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"What is Suffering Worth?" Perspectives Across Disciplines on the Treatment of Victims

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Contents

"What is Suffering Worth?" Perspectives Across Disciplines on the Treatment of Victims

Presentation and Peer-Review Introductory Explanation

This interdisciplinary Edited Collection explores a crucial but little-studied issue with growing importance today: what is the value of harm suffered by victims, whether of terrorism, crime or natural disasters. In law, politics, economics and public opinion, answers differ widely, and unequal treatment is the norm.

Across the globe, victims evoke a range of feelings, from compassion verging on celebrations of heroism, to denial, anger, indifference and even repulsion. Those reactions translate into wide variations in legal and economic responses to their harm.

The Issue brings together experts in law, economics, criminology, history and philosophy to compare perspectives from the United States and France. It is the outcome of a symposium held at the Maison française/French House of Columbia University in New York on 10 September 2019.

This symposium was sponsored by the *Matrice Memory Program*, headed by Denis Peschanski[1] and its component "Programme 13-Novembre" headed by D.P. and Francis Eustache[2]. *Matrice* is a technological platform funded by the French State in order to study the relationship between individual and collective memory through the comparative study of testimonies - at different scales - of WWII and 9/11. *13-Novembre* is a transdisciplinary research program that will run for 12 years: its objective is to study the construction and evolution of memory after the terrorist attacks of 13 November 2015 in Paris.

A peer-review process was conducted for each contribution which led to a number of changes. These changes are summarised in the following lines.

Cyrus R. Vance Jr, *Caring for the Victims in the Manhattan District*

This was a keynote speech. Mark Cohen (Professor, Vanderbilt University) carefully reviewed the speech, suggesting section titles, checked the factual details and suggested that in addition to the text of the speech there be appropriate references added so that the reader could obtain more details about the Manhattan District Attorney's Office programs. These subtitles and references have been added.

François Molins, *The perception of the victim by the French judicial authorities*

This was a second keynote speech. Patrick Morvan (Professor, Panthéon-Assas University)

[1] http://www. matricememory.fr
[2] https://www.memoire13novembre.fr.

reviewed the speech. The structure of the discussion has been revised so that the reader can first understand the role assigned in French law to the victim and the prosecutor respectively, in the course of criminal proceedings. To avoid being too descriptive or abstract, it has been suggested that the relationship between the victim and the prosecutor should be explored. The author then emphasized the empathy and emotions that could interfere in this relationship. Experience feedback is presented in a third section. The author was invited to provide additional details on the public communication operations he implemented immediately following the 2015 terrorist attacks in Paris. Titles and subdivisions have been added.

Mark A. Cohen*, The "Value" of the Victim: An Economic Approach*

Robert Field (Professor, Drexel University) reviewed this paper. Based on his review, the author has introduced two main changes to his original article. First, he explained how economists empirically estimate ex ante versus ex post valuation (this distinction was made but no explanation on how estimation procedures vary). Second, he explained how victim valuation might be used in other contexts such as determining an optimal penalty.

Patrick Morvan*, The Ideal Victim: A criminological approach*

Emmanuel Dreyer (Professor, Panthéon-Sorbonne University) and Mark Cohen (Professor, Vanderbilt University) reviewed this paper and made several suggestions. The author has a different approach to defining the "ideal victim" from Nils Christie and proposes a slightly different taxonomy. It wasn't crystal clear in the abstract and the conclusion what the key insight/difference was from Nils. It was suggested to emphasize why the author's five criteria are different from Christie' six criteria. In light of these observations, the author has presented in a clearer and more detailed way the contribution of his new taxonomy and the differences it presents with that of Christie. The reviewer was also struck by the conclusion of the paper which talked about suffering as a key component. It wasn't obvious to him how suffering fits in to the main thesis or the 5 criteria. This remark led to transferring part of the conclusion to the beginning of the article in order to give a definition of the notion of suffering. The reasons for the compassion experienced were thus evoked before setting out the criteria of the ideal victim. The logical order of the developments has also been rectified on several occasions.

Robert I. Field*, The Value of the Victim in American Tort Law: A Mismatch Between Theory and Practice*

Mark Cohen (Professor, Vanderbilt University) reviewed this paper and suggested that the introduction more clearly provide context for the non-American reader on the role of tort law and how it relates to victim rights. While this paper focuses on civil tort law, it was noted that American criminal law increasingly provides for victim restitution – although this is very limited in scope and in practice. In addition, it was suggested that the comparison be made to the criminal law – including how it is distinguished in legal theory from civil law and how this distinction relates to the role of each in providing victims with compensation for harm.

Philippe Pierre*, The Value of the Victim in Tort and Compensation Law*

Daniel Gardner (Professor of Private Law, Laval University, Quebec) reviewed this article. The paper, which was judged positively overall, needed some light improvements. Following those suggestions, the author endeavored to better specify the scope of the principle of full reparation, which led to the statement of its normative value and presentation of exceptions such as workers' compensation. He put the statute law in relation to case-law, in particular by outlining the enhanced compensation for workplace accidents. On this point, he also completed the bibliographical apparatus in French and Comparative law. Moreover, it was rightly observed that many examples were related to the compensation of victims of terrorism, which the author justified by underlining the link between this paper and the *Matrice Memory Program* (see above), which focuses on the consequences of terrorist acts in France and the USA. Finally, he sharpened the legal terminology, seeking a better correspondence with Common Law institutions.

Denis Peschanski, ***The victim, a recent invention in French collective memory***

This article, which was originally intended for publication in an international journal of criminal policy and research, was submitted to a mainstream peer-review process. Two anonymous reviewers acknowledged its major contributions and suggested the following modifications, which were made by the author: 1) Replace "memory patterns" with "memory paradigms", to translate more adequately the author's concept of "régimes mémoriels". 2) Bring a double precision on the definition of collective memory by highlighting the question of the scale of analysis (from the segment of society to society). 3) Specify the conditions of memory-recording, i.e. the "meaning", the "social utility" that explain the selection by collective memory. 4) Add the "memory paradigm" of the 1970s, to show that negative figures can also structure collective memory. 5) Add references to Paxton and to four CREDOC studies put online since November 2020. 6) Specify what is meant by "memory sciences" and what justifies not limiting oneself to memory studies.

Marc Crépon, ***Terrorism, Terror and their Victims in Philosophy***

Perrine Nahum (Research Director, CNRS) reviewed this article. Most of the comments focused on the need to further clarify the boundaries and content of the two criteria for defining violence (the ruin of trust and 'reification') when it takes the form of a terrorist attack. Furthermore, it was pointed out that that there should be a better understanding of what, in such tragic circumstances, determines the status of the victim and gives him or her specificity. The article has been reworked along these lines. The author was also invited to take into consideration certain remarks made in recent scientific literature by historians, neurologists and psychiatrists on the specific effects of terrorist violence on the bodies and minds of their victims.

Patrick Morvan Mark A. Cohen

Caring for the Victims in the Manhattan District

Cyrus R. Vance Jr, Manhattan District Attorney, New York*

Abstract

This paper examines how the New York City District Attorney's Office has expanded its scope of services to focus on crime victims. While the role of a District Attorney is to prosecute crimes, it is fundamentally about seeking equal justice for all crime victims – including victims of terrorist attacks, mass shootings, and rape and sexual assault. Among the initiatives highlighted are investments to end the backlog of rape kit testing, programmatic support for victims of crime who are LGBTQ, immigrants, hearing impaired, and non-English speaking community members. These initiatives have expanded beyond the State of New York into other States as well as the Federal government.

Keywords: victim assistance; rape victims; victims of terrorism; mass shooting victims

Introduction

Since I became Manhattan District Attorney in 2010, my Office has introduced and championed a host of programs and policies that demonstrate that we care about all victims and emphasize our commitment to equalizing justice. Our focus on serving all victims, equally, is not a mere philosophical concept; it's the foundation of our daily practice to create a more "just" criminal justice system. It's our steadfast belief that victims of crime should be treated like victims of crime, irrespective of their gender, sexual orientation, immigration status, native tongue, or socioeconomic background.

In a few minutes, I will highlight some of my Office's impactful approaches to promoting and achieving equal justice for victims. Our initiatives include: a groundbreaking investment dedicated to ending the national rape kit backlog; programmatic support for victims of crime who are LGBTQ, immigrants, and hearing impaired; and opening a satellite office that brought greater access to bilingual justice services to our predominantly Spanish-speaking northern Manhattan population.

By serving all victims of crime, particularly those whose cries for help have traditionally gone unanswered, we are moving justice forward in New York City.

I. Victims of 9/11 and Terrorism

Before I go into greater detail about our efforts on behalf of crime victims, I want to pause to acknowledge that tomorrow will mark the 18th anniversary of 9/11. This wretched milestone is inescapable at this time of year, but especially when considering this symposium's title -- "What

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is Suffering Worth?"

Seven miles south of where we're gathered today, on a Tuesday morning that started much like this one, time suddenly split into two -- before and after the terror attacks on the Twin Towers. And as much as this wonderful city has risen from the literal and metaphorical ashes in the ensuing two decades, one cannot help but think of all who were lost that day and the family and friends and endless potential they left behind.

Later today, Professor Patrick Morvan will speak about the criminologist's idea of so-called "ideal" victims, such as those who die in terrorist attacks. Their innocence supposedly inspires sympathy from the greater public that sometimes withholds similar concern from victims of other crimes. As a prosecutor, I feel it's imperative to declare my objection to the notion that there are tiers to victimhood. However, that does not lessen the tragedy of 9/11 -- or the need to remember its victims, in particular the first responders who are still suffering and dying from 9/11-related illnesses, and stay vigilant against future terror attacks.

This is just as true for Parisians after the November 2015 terror attacks as it was for New Yorkers post-9/11. No one city, or nation, has an exclusive claim to the suffering associated with terror. Nor is any one ideological group solely responsible for terrorist attacks.

Earlier this year, my Office secured New York's first-ever conviction on the charge of murder as a crime of domestic terrorism against white nationalist James Harris Jackson for the execution of 66-year-old Timothy Caughman (Manhattan District Attorney's Office, 2019). Jackson traveled from Baltimore to New York with the goal of inciting a race war, taking inspiration from white supremacist websites. It is vitally important for the American law enforcement community -- as well as our colleagues in Europe -- to devote the resources necessary to confront the growing and increasingly deadly transnational threat of white nationalist violence. And, to label mass violence motivated by race, gender or sexual orientation of racist for what it is: Terrorism.

Under the leadership of Governor Cuomo, New York State is primed to become the first in our nation to classify "hate-fueled" killings by white supremacists as domestic terrorism (Wang, 2019). I urge our state legislature to adopt the governor's proposal, and encourage the other 49 states to enact similar laws that address this clear and present danger.

II. Victims of Mass Shootings

Just as 9/11 seared the American consciousness with images of death and destruction, today American life is haunted by scenes from mass shootings that stain our schools, houses of worship, shopping centers, and entertainment venues. But whereas the singular act of 9/11 provoked swift congressional and military action -- the validity of which can be debated at another conference -- these modern-day massacres, often carried out by young men brandishing assault weapons, inevitably result in feckless calls for "thoughts and prayers" from Republican leaders backed by the National Rifle Association. Americans recently heard this tired, old song after the August 4 shooting rampages in El Paso and Dayton that left more than 30 innocent people dead.

Inaction from Senate Majority Leader Mitch McConnell and the Republican-majority U.S. Senate

fails to achieve justice for victims or society. It's moral cowardice that perpetuates unconscionable violence and human suffering.

Make no mistake, the death and devastation wrought by America's gun violence epidemic is not limited to mass shootings. Thousands of people die each year in gun-related homicides to far less televised acclaim. The collateral consequences these incidents of gun violence imbue on families, neighborhoods, and cities are no less far-reaching or harmful. To the rest of the world, this gun violence is anathema and would be intolerable if it happened in their homeland. To Americans, according to gun advocates, it's the price we pay for the Second Amendment.

The U.S. Constitution does not mandate that we suffer this bloodshed in silence for some unalienable right for all citizens to carry AR-15s. Indeed, there's another way -- a path in which our nation enacts universal background checks on every firearms purchase and bans assault weapons that have no business on our streets. A path where people's lives are valued more than the bottom line of firearms manufacturers.

If all we're doing is paying lip service to suffering – vis a vis "thoughts and prayers" – then we are failing to make our communities safer or show victims of crime they are valued. Therefore, we must invest our finite resources – be they human, financial, or political -- in providing aid to these victims, as well as their affected communities.

III. Victims of Rape

So, how does my Office show it genuinely cares about victims? There are countless ways, but this morning I will devote the remainder of my time to highlighting three distinct approaches that have transformed our relationship with historically marginalized victims of crime and increased their access to justice.

The first approach I will highlight is my Office's investment to eliminate the national backlog of sexual assault kits, better known as rape kits. When we talk about perception of a victim's value, the image of an untested rape kit collecting dust in a police storage facility for months, even years, after an assault speaks volumes. It's the embodiment of how law enforcement has too often viewed survivors of sexual assault – with the type of skepticism, indifference, and even contempt that has created a chilling effect that stopped women from reporting such abuses. Can we honestly say with a straight face that we value victims of sexual assault, and are determined to solve their cases, when no effort is made to test crucial evidence?

Of course not, and yet for decades this national rape kits backlog perpetuated a seismic injustice against sexual assault survivors, and in particular women, denying them basic, equal, civil rights under the law. This backlog not only undermined justice and equality; it also made every woman and American less safe.

A. Investing in Rape Kits

In 2014, my Office announced what was then an unprecedented, three-year, $38 million national investment to address this intergenerational injustice (Queally, 2014). Using dollars seized in our

prosecutions against major banks, we invested in 32 jurisdictions in 20 states, and asked Congress to match our investment.

At the time, estimates suggested there were hundreds of thousands of untested rape kits – each of which represented a broken promise to a survivor. The Congress acted soon thereafter, enabling the U.S. D.O.J.'s Bureau of Justice Assistance to pledge $41 million toward ending the backlog (Office of the Press Secretary, 2015). From that initial seed, the federal government has contributed more than $140 million and counting to this monumental justice issue.

We knew based on our own history in New York City that eliminating such a backlog, while not easy, could be done. Between 2000 and 2003, my predecessor Robert Morgenthau and a team of pioneering prosecutors spearheaded efforts to eliminate our city's backlog – which then included more than 17,000 kits (Vance, 2019: 1). Clearing the backlog produced an immediate impact on our public safety and brought long-awaited justice to survivors. It enabled our Office to file dozens of indictments based on DNA cold-case hits, and to help solve crimes across the country by entering these DNA profiles into the FBI's nationwide databank.

Our Office learned from this successful endeavor that testing all rape kits, regardless of the facts of the case, could help identify suspects, convict perpetrators, prevent future offenses, and even exonerate the innocent. A decade later, we incorporated these lessons into our groundbreaking investment toward ending the national backlog.

Not every case would be solved, I said when we announced this program, but every kit would be tested and every hit would be investigated. Thus, we would begin to rectify what had been for far too long a tragic failure of government and law enforcement at all levels – a decades-long, systematic denial of equal rights.

This March, we hosted an event, titled "Testing Every Kit," at John Jay College of Criminal Justice, where we announced the extraordinary results of our three-year investment, amplified the voices of a group of fearless survivors whose cases were solved thanks to our program, and convened panels on noteworthy topics such as victim-centered approaches and the path to sustainability and legislative reform (John Jay College of Criminal Justice, 2019).

The investment resulted in:

- More than 55,000 rape kits tested in 20 states.
- Of those, more than 18,000 newly developed DNA profiles were updated into the FBI's Combined DNA Index System.
- 186 new arrests and 64 new convictions, including 47 felony sexual assault convictions.
- The elimination or near-elimination of rape kit backlogs in 6 states – Arkansas, Georgia, Kentucky, Michigan, North Dakota, Ohio, and Oregon.

Dollars alone didn't yield these life-changing, and potentially life-saving, victories. We owe these results to the leadership, determination, and courage of members of law enforcement, elected lawmakers, tireless advocates such as Mariska Hargitay and her Joyful Heart Foundation, and fearless survivors. Our partners' collaborative spirit enriched the lives of countless survivors, and will undoubtedly serve as a model as this work continues.

B. Impact of Rape Kits on Justice for Rape Victims

Six months after our announcement, I remain inspired by the courage and strength of the survivors who took the stage to share gut-wrenching memories of their assaults, their tumultuous quest for justice, and the joy their perpetrators' arrest brought them.

This powerful quartet of women had rightfully assumed that we, in law enforcement, had forgotten about them. They had for years watched law enforcement forensically test every firearm they recovered, and every drug powder they seized, within days of obtaining *those* kinds of evidence. And after navigating this seemingly endless current of disappointment and frustration, they received calls they never thought they would, informing them that their assailant has been identified, and that justice – a concept they would be forgiven for disbelieving – could now commence.

Imagine you were that victim of a crime, a particularly heinous, life-altering crime, and you had to wait years for this type of reassurance that you, as a victim, had value … Value that meant not only your statements about the attack would be investigated, but that the evidence you provided would be too. That should not be too much to ask for us as law enforcement. And if it is, we need to reevaluate our priorities.

It's important to reiterate that not every case will be solved or lead to prosecution. But testing every kit is our best practice and our moral imperative – both to ensure survivors receive the support and action they deserve, and to ensure that these backlogs never happen again in New York or any other state in America.

C. Future Policies to Achieve Justice for Rape Victims

How then do we ensure we keep this promise to survivors? Dedicated funding streams, while a necessary component to end the backlog, are not sufficient alone. States must simultaneously rewrite their laws. We're proud that our program has contributed to a wave of new legislation around rape kits testing in states such as Georgia and Kentucky, and look forward to the paradigm shifting further in the coming years.

Our *Test Every Kit* report recommended four key legislative actions (Vance, 2019):

- One, states have to mandate timely testing of all new rape kits, with ongoing funding guaranteed by the state.
- Two, states must require, by statute, the testing of all backlogged kits.
- Three, states must require an annual statewide inventory of untested rape kits and develop systems to track kits throughout the testing process.
- And four, states including New York must eliminate statutes of limitation for felony sexual assault charges.

We, as a society, have no excuse for putting sexual assault survivors back on the shelf. Not when we've witnessed the impact testing every kit can have not only on survivors but on the justice system as a whole. Nor at a moment when the number of sexual assaults reported to law

enforcement in New York City and across the country is rising. This is due in great part to the movement of courageous survivors, who are forcing a long-overdue reckoning with decades of gender power imbalance, toxic masculinity, and intolerable sexual abuse.

Now more than ever, we must stand vigilantly beside them, and do everything in our power to guarantee them justice, equality, and the civil rights that belong to citizens of the United States. Now more than ever, we must test every kit.

As I mentioned earlier, American survivors of sexual abuse have often remained in the shadows with their pain rather than risk coming forward to pursue justice – and for understandable reasons. Because in such cases, justice was a distant ideal; what was dangerously close and all too real was the prospect of being re-traumatized by a system that often, regrettably, neglected to treat them with the dignity and compassion they deserved.

IV. Underserved Communities

My Office is also mindful of this perception when serving other historically underserved communities – be they victims of crime who are LGBTQ, immigrants and non-native English speakers, or the hearing impaired. We make sure they know when they walk through our door that they are seen, they are valued, and their suffering is not in vain. And we deliver this message, emphatically, to the larger New York City community via our Criminal Justice Investment Initiative ("CJII").

Just two years ago, my Office showcased our ongoing commitment to equal justice by awarding $12 million in grants to 10 organizations that help members of underserved communities who face significant barriers to accessing justice (Manhattan District Attorney's Office, 2017). These investments acknowledged the need for a robust and well-resourced nonprofit sector to support victims. And today, this is perhaps more important than ever as our federal government periodically threatens to cut the funding that supports them, the Trump administration fights in the courts to end legal protections for transgender people, and our president routinely stirs up anti-immigration hatred.

Amid this atmosphere of terminal uncertainty and animosity, our CJII programs reassure victims that resources are available and provide information on how to access them. In addition, we provide knowledge about the assistance we could offer them and emphasize that ours is a safe place to report crime.

All the while, we tailored these services and support efforts to their needs, including:

- A safe and secure place to live
- Mental health services to help them work through the trauma of victimization;
- Career-readiness programs and job referrals; and,
- Programs to help strengthen families and their children.

We recognize that a 21st century justice system, particularly in a metropolitan city as diverse as ours, must provide culturally-appropriate supports – not just one size fits all strategies. They must reflect the community's experience with the criminal justice system. They must understand the

unique challenges this community faces today. And of course, they must speak the community's language.

We meet the demands of the modern justice system through:

- Our Witness Aid Service Unit , or WASU as it's commonly known, which supplies key services and counseling to crime victims, witnesses, and their families in four locations across Manhattan (www.manhattanda.org/wasu-test); and
- The Manhattan Family Justice Center, which furnishes crime victims a central hub where it can access dozens of services, including civil and criminal legal advice, counseling, childcare, and more (https://www1.nyc.gov/site/ocdv/programs/family-justice-centers.page).The leadership of my Office's entire Special Victims Bureau is located next door, so we can serve victims of not only domestic violence, but also sexual assault, child abuse, and human trafficking.

So, we've invested in culturally-appropriate supports that pinpoint how we can best assist each particular victim based on their unique circumstances. But what if, after all this time and effort crafting these supports, they're inaccessible due to the geographic realities of the borough we call home?

V. Community-Based Victim Assistance

The island of Manhattan is 13.4 miles in length, or 21.6 kilometers for my French friends in the audience. Our main office is located in lower Manhattan – a logistical nightmare for our residents living in northern Manhattan. The solution: We came to them.

In 2015, my Office opened its second satellite office – in the northern Manhattan community of Washington Heights, where hundreds of thousands of people reside a 45-minute train ride from our office in lower Manhattan. And that's on a good day. As our wonderful Washington Heights Office Director Joselinne Minaya notes, a substantial portion of North Manhattan residents never set foot below 125th Street in Harlem. They don't need to because their work, their church, and their children's schools are all in that general area. For members of this close-knit Spanish-speaking community, traveling to our main office, and discussing a crime committed against them, can feel daunting or, worse, re-open traumatic wounds.

Thus, our Washington Heights Office provides a vital link for victims of crimes, such as domestic violence and immigration fraud, to access our services. There, victims speak in their native language to someone who can translate paperwork and provide important information about the court process and an order of protection. And walk-ins receive assistance too, even if all we do is guide them toward other resources, as is the case for people requesting aid in civil matters.

Everyone, regardless of where they're from, what language they speak, or their immigration status, is welcome. And though this president and administration seek to stoke fear among immigrants and devalue their lives and experiences, we, as a local prosecutor's office, will not back down from our duty to victims. This is why I've proudly supported the Protect Our Courts Act (Hoylman, 2019) so that undocumented immigrants could feel safe coming to court and have vocally opposed proposed "ICE raids" in New York City.

The message remains: If you're a victim of a crime you're a victim of a crime, and we're here to help you.

Conclusion

I'll leave you with the words of Equal Justice Initiative founder and executive director Bryan Stevenson, who famously says we must "get proximate" to suffering to understand and impact the lives of vulnerable and excluded people.

My Office has followed this ethos in a literal, spatial sense, with the opening of its satellite office in Washington Heights, and in justice matters involving people who have been ignored for too long. And we will continue to increase our efforts to "get proximate" in the future because we believe in the value of victims, all victims, and always will.

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The Perception of the Victim by the French Judicial Authorities

François Molins, General Prosecutor to the French Court of Appeal (Cour de cassation)*

Abstract

This presentation will analyze the status and place victims have or should have in the proceedings in order to guarantee an optimal compensation for their damages according to the principle of the right to a fair trial, that is, respecting the balance of the rights of the parties involved. It will also emphasize the links between the prosecution and the victims in the proceedings and question the role of compassion for victims in the process.
I will first present the increasing role of victims in criminal proceedings. This expansion of their role in criminal justice can be seen in two ways: the development of support for the victims during the proceedings, and the development of their rights in the proceedings (Part I).
I will then analyze the consequences and criticisms of this new place conferred to victims. Even if their place in the criminal proceedings has been expanding over the years, it is nonetheless important to bear in mind the overall principles guiding the magistrates in their work for justice during the investigations and the trials: objective judgment, equity between the parties, and equality of arms, fair trial, and impartiality (Part II).
I will finally focus on the role of the prosecutor in caring for victims, using the example of the terrorist attacks based on my experience at the Court of Paris. The role of the prosecutor's office is decisive in its function of anticipation and coordination of the various actors intervening, in its function of direction and control of the investigations, as well as in its function of support to the victims and preservation of their rights (Part III).

Keywords: victims, criminal proceedings, prosecutor, terrorism, French Law

Introduction

In France, 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. Indeed, since the state granted itself a monopoly on public prosecution, victims have been absent from the trials for centuries, for the benefit of a duel between the prosecutor and the criminal.

The law, defined as a system of protected values and interests, has evolved, and during the last thirty years the role of victims of crimes has been re-evaluated significantly. Today, victims intervene almost as a third actor in the criminal proceedings, along with the prosecutor and the defendant.

Therefore, we may question the place of victims in the criminal proceedings today, as well as the consequences of this trend.

We may also question the "value" of the victim in connection with several legal cornerstones:

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equality before the law; legal procedures ensuring equality between the victims, between the defendant and the victim, and between litigants (equality of arms); equal access to a judge; and the protection of the rights of citizens.

Article 2 of the French Code of Criminal Procedure specifies that civil action aims at the reparation of the damage suffered because of a felony, a misdemeanor, or a petty offense.

What status or place should victims have in the proceedings in order to guarantee an optimal compensation for their damages with respect to the principle of the right to a fair trial, that is, respecting the balance of the rights of the parties involved? What are the links between the prosecution and the victims in the proceedings? Does compassion for victims intervene in the process, and if so, how?

I will first present the increasingly prominent role of victims in criminal proceedings (Part I) and try to analyze the consequences and criticisms of this new position conferred to victims (Part II). I will finally focus on the role of the prosecutor in caring for victims, using the example of the terrorist attacks based on my experience (Part III).

I. The increasing role of victims in criminal proceedings

Since the 1990s, in total, seven texts have strengthened the rights of victims in the criminal justice system. Today, the first article of the Code of Criminal Procedure states that, "Criminal procedure should be fair and adversarial and preserve a balance between the rights of the parties. […] The judicial authority ensures that victims are informed and that their rights are respected throughout any criminal proceeding."

The expansion of the role of victims in criminal justice can first be seen in two ways: the support for the victims during the proceedings, and their rights in the proceedings.

A. The support for victims during criminal proceedings

Several measures have been taken to seek to improve how victims are treated by implementing legal, financial, and psychological aid services.

The purpose of victim support associations is to provide guidance, socio-legal assistance, or psychological aid to all victims of crime, whether they take part in the criminal proceedings or not. In addition, specialized associations can provide appropriate support to the victims of specific crimes (domestic violence, for example).

Victims can get information about their rights and obligations by going to courts, law centers, legal information desks, town halls, and community centers in which victim support associations hold drop-in sessions. Victims can also benefit from free legal advice, regardless of their age, nationality, or financial means, provided in these places by lawyers.

If their financial resources do not exceed a maximum threshold, victims can benefit from legal aid including the lawyer's fees, the expert's or the bailiff's charges, or any deposit that they may have

to pay. The financial condition does not apply for victims of particularly serious crimes.

Regarding protection, for example, in 2014 a law introduced the "TGD" (very high danger) procedure: when women are threatened with acts of violence by a husband or ex-husband, the prosecutor can give them a remote protection device for a period of six months, renewable. It is connected to a call center, available 24 hours a day, which evaluates the danger of the situation, and is connected directly to the police through a dedicated channel. It also allows the geo-tracking of the victim of domestic violence.

Since 2016, a new article 10-5 has been added to the Code of Criminal Proceedings in a chapter entitled "the Rights of victims": a personalized evaluation of the victims' situation is done at the very beginning of the inquiry in order to determine their specific need for protection measures. The victim support associations present at the prosecutor's office in Paris are involved in this first in-depth assessment.

B. The rights of victims in the proceedings

Other measures 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 or be represented in criminal cases.
In the French Code of Criminal Procedure, civil action is open to all those who have personally suffered damage directly caused by the offense.
In France, since the beginning of the twentieth century, we have witnessed the constant expansion of civil action in favor of groups and associations recognized to be of public utility. In 1913, the Court of Cassation granted trade 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, sexual violence, child abuse, crimes against humanity and war crimes, discrimination, animal abuse, drug trafficking, human trafficking, corruption, etc. This evolution has greatly strengthened the role of victims in the proceedings.

The right to initiate prosecutions

If the prosecutor decides to dismiss a case at the end of the investigation, the victim can appeal this decision to the general prosecutor of the court of appeal. If the general prosecutor believes that legal proceedings are necessary, he or she can ask the prosecutor to continue the inquiry.

If a complaint filed with the prosecutor has been dismissed, or if a period of three months has elapsed since this complaint, the victim may file a complaint directly with the competent investigating judge by becoming a civil party.

The victim may also have the alleged perpetrator directly summoned before the court by asking a bailiff to hand him/her a summons, in which case the victim will have to pay a deposit according to his or her financial resources.

Moreover, victims may also formally demonstrate their intention of becoming a party to the proceedings by initiating an independent action before the investigating judge at any stage in the

proceedings. The procedure confers three important rights upon victims of crime. First, they can use this procedure to initiate the investigations; secondly, they have the right to participate and be heard as a party during the investigations and during the trial; and thirdly, they have a right to pursue a claim for civil damages in the criminal action.

Therefore, victims become a "third party" in the trial: they do not intervene concerning the guilt or the sentence, but they contribute to establishing the truth and they ask for compensation for their damages.

The victims' rights during the investigation and the trial

When the investigation is conducted by the police under the authority of the prosecutor, information is given to the victims on the progress of the investigations. When the investigations are complete, the victims are informed of the decision made; and if a trial is to take place, they are informed of the charges filed against the suspect and the date and place of hearing.

When victims choose to become a civil party, they have the right to join the proceedings and to be assisted by a lawyer, who may be paid by legal aid, and to claim financial compensation for the harm suffered. During the inquiry led by the investigating judge, as well as during the trial, civil parties can call witnesses and pose questions to them and to the accused through the judge. They can file written conclusions on the technical aspects of the proceedings, the law and/or the facts of the case, to which the judge must provide an answer.

Civil parties may consult the court files directly or through their lawyer or request a copy of them. The role of the prosecutor, in as much as victims are concerned, may become crucial at the end of the inquiries led by his/her office or by the investigating judge when the criminal classification of the facts is decided. The consequences can be quite different for the victims as well as for the accused. In the case of a rape, for example, the classification of felony can be chosen: the trial will then be held in a Court of Assize in charge of judging the most serious offences, with sentences up to life imprisonment. If the classification of misdemeanors (that is, less serious offences) is chosen to qualify the same facts of rape, the criminal court will be competent to judge the case, with a maximum sentence of 10 years of imprisonment. The French law allows such a legal fiction that deliberately deforms the reality of facts, but only with the acceptance of the victims. This practice has utilitarian purposes and is seen by jurists as useful and sometimes even necessary. As far as the victims are concerned, there are legitimate advantages: the length of the proceedings is considerably shortened, the orality of the debates before the court may be avoided and the hearings may be less trying, and the final decision on guilt is in the hands of professional magistrates and not lay jurors, who may be more predictable or less erratic.

The right to claim compensation from the offender

During the criminal trial, civil parties may ask for financial compensation for the damages suffered, by quantifying them and indicating the amount claimed. The procedure is based on the general rules of civil liability.

This compensation occurs at the end of the criminal trial, and such proceedings are only effective,

however, if the perpetrator of the criminal act has been identified and condemned and if he/she is able to pay the compensation.

Civil parties are not able to appeal against the verdict concerning guilt or the sentence. They can only challenge the parts of the judgment that concern compensation.

In 1990, an independent compensation procedure was created for victims of crime, regardless of the evolution of criminal proceedings and its results. This procedure allows the victims of voluntary or involuntary acts that have the material character of crimes to obtain compensation by bringing the case before a board for compensation for victims of crimes called the *Commission d'indemnisation des victimes d'infractions* (CIVI), present in each court. Proceedings before this board are independent of any proceedings in the criminal courts, and a victim may apply to the board even if there is no judgment from a criminal court and even if the accused is acquitted.

The compensation procedure for victims of terrorists is highly simplified with the implementation in 1986 of the Guarantee Fund for victims of terrorism and other offenses (FGTI).

The Act passed in March 2019 gives an exclusive competence to the civil judge of the Court of Paris to deal with the claims of the victims of acts of terrorism for compensation for their damages. The JIVAT is thus created (a specialized jurisdiction for the compensation of victims of acts of terrorism). A dissociation is therefore made between the civil compensation and the criminal proceedings. The criminal judge thus becomes incompetent for civil claims, which is a quite novel reform in the French criminal code. Victims will still be able to become civil parties to the criminal proceedings, but only to support the public action. This reform will enable criminal proceedings to end more rapidly (medical expertise of victims being time-consuming), and victims will be treated in a more equal way by a unique and specialized jurisdiction.

The rights and therefore the place of the victims during the investigations and the trials have thus significantly increased in the past decades. But questions and criticisms have also emerged.

II. Criticizing the new place of the victims in the criminal proceedings

There are expectations that all trials must fulfill as they unfold: objective judgment, equity between the parties and equality of arms, a fair trial, and impartiality. To these traditional objectives can be added new expectations that are mainly engendered by the presence of victims during the proceedings: victim compensation, the trial's "therapeutic" nature, victim empowerment, and restorative justice.

Even if the place of the victims in the criminal proceedings has been expanding over the years, it is, however, important to bear in mind the overall principles guiding the magistrates in their work for justice during the investigations and the trials.

A. The search for the objectivity of criminal judgments

As a magistrate, prosecutor, or judge in the French meaning of the word, it is important to bear in mind that impartiality is an indispensable requirement to fight arbitrariness and to guarantee that

all individuals will be treated during the inquiry and judged in the same way by the law and by those in charge of implementing it.

A judge or a prosecutor may experience, through his 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.

This is the exact definition of the word "empathy": it is the capacity to conceive of someone else's state of mind, while still keeping a distance, and with the purpose of understanding.

The contribution of the victims to the debates, with their presence and their testimonies, is undeniable because it allows magistrates to formulate a more individualized ruling, by expanding the range of realities that they take into account. Emphasis is therefore placed on the judge's growth in experience and understanding, and on the reduction of ignorance concerning victims.

Isn't it the goal of the proceedings and the trial to gather various points of view? The judicial truth can be reached by the combination of the multiple standpoints of the different parties involved in the case. Indeed, the different actors in a criminal trial can be seen as participating in a collective attempt to elaborate the legal truth, each party contributing to the effort.

B. The presence of victims: support or pressures?

The effects of the increased presence of individual victims and victims' associations on the objectivity of criminal prosecution can be examined from the angle of the nature and legitimacy of the pressures exerted on the justice system.

The defense of collective interests has developed in the past decades. We can highlight the merit of granting actors outside of the justice system the ability to sue state representatives in situations deemed to be abnormal. Victims' associations may play an important role in initiating and supporting the proceedings in cases of involuntary offenses with numerous victims, or in some complex, sensitive, or political cases.

The public prosecutor's office may be reinforced by the presence on its side of individual victims. Several emblematic trials in the 1990s and 2000s have illustrated this situation: the Maurice Papon trial, the contaminated blood affair, or the serial murderer Emile Louis. And more recently, the proceedings regarding the Mediator. In all these cases, the mobilization of victims was seen to have reinforced the prosecution. And in some cases, the offenses may even never have reached the public eye without the work of the victims' lawyers. The power wielded by victims' associations can indeed be highly useful, even decisive.

On the other hand, there are cases in which legal experts have strongly contested the pressure exerted on judges by victims' associations, and they have been supported by public opinion and the media, from inside and outside the judicial sphere.

Some have also objected, in cases of involuntary offenses, and those involving numerous plaintiffs,

especially in the industrial and environmental sectors, that the presence of victims can be overwhelming (for example, in the case of the Erika tanker catastrophe, or the case involving the explosion of the AZF factory).

It is therefore important to set limits on the participation of victims in the judicial system to counter the risks of privatization of the trial.

C. Equality of arms in the judicial system

It is compelling to maintain equity between the parties involved in a criminal case. Some jurists are concerned by the emergence of an increasing "victim rhetoric" and a cult of the victim throughout society.

If we consider that a certain balance between the prosecution and the defense has been established during the last decades, the rise of victims in the proceedings has recently introduced a new risk of inequity, since victims are mainly on the side of the prosecution. Indeed, some consider that in some cases civil parties constitute a second prosecution team, and that the powers they have been granted may be excessive, especially with regard to sentencing.

In the debate concerning the role of victims in criminal proceedings, another question deals with the extent to which the suffering of victims can be taken into account both when establishing the guilt or innocence of the accused and when deciding on a sentence. Although sentences incorporate considerations about the degree of pain suffered by the victims, if this suffering weighs too much in the decision, the criminal risks being burdened with society's abstract need to compensate for the criminal harm done, beyond the simple evaluation of the act itself. Victims can 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 being deemed never severe enough.

The general trend towards reinforcing the "repressive" function of the criminal system is linked to the increased presence of victims. Their presence can be seen as giving a vindicating dimension to the trial.

