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## Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?

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# Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?

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*In the 1970s and early 1980s, legal academics hotly debated the possibility of basing American law reforms on continental procedures, but this voluminous literature produced few conclusions and virtually no sustained research and reform efforts. In this Article, Professor Frase argues that this stalemate was largely due to the fact that the continental procedures most often proposed for borrowing were actually the least feasible transplants, whereas other, more modest possibilities were overlooked or misunderstood. To identify the latter, future researchers must analyze foreign systems comprehensively, in practice as well as in theory, and must subject domestic systems to equally comprehensive scrutiny. Professor Frase further argues that these methodological principles are not unique to international comparisons, but rather should guide all cross-jurisdictional studies, even those within a single country. Applying these principles, Professor Frase compares the American and French criminal justice systems and concludes that the following features of the French system suggest desirable and feasible American reforms: more careful selection, training, and supervision of police, prosecutors, and judges; narrower scope of the criminal law; less frequent use of arrest and pretrial detention; more effective control of prosecutorial charging discretion; less abusive alternatives to plea bargaining; and more frequent use of noncustodial sentencing alternatives.*

Comparative criminal procedure—the study of how other countries investigate and adjudicate criminal charges—entered the mainstream of American legal literature during the decade of the 1970s. Unlike the previous works of comparative law specialists, this new generation of

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research was explicitly reform-oriented.<sup>1</sup> One group of writers argued that Americans should learn from and adopt specific procedures found in one or more continental European systems.<sup>2</sup> Other writers doubted that such foreign procedures would work in the American context<sup>3</sup> or felt they were of limited effectiveness even in Europe.<sup>4</sup> A few writers suggested that the American system was not really so bad,<sup>5</sup> although the general consensus was and is that our criminal justice system is beset by serious problems of uncontrolled discretion, lack of respect for the rights of the accused, and failure to convict the guilty.<sup>6</sup>

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1. One of the earliest examples of this new style of comparative research is K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969), in which the author argued that American prosecutors should adopt the West German principle of "compulsory" prosecution. *Id.* at 191-95, 224-25. Another early reform-oriented work examining continental criminal justice systems is G. MUELLER & F. LE POOLE-GRIFFITHS, *COMPARATIVE CRIMINAL PROCEDURE* (1969).

2. See, e.g., K. DAVIS, *supra* note 1; K. DAVIS, *DISCRETIONARY JUSTICE IN EUROPE AND AMERICA* (1976); L. WEINREB, *DENIAL OF JUSTICE* 117-46 (1977) (explaining and criticizing present criminal processes in the United States and using continental criminal procedure as a model); Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439 (1974) [hereinafter Langbein, *Controlling Prosecutorial Discretion*]; Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204 (1979) [hereinafter Langbein, *Land Without Plea Bargaining*]; Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 1981 AM. B. FOUND. RES. J. 195 [hereinafter Langbein, *Mixed Court and Jury Court*]; Langbein & Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. 1549 (1978); Pugh, *Ruminations Re Reform of American Criminal Justice (Especially Our Guilty Plea System): Reflections Derived From a Study of the French System*, 36 LA. L. REV. 947 (1976); Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 BUFFALO L. REV. 361 (1977); Volkman-Schluck, *Continental European Criminal Procedures: True or Illusive Model?*, 9 AM. J. CRIM. L. 1 (1981).

3. See, e.g., Darby, *Lessons of Comparative Criminal Procedure: France and the United States*, 19 SAN DIEGO L. REV. 277 (1982); Weigend, *Continental Cures for American Ailments: European Criminal Procedure as a Model for Law Reform*, 2 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 381 (1980); Morris, Book Review, 91 HARV. L. REV. 1367 (1978) (reviewing L. WEINREB, *DENIAL OF JUSTICE*, *supra* note 2); see also Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463, 524-29 (1980). See generally Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480 (1975) [hereinafter Damaška, *Structures of Authority*] (suggesting that procedural differences between continental and Anglo-American criminal justice systems reflect divergences in overall systems of governance).

4. See, e.g., Goldstein & Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J. 240 (1977) [hereinafter Goldstein & Marcus, *Myth of Judicial Supervision*]; Goldstein & Marcus, *Comment on Continental Criminal Procedure*, 87 YALE L.J. 1570 (1978) [hereinafter Goldstein & Marcus, *Comment*]. But see Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1025 (1974) (suggesting usefulness of looking to European systems for guidance in controlling prosecutorial discretion).

5. See, e.g., Tomlinson, *Nonadversarial Justice: The French Experience*, 42 MD. L. REV. 131 (1983); Johnson, *Importing Justice* (Book Review), 87 YALE L.J. 406 (1977) (reviewing L. WEINREB, *DENIAL OF JUSTICE*, *supra* note 2) (questioning proposals to adopt continental procedures given the strengths of U.S. system, the difficulty of adopting continental procedures, and the weaknesses of those procedures).

6. See generally Part IV ("Restraints on Evidence Gathering"), Part VI ("Prosecutorial

By the mid-1980s, however, the torrent of articles and books on continental criminal procedure<sup>7</sup> had slowed to a trickle and has now practically ceased.<sup>8</sup> What happened? Have we already learned everything about continental criminal procedure? Have the skeptics proved their case? The recent shift of attention toward English criminal procedure<sup>9</sup> suggests that continental systems are now seen as too "foreign" to serve as useful guides for American law reform, but are they?

The purpose of this Article is to survey the prospects for future reform-oriented research on continental criminal procedure. My thesis is that much still remains to be learned from these systems, provided that we understand the lessons of past research efforts. This Article first attempts to identify the methodological shortcomings of the existing literature, and proposes a new approach (Part I).<sup>10</sup> The Article then applies this approach to a study of the French system and suggests a revised agenda for future reform-oriented research on that system (Parts

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Charging Discretion"), and Part VII ("Plea Bargaining and Its Analogues"), *infra* text accompanying notes 157-291 & 382-466.

7. In addition to the writings cited in the previous notes, the recent literature on continental criminal procedure includes the following: W. FELSTINER & A. DREW, *EUROPEAN ALTERNATIVES TO CRIMINAL TRIALS AND THEIR APPLICABILITY IN THE UNITED STATES* (U.S. Dep't of Justice 1978); J. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* (1977); Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 972-95 (1983); Bradley, *The Exclusionary Rule in Germany*, 96 HARV. L. REV. 1032 (1983); Campbell, *A Comparative Study of Victim Compensation Procedures in France and the United States: A Modest Proposal*, 3 HAST. INT'L & COMP. L. REV. 321 (1980); Casper & Zeisel, *Lay Judges in the German Criminal Courts*, 1 J. LEGAL STUD. 135 (1972); Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506 (1973) [hereinafter Damaška, *Evidentiary Barriers*]; Damaška, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083 (1975); Damaška, *The Reality of Prosecutorial Discretion: Comments on a German Monograph*, 29 AM. J. COMP. L. 119 (1981) [hereinafter Damaška, *Reality of Prosecutorial Discretion*]; Felstiner, *Plea Contracts in West Germany*, 13 L. & SOC. REV. 309 (1979); Herrmann, *The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 468 (1974); Hughes, *Pleas Without Bargains*, 33 RUTGERS L. REV. 753 (1981); Mendelson, *Self-Incrimination in American and French Law*, 19 CRIM. L. BULL. 34 (1983); Weigend, *Criminal Procedure: Comparative Aspects*, 2 ENCYCLOPEDIA OF CRIME & JUSTICE 537-46 (1983); Weigend, *Sentencing in West Germany*, 42 MD. L. REV. 37 (1983).

8. Only a few articles of significance have appeared since 1983. Among them is Pakter, *Exclusionary Rules in France, Germany, and Italy*, 9 HAST. INT'L & COMP. L. REV. 1 (1985).

9. See, e.g., M. GRAHAM, *TIGHTENING THE REINS OF JUSTICE IN AMERICA: A COMPARATIVE ANALYSIS OF THE CRIMINAL JURY TRIAL IN ENGLAND AND THE UNITED STATES* (1983); Hughes, *English Criminal Justice: Is it Better Than Ours?*, 26 ARIZ. L. REV. 507 (1984); Lynch, *A Comparison of Prison Use in England, Canada, West Germany, and the United States: A Limited Test of the Punitive Hypothesis*, 79 J. CRIM. L. & CRIMINOLOGY 180 (1988); Van Kessel, *The Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches*, 38 HAST. L.J. 1 (1986).

10. See *infra* text accompanying notes 12-44.

II through VIII).<sup>11</sup> The Appendix briefly discusses some other distinctive features of the French system that deserve lower priority for research and reform.

# I

## INTRODUCTION: LITERATURE REVIEW AND PROPOSED METHODOLOGY

Certain methodological shortcomings of the reform-oriented comparative research of the past fifteen years help to explain why it sparked much debate but kindled few sustained research and reform efforts. At the center of the debate was a series of widely cited books and articles by Professors Abraham Goldstein, John Langbein, and Lloyd Weinreb. In 1974 Professor Langbein published an article describing and advocating adoption of the West German principle of "compulsory" prosecution.<sup>12</sup> Subsequent articles by Langbein<sup>13</sup> described the absence of plea bargaining in West Germany and advocated a "streamlined nonadversarial" trial procedure, to permit elimination of plea bargaining in the United States. In 1977 Professor Weinreb published a book in which he described the ills of the American system of criminal justice, and advocated adopting procedures modeled after those used in France.<sup>14</sup> These proposed procedures include: (1) investigation of charges by a judge who would develop both prosecution and defense claims, interrogate the defendant without *Miranda* safeguards, and make full disclosure of all findings to the defense;<sup>15</sup> (2) abolishment of guilty pleas; (3) replacement of the American jury with a mixed panel of one judge, two attorneys, and seven laypersons;<sup>16</sup> and (4) nonadversarial presentation of evidence at trial.<sup>17</sup>

Also in 1977, Professor Goldstein and Yale Research Fellow Martin

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11. See *infra* text accompanying notes 45-629.

12. Langbein, *Controlling Prosecutorial Discretion*, *supra* note 2; see also K. DAVIS, *supra* note

1.

13. See, e.g., Langbein, *Land Without Plea Bargaining*, *supra* note 2.

14. L. WEINREB, *supra* note 2, at 117-64; see also Johnson, *supra* note 5; Morris, *supra* note 3.

15. Other writers have also recommended adoption of one or both of these aspects of judicial investigation. See G. MUELLER & F. LE POOLE-GRIFFITHS, *supra* note 1, at 29-84 (discovery); Dripps, *Foreword: Against Police Interrogation—And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 729-31 (1988) (interrogation); Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975) (interrogation and discovery); Pugh, *supra* note 2, at 962-63 (interrogation); Schlesinger, *supra* note 2 (interrogation and discovery); see also Kamisar, Kauper's "Judicial Examination of the Accused" Forty Years Later—Some Comments on a Remarkable Article, 73 MICH. L. REV. 15 (1974); Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224 (1932) (interrogation).

16. Professor Langbein has also advocated the mixed panel procedure. See Langbein, *Mixed Court and Jury Court*, *supra* note 2; see also Casper & Zeisel, *supra* note 7.

17. The presiding judge, already familiar with the pretrial investigative file, would determine the choice and order of all witnesses. The witnesses would then testify in narrative form, subject to few rules of evidence. Prosecution and defense attorneys would recommend witnesses and questions to the presiding judge, and make closing arguments. See Frankel, *supra* note 15; Pugh, *supra* note 2

Marcus published the results of their own research<sup>18</sup> into the "inquisitorial" (nonadversary)<sup>19</sup> systems of criminal justice in Germany, France, and Italy. Goldstein and Marcus argued that, in practice at least, these systems suffered from many of the same problems of uncontrolled discretion and procedural "shortcuts" found in the United States. Plea bargaining still exists, they maintained, at least in the form of "tacit" bargains in which defendants expect and in fact receive leniency in return for waiving full "due process" procedures. Moreover, judicial supervision of the investigatory and adjudicatory stages is a "myth": pretrial investigation is dominated by the police; police and prosecutors retain substantial discretion in the filing of charges; and nonadversary trials rarely address evidence or charges other than those presented by the police and the prosecution.

The Goldstein and Marcus article provoked a strong response from Professors Langbein and Weinreb.<sup>20</sup> The latter two argued that significant theoretical and practical differences do exist between European and American procedures which might suggest desirable changes in American procedures. In particular, Langbein and Weinreb argued that even if relatively "summary" procedures are frequently used in Europe, they may be superior to American summary procedures such as the guilty plea.<sup>21</sup> In a reply article, Goldstein and Marcus stressed the functional similarities of European and American systems, questioned whether the courts in either system *can* exert significant control over the exercise of law enforcement discretion, and called for further empirical research into whether European systems are superior in practice.<sup>22</sup>

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(suggesting an expanded role for trial judge to speed trial and oversight of investigation by magistrate).

18. Goldstein & Marcus, *Myth of Judicial Supervision*, *supra* note 4.

19. For discussion of the different meanings of "inquisitorial" procedure and a recommendation that the term "nonadversary" be used to describe continental procedures, see Damaška, *Evidentiary Barriers*, *supra* note 7, at 555-78.

20. Langbein & Weinreb, *supra* note 2; *see also* Langbein, *Land Without Plea Bargaining*, *supra* note 2.

21. Langbein & Weinreb, *supra* note 2, at 1550.

22. Goldstein & Marcus, *Comment*, *supra* note 4. To a great extent, the differences in the views expressed by Goldstein and Marcus and by Langbein and Weinreb seem attributable to the very different analytic approaches of these authors, and the different assumptions following from their approaches.

The "functional" or "systemic" approach of Goldstein and Marcus assumes that, underneath the surface differences of formal law and legal culture, Western systems of criminal justice are very similar because they face similar problems. These problems include limited resources, political pressures, the conflict between generally applicable law and the desire for case-specific "equity," the inherent dominance of the police over the investigative process despite efforts to impose judicial control, and the tendency in the criminal justice system for reforms in one part of the system to be cancelled out by compensating changes in other parts of the system (the "system hydraulic").

