that are adversary systems from those that are not.

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<sup>27</sup>See generally Freedman, *supra* note 25, at 57.

<sup>28</sup>*Id.*

<sup>29</sup>See Pizzi & Perron, *supra* note at 18, at 63 n.124.

<sup>30</sup>See *id.*

<sup>31</sup>See *id.*

<sup>32</sup>See *id.*

<sup>33</sup>See *id.*

*B. Impartial and Relatively Passive Judges?*

Perhaps the distinction between the adversarial and inquisitorial systems lies in the fact that the trial takes place before "an impartial and relatively passive arbiter."<sup>34</sup> The first part of this element—that the judge be "impartial"—draws no meaningful distinction among trial systems, as every western trial system wants its fact finders, be they professional judges, lay judges, jurors, or some combination thereof, to be impartial to the important task before them. Article 14 of the International Covenant of Civil and Political Rights, which has been ratified by all western countries, states that anyone charged with a crime is entitled to a trial before "a competent, independent and impartial tribunal."<sup>35</sup> All western countries hope that their judges and fact finders are impartial.

The second part of this element—that the arbiter be "relatively passive"—does draw a distinction among western trial systems, but the distinction is not as clear as some might think. Certainly judges on the continent often take the primary responsibility for calling and questioning witnesses at trial, and they can be very active in controlling the conduct of the trial to the point that the lawyers play a greatly reduced role at trial.<sup>36</sup> But there are other continental countries where the parties call the witnesses and do the bulk of the questioning of witnesses. In Norway<sup>37</sup> and Italy,<sup>38</sup> for example, the public prosecutor and the defense attorney call their own witnesses and do the initial questioning, like the American model. In fact, Italy considers its trial system to be an adversarial trial system<sup>39</sup> and yet victims have broad rights of participation at trial, including questioning witnesses and making legal arguments. Is Italy an adversary system because the judges are relatively passive compared to judges in other continental countries?

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<sup>34</sup>Freedman, *supra* note 25, at 57.

<sup>35</sup>International Covenant on Civil and Political Rights, art. XIV, § 1, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16 at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

<sup>36</sup>See generally JOHN H. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* 3–60 (1977) (describing criminal procedure in Germany).

<sup>37</sup>See Johannes Andenaes, *Norwegian Criminal Law, Criminology, and Criminal Procedure*, 2 J. INT'L L. & PRAC. 431, 464 (Thomas M. Lockney trans., 1993).

<sup>38</sup>See Pizzi & Marafioti, *supra* note 17, at 14.

<sup>39</sup>See Lawrence J. Fassler, Note, *The Italian Penal Procedure Code: An Adversarial System of Criminal Procedure in Continental Europe*, 29 COLUM. J. TRANSNAT'L L. 245, 246 (1991) (describing overhaul of Italy's penal code in favor of principles and processes of Anglo-American adversarial procedure).

What makes this notion of a "relatively passive arbiter" somewhat problematic as a distinguishing feature is the fact that American trial judges have the power to ask questions.<sup>40</sup> While in jury trials, American judges tend to be very passive, at bench trials some judges ask many questions.<sup>41</sup> When you consider that individual judges often vary considerably in their willingness to intervene and ask questions at trial, "relatively passive" seems to suggest a difference of degree among trial systems, rather than a bright line that would separate our trial system from those on the continent.

### C. *Winning?*

What really stands out in Freedman's definition of adversary systems is the last part of Freedman's description. It states that in the United States, the duty of the impartial arbiter is to decide "which side wins what."<sup>42</sup> End of definition. American trials are about winning. European trials are not conceptualized in that way. Trials in Europe are supposed to aim at the truth, and to that end, judges (and also the state's attorney) have a responsibility to pursue relevant issues even if not raised by the parties, or to call witnesses if that becomes necessary.<sup>43</sup> In short, European judges feel responsible for the outcome of the trial and the justice of the result.

I think a trial system defined in Freedman's terms is ultimately sterile. Any trial system that is to have credibility has to place heavy emphasis on trial verdicts that are accurate and reliable. But there is no emphasis on truth or reliability in Freedman's definition and, unfortunately, his definition accurately reflects a trial culture where winning and losing are central and heavily emphasized. In an expensive and extremely complicated system, the winner will often be the side that has greater resources or the side with the

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<sup>40</sup>See FED. R. EVID. 611(b) (stating that "the court may interrogate witnesses, whether called by itself or by a party").

<sup>41</sup>Further complicating the American criminal trial system is the fact that we have a system of military trials where the fact finders are encouraged to ask questions during the trial and sometimes play an active role at trial. See SCHLEUTER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* 630 (1996).