D. The victims' new expectations of the trial

The expansion of the role of victims has introduced the possibility of adding new objectives to the traditional purposes of the judicial system, such as victim compensation, therapeutic healing, and restorative justice.

These new expectations are greatly criticized:

- There is a growing trend of victims expecting compensation and thus launching criminal proceedings that in fact create a completely different situation: the accusation of an individual and his or her possible criminal sanction. Victims thus mix up the responsible parties in terms of compensation with the guilty parties in terms of criminal sanctions.

- Even if the trial is important for the reconstruction of victims, it should not be mistaken for a psychotherapeutic mechanism. It is important that recovery take place independently of the criminal process.

- France integrated restorative justice (victim-offender mediation) in a law enacted on 15 August 2014[3], but its practical implementation is still pending.

I will now try to illustrate my discussion with the description of the role of the prosecutor regarding the victims of terrorist attacks, based on my personal experience as the prosecutor of Paris.

III. The role of the prosecutor in caring for victims: the example of terrorist attack cases

The recent acts of terrorism in France caused numerous victims who constantly express themselves and organize themselves to voice their suffering and sometimes their hatred and desire for revenge, but always to fight being forgotten and to ask for the truth and for compensation. The French state has the duty to support these victims and bears the responsibility for building a place in the national memory for them, for they are and were victims because of their belonging to the nation.

The prosecutor's office must deal with two main tasks: the first one is to investigate and gather all evidence in order to establish the truth, and the second is to inform the public.

Indeed, article 11 of the Code of Criminal Procedure endows the prosecutor with a monopoly and a responsibility regarding communication ("in order to prevent the dissemination of incomplete or inaccurate information, or to quell a disturbance to the public peace, the district prosecutor may, on his own motion or at the request of the investigating court or parties, publicize objective matters related to the procedure that convey no judgement as to whether or not the charges brought against the defendants are well founded").

After a terrorist attack, this is the meaning of the prosecutor's communication: "taking back control," explaining the facts, naming them, making them understandable, imputable, and criminally categorized, and giving the exact and objective number of casualties, keeping the ethical dimension of the function of magistrate, respecting the principles of the presumption of innocence, the protection of the ongoing and coming investigations, and respecting the victims' dignity and showing the empathy due to them. And all this while avoiding any sensationalism. It is the role of the prosecutor to communicate because the respect for these principles is part of the prosecutor's ethics as a magistrate.

This communication was quite legitimately and naturally offered by my office in Paris in the aftermath of the first terrorist attacks. It appeared legitimate because it was provided for by the law and because it answered the need for citizens to know what had happened. It appeared natural because it enabled us to reassure the population: only the judiciary could offer objective and respected words. My office therefore communicated very regularly after each major step in the

[3] Article 10-1 of the Code of Criminal Procedure (created by Law No. 2014-896 of August 15, 2014): "In all criminal proceedings and at all stages of the proceedings, including during the execution of the sentence, the victim and the perpetrator of an offense, provided that the facts have been recognized, may be offered a restorative justice measure".

investigation concerning an attack and after each attempted attack. During these dramatic years, we hope to have contributed to reinforcing the confidence of public opinion in the judicial system, and thereby reinforcing democracy.

After the first massive terrorist attack in January 2015 against the newspaper Charlie Hebdo, and then after the Paris attacks in November 2015 and the Nice attack in July 2016 (in total, two hundred and thirty-eight [238] persons killed and eight hundred and fifty [850] injured), meetings focusing on the treatment of victims in the proceedings were periodically held to evaluate the mechanisms implemented and learn from the dysfunctions and failings encountered previously. The conclusions were recorded in notes called "Return of experience," then analyzed, and efficiency was reinforced step by step:

● A division dedicated to the victims was created inside the crisis unit of the antiterrorist section of the prosecutor's office for the first time in November 2015, after the attack in Paris, in coordination with the Interministerial Unit for the Support of Victims (*Cellule interministérielle d'aide aux victimes*, or CIAV). A victim referent became the single point of contact, centralizing the information received and mainly focusing on the creation of the final list of persons deceased.

● An information center for the families of the victims was organized, ready to support and orient them immediately: a place for the physical reception of the families (and a unique phone number to call), a place where they could find information on deceased persons or provide information about missing persons, and a place to get information about the procedures to be followed, with the presence of all the professionals involved (the police, the prosecutor's office, psychologists, victim associations, etc.).

● The focus was made on the organization of the Institute of Forensic Medicine dealing with the autopsies, the collection of post-mortem data, and the coordination of the Institute with the prosecutor's office, the police or the information center for the victims' families. The difficulty was the great number of casualties after a mass murder, and the necessity of identifying the victims and establishing a reliable list of names as quickly as possible so as to shorten the families' waiting time and to restitute the bodies within a reasonable time. This was a complex equation to solve. For this reason, the autopsies were only performed when necessary, and for the other bodies the autopsy was limited to an external examination and a scan. Support structures for the families also had to be organized at the Institute of Forensic Medicine.

● Precise instructions concerning the announcement of the deaths to the families were developed: anticipation and harmonization of the words to use was necessary for the professionals answering phone calls or receiving the victims or their families. The principle was to have the announcement made by the professionals who had received and supported the families in search of information in the first place.

The experience feed-backs after each terrorist attack regarding the situation of the victims were very useful in improving the medical, judicial, and psychological support given to the victims and their families. The role of the prosecutor's office was decisive in its function of anticipation and coordination of the various actors intervening, in its function of direction and control of the investigations, as well as in its function of support to the victims and preservation of their rights.

Conclusion

The prosecutor protects the general interest and cares about the social damage, whereas the victim is interested in the compensation for his or her damage. These two purposes are difficult to reconcile in criminal proceedings. The prosecutor cannot only be the voice of the victims, nor can he or she seek the sole satisfaction of the individuals who are victims of offenses.

It is therefore compelling to stay vigilant about the risks of confusion created by bringing public and civil suits into criminal proceedings, and about the risks of privatization of the criminal justice system, because there is a real risk that law may break down in solicitude or caring.

The criminal justice system must be re-centered on its four traditional objectives: retribution for the crime, prevention of crime, rehabilitation of defendants, and their neutralization.

The 6th article of the European Convention of Human Rights (CEDH) is a common ground for the rights of victims and perpetrators of offenses with the requirement of a fair trial. Which means, as far as victims are concerned, that the rights of the victim in the proceedings must be respected, the equality of resources between the parties has to be provided for by the law, and the victims have to be able to express themselves during adversarial and public debates.

It is important to improve the conditions of crime victims without necessarily increasing repressive measures. Out-of-court mechanisms are efficient: improving compensation conditions, providing psychological support, and establishing mediation bodies. It is necessary to fight against the isolation of the victims in the proceedings and the lack of support.

Indeed, what most victims first seek in criminal proceedings, beyond the sentencing of the offender or the financial compensation for their loss, is to have the truth established in all its complexity, and to have their rights be recognized and supported fully guaranteed.

Hence, the new place of victims will be not so much analyzed as a privatization of the “public action,” but rather as a re-balancing of the rights of each party in the criminal procedure.

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The "Value" of the Victim: An Economic Approach

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Abstract

This paper examines how economics defines victims and places a monetary value on the "cost" of victimization. It is argued that the concept of a "victim" in economics is best thought of as an externality – the negative impact of one actor on another, when the "victim" did not voluntarily choose to receive that harm. This broad definition thus extends beyond direct victims to include members of the public who spend time and money avoiding victimization as well as the cost to society of responding to victimization. Thus, the paper explores several reasons for valuing victims – including *ex ante* valuation of risk reduction as well as *ex post* compensation of victims for actual harm. In addition to reviewing methodologies used to value victims, we explore three important issues: (1) how economic valuation deals with equity and income inequality, (2) how victims in different jurisdictions should be valued, and (3) should all victims be treated equally within a jurisdiction? While most of the examples are focused on crime, the analysis incorporates other forms of victimization such as natural disasters or terrorist attacks.

Keywords: economics of crime; cost of crime; victimization

Introduction

The purpose of this paper is to use my economist lens to shed light on the "economic value" or "cost" of victimization. While most of my examples are focused on crime, the analysis incorporates other forms of victimization such as natural disasters or terrorist attacks. As an economist who has spent nearly 35 years placing dollar values on crime, I am often confronted by skeptics outside the economics profession about both the moral and methodological foundations of my efforts. In my view, these concerns are generally misplaced – either because they are motivated by political beliefs or by misunderstandings about economics and/or statistical methodologies. While I will briefly address some of those concerns in Section 3, one of the goals of this paper is to convince the reader that economic valuation of victims is both a reasonable and important endeavor. Indeed, while this paper only touches upon the methodologies employed to estimate the value of victimization – suffice it to say that there is a longstanding economics literature that places dollar (or Euro!) values on crime – following similar efforts to value health, safety, and the environment – amenities that are not normally exchanged in the marketplace but yet have intrinsic economic value. The methodologies to value health, safety and the environment have been well developed and are sound, but that is the subject of a different paper. Instead, my focus is on how economics helps to inform policy makers on two important questions (1) what value should society place on victimization? and (2) do we care about all victims equally?

Section 2 sets the stage for this analysis by first describing how economics defines victims as well

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as providing a rationale for why one might want to place a value on victims in the first place. Section 3 provides a review of the different theoretical and methodological approaches to valuing victims. Section 4 examines how economic valuation incorporates policy issues such as economic and geographic equity and the important question of whether different types of victims should be treated equally. Finally, a brief summary is contained in Section 5.

I. How Does Economics Define a "Victim?"

In this Section, I address some basic foundational questions about how economics defines victimization and its value. First, I want to focus on a definitional issue: what is a victim in economics? I argue that the economic concept of externality or external cost is the proper way to think about victimization. Second, I describe a simplified economic model of crime that will be used to help illustrate some of the complex issues economists raise when thinking about valuing crime.

A. Externalities and Victimization in Economics

Before turning to the example of crime, let me start with the notion of defining a victim itself. It is important to keep in mind that economics is not a moral science; instead, it is largely about the allocation of scarce resources. The classic case to illustrate this concept in the context of defining victims is the seminal writing by Nobel Prize winning economist Ronald Coase (Coase, 1960). Among other things, he described the case of a confectioner whose heavy machinery made noise and vibrations that disturbed the tranquility of a next-door doctor's office and thus hurt the doctor's business. Among the questions Coase raises is who is harmed in this scenario? Is the doctor a victim of this noise? Of, is the confectioner the victim if a court were to determine that he cannot run his heavy machinery during the doctor's office hours? As Coase pointed out, that depends crucially on who has the property rights to a noise-free environment. Perhaps the confectioner was there before the doctor and had the property right to make this noise. In that case, wouldn't the doctor be responsible to determine whether building a room nearby the factory was a good idea? Coase argued that once property rights were fully established, the private parties could negotiate between themselves and determine the best use of scarce resources; so that whichever party had the highest value use for the environment would ultimately bargain for that use. Of course, any ultimate payment between the two parties will critically depend upon which party has the initial property right. The point of raising this story is to highlight the fact that from an economics perspective, the definition of a victim is somewhat tautological – it depends upon who has the property rights to not being a "victim."

Once property rights have been established, economics would then view any harm to a third party (e.g., the doctor or confectioner) as an "external cost" or "externality." An external cost is simply a cost that is imposed by one person on another, where the person harmed does not voluntarily accept this negative consequence.[4] In the context of crime, the external costs associated with a

[4] Note that I have used the term "external costs" as opposed to "social costs." While these two concepts are closely linked, there are a few subtle differences. Most importantly, I have included the cost of the stolen money as a "cost" of the crime, since this is an "external cost." The victim did not voluntarily give up this amount of money and as a society; we have made it illegal to take it from her. Some economists would

motor vehicle theft might include the value of the stolen property and any other ancillary costs incurred by the owner such as dealing with police reports, obtaining a replacement vehicle, etc. The victim neither asked for nor voluntarily accepted compensation for enduring these losses. Moreover, society has deemed that imposing these external costs is morally wrong and against the law. Put differently, society has awarded the property rights to the owner of the car – not to anyone who decides to take it from the owner without permission! In many cases, external costs include items that are not readily quantified in monetary terms such as pain, suffering, and fear. To the extent that costs are eliminated, society benefits and the public is safer. However, as the doctor and confectioner example suggests, the question of who has the property right can oftentimes be more complicated. Just as one might ask which came first – the doctor's office or the noisy machinery – one might wonder if there is any responsibility of a vehicle owner to turn their car off and lock it while parking in a public area. This is not a matter of "blaming" the victim of the auto theft; instead, understanding the motivation of various actors – including offenders as well as potential victims - would help us understand the costs and benefits of policies designed to reduce victimization – something that we turn to next.

B. An Economic Model of Victimization[5]

This Section describes an economic model of victimization to help the reader understand how economists think about victims of crime. While the example I use in this section is a crime – the notion of externalities and the concepts I am talking about can be adapted to all forms of victimization - whether we are talking about personal injury accident victims, products liability claims, terrorism, or natural disasters.

The economic approach to crime is based on the rational actor paradigm. That is, individuals make rational choices that they perceive to be in their own self-interest. This is true for both victims and offenders (Becker, 1968). Although one might question whether offenders who engage in crimes of passion are rational, even these offenders can be analyzed to a large extent using economics - although that does not diminish the fact that other disciplines such as psychology might play a large role in explaining certain behaviors as well. As rational decision makers, potential offenders base their decision to commit a crime upon their subjective evaluation of the expected costs and benefits of committing the crime. Even if actions appear irrational, they may be based on the offender's perception of risk and opportunities. Furthermore, even for criminals who society might consider completely irrational or mentally ill, economic models can be useful in understanding how to raise the barrier to entry to potential offenders – such as imposing gun restrictions or closing down hate-filled social media sites, when to incapacitate offenders, what actions should be taken to avoid becoming a victim, etc. However, criminals are not the only decision makers that affect the crime rate. Others who play a role are law enforcement officials, judges, victims, and society as a whole—i.e., potential victims.

Although by its very definition, crime is "bad" and socially harmful, so are the resources devoted to catching criminals, punishing them, and avoiding them. Thus, the economic approach to crime control is concerned with finding the optimal combination of prevention, detection, enforcement,

argue that this is not a "social cost" as it is a transfer of money from the victim to the offender and thus the money is not destroyed. For further discussion of this issue, see Cohen (2000: 27).

[5] This section is largely based on Chapter 2 of (Cohen, 2020).

and offending behavior. Put differently, although we would all like there to be zero crime – and hence, no victims, economic theory recognizes the fact that this is an unattainable goal—primarily because of the costs involved in preventing, detecting, and punishing criminal activity.

The concept of an "optimal" level of crime may appear to be morally repugnant to people who believe the government should attempt to eradicate all social evils. In particular, it might be difficult to accept the fact that there will always be some crime and that public policymakers will in effect "permit" some crime to exist. Yet, both private citizens and policymakers make such difficult trade-offs every day.

Consider the petty crime of purse snatching. There are many decisionmakers involved in the "supply and demand" for purse snatching. By employing elaborate preventive security measures or very severe penalties we might reduce the level of this crime, or if security is sufficiently onerous, perhaps eliminate it completely. Women who carry purses might decide to alter the type of purse to buy - a consideration that might include not just fashion, but also the design of the purse in making it less of a target for theft. Potential victims might take other precautions such as possessing extra credit cards that are kept at home, carrying less cash than they might otherwise keep on hand (requiring them to make more trips to the bank), avoiding certain neighborhoods or shopping districts where purse snatchers are more likely to frequent, etc. Implicitly, in deciding what actions to take, potential victims will weigh the costs of these precautionary actions against the expected benefits of reducing the probability that they will become victimized.

Potential victims are not the only actors in this little drama. Store owners in neighborhoods where purse snatchers are known to be numerous might believe that potential customers are staying away and that they would personally benefit from reducing crime on their streets. They might install extra lighting or security cameras, again weighing the cost of those prevention activities against the expected additional profits they expect to receive from increased business. However, if the costs of the extra security exceed their anticipated profits, they are unlikely to provide this protection. Ultimately, the storeowner selects a level of security, and hence implicitly, a positive level of crime, that she believes will result in maximum net profits.

Local government authorities might also take similar precautions or add more police on the street. Purse snatching is a crime, and one that results in punishment for the offender who is convicted. When potential victims and storeowners decide how much to spend on protective activities and potential purse snatchers decide whether to engage in illegal activity, knowledge about what the criminal justice system will likely do in response to purse snatching will be important to all of these actors. What is the likelihood that the purse snatcher will be caught? If caught, how much time must the victim spend away from work or the home in order to deal with the criminal justice system? How expensive is it for the government to prosecute and convict the purse snatcher? What sanction will the judge impose for this offense? All of these questions are important and interrelated. For example, if judges are reluctant to impose any significant sanction on purse snatchers, prosecutors might decline the cases or accept minimal plea bargains or pre-trial diversions. But that doesn't necessarily mean purse snatching will increase dramatically. If the risk of being penalized by the criminal justice system decreases, potential victims and storeowners may increase their surveillance and preventive measures, as these forms of preventive expenditures become more cost-effective relative to punishment. However, if the sanction is very severe—so

that purse snatchers are guaranteed significant prison time, for example, storeowners and potential victims will be able to shift some of the costs they might otherwise bear for crime prevention onto the criminal justice system. Thus, fewer storeowners will purchase costly security systems and lighting that help reduce crime, and instead they will rely on the deterrent effect of strict sentencing to reduce purse snatching. Potential victims might also take fewer precautions knowing that the risk of purse snatching is lower due to the government's increased penalties.

So far, we have talked mostly about potential victims and the government. But of course, one of the most important decision makers in this story is the potential purse snatcher himself. Certainly, the risk of being caught and punished will enter into his decision about whether to commit the crime. But so will other factors - such as the opportunities for legitimate employment as an alternative to illegal means of obtaining money. Another factor might simply be the extent to which social pressures and norms "punish" purse snatchers and hurt the reputation of those convicted of this crime. Does being a convicted felon reduce someone's ability to find employment? Does it reduce their reputation in the community or within their family?

As you can see from this little example, how much purse snatching there is in a community depends on the decisions of numerous actors - including potential victims, potential offenders, businesses, and the government. Each of these actors implicitly weighs the costs and benefits they receive from this crime in determining their optimal response. While some of the burdens imposed by purse snatchers are naturally expressed in monetary terms - such as the cost of replacing the stolen purse, medical costs associated with the victimization if there is a physical struggle, or criminal justice expenditures - other burdens are psychological - such as pain, suffering and lost quality of life to victims or fear of crime to the public at large. Other burdens might include the additional time required by individuals to protect their belongings, or the lack of freedom to walk in certain neighborhoods.

As I have discussed above, there are important interactions between these different cost components that must be taken into account if one is interested in understanding victimization and policies designed to reduce harm. For example, suppose additional police are hired and put on the street. In isolation, this is a bad thing since it increases the external costs associated with crime. Of course, the reason additional police are likely to have been hired in the first place is the expectation that it will lead to a reduction in crime. If indeed this happens, it will presumably result in a net cost decrease - if the additional cost of hiring the police is less than the costs that would have been imposed by the crimes that were averted. It might also reduce fear of crime and enhance the nearby community business activity. Thus, ultimately, in addition to simply tallying up the costs of crime, we want to understand the linkages that exist between these cost components. I have illustrated these theoretical links in Figure One.

To an economist who is interested in economic efficiency, the goal of crime control policy should be to minimize the sum of all external costs associated with crime. That does not necessarily preclude us from considering other goals such as equity or a fair income distribution – a topic I will come back to in Section 4. But for now, let's just consider minimizing the sum of all external costs from crime. This would include both the cost of victimization as well as the cost of prevention and control. Complicating the picture, there are at least five distinct decision makers: (1) potential offenders, (2) potential victims, (3) government law enforcement agencies, (4) the courts, and

possibly (5) individuals potentially accused of committing a crime they did not commit. In order to understand the interrelationships between the actions of these parties, we must first ask what motivates their actions and how we can predict the effect of changing government policy on each of these decision makers. Because this paper's focus is on victimization, I will focus primarily on the actions of victims and potential victims. However, as should become clear, the actions of the other actors have a direct impact on both the extent and the cost of victimization.

Potential Offenders

We are all potential offenders. Although I don't think I'd ever be tempted to evade taxes, for example, I am not inherently any different from someone who does. Instead, the perceived costs of committing tax evasion far outweigh any benefits I can see from doing so. In other words, in choosing what is best for me, I weigh the benefits from committing a tax evasion—saving money—against the costs of tax evasion—which include the expected penalty, possible prison sentence, reduced employability, and moral outrage I would expect to endure from my family, friends and community. For someone who chooses to evade taxes, they perceive the expected benefits from tax evasion to exceed the expected cost to them. It is also possible that offenders receive psychic benefits from some crimes—such as peer approval, a feeling of importance, or 'getting back at the system.'

The expected costs to the offender include the expected sanction—which depends on the risk of being caught, indicted, and convicted, as well as the expected severity of punishment if convicted. It might also depend on the extent to which the potential offender believes his standing and reputation in the community will be affected. Will this reduce his long-term opportunities for employment? Will this reduce his stature among his family and friends? These are all expected costs that the potential offender will weigh against the potential gain from committing the crime.

Notice that I have used the terms "expected" costs and "expected" benefits. The "expected" cost from criminal action includes both the "value" to the criminal of the expected sanction from committing the crime and the foregone opportunities that the criminal gives up in order to pursue criminal activity. The expected sanction is calculated as the probability of apprehension and conviction multiplied by the sanction that the offender expects to be imposed. Thus, in order to fully understand the potential offender's decision calculus, one should look at the offender's personal perception of variables such as the likelihood of apprehension, conviction and imprisonment, even if that differs from actual rates. For example, if all potential tax evaders believe there is a 100% chance of being apprehended and convicted, even if the truth were that only one in a hundred tax evaders were caught—this crime would probably be nonexistent.

Although all potential criminals may face the same expected sanction for the same crime, different people may "value" that expected sanction differently. For example, an individual who is "risk averse" (i.e. prefers certain outcomes to gambles) will react differently to a 50% chance of being convicted than an individual who is risk loving. All else equal, the risk loving individual will be more likely to commit the crime, since he or she is less responsive to the chance of being convicted than the risk averse individual. Not only do people differ in their preferences towards risk, but they may also differ on such dimensions as moral standards, family responsibilities, concern for the social stigma of having a criminal record, and tolerance for living in a prison environment.

Differences in these and other individual dimensions will yield differences in the value the individual places on being sanctioned, and thus on the degree of responsiveness to those sanctions.

In addition to the value of the expected sanction, the potential criminal must consider the foregone legitimate and criminal opportunities as a cost of criminal activity. Foregone legitimate opportunities include (1) the cost of committing the crime itself, for example, the cost of firearms, (2) current wages that the criminal could be earning if he or she did not engage in criminal activity, (3) the value of leisure time the criminal gives up while engaging in criminal activity, and (4) the value of future earning opportunities that may be lost if the individual develops a criminal record. Foregone criminal activity includes the other crimes that the criminal could commit instead of the current one. That is, the potential offender not only considers whether or not to commit a crime, but which crime to commit. This decision will again be based on the (perceived) expected benefits and costs of each type of crime.

Given our understanding of the costs and benefits of criminal activity, in order to reduce the propensity of potential offenders to commit crimes, we need to either raise the expected cost of the criminal activity or reduce the expected benefits. Thus, there are many things that society can do to affect the crime rate, including: (1) making it more technologically difficult and thus more "expensive" or time consuming to commit a crime (for example, the use of CCTV or increased street lighting), (2) providing more non-criminal opportunities to earn a legitimate income, (3) increasing the psychic costs of crime through public information and education campaigns, peer pressure or encouraging other forms of social stigmas, and (4) increasing the expected punishment through increasing the probability of detection or increasing the severity of punishment.

Victims and Potential Victims

Victims are not just passive participants in the economics of crime model and indeed play an important role. First, as a member of society, we are all potential victims. As such, we must decide what level of resources to devote to avoidance or prevention activities. As rational actors, we are assumed to choose actions based upon both our perceived expected costs and expected benefits of prevention. The expected benefits of prevention consist of the harm caused by the criminal act that is avoided, multiplied by the reduced probability of becoming a victim. The costs of prevention include the physical costs such as security alarms or taking taxis instead of walking, but also more subtle costs and foregone opportunities such as the cost of not enjoying an evening stroll in the neighborhood or the fear of being victimized. The cost of prevention is likely to differ considerably among potential victims. Thus, children, the elderly or mentally handicapped, for example, might be more vulnerable to certain crimes; hence, the cost of avoiding victimization might also be higher for these individuals. These factors might justify more punitive sanctions for vulnerable victims.

Potential victims will react to changes in the expected costs and benefits of prevention. In fact, elderly individuals have extremely low victimization rates. The reason, however, is that they generally realize they are especially vulnerable and take added precautions to avoid situations that put them at risk of being victimized. Similarly, a sudden change in the crime rate will affect the benefits and costs of preventive measures by potential victims. Thus, if the government now takes actions that otherwise decrease the crime rate—such as the installation of new street lighting or CCTV—this will decrease the expected benefit of taking private preventive actions. Hence,

potential victims will respond to the increased probability of detection or increased severity of punishment by reducing their own preventive or avoidance activities. Thus, more people who might otherwise stay home might now go out at night. However, this also increases their risk of victimization from what it was when they stayed home. Similarly, increased restitution will decrease the incentive for potential victims to take preventive measures. That does not mean restitution is bad or that the government should not increase the sanction for theft. It simply means that we need to think about and recognize the interrelationships between the actions of each actor in this system. By doing so, we can determine how to prioritize crimes in terms of government enforcement, sentencing, and victim compensation policy (Galvin *et al.*, 2018).

Finally, victims can affect the probability of conviction by the amount of cooperation they give to government officials —which will depend on their treatment in the criminal justice system, including the amount of time spent on legal matters. Thus, the cost of victimization may ultimately affect offenders in other ways.

Government Law Enforcement Agencies

Law enforcement agencies—both investigative and prosecutorial—are obviously key actors in the criminal justice system. To the extent that devoting more attention to one type of crime increases its probability of detection, conviction and punishment, this will result in an obvious deterrent effect on that crime and hence reduce victimization.

Although we would like to think that all alleged crimes are given equal treatment in both investigation and prosecution, the reality is that government resources are limited and each agency must establish enforcement priorities. Those priorities might depend on the perceived harm caused by certain types of crimes, the difficulty of establishing criminal liability, community standards, or even the political aspirations of individual prosecutors. Given scarce resources and the need to prioritize workloads, one factor that inevitably affects the decisions of investigators and prosecutors is the ultimate punishment the alleged criminal offender can expect to receive. Sentencing guidelines, for example, can send strong signals to prosecutors about which crimes should be highest priority and which should be placed lower on the priority list. It is important to recognize that the discretionary nature of enforcement may also have an impact on the impact of victimization on different groups of victims. For example, those who are less politically connected might receive protection from government agencies – whether it is less police protection, lower sanctions thereby reducing any deterrent effect, or less community assistance or restitution if victimized. Once again, the cost of victimization might depend upon actors other than the actual perpetrator.

Courts

As I just indicated, sentencing guidelines can have an important effect on the incentives of the other actors—not just the criminals— in this "system." Sentences provide signals to all parties about the "price" that one will have to pay for committing a crime that is detected and successfully prosecuted. As such, potential offenders may be deterred if the sanction is severe enough. However, as indicated above, there are other effects from raising sanctions. Potential victims might take less care to prevent or avoid crimes as they benefit from the increased deterrent effect of more

severe sanctions. Potential offenders might shift to other crimes that have relatively less onerous sanctions attached to them. Prosecutors might move certain crimes up or down their priority list as they adjust to these signals about the "payoff" from their prosecutorial efforts.

Although most of these effects are intended, one must also be careful about unintended consequences. For example, setting too high a penalty on crimes where innocent individuals are easily mistaken might deter socially beneficial activity as well as criminal activity. Thus, I now turn to the fifth main actor in this system—the potential mistaken offender.

Potential Mistaken Offenders

Although nobody likes to talk about it, there is always the possibility that an innocent individual will be charged with a crime. We put many safeguards into our legal system to prevent such mistakes from happening—and in reality, it is probably a relatively rare event. However, in some cases, the fact that there is always the possibility that an innocent person will be charged with a crime can have important behavioral consequences on the innocent. For example, several high-profile cases of child sexual abuse committed by adults who were in positions of trust such as boy scout leaders might deter other adults who have no propensity to engage in this immoral activity from taking on a leadership role for fear that they might be falsely accused of a crime. Another example is the fear by innocent Black males who are concerned about being falsely accused of a crime if they venture into certain neighborhoods (Gideon's Army, 2016; Cohen, 2017). Of course, sometimes these mistaken offenders are arrested and convicted. In fact, although there is considerable uncertainty about the rate of wrongful convictions in the U.S., there is also growing evidence that the problem is more prevalent than thought prior to the advent of DNA testing. One study estimated that at least 4.1% of all death-sentence defendants were wrongfully convicted (Gross *et al.*, 2014), while another estimated that more than 1% of all convicted felons might have been wrongfully convicted (Zalman, 2012). While these estimates might not be accurate, the National Registry of Exonerations at the University of Michigan Law School maintains a registry of convicted offenders who served time in prison in the U.S. and were later exonerated for their crimes of conviction (http://www.law.umich.edu/special/exoneration/). Between January 1989 and March 2020, they identified more than 2,600 defendants who were exonerated for crimes they were convicted of previously – serving over 23,000 years in prison before being released. Indeed, these "offenders," as well as individuals inappropriately targeted by police might be considered victims of our criminal justice system.

II. Valuation of Victims

Why have I gone to such lengths to explain the economic model of crime when the purpose of this paper is to talk about how economists value victims? Hopefully, the reason is now clear. The notion of a victim is very fluid. Walking down the street in everyday life, you are a "potential victim" of crime – fear, avoidance behavior and prevention activities are all real costs associated with crime. For those who are actually the direct victim of a crime, the harm they endure might depend upon whether or not they have taken preventive actions beforehand (think about my purse example – not walking alone with an expensive purse, leaving some credit cards at home, etc.). Even ignoring these precautionary activities, is the value of victimization different for an unemployed woman whose purse is stolen compared to the purse of a high paid professional – both of whom, let's say,

need to spend the same number of hours dealing with police, credit card companies, buying a new purse, etc.? As discussed in the previous section, the value of victimization might depend upon other actors as well – for example, how much the government spends to reduce the risk and/or harm from victimization. Finally, what about the innocent offender wrongfully accused of a crime?

A. What is the Purpose of Valuing Victimization?

To start to answer the question of how to value victimization, we need to begin with a more basic question – what is the purpose of the valuation? From a public policy standpoint, there are several reasons why victim valuation might be important. For example, policy makers might be interested in which are the most "harmful" crimes from a victim's perspective in order to allocate scarce enforcement or prevention resources to those offenses. Similarly, they might be interested in comparing victimization to other harms such as illnesses, accidents, or self-inflicted harms. Putting these different harms on a common monetary metric facilitates such comparisons. Another reason policy makers might be interested in valuing victimization is to conduct a social benefit-cost analysis that balances the value of reducing victimization against the public investment required. Finally, policy makers might be interested in compensating victims for the harm caused by crime. Generally, there are two different approaches to valuation – *ex ante* versus *ex post* – a topic we turn to next.

B. *Ex Ante* versus *Ex Post* Valuation

Theoretical Distinction between Ex Ante and Ex Post Valuation

Generally, when policy makers are interested in comparing costs and benefits of a program, they are focused on *ex ante* valuation – what is the value of reducing the rate of victimization? Recall from my purse snatching story that it is not just actual victims of purse snatching who would benefit from a reduction in – or would be harmed by an increase in – purse snatching. Instead, businesses, governments, and potential victims – the public at large – are affected. Thinking about a terrorist or mass shooting event, for example, a broad view of victims would thus include those who are physically injured, those who are near the scene and witness the tragic events, friends and family members of those individuals, community members who mourn and fear future copycats – but also private businesses, government agencies, and schools that now invest in more security, etc. Put differently, if we think about using the economic concept of "externality" as a proxy for victimization – all of these costs should be included in our *ex ante* valuation. In fact, going back to the economics of crime model discussed above, because of the inter-relationship between all of the actors and the fact that an increased spending by one party will affect the risk and/or spending by another party – if you ignore the costs of victimization to one party – even if they are not the ultimate direct victims, you are simply shifting the burden from one party to another. From an economics perspective, this may lead to a misallocation of resources. In other words, if we are not focused on compensation – but instead thinking about how victimization should be valued in terms of preventing future victims – all of these costs should be considered. As noted above, economic efficiency would ask what combination of actions lead to the lowest total costs of victimization – regardless of who bears the burden. On the other hand, if we are solely interested in compensating victims for the harm caused by their victimization - an *ex post* valuation approach seems more appropriate. After all, the victim did not lose some hypothetical "expected" value – instead, she

incurred an actual loss.

Next, let's turn to *ex post* valuation for purposes of compensating victims. In theory, compensation of victims requires an *ex post* valuation based on the actual harm they incurred. While legal theories of tort compensation are the topic of another paper in this symposium – from an economics perspective, the concept is virtually identical to the standard legal approach in the U.S. What level of compensation would be required to make an individual "whole" – i.e., return them to their pre-victimization state? While I hesitate to use economics jargon – we often call this "utility," or perhaps more meaningfully it is often called well-being or even happiness. Economists ask the question, how much money would be required to make the victim indifferent between the two states of the world – no victimization versus victimization. Of course, we know that for a murder victim, there is no amount of money that can make that person whole. So, this is neither a fully implementable approach – nor is it an internally consistent approach to valuing victimization. The law and economics literature on torts has focused on this question – including how to compensate for optimal deterrence, optimal insurance, etc. (Landes and Posner, 1987). Although the law and economics literature on torts is not the focus of this paper (and instead is the topic of another paper in this symposium), it is important to note that one concern with using external costs as the basis for compensation, is that it might provide perverse incentives such as not taking adequate care (see Section 4.C. discussion on moral hazard).

Empirical Distinction between Ex Ante and Ex Post Valuation

As discussed above, in theory, *ex ante* valuation is generally more appropriate for policy analysis or programs designed to reduce the risk of harms, while *ex post* valuation is appropriate when estimating how much harm has actually occurred – perhaps for purposes of compensating victims. How do these two concepts differ in reality? It is well known that individual's willingness-to-pay to avoid injury (an *ex ante* approach) is NOT the same as their willingness-to-accept injury (i.e., *ex post* compensation). For several reasons – including limited budgets and cognitive behavioral reasons, the amount that individuals require in order to accept a bad outcome is generally higher than the amount they would be willing to pay to avoid it (Knetsch, 2013; Tunçel and Hammitt, 2014). Thus, *ex post* compensation should be higher than *ex ante* willingness-to-pay.

Without going into too much detail, let me briefly describe how economists implement these two approaches to victim valuation. For *ex ante* valuation, we typically rely upon either market-based data such as housing prices (see eg, Thaler, 1978; Gibbons, 2004; Pope and Pope, 2012) or wage rates (Viscusi and Aldy, 2003; Viscusi and Masterman, 2017; Kochi and Taylor, 2018) to infer the differential impact of victimization on home values or wages for riskier occupations. This how the "value of statistical life" estimates are generally made – using what economist refer to as "revealed preference" or market-based approaches. Alternatively, economists may use "stated preference" approaches where the public is surveyed to determine how much they would be willing to pay to reduce the risk of certain types of harms (for examples in valuing crime, see eg, Ludwig and Cook, 2001; Cohen *et al.*, 2004; Picasso and Cohen, 2019). Because these surveys are conducted with the public at large, they are closer to an economist's notion of externalities for society as a whole – including the avoidance costs and residual fear of "potential victims." These survey methodologies have become quite sophisticated and were originally developed by environmental

economists to value things like the spotted owl or a pristine lake.[6] There have been literally hundreds if not thousands of such studies outside the crime context, and meta-analyses and textbooks have been written on the subject (see e.g., Kling, Phaneuf, & Zhao, 2012; Mitchell & Carson, 1989). Although there is some disagreement on the reliability of these surveys, they are continually being used in benefit-cost analyses, natural resource damages litigation, and for other purposes.[7] A distinguished panel of social scientists, chaired by two Nobel laureates in economics (Arrow *et al.*, 1993) was commissioned by the National Oceanic and Atmospheric Administration (NOAA) to assess the use of stated preference surveys when estimating natural resource damages in legal proceedings involving compensation for damaged public property. The panel concluded that this is a valid approach and provided a set of guidelines for conducting reliable valuation surveys. Note that the original purpose of the panel was to advise NOAA on the use of this methodology when estimating natural resource damages in legal proceedings involving compensation for damaged public property. An important side note is that while the panel was largely discussing studies that estimated *ex ante* "willingness-to-pay" (WTP) to avoid bad outcomes, compensation for natural resource damages should be valued using "willingness-to-accept" (WTA) (Bromley, 1995). The panel was not mistaken in its assessment, however, because the same survey methodology can be used for either WTP or WTA; however, in the context of crime involving the risk of death, there is essentially no value that can appropriately compensate a murder victim; hence WTA is not meaningful. Thus, we turn next to other methods of estimating WTA.