Langbein and Weinreb, on the other hand, seem to apply a more "formal" or theoretical model: Where legal rules or culture differ substantially, it should be assumed that behavior also differs, at least to some extent. Both approaches thus allow their adherents to make major assumptions about



Scholars writing later than these authors have generally supported the conclusions of Goldstein and Marcus.<sup>23</sup> Later scholars have also stressed the broader differences in legal culture between Europe and America which make it difficult, if not impossible, to "import" European procedures to America. In particular, these writers point to the existence of difficult-to-change American constitutional requirements (for example, the right to a jury trial),<sup>24</sup> the vastly different traditions of training and career advancement of American judges and prosecutors, and the fundamentally different American view of the relationship between the individual and the state.<sup>25</sup>

The latter arguments are not without considerable force, but some incongruity exists in the combination of these arguments with those of Goldstein and Marcus. We are told that European procedures will not work in the United States because those systems are too different from ours, but on the other hand, European procedures are really not that different from ours in practice! Perhaps what these various writers mean to say is that some European procedures (for example, nonadversary trials) are so different that they are unlikely to be adopted in the United States; at the same time, other European procedures (such as close judicial supervision of the investigatory process) could be adopted because they are not really that different in practice.

But surely this categorization does not exhaust all of the possibilities. Some European procedures may be significantly different from (and superior to) American procedures; yet the proposed context may be sufficiently similar to permit adoption in the United States. A major shortcoming of comparative criminal procedure literature thus far is that it has focused attention on the extremes of difference and similarity. What is needed now is greater attention to smaller yet real differences which

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what officials actually do in practice, and each set of authors frequently has accused the other of substituting assumptions for data. The present Article attempts to provide some of that missing data and suggests the important areas where more research is needed.

23. See Arenella, *supra* note 3, at 525-27; Darby, *supra* note 3; Hughes, *supra* note 7; Johnson, *supra* note 5, at 410-14; Morris, *supra* note 3; Tomlinson, *supra* note 5; Weigend, *supra* note 3. But see Alschuler, *supra* note 7, at 981-85 (contending that the European system is not equivalent to plea bargaining); Volkmann-Schluck, *supra* note 2, at 31 (suggesting that Goldstein and Marcus reach "false conclusions" because they unwittingly transferred certain assumptions from their own legal system).

24. See *infra* text accompanying notes 696-702. But see Alschuler, *supra* note 7, at 995-1011 (arguing that federal constitutional requirements in state cases could be lowered without resort to constitutional amendment or "radical" judicial reinterpretation if new procedures such as a "mixed" court of lay and professional judges were found to serve adequately the purposes of traditional Bill of Rights guarantees).

25. See generally M. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* (1986); Damaška, *Structures of Authority*, *supra* note 3; Damaška, *Evidentiary Barriers*, *supra* note 7; Damaška, *Reality of Prosecutorial Discretion*, *supra* note 7; see also W. FELSTINER & A. DREW, *supra* note 7, at 20, 41 ("gulf" separates American and continental legal cultures, especially regarding prosecutorial careers and roles, and the use of written versus oral evidence).

may permit viable "legal transplants"<sup>26</sup> to the American context. Indeed, as Professor Norval Morris has noted, such smaller, "politically viable incremental steps" might lead to the eventual adoption of major elements of European procedure that cannot be adopted all at once.<sup>27</sup> This Article is intended as a start in that direction, to break the stalemate in the academic debate and focus our research and reform efforts on more attainable goals.

This Article focuses entirely on the French criminal justice system. But why, one might ask, study *any* of the continental systems? Shouldn't we look first to other "common law" countries, which are both easier for Americans to study and more likely to offer viable legal transplants? These seem to be the assumptions behind the recent shift of attention to the study of English criminal procedure,<sup>28</sup> and they may ultimately prove correct. Certainly, no one should underestimate the difficulties of comparative research, even in so "familiar" a context as England.<sup>29</sup> On the other hand, common law systems—because they are so similar to ours<sup>30</sup>—provide fewer possibilities for comparison and borrowing. Before we give up all hope of borrowing or adapting any continental procedures, we need a better understanding of how those procedures differ from our own, which ones suggest viable reform possibilities, and where further research is needed. This Article attempts to provide that assessment and to suggest a narrower, more realistic agenda for future reform-oriented research on continental criminal justice.

I have chosen to focus on only the French criminal justice system for several reasons. First, much more is known about the French system than about any other continental system except perhaps that of West Germany.<sup>31</sup> Second, focus on a single country permits better understanding of specific foreign procedures and their interrelationships.

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26. See generally A. WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 21-35 (1974) (defining a "legal transplant" as "the moving of a rule or a system of law from one country to another or from one people to another").

27. Morris, *supra* note 3, at 1370.

28. See, e.g., Hughes, *supra* note 9, at 508 (English system is ripe for comparison because of its "congruence" with the American system); Van Kessel, *supra* note 9, at 7 (choosing to compare English and American systems because of their "common core" of values).

29. For a general discussion of the problems of comparative research, see A. WATSON, *supra* note 26, *passim*; Hughes, *supra* note 9, at 509-11; Koopmans, *Understanding Political Systems: A Comment on Methods of Comparative Research*, 17 GA. J. INT'L & COMP. L. 261 (1987).

30. Actually, in some important respects the British criminal justice system differs more from our own than does the French. For example, prior to the passage of the Prosecution of Offences Act, 1985, ch. 23, decisions to prosecute and the conduct of trials were controlled primarily by the police and their hired attorneys; only a small proportion of prosecutions were controlled by the Director of Public Prosecutions. Hughes, *supra* note 9, at 541-45. It remains to be seen whether the 1985 Act will dramatically reduce police control over the prosecution function. Prosecutorial discretion in France is discussed in Part VI ("Prosecutorial Charging Discretion"). See *infra* text accompanying notes 382-466.

31. The focus on Germany in the literature seems misplaced, since the German system is in

Much of the recent literature on "continental" criminal procedure implies that "if you've seen one European country you've seen 'em all." Yet this approach tends to minimize important differences among the countries of Europe<sup>32</sup> and fails to present an accurate, detailed, or coherent portrait of any of them. Third, by analyzing each component part of one country's criminal justice system, we see how the parts complement and compensate for each other in the system as a whole.<sup>33</sup> Such "system" analysis has been a standard feature of recent American criminal justice research<sup>34</sup> and is just as essential in the study of foreign systems. This insight was eloquently stated by Professor George Pugh in an early article on French criminal procedure:

A system for administering criminal justice is a detailed tapestry woven of many varied threads. It is often difficult to understand the nature and significance of any particular fiber without at least a general appreciation of the function of other threads, and also a realization of the impact of the whole.<sup>35</sup>

For all these reasons, future reform-oriented comparative research must examine foreign systems separately as I have done. The "continental" or "families of law" approach only serves to confuse the reader (and perhaps occasionally the author). Future research must also extend beyond criminal "procedure" to include other dimensions of criminal justice (for example, the scope of the criminal law, sentencing practices, and training and supervision of prosecutors) that have an important bearing on the functioning of procedural rules and are important in their own right as well. For similar reasons, reform-oriented research must

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some respects less similar to our own than the French system. For instance, the German rule of "compulsory prosecution," see *supra* note 12 and accompanying text, finds no counterpart in either the American or French systems. See *infra* text accompanying notes 382-466.

32. For an example of an attempt to describe the "typical" procedure in a "continental country," see Schlesinger, *supra* note 2, at 364-69. The composite portrait presented appears quite favorable until one realizes that no single court system in any one country contains all of the safeguards described. The multi-country approach is consistent with the traditional aim of the "science" of comparative law: "to observe, describe, classify and investigate in their relations among themselves and to other phenomena, the phenomena of law." Rheinstein, *Teaching Tools in Comparative Law*, 1 AM. J. COMP. L. 95, 98 (1952). A single country approach, on the other hand, may be more appropriate if our concern is reform based on "borrowing" foreign rules and procedures. See *infra* text accompanying note 36.

33. For example, one can understand a criminal justice system by studying the interactions between pretrial detention practices, interrogation procedures, the defendant's decision to contest the charges or admit them, and sentencing practices.

34. See, e.g., NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, CRIMINAL JUSTICE SYSTEM (1973); PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 7-12 (1967) [hereinafter THE CHALLENGE OF CRIME]; F. ZIMRING & R. FRASE, THE CRIMINAL JUSTICE SYSTEM: MATERIALS ON THE ADMINISTRATION AND REFORM OF THE CRIMINAL LAW (1980).

35. Pugh, *The Administration of Criminal Justice in France, An Introductory Analysis*, 23 LA. L. REV. 1 (1962); see also MAJOR CRIMINAL JUSTICE SYSTEMS 15-16 (G. Cole, S. Frankowski & M. Gertz eds. 1981).

consider all stages of the criminal process, not just the one to be reformed. Seemingly desirable foreign practices may depend critically on one or more related aspects of the foreign system, and those supporting structures may be impossible to duplicate in our own system or may be objectionable on policy grounds.

Such "system-wide" analysis has its costs, of course. For one thing, it sometimes requires a choice of breadth over depth of analysis. System-wide analysis can also be very frustrating: the more one understands about the complex interrelationships among different dimensions and stages of criminal justice, the more difficult seems the task of changing particular rules and procedures. Indeed, one can easily be led to the conclusion that selective reforms and "transplants" are impossible—that we must reform our *entire* system at once, and adopt all of a foreign system, or none of it. Since total system reforms and transplants are extremely unlikely to occur, such a conclusion virtually eliminates the utility of reform-oriented comparative studies (or even noncomparative ones). But it is far from clear, given our present state of knowledge about continental systems, that our only choice is "their" system or "ours." The working hypothesis of this Article is that smaller transplants *are* possible and that the hybrid systems of criminal justice produced by such transplants may be superior to either parent system.<sup>36</sup>

To keep the length of this Article within manageable limits, I will examine only the differences between American and French systems that seem most significant from a reform perspective. Furthermore, I have emphasized seven features of the French system which I believe deserve the highest research priority because they either suggest desirable and feasible American reforms, or because they might be seen as posing insuperable barriers to borrowing other aspects of that system. Those seven features, discussed in Parts II to VIII of this Article, are: (1) more careful selection, training, and supervision of police, prosecutors, and judges; (2) narrower scope of the criminal law; (3) fewer limits on gathering and use of evidence against the accused; (4) less frequent use of arrest and pretrial detention; (5) limits on prosecutorial charging discretion; (6) absence of explicit plea bargaining, as well as less abusive forms of tacit bargaining; and (7) less severe sentencing laws and practices.

The Appendix briefly discusses seven other important differences between the French and American systems and explains why I have given them less emphasis. These differences are: (1) pretrial judicial investigation and review of charges; (2) broader rights of crime victims; (3) liberal defense discovery rights; (4) nonadversary (judge-run) trials; (5) "mixed" court of lay and professional judges; (6) less restrictive trial

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36. Cf. Langbein & Weinreb, *supra* note 2, at 1550 ("[T]he issue should not be posed as 'this model or that,' as if criminal procedure came complete in indivisible packages . . .").

procedure and evidence rules; and (7) broader defense and prosecution appeal rights.

Throughout this Article, I will attempt to describe not only what is different and possibly better about the French system, but also the many similarities between French and American practices. These similarities suggest that the "legal culture gap" between the French and American systems is not as great as some comparative researchers have supposed.<sup>37</sup> This in turn suggests that the donor and recipient systems are compatible, and that some legal transplants may be both "politically" feasible—that is, acceptable to legislators, judges, and attorneys—and practically viable—that is, administratively workable, and effective at improving the quality of justice.

A final, preliminary note about sources: One of the greatest methodological problems of comparative research is the lack of reliable, comparable data on the actual functioning of different systems. This is particularly true in the case of France, where legal academics seem more interested in principles than in practice.<sup>38</sup> The following discussions attempt to incorporate all of the available descriptive and empirical data

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37. See authorities cited *supra* note 25. A number of writers have suggested that the gap between civil and common law systems is narrowing. See Goldstein, *supra* note 4, at 1020 (European and American systems "tend to converge"); Merryman, *How Others Do It: The French and German Judiciaries*, 61 S. CAL. L. REV. 1865-76 (1988) (French and German systems have undergone revolutionary change in post-war era, due to reduced reliance on code law and increased role of constitutional and European Community law; process makes French and German judges more like American judges); Vroom, *Constitutional Protection of Individual Liberties in France: The Conseil Constitutionnel Since 1971*, 63 TUL. L. REV. 265, 266 (1988) ("revolutionary" 1971 decision of the Constitutional Court has produced a "fundamental shift in French political structure").

38. In some respects, the French system is far better documented than our own. For example, statistics on prosecutor screening rates have been gathered on a national basis for at least 50 years. On the other hand, to my knowledge no study has been completed, locally or nationally, of the reasons for screening decisions—for example, what proportion are based on evidentiary considerations versus prosecution policy or alternatives to prosecution of the current offense. Cf. P. GREENWOOD, S. WILDHORN, E. POGGIO, M. STRUMWASSER & P. LEON, PROSECUTION OF ADULT FELONY DEFENDANTS IN LOS ANGELES COUNTY: A POLICY PERSPECTIVE at v-xiv (Rand Corp. 1973) [hereinafter PROSECUTION OF ADULT FELONY DEFENDANTS] (identifying and analyzing factors within the criminal justice system in Los Angeles County that affect treatment of individual defendants); Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246 (1980) (examining the exercise of discretion by federal prosecutors).

contained in published official statistics,<sup>39</sup> French language treatises,<sup>40</sup> American and British studies,<sup>41</sup> statutes,<sup>42</sup> and case law.<sup>43</sup> My own interviews and observations during three semesters spent in France are also incorporated. As is equally true for research on American criminal justice systems, each of these sources has its limitations, and none can be viewed as definitive. Rather, they support and corroborate each other, providing—in Hans Zeisel's classic phrase—"triangulation of proof."<sup>44</sup> The present study is thus an attempt to overcome one of the most serious

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39. The principal French statistical sources used in this Article are the following: MINISTÈRE DE LA JUSTICE, COMPTE GÉNÉRAL DE L'ADMINISTRATION DE LA JUSTICE PÉNALE 1978 (La Documentation Française 1982) [hereinafter COMPTE GÉNÉRAL], containing data on prosecutor screening rates; activities of examining magistrates; conviction rates, sentences, and some manpower data for the years 1978 through 1981; MINISTÈRE DE L'INTÉRIEUR, LA CRIMINALITÉ EN FRANCE EN 1980 (La Documentation Française 1981) [hereinafter LA CRIMINALITÉ EN FRANCE], reporting police statistics on crimes known, crimes solved, and persons taken into custody in 1980; and MINISTÈRE DE LA JUSTICE, ANNUAIRE STATISTIQUE DE LA JUSTICE—1984 (La Documentation Française 1986) [hereinafter ANNUAIRE STATISTIQUE], containing police, prosecution, and court statistics for the years 1974 through 1984.