<sup>42</sup>Freedman, *supra* note 25, at 57.

<sup>43</sup>See JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION* 124-32 (2d ed. 1985) (discussing criminal procedure in continental system); Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 578-86 (1973) (comparing adversarial and nonadversarial procedures and evidentiary rules designed for pursuit of truth).

more skillful advocate, not the side with the stronger evidence. What should be the responsibility of the trial judge in such a situation?<sup>44</sup>

Surprisingly, there is no guidance for trial judges in such a situation. Franklin Strier, in his book *Reconstructing Justice*, points out that the *ABA Code of Judicial Conduct* fails to impose any obligation on trial judges to seek justice.<sup>45</sup> Instead, the only adjudicative constraint on trial judges is to perform their task impartially.<sup>46</sup> Strier warns that impartiality that is thought to require passivity "can make the judge an unwilling abettor of intolerable injustice."<sup>47</sup>

Some strong European trial systems permit victim participation in some criminal cases, while other strong European trial systems, such as those in the Netherlands<sup>48</sup> or Denmark,<sup>49</sup> do not permit victim participation at trial. However, those countries would not define their trial systems as being aimed at deciding "who wins what." The case for victim participation at trial is much stronger in a system like ours that places a low priority on truth and a high priority on winning. If you are not a winner in such a system, you will be a loser, and that is exactly the way that victims are often portrayed after an acquittal. Has anyone ever heard a defense attorney on the courthouse steps following an acquittal say anything other than that the verdict shows that the jury believed the defendant and obviously did not believe the prosecution?

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<sup>44</sup>American trial judges have the power to call their own witnesses at trial. See FED. R. EVID. 614(a) (stating that "the court may, on its own or at the suggestion of a party, call witnesses"). However, there is no guidance as to when or why that power should be used, so it is rarely exercised.

<sup>45</sup>See FRANKLIN STRIER, *RECONSTRUCTING JUSTICE* 83 (1994).

<sup>46</sup>See *id.*

<sup>47</sup>*Id.*

<sup>48</sup>See A.H.J. Swart, *The Netherlands*, in *CRIMINAL PROCEDURE SYSTEMS*, *supra* note 15, at 279, 291-92 (stating that victim is more or less without rights in Dutch criminal system).

<sup>49</sup>See Vagn Greve, *Denmark*, in *CRIMINAL PROCEDURE SYSTEMS*, *supra* note 15, at 51, 59-60 (stating that in Denmark victim has no right to be party to proceedings under penal aspect of case).

## V. A TRIAL SYSTEM UNSURE WHAT IT IS

Of course, judges do care about the justice of the results that take place in their courtrooms, but they often seem unsure whether this concern should temper the system's adversarial excesses. A case that illustrates the difficulties for judges in our trial system is the Louise Woodward case,<sup>50</sup> which received international publicity.<sup>51</sup> As you may recall, Woodward was the English *au pair* charged in Massachusetts with first- and second-degree murder in the death of Matthew Eappen, the infant in her care. While murder was a possible verdict, the case always seemed more appropriate as a manslaughter case. Manslaughter seemed to fit better the facts of the case in which the teenage defendant was supposed to have become frustrated with the infant in her care and caused his death by shaking him roughly.

However, at the end of the trial, the defense team, led by three experienced defense attorneys, asked that the lesser included charge of manslaughter not be given to the jury.<sup>52</sup> This was viewed as an audacious gamble because the jury would be left with the difficult choice of either returning a verdict of second-degree murder or a verdict of acquittal.<sup>53</sup> Making the stakes very high for the defendant was the fact that first-degree murder carried with it a mandatory life sentence, while second-degree carried with it a life sentence, but permitted parole after a minimum of fifteen years in prison.<sup>54</sup> Manslaughter had no minimum.

If one wants to understand how extremely adversarial our trial system can be and how invisible victims are at times in the system, there could hardly be a better example. The trial judge did not see it as his responsibility to put to the jury the option that seemed most likely to fit the facts. We can rationalize this decision by saying that the prosecution "blew it" by charging murder instead of manslaughter, but is it fair to visit this decision on the victim and the victim's family? As mentioned earlier, victims in our trial

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<sup>50</sup>See *Commonwealth v. Woodward*, No. CRIM. 97-0433, 7 Mass. L. Rptr. 449, 1997 WL 694119 *passim* (Mass. Super. Nov. 10, 1997) (Zobel, A.J.), *aff'd*, 694 N.E.2d 1277 (Mass. 1998).