For *ex post* valuation in victimizations involving physical injuries or death where a WTP approach makes little sense, economists have often relied upon jury award data for tort claims; for example, by victims of crimes such as assaults or rape. Here, the focus is on victim compensation to make the victim whole. The U.S. court system generally allows tort victims to recover both monetary costs (e.g., wage losses and medical bills) and non-monetary costs such as the value of lost household services. In addition, however, tort victims may often receive payment for the monetary value of pain, suffering and the lost quality of life. These payments are based on a jury or judge's subjective assessment of the amount of money that would make the victim "whole."

Studies have shown that while there is wide variability in jury awards, they are actually quite predictable in a large sample and I have used this approach in valuing victimization for crime victims (Cohen, 1988; Cohen and Miller, 2003; Miller, Cohen and Hendrie, 2017).[8] But I am not alone – other government agencies such as the Consumer Product Safety Commission have also used this approach (Aiken and Zamula, 2009). Note that if the perpetrator has the means, we might require compensation not only to the victim, but also other costs imposed on society (e.g., cost of prison) - so that the external costs imposed by the perpetrator are "internalized" and they have an incentive not to commit the act in the first place. However, aside from state-sponsored terrorism, it is seldom the case that the perpetrator has the means to compensate. Thus, compensation is generally done by third parties such as businesses who are sued for inadequate security or when the government determines that victim compensation is desirable from taxpayer sources – as in the

[6] For a comparison of the revealed preference and stated preference approaches to valuing crime victimization, see (Cohen, 2010).
[7] For the reader interested in this topic, a good starting point would be the debate between Carson (2012) and Hausman (2012).
[8] Cohen (2020: 159-62) contains a detailed discussion of some of the criticisms of the jury award method.

case of the 9-11 fund.

While I argued above that *ex ante* valuation is likely to be less than *ex post* valuation, in fact, the estimates of the cost of crime that have been generated to date find just the opposite – *ex ante* valuation such as willingness-to-pay surveys show higher valuations. However, this is because we are now comparing apples to oranges. The willingness-to-pay studies measure the public's – i.e., potential victims – valuation of reducing the risk of being a victim. Thus, they include fear of crime, avoidance behaviors, etc. On the other hand, the *ex post* measures using jury awards are focused only on the direct costs of the victimization itself. They thus ignore the significant cost to the public at large – i.e., potential victims. This highlights the definitional question that I've struggled with in developing this paper – what is a victim!

III. Policy Implications of Victim Valuation Methods

While clearly based on rigorous theory and statistical methods, the economic approach to valuing victimization is not without controversy. Even if it were able to perfectly capture the values it was meant to estimate – there are important policy implications that arise. This section discusses three of these issues: (A) equity and income distribution issues, (B) geographic boundaries of victimization, and more generally, (C) should all victims be treated equally?

A. Equity and Income Distribution

On the distributional question, it is important to realize that both the *ex ante* and *ex post* methods of valuing victims rely to some extent on the victim's income or wealth. Thus, if a jury is awarding an amount for pain and suffering, they are likely to start with information about the victim's lost earnings and medical costs, for example, and pain and suffering will likely be a multiple of these figure – which means that for the same injury, a high paid professional is likely to receive a higher award than an unemployed or retired individual. However, it is not clear from the empirical evidence whether the "pain and suffering" component of the jury award would necessarily be any higher for the higher paid individual. That is up to the jury to decide; and I am unaware of any studies examining this important question. Similarly, if one is estimating the public's willingness-to-pay to reduce crime and used this implied value to compensate victims, it not surprising that we generally find willingness-to-pay to be lower for low income individuals (Cohen *et al.*, 2004) – although I would note that this is not necessarily true to the extent lower income individuals face higher risks of victimization and thus could value risk reduction even higher. Thus, the question becomes whether or not the economist's approach to valuing victimization has a disparate impact upon the poor relative to more wealthy victims…

My response is what you would probably expect from an economist – on the one hand yes, on the other hand no… Yes, as the examples I just presented suggest, if taken literally, the economics approaches might value poor victims less than wealthier victims. In terms of *ex post* compensation, for example, if the theory is to make victims whole – wealthier victims might receive more monetary compensation for their direct, tangible losses – simply because they will lose more wages for the same identical injury. However, from a "utility" perspective – both individuals will be made whole and from a Rawlrasian perspective, this does not favor the wealthy over the poor. Moreover, while payments for pain and suffering should be based on the individual circumstances of pain,

suffering and lost quality of life – in reality, there may be a positive relationship between the direct out-of-pocket losses and the pain and suffering award. Thus, for example, if we compare two victims who have identical medical costs and both lose one week of work recuperating from identical injuries, it is possible that the jury will award the wealthier individual a higher pain and suffering award. In theory, because the marginal utility of money is higher for low income individuals, it is possible that controlling for the severity of injury, pain and suffering awards should actually be higher for lower income individuals. To date, I am unaware of any studies that would validate or refute this statement – but it is something worthy of further study.

Turning to *ex ante* valuation that I argue is more appropriate for public policy purposes, it is quite possible that surveys estimating the public's willingness-to-pay for crime reduction will result in estimates that are higher, on average, than the amount that low income households are willing or able to pay. In other words, the concern is that policies that value victims based on their willingness-to-pay to avoid victimization will hurt lower income populations. However, the traditional approach used by economists when conducting benefit-cost analysis and thus used to value victimization does not tell us how to balance efficiency versus equity considerations. Instead, it is based on the notion of minimizing social costs (or maximizing social welfare) under the assumption that the winners could in theory pay off the losers and the size of the pie is thus larger. So, this generally becomes a policy judgment outside the economics profession's expertise.[9]

More importantly, that is not how economists who work in the field of criminal justice value victims. In fact, the approach typically used is to base victim costs on the average willingness-to-pay in the population. Indeed, to the extent that "average" willingness-to-pay is higher than the amount lower income individuals would pay and lower than the amount that more wealthy individuals would pay, criminal justice policy based on benefit-cost analysis will include a progressive income redistribution component to it. Thus, the concern is misplaced – as currently applied, the use of willingness-to-pay will generally favor low-income individuals when applied to crime. In fact, I have seen policy analyses of gang-related murders that value the lives of gang members the same as any individual in society – despite evidence from their own individual risky behavior suggesting they value their own lives at a lower level (Ludwig and Cook, 2001). Similarly, U.S. regulatory agencies generally use a standard value for willingness-to-pay in their benefit-cost analyses. Note that this approach is not necessarily universally agreed upon – and at least two prominent law professors have argued otherwise – that regulatory agencies should generally base the valuation of risk of death on the population that will benefit from the regulation instead of the general population (Posner and Sunstein, 2005). If that approach is to be adopted, however, additional analysis should take into account the value that society places on income distribution. In other words, a policy might be justified based on its distributional outcomes in addition to (or in spite of) pure economic efficiency outcomes.

B. Geographic and/or Jurisdictional Issues

A similar issue arises when assessing the extent to which victims should be valued differently based on their geographic location. Here, I am not talking about differences between wages and

[9] An alternative approach might directly incorporate fairness and equity into the social welfare calculation by adopting a "utilitarian welfare analysis." See Manski (2015) for a discussion of this issue in the context of criminal victimization, along with relevant citations.

the cost of living in my hometown of Nashville versus New York City. Instead, the question is how (if at all) should French victims, for example, be valued in the U.S. when they might benefit from a policy in the U.S. that reduces their risk of injury or death. Or, perhaps, we might ask how victimization of an undocumented immigrant who is living in the U.S. should be valued. This is an issue that economics has little to say about – other than the fact that policy makers themselves need to determine "who has standing" for purposes of either a benefit-cost analysis or compensation (depending upon the reason for valuing the victimization). As a well-known benefit-cost analysis textbook explained:

> For example, if the U.S. government is considering the costs and benefits of a new anti-cybercrime technology, do we consider the benefits to residents of the U.S. only, or do we include the benefits to residents of other countries who enjoy the fruits of U.S. taxpayer's expenditures? There is no simple answer to this question, and oftentimes it is argued that when there are significant spillovers such as this, the benefit-cost analysis should be done both ways – once again increasing transparency and information to decision-makers" (Boardman, Greenberg, Vining, & Weimer, 2011: 38).

Thus, if policy makers determine that it is legitimate to value the victimization of those either living outside our borders or living inside our borders without legal status - economists can do so using the same methodologies we've discussed. Economists do not determine whose welfare to consider – that is a political decision.

C. Should all victims be treated equally?

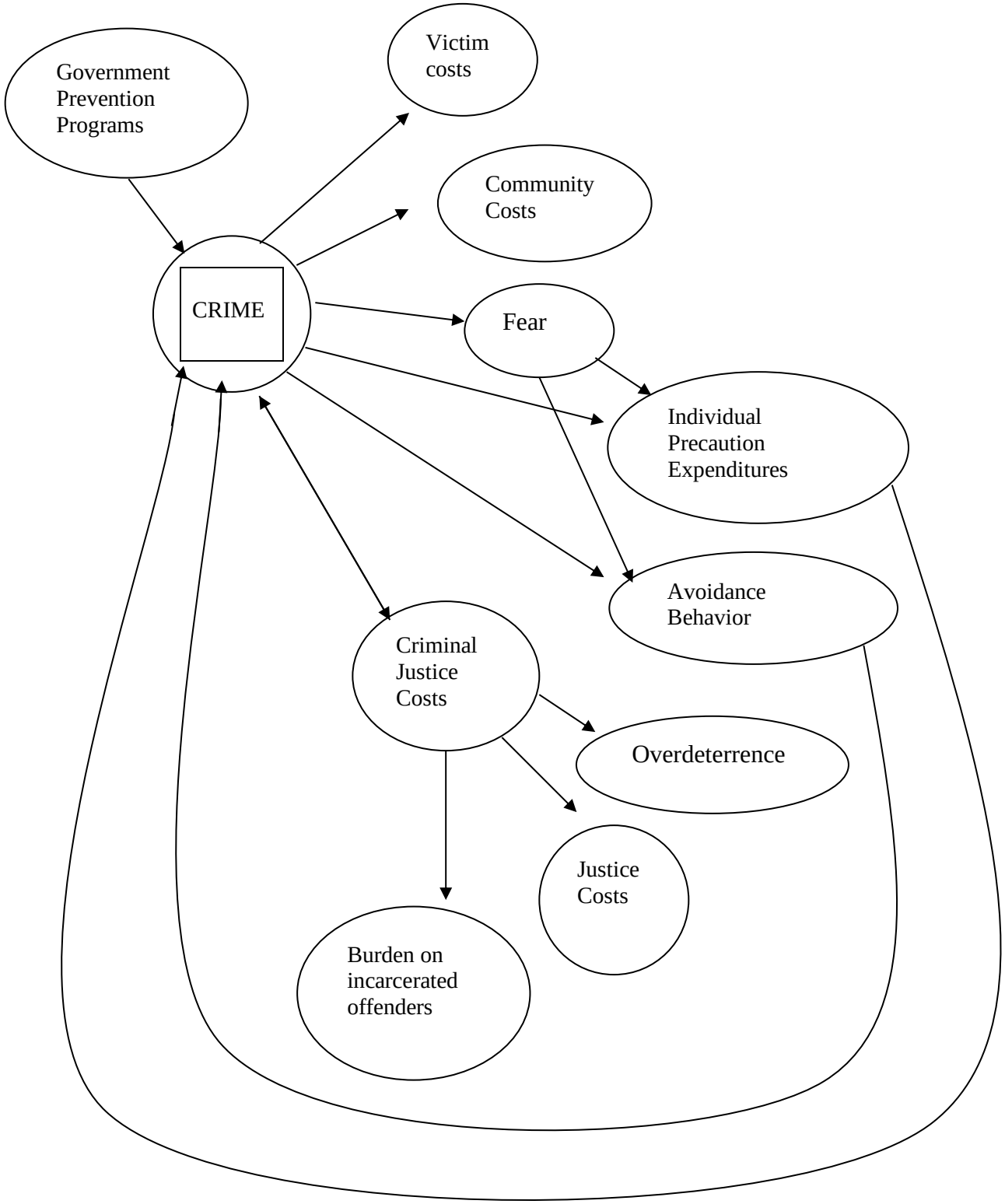
As I have argued thus far, all victims (who have "standing") should be treated equally – whether for purposes of determining the appropriate policy to reduce or deter victimization or to compensate victims. Income of the victim should not matter – except as noted in terms of compensation for pure monetary losses. However, if you read my economics of crime story carefully, you will have noticed that potential victims may take costly actions to avoid negative consequences of crime. So, should we compensate motor vehicle theft victims the same, whether or not they locked their cars or left valuables visible inside an unattended car? Or, to use an example that moves us into the natural disaster category - should the government bail out victims of an earthquake who live in a home that does meet appropriate building standards for the area? If all we care about is economic efficiency – the "optimal level of crime" or the "optimal investment in earthquake preparedness" - the answer is probably no. From an economic theory perspective, society wants the "least cost avoiders" to take relevant precautions. In some cases, it might be least costly for potential victims to take adequate precautions; however, they might not have the incentive to do so. This is a classic moral hazard problem – if potential victims know that they will be fully compensated for losses, they have less incentive to prevent those losses (Landes and Posner, 1987). In fact, that is one reason why tort laws in some states reduce payments to account for any "contributory negligence" on the part of the victim. Also, not that there is no fundamental difference between the impact of incentives on appropriate valuation whether analyzing victims of crime, terrorism, natural disasters, or other harms.

It is important to state that this is not an argument for victim blaming. It also does not necessarily mean that there must be a reduction in valuing victims to the extent they did not adequately protect

themselves against victimization. Instead, it is simply a cautionary note that when thinking about *victim compensation*, economics tells us that we need to think about the incentives of both the victim and the perpetrator. Using the example of an earthquake, there might be many good reasons to care about those who are victimized. Perhaps some victims were unable to afford either home improvements, or to move to a safer location. However, also note that if income distribution and equity are a social concern – and they should be – then there was reason to be concerned about families who could not afford to protect themselves before the earthquake happened! In other words, society might legitimately want to avoid the situation where individuals live in an earthquake zone when they cannot afford appropriate precautions – but I would view that as a different policy issue. If possible, that situation should be addressed before the earthquake so that we don't have the incentive problem I just described. Even if that is not possible, an equity argument can be made for victim compensation to those who could legitimately not afford protection. Of course, that policy creates new monitoring and incentive problems. As you can see, the issue is quite complicated, and while it might seem that I have diverged quite a bit from the topic at hand – I have actually not done so – as victim valuation and compensation will affect incentives in many cases – and this is something that needs to be taken into account.

Concluding Remarks

Economics obviously has a lot to say about how to value victims. First, the concept of a "victim" in economics is best thought of as an externality – the negative impact of one actor (or perhaps, natural causes) on another, when the "victim" did not voluntarily choose to receive that harm. But this definition means that from an economics perspective, the concept of a victim extends beyond the individual who is directly hurt – it might include many other members of society who are indirectly harmed from victimization. Second, before determining how to value victimization, one needs to determine the goal of that valuation. Is it for determining an appropriate public policy to reduce victimization, or to compensate victims after the fact? Finally, there are limits to what a pure economic approach to valuing victims can do without establishing the rules of the game. For example, it is a matter of preference – not economics dogma - whether to use an "average" valuation or to tailor the value to income of the victim – although I've told you how I come out on that issue. Similarly, if you tell me who is to be included in the social welfare function, then as an economist I can value their victimization. But economic theory alone does not have much to say about who has standing to warrant such valuation – that is for moral theorists and the political process to decide. Finally, economics reminds us to evaluate interrelationship between potential victims, potential offenders, and other actors in society as well as their incentives – as their actions are likely to affect both the incidence as well as the ultimate valuation of victimization.



The Costs of Crime

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The Ideal Victim: A Criminological Approach

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Abstract

The cynicism of the media and public opinion is reflected in this observation: on the scale of public emotion, 100,000 deaths in a conflict in a faraway continent is equivalent to 1,000 deaths in a close country which is equivalent to 10 deaths in the city centre of a Western capital which is equivalent to the death of a beloved celebrity. There are victims who arouse extreme compassion (victims of random terrorist acts, child victims of a monster, victims of sexual abuse committed by a cleric, fragile elderly victims of a racist act, victims of police violence or abuse of a State authority, heroic victims...). In criminology, this is referred to as the "ideal victim" (Nils Christie, 1986). But there are also victims who disturb, who exacerbate a divide (such as the aftermath of the Weinstein affair, where the #Metoo were confronted with an antifeminist discourse claiming sexual freedom). Finally, there are victims who arouse indifference or even denial or contempt (victims in remote areas trapped in an unreadable conflict abroad, victims found "guilty"...). The renowned Nils Christie's definition of the ideal victim should be rephrased and refined. A somewhat different presentation can be proposed. The figure of the ideal victim crystallizes in the presence of five elements. It is necessary that the victim be weak (Part I), that there be real or symbolic identification with the victim (Part II), that there should be no victim blaming or divide in the opinion (Part III), that the criminal be "big and bad" (Part IV) and that the victim be seen or heard (Part V). A victim is all the more likely to gain the ideal victim status if the personality of the perpetrator is rejected: this phenomenon may be called the *contrast effect*.

Keywords: crimes, victims, suffering, media, emotion, compassion, identification

Introduction

"*The death of a human being: it's a catastrophe. One hundred thousand deaths: that's a statistic!"* (Tucholsky, 1925)[10]**.**

The cynicism of the media and public opinion is also reflected in this (rhetorical) observation: on the scale of public emotion, 100,000 deaths in a conflict in a faraway continent is equivalent to 1,000 deaths in a close country... which is equivalent to 10 deaths in the city centre of a Western

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[10]Often attributed to Stalin, this quotation was actually written in 1925 by Kurt Tucholsky (1890-1935), a writer, critic and journalist, a satirical and committed spirit, a great observer of society and defender of democracy, at the time of the Weimar Republic. The full sentence, which is credited to a French diplomat and given as a typical example of the French humour, is: *"Der Krieg? Ich kann das nicht so schrecklich finden! Der Tod eines Menschen: das ist eine Katastrophe. Hunderttausend Tote: das ist eine Statistik!"* (*"The war? I can't find it so horrible! The death of a human being: it's a catastrophe. One hundred thousand deaths: that's a statistic! "***).**

capital... which is equivalent to the death of a beloved celebrity.

Sociology observes a hierarchy of value between victims: between deserving victims and those who are less deserving or not at all deserving (undeserving victims); between those who are stigmatized and those who are recognized or even celebrated.

Suffering as a key of selective compassion

The hierarchy, or at least differentiation, between deserving and undeserving victims is the result of social interactions and subtle psychological reactions (Foring, 2018).

An obvious key to reading this is the concept of stigma, forged by Erving Gofman (1963). Stigma is the devaluation or discrediting of the stigmatized individual, "labeled" as such by all "normal" people. Stigma conveys stereotypes. It leads to ostracism, a refusal of social acceptance, a rejection of the stigmatized person who is the object of prejudice and discrimination. Moreover, stigmatized people become "deviants" if they deviate from the "*normative* expectations" of others, of "normal" people. The mentally ill or suffering from certain pathologies, the disabled, the obese, homosexuals, drug addicts, criminals, former prisoners, the unqualified, the divorced, Blacks and other ethnic minorities... are thus discredited, considered dangerous, rejected and discriminated against if they do not act in accordance with the expectations of normal people and the codes of their stigmatized group. For example, a cripple who does not behave as a powerless and inferior being arouses suspicion and attracts antipathy. Victims of all kinds of offences - especially the most serious ones - carry also a stigma.

If stigma is a key of understanding, it does not provide an explanation: why are some victims stigmatized, labeled, while others are treated with respect or even honors? It seems to us that this phenomenon finds its true genesis in the notion of suffering, which itself takes many forms.
Suffering is first and foremost an intimate experience (suffering is a sensitive matter, Kant would say): it is a *subjectively felt* phenomenon. But it can also be an *individual representation*. It is, finally, a *symbolic social representation*.

Childbirth provides an illustration of this. The suffering caused by childbirth can only be *felt* by the woman who has experienced such an event. Nevertheless, a woman (and her partner) can *represent* this pain independently of any obstetrical experience: suffering is thus represented in the individual's imagination; birth preparation classes draw upon this abstract perception in order to improve the threshold of tolerance to physical pain and the control of related emotions. Finally, the pain of the parturient woman has had a considerable *symbolic* dimension in all human *societies* since the dawn of humanity. The Bible, in particular, makes it a punishment for the first woman, who is reputed to be an accomplice to original sin[11], before restoring her (in the New Testament) to a more positive image[12].

Because suffering is - also - a social construction, it spreads through the language, thoughts,

[11] Genesis 3:16: "To the woman [Eve], [Yahweh] said, 'I will multiply the travails of your pregnancies; in sorrow you shall bring forth sons' ".
[12] John 16:21: "The woman who is about to give birth grieves because her time has come; but when she has given birth to the child, she does not remember the pain, rejoicing that a man has come into the world".

attitudes, symbols (art, in particular[13]) that embody the values of society. Naturally, laws are part of this construction, as illustrated by the memorial laws. The victim, who is the subject of suffering, is caught up, embedded in this social construction. The suffering and therefore the victims inspire unequal perceptions, thoughts and feelings in the society, sometimes fantasized perceptions, thoughts and feelings.

Criteria of emotion

The reaction to the commission of a crime belongs to the register of emotions. Of course, the existence of an emotion is intangible. But relatively objective criteria for the emotion generated among the population can be put forward.

● In the first place, large gatherings and mass homages can be organized following a tragic event. The death of George Floyd - an Afro American killed by suffocation during a police arrest on May 25, 2020 in Minneapolis (USA) - has sparked a dramatic wave of wrath across the United States and all around the world. More specifically, the violent death of a person may be followed by a funeral procession or "white march", i.e. a commemorative parade of inhabitants belonging to the community (such as a village or neighborhood) to which the victim's family belonged. The number of participants in a white march is an indicator of public emotion at the local level. The repetition of white marches (commemorations or anniversaries) in subsequent years indicates the persistence and periodicity of this emotion over time[14]. The number of people attending the victim's funeral is a more uncertain indicator as this ceremony occurs only once and may unfortunately never take place (when the victim's fate is unknown or his or her body cannot be found).

Other events tend to rekindle the memory of a past crime, of the suffering endured by the direct victim but also of the suffering that continues to be endured by relatives. For example, when the tragedy has a national or even international dimension, a concert may be organized "in honor" of the victims, or even with the aim of raising the necessary funds for their compensation. Thus, it is clear that the fire that ravaged Notre-Dame Cathedral in Paris on 15-16 April 2019 triggered a wave of emotion in France and around the world. The world's press reported on it the very next day. The President of the United States himself sent a “Tweet” in the first hours of the fire, recommending the dispatch of water bombers. A concert was immediately organized (at the foot of the Eiffel Tower, another symbol of the City of Light) and broadcast on television on 20 April 2019. The fire did not cause any human casualties, but the monument was personified and was mourned as a human victim in the words heard ("I feel like I've lost a friend," said a tearful passer-by).

● A second indicator of the passion generated by a crime is its media coverage (television, print and internet), especially when foreign media cover the event. However, it is difficult to determine whether the media grasp a pre-existing public emotion or create, feed and amplify it. Commercial concerns or even the desire to investigate a crime may lead journalists to draw public attention.

[13] See the statue of Auguste Rodin, "The Head of Pain" (around 1903-1904).

[14] In France, the mysterious disappearance of Estelle Mouzin, at the age of 9, on January 9, 2003, in Guermantes (Paris region), on her way home from school, is thus commemorated by an annual “white march”. A dozen television documentaries have also been produced since 2003.

Clear quantitative data include the number of queries on the main search engines, the number of messages posted on social networks or the number of dramatic hashtags on Twitter. The extraordinary echo produced by the Harvey Weinstein case (American film producer accused of sexual assault in October 2017 by the New York Times and the New Yorker) was particularly evident in the form of hashtags, which have become famous (#MeToo, worldwide; #BalanceTonPorc[15], in France). Likewise, twenty years after the Columbine school shooting (on 20 April 1999), Columbine students has launched #MyLastShot campaign to publicise images of their bodies if they're killed by gun violence.

The success of a book about forgotten victims is also revealing. For example, while thousands of migrants die each year in the Mediterranean sea in anonymity and almost total indifference, in Italy a forensic doctor (Cristina Cattaneo) has tried to give a name back to the victims who were rescued and to reconstruct their life stories from shocking details[16].

● Third, the emotion generated by a tragic or criminal event inspires initiatives that tend to diversify and spread through imitation.

A recurring phenomenon nowadays is the uptake of "fundraising websites". Some are the source of controversy or even litigation because, while victims are the main beneficiaries of these financial donations, some offenders can also spur the generosity of the public.

> Thus a funding pot was set up on the site leetchi.com for the benefit of a violent demonstrator (Chistophe Dettinger) who had "boxed" gendarmes during the French movement called "yellow jackets" (hi-viz jackets) on 5 January 2019 in Paris. This collection, which had reached 130,000 euros, had caused controversy. The website had also frozen the payment and referred the matter to the courts. In response to this initiative, another jackpot was set up for the benefit of policemen and gendarmes injured during the demonstrations, which exceeded 1.5 million euros.
> It will be recalled that the amount of pledges collected in the 24 hours after the fire at Notre Dame reached one billion euros.

In fact, a study has pointed out that “anger leads to higher charitable donations, under the condition that people can restore equity with that donation (i.e., restore the harm done to the victim). If the donation does not serve a specific restorative function, angry people should not be inclined to donate more than people not experiencing anger” (van Doorn et al., 2017)[17].

[15] Translation : “snitch on your pig” (the pig being the predator).

[16] https://www.francetvinfo.fr/replay-radio/en-direct-du-monde/en-italie-rencontre-avec-cristina-cattaneo-qui-veut-rendre-son-nom-a-chaque-migrant-noye_3218207.html

[17] J. van Doorn, M. Zeelenberg & S. M. Breugelmans, *The impact of anger on donations to victims* : *International Review of Victimology* 2017, Vol. 23(3), 303-312 : « Results indicate that when a donation serves a specific restorative function (i.e., compensating the suffering of women so that they can start a new life) as compared to a non-restorative compensatory function (i.e., helping in special crisis centers for women, to alleviate their suffering and prevent deterioration of their situation), angry participants donated more to charity. (…) These results suggest that anger can act as an appeal in soliciting charitable donations. (…) This effect occurs independently from that of co-occurring empathic concerns ».

● Other public or private initiatives testify to the emotional shockwave generated by a crime:
- the presence of the Head of State at the victim's funeral (for example, at the national funeral of Lieutenant Colonel Arnaud Beltrame on 28 March 2018 in Paris ; see below);
- the passing of a law (a kind of memorial law) bearing the name of an emblematic victim (for example, Jessica's laws and Megan's laws in the USA, against sexual predators; Clare's Law in Great Britain, on domestic violence);
- the creation of a specific body or procedure designed to speed up the compensation of victims (guarantee fund or specialized court or commission, such as those established for victims of terrorism);
- a symbolic judicial hearing, with a cathartic purpose, when the alleged offender can no longer be prosecuted (because the limitation period has expired or because he/she is dead). Several of Jeffrey Epstein's accusers told a federal courtroom in Manhattan (on Tuesday 27 August 2019) how Jeffrey Epstein had sexually abused them and used his power to silence them. For many, it was their first time speaking about it in public, and it was a « cathartic moment ». The chair at the defense table remained empty: J. Epstein had hung himself in his cell, where he was awaiting trial on sex trafficking charges.
- the creation of a victims' association (which will subsequently seek justice and to which the investigating judge will have to report).
- toppling statues, ripping up portraits or dismantling monuments which embody a genocide or dictatorship (e.g. statues of Soviet leaders in Eastern European countries before and after the fall of the USSR; statues of Confederate generals in the USA, statues of Christopher Columbus or alleged slavers all over the world, after the violent death of George Floyd).

Priorities in the fight against crime

More broadly, a news item, appearing to be the "straw that breaks the camel's back", can determine a new priority in a national or local policy to combat crime. The fight against sexual violence can thus become a priority for the public authorities: new offences are enacted, penalties are increased, security measures are created, the lodging of complaints is facilitated, etc. The fight against sexual violence can also become a priority for the public authorities.

But, from words to the practice of the field, there is a step. In spite of political announcements and the existing legislative arsenal, the clearance of certain offences is considered as a subordinate activity in a judicial police service that favors "good deals". Rapes and sexual assaults rarely fall into this category and require little involvement by investigators.

However, it seems that the impediments to the conduct of police investigations stem more from objective circumstances than from deliberate inertia on the part of the competent authorities. The police clearance rate of crimes may differ markedly.

> For example, there is a higher likelihood of clearing homicides involving child victims and a lower likelihood of clearing homicides involving the elderly. To explain it, the assertion that police devalue certain victims is common but too simplistic. A research (Hawk, 2014) in a metropolitan police department found considerable variation in terms of prioritization of cases and investigative effort even within homicide cases themselves. Certain case characteristics complicated this process, regardless of officer discretion :

> cases with few viable leads (lack of physical evidence, witnesses, or information). The lower clearances for nonlethal offenses may be due to other organizational hindrances that are unique to cases involving surviving victims, such as perceptions of victim credibility ; also, victims may be reluctant to cooperate for a variety of reasons (fear, intimidation by the offender, possible stigmatization and being labeled a ‘‘victim’’) (Jarvis, 2017).

At a later stage, the judge may himself or herself favor certain victims and deny that status to others, for questionable reasons. For example, a restrictive definition of a victim eligible to be a civil party in a trial before an international criminal court will result in the exclusion of thousands of persons who appeared to be worthy of this qualification.

> A study has made the argument that in the context of the Khmer Rouge Tribunal in Cambodia, recognition of victimhood has been narrowed by a myriad of heterogeneous actors pursuing a variety of political, legal, and social goals. Applying the critical victimological argument that terms such as ‘victim’ and ‘victimization’ are contested and open to manipulation, this study has explored how both the initial creation of the KRT and the way its practitioners have approached their work have excluded numerous individuals who have suffered harm from its remit (Killean, 2018).

Before a national court, the grounds for the inadmissibility of a civil action are a priori more solidly supported by legal arguments. However, the neophyte may find certain distinctions quite subtle. For example, the French Court of Cassation rejected the civil action brought by the city of Nice (French riviera) after the terrorist attack on the ram truck that killed 86 people and injured 458 others on the Promenade des Anglais on 14 July 2016: according to the French judge, only the individuals affected and the State were victims of the terrorist crimes committed[18].

Ideal victim and related situations

The stigmatized or undeserving victim, who does not attain the rank of "ideal victim", is not the one whose damage is contested or denied by the perpetrator, according to a reflex that is extremely widespread in criminal minds. This *denial of the victim* is a *neutralization* technique (Sykes and Matza, 1957) that is particularly salient in hate crimes (e.g. homophobic crimes, cyberstalking, school killings, etc.). It also appears in scams, where the con artist often feels nothing but contempt for the credulity of the person he or she has deceived. The denial of the perpetrators of sexual assault is a much more complex psychological mechanism which has inspired various typologies (depending on the degree or extent of denial) and which must be taken into account in order to establish treatment (Vanderstuken and Pham, 2014; Herzog-Evans, 2012). The stigmatized or undeserving victim is not challenged by the perpetrator but by society as a whole. From this point of view, the victim may be perceived as negatively as the criminal himself.

In contrast to the ideal victim is the *false victim* who at the very least provokes mockery, at the worst a strong moral or even judicial condemnation. This is the case of counterfeiters, impostors or usurpers who are victims of a crime (especially a terrorist attack). Whether they try to swindle

[18] Cass. crim. 12 March 2019, No. 18-80911: neither the material damage invoked by the municipality, nor the moral damage resulting from the damage to its image resulted from terrorist offences, which are only likely "to have directly harmed, beyond the victims who are natural persons, the interests of the Nation".

a compensation fund or are driven by a need for recognition (stemming from a narcissistic flaw), they expose themselves to public reprobation and criminal prosecution. About fifteen of these imposters made themselves known after the 2015 and 2016 terrorist attacks in France, receiving various bird names (such as "scavengers")[19]. The fake victim is pilloried but is in no way a true victim. Even victims seen as undeserving are still victims.

Ideal victim's definition

The fatherhood of the notion of ideal victim belongs to the Norwegian Nils Christie (1986) who drew a typical portrait of the ideal victim. Generally speaking, the term applies to a victim who draws the attention and compassion of the public. A victim would have to have six attributes to be granted this status:

(1) he or she must be *weak*;
(2) he must be *carrying out a respectable project*;
(3) he is above all reproach and *cannot be blamed*;
(4) the criminal is *big and bad* in comparison with the victim;
(5) the criminal is unknown to the victim or unknown at all;
(6) *the victim needs to be weak enough to be regarded as a victim but powerful enough to claim victim status*. It is a matter of making oneself known and recognized as such by the police, the justice system and the media.

According to Christie, the archetype of the ideal victim is "a little old lady who is robbed by an unknown man on her way home in the middle of the day after having cared for her sick sister". This example meets the criteria previously detailed and enables the old lady to claim victim status without question.

But this typology may be rephrased and refined. A somewhat different presentation can be proposed. The figure of the ideal victim crystallizes in the presence of five elements. It is necessary that the victim be weak (Part I), that there be real or symbolic identification with the victim (Part II), that there should be no victim blaming or divide in the opinion (Part III), that the criminal be "big and bad" (Part IV) and that the victim be seen or heard (Part V).

I. The victim must be weak

Christie rightly observes that the status of "ideal victim" requires a first quality: *weakness*. It is a woman, a child, an elderly, handicapped or sick person, etc.

Children are often ideal victims, whether they have been victims of a crime, by definition intentional (for example, murder or kidnapping), or victims of a manslaughter (for example, a fatal accident during school transport) [20]. Indeed, child protection did not become a sacred value until

[19] https://www.francetvinfo.fr/faits-divers/terrorisme/attaques-du-13-novembre-a-paris/elle-a-vole-la-vie-des-morts-comme-un-charognard-plongee-au-coeur-de-la-tromperie-d-une-fausse-victime-du-13-novembre_2669602.html

[20] On the emotion aroused by the Millas accident in France on December 14, 2017 (accident on a level crossing between a high school bus and a train, which killed six teenagers):

the twentieth century. Today, this age is associated with innocence and the murderer of a child considered to be the perpetrator of sacrilege.

Women also may have access to this compassionate status, in some circumstances, namely when they are targeted in the context of a daily activity synonymous with emancipation: typically, the jogger murdered on her way out (see below); or, women who are victims of sexual harassment in the course of their professional activity.

However, individual victimization will not suffice. For the media echo to be powerful enough, the crime must be likely to be linked to a public scandal and benefit from a collective sounding board.

> Thus the Harvey Weinstein case (see below) shed light on countless cases of sexual assault that would have remained invisible in the flood of daily crime if the American film producer's antics had not been revealed by the New York press.

The elderly person (such as Christie's *little old lady*) is another ideal victim, such as the disabled or sick person. The risk is that the emotion aroused - which is very tangible - may be artificially amplified for the purposes of political communication. Reality can be distorted.

> In France, an emblematic news item in this respect is the assassination of Mireille Knoll on 23 March 2018. The victim was 85 years old and was stabbed at her home in her wheelchair by a close neighbor (a 28-year-old Maghrebian) who then set about burning her corpse. Several circumstances amplified the emotion generated by this sordid event, particularly in the Jewish community: the crime was immediately presented as anti-Semitic and it was pointed out that the victim was a survivor of the Vel d'Hiv round-up, her husband having died in Auschwitz[21]. The President of the Republic went to the funeral, greeted the family with the yarmulke on his head and then, in a funeral speech, drew a singular parallel with the death of gendarmerie officer Arnaud Beltrame (who died the same day during a Jihadist terrorist hostage-taking in the South of France), denouncing the same 'barbaric obscurantism'[22]. However, the anti-Semitic character of the crime only emerged confusedly from the investigation and seemed as tenuous as the political recovery was hasty. The investigating judges later decided to retain this aggravating circumstance[23].

II. The need for real or symbolic identification with the victim

Christie wrote that the ideal victim had to carry out a respectable project. He is a journalist who

https://www.francetvinfo.fr/faits-divers/accident/accident-de-car-dans-les-pyrenees-orientales/drame-de-millas-hommage-d-un-village-a-ses-enfants_2525811.html

[21]https://www.francetvinfo.fr/faits-divers/ce-que-l-on-sait-du-meurtre-d-une-octogenaire-juive-a-paris_2675390.html

[22]https://www.francetvinfo.fr/faits-divers/meurtres/meurtre-de-mireille-knoll/emmanuel-macron-s-est-rendu-aux-obseques-de-mireille-knoll_2678402.html

[23]https://www.lemonde.fr/societe/article/2020/07/13/meurtre-de-mireille-knoll-les-deux-suspects-renvoyes-aux-assises-pour-crime-a-caractere-antisemite_6046077_3224.html (published on July 13, 2020).

was tortured because his investigations displeased the government, a monk who was imprisoned because of his beliefs, but not a drug dealer who was the victim of a rival gang or a religious fanatic wearing a belt of explosives shot dead in extremis by soldiers on patrol.