In the remainder of this Article, the statistics cited are generally for the year 1980, although more recent figures are sometimes available. I chose this year because complete data are not available for 1984 and later years, and because data for the years 1981 through 1983 are significantly distorted by the 1981 presidential amnesty decree, which caused a 30-40% drop in reported convictions in 1981 and lesser but nevertheless substantial reductions in 1982 and 1983. ANNUAIRE STATISTIQUE, *supra*, at 109-21; see also *infra* text accompanying note 582.

40. The most frequently cited treatises are: 2 R. MERLE & A. VITU, TRAITÉ DE DROIT CRIMINEL: PROCEDURE PÉNALE (3d ed. 1979); J. PRADEL, PROCEDURE PÉNALE (3d ed. 1985); G. STEFANI, G. LEVASSEUR & B. BOULOC, PROCEDURE PÉNALE (12th ed. 1984); and J. VINCENT, G. MONTAGNIER & A. VARINARD, LA JUSTICE ET SES INSTITUTIONS (2d ed. 1985).

41. Some of the major descriptive works in English include R. DAVID, FRENCH LAW: ITS STRUCTURE, SOURCES AND METHODOLOGY (M. Kindred trans. 1972); A. SHEEHAN, CRIMINAL PROCEDURE IN SCOTLAND AND FRANCE (1975); Pugh, *supra* note 35; Tomlinson, *supra* note 5; and Vouin, *The Role of the Prosecutor in French Criminal Trials*, 18 AM. J. COMP. LAW 483 (1970). Sheehan's work is the most coherent and comprehensive portrait of the French criminal justice system, but it is already out of date in many important respects. Furthermore, it employs none of the nationwide statistics cited in the previous note and contains almost no citations to relevant articles of the French Code of Criminal Procedure. For an overall summary of the French criminal justice system which attempts to remedy these defects, see Frase, *Introduction to THE FRENCH CODE OF CRIMINAL PROCEDURE 1-40* (G. Kock & R. Frase trans. 1988) [hereinafter FRENCH SYSTEM] (introduction to revised translation).

42. Except where otherwise noted, all citations to provisions of the French Code of Criminal Procedure (for example, "Proc. Code art. 16-1") refer to the 1988 Kock and Frase revised translation, *supra* note 41. Individual laws are cited by date, number, and periodical page (for example, "Law of Dec. 30, 1987, No. 87-1062, 108 GAZETTE DU PALAIS, *Legislation* [G.P.L.] Jan. 6-7, 1988, 19"). Since no recent English translation of the French Penal Code exists, citations will refer to the current French language version, CODE PÉNAL [C. PEN.]. Cf. THE FRENCH PENAL CODE (J. Moreau & G. Mueller trans. 1960).

43. Major cases reported in the *Bulletin des arrêts de la Cour de cassation, chambre criminelle* (Imprimerie Nationale, various years) are cited as, e.g.: "Judgment of Nov. 8, 1979 [date of opinion], Bull. Crim. No. 311 [case number]." Other cases are cited by date, court, and page in the *Gazette du Palais*, *supra* note 42.

44. H. ZEISEL, SAY IT WITH FIGURES 190-99 (5th ed. rev. 1968) (referring to a confluence of proof from two or more independent sources).

weaknesses of the existing literature which, by relying primarily on formal rules and impressionistic studies, sparked much debate, few conclusions, and virtually no sustained research and reform efforts.

To summarize, future comparative studies should be guided by the following principles, which are illustrated and applied in the remainder of this Article. First, researchers should study each foreign system both individually (not in "families") and as a whole (not just the procedural rule or stage of the criminal process proposed to be reformed). Second, studies of foreign systems must examine all available sources: formal legal rules and structures, impressionistic descriptions of practice, and quantitative data. Third, researchers must also be prepared to re-examine their own system, in theory and especially in practice, to determine the extent to which it actually differs from the foreign system. Finally, research and reform efforts should concentrate on the smaller differences between foreign and domestic systems that are revealed by the above approach, since it is the smaller differences that are most likely to suggest feasible "borrowings" from abroad.

## II

### SELECTION, TRAINING, AND SUPERVISION OF POLICE, PROSECUTORS, AND JUDGES

Among the perceived barriers to adoption of European procedures in the United States, one of the most fundamental is the difference in the institutions of criminal justice. European systems are "hierarchical," with police, prosecutors, and judges subject to nationwide bureaucratic selection, training, promotion, and supervision. In contrast, United States institutions are said to be "coordinately" organized, with a preference for local control, democratic selection, lay participation, and more flexible decisionmaking.<sup>45</sup> These differences have been cited as particularly significant barriers to our ever adopting the French institution of the examining magistrate,<sup>46</sup> or to adopting other aspects of the French system.

There is little doubt that these institutional differences exist. Moreover, given these differences, the average quality of French officials may be greater than the quality of ours in ways that might permit the French

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45. See generally Damaška, *Structures of Authority*, *supra* note 3; Damaška, *Evidentiary Barriers*, *supra* note 7 (suggesting replacement of accusatorial or inquisitorial trial-centered models of criminal procedure with organizing concepts based on authority, such as hierarchical or coordinate models of procedure).

46. Johnson, *supra* note 5, at 412 (citing Anglo-American tradition of decentralized authority as barrier to adoption of examining magistracy); Morris, *supra* note 3, at 1368-69 (contrasting lack of judicial "career line" for U.S. lawyers with structure of French legal profession; this lack is a barrier to the U.S. adoption of the institution of examining magistrate). See *infra* text accompanying notes 637-48 for a discussion of the French examining magistrate.

system to dispense with some of the costly, delay-producing procedural safeguards we consider essential to our system. But such institutional differences can also be viewed more positively by reform-minded Americans: Shouldn't we improve the quality of our institutions, whether or not we adopt any other aspects of French procedure? The minimal American standards used for selection, training, and supervision of police, prosecutors, and judges seem shocking to French observers and perhaps should shock Americans as well.

I argue that we should consider adopting certain aspects of the French system, namely those concerning police, prosecutorial, and judicial organization. Such changes are feasible because they would build on similar practices that already exist in the United States. The fact that similar American practices exist also suggests that the French and American systems are not so fundamentally different as to preclude American adoption of *other* aspects of the French system—even without concurrently adopting improvements in American police, prosecutorial, and judicial personnel.<sup>47</sup>

#### A. Police

The French police are organized in two nationwide hierarchies: the National Police under the Minister of the Interior, and the Gendarmes under the Minister of Defense.<sup>48</sup> The standards for hiring, promotion, and internal discipline of these police forces have not been discussed in the current literature, and more research is needed. One might nonetheless hypothesize that such national hierarchies permit certain methods of maintaining police quality: supervision of the local "police chief"; regional or national training programs (which local departments cannot or will not pay for); hiring from a wide pool of applicants; ability to transfer officers to where they are needed most; preservation of promotion incentives in "top heavy" departments; and a local force with a broader perspective on local policing problems than the police tend to have in the United States.<sup>49</sup> On the other hand, anyone who has ever

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47. In any case, I do not believe that the French-inspired reform proposals discussed in Part III ("Scope of the Criminal Law") and Parts V through VIII ("Arrest and Pretrial Detention," "Prosecutorial Charging Discretion," "Plea Bargaining and Its Analogues," and "Sentencing Laws and Practices") depend on substantial improvements in American personnel. *See infra* text accompanying notes 127-56 & 292-629. The seemingly broader investigatory powers of the French police, discussed more fully in Part IV ("Restraints on Evidence Gathering"), do seem to require very high quality of personnel; it is not certain, however, that American police really have less power in practice, or that French law enforcement is really any more effective than our own. *See infra* text accompanying notes 157-291.

48. *See* Tomlinson, *supra* note 5, at 157.

49. For a discussion of the related American concept of "lateral entry"—hiring of police officers and supervisors from outside the jurisdiction and from non-police governmental agencies—and its value to police administration, see *THE CHALLENGE OF CRIME, supra* note 34, at 111-12.



lived in France knows that incidents of police misconduct (brutality, corruption, under- and over-enforcement) do occur.

In any case, a national police hierarchy is clearly not compatible with our federal system and would probably be administratively unworkable even if it were. After all, France is in some respects (such as size and cultural homogeneity) more comparable to a large American state than to the United States as a whole. Perhaps even a statewide police department is too foreign to our system to be politically feasible in the near future, although some statewide patrol and investigative agencies already exist, and some jurisdictions have created statewide police licensing.<sup>50</sup> However, two other aspects of the French system of policing merit serious consideration by future reform-oriented researchers.

### 1. *High-Level Police Authorization Rules*

Although the French police have somewhat broader investigative powers than American police,<sup>51</sup> the Code of Criminal Procedure limits the exercise of these broad powers to a select group: the Officers of the Judicial Police (OJPs).<sup>52</sup> OJPs are designated by ministerial decree from a list of persons declared eligible by statute. The Attorney General may suspend or revoke the designation if an OJP abuses his or her powers, and certain judges also have disciplinary powers over OJPs and other members of the police.<sup>53</sup>

The requirement that especially sensitive investigations be authorized by high-ranking officials or supervisors within the police hierarchy is not simply a minor formality.<sup>54</sup> It serves the important function of centering responsibility in the hands of those police officers who are expected to be the most qualified (because they have the most experience) and who have the most to lose (because of the threat of demotion) if a serious

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50. An example is the Minnesota Peace Officers Standards and Training Board (P.O.S.T.), which sets hiring and conduct standards for most police officers in the state. MINN. STAT. ANN. §§ 626.84-.863 (West Supp. 1988); MINN. R. ch. 6700 (1989).

51. See generally *infra* text accompanying notes 157-291. Such powers include broad authority to investigate "flagrant" offenses without judicial supervision and to order 24-hour investigatory detention (*garde à vue*). See *infra* note 161. French police may also exercise delegated judicial investigatory powers under "rogatory commissions." Proc. Code arts. 151 to 155 (describing various components of a judicial investigation). See generally FRENCH SYSTEM, *supra* note 41, at 15.

52. See *infra* note 161. Further distinctions are made as to the powers of the two lower grades of judicial police—Agents and Assistant Agents—and the powers of various specialized "fonctionnaires" are also limited. See J. VINCENT, G. MONTAGNIER & A. VARINARD, *supra* note 40, at §§ 572-573. Throughout this Article, initial capitals are used in referring to each of these three grades to remind readers of the important differences in their powers.

53. See FRENCH SYSTEM, *supra* note 41, at 6 n.39 (describing powers of attorneys general).

54. See, e.g., Judgment of June 17, 1987, Bull. Crim. No. 253 (reversing confiscation of radar detector seized by Agents, not Officers, of the Judicial Police). However, further research is needed on the operation of these rules in practice and, in particular, whether OJPs routinely approve of operations that they do not personally supervise or that have already been carried out by others.

error is made. This regulatory technique is especially valuable where the substantive legal standard governing the particular police activity is weak or nonexistent, as is arguably the case with many aspects of American criminal procedure, such as search standards.<sup>55</sup> The smaller the number of decisionmakers, the more consistent the decisions are likely to be.<sup>56</sup> At the same time, one might hypothesize that contemporaneous police supervision would be stricter than after-the-fact supervision by judges, who may be tempted to defer to police expertise—especially when the alternative is to throw out crucial, irreplaceable evidence.

Even if police supervision is less strict than judicial review, the former represents a useful intermediate approach between judicial control and no control. Examples of this approach may be found in the internal regulations of some American police and prosecutorial agencies<sup>57</sup> and in procedural rules governing the decision to incarcerate a suspect rather than to issue a citation.<sup>58</sup> High-level police approval has also been viewed by courts as a necessary component of a constitutionally valid drunk-driving roadblock.<sup>59</sup> I believe that serious consideration should be given to adoption of legislation (or criminal procedure rules) requiring supervisory-level approval for these and other critical police actions, which American law generally permits *any* police officer to undertake on

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55. See, e.g., *infra* text accompanying notes 184-86 (discussing limitations of American probable cause requirements).

56. See Frase, *supra* note 38, at 293 n.126.

57. See 18 U.S.C. § 2516 (1988) (provisions of the federal wiretap statute (Title III) requiring that all requests for wiretap orders be authorized by certain high-level prosecutors); F. ZIMRING & R. FRASE, *supra* note 34, at 236-41 (a "full investigation" by the FBI must be authorized by FBI headquarters); *id.* at 600-14 (Manhattan District Attorney's Office guidelines for plea bargaining and sentencing, reprinted from Kuh, *Plea Bargaining: Guidelines for the Manhattan District Attorney's Office*, 11 CRIM. L. BULL. 48 (1975)); 42 CRIM. L. RPTR. (BNA) 2340 (proposed Department of Justice policies for plea bargaining under the Federal Sentencing Guidelines, requiring supervisor approval for certain plea agreements); MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §§ 130.1-130.2 (1975) (key role of "station officer" in processing and disposition of arrestees); *id.* § 160.2(7) (requiring one designated officer responsible for conduct of all identification procedures).

58. See, e.g., MINN. R. CRIM. P. 6.01, subd.1(1)(b) (decision must be made by "the officer in charge of the police station or the county sheriff in charge of the jail or an officer designated by the sheriff").

59. See, e.g., *State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 663 P.2d 992 (1983) (invalidating roadblock because of its unilateral establishment by patrolman and operation of roadblock without benefit of guidelines or specific directions).

his or her own. Examples might include undercover operations;<sup>60</sup> warrantless, nonexigent arrest in public places;<sup>61</sup> line-ups and other identification procedures not subject to the right-to-counsel safeguards;<sup>62</sup> and prolonged custodial interrogation.<sup>63</sup>

## 2. Police-Prosecutor Relations

A second interesting feature of French policing is that it is more closely integrated with the prosecution function than in the United States.<sup>64</sup> The prosecutor is to be notified "without delay" when the police learn of an offense, and "immediately" if it is a "flagrant" offense.<sup>65</sup> In the latter case, if a prosecutor arrives on the scene, his or her authority supersedes that of the OJP previously in command.<sup>66</sup> Individual prosecutors have all the powers of an OJP and may also order the police to conduct investigations whether or not the offense is "flagrant."<sup>67</sup>

Even if prosecutors rarely take direct charge of an investigation<sup>68</sup> and infrequently order investigation of facts that the police would not

60. Cf. *United States v. White*, 401 U.S. 745 (1971) (plurality opinion) (holding that use of "wired for sound" informants is not a "search" or "seizure" under the fourth amendment and thus does not require judicial approval).

