Rethinking the Role of Victims in Criminal Proceedings

Lawyers' Normative Repertoire in France and the United States

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RETHINKING THE ROLE OF VICTIMS IN CRIMINAL PROSECUTION

THE NORMATIVE REPERTOIRE OF LAWYERS IN FRANCE AND THE UNITED STATES

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In both Europe and the United States, the criminal trial system was built on the state's assertion of power and the gradual distancing of victims, who were assumed to be motivated by a desire for vengeance.[1] During the last 30 years, however, there has been significant pressure to re-evaluate the role of victims of crime. A number of measures have sought to improve how victims are treated by implementing legal, financial and psychological aid services. Others have more specifically targeted the role of victims in the proceedings of criminal trials. Victims have been granted new opportunities to express themselves during hearings, and to participate in, and be represented in, criminal cases.

The place granted to victims in the criminal justice system has been subject to re-evaluation in both the Continental and American legal systems, although the place of victims remains greater in the Continental tradition.[2] Two important differences should be highlighted here. While Continental judges generally invite victims to present their testimony in a rather free-form fashion, in the American system witnesses (victims, experts, eyewitnesses) are subject to a rigid interrogation that leaves little room for narrative aspects. For the past 30 years or so, American debate has been polarised on the adoption of measures – such as Victim Impact Statements – that would grant victims new possibilities to express themselves in court.[3] While Continental legal systems generally grant victims the right to participate in

1. For France: François Tricaud, *L'accusation. Recherche sur les figures de l'agression éthique* (Paris: Dalloz, 1977); Raymond Verdier, "Histoire du monopole étatique de la vengeance en Occident', in R. Verdier (ed.), *Vengeance. Le face à face victime/agresseur* (Paris: Autrement, 2004), 145-59; Nathalie Pignoux, *La réparation des victimes d'infractions pénales* (Paris: L'Harmattan, 2008). For the United Kingdom and the United States: Janelle Greenberg, "The victim in historical perspective. Some aspects of the English experience", *Journal of Social Issues*, 40(1), 1984, 77-102; Lynne Henderson, "The wrongs of victims' rights", *Stanford Law Review*, 37(4), 1985, 937-1021.
2. Mirjan Damaska, "Structures of authority and comparative criminal procedure", *Yale Law Journal*, 84(3), 1975, 480-544; William Pizzi, Walter Perron, "Crime victims in German courtrooms. A comparative perspective on American problems", *Stanford Journal of International Law*, 32, 1996, 37-64.
3. The Victim Impact Statement was introduced in California in 1976. Several Supreme Court decisions then moved the debate forward, in particular *Booth v. Maryland* in 1987, *South Carolina v. Gathers* in 1989 and *Payne v. Tennessee* in 1991. This measure was adopted throughout the country at the beginning of the 2000s.

the proceedings as a civil (private) party, this possibility does not exist within the American legal tradition. In France, since the beginning of the twentieth century, we have witnessed the constant expansion of civil action in favour of groups and associations recognised to be of public utility.[1]

Regardless of the differences between legal traditions, the reassessment of the role of victims in criminal cases has been seen by many observers as a factor that is likely to bring about a serious reconfiguration of the justice system. The question has provoked, and continues to provoke, a number of disputes among jurists. Some are highly sceptical of, and even at times opposed to, this evolution, while others have become fervent supporters. In this article, we plan to study these contrasting perspectives, from their emergence at the end of the 1970s until the present day, addressing the various positions in a symmetrical fashion, as they are expressed in the doctrinal debate. We aim to be comprehensive and to follow in detail the arguments in question. We also aim to describe the normative bases on which legal experts analyse contemporary transformations in criminal law.

By adopting this approach, we shall take stock of the political dimension that is inherent to the work of jurists. There are at least three different elements to consider here. The political dimension is first tied to the central question: how best to regulate the role of victims in criminal trials? In other words, how do we define the nature and scope of the powers that should be conferred to ordinary individuals within society's main institutions? The political dimension of this doctrinal study is in turn linked to the status granted to political figures. When, on behalf of civil parties, they mobilise groups that are looking for a voice in public debate, criminal cases often bring up this kind of question. Some trials involving political figures – the Papon case, for example, or the contaminated blood affair – became emblematic cases for legal experts. Debating the role of victims in the criminal justice system thus came to mean debating the "judicialization" of politics.[2] Lastly, doctrinal study is linked to the political sphere in a more reflexive fashion. Using the issue of victims' rights as a jumping-off point, some legal scholars have begun to investigate changes in the relations between criminal proceedings and the media, in particular since the 1990s, as well as their positive or negative effects on the development of "real" political action in our society.

The normative repertoire of a mechanism

The work of legal experts regarding the role of victims in the criminal justice system is an example of an endeavour which consists more broadly in establishing the conditions under which a mechanism – in this case, the criminal trial – must or should be organised. By mechanism, we mean an established sequence of operations that seeks, on the one hand, to describe the state of affairs, and on the other, to transform it.[3] Our hypothesis

1. In 1913, the French Cour de Cassation granted trades unions the right to participate in civil action; in 1975, the Family Code awarded family associations the same right. This right was in turn extended to associations designed to fight alcoholism, pimping, racism and sexual violence. Since the 1990s, a number of texts have strengthened the rights of victims in the criminal justice system: the January 1993 laws on criminal proceedings, the 1998 memorandum on victim assistance, and the June 2000 law concerning the presumption of innocence and victims' rights.
2. Cf., for example, Jacques Commaille, Laurence Dumoulin, "Heurts et malheurs de la légalité dans les sociétés contemporaines, une sociologie politique de la 'judiciarisation'", *L'Année sociologique*, 59(1), 2009, 63-107.
3. Elsewhere, we have also closely examined the normative work undertaken by different actors (doctors, researchers, patients' associations) with regard to a different mechanism, the clinical trial, which has become

is that a process of this sort relies on a "normative repertoire", a global structure from which stem all of the arguments employed by actors to assess the aforementioned mechanism. In the social sciences, the notion of a "repertoire" is used when dealing with situations in which normative work exhibits the following traits (as is the case for our study): actors rely in part on a shared normative base, but this base is itself composed of diverse elements, meaning that nothing prevents rulings referencing certain bases from being different from, and even possibly contradictory to, other rulings referencing other bases.[1] By updating the normative repertoire used by legal experts on the question of the victim's role within the criminal justice process, we seek to describe both what unites the perspectives of these experts and what is likely to differentiate them.

The normative repertoire accessed by a certain category of actors can exhibit significant variations depending on the arena in which these actors operate.[2] Therefore, it is to be expected that the normative work of jurists is not the same when the latter are expressing their opinion on legal changes in specialised articles, or making a ruling on a particular case, as when they take the floor during a hearing. In this article, we have therefore chosen to focus on the "doctrinal arena", the sum of the texts (articles and books) in which legal experts formulate their opinions regarding changes in the justice system, exploiting their specialised knowledge of the law. We shall therefore deal more specifically with the "doctrinal repertoire" of legal experts. We shall use the term "jurist" or "legal expert" in a broader sense, to describe any actor who writes books or articles using his or her expert knowledge of the law. The individuals in question are most often law professors and legal practitioners (magistrates, lawyers), but sometimes we shall also refer to philosophers, anthropologists, sociologists, political scientists and psychologists, as the latter may at times claim legal expertise, have close and established ties with the judicial sphere, and their publications may reflect a doctrinal focus.

In studying this arena, we are not looking to define exactly what the current "doctrine" *is*. The concept of doctrine has a specific connotation for French jurists.[3] In this context, doctrine can simultaneously refer to a collection of texts, a style of reasoning with regard to the law and jurisprudence, or a collective author to whom jurists attribute an opinion. Consequently, the definition and understanding of what "the doctrine" says only has meaning for a legal expert. Only jurists can define, hierarchise, and combine the many commentaries on the law and jurisprudence that make up "the doctrine". When speaking of a "doctrinal arena", we posit the existence of an arena where jurists respond to each other as specialists

a key mechanism in the context of medical institutions: Janine Barbot, *Les malades en mouvements* (Paris: Balland, 2002); Nicolas Dodier, *Leçons politiques de l'épidémie de sida* (Paris: Éditions de l'EHESS, 2003).

1. Cf. the use of "normative repertoire" by John Comaroff and Simon Roberts, *Rules and Processes* (Chicago: The University of Chicago Press, 1981); of "cultural repertoire" by Ann Swidler, "Culture in action. Symbols and strategies", *American Sociological Review*, 51, 1986, 273-86, and Michèle Lamont, *Morals, Money and Manners: The Culture of the French and the American Upper-Middle Class* (Chicago: University of Chicago Press, 1992), French translation: *La morale et l'argent. La valeur des cadres en France et aux États-Unis* (Paris: Métailié, 1995); of "repertoires of evaluation" by Michèle Lamont, Laurent Thévenot (eds), *Rethinking Comparative Cultural Sociology. Repertoires of Evaluation in France and the United States* (Cambridge: Cambridge University Press, 2000); and finally of "normative repertoire" by Pierre Lascoumes, Philippe Bezes, "Les formes de jugement du politique. Principes moraux, principes d'action et registre légal", *L'Année sociologique*, 59(1), 2009, 109-47.
2. Nicolas Dodier, "L'espace et le mouvement du sens critique", *Annales. Histoire et sciences sociales*, 60(1), January-February 2005, 7-31.
3. Philippe Jestaz, Christophe Jamin, *La doctrine* (Paris: Dalloz, 2004); Jacques Chevallier, "Doctrine juridique et science juridique", *Droit et société*, 50, 2002, 103-20.

with regard to evolutions in the law. A sociologist may define the contours of such an arena and undertake the study of the "doctrinal work" that takes place therein.[1] Nevertheless, unless this sociologist also considers him- or herself to be a legal expert, s/he will not become a spokesperson for what the doctrine says.