On the contrary, victims who have contributed to a criminal project arouse hostility, not compassion. Such is the case of the French men who have been sentenced to death in Iraq in 2019 after an expeditious trial (less than an hour) for the crime of belonging to the Islamic state (Daesh). The French government, which is fundamentally opposed to the return of its citizens, declared that it respects this state justice, while at the same time - symbolically and lip service - reiterating its opposition to the death penalty. According to a poll, eight out of ten French people said they were opposed to the repatriation of these individuals. Those who criticized this expeditious justice (some human rights associations) were inaudible in the[24]public debate.

The fact remains that most of the victims do not carry out any particular project. The victims of indiscriminate terrorist attacks, for example, are hit in their daily lives (just walking on the street) and yet evoke extreme compassion. The "respectable project" is almost imperceptible, although this condition does play a role. In reality, what is decisive is the circumstances in which the victimization occurred. The respectable project is then the activity that a citizen engages in on a daily basis, or the fulfilment of which is a higher ideal for him or her. The key notion here is that of the real or symbolic identification of the citizen with the victim. Two scenarios appear.

A. The victim is an ordinary person (real identification)

A victim is more likely to arouse public interest if he or she has been struck in the course of an activity in everyday and ordinary life: leisure or sports activity, shopping, walking, travelling by public transport, at school, etc. The entire population is involved in these activities, so it is impossible for a typical citizen not to identify with the victim or victims. Each of us thinks, even for a moment, that "it could have been me". When the victim is struck by crime or tragedy anywhere and anytime, a victim *chosen at random*, almost the entire population feels a sense of identification because no one can be sure that he or she will never be "in the wrong place, at the wrong time".

Attacks in public places naturally inspire this feeling. They can affect individuals of all generations and nationalities. The attack on the Bataclan on 13 November 2015 struck the whole world with astonishment because the whole world could have been in Paris on that day to attend a music concert.

The case of children kidnapped by strangers in public places is evocative. The Maëlys case, which made headlines in 2019 in France, provides a topical illustration. The victim was an 8-year-old child, an ideal victim if ever there was one. Above all, the facts involved some chilling circumstances.

The little girl was abducted on 27 August 2017 during a festive and family event (a

[24]https://www.francetvinfo.fr/monde/proche-orient/francais-condamnes-a-mort-en-irak/a-bagdad-les-deux-jihadistes-francais-condamnes-a-mort-n-ont-eu-que-quelques-minutes-pour-s-expliquer_3052233.html

wedding). She was then kidnapped by a stranger, which is the obsession of all parents, who try to remind their offspring of the eternal advice never to speak to a stranger. In addition, the child's body had disappeared, and mystery hung over her disappearance (until the prime suspect revealed her whereabouts on February 14, 2018).
This silence whetted the appetite of the public and aroused the curiosity of the media. Leaks in the press took place, provoking the anger of the public prosecutor[25]. This lack of communication was clumsy. In such cases, information may be distilled through meticulous press conferences organized by the public prosecutor. François Molins (then public prosecutor at the Paris High Court) had made this practice his "trademark" between 2015 and 2018, when jihadist attacks struck France. It is by feeding the media with a few selected details that leaks are cut off and the violations of professional secrecy are avoided. But one must avoid going into the opposite excess: in another case of rape followed by the murder of a child (the Angélique case in France), the public prosecutor gave chilling and too many details of the torture suffered by the young girl![26]
Last but not least, the psychopathic personality of the presumed culprit (Nordahl Lelandais) gave this criminal scenario an - also - "ideal" protagonist: Impressively cold, having an answer to everything, persisting in denial as long as no irrefutable evidence was presented, a probable serial killer surrounded by a halo of mystery (the real number of his victims remaining unknown), he mobilized a team of a hundred investigators from the gendarmerie and kept the general public on tenterhooks as the investigation progressed.

The abduction and murder of a young woman during a daily activity also raises widespread concern. Once more, the cases of joggers attacked bear witness to this. They are always mentioned by the media. Here again, emotion takes precedence over reason.

For example, in the case of Alexia Daval, the discovery on October 30, 2017 of the charred body of a young woman who had gone out jogging every week and whose very worried husband had reported her missing was the subject of widespread mobilization. Commemorative parades were organized in France by running enthusiasts, defending the right of women to run unmolested. In fact, it took only a few days to discover that the victim had been strangled at her home by her husband (who was particularly grieving at the funeral) who had transported and burned the corpse in a forest. It was a fantasy scenario that had fueled public emotion.

B. The victim is a hero (symbolic identification)

A person killed during an act of bravery (in the course of a mass shooting or a terror attack, for example) becomes a hero. This victim, who has offered his or her life in sacrifice, at the same time gains the status of ideal victim insofar as it give rises to identification, sometimes in multiple facets.

Thus, on 23 March 2018, Gendarmerie Lieutenant Colonel Arnaud Beltrame proposed to a jihadist terrorist, who had taken hostages in a supermarket in the South of France, to exchange him for a

[25] https://www.ouest-france.fr/faits-divers/disparition/maelys/affaire-maelys-le-procureur-excede-par-les-fuites-ouvre-une-enquete-5335007
[26] https://www.francetvinfo.fr/faits-divers/meurtres/meurtre-d-angelique/meurtre-d-angelique-le-procureur-de-la-republique-a-t-il-donne-trop-de-details-lors-de-sa-conference-de-presse_2732307.html

cashier. He was killed three hours later while trying to disarm the madman. Although the soldier's attitude showed a certain recklessness (his initiative ignored all procedure and hierarchy), he was celebrated as an altruistic citizen with a sense of collective interest, as a civil servant who embodied the State (a national tribute was paid to him at the Invalides by the President of the Republic) and as a pious man who embodied the values of Christianity (he had recently converted to that religion). Thanks to these multiple variations, everyone had reason to identify with the deceased hero.

Such identification remains symbolic or virtual: if almost everyone is an ordinary person (which allows real identification with the victim of chance), almost no one has been or will be a hero (which does not prevent one from conceiving of oneself as such in a symbolic and virtual way).

III. No victim blaming or divide

The ideal victim must be innocent. The purpose is disturbing: it obfuscates a clear legal distinction (between *offender* and *victim*) with a moral and blurred distinction among victims, depending on their degree of guilt or innocence.

More worryingly, many studies have found a link or "overlap" between crime and victimization (*Victim-Offender Overlap*). For example, it is common for the victim of a homicide to have been previously arrested by the police themselves. Conversely, social ties (having a family, friends, a job, etc.) protect against criminal temptations and are formed throughout life: as an individual ages, he or she tends to commit fewer offences and, at the same time, reduces the risk of becoming a victim (Schreck and al., 2017). It is therefore easy to say that the victim was not completely "innocent". Worse, the "guilty" victims always have the same profile: male, young, from a disadvantaged economic background and belonging to an ethnic minority.

Born in the United States in the aftermath of the Second World War with the publication of Hans von Hentig's *The criminal and his victim (*1948), traditional victimology (or "first victimology") ceases to consider the victim as a passive being and focuses on the relationship between the victim and the offender and the mechanisms governing that relationship. The approach was innovative in that it broke with traditional theories that focus on the offence or criminal personality without ever considering the victim as a problem. However, this trend rapidly drifted in the 1960s and especially in the 1970s. (Morvan, 2019). Starting from the truism that there is no crime without a victim, some authors endeavored to show that the victims (mainly of homicide, rape, incest, property offences) were, to a large extent, *responsible* for their misfortune (the so-called *victim precipitation* or victim-catalysis thesis). They then established typologies of victims according to their causal role (active or passive, conscious or unconscious) or according to their degree of guilt. Benjamin Mendelsohn, the other pioneer of victimology (Mendelsohn, 1963) identified six categories of victims: the completely innocent victim (who was in the wrong place at the wrong time, unaware of the facts), those who are less guilty than the criminal, as guilty as the criminal (suicide by two people, euthanasia, etc.) or more guilty than the criminal (in the case of provocation), the extremely guilty victim (killed in self-defense) and, finally, the imaginary victim (mentally disturbed). Similar typologies were subsequently developed.

The idea of victim precipitation reflects a popular idea: victims who precipitated the crime, such as the raped prostitute, the drug dealer who is being targeted for revenge, or the burglar who was

shot dead while trespassing on private property, are spontaneously found guilty. The precipitative victim stimulates the phenomenon of victim blaming (A). However, many victims are perceived as disturbing for reasons other than their alleged responsibility in the commission of the crime. They inspire generally contradictory feelings in the public, revealing a divide (B), attraction-repulsion (C) or impatience (D) face to the victim.

A. Victim blaming

Paradoxically, a citizen who feels empathy for the victim with whom he/she can identify - particularly the randomly victim - finds it difficult to admit that an innocent person is struck by fate and tends to look for the fault (at least recklessness) that he may be responsible for. For example, a journalist taken hostage by a militia in a foreign country must have known that he was taking risks by venturing into a dangerous country; if he did not know, he should have known. The fact that he has been running a "respectable project" (defending freedom of information) will not make him immune from the blaming victim; even his colleagues will have to struggle in order to alert the public and maintain a sustained mobilization for the hostage's release.

IPV

In general, the victim who knew his or her abuser or aggressor has hard time accessing the status of ideal victim. Worse still, this blaming victim strikes people who may already be beset by a social stigma. For example, women victims of intimate partner violence (IPV) are labelled as such and, in addition, blamed for not having left the spouse who molested them for years. In the eyes of the public, which is generally unaware of the insidious spiral of domestic violence, their passivity is tantamount to complicity. They are, in a way, summoned to demonstrate their innocence, their "value" as victims, worthy of inspiring the selective empathy that society claims to show (Meyer, 2016).

Studies have analyzed the influence of victim behavior on attributions of blame to victims of sexual assault. This literature has shown that judgments of blame are influenced by the victims' behavior. Women who behave differently from stereotypical beliefs about the behavior of "genuine" or "real" victims of sexual assault are more blameworthy or likely to be blamed: wearing a revealing, sexy, or provocative clothing, not showing active resistance against the aggressor, having had previous sexual contact with him, inviting him home, the victims' drinking… have all been related to a higher degree of victim blaming. The observers assume that they exposed themselves to dangerous situations that ultimately led to the negative outcome and that the aggressor may have been seen as falsely perceiving the victim to show sexual interest.

RMA

By the same token, participants' RMA (*Rape Myth Acceptance*) may be measured on a scale such as the Acceptance of Modern Myths About Sexual Aggression (AMMSA) scale of Gerger (Gerger et al., 2017). The AMMSA is a self-report scale (in English, German or Spanish) with 30 items designed to measure common thoughts about sexual violence that serve to deny, downplay or justify sexual violence that men commit against women (e. g. : "It is a biological necessity for men to release sexual pressure from time to time" ; "Any woman who is careless enough to walk

through “dark alleys” at night is partly to be blamed if she is raped” ; “Alcohol is often the culprit when a man rapes a woman”). The participant answers on a 7-point scale ranging from 1 : completely disagree to 7 : completely agree.

A study has pointed out that the mere acceptance of a drink from a stranger in a situation with sexual overtones (e.g., a disco, party, pub) is seen as suggesting sexual interest and, thereby, as the victim contributing to the aggressor’s misperception of her sexual interest through her behavior. In line with this explanation, the observer’s level of Rape Myth Acceptance (RMA) is especially important when the victim accepted a drink from a stranger who later became the aggressor. But drink type (alcoholic vs. nonalcoholic) did not interact with the other variables (Romero-Sánchez et al., 2018).

The RMA seems accentuated in a religious or conservative society. This is evidenced by the "Shame on who" campaign that was organized in Lebanon by the NGO Abaad so that the shame inherent in a sexual assault, according to a cultural representation, would no longer fall on the victim but on the perpetrator. This was not the first time that the NGO Abaad had been involved in such an event. In 2017, it had obtained the repeal of article 522 of the Lebanese Penal Code, which allowed the perpetrator of rape to escape criminal responsibility by producing a valid marriage contract with the victim. This text was an example of "marry-your-rapist law" of which there are several examples worldwide.

Prostitutes

Prostitutes are probably among the least considered victims on the social scale. Prostitution is often depicted as a low-level victimless crime, or even a job like any other, a contract in which one party supplies and the other demands sex. In reality, most women enter into prostitution when they run out of choices, are desperate, enticed, pressured, manipulated or coerced in some way (by pimps, partners or creditors). Women involved in prostitution are amongst the most victimized group of people in society: they experience or have experienced violence, child abuse, sex trafficking, sexual and mental health problems. Although subject to multiple forms of victimization, prostitutes are often not considered to be ‘suitable victims’ by the authorities. Even those who are victims of sex trafficking and operate on the streets (the most victimized) are poorly treated : there are serious limitations in the enforcement of the legislation (against sex trafficking, namely) and intervention is often inconsistent (Matthews, 2015, who describes the situation in the UK).

Computer fraud

In a more unusual way, victims of computer fraud are not only targeted by intense blaming but also laughed at. More surprisingly, they may take up this stigmatizing discourse on their own, in a kind of self-flagellation.

Victims of online fraud (e.g. Nigerian scams) are constructed as greedy (they are out for money), naive and gullible (they have responded to a clearly fraudulent email request and sent money) and there is an overwhelming sense of blame and responsibility levelled at them for the actions that led to their losses. Besides, in the context of online fraud, the use of humor is a defense mechanism. Framing their own perceptions and conversations in a joking and playful manner allows seniors to

distance themselves from the possibility that they may be vulnerable to potential fraudulent attempts. As a result, reporting of online incidents occurs at an even lower rate than fraud in the material world. Given the strength of the victim-blaming discourse, many victims fail to disclose an online fraud to family and friends: they internalize the shame and stigma associated with the consequences of their behaviors (Cross, 2015).

The Ashley Madison site affair gave rise to a strong "victim blaming discourse".

> The Ashley Madison site, notoriously known for facilitating extramarital relationships, was hacked in 2015 by a data breach that led to the publication of the personal data of 37 million customers. The victims of this data breach did not fit within the characteristics of Christie's ideal victim. Rather, they were largely seen as culpable in their victimization, through the subscription to the adulterous website. These individuals were seen to be "non-ideal" victims. The journalists' comments, in the print media, emphasized the fact that they should not be seen as victims in this situation, as they had directly contributed to their own disgrace ("if you cheat on your partner, should you expect any sympathy when you're caught out ?"). Further to this, there was direct support noted by some, congratulating the hackers for their success in exposing alleged cheaters. This portrays the hackers as 'heroes' or moral crusaders, whose actions can be understood and somewhat forgiven for the greater good (Cross et al., 2019).

B. Divide

Victims disturb in another way. These are the ones that divide opinion, exacerbate - through no fault of their own - a divide, that reinforce trench warfare between supporters of antagonistic ideologies.

Guns in the USA

In the United States, the violent events in Charlottesville on 12 August 2017 (a vehicle-ramming attack into a crowd of counter-protesters to a Nazi rally) first crystallized the strong opposition of part of the population to *white supremacists*. This irreducible opposition was exacerbated by a subsequent statement by President Donald Trump: "*We condemn in the strongest possible terms this egregious display of hatred, bigotry and violence on many sides, on many sides*"[27]. The latter formula ("on many sides") has been criticized for sending the two sides back to back, aggravating an ideological divide in the American nation rather than unequivocally condemning the deadly violence of one side in particular.

Almost every day, a mass killing occurs on American soil, sometimes a school shooting. In an equally ritualistic manner, it then gives rise to a sterile debate between staunch defenders of the Second Amendment and supporters of gun trade control. The prevailing feeling is that the dead victims are being instrumentalized by one side or the other (depending on one's point of view). One also recalls President Donald Trump's comments about the victims of the Bataclan bombing in Paris (who could supposedly have defended themselves if they had been armed), made during

[27] http://www.lemonde.fr/ameriques/article/2017/08/12/aux-etats-unis-un-rassemblement-d-extreme-droite-interdit-a-charlottesville_5171800_3222.html

his election campaign and then reiterated at the convention of the National Rifle Association (NRA), the powerful pro-gun lobby. The speech but also the gestures used by the POTUS shocked victims and politicians in France[28].

In the eternal Manichean debate on firearms, all the arguments are good, at the risk of an absurd instrumentalization of the deaths of victims of mass murder. The absurdity arises from the fact that, in most cases, the victims would not have been able to retaliate in time anyway (for example, in the Las Vegas massacre of 1st October 2017, where a sniper on the 32nd floor of a hotel-casino shot 58 people 490 yards away and wounded 422 others who could not identify the origin of the shots). The victims are therefore presented in vain as people who could have escaped their fate if they had been less naive or more careful.

Jihadist terrorism

No country is immune to Manichean rhetoric that takes ownership of the victims 'memory.

In France, in the aftermath of the Islamist attack on the satirical newspaper Charlie Hebdo on 7 January 2015, in which 11 people were killed (including 8 members of the newspaper's editorial staff), 44 heads of state and government came to participate in a "republican march" in Paris. Over two days, more than four million people marched across the country. Few attacks have produced such a compassionate avalanche in France and around the world. Yet national unity has never existed in the face of religious terrorism. Faced with France brandishing the slogan "I am Charlie" (that of the middle and upper classes, rather urban, white, Christian, republican) stood France "I am not Charlie" (recruiting among young people from the working classes, Muslims, immigrants, confined to urban ghettos). Initially silent, this France then manifested itself through critical comments and even a deluge of insults on social networks against the satirical newspaper from the first issue published after the attacks (with a circulation of eight million copies and a cover with a caricature of the Prophet Mohammed). Charlie Hebdo's victims were honored, as they were insulted on social networks, by two irreconcilable France.

Sexual assaults on women

If there is one area in which unanimous compassion should be unqualified, it is that of sexual assaults on women. However, the seismic tremor produced by the Harvey Weinstein affair has itself given rise in France to an antifeminist backlash initiated by other women[29]. Victim rhetoric is met with antifeminist rhetoric.

In an op-ed published on January 9, 2018 in the French daily *Le Monde*, 100 women, including actress Catherine Deneuve, denounced puritanism and the "purifying wave", public denunciations and accusations with hashtags (such as #MeToo), "hatred of men and sexuality" and the desire to chain women in a status of "eternal victims" born of the Weinstein affair. On the contrary, they

[28]https://www.francetvinfo.fr/monde/usa/presidentielle/donald-trump/francois-hollande-denonce-les-derapages-verbaux-inacceptables-insupportables-de-donald-trump-sur-le-bataclan_2739983.html
[29]http://www.lemonde.fr/societe/article/2018/01/11/la-tribune-signee-par-deneuve-est-l-expression-d-un-antifeminisme_5240249_3224.html

defend the "freedom to annoy" men, "indispensable to sexual freedom"[30]. C. Deneuve had previously criticized the banning of Roman Polanski by certain French film officials, while, in a strange swing, the Polish filmmaker's American victim declared her approval of the platform signed by C. Deneuve[31].

This counter-discourse, old already, is *reactionary* (against the concept of "gender", against parity and positive discrimination) and *biological* (sexuality is an impulse, sex differentiation is not cultural but a natural given, homosexuality and surrogate motherhood are deviances). It underlines the also *cultural* identity of France, where "gallantry", "courtesy" and seduction still have their place, as opposed to Anglo-American "puritanism". The reciprocal is also true since American feminists are indignant at the lukewarmness of French feminists, as shown by the Dominique Strauss-Kahn case in 2011 (see below), which was considered a subject of derision in France while it aroused deep indignation in the United States. At last, standing against moralism, this thought is *libertarian*. It is concerned about attacks on freedom of expression and artistic creation, censorship and "cultural revisionism", which tracks sexism down to works of art. Sexual freedom is emphasized and takes precedence over consensual sexuality. Feminists would prevent women from "playing" with men (themselves victims of a "manhunt") and would threaten the sexual freedom and the right to control one's body... that these feminists (mostly baby boomers of the sixty-eight generation) had won in their struggles of the 1970s (on abortion and contraception).

The theme of male domination or patriarchy is obscured. The asymmetry of pleasures and seduction is claimed. Anti-feminist feminist rhetoric denies violence against women and stresses that men too are victims of prostitution and domestic violence. The most provocative even praise sexual violence as a way of overwhelming the victims[32].

However, there are realities that cannot be denied. Sexual assault is punishable by law; marital rape has long remained unpunished in most rights; the definition of rape was only included in the French Penal Code by the law of 23 December 1980. Worse, the "culture of rape" reigns in mentalities and very strongly in some countries (South African townships, Egypt, among numerous examples). Rape is also a weapon of mass destruction in inter-ethnic or inter-religious conflicts (from Syria to the Democratic Republic of Congo).

Police abuses

The abuses committed in the use of public force during demonstrations generate a political divide between supporters of public order (who advocate a strong approach to demonstrators) and

[30] Le Monde, 9 Jan. 2018, "We defend a freedom to pester, indispensable to sexual freedom".
[31] The victim of Roman Polanski (Samantha Geimer), who forgave the filmmaker, approved on Tweeter the op-ed signed by C. Deneuve (@sgeimer - 10:19pm - 9 Jan. 2018. - *I agree whole entirely with Ms. Deneuve. Women need equality, respect and sexual freedom, we get that by standing up for ourselves and each other. Not by asking others to protect us and define what is "allowed" for ladies*).
[32] Catherine Millet (French art critic and writer) declared: *"We have to be aware of the suffering of women who are for example very ugly women, or elderly women, and that no man wants to sexually harass any more" / "That's my big problem, I regret very much not having been raped. Because I could testify that rape gets you off the hook."* (https://www.francetvinfo.fr/societe/harcelement-sexuel/trois-choses-a-savoir-sur-catherine-millet-coredactrice-de-la-tribune-sur-la-liberte-d-importuner_2558101.html).

defenders of individual freedoms (quick to denounce police and therefore State violence).

This reality was palpable in France between November 2018 and the summer of 2019. The so-called "yellow jackets" (hi-viz waistcoats) movement had become accustomed to setting up unauthorized rallies every Saturday in several cities, which led to numerous overflows and often degenerated into brutal clashes with the police. On the one hand, police violence was denounced. On the other hand, the Minister of the Interior tirelessly recalled that republican order had to be maintained and that the demonstrators included real rioters (the "casseurs").

> It is in this context that, on March 23, 2019, a 73-year-old activist (Geneviève Legay) was knocked down by a police charge during a banned demonstration in the city of Nice. Immediately, the President of the Republic wished her a 'prompt recovery' but also 'perhaps, wisdom' and 'responsible behavior'[33]. The initiative was clumsy on the part of a politician concerned about his image: this *little old lady* presented a priori the features of an ideal victim, the opposite of the victim who must be targeted with the Machiavellian aim of exacerbating a political divide. In this case, it was quite unlikely that public opinion would be divided, on the occasion of this event, between partisans of order and partisans of individual liberties. Moreover, the subsequent investigation confirmed that the police burden was a disproportionate measure, thus reinforcing the status of the ideal victim of the septuagenarian.

In the USA, the Black Lives Matter (#BlackLivesMatter) movement has been denouncing racial profiling and police brutality against African Americans since 2013. The arrests followed by the deaths of black men, filmed by smartphones (from Eric Garner in July 2014 to George Floyd in May 2020), have fuelled outrage among the population. But even the eminent "value" of these victims has been called into question. Compassion has waned. The hashtag #BlackLivesMatter was countered by other slogans: #AllLivesMatter, which tends to deny the specificity, the exclusivity of the problems affecting the African American community (a generalization that may have been accused of anti-black racism); and #BlueLivesMatter, which tends to recall that police officers are also victims of violence. Once again, the first victims, in spite of themselves, awaken political and ethnic divides.

Once again, victims arouse unwittingly political and ethnic divides.

C. Attraction-repulsion

A victim can arouse two contradictory feelings in succession over time. After attracting extreme sympathy, it provokes repulsion. The reversal is usually the result of a fact revealed after the initial victimization. According to a French proverb, the victim goes from the Capitol to the Tarpeian Rock: the wind changes.

Sometimes all it takes is an insignificant detail.

> For example, young Keaton Jones, who gave a moving testimony in a video that went

[33] https://www.lemonde.fr/societe/article/2019/03/26/manifestante-blessee-a-nice-les-versions-s-opposent_5441449_3224.html

> viral on December 8, 2017, about the school harassment he was being targeted for in the United States, was taken in sympathy by the media and many public figures. But photos posted on the child's mother's Facebook and Twitter accounts showed the Confederate flag and the family was accused of racism. Some celebrities withdrew their messages of support, and the Jones family received unpleasant messages on social networks[34].

Sometimes the facts are more serious or murky.

> Nadia Savchenko was a Ukrainian fighter pilot considered a hero in her country. Sentenced in 2016 to 22 years' imprisonment in Russia for complicity in the murders of Russian journalists, she was pardoned and released the same year. However, in 2017, she made controversial statements (notably anti-Semitic) and in 2018, she was arrested and imprisoned in Ukraine for preparing a terrorist attack (an attempted attack on the parliament)[35].

D. Impatience for victims who take too long to heal from their trauma

Modern victimology describes the conditions for "*resilience*", i.e. psychological adaptation to traumatic stress. But too many psychoanalysts celebrate resilience in books for the general public and even on television sets as a "Hollywood happy ending" that must happen.

The literature on restorative justice (RJ) also depicts the victim as trapped in the following stereotypes: *embodied* (physically wounded), *emotional* (a subject in the grip of emotions, wounded but willing to forgive and reconcile), *vulnerable*, *disempowered* and *resilient*. Resilience entails the capacity to make and develop realistic plans keeping self-confidence and a positive outlook as well as using communication, problem-solving and self-management skills. "All these victim capacities seem to be taken for granted within RJ (Maglione, 2017).

In short, any victim should be resilient and be a kind of superman who is bound to succeed in triumphing over his trauma. This vision, propagated by popular psychological literature, can be harmful to victims: seduced by this feel-good scenario, their entourage and, more broadly, public opinion, find it difficult to understand that a traumatized victim does not heal in a relatively short period of time. If they don't, it's because they don't want to. If they did, it is because the miracle of resilience has occurred.

This misleading vision inspires unjustified guilt in victims who are unable to heal from their trauma, even after a long period of time, and blame themselves for being too "weak".

In reality, one should not confuse the trial or ordeal, which is structuring and eventually "makes oneself stronger", and the trauma (traumatic event), which is or can be destructive. Resilience is not a human quality. It is roughly obtained by forging social links (meeting with a referent adult, support from the family circle, a circle of friends or an association, success at school, going back to work, exercise of a sporting activity, etc.) and by developing a system of beliefs (moral,

[34] https://www.francetvinfo.fr/choix/video-on-vous-explique-le-canard-au-milkshake_2522519.html
[35] http://www.lefigaro.fr/flash-actu/2018/03/22/97001-20180322FILWWW00160-ukraine-le-parlement-autorise-l-arrestation-de-savtchenko.php

religious, political, etc.) that gives meaning to life.

Resilience is not a strength of character worthy of admiration. Some unhappy personality traits can even contribute to it, such as egocentricity, emotional insensitivity or religious fanaticism!

IV. The criminal is big and bad compared to the victim

There is no ideal victim, writes Christie, without a *big and bad* criminal in comparison to the victim. This comparison deserves to be further developed.

First, the public tends to idealize the victim (who is considered weak and good) but, as we have seen, is perfectly capable of devaluing him/her. Conversely, it tends to despise the criminal (reputedly strong and evil) but is capable of dramatically enhancing his/her image.

Second, a victim is all the more likely to gain the ideal victim status if the personality of the perpetrator is rejected. I will call this phenomenon the *contrast effect*.

Contrast effect

In this respect, some criminals display an enigmatic, elusive or irritating personality, marked by denial, a cold and detached attitude in front of police officers and magistrates, while the public demands an immediate resolution of the case, an admission of guilt and the expression of repentance. The criminal inspires first of all a sense of moral condemnation and repulsion which, by contrast, enhances the victim's suffering. But public perception is not free of ambiguity: the horror of the crime and the dismaying personality of a suspect, who is widely publicized by the media, exert a fascination in part (at least the fascination of fame in modern society). Worse, this fascination may be magnified by documentaries or works of fiction (such as those about the serial killer Ted Bundy). Some fragile minds even end up worshipping the worst criminals (such as Charles Manson). The effect of contrast is then attenuated: the reappraisal of the criminal's image, which focuses or even monopolizes attention, blurs the solicitude towards his victims, who become secondary or even erased from the collective memory. Only the perpetrator of the crime will be known.

On the contrary, the contrasting effect can be accentuated by the upper social status of the criminal, which makes his crime more appalling or detestable. This is the case where a relationship of domination (physical or moral) or a relationship of trust has been established between the victim and the perpetrator. Abuse of dominance or betrayal of trust, which are commonly established by criminal law as aggravating circumstances of the offence, shocks the public and fuels its compassion for the victims.

This is evidenced by cases involving children victims of sexual abuse (pedophilia) by adults or, even worse, by people whose profession is strongly associated with virtue and confidence (such as clergymen). Public outrage was amplified when the perpetrators had enjoyed impunity, due to the complicit silence of their superiors who had refrained from intervening (as in the case of Cardinal Bernard Law in the USA), police failures (as in the case of the kidnapper, rapist and murderer of children Marc Dutroux in Belgium) or an institutional flaw (typically, as in a case of

a child rape and murder where the suspect, previously convicted, was on the sex offenders' registry but no neighbor could have access to these data which, in France, is reserved only to public authorities).

But the criminal's prestigious status is a double-edged sword. The respectability of the aggressor also devalues the victim's word and encourages the entourage (the victim's family whose trust has been abused, the aggressor's superiors anxious to preserve the honor of the profession or organization) to keep the facts quiet or to conceal them. The pedophilia cases uncovered in the Catholic Church in the four corners of the world since the early years 2000 (USA, Australia, Great Britain, France, Chile, etc.) provide a recurrent illustration of this.

State violence

The status of ideal victim is granted without great hesitation when the criminal embodies a public institution. Ideal victims are victims of abuse of public authority.

Police officers in most countries are or are perceived to be representatives of the state. The abuse of power by a police officer (police blunder) is, however, a relatively ordinary fact and part of public opinion always tends to question the victim's share of responsibility (was he or she not, initially, the target of a police operation, therefore not totally innocent). A victim will only come to the public's attention if the facts reveal a circumstance that heightens their degree of seriousness, such as racist motivation, desire to humiliate from the police officers, violence of a sexual nature or committed in an organized group. For example, the Théo case in France, concerning the routine arrest on 2 February 2017 of a young black boy in a deprived suburb of the Paris region, took on a symbolic dimension from the fact that the police officers were filmed and suspected of having committed rape on this boy with their telescopic baton (in reality, the images were not very explicit and the experts concluded that there was no anal or, in any case, voluntary penetration).

Violence can immediately designate a state as arbitrary or oppressive. Some regions of the world have provided recurring illustrations of this for decades. The media saga of the young Ahed Tamini and her family speaks for itself: the Palestinian girl was forced to plead guilty by the Israeli juvenile justice system after slapping an Israeli soldier in 2017; she also possessed beautiful gold buckles and was surrounded by a family of martyrs who were masters in the use of social networks[36]. Similarly, the 59 Palestinians killed on the Gaza border by live ammunition from the Israeli army on the day of the inauguration of the US Embassy in Jerusalem caused international[37]outrage. In the Israeli-Palestinian conflict, the State of Israel (strong and equipped with sophisticated weapons) regularly assumes, in the eyes of its critics, the role of oppressor, while the Palestinian civilian population (weak and destitute) assumes the role of ideal victim.

Multiple roles

A felon can succeed in the feat of embodying domination in various forms: he has several "hats"

[36]http://www.lemonde.fr/proche-orient/article/2018/03/21/l-adolescente-palestinienne-ahed-tamimi-condamnee-a-huit-mois-de-prison_5274511_3218.html
[37]https://www.francetvinfo.fr/monde/proche-orient/israel-palestine/israel-les-morts-de-gaza-indignent_2754813.html

or roles that all give him a high social status. This is how Dominique Strauss-Kahn, nicknamed "DSK", a French politician whose polls predicted a probable presidential career and who became director of the International Monetary Fund, was suspected of having sexually assaulted Nafissatou Diallo, a Guinean-born maid, on 14 May 2011 in a suite at the Sofitel in New York. In the eyes of many Americans, the suspect was a kind of living monster, the triple incarnation of *male* power, *white* power and *upper-class capitalist caste* abusing a relationship of domination to the detriment of a woman, black, proletarian. American radical (Marxist) criminology used to deplore, in a pun, that *crime in the suites* was not prosecuted as severely as *crime in the streets* (Reiman, 2016). Ironically, the DSK was indicted, in the literal sense of the word, for a crime in the suite; but he was quickly granted a drop in criminal proceedings and then concluded a civil settlement with the alleged victim in return for the payment of a large indemnity.

V. - The victim must be seen or heard

According to Christie, the victim must be strong enough to claim the status of the ideal victim. He or she must make himself/herself known and recognized as such by the police, the justice system, and the media. This observation is paradoxical since the victim must also be weak in relation to his/her aggressor (see above I).

In reality, the question does not arise in these terms. It is first a question of the victim making himself/herself known and recognized as such by the police, the justice system and the media. His/her inner strength can, no doubt, help him/her to leave no stone unturned and draw the attention of the public authorities or public opinion. But extrinsic and objective factors are more decisive.

Out of sight, out of mind

First of all, it is important that the crime not be committed in a territory too far away. An ideal victim should be located close to the population he or she is likely to affect (as the proverb goes, "out of sight, out of mind").

Foreigners are therefore less ideal victims than nationals. An attack claiming several hundred victims in the Middle East, in a notoriously dangerous city, arouses a indifference in the West where public opinion is tired, anaesthetized, by the repetition of similar tragedies. The attack that is taking place today in Baghdad, Kabul, Karachi or in the Egyptian Sinai is barely mentioned in the Western media and on the condition that the number of victims is counted by the dozens.

These tragic but distant events are perceived as trivial. Again, only specific circumstances that reappraise their degree of seriousness can arouse compassion. This is the case for the religion of the victims (for example, crimes committed against Christians in Iraq or Egypt affect more than those committed against their Muslim compatriots) as well as the presence of Western tourists among the victims (for example, the series of attacks in Sri Lanka on 20 April 2019, which killed more than 200 people, had hit Christian churches and luxury hotels).

But nationals themselves have no interest, so to speak, in being victims abroad. When a French person is a hostage or victim of an attack in a faraway country (located on another continent), his or her relatives have great difficulty in drawing media attention, especially in the long term.

Families then try to refresh the collective memory through gatherings or through social networks.

No image, no tragedy

Another saying might be: No image, no tragedy. Typical cases are migrant children and adults, fleeing from war or misery in their own country to end up on our coasts or shores.

Migrant foreigners have frequently suffered violence, kidnapping and torture in transit countries and they perish at sea in tens of thousands every year (especially in the Mediterranean Sea): but no emotion will emerge without an image revealing a geographical proximity to our shores or our territory. We remember (or not) the photograph of the body of little Aylan, a Kurdish child, stranded on September 2, 2015 on a beach in Bodrum, Turkey (a photograph that was immediately accused of being a montage). In the days that followed, emotion overwhelmed Europe: Germany welcomed 20,000 migrants in one weekend; Pope Francis invited each parish to welcome a migrant family; France promised to welcome 24,000 refugees in two years (which it had never actually done!).

This episode found a parallel in the United States when, in June 2018, the Customs Service published photos showing Mexican minors separated from their parents, who had crossed the US border illegally and were locked up in detention centres inside cages. Congressmen stopped Trump in the halls of the Capitol[38]. Even more unusually, Trump's wife - usually mute - spoke publicly before going to the border dressed in a somewhat provocative jacket[39].

Significantly, the category of victims who have the least difficulty arousing public interest are the stars and celebrities. The accidental death of a global celebrity (e.g. Michael Jackson, who died on 25 June 2009 after his doctor gave him an overdose of anaesthetic) or the suicide of a personality adored in his country (e.g. South Korean K-Pop singer Kim Jong-Hyun's suicide in 2017) send a powerful shockwave in the media and in the minds. The emotion is commensurate with their fame, i.e. global and transgenerational if the star has been known for several decades and across borders (e.g. M. Jackson); otherwise, the emotion will not go beyond the limits of a generation and a country (e. South Korean teenage fans of Kim Jong-Hyun).

In fact, studies have shown that such events, when sudden and unexpected, in turn trigger a wave of so-called "anomic" suicides.

> As Émile Durkheim had supposed (1897), events that disrupt the social order create suicidal anomie: disasters in the broadest sense (e.g. the explosion of the space shuttle Columbia in 2003 or the Chernobyl nuclear power plant in 1986, terrorist hostage-taking, re-election of Margaret Thatcher in 1983, sudden death of Pope John Paul I...). More surprisingly, undeniably happy or positive events (e.g. the first heart transplant in 1967, the release of American hostages from Iran in 1981) also lead to their share of suicides.

[38] https://www.youtube.com/watch?v=yr1lwCGHyNE

[39] Jacket with the phrase "I really don't care, do u?" on the back, which seemed to be intended more for her husband than for Mexicans (https://www.francetvinfo.fr/monde/usa/decret-anti-immigration-de-trump/en-visite-a-la-frontiere-avec-le-mexique-melania-trump-porte-une-veste-ou-il-est-ecrit-je-m-en-fiche-completement_2813315.html).

> On the other hand, exceptional but expected or foreseeable news (e.g. the result of presidential elections, a sports competition) do not have the same effect: on the contrary, they reduce the number of suicides. Logically, the mediatized suicides of personalities generate waves of suicides themselves (Bearman and Hoffman, 2015).