It might be argued that undercover operations require a degree of secrecy incompatible with high-level approval requirements. However, similar arguments have been rejected in the case of CIA covert operations, which are subject to presidential approval and congressional oversight. Indeed, former CIA Director William Colby has suggested that such intrusive operations should be limited as a matter of policy to cases supported by the high degree of consensus needed to prevent "leaks" when information is shared. Panel Discussion, *Secrecy in Government*, Univ. of Minnesota Law School (Oct. 16, 1987), reported in T. O'Toole, *Mondale and Colby Speak Out On CIA*, 1 The Source: Newsletter of the University of Minnesota Law School 1 (issue 5).

61. See *United States v. Watson*, 423 U.S. 411 (1976) (police may make warrantless arrests on probable cause in a public place, even if there is time to obtain a warrant beforehand).

62. See *Kirby v. Illinois*, 406 U.S. 682, 688 (1972) (holding that right to counsel does not apply to identification procedures held prior to commencement of "adversary judicial procedures" against the defendant); see also *infra* notes 250-53 and accompanying text.

63. Although even brief custodial interrogation is subject to *Miranda* safeguards, there is reason to question the effectiveness of these rights. See *infra* notes 227-36; cf. Police and Criminal Evidence Act, 1984, ch. 60, §§ 34-45 (British law requiring approval by certain high-ranking officers of prolonged detention and questioning).

64. See generally 2 R. MERLE & A. VITU, *supra* note 40, § 1060 (describing duties of police to inform prosecutors of the commission of certain crimes and explaining supervision of certain police functions by prosecutors). By contrast, less communication is generally required between police and prosecutors in the United States. See generally W. McDONALD, H. ROSSMAN & J. CRAMER, *POLICE-PROSECUTOR RELATIONS IN THE UNITED STATES—EXECUTIVE SUMMARY* (U.S. Dep't of Justice 1982).

65. Proc. Code arts. 19, 54; see also CODE DE LA SANTÉ PUBLIQUE art. L.627 (requiring written authorization by the prosecutor or examining magistrate prior to any search of a residence for drugs).

66. Proc. Code art. 68. One observer states that prosecutors "normally arrive at the scene of a serious offense soon after the police." Tomlinson, *supra* note 5, at 147.

67. Proc. Code arts. 38, 41-42, 75.

68. See G. STEFANI, G. LEVASSEUR & B. BOULOC, *supra* note 40, § 267.

themselves investigate, the mere possibility of such intervention may serve a valuable function in checking the power of the police. At the very least, the French prosecutor must be kept *informed*, at an early stage, of the existence and progress of the investigation. This permits the prosecutor to have more input into the direction and methods of investigation. If the offense is one that will probably not be prosecuted,<sup>69</sup> the police may avoid wasting time and unnecessarily bothering the suspect, his or her associates, and witnesses. If the police are using questionable investigatory methods, the prosecutor may be able to intervene in time to protect both the rights of citizens and the admissibility of the evidence.<sup>70</sup>

In contrast to this "integrated" model, the police and prosecutorial functions in the United States seem to reflect a strict "division of labor" theory.<sup>71</sup> American prosecutors are rarely involved in prearrest investigation decisions or in the arrest decision itself. The major exception to this rule is the U.S. Attorney, who generally declines prosecution without any arrest ever being made (albeit usually long after the commencement of the investigation).<sup>72</sup> Similarly, U.S. Attorneys, Department of Justice Attorneys, and some state and local prosecutors sometimes work closely with police agencies to design and carry out prosecutions involving public corruption, organized crime, narcotics, and other complex matters.<sup>73</sup>

We must learn much more about the actual day-to-day working relationship between police and prosecutors in France *and* in this country, but even now it appears that closer police-prosecutor relationships are both feasible and desirable. Specific changes in American procedures to achieve a more integrated, efficient, and responsible police function might include the following: requiring the police to notify the prosecutor at an early stage of the investigation and, whenever possible, prior to arrest;<sup>74</sup> giving the prosecutor (or designated prosecutors) explicit

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69. See *infra* text accompanying notes 383-408 (discussing the broad discretionary power not to prosecute).

70. This was one of the reasons for the Crime Commission's proposal that police departments employ a full-time legal advisor. See THE CHALLENGE OF CRIME, *supra* note 34, at 114.

71. See generally W. McDONALD, H. ROSSMAN & J. CRAMER, *supra* note 64 (analyzing problems in police-prosecutor relations).

72. See Frase, *supra* note 38, at 251, 316-30.

73. See, e.g., THE CHALLENGE OF CRIME, *supra* note 34, at 196-98 (organized crime).

74. Cf. MINN. R. CRIM. P. 2.02 (complaint normally requires prosecutorial approval); MINN. R. CRIM. P. 4.02, subd.3 (police shall notify prosecutor "[a]s soon as practical" after warrantless arrest); 1 A.B.A., STANDARDS FOR CRIMINAL JUSTICE Standard 3-3.4(b) (2d ed. 1979 & Supp. 1986) ("[a]bsent exceptional circumstances," arrest or search warrant should require prosecutor approval). For a discussion of the importance of reducing the number of arrests, and the use of pretrial detention after arrest, see Part V ("Arrest and Pretrial Detention"), *infra* text accompanying notes 292-381.

authority to direct or order specific police investigatory acts;<sup>75</sup> and placing in the hands of the chief prosecutor or attorney general some police administrative or disciplinary powers similar to the French Attorney General's control over the OJP designation.<sup>76</sup>

### B. Prosecutors

The most distinctive features of the prosecutor's office in France may also be the hardest to duplicate in this country. These include organization in a single, national hierarchy; a nationwide entrance examination and training program; and a tradition that views the position of prosecutor as a career rather than a steppingstone to other careers. Nevertheless, each of these attributes suggests possibilities for useful and feasible reforms of the prosecution function in the United States.

#### 1. Hierarchy

All prosecutors in France serve in a bureaucratic hierarchy headed by the Minister of Justice.<sup>77</sup> Although individual prosecutors are theoretically free to speak their own minds in court,<sup>78</sup> in their written submissions they must follow the written orders of their superiors. If they do not, they are subject to disciplinary action, including dismissal.<sup>79</sup> The French apparently recognize the problems of judicial administration that would arise if individual prosecutorial decisions were always subject to reversal by superiors. Thus, although the chief prosecutor for each court<sup>80</sup> may be disciplined for his or her decisions, the decisions themselves may not be reversed by superiors even if they are directly contrary

75. See 1 A.B.A., STANDARDS FOR CRIMINAL JUSTICE, *supra* note 74, Standard 3-2.4(b) (investigative resources should be under prosecutor's direct control); *id.* Standard 3-3.1(a) (prosecutor should, when necessary, initiate investigation independent from police).

76. See *supra* text accompanying note 53.

77. See FRENCH SYSTEM, *supra* note 41, at 6-7 (describing various actors in the hierarchy under the Minister of Justice).

78. The French maxim, "The pen is bound, but speech is free," is codified in article 33 of the Procedure Code (written submissions of official counsel who conduct prosecutions must follow instructions of higher authorities, while oral observations need not and may be made freely). Some observers assert that this freedom is rarely exercised. See A. SHEEHAN, *supra* note 41, at 17 n.19; Tomlinson, *supra* note 5, at 146 n.43. Other observers claim that it is "jealously defended," J. VINCENT, G. MONTAGNIER & A. VARINARD, *supra* note 40, § 505; that it exists in order to insure that prosecutorial arguments can accommodate any unforeseeable events at trial, 2 R. MERLE & A. VITU, *supra* note 40, § 1009, at 247; and that local prosecutors retain "great independence" from the central Ministry of Justice, Pugh, *supra* note 35, at 7-8.

79. 2 R. MERLE & A. VITU, *supra* note 40, § 1008; J. VINCENT, G. MONTAGNIER & A. VARINARD, *supra* note 40, §§ 504, 508. Before imposing major disciplinary measures, the Minister of Justice must consult a special commission, but in most cases the commission's findings are only advisory. *Id.* § 508.

80. The chief prosecutor in the court of general jurisdiction is the Prosecuting Attorney, and is the Attorney General in the courts of appeal. See FRENCH SYSTEM, *supra* note 41, at 2, 4, 6.

to written orders.<sup>81</sup> Within each chief prosecutor's office, however, all individual decisions are subject to review and correction by superiors, and prosecution policies can be enforced uniformly within those offices (and, to some extent, nationwide).<sup>82</sup> Responsibility for prosecution policy is thus centralized at higher levels.

Such a nationwide hierarchical structure is, of course, incompatible with our federal system.<sup>83</sup> As for state and local prosecutors, some states have already adopted a unified prosecution hierarchy under the state attorney general,<sup>84</sup> thus achieving—or at least clearing the way for—whatever benefits the French system might provide. In other states, the county attorney (and sometimes also the city attorney responsible for misdemeanor prosecutions) is an elected official. This implies that he or she is not subject to supervision by the state attorney general and could not be made so without a state constitutional amendment. Nevertheless, the attorney general in many states enjoys concurrent statutory authority to prosecute some or all criminal offenses,<sup>85</sup> which provides at least the possibility of a parallel check on local decisions *not* to prosecute. Moreover, it would not necessarily be inconsistent with the status of local prosecutors as elected officials to adopt statewide standards for hiring

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81. 2 R. MERLE & A. VITU, *supra* note 40, § 1009; J. VINCENT, G. MONTAGNIER & A. VARINARD, *supra* note 40, § 505.

82. Very little has been reported in either French or American literature concerning the extent to which French prosecution policies are published and thereby uniformly enforced, locally or nationally. However, the Minister of Justice does issue instructions and policy statements to his subordinates, which may suggest some uniformity of views from higher-ups. For example, see the *Circulaire* of October 21, 1981, from the Minister of Justice to all Attorneys General and Prosecuting Attorneys, regarding some of the new Socialist government's specific criminal justice policies. 64 BULLETIN LÉGISLATIF DALLOZ [B.L.D.] 372 (1981).

83. On the other hand, U.S. Attorneys and their assistants are all appointed, not elected, and are currently subject to limited supervision by the Department of Justice in Washington. See Frase, *supra* note 38, at 249-50 (describing limits on authority of U.S. Attorneys). It would thus be feasible for the Department to exercise greater control, particularly in setting uniform prosecution policies and perhaps also in setting standards for hiring and evaluation of Assistant U.S. Attorneys. See generally U.S. COMPTROLLER GEN., GREATER OVERSIGHT AND UNIFORMITY NEEDED IN U.S. ATTORNEYS' PROSECUTIVE POLICIES (U.S.G.P.O. 1982) (discussing uniform prosecution and evaluation policies); see also Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 STAN. L. REV. 1036, 1080-90 (1972) (recommending greater Department of Justice scrutiny of local federal prosecution policies).

84. In the state of Alaska, for example, the attorney general has supervisory authority over all district attorneys and assistant district attorneys in the state because they are members of the State Department of Law, of which the Attorney General is chief executive officer. ALASKA STAT. §§ 44.23.010-.020 (1989). It was apparently this unusual authority which permitted the Alaska Attorney General in 1975 to abolish at least the most visible forms of prosecutorial plea bargaining throughout the state. See M.L. RUBINSTEIN & T.J. WHITE, ALASKA'S BAN ON PLEA BARGAINING 1 (Alaska Judicial Council 1978), reprinted in F. ZIMRING & R. FRASE, *supra* note 34, at 674; cf. 1 A.B.A., STANDARDS FOR CRIMINAL JUSTICE, *supra* note 74, Standard 3-2.2(b) and commentary (statewide prosecution system analogous to federal system may be appropriate in smaller states, and has been adopted in Alaska, Delaware, and Rhode Island).

85. See NATIONAL ASS'N OF ATTORNEYS GEN., POWERS, DUTIES AND OPERATIONS OF STATE ATTORNEYS GENERAL 104-07 (1977).

and evaluation of assistant prosecutors and perhaps even statewide charging standards for all state criminal laws.<sup>86</sup>

Some might argue that any substantially unified state prosecution function is undesirable because it would sacrifice needed flexibility and a valued degree of local control in setting law enforcement priorities. It is also unclear, at present, to what extent the French prosecution hierarchy actually exercises effective supervisory control.<sup>87</sup> More research is needed on both sides of the Atlantic, but one can at least say this much: The observed differences in the traditional structure of the prosecution function in France and in the United States do not necessarily pose an insuperable barrier to the adoption in the United States of reforms modeled on the French system, since some state systems already incorporate important elements of the French hierarchical structure.

## 2. Training

A second major difference between prosecutors in France and in the United States is that French prosecutors appear to be better trained for their roles. The French have instituted a nationwide recruitment and training program for all "magistrates," both prosecutors and judges.<sup>88</sup> The normal path of entry into either branch of the magistrature is by completion of a twenty-four-month training program.<sup>89</sup> The few positions in this program are open primarily to law graduates who have completed three years of study,<sup>90</sup> and who are selected on the basis of a

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86. Cf. 1 A.B.A., STANDARDS FOR CRIMINAL JUSTICE, *supra* note 74, Standard 3-2.2(c) (suggesting that states should assure "maximum practicable uniformity" in criminal law enforcement throughout state); *id.* Standard 3-2.2(e) (recommending "central pool of supporting resources and manpower").