Our hypothesis is that the doctrinal repertoire is constructed around a certain number of "expectations" associated with holding a criminal trial. The notion of "expectations" was chosen over other possibilities (values, interests, rules, principles, standards, etc.) for two reasons. First of all, it simultaneously expresses the idea of a targeted action and its somewhat obligatory nature. This notion also has the advantage of not presupposing the way in which this obligation is expressed. The expectations at the heart of jurists' doctrinal repertoire are, as we shall attempt to demonstrate, of two types. First of all, they are principles that all trials must respect as they unfold: objective judgment, equity between the parties, a fair evaluation of the suffering involved (the victim's suffering taken into account when sentencing, the suffering inflicted on the defendants). Second, they are the purposes attributed to the criminal trial, in the sense of what the penal mechanism is designed to make humans do, either individually or collectively, as a result of its proceedings. At this point, jurists are led to examine the points of compatibility between the traditional objectives of the trial system and the new objectives that could be engendered by the presence of victims (victim compensation, the process's "therapeutic" nature, victim empowerment, restorative justice, a "political" purpose). We shall present each of these different objectives in turn, taking care to demonstrate how each has been addressed in France and in the United States. One goal of our research is identifying the expectations that are shared by all relevant actors and those that are controversial or disputed, in the sense that actors do not agree on their pertinence. Another objective is pinpointing the differences between actors with regard to how they seek to attain the same goals. Our aim is therefore not to identify how an ideal-type jurist would reason, but rather to comprehend the basis from which all these expectations stem (some shared and some disputed) and on which similarities, differences and conflicts between legal experts are founded.

Consequently, we thus follow in the footsteps of the various studies that seek to describe the space of normative positions among jurists with regard to specific issues.[2] Just as Pierre Lascoumes, Pierrette Poncela and Pierre Lenoël did in their work on the birth of the Penal Code in France,[3] we shall systematically examine the arguments relevant to each of the questions raised in the debate surrounding the role of victims in the criminal justice system. The approach that the aforementioned authors proposed to expose the normative bases for the positions adopted by legal experts was as follows: first, identify the values and interests stipulated by various articles of the Penal Code, starting from the theory that the law is a "system of protected values and interests". Next, deduce the types of "incriminating rationalities" that are combined in the law, but also in debate on legal matters. Despite its

1. In Appendix 1, we describe the method used to establish our corpus. The full list of these texts is presented in Appendix 2.
2. On the criminal system: Pierre Lascoumes, Pierrette Poncela, Pierre Lenoël, *Au nom de l'ordre. Une histoire politique du Code pénal* (Paris: Hachette, 1989); Stéphane Enguéléguélé, *Les politiques pénales (1958-1995)* (Paris: L'Harmattan, 1998); Pierrette Poncela, Pierre Lascoumes, *Réformer le Code pénal. Où est passé l'architecte?* (Paris: PUF, 1998). Outside the scope of the criminal system specifically: Jacques Commaille, *L'esprit sociologique des lois* (Paris: PUF, 1994); Antoine Vauchez, Laurent Willemez (eds), *La justice face à ses réformateurs (1980-2006). Entreprises de modernisation et logiques de résistances* (Paris: PUF, 2007).
3. P. Lascoumes *et al.*, *Au nom de l'ordre*...

effectiveness, this approach remains very bound up with its vision of the law as an object. It is in order to get away from this idea that we shall return to more general considerations, via the notions of mechanisms and normative repertoires. The method that we propose for analysing doctrinal research on the role of victims in the criminal justice system can in reality be applied to any study seeking to identify the normative repertoire associated with a mechanism and its resulting issues.

The objectivity of criminal judgment

In the debate that surrounded the appearance of Victim Impact Statements, American jurists thoroughly examined the role of emotions in face-to-face interactions between judges and victims, and the effects these emotions had on establishing an objective verdict. In France, it was in relation to the expansion of powers granted to associations as civil parties that the objectivity of criminal judgment was studied, in particular the issue of the degree of openness that judicial institutions have with regard to these new groups.

The Rule of Law model and conceptions of objectivity

In the United States, the expanding role of victims in criminal prosecution initially led some jurists to reiterate the requirements of the Rule of Law model, which demands the strict application – that is to say, involving the least amount of interpretation possible – of the law in the cases that fall under its purview. In this model, the formal rationality that must prevail is incompatible with any emotion. This is the case argued by Toni Massaro, a law professor primarily known for her work on emotions in court and the position of rape victims in trials.[1] Rationality is thus seen as an indispensable measure which fights arbitrariness and guarantees that all individuals will be judged in the same way by the law. References to the Rule of Law model have thus been at the root of many opinions expressed by Supreme Court justices against Victim Impact Statements[2] and in favour of the recommendations made to the jury to exclude "sentiment, sympathy or passion" from their decision, whether these feelings were for the plaintiff or the defendant.[3]

In contrast to the requirements of this model, some jurists have proposed re-evaluating the role of emotions, empathy, and narrative in the criminal justice system.[4] Such experts have developed another, "broader" conception of objectivity. According to these experts, the Rule of Law model is inherently unrealistic. The work of a judge is necessarily, whether s/he likes

1. Toni M. Massaro, "Empathy, legal storytelling and the Rule of Law. New words, old wounds?", *Michigan Law Review*, 87(8), 1989, 2099-127. While criticising the limitations of the Rule of Law model, Massaro nevertheless remains vigilant with regard to "empathetic excesses" in the courtroom.
2. In *Payne v. Tennessee* (1991), Judge Stevens thus suggested basing one's ruling on "reason" rather than on "caprice or emotion". Cf. Lynne Henderson, "Revisiting victims' rights", *Utah Law Review*, 2, 1999, 383-442.
3. For a discussion of *California v. Brown* (1987) from this perspective, cf. Martha Nussbaum, "Equity and mercy", *Philosophy & Public Affairs*, 22(2), 1993, 83-125.
4. The notion of narrative ("storytelling") refers to the idea that both sides in the criminal case (victims and defendants) spontaneously structure their testimony as "narratives" or "stories", thus forcing judges to interpret their accounts and go beyond a strict application of the law. Since the 1980s, this aspect of the criminal justice system has been the focus of a number of studies, grouped under the heading of "narrative in the law", which have criticised the narrow limitations of the Rule of Law model. On the rise of this trend from the perspective of a sociologist who encourages judges to incorporate the existence of the different "narratives" expressed in the courtroom, see Kim Lane Scheppele, "Foreword. Telling stories", *Michigan Law Review*, 87(8), 1989, 2073-98.

it or not, influenced by emotions. It is thus better to integrate the emotional dimension into the organisation of criminal trials. Martha Nussbaum, a philosopher and a professor of law and ethics, outlines the work of a judge by comparing it, much as in Adam Smith's theory of an impartial spectator, to the work of the reader of a novel. In this setup, a judge may experience, thanks to the power of his or her imagination, the emotions of the different parties in the trial and the full complexity of their stories without, however, being personally affected. His or her ruling can therefore be "both emotionally sympathetic and, in the most appropriate sense of the word, neutral".[1]

Among the jurists who have defended this broader definition of objectivity, all have not supported Victim Impact Statements, however. Despite recognising emotions as valid and inescapable elements in a criminal trial, some jurists have worried about the problems that could arise if the expression of these emotions was further encouraged. They expressed reticence with regard to Victim Impact Statements and mentioned the risk of arbitrariness linked to emotional excess. This is the position of Susan Bandes, a law professor, in an oft-debated article.[2] Without taking a stand against the new practice, she is careful to outline both the advantages and risks that it offers, depending on the different configurations present in the courtroom.