Green crimes

In a quite different field, Green criminology has highlighted an internal hierarchy for victims of environmental crimes. The human mind finds it difficult to imagine environmental victims, precisely because they present a very variable proximity to the human being. While it can conceive of the animal as a living being, feeling suffering and capable of arousing compassion as such, humans are more reluctant to treat an ecosystem and Nature in general as victims in their own right.

> According R. White, victimhood can be conceptualized in terms of three overlapping spheres of justice and victimization: environmental justice (where the victim is human); ecological justice (where the victim is specific environments : oceans, rivers, mountains, forests and other ecosystems); and species justice (where the victim is animals and plants). Hierarchies of victims (human and non-human) between and within each of these three spheres can be identified. A fundamental aspect of ecocentrism is to see entities such as animals, plants and rivers as potential rights-holders and/or as objects warranting a duty of care on the part of humans. In New Zealand law and environment court judicial practice, the 'environment' is considered a 'victim'. The Ecuadorian Constitution has provisions relating to the 'rights of nature', which assert that 'Nature or Pacha Mama has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution' (White, 2018).

But the ecocentric approach remains an exception. Legislation remains anthropocentric: the protection afforded to animals, for example, varies greatly depending on the species concerned and the circumstances. Farm animals, laboratory animals or animals deemed harmful can be killed or mistreated with impunity, unlike domestic animals that live close to humans. As for ecosystems, unlike living beings, they are hardly ever recognized as environmental victims and their destruction is widely tolerated. At the bottom of the hierarchy of environmental victims are entities whose legal existence is simply ignored. At the top, human beings suffering from the destruction of their environment can expect legal protection, but not to the same extent as that afforded by criminal law to victims of damage to property or persons.

Ideal victims in international crimes

One author has proposed extending the list of conditions that victims of international crimes (genocide, crimes against humanity, war crimes) must meet to become "ideal victims" (van Wijk, 2013). The major challenge here is to win the heart of world public opinion in order to convince the international community to take action. The victims must make themselves heard, at least by a foreign state with sufficient military power to stop the atrocities or tragedy taking place.

Firstly, the conflict must be understandable and not complex. *The Good* and the *Evil* must be easily

identifiable. Conversely, inter-ethnic or inter-religious conflicts (in Africa or the Middle East) often seem unreadable to Westerners. Genocide and other crimes under international law can thus be perpetrated with impunity, with no sanction other than the remote and hypothetical prospect of prosecution before the International Criminal Court or the adoption of a UN resolution. The civil war in Yemen which, since 2014, has pitted the Shia Houthi rebels against government loyalist forces, backed by Saudi Arabia, has exposed more than 20 million people to famine and epidemics. But this humanitarian disaster occupies only a few lines, at best, in the Western press.

Second, the duration of the tragedy must be short so as not to cause public weariness and it must come "just in time" (*well-timed*). For example, the Tsunami that devastated Southeast Asia on December 26, 2004, the day after Christmas Day, caused a huge stir in the world and a flood of donations.

Third, the conflict must take place in a single, clearly circumscribed location. Such was the case with the massacre of 8,000 Bosnian Muslims by the Serbian army in the enclave of Srebrenica in July 1995. This genocide provoked NATO intervention, putting an end to the war in Bosnia and Herzegovina; in 2017, the commander of the Serbian army, General Ratko Mladić (nicknamed the Butcher of the Balkans) was sentenced to life imprisonment by the International Criminal Tribunal for the former Yugoslavia. In western Burma, in the Arakan region, the Rohingya Muslim minority has been considered stateless and persecuted since the 1960s: it enticed the Burmese army to carry out new massacres in August 2017, forcing hundreds of thousands of Rohingyas to flee to Bangladesh, where a million of them live in makeshift camps. These crimes sparked international outrage and 12 Nobel Prize winners signed a letter of protest to the UN Security Council.

Fourth, military intervention by foreign states requires a favorable political context. There must be geopolitical interests to be defended (for example, the need to secure oil supplies may have led the United States to engage in the first Gulf War in 1990-91, following Iraq's invasion of Kuwait). Conversely, it is important that domestic policy does not stand in the way: a head of state may have national priorities at the time. For example, Barack Obama decided in August 2013 not to intervene militarily in Syria despite the fact that the dictator Bashar Al-Assad had crossed the "red line" that the US president himself had set, namely not to use chemical weapons.

Conclusion

The iconic definition of the "ideal victim" coined by Nils Christie demands a few corrections. Only three points prove to be relevant: the victim who draws the public's attention and arouses public sympathy must be perceived as weak, faced with a “big and bad” criminal, and must not be blameworthy. The second and the third points, however, require further development.

The confrontation between the victim reputed to be "weak" and the criminal reputed to be "big and bad" is influenced by a *contrast effect*. The criminal inspires, first of all, a sense of moral condemnation and repulsion which, by contrast, enhances the perception of victim's suffering. But the contrast effect may be *attenuated*: sometimes, the criminal's image monopolizes attention and blurs the solicitude towards his victims who become secondary or even erased from the collective memory. On the contrary, the contrast effect can be *accentuated* by the upper social status of the criminal, which makes his crime more appalling or detestable.

Further, victims are not disturbing just because they look guilty of their misfortune, i.e., not merely innocent. They disturb also because they *divide public opinion*, exacerbate - through no fault of their own - a divide that reinforce trench warfare between supporters of antagonistic ideologies.

The condition that the victim carry out a respectable project seems, for its part, irrelevant. Most of the victims do not carry out any particular project, namely when they are targeted by a violent act in the context of a daily activity. The "respectable project" is most often imperceptible. In reality, the key notion here is that of the *real or symbolic identification* of the citizen with the victim.

Finally, according to Christie, the victim must be strong enough to claim the status of the ideal victim. This observation seems paradoxical since the victim must also be weak in relation to his/her aggressor. In reality, the question does not arise in these terms. It is first a question of the victim making himself/herself known and recognized as such by the police, the justice system and the media. His/her inner strength can, no doubt, help him/her to leave no stone unturned and draw the attention of the public authorities or public opinion. But extrinsic and objective factors are more decisive. First of all, an ideal victim should be located close to the population he or she is likely to affect (as the proverb goes, "out of sight, out of mind"). Another saying might be: No image, no tragedy.

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The Value of the Victim in American Tort Law: A Mismatch Between Theory and Practice

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Abstract

For Americans harmed by the wrongful conduct of others, criminal law serves to impose penalties on the wrongdoer, but it is the system of tort law, a component of civil law, that is the primary means through which the law provides compensation. This Article presents an overview of that system and of impediments to its effectiveness. The system embodies two overriding goals - to compensate victims for their harm and to deter future wrongful conduct. In doing so, it can be seen to promote societal interests along four dimensions - social, economic, ethics and psychology. However, the reality of tort law in practice often falls short of realizing its aims. Outcomes of tort litigation can be distorted by a number of factors, including the high cost of resolving claims, the emotional burden on plaintiffs, biases in jury decision making, the ubiquity of settlements and the role of insurance in covering defendants' costs. These factors are exacerbated in mass tort litigation involving widespread harm to multiple victims. Wider use of no-fault compensation mechanisms has been proposed as an avenue for reform. However, several challenges would make its implementation in the United States difficult, including the lack of universal health care coverage, limited alternatives for holding corporations and professionals accountable, vested interests in the current system and the high value Americans place on individual rights.

Keywords: tort; tort law; compensation; civil law; heuristics

Introduction: The Tort System and Its Limitations

When Americans are harmed by the wrongful conduct of others, criminal law may offer the satisfaction of knowing that the wrongdoer will face consequences, but it offers little or no recompense for the suffering or monetary loss. To seek compensation, the primary legal avenue available to victims is the system of tort law. A tort is an act or omission that is wrongful but not necessarily criminal, , and the legal system seeks to remedy its effects with monetary damages ("Tort", n.d.). The goal is to put the victim in as close a position as possible to the one he or she was in before the wrongful conduct occurred (Keren-Paz, 2007), in other words, to make him or her "whole."

Damages are available for several categories of harm: medical expenses related to the injury; lost wages due to time missed from work; other economic harm such as losses incurred by a business; incidental expenses necessitated by the injury; and noneconomic harm such as pain and suffering, mental distress and loss of functional capabilities ("Actual Damages," n.d.). When the defendant's conduct is found to have been especially egregious, punitive damages may also be awarded as a warning to future wrongdoers (Englard, 1993), although such awards are rare, occurring in just

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five percent of trials in which the plaintiff prevails (Langton & Cohen, 2008).

The tort law system has its origins in the common law of England, which goes back many centuries. It emerged as a coherent body of law in the United States in the nineteenth century (White, 2014). Its underlying premise is that wrongdoers should bear the cost of remedying the harm their conduct caused. Most cases that reach trial are resolved by a jury of fellow citizens who bring the community's sense of morality and fairness to bear in deciding whether the defendant's conduct was, in fact, wrongful and whether the victim's harm is worthy of redress (Hans, 2009). In addition to compensating the victim for his or her losses, the assignment of liability and assessment of costs to pay for them also serves as a deterrent to others against wrongful or careless behavior (Keren-Paz, 2007).

Tort law is a component of American civil law, which adjudicates disputes between private parties. It is distinguished from criminal law, which concerns offenses by private parties against the state ("Tort", n.d.). (The term "civil law" in this context differs in meaning from its use in differentiating a legal system based on an overarching code of laws from a common law system based on precedents established by the holdings of courts.) Lawsuits in tort are generally initiated by an aggrieved party against an alleged wrongdoer who is claimed to be responsible, while proceedings in criminal law are generally initiated by a government prosecutor against an alleged wrongdoer for an action that undermines the interests of society as a whole. In some cases, both aspects of law can apply to the same transgression. For example, the theft of a car may be adjudicated as a tort claim by the car's owner for compensation for the car's value and as a criminal proceeding for imposition of a penalty for violation of a norm of behavior that protects society's interest in the orderly disposition of property.

There is a movement to include some form of compensation to the victim in criminal law, either through laws allowing for or mandating restitution for all or some of their loss as part of a sentence (Lollar, 2014). Its use grows out of a concept known as restorative justice. However, offenders rarely have adequate assets to compensate victims, and restitution laws rarely allow for nonpecuniary damages such as pain and suffering. Criminal restitution is beyond the scope of this paper, as civil tort law remains the primary legal means through which victims can receive compensation from a wrongdoer.

As a mechanism designed to compensate private parties for harm and to deter future wrongdoing, tort law assumes an economic relationship between the cost of harm and the outcome of litigation (Posner, 1985). To effectuate fair compensation, it must generate accurate calculations of the actual economic loss to the victim, and to deter future wrongdoers, those amounts should impose a sufficiently large burden. Criminal law embodies different goals that do not rely on the same economic considerations (Posner, 1985). It shares with tort law the purpose of deterrence, but, with the exception of recent efforts to add an element of restitution in some circumstances, compensation is not a primary concern. It shares with tort law the purpose of deterrence but not that of compensation. It also enforces moral values and educates the public regarding the parameters of acceptable behavior. The focus is on the wrongdoer's intent to violate societal norms rather than the extent of actual harm, and it can apply even when a wrongful act that could cause harm is attempted but not completed (Cohen, 1992). Therefore, it is tort law that victims turn to for economic relief and that determines the value of a victim's suffering in individual cases.

This Article presents a basic overview of tort law as a means of providing economic compensation for victims who have suffered harm and of barriers to the realization of this goal in practice (Part I). It introduces key elements of this area of law for readers who may be unfamiliar with the American system of civil law and describes two kinds of impediments to its effectiveness. These are the length and complexity of the litigation process and biases in human decision making that may impair the ability of jurors to objectively assess claims (Part II). These impediments are exacerbated in complex litigation involving multiple plaintiffs and widespread harm. Two kinds of cases are described that illustrate these shortcomings – claims for medical malpractice and claims for asbestos disease (Part III). The Article concludes with an overview of approaches to reform that have been proposed and of impediments to their implementation in the United States (Part IV).

I. Tort Law in Theory

A. Elements of Tort Claims

Torts are divided into two broad categories (Mulheron, 2016). Intentional torts are deliberate acts intended to cause harm. Negligent torts are mistakes or oversights that cause unintended harm. A victim of an intentional tort can pursue a claim through a lawsuit against a wrongdoer by simply establishing that the act took place. Establishing liability for negligence, since it is not deliberate, is more complex and requires proof of additional elements. The plaintiff must show that the defendant was subject to a legally recognized duty to act or refrain from acting in a certain way, that the duty was breached, that harm was suffered and that the harm was caused by the breach.

Within this structure, tort law affords victims several rights. The United States Constitution guarantees plaintiffs in civil lawsuits the right to trial by a jury rather than by a judge (Peck, 2005). Juries are often more sympathetic to fellow citizens who have suffered injuries. The measure of damages is the extent of the victim's harm regardless of preexisting medical conditions or other susceptibilities. Similarly, the magnitude of the defendant's negligence does not affect the amount of a victim's recovery, unless his or her actions contributed to the harm (Mulheron, 2016).

Of particular help to plaintiffs is a relatively lenient standard of proof to establish the defendant's fault. A plaintiff must prove a claim by a preponderance of the evidence, in other words that it is more probable than not that the defendant engaged in wrongful conduct that was the cause of harm (Kaye, 1982). This contrasts with the higher standard of proof in criminal law, which requires that the defendant's misconduct be established beyond a reasonable doubt (Weinstein & Dewsbury, 2007).

B. Conceptual Underpinnings of Tort Law in Theory

The conceptual foundations on which tort law rests extend to four spheres of activity. First, they reflect the social values of a common culture and community (Von Benda-Backman, 2009). Juries apply a communal sense of right and wrong and of the appropriate duties that citizens should owe one another (Hans, 2009). Sanctions against wrongdoers thereby reflect the judgment of the community rather than of an external authority. To the extent jurors are representative of the

general population, their decision making is also democratic. The system's deep roots in English common law also provide consistency over time, while its approach of case-by-case determinations lend it flexibility to accommodate changes in social norms over time.

Second, they offer the economic benefit of protecting victims and encouraging desirable behavior in a way that may be more efficient than the alternative of regulation. Resolving disputes on a case-by-case basis rather than through regulatory mandates allows for individual circumstances to be taken into account, and the threat of liability for damages serves to deter carelessness without the need for direct enforcement (Englard, 1993). In essence, the system is self-policing. In contrast, regulation can be cumbersome and heavy-handed. Officials who are removed from the effects of the wrongful behavior craft rules that apply to all actors with less consideration of individual variations in circumstances. Moreover, regulatory oversight must account for a defined set of harms, while juries in lawsuits have the flexibility to consider novel kinds of injuries. The tort system does not eliminate the need for regulation, but it serves as a more flexible supplement.

Third, they operationalize shared ethical values (Englard, 1993). This can be seen in the promotion of five core ethical principles (Steffen, 2016). The tort system promotes beneficence, the imperative to assist those in need, by helping victims who have suffered losses. It promotes utilitarianism, the imperative to promote communal wellbeing, by deterring conduct that can threaten the health and safety of broad segments of the population. It promotes justice by fairly allocating the cost of harm to those who are responsible (Keren-Paz, 2007). It promotes autonomy by respecting individual choice in taking action to avoid liability for harm. It promotes nonmaleficence, the imperative to avoid harm, by mitigating the effects of the perverse incentives that external regulation can create.

Fourth, they have important psychological effects. The tort system offers victims an outlet for channeling distress over their harm and a chance for catharsis in publicly airing their grievances. Receipt of monetary damages for a serious injury has been shown to have a therapeutic effect (Robbennolt & Hans, 2016). It projects a sense of fairness that builds confidence that society can maintain order and moral accountability. It shames wrongdoers by publicizing their misdeeds, which can be as effective a deterrent to misconduct as monetary damages, particularly for corporate defendants that fear loss of reputation. It also provides a sense of finality, helping plaintiffs, and sometimes defendants, to move emotionally beyond the dispute.

II. Tort Law in Practice

While tort law embodies a range of theoretical benefits, the reality in practice falls short of achieving them in several ways. This discussion focuses on two aspects of the process that are particularly important in impeding its effectiveness. The first is the cost and complexity of the litigation process. The second is the role of decision making biases in influencing the judgments of jurors who are charged with evaluating claims.

A. Procedural Complexity

The process of resolving tort lawsuits is long and complex, and it can present significant obstacles for many plaintiffs (Helland, Klick & Tabarrok, 2005). As a case progresses, he or she may have

to sit for depositions that can be tremendously stressful. Testimony at trial can be even more so. A plaintiff may also be required to submit highly personal information, such as medical records, in response to requests from a defendant as part of the pre-trial process. Trials can last for several days, and final resolution from the time of filing a case can take several years (National Center for State Courts, 2005).

Considerations such as these lead many potential plaintiffs to leave their claims unpursued, while the system's opaqueness leaves many unaware that a claim for an injury is even possible. A 1991 study by the Rand Corporation estimated that one-sixth of people in the United States experience some amount of economic loss from a nonfatal injury each year (Hensler et al., 1991). Of these, only five percent consult a lawyer, and only one percent file a lawsuit. The result is that the opportunity for compensation under tort law is realized by only a small proportion of those who are eligible for it (Baker, 2005).

Because of the expense and uncertainty for both plaintiffs and defendants of pursing a lawsuit to the end, the vast majority of civil law cases are resolved through settlements. Only 3.5 percent were resolved through a trial in 2005 (Langton & Cohen, 2008). By avoiding a trial and the lengthy process leading up to it, victims can receive compensation more rapidly and with fewer burdensome steps, however payments may be lower than those that would result from a favorable verdict. The plaintiff also loses the opportunity for the vindication that a formal judicial ruling can provide.

Attorney Incentives

The instrumental role of the plaintiff's attorney begins before a claim is filed, when a decision is made on whether to accept the case (Posner, 1985). Beyond shepherding the claim through the process, the attorney negotiates with the attorney for the defendant over a possible settlement and advises the plaintiff on whether to accept a settlement offer. Shaping the attorney's decision at each of these steps is the payment structure for his or her services. Plaintiffs' attorneys usually receive compensation based on a percentage of any amounts recovered, usually in the range of 33 percent but sometimes higher, an arrangement known as a contingency fee (Dana & Spier, 1993). The more the plaintiff recovers, the higher the fee, but if the claim fails, the attorney is paid nothing. This arrangement takes much of the financial risk of litigation off of the plaintiff, but it also means that a large portion of any recovery is lost to this transaction cost.

From the attorney's perspective, contingency fees create an incentive to favor cases with large potential recoveries and minimal expense and risk (Pierce, 1990). Cases that might fail to produce a recovery or that might produce a small one may not justify the time and expense involved (Hyman & Silver, 2006). For example, an attorney has less to gain in representing a retiree with no wages to lose from an accident than a child with a lifetime of potential earnings ahead. Similarly, the damages would be less for a plaintiff in a low-paying job than for a highly paid professional. As a result, plaintiffs with lower potential recoveries may find it difficult to find legal representation, although they may be no less deserving than plaintiffs with higher value claims.

Contingency fees also create an incentive for attorneys to resolve cases as quickly and efficiently as possible, since additional effort brings no additional financial reward. Therefore, it can be to an

attorney's advantage to settle cases quickly, even when a longer negotiation or trial might produce a larger recovery (Gross & Syverud, 1996). Vindication at a trial may be important for an injured plaintiff, but for the attorney, it is usually a secondary concern.

Assessment of Damages

Even with a favorable verdict, the amount that is actually awarded to a plaintiff can vary based on a jury's subjective reactions. Direct costs for which a plaintiffs may be compensated include medical expenses, lost wages and incidental expenses caused by the injury ("Actual Damages," n.d.). These are relatively easy to calculate when there has been a well-defined injury and a specified number of workdays that have been lost. However, they are subject to speculation when medical care and lost work will continue for an indeterminant amount of time, and estimates can involve subjective judgments. Subjectivity is also present in the valuation of intangible harm, such as pain and suffering (Robbennolt & Hans, 2016). Such harm can be the most significant element of a victim's distress, yet it is not usually amenable to objective measurement. Reducing it to a monetary amount is a difficult task, and the outcome can vary with the capriciousness of jury sympathies or with the negotiating skill of the attorney. Plaintiff's attorneys can try to select jurors most likely to sympathize with their client during a pre-trial process known as *voir dire*, but a juror's ultimate decisions are not always predictable.

Many states have reduced this variability by imposing limits on the amounts that juries can award for intangible harm (Peck, 2005). The limits do not vary with the circumstances of individual plaintiffs, and they can significantly decrease recoveries for those who have sustained severe injuries (Furrow, 2011). While the limits do not apply directly to settlements, they do so indirectly by reducing the amounts that defendants are willing to accept. Lowering the amounts of expected recoveries also reduces the attractiveness of some cases to plaintiffs' attorneys.

Appeals

Even when a plaintiff obtains a favorable verdict and a generous award of damages, it is often not the end of the story. A sizeable proportion of losing defendants appeal. One study of appeals of state court verdicts in civil cases estimated the number at 15 percent overall and 44 percent when the jury's award was one million dollars or more (Cohen & Farole, 2011). Many of these appeals ultimately fail. Almost 40 percent are dismissed or withdrawn, and many of the rest are rejected by the appellate court. However, the specter of an appeal can induce a plaintiff to accept less than the verdict amount in return for the defendant abandoning it (Eisenberg, 2004). Appeals can take several years to reach a conclusion, and victims needing immediate financial support may find it difficult to hold out. Moreover, the process can be extremely expensive and time-consuming for the plaintiff's attorney, who may encourage his or her client to accept a settlement offer while an appeal is pending.

B. Decision Making Biases

The jury system is built on the premise that a collection of ordinary citizens can be relied on to fairly and impartially evaluate evidence presented to it and render a reasoned decision based on that evidence. Juries are not expected to reflect subject matter expertise but rather common sense

and community values (Amar, 1995). By including a number of members, usually 12, each jury reflects a range of reactions that can be reconciled through deliberations.

However, research on the psychology of decision making suggests that this is an idealized model. Psychologists have identified several sources of unconscious bias that most people apply to at least some extent in evaluating information (Robbennolt & Hans, 2016). Among the most important are biases known as "heuristics" that can influence the way information is processed and the ways decisions are made based on it.

Of course, when a case is settled prior to trial, as are the vast majority, witnesses never appear before a jury, so decision making heuristics and other sources of bias have no direct effect on the outcome. However, they can exert an important indirect effect. Settlement negotiations are based on assessments by attorneys on both sides of the likely outcome were the case to go to trial. Those assessments are based in part on the strength of the evidence but also on the likely subjective reactions to it of jurors, which will be shaped by the factors that can bias those reactions. This discussion describes ten heuristics that can be especially important.

Group Decision Making

Within a group that is working toward a common goal, individuals can feel pressure to conform. When one member observes concordance among the others in the group, it can be interpreted as a reflection of common wisdom. Going against it puts the holdout in the position of a contrarian, which can be uncomfortable. Members of a jury may thereby be drawn to support a decision that appears to have the most widespread support, even when it differs from their own conclusion (Hans, 2009).

Outcome Bias

There is a tendency to see a chain of causation in reverse, starting with the outcome (Engel, 2009). This leads to a chain of thinking along the following lines. If the plaintiff suffered harm, something must have gone wrong to cause it. Since the defendant's conduct preceded the harm, it must have been a causal factor, even if this was not apparent at the time. If it contributed to causing harm, it must have been wrongful.

Intentionality Bias

People tend to explain outcomes by assigning intentionality to the actors involved (Robbennolt & Hans, 2016). Moreover, they are more likely to conclude that an action was intentional when the consequences were negative than when they were positive. Conversely, there is a tendency to conclude that there was harm when an action was intentional. This can distort the judgement of jurors by making them more likely to see a defendant's conduct as intentional or extremely negligent when a plaintiff sustained a significant injury and to assume that the plaintiff suffered harm when the defendant's conduct is framed as intentional.

Similarity Bias

People tend to identify with those who seem similar to them (Devine, Clayton, Dunford, Seying, & Pryce, 2001). Points of perceived similarity can be along many dimensions, including gender, race, ethnicity, age, occupation, and socioeconomic status. For members of a jury, litigants who seem similar in these or other ways are likely to elicit more sympathy than those who do not. This unconscious bias extends to everyone involved in a trial, including witnesses and attorneys. Jurors are likely to see similar plaintiffs as more deserving, defendants as less culpable and witnesses and attorneys as more trustworthy.

Implicit Bias Based on Stereotypes

Stereotypes can exert a formidable influence in shaping perceptions (Devine et al., 2001). People unconsciously assume that others share multiple characteristics with those who bear superficial similarities to them, for example with regard to race, ethnicity, sex or socioeconomic status. Stereotypes, both positive and negative, can most powerfully influence perceptions of people about whom little else is known, thereby shaping jurors' assessments of the trustworthiness of litigants or witnesses.

Subjective Assessment of Credibility

Similarity bias and stereotyping are not the only subjective considerations that can unconsciously sway a juror's assessment of a witness's credibility. Another important influence is a subjective evaluation of trustworthiness based on a witness's demeanor and speaking style. This can shape perceptions of four key factors that influence the weight jurors give to a witness's testimony: likeability, believability, trustworthiness and intelligence (Brodsky, Griffin, & Cramer, 2010).

Numerical Estimations

Statistical analyses can be extremely difficult for non-statisticians to interpret. Probabilistic estimates are a particular source of confusion, since they are often counterintuitive (Robbennolt & Hans, 2016). Statistical estimates can also be difficult for a lay person to put into context. Is a disease that strikes one in 100,000 people common or rare? Is a chemical that increases the odds of developing cancer by ten percent a cause for concern? Framing of such statistics is important in shaping the way they are understood.

Complex litigation often revolves around statistical evidence (Greenland & Robins, 2000). This is especially true in environmental lawsuits in which plaintiffs contend that exposure to a toxic substance caused an adverse health effect. Public health and epidemiological analyses of links between exposures and outcomes usually generate probabilities of possible harm, rarely certainty. It is easy for attorneys to sway jurors who lack statistical expertise with careful framing of such information.

Cognitive Dissonance

It can be difficult for people to accept a set of facts as accurate when they contradict a belief that is strongly held (Boyll, 1991). They may resolve the conflict by disbelieving the facts, even in the face of evidence that they are correct. For example, in a courtroom, a juror with deep respect for

scientific expertise may be confronted with evidence that a trained scientist has presented false testimony. Rather than accepting the conclusion that the witness is untrustworthy, the juror may believe the testimony and disregard evidence that it is unreliable.

Availability Bias

The probability of a future event tends to be perceived as more likely when it can be visualized than when it is described with words alone (Robbennolt & Hans, 2016). For example, the possible devastation of an earthquake will elicit more concern when presented with pictures or videos than with a narrative description. Similarly, the threat of a serious disease will elicit more fear when pictures of patients are presented than when their symptoms are explained verbally (Field, 2013). In complex cases that require prediction of the long-term consequences of a plaintiff's harm, jurors may inflate their estimates when an image readily comes to mind and to diminish them when the harm is described by an expert with words or statistics.

Identifiable Versus Statistical Victims

Plaintiffs who appear before a jury are likely to generate more sympathy than an unseen population of individuals among whom harm is spread. In a lawsuit seeking redress for a toxic exposure, for example, a plaintiff who personally describes his or her suffering will seem more deserving of recompense than a group of anonymous victims whose harm is estimated with statistics, even when there are many of them. This effect is often described as the difference between identified lives and statistical lives (Jenni & Loewenstein, 1997). An identified life is an actual person with whom others can identify. A statistical life is an abstraction. On an emotional level, identifying victims based on statistical models makes them seem hypothetical and their suffering an intellectual construct, although the total amount of harm experienced by the group may be substantial.

III. Tort Law's Conceptual Underpinnings as Shaped by Practice

How do the four spheres of activity on which conceptual support for tort law rest – social, economic, ethical and psychological - fare in light of these practical considerations? For the most part, the effects of tort law in these spheres fall short of the ideal. In each of them, tort law's practical effects fail to match important assumptions on which the system rests.

In applying social norms, juries often fail to represent the heterogeneity of their communities. The pool of potential jurors may be diverse, but attorneys on each side can exclude individuals whose outlook does not seem consistent with the interests of their clients during the process of *voir dire* (Middendorf & Luginbuhl, 1995). Sophisticated techniques are available for predicting juror behavior and the effects of biasing influences, and jury consultants can be retained to guide the process (Pierce, 1990). Rather than producing a representative sample of community values, the result is often a jury that has been crafted by the litigants to reflect favored characteristics.

The application of common social norms is further attenuated in cases involving complicated scientific disputes. A range of complex subjects can come before juries in matters such as medical malpractice, environmental harm, securities fraud and antitrust. Evidence in these kinds of cases may come from technical disciplines such as physiology, psychology, epidemiology, toxicology,

accounting and economics. Without a technical background, jurors may find the evidence difficult to fully comprehend, making it challenging to apply common sense and community values in evaluating it (Waites & Giles, 2005).

In terms of economics, rather than realizing efficiency, tort lawsuits, as noted, incur heavy transaction costs (Englard, 1993), especially in the form of fees paid to attorneys. By one estimate, the median amount of fees paid to attorneys and witnesses in tort lawsuits is more than $40,000, and amounts can exceed $100,000 (Hannaford-Agor & Waters, 2013). Successful plaintiffs' attorneys receive a sizeable percentage of their clients' recoveries through contingency fees, and attorneys for defendants, who usually bill on an hourly basis, can also generate considerable fees. Beyond the costs to litigants, there is a substantial administrative cost of operating courts, which is paid by taxpayers (Lee, 1985).

In terms of ethics, the five core principles that tort law promotes in theory are greatly mitigated in practice. The imperative of beneficence, to help those in need, is compromised by the emotional strain placed on plaintiffs by the litigation process (Robbennolt & Hans, 2016). Plaintiffs may have to wait years before their case is finally resolved, which delays the receipt of compensation that may have been urgently needed when the process began. The imperative of utilitarianism, to produce the greatest good for the greatest number of people, is called into question when so much of the system's expense goes to transaction costs. Justice is not served when wealthy defendants can gain an advantage by outspending plaintiffs of limited means on attorneys, witnesses, jury consultants and other aspects of the process. Nor is it served when decision making biases influence jurors' assessments of the trustworthiness of litigants. Autonomy is compromised if plaintiffs are encouraged by their attorneys to accept settlement offers that save the attorney time and expense. Nonmaleficence is negated when inconsistent jury verdicts send confusing messages to potential defendants as to which behaviors are meant to be deterred.

In terms of psychological effects, the litigation process can produce considerable stress for a plaintiff that may be more than a monetary recovery is worth (Robbennolt & Hans, 2016). Moreover, the ubiquity of settlements, usually without an admission of fault by the defendant, eliminates the chance for a sense of vindication that a verdict at trial might bring. Even the cathartic effect of a generous settlement may be mitigated by the realization that an insurance company and not the defendant is actually making the payment.

A. Tort Law and Mass Tort Claims

The incongruity between the tort system in theory and practice is especially stark for lawsuits involving large numbers of victims. These mass tort claims generally stem from corporate conduct that is alleged to have caused widespread exposure to a defective and dangerous product or a toxic substance (Trangsrud, 1989). Examples are lawsuits claiming harm from side effects of prescription drugs and from environmental releases of hazardous chemicals. Thousands of victims are affected by such occurrences, each with his or her own level of harm and amount of economic resources for dealing with it (Weinstein & Hershenov, 1991).

Resolving such claims individually would be extremely inefficient, since many of the underlying circumstances are similar (Robbennolt & Hans, 2016). Therefore, they are often grouped together

(Hensler, 2006). A single proceeding may determine common issues, such as the defendant's underlying culpability and the kinds of harm it could have caused. Once these points have been settled, individual attorneys can present claims for groups of plaintiffs and apportion funds among them. Considering each client's circumstances requires weighing multiple factors, some of which, such as the chance of future harm, can only be assessed based on speculation. The risk of arbitrary determinations is unavoidable.

Another result is a process that is especially inefficient in delivering relief to victims. A study by the Rand Corporation estimated that of the $70 billion paid by defendants through 2002 in lawsuits for harm caused by asbestos, 27 percent went to plaintiffs' attorneys, 31 percent to defense attorneys, and only 42 percent to claimants (Carroll et al., 2005). Transaction costs of this magnitude would be difficult to justify in most other kinds of transaction.

B. Theory and Practice Distortion Examples

Two kinds of claims help to illustrate the ways in which the tort system's goals can be distorted in practice. The first is lawsuits for medical malpractice, which usually involve single plaintiffs. The second is lawsuits for harm from asbestos, which have generated claims involving large numbers of them.

Medical Malpractice

The tort system is the primary means through which the American legal system compensates victims of medical errors. It is also the primary means through which negligent health care providers are held to account for deficient behavior. While on their surface, these goals appear consistent, in practice they may conflict.

When a patient experiences a bad outcome from a medical encounter, it is natural to seek a culprit. Sometimes, the culprit is obvious, as when a blatant error has occurred. Hospital care is known to generate many of them. In fact, research has shown that errors in hospitals claim more than a hundred thousand lives every year (Kohn, Corrigan, & Donaldson, 2000). In cases in which fault is clear, a malpractice suit can focus primarily on the nature and extent of the patient's harm.

However, in many instances of patient harm, fault is less clear. Often, there is none. Medical care can produce undesirable results for reasons that are mysterious or beyond anyone's control. For example, a patient may experience an idiosyncratic adverse reaction to a medication or an infection after surgery despite the most meticulous precautions. In the absence of fault, tort law provides patients with no remedy, regardless of the severity of the harm. As a result, an injured patient who can identify a wrongdoing party may be eligible for generous compensation, while one who is unable to assign blame receives nothing, even when the harm and need for financial redress are the same.

If a negligent party can be found, the criterion for finding fault is a failure to follow the standard of care (Peeples, et al., 2002). However, the appropriate standard for an individual plaintiff's care may not be clear. The best way to diagnose and treat a particular patient may be a matter of judgment that requires the assessment of numerous factors and often involves a subjective

determination on which competent experts can disagree. When malpractice cases go to trial, lawyers for both sides usually present medical experts to offer opinions, leaving jurors, most of whom lack medical training, to assess the technical issues that they raise (Bernstein, 2002). Without relevant expertise, jurors may be more susceptible to the biasing influence of the demeanor of the experts whose testimony they must evaluate.

In situations in which the standard of care is clear, the system's goals can be distorted in a different way. Since deviation from the standard can be used to establish fault, physicians who follow conventional thinking have a strong defense, if there is an adverse outcome. Physicians who try an innovative approach in a difficult case may be more vulnerable to being found negligent. The tort system is thereby deterring not just substandard care but also attempts at innovation.

Distortion of the system's goals begins even earlier in the process when attorneys decide whether to take a case (Hyman &Silver, 2006). Presenting a claim involving a complex medical situation can be time-consuming and expensive. The fees charged by experts can eat into the attorney's contingency fee. This creates an incentive for attorneys to take the easiest cases, regardless of the seriousness of patient's harm or the extent of a potential defendant's fault.

As noted, an attorney's willingness to take a case is also shaped by the size of the likely recovery, since this is the basis for the amount to be earned under a contingency fee arrangement (Havers, 2000). This is a particularly important factor in cases involving birth injuries and other kinds of harm to children (Hyman & Silver, 2006). They may have lost the chance for earnings over their entire lifetime. This can make cases involving obstetrical mishaps especially attractive to attorneys regardless of the level of actual negligence, leaving practitioners in this specialty particularly vulnerable to lawsuits.

These considerations for attorneys significantly exacerbate the mismatch between the goals of assessing the extent of harm and finding fault (Keren-Paz, 2007). An obstetrician found to have deviated slightly from the standard of care may face a huge judgment or settlement if a baby is born with a severe impairment leading to a public perception that the amount of negligence was extreme. In contrast, a physician who was grossly negligent in caring for an elderly patient whose career earnings are behind them may never face a lawsuit. The system can thereby penalize a competent physician with severe reputational harm while leaving a deficient one unscathed.

Even when fault is clear, recoveries for the same harm can vary widely based on the jury's assessment of the amount of pain and suffering (Robbennolt & Hans, 2016). The psychological toll of a medical error can be devastating, even dwarfing the burden of physical harm. Many plaintiffs would not be fully compensated were this type of harm not adequately considered. However, there are no metrics for measuring it or for translating it into a financial amount. Unlike physical harm, for which medical expenses can serve as rough guide, claims for psychological harm give jurors little to go on but their subjective reactions. Variation across cases sends an inconsistent message regarding deterrence (Blumstein, et al., 1991).

Yet, there is an even more serious threat to tort law's ability to deter negligence effectively that lies outside of the formal legal process. It is the presence of liability insurance that buffers physicians from the financial consequences of malpractice liability (Schwartz, 1990). Most

physicians carry such insurance, and some states require it as a condition of practice. It relieves physicians of the financial burden of both legal expenses in defending a case and paying compensation to a plaintiff based on either a settlement or jury verdict. In doing so, it provides a reliable source of funding for injured patients but mitigates the deterrent effect of imposing direct financial responsibility on the negligent party.