87. See *supra* note 82.

88. Tomlinson, *supra* note 5, at 146.

89. To remedy the recent shortage of magistrates, a limited number of magistrates may be appointed each year without completing the training program. J. VINCENT, G. MONTAGNIER & A. VARINARD, *supra* note 40, § 466. All permanent appointees must have at least a *licence* (three-year law degree). In addition, public employees and attorneys must have at least eight years of experience; full professors and associate professors of law must have two years of teaching experience, and assistant professors, four years. *Id.* § 473. In 1981, approximately 50 to 60 magistrates were recruited in this fashion; by comparison, in 1982, 266 magistrates were recruited by means of the training program. *Id.* §§ 471, 473. French law also permits temporary magistrates to be hired for a fixed, nonrenewable term of three, six, or nine years. The maximum allowable number of such appointments, as a percentage of vacancies, is now one-third or one-fifth, for first- and second-level appointments respectively. *Id.* § 473.

90. French students enter law school directly after completing their secondary education and without attending an "undergraduate" college, although French secondary education is often said to be roughly equivalent to a junior college degree in the United States. See Pugh, *supra* note 35, at 6 n.33. The first two years of law school lead to the *Diplôme d'Etudes Universitaires Générales* (D.E.U.G.). This degree is primarily designed to prepare students for further legal study, but it also confers eligibility to take certain civil service examinations. The third year of study leads to the *Licence en Droit*, and includes some specialization (for example, in private law or public law). The

nationwide competitive entrance exam.<sup>91</sup> The first seven months of the program are spent in classes at the National Magistrates' School in Bordeaux, followed by three periods of internship: (1) thirteen months in one of the provincial courts of appeal; (2) two months with a judge or prosecutor in Paris; and (3) two months in the office selected by the candidate for his or her first post.<sup>92</sup> Between their second and third internships, candidates (known as *auditeurs de justice*) take an examination to determine their class ranking and then they choose (in rank order) a post from the list of available openings. During their internships, candidates may not sign documents on behalf of actual magistrates, but they may do any of the following: assist an examining magistrate or prosecutor during all phases of his or her respective functions; sit on the bench with judges of civil or correctional courts and join their deliberations (in a nonvoting consultative capacity); orally present the prosecution's pleadings before these courts; and attend the deliberations of the judges and jurors in the assize court.<sup>93</sup>

During the entire twenty-four-month period, candidates receive a salary and are subject to most of the requirements applicable to magistrates, including an oath of office, no outside employment, and no right to strike. Candidates must also agree at the outset to remain in the magistracy for at least ten years.<sup>94</sup> During the first four years after their installation, all new magistrates are required to complete four months of additional, specialized training in sessions of at least two weeks each.<sup>95</sup>

Although the role of the prosecutor is at least as important in the United States as it is in France, the procedures for training American prosecutors are rudimentary at best. Chief prosecutors are typically elected or appointed after limited criminal practice experience,<sup>96</sup> and assistant prosecutors are often hired right out of law school where any

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fourth year is even more specialized, leading to the *Maîtrise en Droit*. Doctoral and other advanced degrees are obtained after five or six years.

Although students are eligible to enter the magistrate training program after three years, many do not do so until after four or five years of law school. Admission to the bar requires the *maîtrise* (fourth-year) degree. J. VINCENT, G. MONTAGNIER & A. VARINARD, *supra* note 40, § 470.

91. J. VINCENT, G. MONTAGNIER & A. VARINARD, *supra* note 40, §§ 469-471. Up to one-third of the positions may be filled by nomination rather than by the competitive exam. Nominees must have a doctor of law degree (a five- or six-year program), or three years of legal work. *Id.* § 470.

92. *Id.* § 471. For further description of the program at the National Magistrates' School, see Applebaum, *Cogestion and Beyond: Change and Continuity in Modern French Legal Education—A Design for U.S. Law Schools*, 10 NOVA L.J. 297, 310-14 (1986); see also M. VOLCANSEK & J. LAFON, JUDICIAL SELECTION: THE CROSS-EVOLUTION OF FRENCH AND AMERICAN PRACTICES ch. 6 (1988).

93. J. VINCENT, G. MONTAGNIER & A. VARINARD, *supra* note 40, § 472.

94. *Id.*

95. *Id.* § 471 n.9.

96. See generally Reiss, *Public Prosecutors and Criminal Prosecution in the United States of America*, 1975 JURID. REV. 1, 9-10.



clinical or trial practice training is likely to have involved only criminal defense or civil procedure. In recent years, many new prosecutors have attended in-service training programs, but we probably can learn something more from the French in this area.

Even if it is not feasible (especially in smaller jurisdictions) to require chief prosecutors to have specified experience or training prior to their election or appointment, why shouldn't they be expected to attend specially designed training programs soon afterward, rather than trying to learn everything "on the job"? The answer may be that such programs do not exist at present or are too expensive for most states to establish. But the prosecution function, and the role of chief prosecutors in particular, is probably uniform enough throughout the United States to justify a nationwide program—perhaps sponsored and partially funded by the federal government. As for assistant prosecutors, who are almost always appointed rather than elected, it might be feasible to establish and require pre-appointment training programs run by law schools or by continuing education centers; if not, post-appointment training can and should be required (and publicly funded).<sup>97</sup>

### 3. *Career Tradition*

A third distinctive feature of the prosecution function in France is that becoming a prosecutor in France is more a long-term career choice, whereas the average tenure of prosecutors in the United States is relatively short.<sup>98</sup> In part, the French career tradition is due to the fact that candidates must undergo two years of specialized training before becoming prosecutors and must agree to remain in the magistracy for at least ten years.<sup>99</sup> Moreover, the nationalized, bureaucratic structure of the French prosecution hierarchy may allow more possibilities for advancement than are available in the smaller, self-contained American prosecutor's office, and perhaps may also provide more protection from removal for purely political reasons.

A system of "career" prosecutors should permit greater development and use of expertise, and might also make prosecutors more accountable and responsive to their superiors. There may be disadvantages as well: "burnout" and cynicism; narrow-minded pro-prosecution partisanship; and unwillingness to work cooperatively with judges and defense counsel.<sup>100</sup> Again, more research is needed into the nature of

97. See 1 A.B.A., STANDARDS FOR CRIMINAL JUSTICE, *supra* note 74, Standard 3-2.6 (advocating use of public funds for prosecutors to attend "substantially expanded" continuing education programs).

98. Reiss, *supra* note 96, at 9 (noting that average tenure in office of U.S. prosecutors is four years).

99. See *supra* note 94 and accompanying text.

100. Since prosecutors in France (as in the United States) often aspire to become judges, they

prosecution "careers" in France.

If Americans want to encourage this kind of system here, there are a number of measures we could employ. Assistant prosecutors in some jurisdictions already hold civil service positions,<sup>101</sup> and no doubt a number of experienced career prosecutors may be found in these offices. Even where prosecutors are not protected by civil service guidelines, they would have the incentive to develop a career interest if they were paid well enough at higher levels and protected, by law or custom, from routine discharge by newly elected or appointed chief prosecutors.<sup>102</sup> Surely the prosecution function is too important in our system to allow assistant prosecutor positions to be used solely for patronage purposes. The traditionally high rate of voluntary turnover in these positions is also undesirable, although it does reduce salary costs. In the end, though, we get what we pay for.<sup>103</sup>

### C. Judges

French judges share several of the distinctive traits of French prosecutors, including an organization with a single, national hierarchy, and a nationwide entrance examination and training program.<sup>104</sup> As with the prosecution function, each of these features suggests possibilities for useful, feasible reforms of the judicial system in the United States.<sup>105</sup>

#### 1. Hierarchy

French judges, like prosecutors, are part of a national hierarchy,

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may not be entirely unresponsive to pressures from the bench. It is apparently quite common for senior French prosecutors to follow this career path. See R. DAVID, *supra* note 41, at 61.

101. As of 1973, civil service prosecutors were found in about 3% of American jurisdictions. Reiss, *supra* note 96, at 9.

102. See 1 A.B.A., STANDARDS FOR CRIMINAL JUSTICE, *supra* note 74, Standard 3-2.3(a) (jurisdictions should promote continuity of service for prosecutors); *id.* Standard 3-2.3(c) (recommending non-partisan selection); *id.* Standard 3-2.3(d) (urging pay for prosecutors comparable to peers in private sector).

103. The same could be said for public defenders. The French system is less helpful in this area. Perhaps owing to the less active role of counsel at trial, see *infra* notes 678-90 and accompanying text, French defense counsel receive little specialized training either in law school or after graduation. American legal education, with some schools' recent emphasis on clinical studies and trial practice training, is far ahead of the French system in this area.

104. The third distinctive feature of French prosecutors—a tradition viewing this work as a life-long career—is even more true of French judges. In this respect, however, the judiciaries in France and the United States are not that different. The typical American judge is first appointed or elected after considerable experience as an attorney or prosecutor, and then remains a judge until retirement. See, e.g., H. STUMPF, AMERICAN JUDICIAL POLITICS (1988).

105. Another distinctive feature of the judicial corps in France is the high proportion of women judges. In 1979, 23% of all magistrates (including prosecutors) were women, and the figure is expected to surpass 50% by 1990; a higher proportion of women is found among judicial than among prosecutorial magistrates. J. VINCENT, G. MONTAGNIER & A. VARINARD, *supra* note 40, § 466.

with the same classification grades and promotion procedures.<sup>106</sup> However, judges are not subject to a similar chain of command;<sup>107</sup> as in the United States, judicial decisions may only be reversed through the appellate process.<sup>108</sup> Moreover, in order to protect their independence and perceived fairness, French judges are considered, in principle, "unremovable":<sup>109</sup> Once appointed, they hold office until the age of mandatory retirement and may not be fired, suspended, transferred to a different court, or even promoted against their wishes.<sup>110</sup>

To deal with the inevitable "bad apples," a special procedure exists for ordering disciplinary measures—which include removal, demotion or transfer<sup>111</sup>—but this procedure is used infrequently.<sup>112</sup> Thus, in practice, the quality of judicial performance appears to be maintained by other mechanisms: (1) careful initial selection and training of judges; (2) use of the promotion process to reward good performance; and (3) broad rights of appeal. The first two of these will be considered presently, and the third is discussed in the Appendix.<sup>113</sup>

All French magistrates (including prosecutors) are classified in one of five ranks.<sup>114</sup> Except for the highest rank, promotion requires a certain number of years of experience<sup>115</sup> and inscription on an approved list, made up under the supervision of the Commission of Advancement, which is composed of both judges and prosecutors.<sup>116</sup> Every magistrate has his or her own personnel file or *dossier*,<sup>117</sup> thus allowing the Commission to use the magistrate's past performance in making promotion decisions.

Although we must learn more about how the French system works

106. See *infra* notes 114-16 and accompanying text.

107. See *supra* text accompanying notes 78-82.

108. See FRENCH SYSTEM, *supra* note 41, at 36-38.

109. J. VINCENT, G. MONTAGNIER & A. VARINARD, *supra* note 40, §§ 479-481.

110. *Id.* Apparently, judges may be given different or fewer cases by their superiors, or be transferred to a different assignment within the same court. *Id.* § 73.

111. These decisions are made by the *Conseil supérieur de la magistrature*, *id.* § 492, which also has a role in the initial appointment of judges. *Id.* § 483, at 504 n.11. The sanctions available are: (1) reprimand, with a notation in the judge's personnel file; (2) transfer to a different assignment; (3) removal of certain powers; (4) reduction in grade; (5) forced retirement; and (6) dismissal, with or without loss of pension rights. *Id.* § 493.

112. Between 1958 and January of 1981 there were only 39 disciplinary actions. *Id.* § 492 n.37. In 1982 there were approximately 3,600 professional judges in France. See *id.* § 466.

113. See *infra* notes 737-42 and accompanying text.

114. The highest classification includes judges of the French supreme judicial court (*Cour de cassation*), the first presidents and Attorneys General of the Courts of Appeal, and certain judges in courts in the major cities. J. VINCENT, G. MONTAGNIER & A. VARINARD, *supra* note 40, § 483, at 535 n.11.

115. For example, to be promoted from the lowest rank to the next rank requires seven years of active service. *Id.* § 484.

116. *Id.* The members of the Commission are nominated by the College of Magistrates, which is composed of magistrates elected from each appellate district. *Id.* § 484 n.12.

117. A. SHEEHAN, *supra* note 41, at 14.

in practice, the system appears to be superior to ours in several respects. Judges in the United States at a given court level may aspire to higher judicial positions, but there is little assurance that their ability and performance level will be recognized by the politicians or advisory committees responsible for filling these positions.<sup>118</sup> There are fewer systematic records of judicial performance, such as disposition rates and backlog, appellate reversal rate, forced recusals, and complaints received from parties or witnesses. Moreover, many of the most desirable higher positions are filled not from the ranks of experienced jurists, but "laterally" by attorneys with political connections but little or no judicial experience.<sup>119</sup> Even where promotions are guided by performance rather than by politics, the bar tends to control advancement decisions and other judges have little input. The French system, which gives other judges and prosecutors an explicit role in promotion decisions, may or may not yield better decisions, but it is certainly different and worthy of further study.

## 2. Training

The procedures for selection and training of French judges are identical to those previously described for prosecutors,<sup>120</sup> except that judges are appointed with the advice of a special commission.<sup>121</sup> Thus, most French judges begin their careers having received twenty-four months of specialized pre-appointment training, and they receive four months of additional training some time during the first four years of service.

In contrast, specialized training—either before or after appointment or election to the bench—traditionally has not been required of American judges. This apparently casual approach to judicial competence may reflect both the influence of democratic theory—elected officials require no particular training—and the tradition of electing or appointing older, more experienced attorneys to the bench. However, in recent years the federal courts and many states have adopted rules requiring judges to attend special orientation and training sessions within a certain period of time after appointment,<sup>122</sup> and experimental attempts

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118. See generally H. STUMPF, *supra* note 104.

119. See *id.* at 180, 218 (57.8% of justices on state high courts from 1961 to 1968 and 56% of justices on the U.S. Supreme Court from 1933 to 1981 had prior judicial experience). In 1977, 24% of state trial judges had been promoted from the position of lower court judge. *Id.* at 184. From President Johnson's term through President Reagan's first term, the proportion of district court appointees with prior judicial experience ranged between 34 and 55%; and between 54 and 75% of court of appeals appointees had had such experience. *Id.* at 199, 202.