Other authors have, on the contrary, argued that Victim Impact Statements make a new form of objectivity possible, one whose contribution is undeniable because it allows judges to formulate a more "individualised" ruling, by expanding the range of realities that they take into account.[3] In different articles, emphasis has been placed on the judge's growth in "experience" and "understanding"; on the reduction of "ignorance" concerning victims; as well as on the establishment of "shared social meanings".[4] Decreasing the social distance between judges and litigants is at the heart of these debates. This is why Jennifer Culbert, a political science professor who is otherwise rather critical of Victim Impact Statements, admits that the necessity of knowing the victims can be a valid issue, in that the latter rarely belong to the same social sphere as judges or juries.[5] In this light, the fight for minority rights plays an important role in the American debate.[6]

Finally, some jurists who could be described as "comprehension radicals" proved to be somewhat sceptical with regard to the ability of criminal proceedings to bring together – even with the use of Victim Impact Statements – the necessary conditions for the expression of authentic emotions, spontaneous narratives and true empathy. This is the position held by Martha Minow, a Harvard law professor, who has criticised the rather poor imagery of victims, to which Victim Impact Statements inevitably seem to lead.[7] According to these

1. M. Nussbaum, "Equity and mercy", 110.
2. Susan Bandes, "Empathy, narrative, and Victim Impact Statements", *The University of Chicago Law Review*, 63(2), 1996, 361-412.
3. In *Payne v. Tennessee* (1991), individualisation was in fact one of the Supreme Court's arguments in favour of Victim Impact Statements. Paul Gewirtz, a Yale law professor, discusses this in "Victims and voyeurs at the criminal trial", *Northwestern University Law Review*, 90(3), 1996, 863-97 (874). This article is one of the most favourable to Victim Impact Statements in our corpus.
4. This expression comes from philosopher Judith Skhlar in *The Faces of Injustice* (New Haven: Yale University Press, 1990), 114; French translation: *Visages de l'injustice* (Belfort: Circé, 2002), 164.
5. Jennifer L. Culbert, "The sacred name of pain. The role of victim impact evidence in death penalty sentencing decisions", in Austin Sarat (ed.), *Pain, Death, and the Law* (Ann Arbor: The University of Michigan Press, 2001), 103-35, 117.
6. P. Gewirtz, especially, defends the new procedure from this angle ("Victims and voyeurs…", 864).
7. Martha Minow, "Surviving victim talk", *UCLA Law Review*, 40, 1993, 1411-45. Cf. also S. Bandes, "Empathy…".

authors, the criminal process cannot evolve in this direction. It would be preferable to establish other mechanisms to bring about a better understanding between the various parties involved.

The nature and legitimacy of pressures on the justice system

In France, the effects of the increased presence of individual victims and victims' associations on the objectivity of criminal prosecution have been examined from the angle of the nature and legitimacy of the pressures exerted on the justice system.[1] This debate is somewhat reminiscent of the controversies that dogged scientific institutions when they began to open up to new forms of expertise, especially in the 1980s and 1990s.[2] Jurists became polarised, some emphasising the role of checks and balances in the proper functioning of the justice system, and some expressing concern about the threat that these counter-balancing measures could pose to the system's independence. As in the United States, but on a more collective level, a broader notion of objectivity was pitted against a limited or "hard-line" vision.

On the one hand, legal experts have highlighted the merit of granting actors outside of the justice system the ability to sue state representatives in situations deemed to be abnormal. This argument emerged very early on in the debate. In an article published in 1988 by Olivier Kuhnmunch, a trial judge in the Court of Cassation, it was argued that victims' associations could play a role in mitigating the difficulties experienced by the public prosecutor's office due to the "complexification" of criminal law. From this perspective, it would be better to see "lawsuits explode rather than be stifled".[3] In fact, if the public prosecutor's office was alone on the side of "individual" victims in such a context, it "could only very poorly fulfil its duties", Kuhnmunch argues. This position was revived in connection with several emblematic trials in the 1990s and 2000s: the Papon trial, the contaminated blood affair, the terrorist attacks, and the serial murderer Émile Louis. In all of these cases, the mobilisation of victims was seen to have achieved more than the criminal justice system. This perspective has been echoed by Antoine Garapon, a former juvenile court judge, who teaches at the École nationale de la magistrature (National School for Magistrates) and is the author of a number of works on the justice system.[4] This is likewise the view of Pierrette Poncela, a professor of criminal law who, having analysed the consequences of the contaminated blood affair, believes that the errors committed would never have reached the public eye without the work of victims' advocates in the criminal system.[5] Despite being more favourable to strict controls over victim participation in the justice system (to counter the risk of the process's "privatisation"), Xavier Pin, a

1. This does not prevent magistrates revisiting the question of compassion for victims when elaborating a verdict (although this generally happens in judicial interviews). Cf. the study conducted on magistrates by Patricia Paperman, "La contribution des émotions à l'impartialité des décisions", *Social Science Information*, 39(1), 2000, 29-73.
2. Cf. in particular Francis Chateauraynaud, Didier Torny, *Les sombres précurseurs. Une sociologie pragmatique de l'alerte et du risque* (Paris: Métailié, 1999); Michel Callon, Pierre Lascoumes, Yannick Barthe, *Agir dans un monde incertain. Essai sur la démocratie technique* (Paris: Seuil, 2001); J. Barbot, *Les malades en mouvements...*; N. Dodier, *Leçons politiques....*
3. Olivier Kuhnmunch, "La défense des intérêts collectifs et l'éclatement des poursuites", *Archives de politique criminelle*, 10(35-44), 1988, 35-50 (50). [All translations from the French in this article are by the article translator, unless an alternative English-language source is given.]
4. See Antoine Garapon, "La justice reconstructive", in Antoine Garapon, Frédéric Gros, Thierry Pech, *Et ce sera justice. Punir en démocratie* (Paris: Odile Jacob, 2001), 247-324 (285).
5. In Guy Casadamont, Pierrette Poncela, *Il n'y a pas de peine juste* (Paris: Odile Jacob, 2004), 88-9.

law professor, likewise admits that on this specific point, the power wielded by victims' associations can be useful.[1]

However, despite being fairly common among French jurists, this belief is not shared by all. Some legal experts have strongly contested the pressure exerted on judges by victims' associations, supported by public opinion and the media, both from inside and outside the judicial sphere. Daniel Soulez-Larivière, a lawyer and member of the Paris Bar, is a good example. As the author of many works on the justice system and the legal profession, and as a member of many judicial review boards, he has acted as a defence attorney in several high-profile cases involving numerous plaintiffs, in particular in the industrial and environmental sectors (the *Erika* tanker catastrophe, the explosion of the AZF factory). In a book co-authored with psychoanalyst Caroline Eliacheff, he describes in polemical terms the ambiance of certain hearings characterised by the usually presence of victims acting as civil parties. The authors speak of "the rot having settled in", of judges having become "the servants of victims", and of "political trials of a new kind".[2]

Equity and the criminal justice system

Confronted with the expanding role of victims in the criminal justice system, jurists in both the United States and France have examined the necessary conditions for creating and maintaining equity between the parties involved in a criminal trial. Here once again the differences between the two justice systems have significant consequences on how equity is addressed. Beyond these differences, however, highly conflicting positions have been expressed within both legal traditions, both for and against the greater role of victims.

Equity in the American system

In the United States, jurists have addressed equity in the binary framework of prosecution and defence that characterises the American criminal justice system. Some experts believe that the expanded presence of victims in the system is part and parcel of the fair balance between resources awarded to plaintiffs and defendants. From their perspective, there has hitherto been an imbalance, be it with regard to the rights each party was granted, their capacity to act, or the attention they received. Justice Scalia thus ruled in favour of Victim Impact Statements in the Supreme Court, arguing that although defendants have long had the ability to be heard and to present the circumstances behind their actions, victims had until now lacked any capacity to express themselves.[3] The fact that defendants were "active", while victims were forced to remain "passive" was deemed problematic. This is one of the arguments touted by the victims' rights movement in the United States that has (unsuccessfully) pushed, since the end of the 1990s, for a Constitutional amendment. The proposed amendment was primarily designed to restore balance to a situation where only those accused of a crime were seen to possess Constitutional rights.[4] Against this notion of a new balance

1. Xavier Pin, "La privatisation du procès pénal", *Revue de science criminelle et de droit pénal comparé*, 30, 2002, 245-61 (254).
2. Caroline Eliacheff, Daniel Soulez-Larivière, *Le temps des victimes* (Paris: Albin Michel, 2007), 197-9: this work is highly critical of the rise of the victim in our society.
3. Judge Scalia's statement is discussed in J. L. Culbert, "The sacred name of pain…", 128.
4. The arguments made by the supporters of this amendment are analysed by L. Henderson, "Revisiting victims' rights", although she ultimately rejects them.

of resources between victims and the accused, other jurists upheld the necessary asymmetry of the roles in the criminal justice system. In their view, victims cannot be treated in the same fashion as defendants and, to this end, be granted the right to testify.[1] In fact, the Constitutional rights of defendants are first and foremost designed to shield them from possible abuses in the state's exercise of its official powers. As victims are not faced with this threat, it is therefore unfounded for them to demand "equivalent" Constitutional protections.