<sup>51</sup>While lecturing in China in late October of 1997, I was able to follow developments in the trial on CNN International.

<sup>52</sup>See William F. Doherty, *Woodward team wins bid to limit verdict to murder or acquittal*, BOSTON GLOBE, Oct. 28, 1997, at A1 (discussing defense team's success in not allowing jury to consider 'compromise verdict' of manslaughter); CourtTV, *Daily Updates from Massachusetts v. Woodward, Highlights from October 27* (visited Mar. 6, 1999), <<http://www.courtvtv.com/trials/woodward/week4.html#oct27>> (same).

<sup>53</sup>See Tunku Varadarajan, *Au pair risks 'noose or loose' verdict*, TIMES (London), Oct. 28, 1997, at 3.

<sup>54</sup>See Doherty, *supra* note 52, at A1.

system feel like they are invisible and this is a good example. The judge went to great lengths to make sure that Woodward approved of the daring gamble that was going to take place. He brought in an additional attorney to make sure that she was fully informed of the risks of the decision not to instruct on manslaughter.<sup>55</sup> After meeting with the additional attorney, Woodward told the court that she agreed with the decision only to put murder or an acquittal to the jury.

What this judge, a judge with an excellent reputation,<sup>56</sup> was saying to the world watching this trial is that trials in the United States are more about winning and losing than they are about accurate verdicts. Obviously, if the defense had won, there would have been high praise for the brilliance of the defense advocates and their bold strategy. But we all know what happened. The prosecutor gave a tremendous summation, and the defendant "lost," receiving a life sentence, as she knew she would if she were to be convicted. When a system emphasizes winning and losing so heavily, and openly permits such an audacious gamble, losing is possible.

It is at this point that our supposedly "adversary system" took a different turn. A few days later, the same judge entered the courtroom now concerned about the injustice of the result.<sup>57</sup> Where does this judge come from in an "adversary system" and where was the judge with these concerns at trial? Having permitted the defense to gamble and having made sure that the defendant was fully informed of the consequences of the gamble, where in an adversary system does this judge get the authority to question the second-degree murder conviction? The judge substituted a manslaughter verdict and dropped Woodward's sentence from life (meaning a fifteen-year minimum) to time served, permitting her immediate release.<sup>58</sup>

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<sup>55</sup>See *id.*

<sup>56</sup>See David Nyhan, *But can he make the case for attorney general?*, BOSTON GLOBE, Oct. 26, 1997, at E4 (characterizing Zobel as "a savvy trial judge"); Don Aucoin, *While millions watch: Trial of Woodward in infant's death is touchstone for US, British television*, BOSTON GLOBE, Oct. 9, 1997, at A1 (quoting Rikki Klieman, Boston lawyer who stated that Judge Zobel "runs a tight ship"). Judge Hiller Zobel, the judge in the Woodward case, is also an amateur historian. See Hiller B. Zobel, *The Jury on Trial*, AMERICAN HERITAGE, July/August 1995, at 42 (discussing history of trial by jury).

<sup>57</sup>See Tom Mashberg, *Judge rules manslaughter in nanny case*, BOSTON HERALD, Nov. 10, 1997, at 4 (quoting Judge Zobel that "justice requires lowering the level of guilt from murder to manslaughter").

<sup>58</sup>See *Au pair freed after judge reduces verdict*, CHI. TRIB., Nov. 10, 1997, at C1 (quoting Judge Zobel, who remarked that he was "morally certain that allowing this defendant on this evidence to remain convicted on second-degree murder would be a miscarriage of justice"). Massachusetts sentencing guidelines had suggested a prison sentence of from three to five years. See David Osborne, *Ordinary girl who put justice on trial*, THE INDEPENDENT (London), June 17, 1998, at 3.



The *Woodward* case reveals a trial system that does not know what its goal is. I do not dispute the justice of the manslaughter verdict in the *Woodward* case or even the sentence that was imposed. However, the way the system got there raises serious questions about the premises of our trial system. In a trial system where judges are supposed to be "relatively passive arbiters," a single judge rejects the verdict of a jury and imposes the verdict he feels is correct. He then goes on to impose a very lenient sentence, based on a view of the facts that some jurors plainly did not accept.<sup>59</sup>

I think it is time to put aside the convenient labels and clichés that dominate the descriptions of our trial system—that "we have an adversary system," that "we don't trust judges," that "we believe in jurors of 'our peers,'" and so on—and look at what we really have. When I do this, I see a trial system that does not know what it wants to happen at trial and does not know itself very well. It swings from extremely adversarial to extremely inquisitorial; from vesting incredible power in juries to permitting judges to undo or effectively overrule jury verdicts with which they disagree; from incredibly weak judges, at times, to judges vested with tremendous power over the liberty of citizens at other times. I do not think any of these extremes is healthy for victims, or for defendants.