120. See *supra* notes 89-95 and accompanying text.

121. J. VINCENT, G. MONTAGNIER & A. VARINARD, *supra* note 40, §§ 474-475.

122. In Minnesota, for example, the Supreme Court requires that all state judges complete 45 hours of approved judicial education coursework every three years (the same number of CLE credits required of attorneys), and that all district court judges complete an approved sentencing institute

are being made to adapt "hands on" trial advocacy training methodology<sup>123</sup> to the training and improvement of judges.<sup>124</sup>

Such training programs may be preferable to the French program, which does not offer structured feedback or critique of simulated judicial exercises.<sup>125</sup> Nonetheless, many other American jurisdictions still have only minimal judicial training requirements; as a result, the quality of their judges is only as good as their selection process. And the quality of judges determines, in large measure, the quality of justice. This is particularly true in the trial courts, where many decisions are legally or practically nonappealable.<sup>126</sup> Arguably, French judges need to be better trained than ours due to their more active role at trial and during pretrial investigation; still, it seems clear that American judges need more training than they have traditionally received.

### III

#### SCOPE OF THE CRIMINAL LAW: VARIETIES OF DECRIMINALIZATION

The quality of justice dispensed by police, prosecutors, judges, and other officials is determined not only by the quality of these officials, but also by the nature of the offenses that they must handle. A system that must process large numbers of trivial, unpopular, difficult-to-enforce laws will have fewer resources to devote to serious offenses against persons and property. Accordingly, many observers of the American system have argued for the repeal or narrowing of laws involving

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during each term of office. In addition, within the first year after appointment or election all new judges must complete an orientation course approved by the Office of Continuing Education for State Court Personnel (for example, a three- or four-week course at the National Judicial College of the University of Nevada at Reno). Supreme Court Administrative Policy No. 11, Policies Regulating Continuing Education for Members of Minnesota's Judiciary (Oct. 11, 1979).

In the federal system, the training of judges and other court personnel is supervised by the Federal Judicial Center, established in 1967. See H. STUMPF, *supra* note 104, at 144.

123. This usually consists of videotaped trial exercises with both self critique and professional feedback.

124. Such a program was established at the University of Minnesota Law School in the spring of 1983, under the direction of Clinical Professor Stephen Simon, and has also been offered at the National Judicial College at Reno. For a description of the training program at the University of Minnesota, see Simon & Poritsky, *Judicial Trial Skills Training*, 37 J. LEGAL EDUC. 428 (1987).

125. See *supra* text accompanying note 93. I also doubt whether the French practice of appointing judges at the outset of their legal careers could or should be adopted in the United States. Indeed, some French observers have expressed a preference for the greater age, experience, and prestige of American judges. See, e.g., *Faut-il faire le procès des juges?*, L'EXPRESS, Apr. 10, 1987, at 46, 50.

126. In criminal cases, of course, the appeal of most trial rulings adverse to the prosecution is barred by double jeopardy rules. See generally W. LAFAYE & J. ISRAEL, *CRIMINAL PROCEDURE* §§ 24.1, 24.3 & 24.4 (1985). Defendants have broader legal appeal rights, but in practice trial judges have broad discretion in many areas affecting the conduct of the trial. Even constitutional requirements and standards of review leave room for considerable lower court discretion in making critical factual determinations. See, e.g., *infra* text accompanying notes 184-86 & 253.

"victimless" crimes,<sup>127</sup> particularly the following: public drunkenness; vagrancy; disorderly conduct; various sexual acts when occurring between consenting adults (fornication, adultery, bigamy, incest, sodomy, homosexuality, and prostitution); obscenity; pornography; drug offenses; abortion; gambling; and juvenile offenses that would not be criminal if the actor were an adult.

In France, as a result of legislative and administrative decriminalization and downgrading of offense severity, such problematic offenses appear to play a much smaller role in the criminal justice system than they do in the United States. The impact is particularly visible in the law enforcement and court systems responsible for handling serious offenses against persons and property.

There is some question whether the offenses listed above are all "victimless" in any single sense of the word, or whether a workable definition of this term could ever be devised.<sup>128</sup> The alternative concepts sometimes employed—"morals," "public order," "complaintless" or "consensual" offenses—confront similar definitional problems. For present purposes, however, it is sufficient to note that most of these offenses (hereinafter "consensual offenses") share at least two of the following three characteristics: (1) generally, police officers are the only complaining parties; (2) the offense involves goods or services that are prohibited but strongly desired by the participants, or acts over which the actor has little control; and (3) the targeted individual harms or social dangers are widely seen as not very serious, and not worth the cost of social intervention.<sup>129</sup>

Each of these three attributes causes major problems in administering criminal justice. The absence of complaining parties makes these offenses difficult to detect and prosecute, and forces the police to use methods of enforcement that are unpopular or susceptible to abuse.<sup>130</sup> Lack of visibility also permits discriminatory enforcement, bribery of officials, and extortion by such officials and thus leads to diminished public respect for law enforcement. To the extent that the prohibited goods and

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127. N. MORRIS & G. HAWKINS, *THE HONEST POLITICIANS' GUIDE TO CRIME CONTROL* 6 (1970); H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 151 (1968); see also E. SCHUR, *CRIMES WITHOUT VICTIMS: DEVIANT BEHAVIOR AND PUBLIC POLICY—ABORTION, HOMOSEXUALITY, DRUG ADDICTION* (1965).

128. Frase, *Victimless Crime*, 4 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 1608 (1983) [hereinafter Frase, *Victimless Crime*]; see also E. SCHUR & H. BEDAU, *VICTIMLESS CRIMES: TWO SIDES OF A CONTROVERSY* 66-76 (1974); Oaks, *The Popular Myth of the Victimless Crime*, *U. CHI. LAW ALUMNI J.* 3, 5 (1975). The various alternative criteria for making decisions about the scope of the criminal law are discussed in Frase, *Criminalization and Decriminalization*, 2 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 438 (1983).

129. See Frase, *Victimless Crime*, *supra* note 128, at 1608.

130. These methods might include intrusive searches, electronic surveillance, undercover agents and informers, and decoys.

services are strongly desired, or the prohibited acts are difficult for the actor to control, violation rates remain high notwithstanding the risk of criminal penalties. Finally, the enforcement of these laws diverts scarce criminal justice resources from more serious offenses, overloads the courts and other institutions of criminal justice, and leads to the widespread use of procedural shortcuts—especially plea bargaining<sup>131</sup>—to dispose of cases.

In light of these problems, it is important to examine both the theoretical and practical scope of the criminal law when comparing different systems of criminal justice. As shown in the following table, the consensual offenses listed above apparently play a much smaller role in the French law enforcement and court systems responsible for handling nonpetty crimes—felonies and delicts—than in comparable U.S. systems.<sup>132</sup> In 1980 less than 6% of all persons charged by French police with felonies and nontraffic delicts were charged with these crimes. In the United States comparable offenses accounted for over 30% of all arrests, notifications, or citations for nontraffic violations.

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131. See Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 1012 (1983).

132. There are three grades of criminal offenses under French law: *crimes*, *délits*, and *contraventions* (translated herein as "felonies," "delicts," and "contraventions," respectively). Different trial courts—the assize, correctional, and police courts, respectively—have jurisdiction over each, and more serious offenses are generally subject to more elaborate procedural safeguards. Felonies are punishable by a maximum penalty of either life imprisonment or a prison term of five years or more. Delicts are punishable by a prison term of more than two months but (with some exceptions) not exceeding five years, or by a fine exceeding 10,000 francs (about \$1,750 at the March 1990 exchange rate of 5.7 francs to the dollar). Contraventions are punishable by a fine of up to 10,000 francs and/or a jail term not exceeding two months. There are five classes of contraventions, of which only the fourth and fifth are punishable by incarceration; the maximum lengths for those classes are five days and one month, respectively, for first offenses. See generally FRENCH SYSTEM, *supra* note 41, at 1-2.

Offense	France <sup>133</sup> %	U.S. <sup>134</sup> %
Offenses Against Public Authority	2.2	*
Public Indecency/Morals/Pornography	1.4	*
Drunkenness	*	12.5
Disorderly Conduct	*	8.5
Nonviolent Sex Offenses	*	0.7
Curfew/Loitering	*	0.8
Vagrancy/Begging	0.3	0.3
Prostitution-Related	0.2	1.0
Drug Offenses	1.6	6.4
Gambling	0.1	1.0
Subtotal	5.9%**	31.2%
Violent Offenses (including Arson and Weapons)	9.3	12.8
Property Offenses	67.9	28.8
Other Specified Offenses (not includable in above)	6.4	7.5 <sup>135</sup>
Other, Unspecified Offenses <sup>136</sup>	10.5	19.7
Total (%)	100.0%	100.0%
Total (number)	686,354	9,014,300

\* No such offense specified in statistics for this country.

\*\* This subtotal differs from the sum of the component figures because the figures are rounded off.

To some extent, these statistical differences reflect differences in the relative numbers and types of crimes committed in each country,<sup>137</sup> but

133. These statistics are taken from *LA CRIMINALITÉ EN FRANCE*, *supra* note 39, at 60-61. Since "arrest" as such is an exceptional measure—most defendants are simply sent a notice to appear in court, *see infra* text accompanying notes 301-17—some other general measure of law enforcement activity is needed. The closest analogue appears to be the data on the number of persons charged (*mise en cause*) by the police, that is, "persons against whom sufficient evidence is uncovered, during the course of official investigation, to permit the assumption that they are the perpetrators of or accomplices to a felony or delict." *LA CRIMINALITÉ EN FRANCE*, *supra* note 39, at 5.

There are no statistics on the number of persons charged by French police with contraventions, but French police may charge many consensual crimes as contraventions. *See infra* text accompanying note 147.

134. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES—1980, at 191 (U.S.G.P.O. 1981) [hereinafter *CRIME IN THE U.S.—1980*]. These reports include no traffic offenses other than drunk driving, which has been excluded from the present analysis since traffic offenses are not included in the cited French statistics.

135. *Id.* Most of these (5.1% of all non-traffic arrests) were for violations of "liquor laws." It is not clear how the French deal with liquor violations, since they are not listed separately in the statistics of persons charged by the police with felonies and delicts. Another 1.7% of American arrests in 1980 were of "runaways." No such charge appears in French police statistics, and it is unclear what role the police play in this area. Some have argued that all juvenile offenses which would not be criminal if committed by an adult should be decriminalized. N. MORRIS & G. HAWKINS, *supra* note 127, at 3, 146-56.

136. It seems likely that some of the persons in this category were charged with consensual crimes. If we exclude all unspecified "other" offenses from the denominator—assuming, in effect, that the offense mix in this category is similar to the mix among specified offenses—then the proportions of persons charged with consensual crimes would be 6.5% for France, and 39.0% for the United States.

137. This is probably particularly likely for drug offenses. However, *see infra* note 607.



differences in criminal justice policy have also played an important role. The French have deemphasized consensual crimes through a combination of legislative decriminalization, administrative decriminalization (nonenforcement), legislative downgrading of offense severity, and administrative downgrading of charges. Decriminalization completely removes the offense from the criminal justice system; downgrading allows the application of less expensive and time-consuming procedures and reduces caseload pressures in the courts that handle serious criminal offenses.

There are several examples of legislative decriminalization in France: adult prostitution is not itself a crime, although pandering<sup>138</sup> and public solicitation<sup>139</sup> are; fornication and adultery<sup>140</sup> are not crimes, although bigamy still is;<sup>141</sup> homosexual acts between adults in private are not criminal,<sup>142</sup> and some forms of gambling are prohibited,<sup>143</sup> but many others are permitted.<sup>144</sup> As for legislative downgrading of offense severity, the most notable example was the 1959 decision to move a number of offenses from the middle-level offense category (delicts) down to the least serious offense category (contraventions).<sup>145</sup> Before 1959, the legislature also downgraded several offenses from felonies to delicts.<sup>146</sup>

138. See C. PEN. arts. 334 to 335.

139. See *id.* arts. R.34(13), R.40(11). Article R.34(13) prohibits "passive soliciting," M. VOUIIN, *DROIT PÉNAL SPECIAL* 233 (1976) ("an attitude on a public street of a nature likely to provoke debauchery"), which is a contravention of the third class (fine of 600 to 1,300 francs). Article R.40(11) prohibits "active soliciting," *id.* at 231 ("those who by gestures, words, writing, or other means publicly solicit persons of either sex, to commit debauchery"), which is a contravention of the fifth class (fine of 2,500 to 5,000 francs and/or 10 days to one month in jail for a first offense).

140. Cf. C. PEN. arts. 336 to 339 (repealed 1975) (making fornication and adultery crimes).

141. C. PEN. art. 340.

142. Cf. *id.* Article 330, paragraph 2 of the CODE PÉNAL, defining the felony of public homosexual conduct, was repealed in 1980. However, exposure and other forms of public indecent conduct are still punishable under paragraph 1 of that article, and certain homosexual acts with minors are punishable as delicts under C. PEN. arts. 331 and 331-1. Obscenity and pornography are punished either as delicts, *id.*, arts. 283 to 290, or as a contravention of the fourth class (fine of 1,300 to 2,500 francs and/or up to five days in jail for a first offense). *Id.* arts. R.38(9), (10).

143. See *id.* art. 410 (delict, punishable by up to six months in jail); *id.* art. R.30(5) (contravention of the second class, punishable by a fine of 250 to 600 francs).

144. See, e.g., provisions of the Decree of June 19, 1987, reprinted in C. PEN. (following art. 410) (establishing the procedure for authorization of lotteries).

145. 1 R. MERLE & A. VITU, *TRAITÉ DE DROIT CRIMINEL: PROBLÈMES GÉNÉRAUX DE LA SCIENCE CRIMINELLE* § 378, at 476 (5th ed. 1984); A. SHEEHAN, *supra* note 41, at 81. For a description of a similar legislative downgrading process in West Germany, see J. LANGBEIN, *supra* note 7, at 92-96.

Included in the delict offenses downgraded in 1959 were minor assaults and active public solicitation of prostitution. C. PEN. art. R.40(1), (11). Other examples of consensual crimes chargeable only as contraventions include disturbing the peace, *id.* art. R.34(8), "passive" public solicitation of prostitution, *id.* art. R.34(13), see also *supra* note 139, brawling and other "light violence," C. PEN. art. R.38(1), and first-time public drunkenness, *id.* app. at 842 (86e ed. *Petits Codes Dalloz* 1988-89) (CODE DES DÉBITS DE BOISSONS ET DES MESURES CONTRE L'ALCŒOLISME art. R.5).