The many forms of equity in France

In France, the fact that victims and victims' associations are able to be present in the criminal justice process as civil parties alters and complicates the terms of the debate. One approach to the problem consists in examining equity between pairs of actors in the criminal justice process. When jurists look at equity between the public prosecution and the defendant, they are usually concerned about the expanding role of victims. In 2004, Thierry Lévy, a well-known Parisian defence lawyer, published a highly polemical criticism of the rise of victims in the criminal justice process, and more broadly of the emergence of "victim rhetoric" and a "cult of the victim" throughout society.[2] The defence of equity is central to his work. According to Lévy, the prosecution has long held an abnormally dominant position in France and the new prerogatives granted to victims have only reinforced this situation. The balance between prosecution and defence, which used to exist in the "judicial duel" (where two arguments competed "with the same tools [...] under a judge's impartial gaze"[3]) was destroyed by the emergence of the inquisitorial model under the absolute monarchy. Under the guise of distancing victims' "thirst for vengeance" from the process, an imbalance was established between the prosecution and the defence, during the reign of the "authoritarian state". This inequality was in turn bolstered by the rise of victims in the criminal justice system. Lévy speaks of the latter as "new masters", who are "even more blind, irrational and threatening' than their predecessors.[4]

Other jurists, while believing that on the contrary, a balance between the prosecution and the defence had been established *before* the rise of victims, agree that this phenomenon has introduced a new risk of inequity, since victims are essentially a weapon for the prosecution. This position is expressed by Hervé Henrion, author of a legal dissertation on the presumption of innocence, when he states that victims' associations, as "civil parties", act as support for the "forces for the plaintiff".[5] Despite his interest in strengthening the role of victims, Henrion is not indifferent to the aforementioned risk. In a similar vein, Denis Salas, a magistrate teaching at the École nationale de la Magistrature and the author of numerous essays on the law, argues that civil parties constitute a "second prosecution team", and that the new powers they have been granted can seem excessive, especially with regard to sentencing.[6]

When it is a matter of examining the balance between the prosecution and victims, debate surrounding doctrine has instead favoured re-evaluating the presence of victims. The state

1. This is L. Henderson's conclusion in "Revisiting victims' rights".
2. Thierry Lévy, *Éloge de la barbarie judiciaire* (Paris: Odile Jacob, 2004).
3. T. Lévy, *Éloge de la barbarie judiciaire*, 112ff.
4. T. Lévy, *Éloge de la barbarie judiciaire*, 8.
5. Hervé Henrion, "La loi du 15 juin 2000 assure-t-elle l'équilibre nécessaire entre les droits et devoirs de l'État, de la personne mise en cause et de la victime?", *Archives de politique criminelle*, 24, 2002, 81-121 (111).
6. Denis Salas, "Les enfants d'Orphée. Anciennes et nouvelles victimes", in R. Verdier (ed.), *Vengeance...*, 209-21.

has notably been criticised for having deprived victims of the right to defend themselves and to press charges under the Ancien Régime. This historical view of the prosecution's role has in particular been defended by one of the main advocates for victimology in France, law professor Robert Cario.[1] He argues that a first step towards recognising the rights of victims was made during the Revolution, when the protection of "individual rights" was enshrined. From this perspective, the increased presence of victims in the criminal justice system is a logical continuation of this trend.

Jurists who analyse equity in the context of the relationship between victims and the accused likewise tend to have a positive view of the recent developments in criminal law which grant victims the possibility of "taking the stand in the context of the interaction that pits them against the presumed innocent".[2] Some have demanded far-reaching changes in favour of victims in this face-to-face with the accused. This is the perspective adopted by Xavier Bébin who, after obtaining a Masters from Sciences Po on theories of punishment and the defence of a "utilitarian" approach focused on crime prevention,[3] went on to study criminology at the Conservatoire national des arts et métiers (CNAM). Bébin is currently Secretary-General of the Institut pour la Justice, an agency created in 2007 as "an association of citizens, victims and experts mobilised to promote justice that is more protective of citizens and more equitable with regard to victims'. The agency frequently communicates with elected officials and government representatives, takes part in public debates to defend victims, and mobilises legal experts for publications and conferences. In a publication that has all the trappings of a manifesto, Bébin systematically lists, in the form of a long appeal for victims, the sequences in the criminal justice process where the latter are not, even today, on a level playing field with the accused.[4]

In addition to these different ways of looking at equity between pairs of actors, some jurists have, although more rarely, attempted to look at all three actors (the prosecution, the defence, and the victims) symmetrically. In such a scenario, the trial is no longer seen as the setting for a confrontation between a pair of antagonistic parties, but rather as an arena that favours the deployment of a "communicational" dynamic, in a Habermasian sense. This approach leads jurists to support expanded prerogatives for victims, but for different reasons. The different actors in a criminal trial are seen as all participating in a collective attempt to elaborate the legal truth, each party contributing its own perspective to the effort. Hervé Henrion thus refers to a change in the model of the criminal trial, to which he believes the 15 June 2000 Law on the Presumption of Innocence and Victims' Rights contributed.[5]

Measuring suffering in the criminal process

The relationship between the suffering of victims and the calculation of punishment

In the debate surrounding the role of victims in the criminal justice system, defence lawyers often refer to another key expectation: the need to ascertain the extent and nature of the suffering of victims that will be taken into account, both when establishing the pertinent facts of the case and when determining a sentence. The matter of establishing how much,

1. Robert Cario, *Victimologie. De l'effraction du lien intersubjectif à la restauration sociale* (Paris: L'Harmattan, 4th edn, revised and corrected, 2012). Cf. also H. Henrion, "La loi du 15 juin 2000…".
2. H. Henrion, "La loi du 15 juin 2000…", 106.
3. Xavier Bébin, *Pourquoi punir? L'approche utilitariste de la sanction pénale* (Paris: L'Harmattan, 2006).
4. Xavier Bébin, *Quand la justice crée l'insécurité* (Paris: Fayard, 2013).
5. H. Henrion, "La loi du 15 juin 2000…".

and what kind of suffering victims can legitimately manifest is still a polarising issue. Both in the United States and in France, jurists have defended the active distancing of victims' pain and suffering. Given the increased presence of victims, they point to the risk that criminal sanctions could be determined depending on the intensity of the suffering expressed during a hearing. Justice Scalia's position in favour of Victim Impact Statements was thus criticised as introducing the idea that "punishment should be keyed not to the defendant's moral guilt, but to the total harm caused by his actions, whether direct or tangential, intended or unintended, foreseeable or unforeseeable".[1] The criminal would thus be burdened with society's "abstract need" to compensate for the criminal harm done, beyond the simple evaluation of the act itself.[2] In France, Caroline Eliacheff and Daniel Soulez-Larivière likewise observed that victims can themselves be blinded by this confusion and by the desire to see "the criminal sanction measured against the pain suffered". Given the fundamentally incalculable nature of pain and suffering, punishment thus risks never being deemed severe enough.[3] Some authors have linked this excessive consideration for the suffering of victims to a deep-seated societal trait: the alleged tendency to "sanctify" suffering.[4]

Other legal experts have, on the contrary, argued that the sentence for an offence commonly incorporates considerations about the degree of pain suffered by the victims. In his defence of Victim Impact Statements, Paul Gewirtz thus reminds us that "the acts done with the same state of mind may have different legal consequences depending on the actual harm caused".[5] This notion does not, however, preclude the existence of differences between jurists with regard to the best way of organising victim testimony. Some have in fact called for victim testimony to be limited to what is strictly necessary to determine the legal qualification of responsibility. Jurists on this side of the argument worry that calculating sentences based on suffering will cloud a judge's reasoning, at times without he or she realising it, regardless of whether this bias is ultimately to the detriment of the accused or in his or her favour. Lynne Henderson, a law professor who is somewhat reticent with regard to Victim Impact Statements, also points out that, abnormally, judges show more clemency towards rapists when their victim(s) are able to control their display of suffering when testifying.[6] Other experts have seemed less concerned. Supreme Court Justice Souter, in support of Victim Impact Statements, maintains that in cases of homicide, for example, the accused must be confronted with all the "foreseeable" consequences of the actions of which he or she stands accused. The relatives of the deceased are thus invited to testify regarding the pain they suffered after the death of their loved one.[7] Experts like Justice Souter consequently encourage opening up the process to anything that could possibly (but not necessarily) end up being pertinent to the sentence. The 1982 Federal Victim and Witness Protection Act provides for a "pre-sentence report" that includes all the elements related to the damage (financial, physical, psychological, etc.) suffered; these elements are considered as "useful tools in determining equitable penalties during the sentencing of a convicted offender".[8]

1. This is one of the criticisms of Victim Impact Statements made by S. Bandes ("Empathy…", 397).
2. This argument is made by Steven Gey, a law professor, in "Justice Scalia's death penalty", *Florida State University Law Review*, 20, 1992, 67-132 (123), and is repeated by Susan Bandes.
3. C. Eliacheff, D. Soulez-Larivière, *Le temps des victimes*, 24.
4. J. L. Culbert, "The sacred name of pain…".
5. P. Gewirtz, "Victims and voyeurs…", 871.
6. L. Henderson, "Revisiting victims' rights".
7. Justice Souter's position is presented in J. L. Culbert, "The sacred name of pain…", 129.
8. Cited by L. Henderson, "The wrongs of victims' rights", 999.

Measuring the suffering inflicted on defendants

Appropriately regulating the suffering inflicted on defendants is likewise a central concern in debates on criminal law. Although all jurists seek to identify clearly the terms of legitimate violence, their often-conflicting views are situated along a spectrum which ranges from the "toughest" positions to the "most measured" ones. Here we explicitly connect the doctrinal debate concerning victims with this conflict, at all stages of the criminal justice process: before, during and after the hearing.