This is not to say that malpractice insurance relieves physicians of all consequences for negligence. The litigation process itself imposes a substantial cost in both psychological and economic terms (Couch & Thiebaud, 2002). Responding to a lawsuit can mean sitting for depositions and responding to requests for voluminous amounts of records. In addition to being stressful, depositions and records requests require preparation that can be extremely time consuming, diverting professional time and resources away from revenue-producing patient care. If a case goes to trial, the stress of testifying in court and the preparation involved can be even more onerous. These costs are imposed regardless of the lawsuit's outcome, so physicians must absorb them even when they ultimately prevail.

The threat of this burden has led many physicians to charge that the system encourages them to practice defensive medicine – conducting unnecessary diagnostic tests and procedures to reduce the grounds for a possible lawsuit should the patient experience an adverse outcome (Hermer & Brody, 2010). Such tests and procedures, it is claimed, have little clinical value but impose added costs. Rather than deterring negligent care, the tort system thereby creates a perverse incentive for excessive treatment. While the extent to which physicians actually engage in defensive medicine is not clear, at least some see it as a prudent response to legal risk (Hermer & Brody, 2010).

For plaintiffs, the burden of malpractice litigation can be equally onerous. An analysis of trials conducted in 2001 found that the median time from filing to verdict was more than three years, with some cases taking more than 13 (National Center for State Courts, 2005). Yet even after going through this lengthy process, most plaintiffs ultimately lose at trial. An analysis of cases decided in 2005 found that plaintiffs win only 23 percent of the time (Lee & LaFountain, 2011). Those who are willing to persevere face the added risk that their claim will fail because of a legal technicality, such as expiration of a statute of limitations, or the reversal of a favorable verdict on appeal.

Research on malpractice lawsuits highlights the tort system's shortcomings in handling them. An exhaustive study of errors in hospitals found that 3.7 percent of admissions resulted in an adverse outcome, 27.6 percent of which were caused by professional negligence (Weiler, et al., 1993). Yet only 14 percent of the patients who sustained adverse outcomes brought claims. For those injured patients who did gain compensation, the amounts were found to average less than the estimated medical costs. Adding to the inequity, among claims that did result in compensation, many were judged by the researchers to lack merit. In other words, the tort system failed to compensate many patients who were injured by medical malpractice while offering financial reward to many who did not deserve it. A review of several studies of closed malpractice claims found further support for the finding that most people who are eligible do not bring claims (Baker, 2005). Yet, the cost of adjudicating claims is substantial. An estimate of the median cost of litigation for medical malpractice placed it at $122,000 (Hannaford-Agor, 2013).

Asbestos Disease

Asbestos is a mineral that serves as an extremely effective insulator against heat and fire and has been used widely in construction (WHO, 2014). It consists of fibers that easily disburse through the air. If inhaled, they can severely damage the lungs. Chronic exposure can lead to a condition known as asbestosis in which lung capacity is significantly diminished, often with fatal consequences. Exposure to asbestos can also cause cancer of the lungs and surrounding tissues, most notably a form of cancer known as mesothelioma that affects connective tissue around the lungs (Carroll et al., 2005). The link between asbestos inhalation and lung disease has been known for decades (Brodeur, 1985). In the 1930s and 1940s, some manufacturers of asbestos, aware of the dangers their products could present, took steps to conceal them (Sells, 1994).

Use of asbestos increased dramatically during World War II, when it was applied as an insulator in shipbuilding for the war effort (Corn & Starr, 1987). Once inhaled, asbestos fibers remain in the lungs, where they can cause progressive damage over decades before the ill effects become evident. A jump in cases of asbestos-related diseases among World War II shipyard workers began in the 1960s and grew during the decades that followed.

The first tort lawsuit for asbestos-related harm to be brought by a former asbestos worker against a manufacturer was filed in 1969 (Brodeur, 1985). The worker's attorney faced a daunting task in establishing the elements of the case. He had to convince the court of the existence of a link between asbestos and illness, of the likelihood that the link applied to the disease that his client suffered and that the defendant knew of the risk. After rounds of trials and appeals, he ultimately prevailed in 1973. However, the cost in time and resources of bringing the case was substantial. In the end, he earned a meager amount for his efforts.

Once that first case succeeded, the path had been forged for subsequent lawsuits both in terms of the legal principles that had been recognized and the medical findings that had been established (Carroll, et al., 2005). With the path to success delineated, thousands of additional cases were brought in the decades that followed. For the plaintiffs, an opportunity emerged for recompense for the costs and pain of severe and fatal ailments. For many attorneys, a guide emerged for relatively easy litigation success. For manufacturers, a flood of claims began.

The large number of cases presented an unprecedented challenge for the legal system. It would have been logistically impossible to adjudicate each one individually. A quicker and more efficient process was needed. The response was to group cases for resolution in bulk. Attorneys presented collections of claims to defendants and negotiated aggregate compensation amounts covering all of them (Hensler, 2006). The task then fell to the plaintiffs' attorneys of apportioning the proceeds, and their clients were left to hope they did so fairly.

Apportioning compensation fairly in these circumstances requires consideration of some factors that are unknowable. Since asbestos harm is progressive, a plaintiff's level of disease may change in the future. If a plaintiff is still asymptomatic when a lawsuit is filed, the chance that illness will arise at a later time is a matter of guesswork. Inevitably, some plaintiffs who later become severely ill will have been undercompensated, and others who remain healthy will be overcompensated and effectively receive a windfall. In some cases, this dilemma can be resolved with structured

settlements that create a reserve of money that is available if a plaintiff needs financial help in the future, but they are not often used.

Plaintiffs who are already severely ill at the time their case is filed are at an additional disadvantage, as they may have difficulty waiting for financial assistance. If their condition is likely to be fatal, they have no time to wait. This leaves them with little ability to bargain with defendants, or with their own attorney, over the size of the settlement they should receive and no ability to wait for the chance to present their case to a jury at a trial.

The flood of asbestos claims has also created financial chaos for many defendants, often to the detriment of the victims (Rothstein, 2001). In 1986, a major manufacturer of asbestos, Johns Manville Corporation, declared bankruptcy because of the burden of claims, and other manufacturers later followed suit (Carroll et al., 2005). These actions limited the amount of funds available to compensate plaintiffs and added another layer of complexity to the litigation process. In yet another wrinkle, manufacturers demanded coverage for their costs from insurance companies under liability policies, and insurance companies often resisted, spawning a separate litigation explosion (Stempel, 2005).

Billions of dollars have been spent on asbestos litigation, and cases continue to be filed. Litigation expenses and attorney fees have claimed the lion's share of the sums expended, with plaintiffs receiving only an estimated 42 percent (Carroll, et al., 2005). This is a remarkable level of inefficiency.

IV. Possibilities for Reform

Are there alternatives that can better serve the tort system's goals of compensation and deterrence? Several have been proposed (Keren-Paz, 2007; Hyman & Silver, 2006). Some involve changes to the litigation process and to the method of calculating a plaintiff's damages and fall under the heading of tort reform (Englard, 1993). The aim of most of these proposals is to limit the amounts that plaintiffs and their attorneys can recover in order to discourage lawsuits. The most commonly discussed reform, which has been adopted by several states, limits the amount that plaintiffs can receive for noneconomic damages, such as pain and suffering (Robbennolt & Hans, 2016). This works to the clear disadvantage of many plaintiffs with meritorious claims and has even been described as "cruel" (Furrow, 2011). Others limit the amount that plaintiffs can receive for medical expenses that are covered by health insurance, restrict the percentages of recoveries that attorneys can charge as contingency fees, require mediation before a lawsuit can proceed, and shorten the statute of limitations for filing a claim (Hubbard, 2006). For the most part, they do little to make compensation fairer or deterrence clearer.

A. No-Fault Models

Other reform proposals that are more comprehensive call for promoting the goals of compensation and deterrence by decoupling them. A prominent idea along these lines is to evaluate claims based solely on a victim's needs without regard to fault (Studdert & Brennan, 2001). Payment for harm is awarded whether or not a negligent party can be identified. It may be implemented through a social insurance system that automatically covers the entire population or through case-by-case

determinations for specific kinds of injuries (Englard, 1993).

This approach is embodied in some compensation systems that already exist. An example that illustrates the concept is workers' compensation (Moore & Viscusi, 1990). Every state operates a program that provides remuneration for medical expenses and lost wages due to disability for people who have been injured on their job (Sengupta et al., 2012). They are eligible for awards if they sustained an injury or illness that results from work, regardless of whether an action or omission by their employer or anyone else was responsible. Medical expenses are paid directly to their providers according to a fee schedule, and the worker can receive direct payment for temporary disability. A supplement may also be available according to a schedule in cases involving permanent disability. The cost is covered by insurance policies that most employers are required to maintain.

The advantages for workers over the tort system are faster recoveries and a more streamlined process. In most cases, an attorney is not needed, and the claimant need not endure lengthy litigation. The amount of recovery is more predictable, as it does not depend on the reactions of jurors or on negotiations. However, these amounts tend to be smaller than those available in tort. The system, in effect, represents a trade-off for workers of speed, predictability and administrative ease in return for smaller recoveries.

Although fault is not considered in awarding compensation, the workers' compensation system still incorporates an element of deterrence. The insurance premiums that employers pay may be based on their claims experience, which creates an incentive to minimize workplace harm (Liz et al. 2012). However, there is no direct sanction for negligence. Moreover, workers are precluded from bringing claims against their employer in tort, unless hazardous conditions were created intentionally.

Nevertheless, the workers' compensation system is not entirely litigation-free. While fault need not be established, a causal link between an injury and workplace conditions must be. This is straightforward for most injuries, but illnesses may be more difficult to trace to employment. In particular, diseases with multiple possible causes, such as cancer, may be difficult to link definitively to a workplace exposure, and ill workers must often resort to litigation before administrative boards to establish their claims. Even for more routine claims, workers often find the claims process cumbersome and frustrating (Strunin & Boden, 2004).

A system of no-fault compensation has been in place in New Zealand for several years covering all accidents, regardless of cause (Wallis, 2017). Victims can recover damages according to a schedule without litigation. Professional boards and other bodies can investigate allegations of deficient behavior to add an element of deterrence. The system is well-accepted by the public.

B. Sources of Resistance to No-Fault Reform

Might a no-fault system generate support in the United States? While it requires trade-offs, it could benefit many victims who risk delays and capricious outcomes for claims brought in tort. However, it would face serious challenges for several reasons.

First, the United States lacks a comprehensive social insurance system (Englard, 1993). Universal health care coverage does not exist, so an alternative compensation system must account for medical costs, which adds complexity and variability. America has a collection of public health care insurance programs, including Medicare, Medicaid and the Affordable Care Act, but almost ten percent of the population remains uninsured (Gunja & Collins, 2019).

Second, aside from the tort system, the United States lacks a reliable system for holding negligent parties accountable. Professional licensure boards are inconsistent in imposing discipline (Harris & Byhoff, 2017). Regulatory oversight of health and safety practices by industry, for example through environmental and workplace safety laws, can be erratic. A no-fault system requires a companion system that supplies an effective deterrent to negligent behavior.

Third, numerous interests have a stake in maintaining the tort system in its current form, among them plaintiffs' attorneys, defense attorneys and insurance companies. They would likely oppose wholesale changes that could affect their incomes and revenues. Their ability to marshal support for maintaining the current system could be formidable.

Fourth, and perhaps most importantly, Americans strongly value their rights, and a no-fault compensation system would limit their right to pursue vindication for perceived wrongs. For all its shortcomings, the tort system can still serve as a great equalizer that affords the humblest citizen an avenue for redress against powerful interests. It is a platform on which victims, at least in theory, can present their case before an impartial arbiter and to the broader public. Americans would not readily abandon this egalitarian vision.

Conclusion

The American system of tort law embodies the lofty goals of affording redress to victims of wrongdoing and deterring misconduct. It reflects an ethical framework that supports equality under the law, accountability regardless of social status and compassion toward those who have been harmed. For many Americans, it represents a vision of equality and fairness.

However, in practice, the system falls short of achieving these goals in several ways (Keren-Paz, 2007). It is extremely complex and inefficient, diverting a substantial portion of its costs from victims to attorneys and judicial administration. Its outcomes can be capricious, denying recovery to some deserving plaintiffs and awarding it to some undeserving ones. It relies on decision making by juries whose members can be swayed by psychological biases that distort objective judgments. Its ability to deter misconduct is mitigated by liability insurance, which buffers defendants from the financial consequences of their behavior. All of these shortcomings are particularly acute for mass injury claims in which the needs of thousands of victims stemming from the same occurrence must be adjudicated.

This is not to deny that the tort system serves the interests of victims in many cases (Hyman & Sliver, 2006). Adequate, and even generous, recoveries are often obtained, and potential wrongdoers receive a message that failure to exercise care can lead to substantial expense. However, these outcomes do not always result. When they do, the process by which they are achieved can be extremely inefficient. These shortcomings of the system impose a burden on

everyone through higher taxes, insurance premiums and costs for good and services.

Much of the problem can be seen to lie in the potential for conflict between the tort systems' two primary goals of compensation and deterrence. Greater amounts of harm do not necessarily equate to greater levels of negligence. Victims receive nothing when they are unable to identify a negligent party, and defendants can escape liability for severe negligence when the economic consequences are minor. In trying to serve both goals, the system in many instances serves neither.

A no-fault compensation system would ameliorate some of the tort system's shortcomings but would not fit comfortably with American's social and political environment. However, incremental steps could make the system fairer and more just. An initial step would be to implement universal coverage for health care costs to account for the millions who remain uninsured despite the reforms of the Affordable Care Act (Courtemanche, et al., 2018). A second step would be to create a system of universal paid time off from work for illness and injuries funded either by employers or by a government fund. These two measures would significantly lower the stakes for victims in resolving tort claims and might ease the path for further reform.

Policy reforms such as these are not likely to be imminent. The United States has been struggling to achieve universal health care coverage for more than a hundred years. Nevertheless, they can represent an aspirational goal. Until more comprehensive reform is achieved, the tort system's shortcomings should at least be openly acknowledged to maintain a focus on the need to make the system more efficient and fairer.

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The Value of the Victim in Torts and Compensation Law

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Abstract

What is a victim value in terms of compensation for the harm they suffer? The question is as complex as the answer. Indeed, this issue implies translating into legal and then monetary terms the harm, both physical and moral, directly or indirectly suffered by victims. The right to full reparation for this harm suffered is certainly a fundamental principle of compensation law. However, it must be noticed that this principle is relative. Not every violation necessarily leads to the recognition of the status of victim, and not every victim necessarily has the same right to compensation. This reflection on the value of the victim will be conducted in French law, with elements of comparison in European countries, and will take different examples such as those provided by the recent terrorist attacks on French soil.

Keywords: direct and indirect victims, bodily harm, accident, terrorist attack, full compensation, predisposition, anxiety damage, damage of affection, Guarantee Fund, nonpecuniary losses, discrimination, European and International Law

Introduction

If we approach the subject from a hexagonal (French) angle, which will be the focus of this presentation even if incursions of comparative law will enrich it, the answer of French civil law is *a priori* simple: all victims must be treated identically in terms of compensation for the damages they suffer. There are indeed two essential principles of our law, which our Court of Cassation regularly recalls

The first principle is so named full compensation, according to which "the characteristic of civil liability is to restore as precisely as possible the balance destroyed by the damage and to return the victim to the situation in which he would have been had the harmful act not taken place"[40]. It should also be noted that case law has taken up this principle and given full reparation an unimaginable scope a few decades ago, according to what one author called "the ideology of reparation"[41]. Even if this principle has no constitutional value in France, as illustrated by the lump-sum compensation of victims of work accidents under a legal system that is now old and obsolete[42],

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[40] Since: Cass. 2ème civ., 28 oct. 1954, JCP 1955. II. 8765, note R. Savatier ; see: Cass. 1ère civ., May 9, 2019, n° 18-14839; Cass. 2ème civ., February 6, 2020, n° 18-19518.

[41] L. Cadiet, *Sur les faits et méfaits de l'idéologie de la réparation* (On the facts and misdeeds of the ideology of reparation), Mélanges Pierre Drai, Dalloz 2000, p. 495.

[42] Since the law of April 9, 1898, currently articles L. 411-1 et seq. of the Social Security Code; Cons. Constit., June 18, 2010, n° 2010-8 QPC, D. 2010, p. 454, obs. S. Porchy-Simon, D. 2011, p. 45, obs. Ph. Brun ; P. Morvan, *Droit de la protection sociale* (Social welfare law), LexisNexis 2019, n° 170 et s.

it expresses an almost general rule that is omnipresent in the ordinary law of compensation as well as in the special compensation regimes in France and in the majority of European countries.[43]

Following a second principle, less often stressed but just as important because it is a corollary of the previous one, the scope of the reparation should not depend on the nature of the event giving rise to liability. In other words, and unlike criminal or disciplinary law, civil liability will not modulate the amount of compensation according to the existence or absence of fault causing the damage or the degree of seriousness of that fault.

Here's for the theory. The practice is in fact quite different, and the general problem of this Special Issue is as relevant in civil law as in the other fields covered. Many factors come to put in perspective this apparent reign of the most perfect equality.

The first one is naturally that of borders, which are abolished by tragedies, particularly when they are collective. An ideal world would like a reparation to ignore the nationality of the victim, to calculate all compensation with the same cursor. It is true that compensation for damages is often linked to principles with a universal vocation, such as the right to physical safety or even to the dignity of the person. Despite some strong recommendations from European authorities in favour of a common juice[44], despite constant research in comparative law[45], despite some agreements that are partially binding on the signatory States, the situation remains that of the heterogeneity of national rules for calculating compensation in Europe and *a fortiori* in the world.

If we return to French law, and especially to the law of personal injury which will be at the heart of this paper, we must immediately face a considerable technical difficulty: what does it mean to compensate for a physical injury? How to restore the victim to his former state, according to the position of the French Court of Cassation? This is complex, but possible, for economic harm following the physical injury, such as the current and future loss of income of a victim who lost her previous job. However, what does compensation mean in practice for non-economic damage, physical or moral suffering that may be suffered both directly and indirectly? It is immediately obvious that restoring the previous state in the face of an irreversible situation is a legal fiction. And the reign of fiction is conducive to arbitrariness - jurisdictional or transactional - and arbitrariness is itself the ferment of unequal treatment of victims...

Another factor of potential inequality is as much economic as legal: it is not enough to decide on the principle of compensation, but it is necessary to be sure to find the solvent debtor! As we know, the amounts of compensation can reach considerable levels and this financial problem is multiplied by mass losses, whether accidental or criminal, such as terrorist attacks. Several guarantee systems exist, and coexist in France, namely basic social benefits, private insurance and public guarantee Funds. But not all victims have access to an insurer, the purpose of guarantee Funds is very

[43] On the application of this principle in the main European countries, see : F. Leduc, Ph. Pierre (dir.) *La réparation intégrale en Europe. Etudes comparatives des droits nationaux* (Integral Reparation in Europe, Comparative Studies of National Laws), Ed. Larcier, 2012

[44] See : European Council, Resolution 75/7, 14 March 1975, regarding compensation for damages in the event of personal injury and death

[45] See : European Research Group on Liability and Insurance (GRERCA, https://iode.univ-rennes1.fr/grerca) ; *Principles of European tort law*, European Group on Tort Law (www.egtl.org).

specific, creating real discrimination as long as compensation from a universal public Fund, such as the one in New Zealand, is not chosen. Our solidarity system is certainly very efficient, but it cannot cope with the accumulation of damages. Equal treatment therefore fundamentally raises another point: to what extent is a State-incorporated company prepared to commit itself to compensate its nationals who are victims of bodily injuries?

However, first of all, we have to admit that such violations are legally relevant. In other words, the identification of compensable victims (Part I), in the first place, can be a source of inequality of treatment according to the greater or lesser opening of the circle including them as such. Nevertheless, being qualified as a victim is not, as we have just seen, the promise of a homogeneous and unambiguous legal treatment. So that secondly, the compensation of victims identified as such (Part II) is a matter of civil law.

I. Identification of compensable victims

French law distinguishes the situation of direct victims (A) from that of indirect victims (B) whose rights depend on the former.

A. Identification of direct victims

It is incumbent for any person claiming to be a victim to establish not only the operative event capable of providing the basis for compensation - fault or objective harmful event - but also the reality of the damage inflicted on him and the causal link with the triggering factor. In this trilogy, each element of which is in itself a source of complexity, we will therefore only examine the damage itself, to which the status of victim is linked. It should be noted, however, that some courts on the merits, given the abnormal situation of a victim of a bodily injury, have tried to presume that this abnormal injury caused the fulfilment of the other conditions of liability, such as a patient seriously affected by the eye after surgery, which, according to the Court of Appeal, was necessarily the result of a blunder by the surgeon, even if not proven. This position, which is expressed through compensation for "virtual misconduct", was condemned by our Court of Cassation, according to which “the existence of a fault cannot be deduced solely from the abnormality of the damage and its seriousness”[46].

It is symptomatic that the French reference works do not attempt to define the notion of victim as such, referring from the outset to the varieties of harm they may suffer. However, various hypotheses attest that the reality of damage will not so easily lead to the recognition of victim status.

First, the victim of a bodily injury may be deprived of partial or total compensation because it is actually the result of factors specific to him/her, his/her previous condition[47]. When this is known and medically documented, it is normal for this condition to reduce the amount of compensation:

[46] Cass. 1re civ., 27 mai 1998, no 96-17.197, D. 1999, jur., p. 21, note S. Porchy, JCP G 1998, I, no 187, spéc. no 32, obs. G. Viney ; Ph. Pierre., *Chronique de responsabilité civile médicale* (Medical Civil Liability Chronicle), Méd. & Droit, 1999, no 35, p. 15 ; add. : Cass. 1re civ., 21 janv. 2003, no 00-18.343.

[47] See : Ph. Pierre, *Le passé de la victime, l’incidence de l’état antérieur* (The victim's background, the impact of the previous condition), Gazette du Palais, April 8, 2011, p. 15.

a person's degree of functional incapacity will be deducted from the rate of damage caused by a new damage attributable to a person in charge. What happens, on the other hand, when the trauma suffered has revealed the victim's physical or psychological fragility, and has caused barriers to collapse according to a phenomenon medically described as "decompensation"? Taking into account this fragility, which has hitherto been silent, would certainly be a source of inequality between victims, and French case law firmly refuses to do so: the author of the damage must take the victim as he finds her, and no reduction in compensation is possible "because of a pathological predisposition when the condition resulting from it has only been caused or revealed by the harmful event". A psychiatric history, even if it goes back to childhood, cannot therefore be taken into account as long as it has not resulted in behavioural disorders. Nevertheless, this impact of the previous state is one of the most sensitive issues in the field of forensic expertise of victims, and it is important that the missions assigned to the expert are precisely drafted in this respect.

Second, the egalitarian treatment of victims requires not only a retrospective but also a prospective approach. Can a person claim the status of victim when the physical or psychological damage concerning him has not yet materialized, when he remains in a form of expectation? The answer might seem simple: in the absence of current damage, there is no certain damage and therefore no correlative reparation. The reality is more complex, and questions in French law on the compensation of so-called anxiety or anxiety damages. All these anxieties are not worth (yet) each other!

Reparation does not pose any difficulty in principle when the victim has suffered bodily harm: the Court of Cassation – such as public funds like the FGTI[48] - agrees to recognise and pass on to the heirs of the deceased the compensation for the imminent death anxiety damage, for the mental suffering of the person who has been killed, but excludes the so called *pretium mortis*, compensation solely because of the reduction in statistical life expectancy[49]. Similarly, a person who has suffered post-traumatic stress during an accident or attack from which he or she survived may report suffering and/or permanent functional deficit after consolidation. Anxiety is recognized here through the classic prejudices.

What happens, however, when the physical injury does not exist at all, due to a lack of death, documented suffering or sequelae? It is not certain that all victims are equal under French law. Some, such as workers exposed to asbestos, are compensated for the anxiety, for the "permanent worry" caused by the risk they incur, even though the diseases in question have not yet appeared[50]. But other forms of anguish and anxiety are rejected even though they exist independently: thus the Court of Cassation has ruled out the possibility that police officers caught in riots and saved in extremis may be compensated for their "extreme feeling" of anguish about death, which the Court of Appeal had nevertheless taken into account[51]. Although these police officers had also been

[48] Fonds de Garantie des victimes d'actes de Terrorisme et d'autres Infractions (Guarantee Fund for Victims of Terrorism and Other Offences) created by law n° 86-1020, September 9, 1986 ; see G. Defrance, Le Fonds des victimes d'attentats et d'autres infractions (The Fund for Victims of Terrorist Attacks and Other Crimes), Argus 1990, p. 2478 (https://www.fondsdegarantie.fr).
[49] See : Cass. crim. March 26, 2013, n° 12-82600.
[50] C. Corgas, *Le préjudice d'angoisse lié à un dommage corporel : quel avenir ?* (Anxiety injury related to bodily harm: what does the future hold?), Responsabilité civile et assurance 2010, étude 4.
[51] See : Cass. 2ème civ., February 5, 2015, n° 14-0091/14-10097 ; Rapport de la Mission sur l'amélioration

injured and compensated in this way, the anguish suffered was independent of these injuries and was additional to them.

After the series of attacks in France[52], this type of debate has reappeared around the autonomous reparation of the "situational injuries" of victims, because they are "linked to an exceptional situation or circumstances resulting from a sudden and brutal act, in particular a collective accident, a disaster, an attack or a terrorist act, and causing the victim, during the course of the event, very great distress and anxiety due to the awareness of being confronted with death"[53]. This compensation, independent of the physical or psychological outcome of the event and cumulative with compensation for other items of indemnity for bodily harm, has only partially been accepted to date, with the Guarantee Fund for Victims of Terrorism (FGTI) making it an explicit component of the suffering suffered and not a truly autonomous position. The subject is all the more complex as the Fund also recognises compensation for "exceptional damage specific to victims of attacks" (PESVT[54]). This indemnity does not correspond either to the problem of situational damage because it is lump-sum, partially dependent on physical damage (€ 30,000 for "circle 1", in this case survivors who have personally suffered an injury or directly assisted with the injuries) and also includes a symbolic dimension of recognition of the Nation, for the blow absent from other forms of collective trauma, such as the above-mentioned victims of riots. Faced with this complex delimitation of borders, it should be noted that the FGTI finally abolished the right to a PESVT of € 10,000 for the so-called victims of circle 2, meaning persons located in a circle of insecurity without having been aware at the time of the attack, which was the closest to the situation damage.

B. Identification of indirect victims

About these victims who were not immediately affected by the harmful event, French law is very generous, or effective according to terminology preference! These victims, if they are heirs of deceased direct victims, will collect all the actions for compensation from the estate, even if the deceased did not file a lawsuit during his lifetime, and the sums received will not bear any tax liability. But the heirs, and more generally all the relatives of the direct victims who prove a sufficient close link with them, will be allowed to claim the status of “victim by ricochet” - meaning impact victim - and obtain separate compensation for the material (loss of income) or moral (loss of affection) damage they suffer.

Even before considering this quality, it is important to specify that the legal notion of indirect

du dispositif d’indemnisation des victimes de préjudices corporels en matière de terrorisme (Report of the Mission on the improvement of the compensation scheme for victims of bodily injury in connection with terrorism), ss dir. Mme Bussière, mars 2018, Ministère de la Justice ; Livre blanc sur les préjudices subis lors des attentats, Barreau de Paris (White Paper on the damage suffered during the attacks, Paris Bar Association) *Gazette du Pal*ais, 6 december 2016, p. 78.

[52] As this paper is part of the "MATRICE" and "November 13" research programs, many examples have been chosen about victims of terrorism.

[53] See S. Porchy-Simon, *L’indemnisation des préjudices situationnels d’angoisse des victimes directes et de leurs proches*, ed. S. Porchy-Simon, Ministère de la Justice, de l’Economie, Secrétariat d’Etat chargé de l’aide aux victimes, 6 mars 2016, La Documentation française (Compensation for the situational anguish of direct victims and their relatives, report to the French Ministry of justice, Ministry of Economy, State Secretariat for Victim Assistance, March 6, 2016, La Documentation française).

[54] Préjudice Exceptionnel Spécifique des Victimes d’Actes de Terrorisme.

victim must be distinguished from the material notion of victim far away – "involved in" - from the harmful event, a category which poses particular difficulties, as the French attacks, and in particular the truck Nice attack[55], have once again shown. In fact, the definition of the persons involved in the attack led for a time to a divergence with the Paris TGI[56] Prosecutor's Office, which had a restrictive definition of the "single list of victims" - recognizing only those directly and immediately exposed to the risk of death, i.e. located on the truck's trajectory or in close proximity. The Guarantee Fund for Victims of Terrorism (FGTI), based itself on a "danger zone" which has been extended to people on the periphery of the truck's trajectory such as on the other side of the platform, as long as they could medically prove physical or psychological damage. A "shared list" is now established by adding the single list and victims who have received a provision from the FGTI. Nevertheless, the fact remains that 30,000 people were present at the scene of the attack and that delimiting the scope of the victims is and will always be extremely delicate, creating a risk of diluting the status of victims.

We can see the same difficulty for both direct and indirect victims. How much compassion can be shown for them? How far can they be treated as victims? The issue is old, that has given rise to previous debates but is far from being exhausted. In particular, in order to obtain compensation for damage of affection, the barriers have long since been removed. It is no longer necessary to prove a particular emotional link with the direct victim : a direct and certain damage is sufficient, the damage of affection caused by the erroneous announcement of the death of a relative is reparable, the damage of affection is compensable whether the direct victim is deceased or still alive… A final situation seemed incompatible with this extension of affliction, which may concern both individual cases and collective acts such as disasters or terrorism: can an unborn child conceived at the time of his father's death claim compensation for the moral suffering caused by his father's absence during his lifetime? The French jurisprudence had earliest refused to do so, on the grounds of lack of possibility for a child to be aware of this prejudice at the time when his case arises, but the Court of Cassation has just the same end to this opposition, provided that the child is at least conceived at the time of his father's death[57]. If the latter is therefore a new victim, what is the potential for this solution to expand beyond the parent/child relationship?

In any case, taking into account indirect victims requires a different approach from that of direct victims. Specific prejudices are recognised in French law. In addition to the prejudicial effects of affection, mention should be made, for example, of the accompanying prejudices recently accepted in the typology of prejudices of relatives, which compensate for the disruption of their lives, an acute disorder in their living conditions but provided that a community of life has previously existed and that the direct victim has finally passed away. Naturally, the question of the circle of victims of collective acts such as attacks, with the originality that characterizes the status of "victims by ricochet", comes up here again. Thus, the creation of a "circle 3" was decided by the French public Fund (FGTI) for the exceptional damage specific to victims of attacks (PESVT). The amount allocated to the beneficiaries depends on the previous relationship with the deceased victim. Above all, the debate focused on the recognition of a "prejudice of expectation and concern" for the relatives of the dead victim as soon as they cohabited with him or her: the

[55] This terrorist attack on a truck that killed dozens of people in Nice (86) on the "Promenade des Anglais", and injured many others, during the fireworks display on the night of July 14, 2016.
[56] Tribunal de Grande Instance (First Instance Court).
[57] Cass. 2ème civ., December 14, 2017, n° 16-26.687

originality of this prejudice is that it can be compensated on a flat-rate basis and without expertise by an increase in the prejudice of affection and, in the event of expertise, by an increase in the item of suffering suffered, all this being cumulative with the other injury items and PESVT[58].

This treatment of victims of attacks, which is probably not perfect, as expressed in particular by the difficulty of grasping the content of the PESVT, shows in any case a distortion with the other victims under the jurisdiction of the FGTI, those affected by the "other offences", which here means victims of ordinary bodily criminal offences. More generally, whatever the source of the damage, the piecemeal creation of special protective compensation schemes, as social emergencies occur, is in itself a source of inequality between victims. Again, only the establishment of a universal fund, based on the New Zealand model, would be able to avoid these inequalities in the legal system.

II. Compensation for identified victims

This compensation must be tested across both national borders - under the French legal system (A) - and international borders (B).

A. Compensation at the test of the French legal system

The key principle of French compensation law is, as previously mentioned, full compensation for the damage suffered. Under this benevolent umbrella lies a very contrasting reality, and it would be inaccurate to argue that French law treats all victims seeking compensation in the same way.

First, the right to full reparation has no constitutional value, unlike the declaration of liability for fault[59]. Thus, an old law of 9 April 1898 continues to impose lump-sum and limited compensation for work-related accidents, which excludes, in particular, the taking into account of their aesthetic or recreational damage, unless they can escape this rule by demonstrating, for example, that they have been the victims of an inexcusable fault on the part of their employer[60]. It is true that this exception is the target of many criticisms, and that it has never been repeated in special compensation schemes for road accident victims, victims of medical accidents, victims of terrorism etc.

Assuming that the principle of full compensation applies, it is still necessary to submit it secondarily to the concrete test of the facts. It must be acknowledged that, for non-pecuniary losses at least, there is in reality a fiction that leaves all the excesses open. What does it mean to compensate for physical or moral pain, to compensate for the loss of a loved one, to estimate the trauma caused by certain individual or collective acts of immeasurable violence? Reparation is full

[58] Decision of the FGTI board, September 2017, relating to the anguish and waiting losses of victims of terrorist attacks.
[59] C. const., decision n° 99-419, November 16, 1999, JCP 2000, I, 280, obs. G. Viney
[60] See *supra*, introduction, and *supra* I/A about workers exposed to asbestos; on the improvement of lump-sum compensation in the event of inexcusable fault on the part of the employer, which does not, however, lead to the restoration of full compensation for damages suffered by the victim of a work-related accident: Social Security Code, Section L. 452-3; Cass. 2ème civ., April 4, 2012, n° 11-18014 et s., D. 2012, p. 1098, note S. Porchy-Simon, D. 2013, pan. 52, obs. Ph. Brun ; RTDciv. 2012, p. 539, obs. P. Jourdain

when the judge considers it to be infringed! But it is often dependent on the expert, or compensation is still full when the victim confronted with an insurer or a public guarantee Fund agrees to consider it as such and signs a settlement, even though it is known that in practice the amount of the settlements is not always a jurisdictional equivalent. A degree of arbitrariness on the part of the judge, insurer or public Fund is therefore inevitable. But this risk is aggravated by specific factors to French law.

Thus, with a few exceptions, the common law of liability is implemented sometimes by the judicial judge, sometimes by the administrative judge, depending on whether the perpetrator of the damage has a private or public status, as may be the case for health establishments in which medical accidents have occurred. This duality undoubtedly causes divergences in assessment, as the administrative judge is less favourable to victims than his judicial counterpart. Moreover, the Court of Cassation leaving the lower courts - our "Courts of appeal" - self-determining in this respect, such Court of Appeal will be more generous than another for an identical infringement. And yet the victim does not choose the author, private or public, of his damage, nor the place of it!

Such distortions, which are very disappointing and specific to French law, seem nevertheless tempered by several positive factors. As we noted above, our solidarity system has created a lot of public guarantee Funds (FGTI, ONIAM[61] etc.), which have uniform national jurisdiction regardless of the circumstances of the damage, thus treating all victims in the same way. In addition, both orders of courts, like other non-judicial compensation structures, now apply a single instrument for determining the items of compensable damage : this is the famous "Dintilhac nomenclature" created in 2007, named after the High Magistrate who coordinated a working group to draw up a rational typology of damage, organised around the distinction between pecuniary and non-pecuniary losses resulting from physical injury, and the status of direct and indirect victim[62]. This nomenclature, which is not legally binding but has acquired great authority from the courts, insurers and guarantee Funds, thus distinguishes 26 types of damages and innovates in many respects. The Dintilhac nomenclature admits, for example, that "victims by ricochet" – impact victims - can be compensated for exceptional extra-patrimonial damage, distinct from the loss of affection and compensating for the disruption of the lifestyle of relatives, including sexual damage.

As any answer in turn raises questions, the Dintilhac nomenclature has provoked much debate. In particular, should it be considered that a victim who can report many items and sub-items of harm will necessarily be treated better than if this breakdown does not exist ? This was the situation before, and led the courts to more global compensation, just like the moral suffering that is now very - too - subtly analysed to be fragmented. The question would deserve a real systematic study, of an economic or even historical nature, but it is not certain that clear conclusions can be drawn... Above all, and this leads to the last point of reflection, the nomenclature is a doubly limited tool.

First, in that the list of damage types is not exhaustive, which opens the way for the emergence in case law of new grounds for compensation, such as anxiety damage or waiting damage as we saw

[61] Office National d'Indemnisation des Accidents Médicaux (National Office for Compensation of Medical Accidents), established by the law n° 2002-403, March 4, 2002.
[62] *Nomenclature des préjudices corporels. Groupe de travail présidé par le Président Jean-Pierre Dintilhac* (Nomenclature of Personal Injuries. Working group chaired by President Jean-Pierre Dintilhac), July 2006, http://www.ladocumentationfrancaise.fr

above. But this absence of borders also creates some form of confusion, since it has made it possible, for example, to compensate *sui generis* items on the edge of the personal injury, such as the exceptional damage specific to victims of attacks (PESVT), whose cumulative nature with compensation by the nomenclature may then be questioned as to whether it respects the principle of full compensation...