146. Examples of crimes reclassified from felony to delict are abortion (1923); bigamy (1933);

The decisions of police and prosecutorial authorities to decline or downgrade charges probably have had an even greater quantitative impact than the legislative decisions noted above. Several consensual offenses are chargeable as either delicts or contraventions,<sup>147</sup> and the statistics previously cited suggest that delict charges are rare. Whether these and other consensual crimes are often charged as contraventions, or whether they are declined outright, is harder to say since there are very few offense-specific statistics for contraventions.<sup>148</sup> As discussed more fully in Parts VI<sup>149</sup> and VII,<sup>150</sup> French prosecutors often decline prosecution, but it is not known how often this involves consensual offenses.

However, even if large numbers of consensual offenses are not declined but are instead prosecuted as contraventions, this does not represent a major drain on the resources of the French criminal justice system. Persons charged with contraventions may neither be arrested nor detained, but may only be issued a citation to appear in court.<sup>151</sup> Generally, far fewer than one percent of contravention cases result in a custodial sentence;<sup>152</sup> such charges are usually disposed of by penal order or preset fine schedule, without even a single court appearance.<sup>153</sup> In this respect, the French police courts, which handle contraventions,<sup>154</sup> function much like the traffic law violations bureaus found in many American municipal courts. Although the American bureaus have not been used to process consensual crimes, this would be one way for Americans to better manage such offenses.<sup>155</sup> This in turn would help us to improve the

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bribery and misappropriation of public funds (1943); and forgery and fraudulent bankruptcy (1958). 2 R. MERLE & A. VITU, *supra* note 40, § 1394. Abortion was partially decriminalized in 1975, and further decriminalized in 1979. C. PEN. art. 317.

147. See C. PEN. app. at 838, 842 (86e ed. Petits Codes Dalloz 1988-89) (CODE DES DÉBITS DE BOISSONS ET DES MESURES CONTRE L'ALCŒOLISME arts. L.65 (delict of third-offense public drunkenness), R.4 & 5 (contravention, first or second offense)); see also *supra* notes 142 (obscenity and pornography) & 143 (gambling).

148. The statistics on persons "charged by police," *supra* note 132, do not include those charged with contraventions. Moreover, conviction statistics by offense are only available for the most serious (that is, fifth class) contraventions and are not available for the years 1979 and 1980, see *supra* note 39. For the years 1981 through 1984 combined, 2.8% of fifth class contravention convictions were for the consensual crimes listed in the text, mostly soliciting prostitution, see *supra* note 139. Additional consensual crimes may be included in the category of "other" offenses, which accounted for 12.5% of fifth class contravention convictions in this four-year period. ANNUAIRE STATISTIQUE, *supra* note 39, at 123.

149. See *infra* text accompanying notes 382-466.

150. See *infra* text accompanying notes 467-562.

151. See *infra* text accompanying note 310.

152. ANNUAIRE STATISTIQUE, *supra* note 39, at 123-25.

153. See *infra* text accompanying notes 551-56 & 587. See generally FRENCH SYSTEM, *supra* note 41, at 31.

154. See *supra* note 132.

155. The parallel between the French Police Court and an American Violations Bureau is discussed more fully *infra* at text accompanying notes 558-62. See generally N. ABRAMS,

integrity of our criminal justice systems and deal more effectively with serious crimes against persons and property.<sup>156</sup>

#### IV

#### RESTRAINTS ON EVIDENCE GATHERING

It is commonly assumed that continental law enforcement authorities are much freer than their American counterparts to gather and use evidence of criminal offenses.<sup>157</sup> Some writers have argued that American police should be given similarly broad powers so that they can fight crime more effectively;<sup>158</sup> we should, in other words, "take the handcuffs off" of our police. Others believe that such powers would be excessive and inconsistent with American ideals.<sup>159</sup> But even if we are unable or unwilling to give our police broader powers, the absence of such powers could pose a significant barrier to American adoption of *other* continental procedures that depend critically on a broad investigatory power. For example, the greater powers of authorities working within continental systems might help to explain why they have less need for coercive plea bargaining than do U.S. authorities: When prosecutors have mostly "dead bang" cases (with little risk of acquittal), they have much less incentive to offer charge or sentencing leniency in return for waiver of trial rights.<sup>160</sup> Thus, whether or not one accepts the desirability and feasibility of "de-handcuffing" American police, it is essential to examine the extent to which continental investigative authorities really do have broader powers than their American counterparts.

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ADMINISTRATIVE PROCESS ALTERNATIVES TO THE CRIMINAL PROCESS (1979) (suggesting switch to civil administrative process enforcement for certain criminal offenses).

156. As shown in the table in the text, 77% of the persons charged by French police with non-traffic felonies and delicts were charged with violent or property offenses, whereas such offenses represented only about 42% of American arrests. The comparatively low proportion of consensual crimes charged as felonies or delicts thus permits the French police and criminal court systems responsible for non-petty offenses to concentrate more of their efforts on violent and property crimes.

157. See Damaška, *Evidentiary Barriers*, *supra* note 7, at 506, 522; Tomlinson, *supra* note 5, at 182-83. These two articles deal with both the limits on law enforcement investigatory activity and related exclusionary rules, and the general rules of trial evidence and procedure such as hearsay, privilege, and impeachment. The remainder of this Part of the Article focuses on the former category of evidentiary restrictions. General trial evidence and procedure rules are discussed in the Appendix, *infra* text accompanying notes 703-36.

158. See, e.g., *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting) (noting absence of exclusionary rules in England and Canada); Schlesinger, *supra* note 2, at 377-85 (expressing a preference for European rules encouraging defendants to testify before and at trial). Ironically, others have suggested that American exclusionary rules should be cut back for the opposite reason—because they are ignored by police and courts, thus breeding disrespect for the law. M. GRAHAM, *supra* note 9, at 263-65.

159. Tomlinson, *supra* note 5, at 195.

160. Similarly, the more admissible evidence of guilt the prosecution has, the more it can afford to allow broad pretrial discovery to the defense, with less fear that evidence-tampering or "tailoring" of defense evidence will prevent conviction at trial. See *infra* text accompanying notes 669-77 (discussing French and American discovery rules).

### A. Overview of French Investigatory Powers and Exclusionary Rules

The French Code of Criminal Procedure permits four types of investigations: investigations of "flagrant"<sup>161</sup> offenses; "preliminary" investigations;<sup>162</sup> identity checks;<sup>163</sup> and formal judicial investigation conducted

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161. A "flagrant" felony or delict is one that is "in the process of being committed or which has just been committed." Offenses may also be treated as flagrant at the request of the head of a household in which the offense was committed, or "when, in the period immediately following the act" a person "presents traces or indications leading to the belief" in his complicity. Proc. Code art. 53. In such cases, the Code permits Officers of the Judicial Police (as well as prosecutors and examining magistrates, *id.* arts. 68, 72) to: (1) search the scene of the offense, and seize any evidence found there, *id.* art. 54; (2) search the domiciles of all persons who appear to have participated in the offense or to be in possession of evidence, and seize any evidence "useful to the manifestation of the truth," *id.* art. 56; (3) designate experts to conduct scientific or technical examinations, *id.* art. 60; (4) detain persons on the scene until completion of the investigation, *id.* art. 61; (5) summon (by force, if necessary) and interrogate (not under oath) any persons capable of furnishing evidence, *id.* art. 62; and (6) place witnesses and suspects in investigatory detention (*garde à vue*) for up to 24 hours (which can be extended to 48 hours with the approval of the prosecuting attorney), *id.* art. 63.

Investigatory detention is frequently employed; it can also be invoked during a preliminary investigation or a judicial investigation, *see infra* note 167. The total number of persons subject to such detention in 1980 represented 38% of the total number of persons charged by police with felonies or non-traffic delicts. If "bad check" cases are excluded, the proportion is 45%. LA CRIMINALITÉ EN FRANCE, *supra* note 39, at 64. About one-seventh of all detainees were held for more than 24 hours. *Id.*

162. Proc. Code arts. 75 to 78. These inquiries "constitute the *only* form of investigation used in most cases involving traffic violations, contraventions, and nonflagrant delicts." FRENCH SYSTEM, *supra* note 41, at 11. They are noncoercive procedures: Searches and seizures of evidence may only be made with the express written consent of the person affected, and the police cannot summon suspects and witnesses or detain persons at the scene. However, if a suspect or witness "voluntarily" comes to the police station or is being held for some other reason, he or she can be placed in investigatory detention for the same duration and be subject to the same procedural protections applicable in a flagrant offense investigation. The prosecutor may use the results of a preliminary investigation in deciding whether to request the opening of a judicial investigation, to send the matter directly to police or correctional court, or to decline prosecution. *Id.* at 11-12.

163. Officers of the Judicial Police (and under their orders, Agents and Assistant Agents) may demand identification from any person suspected of committing or attempting an offense, or preparing to commit a felony or delict. Officers may also demand identification from one who is likely to furnish information useful to an inquiry in a case of felony or delict, or who is a person sought by order of a court. Identification may also be demanded "to prevent a breach of the public order, particularly a violation of the security of persons and property." Proc. Code art. 78-2. If the person refuses or is unable to furnish identification, he or she may be detained for up to four hours if necessary to permit verification of his or her identity. Certain procedural protections apply to such detentions, and to the creation of police records based on the incident. *Id.* art. 78-3; *see infra* text accompanying note 215; *see also infra* note 351.

Although weapons frisks during an identity check are not specifically authorized, they were common under prior laws and were upheld by the Court of Cassation. FRENCH SYSTEM, *supra* note 41, at 12.

by an examining magistrate.<sup>164</sup> The Code stipulates the evidence-gathering and arrest powers available under each type of investigation.<sup>165</sup> In addition the Code defines, with varying degrees of specificity, when the failure to comply with these rules will lead to exclusion of the evidence obtained.<sup>166</sup>

At first glance, these provisions do appear to give French law enforcement authorities much broader powers than are enjoyed by police and prosecutors in the United States. French search and seizure powers are indeed broader in several respects: First, there is no general legal requirement of probable cause to search, arrest, or detain.<sup>167</sup> Second, there is no general judicial warrant requirement for search or arrest.<sup>168</sup> Finally, identity checks need not always be based on individualized suspicion, and detention for identification purposes may last for up to four hours. Moreover, there is no separate "articulable suspicion of danger"

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164. Proc. Code arts. 79 to 190. A judicial investigation (*instruction*) is required only when the prosecution wishes to charge a felony. Use of the *instruction* in contravention cases is very rare. Its use in delict cases is a little more common; in recent years, less than 10% of delicts tried in correctional court have been preceded by an *instruction*. An *instruction* is only used when further investigation is needed, when the case is politically sensitive, or when there is a need for an arrest warrant, pretrial detention, or pretrial supervision. FRENCH SYSTEM, *supra* note 41, at 12-13.

The judge has broad power to issue arrest and detention orders, conduct searches, question witnesses and suspects, and undertake other acts of investigation. *Id.* at 13-15. Most of these powers may also be delegated to other judges, or to Officers of the Judicial Police, by "rogatory commissions." Proc. Code art. 151. The right to counsel and warnings of the right to remain silent are required only for those persons as to whom there exist "grave and concordant indications of guilt." Proc. Code arts. 104, 105, 114; *see also* FRENCH SYSTEM, *supra* note 41, at 14-15.

165. FRENCH SYSTEM, *supra* note 41, at 8-16.

166. *Id.*

167. However, the opening of a flagrant offense inquiry requires objective signs (*indices apparents*) that an offense has occurred and is still "flagrant." *See* FRENCH SYSTEM, *supra* note 41, at 9 n.59. Moreover, the decision to renew (extend) the *garde à vue* during the course of a flagrant offense investigation requires "grave and concordant indications of such a nature as to substantiate charges against [the suspect]." Proc. Code art. 63[2], [3].

In contrast, the following procedures apparently require no particular suspicion or justification: the first 24 hours of detention in *garde à vue*, Proc. Code arts. 63[1], 77; renewal of the *garde à vue* during a preliminary investigation, 2 R. MERLE & A. VITU, *supra* note 40, § 1086; searches carried out during a flagrant offense inquiry, Tomlinson, *supra* note 5, at 185-88; searches, arrests, and detentions carried out directly by the examining magistrate, or by means of a rogatory commission, FRENCH SYSTEM, *supra* note 41, at 13-15; and the temporary, pre-arraignment detention permitted under the immediate appearance procedure, *see infra* note 301 and text accompanying notes 316-17.

168. The closest counterpart to the Anglo-American search warrant is the rogatory commission. *See* FRENCH SYSTEM, *supra* note 41, at 14-15; *see also supra* note 164. However, the search powers thus delegated are apparently limited neither by "particularity" nor "staleness" rules. FRENCH SYSTEM, *supra* note 41, at 14 (examining magistrate has almost complete discretion).

Arrest warrants are sometimes issued by examining magistrates in the course of a judicial investigation. *Id.* at 15. Even without an arrest warrant, however, Officers of the Judicial Police who are executing a rogatory commission may hold suspects in investigatory detention for up to 24 hours without judicial approval. Proc. Code art. 154[3].

requirement for accompanying weapons frisks.<sup>169</sup> Police powers to interrogate are broader because there is no general *Miranda* rule,<sup>170</sup> and defendants may be held in investigatory detention (*garde à vue*) for up to forty-eight hours without probable cause, judicial approval, or mandatory court appearance.<sup>171</sup> Pretrial line-ups are not protected by a right-to-counsel rule.<sup>172</sup>

Furthermore, although the Procedure Code does provide important safeguards for many of these investigatory procedures, the exclusionary remedies to enforce these safeguards are quite narrow.<sup>173</sup> Finally, Officers of the Judicial Police (OJPs) directing the investigation of "flagrant" offenses have several other important powers not expressly granted to American police: They may detain any person on the scene, summon witnesses to testify (not under oath), and designate expert witnesses to conduct scientific or technical examinations.<sup>174</sup>

This is indeed a formidable array of investigatory powers, strongly suggesting that American law enforcement authorities are, relatively speaking, "handcuffed" by limited authority and strict exclusionary rules. The discussion below will attempt to demonstrate, however, that American police can and do exercise most of the powers listed above and that the evidentiary fruits are usually admissible under one theory or another. The discussion also notes important French safeguards lacking in the United States, and concludes with a comparison of arrest and conviction rates in France and the United States. It may still be true that French authorities have more power than their American counterparts, and that French citizens have fewer rights. Subject to further research, however, we must no longer simply *assume* that the American system protects individual rights and limits investigative authority more than the French system does, nor that the French system is significantly more successful at catching and convicting offenders.