## VI. VICTIMS IN OTHER COMMON LAW TRIAL SYSTEMS

I want to return to Gerald Lefcourt's worry—that victims might have a seat at counsel table<sup>60</sup>—to make one more point about trial systems, specifically about other common law trial systems. I have to confess that I do not know of any common law country that would permit the victim to sit in the front of the courtroom at counsel table, which is the worry Lefcourt expresses. This might seem to support Mr. Lefcourt's assumption that permitting a victim to sit in the front of the courtroom ought to be unthinkable.

The problem is that, in the common law countries I have visited, the defendant also does not sit in the front of the courtroom at counsel table. The defendant sits in a small box, usually next to a uniformed guard, at the very

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<sup>59</sup>See Joe Ryan & Anne E. Kornblut, *Juror 'appalled' at sentence*, BOSTON GLOBE, Nov. 11, 1997, at B1 (quoting juror in Woodward trial who called Judge Zobel's decision "a complete injustice").

<sup>60</sup>See *supra* notes 12–13 and accompanying text.

back or at one side of the courtroom.<sup>61</sup> Enter any Crown Court in London and it is easy to tell who is on trial—I mean that on more than one level.<sup>62</sup>

Imagine how Mr. Lefcourt would feel if it was proposed that defendants at serious criminal trials had to sit in a small box at the very back of the courtroom, far removed from their attorneys and often even farther from the proceedings than some members of the public. American defense lawyers sometimes complain about the difficulty of “personalizing” the defendant to the jury.<sup>63</sup> They are quite fortunate compared to defense barristers in England who must work at considerable distance from the defendant.<sup>64</sup> The barrister cannot personalize the defendant to the jury by putting an arm on the shoulder of or chatting quietly with the defendant.

I am not advocating that we build docks in American courtrooms or that we only permit lawyers—and not defendants—to sit inside the bar in our courtrooms. However, the Victims’ Rights Amendment has to be understood against an American background in which defendants have many advantages that they do not have in other trial systems. Conversely, American victims have many disadvantages at trial that they do not have in other trial systems. It is against this background that the limited “right” provided victims at trial in the Victims’ Rights Amendment—a right “not to be excluded” from proceedings—should be seen as completely appropriate for our trial system.

#### VII. A FINAL OBSERVATION ON VICTIMS’ RIGHTS “VERSUS” DEFENDANTS’ RIGHTS

One of the frequent claims of those opposed to the Victims’ Rights Amendment is the claim that victims’ rights undercut defendants’ rights. Consider again Gerald Lefcourt’s attack on the Victims’ Rights Amendment.<sup>65</sup> He states that “the amendment establishes rights that would, by definition, overwhelm protections the Constitution affords defendants including the presumption of innocence.”<sup>66</sup> This is complete hyperbole. The amendment has been carefully crafted so that its provisions do not conflict with any of the constitutional rights of defendants. Basically, the amendment

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<sup>61</sup>See MICHAEL H. GRAHAM, TIGHTENING THE REINS OF JUSTICE IN AMERICA 69–70 (1983) (describing and diagraming where defendant sits in English court).

<sup>62</sup>See William T. Pizzi, *Discovering Who We Are: An English Perspective on the Simpson Trial*, 67 U. COLO. L. REV. 1027, 1028–29 (1996) (comparing English courtroom, where defendant does not sit in well of courtroom, to United States system where defendant at times appears to be “host[ing]” trial).

<sup>63</sup>*Id.*

<sup>64</sup>See GRAHAM, *supra* note 61, at 69.

<sup>65</sup>See *supra* notes 12–13 and accompanying text.

<sup>66</sup>See Lefcourt, *supra* note 12, at 5.

tracks the law that has been put into effect in the majority of states through state constitutional amendments.

However, the supposed battle between victims' rights and defendants' rights is largely a chimera, because a trial system that fails to treat victims well will often end up treating most defendants poorly too. This is the case in the United States: our system heavily favors rich and sophisticated defendants, but it is not a good system for the vast majority of defendants, who are neither rich nor sophisticated. That our system is not a good one for most defendants may seem puzzling because comparatists often say that if a defendant is really guilty, that defendant would prefer to be tried in the United States.<sup>67</sup> They do not mean that as a compliment. What they mean is that no matter how strong the evidence, if the defendant has a good lawyer, anything might happen at trial.