Secondly, in that this nomenclature only determines the list of types of damage, and not their actual amount. In this way, previous questions about the individual disparity of compensation amounts remain unresolved, except of course when the nomenclature is implemented by a single actor at national level, meaning by a public guarantee Fund. The real answer to this disparity, and the guarantee of equal consideration for all victims, would be to subject the calculation of their compensation to a real scale identically binding on courts, insurers or public funds. However, this vector of equality has bad press in France, because it refers to the outdated model of work accidents, lump sums have become derisory over time. Such scale would also clash with the age-old tradition of freedom of assessment *in concreto* of the damage which has made it possible, let us acknowledge, to move forward steadily in the rights of victims, even at the expense of their complete equality.

French law, which is in the process of being reformed, is moving towards an in-between solution, which can be supported because it paves the way for a compromise between judicial freedom and the equality of victims. It is a question of making available to all those involved in compensation a global assessment reference framework, established by decree, which would not be binding but would allow all those concerned to have access to a guide based on "flexible law", because it can be ruled out when the particular situation of a victim so warrants[63].

B. Compensation at the test of international borders

The initial question - are all victims equal? - already resonates strongly within the borders of France. It increases considerably if we accept to project ourselves out of them, which naturally prohibits any exhaustive proposal, but allows us to draw some perspectives as a conclusion.

There are circumstances where the nationality of the victim is indifferent. Thus, with regard to victims of acts of terrorism, article L. 126-1 of the French insurance Code[64] authorises action against the FGTI by victims of acts committed on French territory, regardless of their nationality, whether they are direct victims or victims by ricochet, while French victims of attacks committed

[63] Liability reform project, Ministry of Justice, March 13, 2017, article 1271: "a decree of the Conseil d'Etat determines the items of extra-patrimonial damages that may be assessed according to an indicative compensation reference framework, and the procedures for their preparation and publication. This reference framework is re-evaluated every three years based on changes in the average compensation awarded by the courts. To this end, a database is compiled, under State control and under conditions defined by decree of the Conseil d'Etat, of the final decisions rendered by the Courts of appeal on compensation for bodily injury to victims of a traffic accident" (http://www.justice.gouv.fr).

[64] "Victims of acts of terrorism committed on national territory, persons of French nationality who are victims abroad of these same acts, including any public official or military personnel, as well as their heirs, whatever their nationality, shall be compensated under the conditions defined in Sections L. 422-1 to L. 422-3. Compensation may be refused, or its amount reduced on the grounds of the victim's fault".

abroad also benefit from this right of action. The main subject is then the definition of the act of terrorism itself, even if the consequences of which may be individual or collective (Penal Code, art. 706-16[65]). The same applies, to a greater or lesser extent, to victims of other offences, but the indifference of the nationality of persons exposed to offences on French territory has only gradually been acquired, under pressure from the Court of Justice of the European Union, which has qualified any reservation in this area as discrimination prohibited by Union law[66]. It should be pointed out on this occasion that, for the first time, unequal treatment between victims is qualified as discriminatory, although this principle has not been applied in other areas of compensation law. Other illustrations of this uniform treatment could be proposed, such as victims of medical accidents who can be covered by the public Fund (ONIAM) without reservation of nationality if the event giving rise to the accident occurred in France.

In truth, the real inequality of treatment of victims can be observed if we agree to go one step further, in this case to compare national compensation between them, at European and international level, once the law applicable to the victim's action has been determined according to the ordinary conflict rules if there is an element of extraneity. This change of scale becomes revealing: no, not all victims are at all equal! How could it be otherwise in the absence of binding compensation *quantum*? Thus, to take a European example, a survey[67] showed that in the event of the death of a child, parents in France obtain on average between € 15,000 and 25,000 ($ 17,000/27,000) for their moral suffering by repercussion. But some countries prohibit this compensation (Germany, Netherlands, Hungary…) unless the parents personally suffer serious medically recognized disorders. Others are very receptive, Italian courts have gone up to € 300,000 ($ 325,000), Spanish law admits a maximum of € 100,000 ($ 110,000), Portuguese law adds to moral suffering the inheritance of the *pretium mortis* for € 40,000 to 60,000 ($ 45,000 to 65,000). And, finally, some countries are very similar to France (Belgium, Austria) and others less generous (Sweden: € 2500, $ 2800).

Such variations are even more obvious when the same accident is collective and involves victims of different nationalities. An air disaster is subject to the Warsaw and Montreal conventions[68], which allow beneficiaries to choose between the compensation rules of the country of residence of the victims, the country of purchase of the ticket, the country of departure or arrival of the flight or the country where the airline is established. Inequality then becomes a procedural issue, a legal challenge subject to the competence of lawyers, while compensation for victims is, let us remember that, a universal value for all those who accept, as the 1789 French Declaration of Human Rights points out in article 2, that "men are born and remain free and equal in rights". From this perspective, and going back to a hexagonal viewpoint, we can only welcome the significant work being done today by the inter-ministerial delegation for victims' help[69].

[65] "Terrorist acts incriminated by Sections 421-1 to 421-6 of the Penal Code, as well as related offences, shall be prosecuted, investigated and tried in accordance with the rules of this Code, subject to the provisions of this Title. These provisions are also applicable to the prosecution, investigation and trial of terrorist acts committed abroad when French law is applicable…"
[66] See : CJUE, July 5, 2008, case C-164/07.
[67] *La réparation intégrale en Europe* (Full compensation in Europe), ed. F. Leduc et Ph. Pierre, cited above.
[68] Warsaw convention, 1929, amended in 1955, 1961, 1971 and 1975; Montreal convention, May 28, 1999.
[69] Decree 2017-1240, August 7, 2017. This delegation is placed with the Minister of Justice and headed currently by Mrs Frédérique Calandra. The Interministerial Delegate for Victim Assistance coordinates the

Conclusion

In conclusion, if we compare the affirmation of the principles such as full reparation or the indifference of the event giving rise to compensation with the scope of the rights of the victims, we can see how difficult it is to apply these principles on a daily basis. Numerous factors of inequality appear when examining the situation of victims, whether it be their previous status, the fiction of compensation for non-pecuniary losses, or the status of direct or indirect victim. Attempts to regulate compensation come up against the freedom of judicial assessment, the lack of a coercive tool under French law, the variety of public and private actors involved in compensation, and the diversity of national legal systems at European and international level. This state of affairs can be criticized as a source of permanent discrimination. It can also be seen as a way of freedom to constantly adapt the law to renewed social needs, as recently demonstrated by the care of victims of terrorist attacks.

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action of the various ministries in monitoring and supporting victims of acts of terrorism, collective accidents, natural disasters, serial disasters and other criminal offences. It ensures the effectiveness and improvement of victim support mechanisms and coordinates all the actions of the ministries in their relations with victims' associations and victim support groups.

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The Victim, a Recent Invention in French Collective Memory*

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Abstract

Collective memory is a part of history: it evolves with history and has an impact on history. In order to study the hazards of collective memory, we first wanted to frame the main conceptual tools that we use: collective memory, conditions of narrativization, memory paradigms, and weak memory/strong memory. Using these tools, we question the centrality of the victim in recent memory systems. We take two examples from France: the Second World War and the terrorist attacks of 2015. Since 1985 (and not before), the figure of victim has been hegemonic in French collective memory. Between 2015 and 2019, massive surveys of a representative sample show a memory condensation of the terrorist attacks since 2000 into "11/13" and those since 11/13 into "Paris" and "Bataclan."

Keywords: victims, collective memory, memory paradigms, conditions of narrativization, weak memoryand strong memory, France, World War II, terrorist attacks

Introduction

Memory is a part of history in that it evolves with it and influences it. This two-fold assertion leads us to reject any essentialist interpretation of memory as a definite image or object that would shape itself as a close to immediate reaction to the event, both in the individual and in society. Memory, however, changes both in the individual, where the mechanisms of encoding- consolidation-reconsolidation are now well known, and in society, where collective memory cannot be understood as a fixed representation that is unwavering for eternity. Memory acts on history because it can be mobilized in response to an event. The representation we have of the past will then serve as a key to our analysis of and/or mobilization in response to new events.
We frame these considerations within the discipline of "memory science", since the conceptual tools we will use need that theoretical background. After clarifying this framework, we will

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examine two major examples: France during World War II and the terrorist attacks of 2015-2018.

I. Understanding collective memory

For memory to be considered a singular subject for research, we need the conceptual tools to analyze it. *Collective memory* can be understood as a selective representation of the past that participates in constructing a group's identity, a society in its globality or a segment of this society. This definition has been forged, decade after decade, since the seminal work of the French sociologist and philosopher Maurice Halbwachs (Halbwachs, 1925, 1950). In many respects, the "schemas" of the great psychologist Frederic Bartlett (1932) echo Halbwachs' "social frameworks of memory" (Halbwachs, 1925). The closeness and complementary between these two approaches sparked a discussion. The idea of the singularity of each discipline, a true impermeability, prevailed, and this framing spread in the 1970s and 1990s (Nora, 1984; Lavabre, 1994; Rousso 1987; Olick 2011; Assmann J. & Czlapicka, 1995; Ricoeur, 2000) when Halbwachs was rediscovered in the social sciences. But it is as if two paths had been explored separately since the 1930s, with psychologists reading little or nothing about Halbwachs and knowing only Bartlett. And vice versa in the social sciences. What a waste of time! It was not until the first decades of the 21st century that psychologists became interested in Halbwachs and collective memory (Hirst & Manier 2008; Hirst, Yamashiro, Conan, 2018; Eustache et al., 2019; Gagnepain et al., 2019; Mary et al., 2020) and historians thought that in order to think fully about collective memory, we needed to question the cerebral dynamics of memory (Peschanski, 2019).

So if we go back to the definition on which our approach is based, the *representation of the past* is not, as its name might indicate, an analysis based on a scientific methodology, but a representation that responds to approaches other than heuristics. It is *selective* because we do not retain everything, and this is also true for individual memory. Hypermnesia can even be pathological, as Borges showed so well in the short story "*Funes el memorioso*," whose hero, Funes (Borges, *La Nacion*, 1942), died from remembering everything. It is well known, for example, that sleep causes a radical sorting of memories. Society also sorts out its memories, mainly because it cannot retain everything, but also because it collectively remembers only the elements that have a meaning, a social utility, that participate in the *construction of a group's identity*. For simplicity's sake, we will use the term "group" because a group's perimeter varies. Collective memory is usually apprehended on the scale of society as a whole; but it can also be the memory of a segment of that society. It's a question of scale but, obviously, there are overlaps as well as specificities.

Once the definition of collective memory has been framed, a question immediately arises: are the *conditions of narrativization* in place? In other words, what are the conditions for a remembered event to become part of the collective memory of a society or a segment of that society? One example both clarifies the question and shows how the situation changes over time. "Hidden children" refers to the Jewish children who went into hiding during the war, a kind of rescue resistance that has long remained on the margins of collective memory. These rescuers are called the "Righteous Among the Nations" (Zajde, 2002) for the official recognition awarded to them by the Yad Vashem Institute (Israel), whether they rescued children or adults. It was not until 1992 that the first international congress of hidden children was held in New York. At the same time, associations were being organized in Poland and France, and soon in Belgium. And it was only by

the end of the 1990s that a successful program and then a widely sold book, *Parole D'étoiles* (Guéno, 2002) opened the door to collective memory for them. Jean-Pierre Guéno called for testimonies via Radio France, and hundreds of people responded. A first symbolic consecration was the recent January 2007 ceremony at the Pantheon where the head of state, Jacques Chirac, and the president of the Foundation for the Memory of the Shoah, Simone Veil, unveiled in the Pantheon ("To the Heroes, the Grateful Homeland") a plaque in homage to the "Righteous Among the Nations." These few chronological landmarks are enough to illustrate our questions about the setting of the memorial narrative. This does not mean that the rescue of Jewish children has never been mentioned before. It even inspired a very beautiful and successful film by Claude Berri as early as 1967, "Le Vieil Homme et l'Enfant" (The Old Man and the Child). But this memory was "weak" — we will come back to this term —and the event did not structure the collective memory of World War II in France until the late 1990s. In other words, the conditions for narrativization were not met.

This example is all the more interesting in that it is out of phase with the memory of the Jewish victim, which became central, even hegemonic, from the mid-1980s onwards. I will return to the vagaries of the memory of the Shoah in France, but first I will address this discrepancy. From my point of view, it owes much to the victim hierarchy that creates a kind of leveling of experiences linked to their symbolic reappropriation by the group, a hierarchy that is usually integrated by the victims themselves. Even though the plight of Jewish hidden children most often centers their suffering due to separation from their parents and their anxieties over them, while also worrying about their own fates, do they really have the status of victims at the end of the war when they are alive? The question also arises for them when they think of all the Jews who died in the Shoah and of their relatives, near or far, many of whom were gassed at Auschwitz-Birkenau. In other words, how can they claim a place in the collective memory when what is centered is first and foremost the people who died? The path taken — not necessarily a conscious strategy — illustrates our point: the hidden children did express themselves, but as spokespersons rather than victims. Their words converge: "you have forgotten an essential component of the resistance, namely the rescue resistance, that of modest men and women who risked their lives to save Jewish children from death". In other words, the condition for the memorial narrative was the reference to a forgotten resistance and not to their fate as hidden children. Once the door of collective memory opened, it became possible to explain what their lives were like, and thus for the hidden children to enter the French collective memory of World War II. We deliberately chose this example because it illustrates the complex mechanisms that lead an event to integrate the collective memory and it also shows that, for this to happen, the event must have a "meaning", a "social utility".

We have dwelt at some length on this example because it illustrates the concept of the conditions for narrativization, but also the concept of the "memory paradigm" (*regime mémoriel*) (Peschanski, 2012), which is intrinsically linked to the historization of memory. Complementing François Hartog and Gérard Lenclud (Hartog, Lenclud,1993) who forged the concept of *regimes d'historicité* (historicity paradigms) several years ago and showed, with finesse, how much the ancient writing of history should not be read and criticized according to the critical rules established at the end of the nineteenth century, but from the context in which it emerged, I think that in each period we can find selective representations of the past participating in the construction of the identity of the group we are studying. Each period has its collective memory, in a way, understood as memory configurations stabilized over a significant period of time and based on

real, fantasized, or virtual figures. The notion can be applied on various scales: we can thus inquire about the memory paradigms in Antiquity, the Middle Ages or the Renaissance; we can also start from a given event, such as the Second World War, and ask ourselves what the successive memory paradigms are in France, without forgetting that such a question can be asked in several countries and thus give rise to rich comparative studies.

We should not, however, take a radical view of these memory paradigms. We can define several of them over time and identify the structuring figures with which each one is associated. Does this mean that a former structuring figure disappears in the following period? Does the figure of the hero disappear completely when it is supplanted by the figure of the victim, for example? Simplistic visions are always to be distrusted. Yet there are competing representations based on other figures that structure the collective memory in a previous or subsequent memory paradigm. I am very cautious about radical readings that speak, for example, systematically of occultation, as if collective memory were the result of a political decision by this or that actor about whether or not to record this or that event in memory — even in authoritarian regimes. It may exist, but it is marginal. Much more important are the cross-movements of accentuation or blurring. In my opinion, memory paradigms reflect a dominant, even a hegemonic figure, but rarely to the point of making another memory configuration disappear completely.

The notions of *strong memory* and *weak memory* enable a better, more precise and complex account for these memory processes. The hidden children are a perfect illustration of this complexity. Even though the public became aware of them in the 1990s and 2000s in a memory paradigm very marked by the figure of the victim, a very strong memory at the time, the association of the hidden children with World War II was conditioned by a reference to the Resistance, a weak memory in this period.

II. The Jewish victim, a central figure in the collective memory since the mid-1980s

When we try to retrace the genealogy of French memory of the Second World War, we tend to reduce this history of memory to two moments, two memory paradigms, an approach that is still used in French school textbooks. A first memory born of the war and structured around the figure of the resistance fighter would have been replaced in the 1970s with a memory based on the figure of the Jewish victim. Two moments, two memory paradigms, two figures. When we retrace history, the situation is much more complex, leading us to the moment when the figure of the Jewish victim is imposed as hegemonic in our frame of reference. Without going into excessive detail, I can identify at least six memory paradigms on the subject. For example, the figure of the Resistance fighter is only hegemonic between 1958 and 1969, between General De Gaulle's return to power and his resignation. The reason is simple: De Gaulle's legitimacy was fundamentally associated with his call for resistance on June 18, 1940. It turns out that this great national narrative was supported by the discourse of a communist party which, at the time, received nearly a quarter of the votes in the elections. The convergence was there.

The memory paradigm which followed the fall of De Gaulle in 1969 reflects the image of a much blacker France, *a minima* pleutral, even collaborating. It is the time of the black legend. It was then that negative figures, "villains", emerged in the collective memory (for there are not only positive figures): the figure of the Vichy regime and, conversely, that of Pétain. As for the figure of the

Resistance fighter, it fades away.

A new period began around 1985, with the advent of a new memory paradigm in which the structuring figure of the Jewish victim was imposed in the collective memory of the Second World War in France (Poznanski, 1994). I feel certain of that date, although some people point to the Eichmann trial in 1961. Of course, the media talked about it for a while, but we certainly can't call it a change, or even an inflection. The 1970s are more frequently mentioned, whether by the media or in teachers' lessons about the 1970s elsewhere. In fact, memory activism (Serge Klarsfeld's role as a "memory entrepreneur") and historical writing (Paxton & Marrus, 1981; and Klarsfeld 1983 and 1985 in particular) are mistaken for inclusion in the collective memory. It was not until the mid-1980s, particularly with the Barbie trial, that the Jewish victim became the central figure. It was then accompanied by the figure of the Vichy regime, which had already been present since the 1970s, as one of the components of the memory paradigms then at work. But from the mid-1980s onwards, however, it emerged alongside the figure of the Jewish victim, to the point that the German occupier moved into the background, if not beyond. Moreover, Vichy is first seen as an actor in the persecution of Jews and in their deportation, while the French state had other major areas of involvement that are hardly mentioned.

If we focus on the actors and entrepreneurs of memory, once again the memory paradigm beginning in the middle of the 1980s is singular. By way of comparison, the memorial paradigm that began in 1958 was led by the state and, in particular, by General de Gaulle, who built his legitimacy on the call to Resistance on June 18, 1940 ("L'Appel du 18 juin"). The initiative therefore came from the head of state. In the mid-1980s, the memory paradigm structured by the figure of the Jewish victim and the figure of the Vichy regime was the result of "memory entrepreneurs" (Lavabre, 2007), with Serge Klarsfeld first in line, relayed by other segments of civil society and by part of the French historical school, in the continuity of Robert O. Paxton's work. This is where, in the media, the formula of the *devoir de mémoire* is imposed and invades the entire field of media memory (Ledoux, 2016).

The French state followed after some time. We often talk about Jacques Chirac's speech in 1995, ten years later, on the day of the commemoration of the Winter Velodrome roundup. This talk would come to be seen as a generational and political break with the president's predecessors, Mitterrand and De Gaulle. None of Chirac's successors really reversed this change (Rousso, 2017), even if a new memory paradigm emerged under Sarkozy and imposed itself under Hollande: in a context of commemorative hypertrophy, we can speak of a convergence of memories, the figure of the resistant hero joining that of the Jewish victim.

Emmanuel Macron further accentuated this tendency, both denouncing France's responsibility in the deportation of Jews from France and acknowledging the heroism of the Resistance. The context requires it. As a transition with our next chapter, consider Gendarmerie Lieutenant Colonel Arnaud Beltrame, who sacrificed himself during the terrorist attack on Trèbes in the south of France on March 24, 2016. In his speech at "Les Invalides"[70], President Macron made two references to the Resistance, naming Moulin, Brossolette, and the Vercors, then made the same reference from a very Gaullist perspective, Jeanne d'Arc, a figure embodying the spirit of the resistance. He also made it clear, however, that we must forget the name of the terrorist and remember only the name

[70] https://www.youtube.com/watch?v=kxONh0KLtKc

of the hero. This is part of presidential political speech, which wishes to highlight individual initiative.

By the way, the omission of the terrorist's name implicitly functions as an answer to the Merah case. Merah made the headlines in April 2012 after murdering children and soldiers before being stalked and killed by members of the RAID (an elite unit of the French police). The murderer was the only one whose name is associated with this episode. Who in France could name his victims, the ones he murdered, Jonathan Sandler and his two children, Gabriel, 3, and Aryeh, 6, and Myriam Monsonégo, the daughter of the director of the Toulouse Jewish school? Who will mention the three policemen he killed in Montauban: Imad Ibn Ziaten, and in Toulouse: Abel Chenouf and Mohamed Legouad? However, not only is the name Merah remembered, but he became a kind of hero in some suburban neighborhoods.

III. The victim at the heart of the memory of terrorist attacks

This was an exception, however. The figure of the victim also became apparent in the aftermath of the terrorist attacks in France. A specialist in political science, Stéphane Latté, dates the creation of the "victim," to the 1980s with, at the same moment, the development of associations of victims, and its institutional and academic corollary, "victimology" (Latté, 2004). To understand the major change that has taken place in a few decades, I will begin by referring to a major book written by Didier Fassin and Richard Rechtman on what would be called the social invention of PTSD (post-traumatic stress disorder), a book which was published in French in 2007 and in English in 2009 under the same title, *The Empire of Trauma, An Inquiry into The Condition of Victimhood* (Fassin & Rechtman, 2009).

Let us remember a crucial point: they note that PTSD was somehow invented in the United States in the 1970s, in the dual context of the Vietnam War and the feminist movement. I am not going to go back to this original context, but, noting that after a few decades PTSD had become recognized along with the figure of the victim, they said, "we are not commenting on the validity or otherwise of the diagnosis of PTSD, but we are basically noting that PTSD did not exist until the late 1970s and that it did afterwards."

Let us take the French attitude to terrorism of Middle Eastern origin and, specifically Islamist. In 1980, an attack took place against the synagogue on Copernic Street in Paris. We retained the statement of the French Prime Minister, Raymond Barre, which referred to the death of Jews and, and I quote, "innocent Frenchmen." What interests us today is that the mentally wounded, whether Jews or "innocent Frenchmen," were not taken care of at all. Today, the slightest serious road accident is treated by a CUMP or medical-psychological emergency unit (*cellule d'urgence medico-psychologique*). Note the link with the attacks: it was after the Saint-Michel RER attack in 1995 that the CUMPs were created in France, at the initiative of Minister Xavier Emmanuelli and under the presidency of Jacques Chirac.

Let us look back at the stages of this story. Again, this is the mid-1980s. We know that it was Robert Badinter, François Mitterrand's Minister of Justice, who entrusted Professor Milliez with the mission to follow up on the victims. In his report, the latter advised him specifically to create an associative network to help victims. The year 1986 marked an essential date with the creation

of the Guarantee Fund for Victims of Acts of Terrorism and Full Compensation for Victims' Injuries (FGTI) and thus a consortium of associations, INAVEM, which bought together the 60 victims' associations. Another important step was taken in 2000 with the legal recognition of associations assisting victims. Similarly, the following year, for all of Europe, a framework decision was taken by the European Union on the status of the victim in criminal proceedings.
In this history, there is again a personality who, as a victim of an attack, plays a role quite similar to that of Serge Klarsfeld for WWII Jewish victims, namely Françoise Rudetzki. The victim of an attack at the Grand Véfour restaurant in Paris in December 1983, she was and still is the major figure in the struggle for the recognition of victims. In 1986, she created the "SOS Attentats" association. That same year, she completed the creation of the FGTI (*Fonds de garantie des victimes d'actes de terrorisme et autres infractions*) and, recently, was part of the initiative to create the "Centre National de Ressources et de Résilience," finally set up in 2019 (Rudetzki, 2004; Pierre, 2020).

The series of attacks affecting France, in the proportions we know, between 2015 and 2018, put the issue of terrorism at the forefront of public opinion (Mayer & Tiberj, 2016; Hoibian, 2018). The victim is at the heart of the political, associative, and memorial accompaniments of the attacks. It was first established in 2016 at the heart of the state with the creation, after the attacks of January and November 2015, of a ministry for Victims' Assistance, which was assisted and soon followed by a General Secretariat (a dedicated administration). These two structures were not perpetuated after the 2017 presidential elections, but the establishment of an Inter-ministerial Delegation for Victims' Assistance reassured the associative actors.

Considering memory management, in 2018, President Macron set up a memory committee under the chairmanship of the inter-ministerial delegate, Élisabeth Pelsez, with two missions: to propose a date of commemoration for the memorial ceremony for victims; and to establish a way of reporting on this history. In September 2018, the report was submitted to him. He retained the three main proposals: the date of the ceremony (March 11, the date of the European commemoration), its integration into school programs, and the construction of a memorial museum on democratic societies in the face of terrorism. A prefiguration committee for the memorial museum was set up under the chairmanship of the historian Henry Rousso. A first report was submitted and on the first Day of Homage to the Victims of Terrorism, on March 11, 2020, shortly before the decision to have a generalized lockdown against the Covid-19 pandemic, the president of the republic announced in his speech that he had received the committee's report[71] and that he was still entrusting Henry Rousso with the task, in the next stage, of moving on to the concrete preparation of this future museum/memorial.

The role of associations enters the complex intertwining growth of collective memory. In the aftermath of the wars (1920' and 1930'), veterans' associations emerged and famously had a major influence on 20th century France's political life and social organization. In the 21st century, the victim replaced the veteran. Françoise Rudetzki had been an avant-garde agent with "SOS Attentats." At the same time, INAVEM, which recently became France Victimes, played a role. But it is above all the attacks on November 13, 2015, that spurred the emergence of two victims'

[71] DIAV, Musée-mémorial des sociétés face au terrorisme, Mission de préfiguration, 2020, http://www.justice.gouv.fr/delegation-interministerielle-daide-aux-victimes-12894/le-musee-memorial-des-societes-face-au-terrorisme-32985.html

associations that have played a central role since then in public space and public policies, namely Life For Paris, which mainly includes the victims of the Terraces and the Bataclan, i.e., young people, and 13onze15, which gathered together bereaved parents. In addition to these dedicated associations, there are other more generalist victims' associations and a Foundation for the Assistance of Victims of Terrorism.

This story/history in progress shows the importance of this interweaving of associative, state, and parastatal structures that participate in the centrality of the victim in the construction of both the individual and collective memory of the attacks[72].

IV. Collective memory of the terrorist attacks in France, a memory condensation

We know more about the representation of terrorist attacks in French society thanks to a long-term program (2016-2028) to memorialize the 11/13 attacks (memoire13novembre.fr). As part of the *Programme 13-Novembre*, the aim of which is to understand the links between individual memory and the collective memory of a traumatic event, a program headed by CNRS, INSERM, and HÉSAM University, supported by Investissements d'Avenir, and involving 31 partners, in June 2016 and June 2018 we conducted a survey led by the CRÉDOC on the attacks of November 13, 2015, and their memorization and perception by French society.

The jihadist attacks in France in 2015 and 2016 were traumatic beyond the imaginable for the victims, their relatives, and witnesses as well as the entire national community. It is the contemporary nature of the social bond — its forms, constraints, and representations, its connection with politics and the everyday world — that these attacks put to the test. The research undertaken by the *Programme 13-Novembre* is intended as a strong epistemological answer. It postulates an integrated transdisciplinary approach as the key to analyzing the seismic shock that gripped the social body in the aftermath of November 13, 2015.

The aim here is not to present the program as a whole, but it is important to note that at the heart of the approach is the desire to cut across the disciplines of the human and social sciences, life sciences, and engineering sciences. We will dwell here on one of the aspects of this work, namely the study of representations carried out by CRÉDOC, the Research Center for the Study and Observation of Living Conditions. Every six months for nearly half a century, CRÉDOC has conducted massive surveys in France on a representative sample of 2,000 people in June (face-to-face) and 3,000 people in December (online) (using the quota method). As a partner in the *Programme 13-Novembre*, in the middle of a very comprehensive questionnaire, it included eleven questions on the memory of terrorist attacks in June 2016, and again in June 2018, making it possible to follow the evolution of the French memory of terrorism over a short period of time. The same series of questions will be asked again in June 2021 and June 2026. The questionnaire was developed jointly by these public opinion specialists along with historians, sociologists, neuroscientists, and psychopathologists.

We wonder what the French retain from these traumatic episodes. By using the two notions "memory" and "oblivion," the aim is not to deny the differences between them. It is much more a

[72]« Terrorisme: faire face. Enjeux historiques et mémoriaux, http://www.justice.gouv.fr/publication/DIAV_Rapport_Comite_Memoriel.pdf

question of forming a somewhat progressive, somewhat evolving hierarchy that is attached to the event and its representation. The individual cannot remember everything; neither can society (see above). At such a short distance from the event (7 months and 2 years 7 months, respectively), we cannot yet say precisely what will be part of the collective memory and what will be, temporarily or definitively, left out, but the results already offer a major insight (Brice et al., 2016; Hoibian et al., 2018; comparing these with memories just after November attacks in Bianquis & Castell, 2018; and four first studies have been published online in November 2020).

November 13 is the memory reference for the chain of terrorist attacks

In order to avoid the bias of a questionnaire focusing a priori on November 13, the first question asked of respondents in 2016 and in 2018 was, “Can you name the terrorist acts committed in the world or in France that have had the greatest impact on you the most since the year 2000?” Let us remember, because it is essential, that no list is proposed a priori from which the respondents would have to choose; it is up to them to mention three events (at most) that they wish to select.

Graph 1: "Can you name the terrorist acts committed in the world or in France that have had the greatest impact on you since 2000? "(in % in June 2016 and June 2018) (3 possible answers)

		A	B	C	D
		January 2015 attacks	13 November 2015 attacks	11 September 2001 US attacks	14th of July 2016 Nice attacks
X	June 2016	59 (BC, Y)	80 (AC, Y)	53 (AB, Y)	-
Y	June 2018	37 (BD, X)	70 (ABCD,X)	40 (B, X)	43 (BA, X)

- The percentages don’t sum up to 100 because people could cite many responses (3 possible answers), and here are presented the main responses that occurred.
- The letters ABCD (for columns) and W, X, Y, Z (for lines) indicate a significant difference between the two figures, using a confidence interval of 95%
- Field: All respondents - residents of France aged 18 and over (in June: only in metropolitan France).
- Source: CRÉDOC, "Living Conditions and Aspirations" survey, June 2016, January 2017, June 2018, January 2019.

In June 2016 (i.e., before the Nice attack), most of the answers mentioned three series of attacks: those on November 13, 2015, in France (80%), those on September 11, 2001, in New York (52%) and those in January 2015 in Paris (59%).

This concentration is the first conclusion to be drawn from this graph. Generally speaking, the very many attacks occurring abroad are hardly mentioned, with the exception of 9/11, of course, but also, to a lesser extent, those of March 2016 in Brussels (20%), which were perpetrated three months before the survey.

Two years later, in June 2018, the answers to the same question showed that the mechanisms at

work have been singularly amplified. The attacks of November 13, 2015, are still the terrorist acts most cited by the French (70%, -10 points) of all the terrorist acts that have influenced them since 2000 (Graph 1). The attacks on July 14, 2016 in Nice (43%), the attacks on September 11, 2001 (40%, -13 points), and the attacks in January 2015, mainly associated with the "Charlie Hebdo" attack (37%, -22 points), are also among the most frequently cited. The March 2016 attacks in Belgium, cited by 20% of those surveyed in 2016, have almost disappeared in 2018. The most spectacular drop was in mentions of the January 2015 attacks. The new reference to the Nice attacks partly explains this redistribution, but these figures do not prevent the November 2015 attacks from becoming the preferred vehicle for inscribing the various waves of attacks in the collective memory of the French.

I would account for this very singular phenomenon by using the term "memory condensation"[73] to account for this very singular phenomenon. At a time when France, and to an even greater extent the world, is experiencing cycles of large-scale attacks, the collective memory of the French is focused on three and then four reference events. Beyond that, it is as if the memory of the attacks was increasingly focused on November 13, but we should again qualify this and account for a kind of interlocking temporalities. There is a long temporality, that of the memory of September 11, which remains, year after year, with fluctuations, a kind of reference, like the matrix of the 21st century. For the January attacks, we were able to refine our reading because we asked the same question in January 2017 and January 2019. We note, not surprisingly, that the memory of the January attacks is reactivated when the media addresses the topic each year near the anniversary of the event. It is as if every anniversary is a time when a buried but ever-present memory is solicited, no matter how quickly it fades away throughout the rest of the year. For the Nice bombing, we observed the rapid decline of the event as a memory reference. We will see whether we find the "January 2015 model" again or whether the decline is confirmed. Yet this does not prove to be the case, at least so far, for the November 13 attacks, which remain present at a very high level throughout the year and which have imposed themselves as a major structuring event in the collective memory.

From November 13, 2015, one remembers more and more a precise place, "le Bataclan," or a vaguer reference, "Paris"

Another question makes it possible to further clarify the phenomenon of "memory condensation" by changing the scale, i.e., by learning what the French have retained from the attacks of November 13. First of all, they were asked, in June 2016 and again in June 2018, in exactly the same terms, "Can you name precisely the different places where the attacks on November 13, 2015, took place?"

The evolution of event memory since 2016 shows that the individuals interviewed recall with less precision the details and factual elements characterizing the attacks.

Graph 2: Can you cite precisely the different locations where the attacks on November 13, 2015, took place? (in %)

[73] We would like to thank Daniel Marcelli for having proposed this formulation to us during a symposium held in September 2018 by the COPELFI association (Conferences of Child and Adolescent Psychiatry of the French Tongue in Israel).

		A	B	C	D	E
		Bataclan	Paris	Stade de France	Restaurants and cafés	Don't know
X	June 2016	71 (BCDE, Y)	41 (ACDE)	45 (ABDE, Y)	37 (ABCE, Y)	3 (ABCD, Y)
Y	June 2018	50 (BCDE, X)	38 (ACDE)	19 (ABE, X)	17 (AB, X)	15 (ABC, X)

- Open-ended question, verbatims coded a posteriori
- The letters ABCDE (for columns) and X, Y (for lines) indicate a significant difference between the two figures, using a confidence interval of 95%
- Field: All respondents - residents of metropolitan France aged 18 and over.
- Source: CRÉDOC, "Living Conditions and Aspirations" survey, June 2016 & 2018.
- Open-ended question, verbatims coded a posteriori
- Reading: 50% of respondents in 2018 cite the Bataclan as the venue for the events of November 13, 2015.
- Note: For ease of reading, labels for locations cited by less than 10% of respondents have been removed. For example, 4% of the population cited Charlie Hebdo as one of the places targeted by the attacks on November 13, 2015.
- Since respondents were able to give several answers, the sum is well over 100%.

In June 2016, eight months after the event, the Bataclan, especially and massively, the Stade de France, and the Terraces were still very much present in the memory of the French. Two years later, the developments were spectacular. The first lies in the difficulty in providing a precise answer. The only section to experience spectacular growth is "*Ne sait plus*" (Don't Know), which has risen from 3 to 15%, while the vague reference to "Paris" remains almost stable, and all other precise references drop, including "le Bataclan." The second evolution is the collapse in references to the Stade de France, which fall from 45% to 19%, and to the Terraces, from 37% to 17%. To sum up, the process of memory condensation has reached a new level: while November 13 has established itself as the major reference among terrorist attacks, in two years it has been drastically reduced to a specific place, "le Bataclan," or to a vaguer "Paris."

An increasing proportion of the population no longer knew where the attacks took place (+12 points to 15%), or even indicates another city or country. In total, 53% of those surveyed named at least one precise and accurate location, compared to 77% in 2016. Conversely, 27% mentioned imprecise but nonetheless accurate locations, while they were 17% in 2016.

To sum up, the process at work is that of a condensation of memory, with a general increase in memories of the terrorist attacks of November 13 and anchoring in an increasingly reduced number of places. This double "memory condensation" — from the terrorist attacks since 2000 into November 13 and from November 13 into "Paris" and "le Bataclan" — is the main characteristic of this collective memory.

This brings up essential epistemological questions dealing with memory and forgetfulness, as well as the notion of sorting.

Conclusion

I focused mainly on the French case based on two case studies, the memory of World War II and the memory of the terrorist attacks. With these two case studies, I will call for comparative studies. A lot has already been done on the memory of World War II in Europe. Concerning 9/11, psychologists have produced comparative studies on flashbulb memory and event memory in six countries (Luminet et al., 2004). To go further, I would argue for using the same conceptual tools, both to identify different chronologies and mechanisms and possibly highlight transnational circulation of memory standards.

Anthropologist and psychoanalyst Richard Rechtman has shown how a traumatic narrative resonates with the victim's human condition and the clinical condition of PTSD (Rechtman, 2011).

A political scientist, Stéphane Latté, defended a PhD in 2008 about victims and victimology (Latté, 2008). He wrote, "An invisible group for a long time, the category of 'victims' has known a multifaceted process of objectification since the 1980s. This thesis focuses primarily on the social fabric of this category: the promotion of 'victim assistance policy,' the institutionalization of an academic discipline, 'victimology;' the invention of a diagnosis (post-traumatic stress disorder), and therapeutic practices (CUMPs: medico-psychological crisis unit)."

Psychologists like Olivier Luminet (Luminet, 2004) or William Hirst (Hirst et al., 2015) have focused on understanding how the individual memories of the traumatic 9/11 event functions. But, in addition, Hirst is one of the first psychologists to advocate for a "psychology of collective memory" (Hirst, Yamashiro, Conan, 2018).