Let us first look at those positions that seek above all to limit the violence endured by the accused. On this end of the spectrum, jurists generally represent a victim figure who is likely to unleash excessive emotions and accusations against the defendant, and who thus needs to be circumscribed. Some of these experts also worry about the risk of stigma that ordinary citizens may face, even before the hearing takes place, once victims are granted unwarranted powers.[1] Hearings are also evaluated from this angle. The emotional expression of victims within a hearing is seen no longer merely from the angle of its effect on the judge and his or her objectivity, but also from the angle of the violence that this expression inflicts upon defendants. In the United States, the same jurists who wish to incorporate compassion into interactions between judges and victims nevertheless warn about the dangers of other emotions – such as hatred and anger – that Victim Impact Statements may encourage. In France, legal professionals have described situations where the dignity of the accused was violated during criminal hearings characterised by the overwhelming presence of civil parties.[2]

With regard to calculating sentences, some jurists have similarly expressed concern about a general trend towards reinforcing the "repressive" function of the criminal justice system, to which the increased presence of victims is seen as contributing. In the United States, "liberal" jurists have expressed alarm at the rise of the Crime Control Model promoted by conservatives during the 1980s, which holds increased repression as a key to reducing crime. They have pointed to the risks of collusion and manipulation between advocates for this repressive policy and victims' rights movements. This is the position adopted in the middle of the 1980s by Robert Elias, a professor of political science specialised in public law, in a text often cited by American experts who are worried about the conservative appropriation of victims' rights movements.[3] Robert Elias further developed his argument in a subsequent work published in 1993.[4] Drawing on more than a decade of hindsight, Elias demonstrates what he believes to be the total failure of this repressive policy in the fight against crime.

On the other hand, some jurists wish to embrace the vindicatory dimension of victim participation. In France, some experts thus defend the value of recognising the "public action" of victims, independently of their civil action. This is the position held by Philippe Bonfils, a lawyer and professor of law.[5] Bonfils defends the recognition of what he calls the "criminal victim", whom he clearly differentiates from the "civil victim" who is seeking compensation (including in a criminal court). Another perspective has recently emerged, which is resolutely

1. For example, this concern is expressed by C. Eliacheff and D. Soulez-Larivière (*Le temps des victimes*, 169) with regard to cases related to sexual matters.
2. On the subject of the insults launched at the defendants during the trial for the Armand Césari Stadium disaster in Bastia, see C. Eliacheff, D. Soulez-Larivère, *Le temps des victimes*, 192-3.
3. Robert Elias, *The Politics of Victimization. Victims, Victimology and Human Rights* (New York: Oxford University Press, 1986).
4. Robert Elias, *Victims Still. The Political Manipulation of Crime Victims* (Newbury Park: Sage Publications, 1993).
5. Philippe Bonfils, *L'action civile. Essai sur la nature juridique d'une institution* (Aix-en-Provence: Presses Universitaires d'Aix-Marseille, 2000).

in favour of the increased presence of victims, fighting against the neglect that the latter are seen to have suffered due to the dominance of the "anti-repressive" legal stance. This is the fight against "criminal dogmatism" to which Xavier Bébin has committed himself.[1]

Expanding the purpose of criminal prosecution?

The normative work done by jurists regarding criminal prosecution is usually organised, both in France and the United States, around a number of largely stable objectives associated with the trial system. Essential differences in doctrine appear in the ways in which criminal experts conceive of, express, and weigh these objectives.[2] The debate on the expansion of the role of victims has revived this line of investigation into the purposes of criminal prosecution by introducing the possibility of adding new objectives to the "traditional" purposes of the justice system, such as victim compensation, therapeutic healing, victim empowerment, and restorative justice. In addition, the debate has also begun to revisit the "political" objective of criminal prosecution.

Limiting or expanding the purpose of criminal prosecution

One line of investigation has focused on the proliferation of objectives attributed to criminal prosecution, independent even of the content of such objectives. Two different perspectives can be highlighted here. Mireille Delmas-Marty's work is a good example of the first perspective. A law professor, Delmas-Marty has been directly involved in changes to criminal law: in particular, she was a member of the Penal Code Reform Commission (1981-86) established by Robert Badinter, and, as president of the sub-committee on "Criminal Justice and Human Rights", drafted a report on the reform of criminal procedure, in which she deals with the status of victims several times.[3] Delmas-Marty pushes for clarity in the distinction between the different branches of the law and their respective functions.[4] According to her, none of these different aspects of the law should "become blurred" by the excessive proliferation of the functions associated with them. Any trend moving towards "a lack of precision in legal categories' is seen as "a threat of disorder". If the rise in victim participation is not properly controlled, it could contribute to the "patchwork" nature with which criminal law is currently threatened.[5]

Other jurists, however, have called for a wider conception of the criminal justice system, situated at the crossroads of many different purposes, even if tensions might inherently make this configuration difficult. For Frédéric Gros, a professor of political philosophy, "a

1. X. Bébin, *Quand la justice crée l'insécurité.*
2. Regarding the birth of the Penal Code in France, Pierre Lascoumes *et al.* (*Au nom de l'ordre*, 10-11) have identified the three major kinds of punishments that structure debates on criminal justice: "punitive" measures, attempts at "deterrence", and "socialising" punishment. In an attempt to establish a "democratic theory of punishment", Bertrand Guillarme in *Penser la peine* (Paris: PUF, 2003) has indicated how "retributive" and "consequentialist" philosophies of punishment can be linked. In her first article on victims' rights in the criminal justice system, Lynne Henderson explains which functions are traditionally associated with the criminal justice system in American legal debate, in order to examine how (and to what extent) victim participation is pertinent to each of the latter. L. Henderson, "The wrongs of victims' rights", 987-99.
3. Mireille Delmas-Marty, *Rapport sur la mise en état des affaires pénales. Commission Justice pénale et droits de l'Homme* (Paris: La Documentation française, 1991).
4. Mireille Delmas-Marty, *Pour un droit commun* (Paris: Seuil, 1994), 18.
5. M. Delmas-Marty, *Pour un droit commun*, 30.

monstrous punishment is a punishment restricted to a single purpose".[1] According to Gros, the truth of a criminal sanction lies in "the movement from one purpose [of the criminal justice system] to another". It is thus necessary to think about the plurality of objectives linked to the criminal justice system. Antoine Garapon views the development of new objectives as a means to exit the "crisis of punitive symbolism" that our societies are currently experiencing. This crisis is seen as a result of serious doubts regarding the rehabilitative virtue of prison (which is to give criminals the means to reintegrate into society) and its safety (reducing crime).[2]

Victim compensation

Another aspect of the debate on how open the criminal justice system should be to new objectives, linked to the increased presence of victims in the courtroom, is the question of how compatible each of these new objectives may be with the traditional aims of criminal trials. In the United States, victim compensation plays an important role in debates on measures that seek to make "restitution" to the victim an additional penalty;[3] or in the French case, in debates on the very presence of civil parties in a criminal trial. As early as 1985, law professor Lynne Henderson expressed scepticism regarding the expansion of the functions fulfilled by the criminal justice system. Referring to classic authors such as Jeremy Bentham and Raffaele Garofalo, she emphasises that "compensation to victims is not a good end in and of itself".[4] The criminal justice system must be recentred on its four traditional objectives: retribution for the crime, prevention of the crime, the rehabilitation of defendants, and their neutralisation. In France, while Philippe Bonfils proposes a significant re-evaluation of criminal law by fully recognising the capacity of victims to "support or trigger public action", he nevertheless suggests limiting civil action to civil courts.[5] He criticises the confusion created by bringing public and civil suits into criminal proceedings. Other experts have expressed concern about the system if punishment is excessively endowed with a function of symbolic reparation for the victims. This is the position held by law professor Maria Luisa Cesoni, and anthropologist and psychiatrist Richard Rechtman.[6] Without denying the importance of measures that seek, from the victim's point of view, to repair the crime committed, these two authors would prefer for this operation to take place outside of the criminal justice system rather than within it. Working from the notion of psychological reparation, they follow a unique line of reasoning but ultimately agree with critics of the "privatisation of the criminal justice system".[7] Yet other jurists believe that the contemporary crisis of criminal law is linked to the growing trend of victims expecting compensation, and

1. Revisiting the philosophy of law, Frédéric Gros identifies the four "centres of meaning" of the criminal justice system, at the crossroads of which verdicts are elaborated today: the "paradigm of the Law" (reasserting the trampled majesty of the Law); the "paradigm of society" (protecting social interests by neutralising those who threaten them); the "paradigm of the individual" (taking into account the individual, in this case the convict, to transform him or her); and most recently developed, the "paradigm of suffering" (appeasing the suffering of victims). See Frédéric Gros, "Les quatre foyers de sens de la peine", in A. Garapon *et al.*, *Et ce sera justice...*, 111-38.
2. A. Garapon, "La justice redistributive", 265.
3. This is provided for in California's 1982 Victim's Bill of Rights, as well as in the Federal Victim and Witness Protection Act.
4. L. Henderson, "The wrongs of victims' rights", 1009.
5. P. Bonfils, *L'action civile...*.
6. Maria-Luisa Cesoni, Richard Rechtman, "La 'réparation psychologique' de la victime: une nouvelle fonction de la peine?", *Revue de droit pénal et de criminologie*, February 2005, 158-78.
7. X. Pin, "La privatisation du procès pénal".

thus launching criminal proceedings that in fact create a completely different situation: that is to say, the accusation of an individual and his or her possible criminal sanction. The philosopher Paul Ricœur emphasises this issue.[1] According to him, we are witnessing "the social resurgence of accusation", linked to victims' expectations regarding compensation. Victims thus come to see the responsible parties (in terms of compensation) as the guilty parties (in terms of criminal sanctions). In order to avoid this problematic trend, Ricœur suggests that it would be better to dissociate indemnification practices – viewed as a technique to manage the risk dimension of human interactions – from the imputation of responsibility.[2]

The therapeutic objective

The question of the psychological and psychotherapeutic dimensions associated with criminal trials is now an important element of jurists' normative work on the presence of victims in the justice system. Sometimes working in collaboration with psychological specialists, jurists view the "effects" of trials on the psychological well-being of victims in a variety of different ways. Some experts have been very sceptical with regard to the effective contribution of criminal justice to the "recovery process". In their view, as a result of the very nature of its organisation, including when it incorporates "free style narratives", the trial system should not be mistaken for a psychotherapeutic mechanism. Lynne Henderson draws on her personal experience as a rape victim, as well as her competencies as a law professor, when she affirms that, in this sense, "despite the success of the criminal trial, I learned very early that the recovery takes place independently of the criminal process".[3] Victim Impact Statements could even present non-negligible risks to the dignity of victims.[4] With regard to the contribution of the trial to the grieving process, different arguments are invoked to describe this as a "red herring": the duration of the trial is generally too long, it "abusively" brings the deceased back to life, the punishment meted out can only be seen as "disproportionate" with the extent of suffering.[5] Most frequently, such considerations feed into a critique of the expanded role of victims in the criminal process, even if this critique is made in the interest of these same victims.