However, the dark side of these apparent advantages is that the American system has evolved very effective means of coercing defendants to waive their constitutional rights. What the system does is threaten defendants with very high punishments if they have the temerity to try to exercise their constitutional rights.<sup>68</sup> What we have seen over the last twenty years has been a tremendous increase in habitual offender statutes, statutes with high mandatory punishments and very high sentencing ranges, and other sentencing statutes that put tremendous pressure on defendants to waive their rights and avoid trial.<sup>69</sup> The result is a system that works to the advantage of wealthy and sophisticated defendants but is not a good system for the vast majority of defendants who are neither wealthy nor sophisticated.

A great deal of sentencing power has been shifted from judges to prosecutors, and they use this power to pressure defendants to plead guilty or face some very unattractive alternatives.<sup>70</sup> In many states, the number of cases

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<sup>67</sup>See MERRYMAN, *supra* note 43, at 132 (concluding that "criminal proceedings in the civil law world are more likely to distinguish accurately between the guilty and the innocent").

<sup>68</sup>See William T. Pizzi, *Punishment and Procedure: A Different View of the American Criminal Justice System*, 13 CONST. COMM. 55, 55-56 (1996) (arguing that United States provides strong procedural and constitutional protections for defendants, but that if defendants choose to go to trial they risk harsher sentencing if found guilty).

<sup>69</sup>The growing harshness of American sentencing laws and the political pressure that have encouraged this development have been the subject of book-length studies. See, e.g., KATHARINE BECKETT, *MAKING CRIME PAY passim* (1997) (analyzing sociohistorical context, public discourse and popular sentiment as influencing crime control and punishment); MICHAEL TONRY, *SENTENCING MATTERS passim* (1996) (describing refashioning of sentencing because it has become recurrent subject of ideological conflict and because of shift in sentencing processes and institutions).

<sup>70</sup>A shocking example of prosecutorial sentencing power and the risks to a defendant of trying to withstand that power is *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). Hayes turned down a plea bargain offer of a five-year sentence to go to trial. See *id.* at 358-59. He was

going to trial is shrinking. The system is completely given over to plea bargaining. Why would any sane prosecutor want to go to trial if a trial is a crapshoot? Also, it is pretty tough for a defendant to turn down a one-year offer if trial may result in a five- or ten-year minimum sentence.

This is not a criticism of plea bargaining per se. Every western system has some mechanism for the expedited disposition of a large percentage of its criminal cases, which offers defendants some discount for avoiding trial or at least avoiding a prolonged trial.<sup>71</sup> However, there is good plea bargaining and bad plea bargaining, and the United States draws no distinction between the two. Today, one should worry less about false convictions at trial than about defendants with credible defenses who go to prison because the pressure on them—often from their own lawyers—to plead guilty is intense.<sup>72</sup>

### VIII. CONCLUSION

What the Victims' Rights Amendment does in terms of expanding the law for victims is minimal. Many of the provisions of the amendment, such as the right to file a victim impact statement or the right to be informed and heard on the merits of proposed plea bargain agreements, are already embodied in the law of many states. In fact, because the amendment is limited to crimes of violence, the provisions of the amendment are significantly less extensive than the existing law in many jurisdictions.

However, the symbolism of recognizing victims in our Constitution is tremendously important and this Article has tried to show why. There is nothing inconsistent in having a strong and reliable trial system that, at the same time, acknowledges that victims have an interest in the prosecution of a criminal case, including the trial.

Victims are very angry at the treatment they receive in our criminal justice system and I have tried to show that they have a right to be angry. Unfortunately, anger is not a good basis on which to make important public policy decisions and it contributes to the increasing harshness we see in our system. Crime is a serious problem in all western countries and politicians have to get elected in these countries as well. But we need to ask ourselves why judges and lawyers in other countries have been more successful in

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convicted and received a mandatory life sentence. *See id.* at 359.

<sup>71</sup>*See* Pizzi & Marafioti, *supra* note 17, at 35–37 (describing plea bargaining analogs in Denmark, Spain, France, and Germany).

<sup>72</sup>In a recent article, William Stuntz has warned that a highly complicated legal system like the American system encourages defense lawyers to work hard at procedural issues and puts pressure on them to avoid factual lines of inquiry that require much more time to develop. *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 47 (1997).

fending off calls for the death penalty, for harsh mandatory minimums, tough habitual offender statutes, and the like. Part of the answer is that the judges in those systems have greater credibility with the public and, in some of the countries at least, the trial system commands greater respect and public confidence. We need the balance that a Victims’ Rights Amendment offers to restore some of the public confidence our system has lost. Victims need it, but so do defendants.