These few examples confirm my belief in "memory sciences" that, with my neuropsychologist colleague Francis Eustache, we call for, different that memory studies because based on four pillars: transdisciplinarity, dialectic (between individual memory and collective memory), mathematical modelization (because we have to analyze big data) and complexity (the comprehension of a whole that cannot be reduced to the sum of the comprehensions of its components) (Peschanski & Eustache, 2016).

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Terrorism, Terror and Their Victims in Philosophy

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To Elizabeth

Abstract

This essay examines the inflation in the use of the semantic register of "terror" and "terrorism" on a global scale. In order to sort out the legitimate uses of the terms from their undue and ideological uses, the following approach is adopted: first, start from an analysis of violence that chooses to study it by its effects, rather than by its causes, and then determine what distinguishes these effects in the case of terrorism. Such a method has the merit of placing the question of victims and their resilience at the heart of the reflection. In the end, the question raised is that of the link between terrorism and nihilism.

Keywords: terrorism, terror, violence, victims, nihilism

Introduction: The Ambivalence of a Word

The discussions that follow have been informed by the work carried out by the memorandum committee set up by the Minister of Justice at the request of the president of the republic in February 2018, and in particular by the hearings of victims' associations. The purpose of the question put to the committee, composed of historians, a sociologist, a philosopher, a magistrate, representatives of the medical world, the Ministry of Justice, and the Ministry of Education, was to identify the stakes and challenges of a policy for the collective memory of terrorism and to make concrete proposals to the head of state. These proposals were essentially to include the memory of terrorism in school curricula, to set the European date of March 11 (which commemorates the attacks in Madrid) and to create a memorial museum. All these proposals were accepted, leading to the installation, the following year, of a commission to design the Memorial Museum for the Victims of Terrorism. Because they are the most painfully concerned by this memory, the maintenance of which, along with legal action, is a necessary condition for their resilience, the committee and the commission, entrusted with a mission of remembrance, had prioritize the associations that were formed in the aftermath of the attacks of November 13, 2015 in Paris, or July 14, 2016, not to mention the various actors who have long been involved in public action, committed to the recognition and advancement of victims' rights. Beyond the major difficulty represented by the need to reconcile the expectations of a different order involved in any memory policy, those relating to the wounds of memory and those relating to the work of historians, sociologists and, in general, scientific researchers, major problems of a historical and semantic nature arose. We shall leave aside the historical questions, the essential part of which consisted of knowing where, from what date, to begin this work of history and memory. Should we take the attacks of the 1970s as a starting point or go back to the wars of decolonization, particularly the Algerian War? We shall therefore suspend these questions in these reflections, even if they are not

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completely disconnected from questions of a semantic nature.

On many occasions, when the opportunity was given to speak publicly or privately about the work of the committee or commission, a dubious, if not suspicious, questioning arose, due to the ambivalence about terrorism. It was not, as one imagines the phenomenon to be, as much about the attacks as about the ideology, which are commonly murderous. These are unjustifiable and require no reaction other than outrage at the crime and compassion for the victims, and there **is** nothing ambivalent about them. What was in question were the political, media, or popular uses of the word. Objections to the very idea of a remembrance mission attached to terrorism and the planned institution of a memorial museum were met with a two-fold dubious reaction, for which these reflections hope to provide some elements of an answer. The first is the practice of terror. It was pointed out that this practice is not limited to these highly organized groups, which the social sciences and the media as well as political actors, identify, denounce, and condemn as "terrorist groups" — as are Al Qaeda, the Islamic State, and all those who claim to be terrorists, whether near or far. The objection was, in other words, about the actors of terror. And very clearly, the skepticism encountered consisted of asking to what extent the work of a committee and a commission, ordered and organized by governmental bodies, would be able to integrate what these "objectors" somewhat hastily called "state terrorism" — referring to a state practice of terror which, in their minds, was not limited to totalitarian systems or, in any case, did not (or any longer) allow them to be distinguished from other forms of government. In their view, it was no longer possible to consider, on the one hand, that terror was, as Hannah Arendt thought, the exclusive distinctive sign of totalitarian systems, without questioning the various forms in which states had acquired the power, all regimes taken together, to "terrorize" the populations they governed, in whole or in part, according to one or another criteria of belonging, such as religion, morals, ethnic origin, commitment, or activism of associations. Nor could it be ruled out that this was just another form of "terrorism."

It was then that this first skeptical objection was joined by a second, which related to the state use of the concept of terrorism. What was on the table was the way in which the most oppressive states used the notion of terrorism and the adjective "terrorist" to disqualify, delegitimize, and stigmatize any form of political opposition in the eyes of public opinion and in the international arena. Calling these opponents terrorist had become, it was recalled (and was likely to remain for a long time to come), the best way to *turn* the meaning of terror on its head, i.e., to hold those who oppose it responsible, in a fool's game that took advantage of the negative resonance of the term and its emotional charge. Thus the noun as well as the adjective ended up joining the arsenal of rhetorical devices that the worst regimes mobilize, with an energy never short of invectives, to disqualify, delegitimize, and suppress all opposition. They were an unstoppable weapon that they could recycle indefinitely to extinguish any protest, whether it came from underprivileged workers, an ethnic minority, or, even more recurrently, from youth. One need only recall the recent use of the term by the Hong Kong government. Who can say that the prospect of a law extraditing Hong Kong nationals to China was not likely to "terrorize" the population, exposing them at any moment to the risk of disappearing into the workings of the "terrifying" system that is the Chinese judicial system? Who was terrorizing whom in this story? Who was the terrorist and who was terrorized? The reflex of the authorities was no less immediate; the "element of language," as one says, imposed itself. The government had nothing more urgent to do than call terrorists the "terrorized" as soon as they no longer allowed themselves to be terrified, braving the terror, week after week,

by demonstrating in the streets and occupying the universities, wearing masks to protect themselves from the ruthless virus that are the cameras of power. The scene is disturbing in itself. It is even more worrying if we consider that it is repeated indefinitely, weakening the symbolic boundaries that should enable us to distinguish between the regimes that we should be able to distinguish, and thus to recognize in these democracies a system of government that is sufficiently attached to its principles to prevent any semantic trickery of this kind. It is everywhere in the world, in Lebanon, Chile, etc., that movements of protest against corruption, against poverty, against arbitrariness, against attacks on democracy are appearing that, because they disturb the established order, qualify as "terrorists," so that in return, very specific forms of terror (arbitrary arrests, torture, etc.) are applied to them, in the name of supposedly unquestionable security imperatives.

What the two objections that have just been raised are showing is not insignificant: nothing less than a perverse and perverted double use of the notion of terrorism. The first consists of calling "terror" any state use of force, whatever the nature of the repression. Such a qualification unquestionably poses a problem of limits. At what point can a given government be said to terrorize its population? When can we say that a repression turns into terror? What objective criteria allow us to use the term to classify a state, police, judicial, or military practice under this term, without using words? We should fear, indeed, that to label any police measure with this term no longer means anything and loses all effectiveness, or worse still that it ends up justifying everything. If the slightest measure is described in this way, what will we call what is a form of terror that is otherwise murderous: the terror that causes bloodshed and kills blindly? On the other hand, we also cannot exclude the possibility that there may be state practices, forms of repression that can and even must be qualified as terrorist, contrary to what always suits the most conservative forces: all those unconditional advocates of order and security who will stop at nothing to justify state violence. We cannot, in other words, refuse to extend the use of the concepts of terror and terrorism to actors other than the so-called "terrorist groups," and deny the evidence that it is right and necessary under specific circumstances to denounce and combat a particular state practice, such as collusion with mafia groups, as "state terrorism." Otherwise, one would have been quick to suspect in the analysis of terrorism a presupposition fraught with meaning, likely to disorder thinking as much as the memory action on which it is based. "Let's see," **they** would say, not without irony, "your 'terrorist' is always the 'other' in power." And we would easily return to the inflation of the term in the mouths of leaders who have no other way of dealing with those who oppose them than by disqualifying them, expecting the term to be sufficiently damaging to call for their pursuit and their dismantling, if not their "elimination."

This has a very clear consequence for the analysis that we must perform of the different terms involved in these reflections: terror and terrorism in terms of the plurality of registers that mobilize them or even instrumentalize them. Of course, we need the work of historians to shed light on the different forms of action and policies which, on the one hand, their contemporaries (journalists, writers, politicians) agreed to identify under these terms and which, on the other hand, historians still remember and describe under these names, giving their designation in these terms a further legitimacy. From this history, it must be admitted that the object is itself difficult to identify. Is it the *so-called* terrorist groups? Who, then, designates them by this name? What criteria, in light of history, allow this designation to be considered legitimate? How are we going to object to the unbearable fallacy, heard a thousand times over, according to which, if the resistance fighters could be described by the German occupying forces as terrorists, we do not see what would prevent those

whom we designate terrorists from being perceived as resistance fighters themselves? Are these their acts? What is it about their violence that makes it possible to say that it is terrorist? Finally, is it the ideology that supports them, and what are the discursive practices that allow us to speak of terrorism? Is it a certain type of call to violence? Is it the *a priori* and *a posteriori* justification of murder? How to distinguish between terrorism and the ideology of terror? Unlike the groups that we designate (and that recognize themselves) as terrorists, claiming terror as the only mode of action, a state that uses terror to ensure its control over the population will never define itself as terrorist.

In the same way, the work of sociologists is necessary for us to analyze the constitution of these groups, the origin and conditions of their formation, to shed light on the way in which the language that calls for the practice of terror gathers and unites those who are seduced by its programmed violence. But we need something else, and this is what these introductory reflections would like to highlight. We urgently need a critical analysis — one hardly dares to say a deconstruction — of the uses of the word. In other words, we cannot disregard the great rhetorical scene, now "globalized," of "terrorism" — the complex and varied uses of the noun and adjective, starting with their political instrumentalization, which blurs emotional and conceptual landmarks. This is a necessity because there is a real risk — as with any expression with an undeniable explosive charge — that confusion will set in, that we will no longer know exactly what we are talking about and that it will widen like an abyss between, on the one hand, the traumatic images, testimonies and very precise accounts that we have in mind when we talk about "terrorism" and when we work on setting up an institution such as the French memorial museum that inspires these reflections and, on the other, the confusion that this great scene creates.

I. Criteria for violence

In the following pages, the question of the definition of terrorism will be addressed, and elements of a response to the questions that have just been raised will be provided through a preliminary reflection on violence. There are two approaches to violence. The first and more traditional is to analyze it according to its causes, and it is certainly necessary. This is undoubtedly the priority task of political scientists, sociologists, and no doubt also historians, whatever measure they propose of its effects, from a global point of view: its impact on the economy, the geography of the territories, the age pyramid, the balance of institutions, etc. Analyzing violence by its causes means establishing a minimum critical distance from the emotional impact of the event. This is what distinguishes the activity of a research center, such as those whose work on the mass violence of the twentieth century prompted the creation of memorial museums all over the world, which must not only explain and analyze violence but also *show it*, make it *visible* and *sensitive in* order to activate or reactivate the *emotional* work of memory, and assure its surviving victims of the durability of a visual and narrative device that is sufficiently effective so that those who did not survive are never forgotten. The balance struck between the narrative, analytical, and emotional imperatives is what distinguishes each of them. In the museum's own museographic itinerary at the September 11th Memorial Museum in New York, the explanatory dimension is almost absent, reduced to its bare essentials, as if "entering into the explanation of causes" meant rationalizing what should appear, on the contrary, to be perceived by all as an absolute evil; as if the concern to federate emotion, to give a support to its sharing, to create a union and communion of sensibilities, implied suspending the analysis of reasons, going back to the origins of the event, its inscription

in a complex geopolitics that is likely, if not to attenuate it, at least to divide its unity.

One recalls the polemic that arose after the 2015 attacks, regarding the confusion between "explain" and "justify." The prime minister of the French government at the time attacked social scientists, accusing them of finding excuses for terrorists, placing their radicalization, their recruitment by terrorist networks, and their action in the more general context of their difficulties of integration, or even their discrimination. Attempting to understand the unjustifiable, he suspected, was to risk breaking the unanimity required to condemn the crime. The confusion of explanation and justification has no place, however — and it was a serious trial for the social sciences to suspect their analytical work of the slightest complacency toward its object. It has no reason to be, but it is always possible. And it happens that the desire for critical understanding, freed from the emotional register, is blinding and reverses the order of reactions which nevertheless unconditionally and primarily calls for indignation and compassion. Thus, after the murderous attack on Charlie Hebdo's premises, intellectuals, oriented to postcolonial struggles, found themselves trying to inscribe the satirical weekly's provocative drawings in the history of these struggles. By caricaturing the prophet, the murdered draftsmen had, according to them, not only touched on the sacred; they had unwittingly endorsed the stigmatization or Western contempt for Islamic cultures. It was not surprising, therefore, that they aroused anger. These intellectuals, anxious to keep up with the criticism, were so eager to make the attacks part of the history of relations between the Judeo-Christian West and Islam that they almost unanimously ended up finding reasons, if not good reasons, for them. They did not understand why one should on the principled position that was just being recalled: indignation at the crime and compassion for the victims.

If we step outside academic circles, the confusion becomes even more frightening. Much has been said — and much has been politically instrumentalized — about the reluctance, if not the stubborn refusal, shown in some circles to respect the minute of silence that the government instituted after the attacks. A significant number of children and teenagers, trapped by their sense of belonging, felt that this tribute did not concern them, since the murdered journalists had insulted *their* religion, while the terrorists had only "avenged the outrage." Refusing to share the collective emotion and to participate in the recollection that was imposed on them, their first reaction was, however badly and poorly informed they were, to place the event in the simplifying gigantomachy of this supposed clash of civilizations, whose theory had not stopped spreading its poison in the veins of society since the September 11 attacks. This negative reaction raised many alarms and concerns about the failure of republican integration, since these were mostly the children of immigrant families. And yet it was perhaps not so much or not only a feeling of belonging to the French people that was lacking in this refusal to feel solidarity with their emotion and indignation. What was missing in their rejection, what was glaringly absent, was consideration of the effects: a perception of violence that does not remain abstract, despite its images, but converts right to its most concrete manifestation. What was forgotten was what should have been recalled in the first place: namely, what it means to interrupt a life abruptly, or to wound it, as blindly decreed by a minority that planned it. It should therefore have been recalled that it is singular, irreducibly singular and irreplaceable lives that a terrorist attack destroys — and that nothing ever, under any circumstances, justifies or excuses the taking of life.

There are two ways, as mentioned above, to deal with violence. The second way is to understand

it in terms of its effects. Therefore, the method we will use in our deliberations to understand what makes the victims of a terrorist attack special is as follows. We will first try to sketch out a phenomenology of the effects of violence, common to all the forms it takes; we will then try to grasp how the resulting description is specified in the context of a terrorist attack and we will finally return to the link between terrorism and nihilism. We have seen above the risks of addressing violence according to its causes, however necessary all the work that transforms this treatment into a study, with all the guarantees that this transformation presents. The analysis of violence by its effects is nevertheless devoid of any such **risks**. And the first is that of its spectacularization. It is important to underline this, because if we think of the media coverage of the attacks, those of September 11 and those of the last five years, especially on 24-hour news channels, we cannot deny that it has done everything to make terrorist violence a spectacle, however difficult it is for us to hear that word, with its own astonishing effects. Then the problem is that, if the consideration of the effects is reduced to the fascination of images whose repetition holds the consciousness captive, it is these effects themselves that eventually disappear behind their image. Too many images kill the very possibility of imagining what violence means in its effects. Seeing too much, in a compulsive way, one ends up no longer seeing anything, no longer feeling anything, confusing violent death with the calculated treatment of its presentation: the framing and editing of a narrative, whose principle is less the truth of necessary information than the seduction of consciences, eager for sensations, even unconsciously. The spectacle is ambiguous, for no one knows what obscure impulses, what undisclosed pleasure it awakens. That is the difficulty: to dissociate the perception and understanding of the effects of violence from what constructs the spectacle in terms of the media and no doubt also politically, whatever the motivations for this spectacularization, which terrorists, incidentally, are not the last to use and enjoy.

So how do we understand the effects of violence? And what specifically distinguishes those that characterize a terrorist attack, thanks to which we could remove from the notion of terrorism the violence that usurps its name? It is difficult to propose a generic definition of violence. However, we will try to do so by proposing two criteria. Because it is always, in spite of everything, even in the case of mass violence, even in the case of an indiscriminate massive attack, *singular* existences that are affected, bruised, destroyed; it is from what "exist" means, for a singular being, that we will start again. Existence is relational. This means that, at any moment, it is understood as the result of the bundle of relationships that have constituted it in the past, extend it into the present, and project it into the future. The relationships they maintain link us first to other beings, living or dead, human and non-human, from birth to death. Even though the ties have been lost with age, their traces in memory, conscious and unconscious, are part of what defines us. They are constantly changing within us and transforming us. They are what makes and undoes our identity, so that it keeps becoming different from itself, in other words, self-hetero-differentiating. It is not exclusively living beings, however, with whom we are linked in this way. There are also objects, places, a space, an environment, a milieu that give us, day after day, the landmarks that allow us to live, sometimes renewing them, like the air we breathe. These relationships are what *keep us* going over time. And for this to be the case, they require a minimum of trust, which is vital for their maintenance. We need to be able to rely on them, that is, to continue giving them this minimum. As long as this is exhausted or disappears, it is, in an incompressible time, the very continuity of life that seems to be compromised, as happens whenever we are affected by a loss, a break-up, or a mourning.

What does violence do then? What is its first effect? It is first and foremost to break that trust. When it erupts in a group, be it in a couple, in a family, between two lovers, at school, in the professional sphere, or perhaps in a space extended to the limits of a city, a neighborhood, or any other territory, it is the vital credit that sustains our relationships that violence attacks, weakens, and ends up destroying. This is true of all those that define us, no matter how much we trust them, including those we have with institutions, a government's ability to protect us and keep us safe, and so on. Violence renders existence *unviable*, as it destroys the possibility of it. That is why the lives of victims need to be rebuilt. This is the lesson they teach, so true is it, as Arthur Dénouveaux and Antoine Garapon point out, that "coming back to life, reaffirming [their] will to live is [their] answer to the enigma of evil" (Dénouveaux and Garapon, 2019, 36). It achieves this, according to processes of resilience, the first of which is that the "harm suffered" be recognized not only by society in general, through the work of justice, but at least as much by the *rest of* the relationships that bind us to the world, as far as they remain possible. This *rest*, in fact, can never be taken for granted. When the destruction of a relationship, wherever it occurs (in the private or public sphere), affects the relationship to oneself, it weakens all others. No matter how much violence we have suffered, it persists in each of us, cutting us off from the rest of the world. The insidious form it takes to haunt existence is to feed the temptation to withdraw, to erect a wall of silence between us and the signs of attention, the forms of care and rescue of beings and institutions, at the very moment when we need them most. Violence multiplies mistrust. To be the victim is to see oneself brutally dependent on what is *left*, even as the trauma weakens it, threatening to take away everything. This is true of all aggressions for which a third party is directly responsible; it is also true of climatic and health disasters, of the disease that makes us lose all confidence in our own body and its capacities. It is also worth the loss of a loved one.

We will see in a moment how terrorism is programming and multiplying the ruin of the credit we need to live on. Before coming to this specificity, however, we should mention a second criterion that we will use to define violence. The first is not enough, because it does not sufficiently specify what violence does to the bodies and minds on which its force is exerted. There is no violence, indeed, no physical violence, no doubt, but just as much psychic violence and certainly verbal violence (outrage, humiliation) that is not the application of force. To undergo violence is to be *reduced to* a raw material, a "thing" in a way, to which a force is applied, independently of our will. The verb "reduce" is not too strong, because it is indeed a reduction, that is, a negation. To be the victim of violence, in the very instant when it falls upon us, when the blows rain down on us, when the torture begins, when the insults are hurled, is to be suddenly nothing other than this thing to which an opposing force applies itself to break down all resistance. We then no longer exist by ourselves and for ourselves — the law is taken away from us — but only and exclusively as the object on which this force is applied. Everything that makes us unique, irreplaceable, inassimilable is denied. Our *infinity* (the other name for singularity), which, in so far as it transcends all that the other can say about it, know about it, understand about it, is unfit for any appropriation, as it is for any mastery, is denied that minimum of recognition, consideration, and respect, without which there is no limit to what men can inflict on each other and how they destroy each other.

Philosophy has a word for the reduction that this force produces: it speaks of "reification." That is the second criterion for defining violence by its effects: it reifies, as illustrated by all those forms

of abuse that can terrorize children, women, and the elderly for years to come, as the **weakest** and the most vulnerable. This is the case with domestic violence, but it is also the case with all forms of sexual harassment and abuse, in which whoever exercises force, by abusing his power, enjoys this reduction. More generally, anything that reduces the other to a calculation of power, to a strategy of conquest and domination, to the construction and consolidation of a political, moral, religious, or ideological hold, which denies his or her singularity, produces this effect of annihilation of singularity, defined by its irreducible infinity.

II. Terrorist violence

We must now put an end to this long detour through a general analysis of the effects of violence, trying to understand what specifies the two criteria we have chosen in the context of terrorism. First, what about the destruction of this minimum trust, this vital credit that makes both the lives of individuals and the common life that brings them together and unites them in the same society, liveable? There is a fairly simple way to assess it. It consists of understanding what it was important to restore, assuming that we succeeded, in the aftermath of a terrorist attack, such as those that have struck Paris, Nice, and so many other cities, in France, in Europe, and in the rest of the world, for many years. Each time, indeed, it was a question of trust. Let us remember what was weakened. The plan for a memorial museum, which is at the origin of these reflections, is not so much about terrorism itself as about the resilience of societies confronted with it. How can this resilience be understood other than as the restoration of credit, if not as its conservation, wherever it has been called into question, a resistance to mistrust and suspicion? What credit, what trust? First, those that we place in the space we share, our common world, our ordinary landmarks: café terraces, theatres, public places, public transport. Who has not wondered, who hasn't been apprehensive, in the four corners of the world, in the aftermath of the attacks, when **he** had to start using them again? Having heard so many testimonies from victims and read their stories, we know how difficult it was and, for some, how problematic, if not impossible, it is still today to re-appropriate them. Second — and this is not the least challenge that had to be, and still has to be, taken up — it is the confidence in the possibility of communities divided by religion, culture, and even language to *live together* that was called into question: the very principle of an open, multicultural, and multifaith society. What was in danger of collapsing was the credit we give to our ability to keep as an ideal the protection, against all odds, of principles that enable a society in motion to guard itself, whatever the cost, from any stigmatization of part of its population, from any discrimination, whether based on ethnic, cultural, religious, or political affiliation. The threat was all the stronger because there was no shortage of political leaders, everywhere in the world, to make the **refusal** of an open society, with all the closures and inward-looking attitudes it implies the business of their ideology and their vehemence. Their strategy was always the same: to bet on fear and hatred ruining the credit of openness.

Finally, it is our confidence in institutions that has been **weakened**, whether the institutions are for protection, relief, or repair. The nagging question that troubled people's consciences was the following: is a democratic government, committed to the principles and values of democracy, to its traditions of freedom, equality, fraternity, and even hospitality, still capable of guaranteeing them, or is it now necessary, to face the threat, to compromise with their unconditional demand, that is, to subject them to restrictive conditions? Faced with the temptation of extreme security measures, which violate these principles, such as the indefinite prolongation of a state of exception,

it is always the credit that we place in democracy, in the fundamental principles that define it and distinguish it from all other political regimes, that it has been necessary to preserve from the tricks and calculations of terrorism in order to provoke, through its harassment, their collapse. It is expected of a political regime that, in protecting the future, **the citizens should be able to project themselves** into the future. In this perspective, the characteristic of democratic institutions is to reconcile, in a principled way, the need for security and the demand for freedom, taking care that the one is never satisfied to the detriment of the other. "To hold on to democracy" means remaining attached to the principle that, against all the vicissitudes of history, the inviolable balance of their two-fold need should never be sacrificed. It means taking care that no negative passion, such as fear, anger, resentment, or thirst for revenge, can serve as a pretext or alibi for such a sacrifice. That is why it is impossible to overemphasize **how the credit we give to the spirit of institutions is essential in our lives**. Fundamental freedoms require *commitment*. We must be able to believe that they remain indispensable, vital even. This is perhaps even a fundamental belief, since it is the quintessence of the trust we want, and hopefully can still place in *each other*.

What, then, is terrorism? What do terrorists do? Their deadly fascination, their cult of violence, have as their primary objective to multiply our loss of confidence by extending it to the population of an entire territory and to prolong, through the repetition of their spectacular acts, the stupefaction and paralysis that maintain its ruin. They systematize, they radicalize discredit. Their will is to overturn the conditions of an ordinary, relatively peaceful, habitat in the city, by hindering the spontaneity of our movements, by making it impossible to circulate serenely in the city: the innocent use of its means of transport, squares, café terraces, and theatres. This is the goal pursued by the repetition of attacks that are anticipated, foreseen, planned, and yet unpredictable. A terrorist attack is therefore defined not only by the shock it causes in society, the number of dead and wounded, but by the haunting of this repetition, such that it makes any mourning impossible. As Jacques Derrida recalled in interviews conducted in the aftermath of the September 11 attacks, "There is trauma without any work of mourning possible when the evil comes from the possibility of the worst coming, of the repetition to come, but worse. Trauma is produced by the *future*, by the threat of the worst *to come* rather than by a past and finished aggression" (Jacques Derrida and Jürgen Habermas, *Le "concept du 11 septembre,"* 149). Nothing allows us to imagine that an attack will not happen again. This is the certainty that terrorists intend to substitute, until they are exhausted, for all forms of trust that make up the relationships that **build** our identity, both individual and collective. The essence of their sustained terror, chanted by the succession of attacks, the litany of dates and city names that go down in history, is to install this haunting for an indefinite time.

It is not only this trust that terrorism destroys, however. It also attacks the credit that we put on the possibility of preserving a minimum of social cohesion and national unity, with the avowed aim of breaking the unanimity of consensus and the reactions that horror calls for. This fracture is its logic of hatred, supported by an irreducible culture of the enemy, which aims to produce it. It refers everyone to a denominational, "civilizational" belonging synonymous with antagonism and hostility. This is the trap that terrorists set for those they inundate with their propaganda, indoctrinating and recruiting people into their destructive nihilism: tell me who you hate and what you are ready to destroy. Then I will tell you who you are and whether you are who you should be. Their strategy is to make everyone a hostage of his or her belonging, with the conviction that the essence of the fidelity that this **belonging** implies and for which they demand proof, **is based**,

for those whom they convert to their bloodthirsty method, on hostility towards all the others that they are ready to display and to demonstrate by extreme violence that nothing can hold back. In this way, terror becomes the pledge of belonging. The result is that everything that in a given society has the vocation of overcoming its divisions, everything that can be exchanged and shared, from one community to another, instruction through the school, common institutions, the trans-communal dissemination of culture, through theatres, convivial gathering places, such as the terraces of restaurants and cafés, public transport, anything that mixes populations and contributes to giving everyone's identity a heterogeneity that takes them away from their origins and their fantasies, becomes the target of their discredit.

There remains now the second criterion that we have previously used to define violence by its effects, namely reification. Here again, it is rather easy to conceive of the way in which terrorism specifies it, whether an attack targets a particular community, by **terrorizing** a synagogue, a denominational school, a church, or the editorial office of a newspaper, or whether it strikes indiscriminately in an auditorium, a means of transport: bus, train, plane. In the first case, reification consists in the reduction of the other, by virtue of his or her belonging to the pure object of a desire for destruction. Comparable in this respect to that which supports genocidal violence, reification knows no more about the other than the community with which it identifies him or her and for which he or she must pay, more or less anonymously, the price of the hatred it arouses. What the adjective "pure" indicates is that the targeted other is then only the result of the abstraction that has identified, characterized, stigmatized, and above all conceived the indeterminate and yet real project of destroying it. He is the phantasmatic object of this dream of annihilation that leaves him no escape. This is the terror: the absence of a way out, the impossibility of escaping from the abstract image that the other, the potential murderer, the anonymous, unknown terrorist, has forged of you. To be terrorized is to know that at any moment this abstraction designates you as a target and that by virtue of the image that these invisible assassins will have created of the belonging to which they have reduced you — this thing that they fantasize in you — you fit the bill, so that they will be able to satisfy in *you*, *on you*, their murderous impulse. What they will want to destroy in you is not you, of course, as an irreducible, infinite, unassimilable singularity, but — and this is the height of reification — an abstraction.

As for the blind strike, that which has made you or your loved ones a victim, because *you or they* found you *by chance, in the* wrong place at the wrong time, it raises reification to the abstraction of bad luck, bad fate, incomprehensible fatality. A malevolence, of which nothing justifies that it is precisely you who pay the price, a malevolence will have destroyed your life, in a dizzying anonymity. This is the abyss that the reification of terrorism digs: the conjunction of malevolence and anonymity. But it is also the reason why it can spread to society as a whole, in other words, in the minutes, hours, and days following an attack, in the form of the astonishment, petrification, and paralysis that are its concrete manifestations, reification is contagious and affects all those who share the news. You could have been the victim of this attack. It was them; it was you; it could have been anyone. You are becoming, we are becoming, the hostages of an indistinguishable force, which could resurface at any moment, in one form or another, which has not given up striking, whose malevolence is intact and which can, therefore, turn your life into horror from one day to the next. It is then in fear that reification is most explicitly expressed — the fear that we will then have to conjure up, as so many words, so many incantations, in the weeks following the most spectacular attacks.

III. The specter of nihilism

Are these reflections likely to bring some clarity to the confusion from which we initially started, to avoid in particular the inflation of the notion of terrorism to designate, on the one hand, a protest, a movement of revolt emanating from opposition groups, even if violent, and on the other hand such a repressive policy, too quickly designated as "state terrorism"? Yes, undoubtedly, if one considers not only the two stated criteria of the destruction of credit or trust and reification in order to think of violence according to its effects, but also their specification, when it comes to terrorism. In the first case, it is clear that it is an abuse of language, a strategy adopted by a particular power, whether authoritarian or dictatorial, to discredit a movement that denounces its arbitrariness, oppression, and/or corruption and as such constitutes a threat to it. The ruse of rulers, anxious to maintain their dominant position, consists of *playing on* the emotional and vindictive charge that the suspicion and accusation of terrorism, as well as the qualification of terrorist, contain in themselves, to reinforce their domination. What must be recognized and denounced is the way in which the state apparatus (army, police, justice) is not used to repress any terror, that of its opponents, but to organize it.

Let's dwell, just for a moment, on these movements. What inspires their commitment to protest and animates their protest action? If it was a question of destroying for the sake of destroying, of ruining institutions, as was the case with anarchist movements in Russia, Italy, France, or the United States at the end of the 19th and the beginning of the 20th century, it would be legitimate to speak of terror. What would be aimed at would then be the generalized destabilization of any form of authority, by its effect, with a view to its disappearance. Because the murderous attack was the principle of their action, these past movements shared a taste for violence, blood, and death: a deadly culture that will always be, as Camus knew, the common denominator of terrorism and nihilism. Life, in its very singularity, was priceless. And the victims existed, in the eyes of those who claimed to be victims of their murderous ideology, if only through the terror sought in the indefinite and anxiety-provoking growth of their numbers. There is nothing like this in the movements we have just mentioned, even if their mobilization is sometimes contaminated by the infiltration of external elements, as are the most radicalized *Black Blocs*, convinced that only the demonstration of force, of a violence that nothing can stop can be effective and efficient. What has brought the demonstrators together in Hong Kong, Beirut, Santiago de Chile, and in so many European capitals and so many cities and countries around the world in recent times, is certainly not the nihilistic desire to terrorize the population to the point of making them lose all confidence in themselves, but rather the hope of giving their future a new chance. It is the desire to restore a minimum of credit to institutions, in which it would once again be possible to believe and to be affiliated with, provided that they are no longer monopolized by the minority that has for decades placed them exclusively at the service of its own interests. Such a commitment represents, from an ethical as well as a political point of view, the very opposite of this nihilism with which it is all too convenient to identify. Trying to bring about the overthrow of a corrupt government, by taking to the streets, by protesting against injustice and arbitrariness, by demonstrating the contagious refusal to suffer the oppression of a regime passively, will never have terrorized anyone except those who benefited from the demobilization of the population, its resignation to the imposed order, its passivity in the face of any form of domination, its consent to the worst, out of indifference or lassitude. This, then, is the sense of mistrust of governments and institutions that

these protest movements demonstrate. Their action finds its raison d'être not in the choice of terror but in the need to escape from two pitfalls which, inseparable, define the two forms of nihilism characteristic of our time. It is rooted in their double rejection: that of state violence (first nihilism) and that of resignation (second nihilism). It would be quite difficult, therefore, to detect anything that resembles the deadly will shared by nihilism and terrorism.

If there is a malevolence animating them, it is not directed against the population, blindly, nor is it directed against a specific community. The only "popular violence" for which the question could be asked is that which targets a part of the population because of its cultural, religious, denominational or "ethnic" difference and feels authorized, with the support of the state, **to *terrorize*** it. One should therefore be wary of hastily assuming that terror is always a matter for governments, even if, as long as it takes place between communities of different languages, cultures, or religions, it never occurs without their consent. There are popular movements that cannot be blamed on the political virtue of legitimate protest, but rather on negative passions that can always be used for murderous purposes: fear, hatred, anger when blind, and resentment. To pretend to ignore it would be to forget the obscure call for blood, the thirst for vengeance that lies dormant in each of us. There would not be, there would never have been victims of any terror whatsoever, if we did not have the capacity to be governed by these passions, which carry within them the seed of a radical evil. This is the most difficult thing to admit: it is each of us who carries within us the dark power to terrorize others. The "becoming-victim" of those around us, close and not so close, is a potentiality of the life we share with them, like an insidious threat lodged at the heart of living together and its promises. There is not one of the relationships, individual and collective, that make up the fabric of our existence that cannot be perverted in this sense. The radicalization of terrorists is no exception to this rule.

There remains the question of "state terrorism." Here again, the foregoing considerations allow us to provide a few clarifications. Any repression, however unacceptable it may be, is not synonymous with terror. When does it become terror? First, it acquires this dimension when no one within a given population is safe from being attacked by the repressive state apparatus without any reprehensible act justifying it. Terror then translates into a generalized insecurity, from which no position in society, no subjective history, no merit, humility, or glory protects us. Reification in this way is at its height when it no longer even bother to target those it destroys. Because one's destiny can be shattered overnight, because it can be wrenched from the affection of one's own, without any reason being given, it is each individual who sees himself *reified* by power, even before he has reached it. It is no longer in his lifetime that this frightened thing, which, because its entire existence is like a reprieve, has time to die a thousand times before it is caught up by violence. Nothing exemplifies this reification more than torture. For those who command it, it is the living mark of their hold on the bodies, primarily those of their victims, and also those of their torturers, that it reduces to their function. From the officials of terror, it demands results, in the form of extorted confessions, that forbid them any humanity. We will therefore refrain from speaking of state terrorism in all circumstances, reserving the term for this contagious form of reification, whose dehumanization leaves no one unscathed.

However, sometimes it is a category of the population, identified by sexual difference, skin color, religious, and cultural practices, that is systematically targeted and thus becomes the medium of murderous reification. This was mentioned earlier in connection with the terror implemented by

groups that, in a given society, focus their attacks on such a community. The logic is the same when the state takes care of it with legal means. Far from being a usurped use of the term, it is then that the semantic register of terror and terrorism is not only appropriate, but also particularly revealing. It shows, from the only appropriate angle, what governments that abandon themselves to such discourse and practices present in much more elaborate terms, disguising the terror their policies exert on the populations concerned under the names of "strict migration policy," "preservation of national identity," "reinforced border control," "protection of morals," etc. What rhetoric? First of all, it is the rhetoric of those who, in stigmatizing a given population, isolate it, encircle it, designate it in the eyes of others as a *victim consented* by the exceptional status reserved for it by official language, as the media in its pay take it up. Such was the case with the Tutsis in the decades before the Rwandan genocide, or with the Rohingyas in Burma. It is the rhetoric of those who then prepare public opinion for the extreme measures to which they will be subjected, so much so that it is true that we get used to terror when it is others who are the target. What practices? The practices of those who organize the legal discrimination of populations, the despoiling or destruction of their property, their mass displacement, the exodus that precipitates them onto the roads, fleeing persecution, in search of an unlikely refuge, their *lifelong* internment in makeshift camps. Who would say today that the inhuman living conditions to which these populations are reduced, their wandering, their misery, the low price placed on their lives, exposed to all forms of violence, is not the most ordinary and terrible face of terror in the contemporary world? Who will also deny that the climatic and health disasters to come, those which global warming leads us to predict, are not likely to aggravate the situation, on a global scale? It is important, then, to guard against terms that, by downplaying this seriousness, water down the responsibility for the attention, care, and relief that the resulting vulnerability and mortality call for. This is, without a doubt, the first figure of nihilism today, which has been given the name "murderous consent": to compromise with the demands of exercising this responsibility. When this transaction is orchestrated by states and the world order comes to terms with it, dedicating those whom it abandons to their fate, to that feeling of abandonment that is the common denominator of all its victims, is it not, however difficult it may be to admit it, as courageous as it is to face the truth about it as if one dared to speak of it as "planetary terror"?

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