Other experts have expressed more confidence in the therapeutic benefits of criminal trials. Raymond Verdier, a specialist in legal anthropology, consequently emphasises the value of laws that, by granting victims "their true place in the criminal process", allows them to be "recognised as such in order to be able to grieve".[6] Other experts, more warily, call for a detailed assessment of the effects of a trial depending on the nature of the crime, the characteristics of the victim(s), and the practices of the magistrates and lawyers involved. Leonore Walker, a lawyer specialised in violence against women, thus observes that "it is dangerous

1. Paul Ricœur, *Le juste* (Paris: Éditions Esprit, 1995), 41-70.
2. P. Ricœur, *Le juste*, 60.
3. L. Henderson, "Revisiting victims' rights", 439.
4. This argument is notably made by S. Bandes, "Empathy…", 366.
5. C. Eliacheff, D. Soulez-Larivière, *Le temps des victimes*, 205ff., 262.
6. R. Verdier (ed.), *Vengeance…*, 6. Raymond Verdier has a PhD in law and a PhD in religious studies from the École pratique des hautes études (EPHE). He has attempted to shift the essentially negative view that legal experts have of vengeance, by demonstrating the highly regulated nature of vindicatory systems and the nature of the initiatives offered to victims within these systems. He was among those who sought to expand the role of victims in measures designed to deal with situations of violence, in particular in the series of works that he edited between 1980 and 1984: *La vengeance. Études d'ethnologie, d'histoire et de philosophie* (Paris: Éditions Cujas, 4 vols).

to make any unilateral conclusions about how testimony impacts on women violence victims. Clinical data from the field makes it clear that, for some women, testifying is a horrendous experience and sets back their healing but for others it is wonderful and saves years of psychotherapy".[1] A new field of research has even emerged in the United States to try to assess these phenomena objectively, focusing on the notion of "therapeutic jurisprudence". David Wexler, a law professor, is one of its leading proponents.[2] Pamela Casey, a psychologist, David Rottman, a sociologist, and Wexler have all been consultants to the National Center for State Courts, a non-profit organisation created by Supreme Court Justice Warren Burger in 1971 in order to support American courts with programmes, studies, and counsel.[3]

Finally, independently of the opinion that one may have regarding the effects of the trial system, some jurists have challenged the very legitimacy of this therapeutic outcome. Although now coming from a different angle, here we find once again criticisms of the confusion between "private" and "public" interests. In this perspective, the confusion is attributed to the problematic evolution of how our societies deal with loss and misfortune. With the decline of religious practices, it is suggested that public trials are now seen as a substitute for private funeral rites.[4] Already sceptical regarding the therapeutic benefits of the trial process, authors such as C. Eliacheff and D. Soulez-Larivière have ironically suggested that perhaps some victims use the trial to try to "speak to the dead". Referring to certain trials, where "hundreds of victims who had lost their mother, father, brother, sister, husband, wife or partner [...] unabashedly displayed their private affairs in public", these authors paint the picture of "a perverted judicial stage".[5]

Victim empowerment

In both France and the United States, jurists have also examined the increased presence of victims in the criminal justice system from the perspective of empowerment. This objective is central to the position developed by Robert Cario, an advocate for victimology in France: "Regardless of the expression used, the strategy implemented is empowerment: the victim, at the centre of the process, must remain as much as possible master of his or her own affairs."[6] Studies have been conducted with victims via questionnaires, in order objectively to describe the effects of their participation in the process. The work done by Edna Erez, a sociology professor in the Department of Criminology, Crime and Justice at the University of Illinois (Chicago), illustrates this approach. Several of her articles published between 1990 and 2000 are based on studies conducted in the United States and a number of other countries (Poland and Australia in particular); their conclusions tend to be favourable to legal processes and systems that allow for greater victim participation.[7]

From a more critical perspective, some jurists have examined the effects of criminal trials in terms of victims' "ability to take responsibility" ["*responsabilisation*"] and "ability to feel in control" ["*autonomisation*"] when faced with misfortune. Jurists who have adopted this

1. Cited by L. Henderson, "Revisiting victims' rights", 44-5.
2. David B. Wexler, "Therapeutic jurisprudence. An overview", *Thomas Cooley Law Review*, 17, 2000, 125-34.
3. Pamela Casey, David B. Rottman, "Therapeutic jurisprudence in the courts", *Behavioral Sciences and the Law*, 18, 2000, 445-57.
4. C. Eliacheff, D. Soulez-Larivière, *Le temps des victimes.*
5. C. Eliacheff, D. Soulez-Larivière, *Le temps des victimes*, 240.
6. R. Cario, *Victimologie...*, 40.
7. Cf., for example, Edna Erez, "Victim participation in sentencing. Rhetoric and reality", *Journal of Criminal Justice*, 18, 1990, 19-31.

approach believe that the increased presence of victims in the justice system is illusory in relation to the requirements for true empowerment. Although they confirm the importance, for individuals, of wanting to be "active" when confronted with the misfortune that befalls them, such experts are extremely wary of the effects of these individuals' participation as victims in the criminal justice system. This kind of involvement is seen as focusing on the past, rather than investing in the future. Due to the trial's inherent logic, it would inevitably drive these individuals to shift the burden of responsibility onto others, to minimise their own ability to act at the time of the offence, and to neglect their future responsibilities. Against the harmful effects of over-investing in penal logic, Lynne Henderson and Martha Minow, both American law professors, talk instead of the positive impact of forgiveness. Referencing Hannah Arendt in particular, both emphasise that victims, in distancing themselves from the crime by forgiving their offenders, are no longer alienated in a "reactive" mode and regain their ability to act.[1]

The reconstructive purpose

Finally, debate surrounding the role of victims in the criminal justice system has been marked by the significant efforts of some jurists to formulate what the "reconstructive" or "restorative" purpose of the trial process might look like. In the United States, the rather diverse movement that has emerged around the notion of restorative justice is more focused on alternatives to the criminal justice process than on internal transformations to the system.[2] This is primarily linked to the limited role played by victims in the American legal system. Since it is characterised by the greater presence of victims, the French criminal justice system grants jurists greater latitude to conceive of a restorative objective within the system itself.[3] Antoine Garapon explains this objective in the context of "relational" law. Through the face-to-face confrontation between the victim and the defendant, the trial must simultaneously affect both parties. The victim must find in the trial the possibility of moving beyond "the feeling of disdain" experienced by anyone who has been the victim of a crime.[4] The criminal, on the other hand, must find a kind of rehabilitation in the trial. While this reconstructive aim overlaps with a number of other objectives recently added to the trial process (empowerment and therapeutic jurisprudence), it is unique in that it introduces the need for symmetry – for both the victim and the accused to be influenced by the process. According to Garapon, "the abuser and the abused" must regain their "ethical ability" to awaken "their particular capacities, which have been dulled by institutional paternalism".[5]

The normative work of jurists on restorative justice sometimes involves looking far back in history and opposing the "modern" view of the justice system, which is careful to distance itself from vengeance, with the more positive approach of vindicatory systems. Consequently, according to Raymond Verdier, the "state's confiscation of vengeance" as undertaken by the justice system has a number of different effects: "1. It destroys the relation between the offender and the victim. 2. It places criminal justice and civil justice in opposition to each

1. L. Henderson, "The wrongs of victims' rights", 999; M. Minow, "Surviving victim talk", 1445.
2. For an overview of the different components of this movement, cf. Sandrine Lefranc, "Le mouvement pour la justice restauratrice. 'An ideal whose time has come'", *Droit et Société*, 63-64, 2006, 393-409.
3. For an important work explaining the meanings that could be attributed to the notion of restorative justice, especially in the French context, see A. Garapon, "La justice reconstructive", 291-3.
4. A. Garapon, "La justice reconstructive", refers to the notion of "disdain" used by Axel Honneth, *The Struggle for Recognition. The Moral Grammar of Social Conflicts* (Cambridge: Polity Press, 1995 [1st German edn 1992]).
5. A. Garapon, "La justice reconstructive", 308-10.

other. 3. It makes criminal justice an exclusively punitive form of justice, while ignoring the mechanisms of compensation, conciliation and reconciliation employed by vindicatory justice."[1] The emphasis placed on the restorative aim of the criminal justice system is thus argued to coincide with a vision of the law in which, by re-examining its own history, it seeks to find new legitimacy – through change – for certain modes of victim participation that the criminal justice system had hitherto fought against.

The political purpose

Beyond the normative work of jurists on these possible objectives of the criminal justice process, the increased presence of victims has also prompted lively debate concerning the *political* aims attributed to criminal justice, and more specifically concerning its ability to sustain a "true" form of political action in society, resisting perverted or diminished versions of politics. Although not a new step, the relationship between the criminal justice process and political action has thus been re-examined in light of the growing power granted to associations as civil parties, especially in France. This aspect of the legal discussion is less present in the United States, where the possibility for collective action by victims has been established outside of the criminal justice system, through class action lawsuits.[2] It is thus essentially in France that views are expressed on how the criminal justice process can contribute to political action.

Two approaches stand out. On one side, some jurists believe that the criminal justice process can play a role in reviving or sustaining political action by serving as a weapon for collective mobilisation. These experts thus refer to the American "cause lawyering" movement, wherein social actors wield the law as an instrument to enforce a certain number of collective imperatives in the public sphere.[3] Other experts have on the contrary pointed out the potential dangers to political action that could be caused by the increased participation of victims in criminal justice. Two concepts occupy a strategic position here: the notion of a "democracy of opinion", first of all;[4] and the notion of "penal populism", which forms the keystone of an insightful work by Denis Salas.[5] The problem that Salas observes is not the place occupied by victims in the criminal justice process as such, but rather how this role is exploited. Victim testimony, he argues, is used in convergent ways by judicial, political and media powers to "radicalise the right to punish"; a phenomenon that is characteristic of the transformations that occurred during the 2000s, according to Salas.[6]

The issue of the emotions provoked by the suffering of victims occupies a central place here. While American jurists approach this issue primarily from the angle of maintaining objective

1. Raymond Verdier, "Une justice sans passion. Une justice sans bourreau", in Raymond Verdier, Jean-Pierre Poly (eds), *Vengeance, pouvoirs et idéologies dans quelques civilisations de l'Antiquité* (Paris: Éditions Cujas, 1984), 149-53 (152-3).
2. On the collective movements that have employed class action lawsuits in the United States, see for example Peter Schuck, *Agent Orange on Trial. Mass Toxic Disasters in the Courts* (Cambridge: The Belknap Press of Harvard University Press, 1986); Liora Israël, *L'arme du droit* (Paris: Presses de Sciences Po, 2009).
3. On the topic of "cause lawyering" and its echoes in France, cf. Brigitte Gaïti, Liora Israël, "Sur l'engagement du droit dans la construction des causes", *Politix*, 16(62), 2003, 17-30.
4. Cf. Antoine Garapon, in a text that is highly critical of the expanded role of victims in society: "Une société de victimes", in Daniel Cohen *et al.* (eds), *France. Les révolutions invisibles* (Paris: Calmann-Lévy, 1998), 87-96. In Garapon's later work, the perspective adopted with respect to the restorative objective of the criminal process marks a tangible shift in his position.
5. Denis Salas, *La volonté de punir. Essai sur le populisme pénal* (Paris: Hachette, 2005).
6. D. Salas, *La volonté de punir*, 14.

judgment during face-to-face interactions between judges and victims (see above), the French perspective is interested in a reflection on public space and the effects of the "spectacle of suffering" *from a distance*.[1] Consequently, although the jurists who have adopted this perspective remind us of the central role of compassion in democracy (often in reference to de Tocqueville), they emphasise its problematic nature when it is instrumentalised in the public space. The notion of a "politics of pity", derived from the work of Hannah Arendt, thus occupies a key place in the normative work of jurists. In this approach, the "compassionate occasions" engendered by the succession of isolated occurrences (current events, catastrophes, and crimes) thus constitute the cause for political action today.[2] This transformation is often associated with the "ebbing of ideologies".[3] Consequently, the juxtaposition of immediate moral reactions to "scandalous" events – often promoted by both the media and judicial powers – would come to be substituted for the contentious encounter between collective narratives that are both structuring and contradictory, a trait of true political action.

The normative bases of doctrinal work

Studying the normative repertoire of a problematic issue in a specific arena has allowed us systematically to establish the expectations that actors are attached to, as well as the arguments that they make to explain their differences, both on the nature of the expectations deemed pertinent and on how to satisfy these expectations. Applying this method to the doctrinal debate allows us to organise the different facets of a complex legal debate into an overall picture. In conclusion, we can review the results by connecting two different layers of analysis: the identification of jurists' expectations and the analysis of their work within the framework of these expectations.

First of all, with regard to expectations, research has allowed us to distinguish two different types: shared expectations and disputed expectations. The debate on the role of victims has revived a whole set of expectations that are for the most part rooted in the long history of the trial system. This in turn has led jurists to re-examine the trial process with different concerns in mind: objectivity, equity, the measurement of suffering (for both victims and defendants), the trial system's purpose and aims. The presence of these expectations is pervasive throughout the literature, even if each author usually chooses which expectations to focus on. At any rate, the pertinence of these expectations is never called into question. We have thus identified the existence of a normative basis that is shared by all jurists: we have analysed in a new way what unites legal experts by drawing on the manner in which they treat problematic issues. Pierre Bourdieu was able to identify what jurists had in common at the level of what he called a "legal mind".[4] This refers to the global stance that all jurists

1. These considerations belong to a broader line of questioning, prevalent in France since the 1980s, on the conditions under which "true politics" can be conducted. See for example Luc Boltanski, *La souffrance à distance. Morale humanitaire, médias et politique* (Paris: Métailié, 1993), referred to multiple times in the doctrinal debate that we studied.
2. This is the conclusion reached by C. Eliacheff and D. Soulez-Larivière (*Le temps des victimes*, 131).
3. This argument is made in particular by Garapon ("Une société de victimes", 91), following the current trend in texts that more broadly condemn the rise of "victimisation". For the "unifying concepts" of this literature, see Stéphane Latté, "Les 'victimes'. La formation d'une catégorie sociale improbable et ses usages dans l'action collective", doctoral dissertation in political science, supervised by Michel Offerlé, Paris, EHESS, 2008, ch. 3 "La 'société des victimes' ou l'histoire d'une sociodicée inversée".
4. "Un esprit juridique": Pierre Bourdieu, "La force du droit. Éléments pour une sociologie du champ juridique", *Actes de la recherche en sciences sociales,* 64, 1986, 3-19 (5).

tend to internalise and which combines three different aspects: a specific relationship to texts and the past (taking "precedents" into account, paying attention to doctrine); a particular approach, in relation to what we can observe in other disciplines, to establishing the autonomy of the legal field with regard to the outside; and a way of defining oneself within the context of the field's specific hierarchy (in particular with regard to the divide between "theoreticians" and "practitioners"). Via ethnographic study, Bruno Latour has likewise identified a common basis shared by jurists in a series of practical operations, which are deemed by legal experts to provide a specific and unique form of veridiction (different, for example, from the methods of science, religion or politics).[1] Our approach allows us to identify this common basis at another level: as a set of expectations which, during a given time period, determine the issues concerning which jurists believe they have the right, and the duty, to examine the legal evolution.

In addition to shared expectations, our analysis has revealed the existence of other controversial or disputed expectations. In the debate on the proper role of victims, one part of the doctrinal work has focused on the relevance of the new objectives that could be associated with the criminal justice process: victim compensation, therapeutic jurisprudence, victim empowerment and restorative justice. Jurists differ with regard to the pertinence of these objectives. Some experts see these new objectives, either as a whole or individually, as a source of confusion for the criminal justice process, while others see them as a way to enrich the process, and even possibly a means to escape "the penal crisis". The debate surrounding victims thus appears as a moment when the shared normative basis of jurists is "fraught' – without, for the moment, a new set of expectations having emerged victorious.[2]

Our results then relate to the positions taken *within* the context of each expectation. There is striking scope and variety in the differences between jurists generated by the issue of victims. With regard to each of the major expectations cited above, it appears that a fault line consistently emerges between jurists. This line divides jurists who advocate for "controlled" objectivity, which strives to keep victims at a distance from judicial institutions (whether in the case of face-to-face interactions between judges and victims, or in the context of collective action), and jurists who support a "broader" form of objectivity, which sees the presence of victims (or of the associations that represent them) as an asset for judicial objectivity. Consequently, the line runs between those who wish to promote equity by giving victims more weapons, and those who on the contrary wish to strip them of these weapons; between those who want greater attention paid to the suffering of victims when calculating sentences, and those who want less; between "tough" jurists who assume, even perhaps encourage, a certain level of violence inflicted on the accused during the different stages of the criminal justice process, and those who strive to limit this violence as much as possible; between those, finally, who see the participation of victims' associations in the criminal process as a path towards political action, and those who are concerned about the possible political dangers associated with the rise of victims' groups.

1. Bruno Latour, *La fabrique du droit. Une ethnographie du Conseil d'État* (Paris: La Découverte, 2002).
2. Let us note that the last objective that we discussed above, the construction of true political action, is of a slightly different order. The pertinence of this expectation has never been disputed as such, but it is an issue for a limited number of jurists: those who take part in a broader intellectual debate on politics and policy in France. In this sense, it is a more "circumscribed" expectation, somewhere between shared expectations and disputed ones.

Establishing comparisons between France and the United States helps to complete this analysis by providing two important observations. First of all, it shows that despite the differences inherent to these two justice systems, jurists on both sides of the Atlantic tend to approach the criminal justice process with the same expectations. In this similar normative framework, the differences between the two systems, both in the general organisation of the criminal justice process and in the kinds of innovations that have been discussed during the last 30 years, largely explain the variations observed between the two doctrinal repertoires. The debate concerning objectivity thus varies significantly, depending on whether it concerns the face-to-face interactions between judges and victims (linked with Victim Impact Statements in the United States) or the growing power of victims' associations (in France). The debate on equity is structured differently depending on whether it takes place in a context where all civil parties are excluded (such as in the United States) and thus balance is sought between two actors, the plaintiff and the defendant, or if it takes place in the French system, which complicates reflections on equity due to the multiplicity of pairs of actors that can enter into the equation. Victim compensation as a new purpose of criminal prosecution is viewed very differently depending on whether civil action is possible within the criminal justice process or not. In addition to these differences linked to the two justice systems, differences of another kind, associated with each country's evaluation repertoire,[1] could be further explored in order to better understand how this legal debate unfolds in both societies.

Links with criminal policy

This representation of the doctrinal debate based on the study of normative repertoires thus depicts a group of actors structured around a certain number of expectations, each of which constitutes a dividing line between jurists: on one side, the oppositions built around the principles that the trial process must respect (objectivity, equity, the measuring of suffering inflicted); on the other, the oppositions built around the objectives associated with the trial process. Among jurists, each fault line produces a position that could be broadly summarised as "pro-victim" and "anti-victim". The overall position of each jurist in the doctrinal debate can be represented as the spectrum of arguments along each of these fault lines, some orienting opinion towards a pro-victim stance and others towards an anti-victim stance. The complexity of the doctrinal space surrounding the issue of victims is due to the fact that these axes do not share the space in the same way. All jurists are not pro-victim or anti-victim along all the axes, though some of them may be. In order to elaborate a global position, each jurist must therefore structure and weigh his or her arguments along each axis.

It is interesting to relate these results to works of political science that deal with the recent history of criminal policy.[2] These studies have all emphasised the structuring nature of a spectrum ranging between the "repressive" and "liberal" poles, and which cuts across all the categories of actors involved in the elaboration of criminal policy (political leaders, senior

1. In the sense, for example, used by M. Lamont, L. Thévenot (eds), *Rethinking Comparative Cultural Sociology*.
2. For France cf. especially: S. Latté, "Les 'victimes'...", which discusses the different actions undertaken, since the 1980s, to give legal, administrative, political and psychological consistency to the cross-cutting status of the "victim"; and S. Enguéléguélé, *Les politiques pénales...*, which addresses the broader evolution of criminal policy. For the United States: Frank Weed, *Certainty of Justice. Reform in the Crime Victim Movement* (New York: Aldine de Gruyter, 1995); Vanessa Barker, "The politics of pain. A political institutionalist analysis of crime victims' moral protests", *Law and Society*, 41(3), 2007, 619-63.

civil servants, law professors, lawyers, victims' associations). This polarisation has occurred since the 1970s with the rise of the debate on the role of victims in the criminal justice system. It has produced two different pro-victim positions, one repressive and the other liberal. The repressive position brings together actors who have tried to expand the powers granted to victims and their representatives in the justice system while still defending an increase in repression. In the United States, during the 1970s and 1980s, one can clearly see the connection between conservative circles in the fight against crime and certain victims' advocacy groups searching for institutional support.[1] From 1975 in France, we can likewise observe the shift in criminal policies towards an increase in repression. This movement was led by "neo-classical" jurists[2] and the Minister of Justice, Alain Peyreffite, and was behind the so-called "Security and Freedom" law passed in 1981 which dovetailed with the demands made by victims' associations, such as Légitime défense, created in the 1970s.[3]

On the liberal end of the spectrum, in both the United States and France, we find actors who seek to improve the conditions of crime victims without necessarily increasing repressive measures. These actors prefer out-of-court mechanisms: improving compensation conditions, providing psychological support, and establishing mediation bodies. In France, the liberal end of the spectrum brings together a number of diverse actors who, under the leadership of the Minister of Justice Robert Badinter in the 1980s, fought for an alternative to the "Security and Freedom' law and initiated a new victim assistance policy, via the creation of a victim support association spearheaded by the state.[4] This end of the spectrum unites legal "reformists" associated with the Syndicat de la Magistrature (Magistrates' Trade Union), the champions of victimology, and representatives from the "legal left", concerned with issues of equal access to the law.[5]

The polarisation of criminal policy actors continued to produce two different pro-victim approaches during the 1990s and 2000s, as new initiatives were proposed. In France, liberal jurists continued to support victim assistance programmes, but went even further than in the 1980s with regard to the transformations they wished to see in the criminal process itself. This shift was evident when the 2000 Law on the Presumption of Innocence and Victims' Rights was being drafted (sometimes called the Guigou Law after the socialist Minister of Justice who championed it). Jurists on the repressive end of the spectrum, on the other hand, gained momentum thanks to the criminal policies spearheaded by President Nicolas Sarkozy, especially with regard to the increased participation of victims' associations in criminal follow-up procedures. The positions adopted by Bébin and the Institut pour la justice in the doctrinal debate surrounding the place of victims in the criminal justice system generally fall at this end of the spectrum. In the United States, Vanessa Barker has likewise insisted on the importance of state structures and political actors with regard to the criminal process.[6] She demonstrates the importance of local configurations linked to each state. According to

1. See F. Weed, *Certainty of Justice*...
2. In the sense that these jurists consider offenders to be "free from any external constraints, developing their strategies based on utility" (S. Enguéléguélé, *Les politiques pénales*..., 49). In this perspective, "neo-classical" circles emphasised the simultaneously retributive and preventative objectives of punishment. At the time, these jurists sought to set themselves apart from the "new social defence" movement that focused on the rehabilitative purpose of the penal system and which inspired a large part of criminal laws after World War II.
3. S. Latté, "Les 'victimes'...", 72-80.
4. This was the creation, in 1986, of the Institut national d'aide aux victimes et de médiation (Inavem - French Victim Support and Mediation Institute).
5. S. Latté, "Les 'victimes'...", 81-107.
6. V. Barker, "The politics of pain...".

Barker, since the 1980s victim participation in the criminal process has been supported by actors on the repressive end of the spectrum in political contexts that were more "populist", while actors on the liberal end were more likely to see their programmes succeed in political contexts that were "deliberative".

Whether we examine criminal policy or doctrinal work, we are thus forced to conclude that actors can be pro-victim in two different fashions, falling either on the repressive or the liberal end of the spectrum. To this end, the two research strategies that we have employed – examining the normative bases of doctrinal work and analysing the role of actors at the level of criminal policy – are mutually reinforcing. Nevertheless, the study of doctrinal work additionally brings to light other fault lines between jurists that are more complex, and which cannot be reduced to the dichotomy between repressive and liberal attitudes to punishment. As we have seen, in the doctrinal debate jurists do in fact differ with regard to many other matters: their view of objectivity, their concept of equity, how to measure the suffering endured by victims, how to make a link between the criminal process and political action, and even the pertinence of new objectives that could be associated with the increased presence of victims in the criminal justice system. As a consequence, we may be tempted to wonder what becomes of this normative complexity when we move from examining doctrinal work to investigating the multiple arenas that contribute, with the active participation of jurists, to the development and implementation of criminal policies. Would we thus be dealing with a dynamic of normative simplification that merits further study? Or are the normative bases of criminal policy more complex than they seem? We hope that the analytical framework that we have developed in this article will be able to provide useful methodological tools to better address these issues in the future.[1]

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Appendix 1. Methodology for selecting our corpus

The corpus that we selected is composed of books and articles published in law journals, in which, since the beginning of the 1980s, jurists have developed their expert positions on how the criminal process should incorporate the presence of victims. We combined three different methods to select this corpus.

1) We identified the primary "reference" texts (the ones that are the most frequently cited or which are essential references) by using groups of keywords (such as "victim", "criminal" and "trial", or in French "victime", "pénal" and "procès") in different search engines (such as Google Scholar).

2) This first step allowed us to identify other authoritative texts on the subject, which helped to structure the main shared and disputed arguments developed by jurists.

3) We likewise gradually identified texts which, despite not being frequently cited, seemed to reflect innovative positions with regard to the corpus as then constituted.[1]

The corpus was deemed sufficiently viable for analysis once, for each country, the combined use of these three methods (keyword searches, primary references, secondary references, and innovative positions) allowed us to reach a "saturation" of pertinent contrasts, to use the term employed by Glasner and Strauss.[2] The final corpus includes 20 articles and 20 books for the French context and 19 articles and 3 books for the American context.

Appendix 2. Bibliography of primary sources for the study of the doctrinal work of jurists (in chronological order)

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1. To this end, we applied the constant comparative method of qualitative analysis developed by Barney Glaser and Anselm Strauss in *The Discovery of Grounded Theory* (Piscataway: Aldine Transaction, 1967); French translation: *La découverte de la théorie ancrée* (Paris: Armand Colin, 2010).
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