### *B. Comparison of American Police Powers and Exclusionary Rules*

Contrary to the assumptions of both liberal and conservative critics, American police powers are, in practice and even in theory, almost as broad as those enjoyed by French investigating authorities. This is true because our substantive constitutional rights rarely apply or are easily avoided by the police, and because the exclusionary remedy is the exception rather than the rule. To readers who regularly teach or write in the

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169. See *supra* note 163.

170. See *infra* text accompanying notes 222-23.

171. See *infra* text accompanying notes 241-44.

172. See Judgment of July 8, 1959, Bull. Crim. No. 347; Judgment of October 21, 1975, Bull. Crim. No. 221; L. LAMBERT, FORMULAIRE DES OFFICIERS DE POLICE JUDICIAIRE 180 (1979).

173. See *infra* text accompanying notes 254-56.

174. See *supra* note 161.

area of constitutional criminal procedure, the specific American rules summarized below will seem very familiar, but it is also important to consider the cumulative impact of all these rules: To a very great extent, the American police, like their French counterparts, can do whatever they want to do.

### 1. *Probable Cause Requirements*

Although probable cause is a presumptive fourth amendment requirement to arrest, search, or detain someone,<sup>175</sup> there are numerous exceptions to this rule. To begin with, most searches occur either incident to an arrest or by consent of the arrestee.<sup>176</sup> The former situation requires arrest but not "search" probable cause; the latter requires neither.<sup>177</sup> Moreover, the power to search incident to arrest continues for some period of time after arrest, at least with respect to the person and clothing of the arrestee.<sup>178</sup> An even broader search without probable cause is permitted when an arrestee is booked into jail.<sup>179</sup> If the search involves the arrest of a person in a car, the searchable area is deemed to include the entire passenger compartment and any containers found therein.<sup>180</sup> If the police validly impound a car (whether occupied or unoccupied), they may routinely examine and take an inventory of the entire contents of the car, including any closed compartments and luggage therein.<sup>181</sup> Cars may also be stopped at roadblocks set up at or near

175. See W. LAFAVE & J. ISRAEL, *supra* note 126, § 3.3(a).

176. Van Duizend, Sutton & Carter, *A Review of the Search Warrant Process*, 8 STATE CT. J. 4, 6 (1984). This study also suggests that "consent is the easiest thing in the world to obtain . . . you just make an offer that cannot be refused." As one officer put it:

[You] tell the guy, "Let me come in and take a look at your house." And he says, "No, I don't want to." And then you tell him, "Then, I'm going to leave Sam here, and he's going to live with you until we come back [with a search warrant]. Now we can do it either way." And very rarely do the people say, "Go get your search warrant, then."

*Id.* at 6. One might add that such "offers" are particularly irresistible when made to a *nonsuspect* who has sufficient "joint access or control" over the premises to give valid "third-party" consent. See *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974) (cohabitants assume the risk that any one among them might permit search of common areas).

177. Search incident to arrest requires a valid custodial arrest based on probable cause, but police may search the arrestee and the area of the arrestee's "immediate control" without independent probable cause to search. *United States v. Robinson*, 414 U.S. 218, 235 (1973) (search of the arrestee); *Chimel v. California*, 395 U.S. 752, 763 (1969) (establishing "immediate control" test). "Voluntary" consent, by the defendant or a third party, avoids both probable cause and warrant requirements. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

178. *United States v. Edwards*, 415 U.S. 800 (1974) (person arrested at night and searched the following morning).

179. *Illinois v. Lafayette*, 462 U.S. 640 (1983) (inventory search of arrestee's shoulder bag).

180. *New York v. Belton*, 453 U.S. 454, 460 (1981).

181. *Colorado v. Bertine*, 479 U.S. 367 (1987) (inventory of contents of closed containers found in vehicle of drunk-driving arrestee); *South Dakota v. Opperman*, 428 U.S. 364 (1976) (inventory search of car impounded for parking violations).

international borders.<sup>182</sup> Roadblocks far from any border have also been upheld when used to enforce driver's license or drunk-driving laws.<sup>183</sup>

Even where the probable cause requirement applies—for example, search of a private residence, office, or motor vehicle—the standard is not very strict. In recent years the Supreme Court has substantially relaxed the requirements of probable cause based on information from anonymous informants,<sup>184</sup> and has also held that evidence need not be suppressed when it is obtained in reasonable reliance on a warrant subsequently found to be defective because of a prior incorrect determination of probable cause.<sup>185</sup> Read together, these two rulings have rendered most magisterial findings of probable cause practically unreviewable.<sup>186</sup>

## 2. Warrant Requirements for Arrests and Searches

The fourth amendment also imposes a presumptive judicial warrant requirement for arrest, search, or detention,<sup>187</sup> but here again there are many exceptions, and most searches and arrests in fact are conducted without a warrant.<sup>188</sup> The broad French provision for warrantless search and detention in "flagrant" cases has much in common with the American "hot pursuit" and "exigent circumstances" exceptions to the warrant requirement.<sup>189</sup> The latter exceptions apply in many recent-

182. See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (checkpoint 66 miles north of U.S.-Mexico border).

183. *Texas v. Brown*, 460 U.S. 730 (1983) (driver's license checkpoint); *State v. Deskins*, 234 Kan. 529, 673 P.2d 1174 (1983) (drunk-driving roadblock).

184. See *Illinois v. Gates*, 462 U.S. 213 (1983) (abandoning the "two-pronged" standard of probable cause requiring evidence of informant's veracity and basis of knowledge, and upholding search warrant based largely on anonymous telephone tip under a more flexible "totality of the circumstances" test).

The French supreme judicial court (*Cour de cassation*) recently held that an anonymous telephone call does not provide sufficient basis (*indices apparents*) to invoke the "flagrant offense" doctrine described *supra* notes 161 & 167. See Judgment of Feb. 2, 1988, Bull. Crim. No. 52, at 142-45.

185. *United States v. Leon*, 468 U.S. 897 (1984).

186. One might argue that this is no change. See Frase, *Criminal Procedure in a Conservative Age: A Time to Rediscover the Critical Nonconstitutional Issues*, 36 J. LEGAL EDUC. 79, 82 n.10 (1986) (probable cause is too fact-dependent to yield enforceable legal rules; in addition, the two-pronged standard abandoned in *Illinois v. Gates*, 462 U.S. 213 (1983), had already been undercut by the decision in *McCray v. Illinois*, 386 U.S. 300 (1967), giving trial courts broad discretion to deny disclosure of the informant's identity).

187. *Terry v. Ohio*, 392 U.S. 1, 20 (1968); *Katz v. United States*, 389 U.S. 347, 357 (1967); *United States v. Ventresca*, 380 U.S. 102, 106-07 (1965).

188. See Van Duizend, Sutton & Carter, *supra* note 176, at 6. Even when warrants are obtained, the haste and superficiality of these *ex parte* proceedings substantially limit their value. See Goldstein, *The Search Warrant, the Magistrate, and Judicial Review*, 62 N.Y.U. L. REV. 1173, 1182-83 (1987) (1983 study found many proceedings lasted "only two to three minutes" and police often sought judges who would give application minimal scrutiny).

189. See generally *Warden v. Hayden*, 387 U.S. 294 (1967) (warrantless entry to arrest armed robbery suspect).



crime cases, which the French would consider "flagrant." In addition, the American warrant exceptions apply to some offenses that are no longer "flagrant" (for example, when exigent or "hot pursuit" entry is based on a recent tip in an old case). American law enforcement officers may also make warrantless arrests of any person found in a public place if the arrest is based upon probable cause.<sup>190</sup> Detention may then continue for at least several hours—sometimes for several days—without judicial approval,<sup>191</sup> and the required judicial approval for further detention may be obtained in an informal *ex parte* hearing,<sup>192</sup> in most cases based solely on hearsay and written testimony.<sup>193</sup>

As for searches, a number of exceptions apply. Any motor vehicle found in a public place may be searched on probable cause alone without a warrant, and certain containers found inside may also be searched.<sup>194</sup> If the vehicle is impounded, an inventory search may be done without a warrant.<sup>195</sup> When the arrest is properly made without a warrant, all searches incident to that arrest do not require a warrant.<sup>196</sup> Even where an arrest warrant is obtained, it need not specifically authorize the search incident to arrest.<sup>197</sup> Other exceptions to the search warrant requirement include jail booking searches,<sup>198</sup> "frisks" in the course of investigatory stops,<sup>199</sup> various "administrative" searches (such as roadblocks, regulatory inspections, and school and workplace searches),<sup>200</sup> and consensual searches.<sup>201</sup>

Where search warrants are required—for example, for residential<sup>202</sup> and private office searches<sup>203</sup>—the particularity and staleness limitations imposed by American law may grant greater protection to citizens.

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190. *United States v. Watson*, 423 U.S. 411 (1976) (warrantless arrest in a restaurant by postal inspector).

191. See *infra* text accompanying note 248.

192. See *Gerstein v. Pugh*, 420 U.S. 103 (1975) (probable cause determination required for extended detention after arrest).

193. *Id.* at 120.

194. *United States v. Ross*, 456 U.S. 798 (1982) (probable cause to search vehicle allows police to search any container which might contain object of search); see also *California v. Carney*, 471 U.S. 386 (1985) (warrantless search of mobile home in public parking lot permitted); *Chambers v. Maroney*, 399 U.S. 42 (1970) (warrantless search also permitted after car and its occupants have been taken to police station).

195. *South Dakota v. Opperman*, 428 U.S. 364 (1976).

196. See *supra* note 177 and accompanying text.

197. See *United States v. Robinson*, 414 U.S. 218 (1973) (valid custodial arrest permits search of arrestee).

198. *Illinois v. Lafayette*, 462 U.S. 640 (1983).

199. See W. LAFAVE & J. ISRAEL, *supra* note 126, § 3.8.

200. *Id.* § 3.9.

201. *Id.* § 3.10.

202. See, e.g., *Vale v. Louisiana*, 399 U.S. 30 (1970) (invalidating warrantless entry and search of a house).

203. See, e.g., *Mancusi v. DeForte*, 392 U.S. 364 (1968) (invalidating warrantless entry and search of an office).

However, the contrast with French law should not be overstated. American police may rely on a warrant that fails to describe with particularity the things to be seized, unless the defect would have been apparent to a reasonably well-trained officer.<sup>204</sup> The staleness rule—requiring that a search warrant be executed within a certain number of days<sup>205</sup>—seems preferable to the rogatory commission procedure, which is the French equivalent to American warrant procedure and sets no time limit. But the fact that the latter can only be executed by an OJP or by another judge<sup>206</sup> may serve to reduce the number of unreasonably stale searches.

French law also imposes a number of other procedural requirements unknown in the United States. In particular, most residential searches must be witnessed by a resident or by two persons not subject to the administrative authority of the searching official, who must read and sign the official report of the operation.<sup>207</sup>

### 3. *Stop and Frisk Rules*

The French identity check procedure has much in common with the American "stop and frisk" doctrine—both are aimed at preventing, as well as detecting, crime—but the French procedure at first glance appears to give the police broader powers. French law does not always require *individualized* suspicion for preventive stops,<sup>208</sup> nor is any suspicion of danger required for accompanying weapons frisks,<sup>209</sup> and French stops may last longer (up to four hours).<sup>210</sup>

Once again, however, we must ask whether American law actually

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204. *Massachusetts v. Sheppard*, 468 U.S. 981 (1984). In an earlier case, the Supreme Court had held that the particularity requirement was satisfied by a warrant specifying certain items "together with other fruits, instrumentalities and evidence of crime at this [time] unknown." *Andresen v. Maryland*, 427 U.S. 463, 479-82 (1976).

205. See, e.g., FED. R. CRIM. P. 41(c)(1); MINN. STAT. ANN. § 626.15 (West Supp. 1990).

206. Proc. Code art. 151[1].

207. See *id.* arts. 56 to 57.

208. Cf. *Terry v. Ohio*, 392 U.S. 1 (1968) (requiring particularized suspicion for a stop and weapons frisk).

Between 1983 and 1986, the French Procedure Code required all identity checks to be based either on individualized suspicion or on some immediate threat to public safety in the area. Accordingly, the Court of Cassation invalidated a stop based on general frequency of crime in the area (subway stations). Judgment of Oct. 4, 1984, Bull. Crim. No. 287, at 767-69. See generally J. PRADEL, *supra* note 40, § 307. But in 1986 the Code was changed to allow identity checks "to prevent a breach of the public order, particularly a violation of the security of persons and property." Proc. Code art. 78-2[2]. This change was specifically intended to eliminate the requirement of any "immediate" (in space or time) threat to public safety. See Ministère de la Justice, *Circulaire* of Sept. 10, 1986, 1986 RECEUIL DALLOZ-SIREY, *Législation* [D.S.L.] 487.

209. See *supra* note 163.

210. *Id.* The U.S. Supreme Court has declined to impose any specific maximum time limit on an investigative stop, but the Court has invalidated the detention of a traveler's luggage for 90 minutes. *United States v. Place*, 462 U.S. 696 (1983); cf. MODEL CODE OF PRE-ARREST PROCEDURE, *supra* note 57, § 110.2(1) (recommending a maximum length of 20 minutes). In *Place*, the Court "question[ed] the wisdom of a rigid time limitation." 462 U.S. at 709 n.10.

provides suspects with significantly greater protection. American cases invalidating an investigatory stop are rare,<sup>211</sup> and courts increasingly avoid even the minimal "articulable suspicion" requirements by holding that no forcible "stop" occurred at all.<sup>212</sup> American cases invalidating frisks are almost as rare as cases invalidating stops,<sup>213</sup> and the permissible scope of the frisk appears to be expanding.<sup>214</sup>

Moreover, French identity checks are more limited in several other respects than American investigatory stops.<sup>215</sup> First, French suspects may only be detained for the time "strictly required" to establish their identity.<sup>216</sup> Second, the procedure may not apply to persons preparing to commit, or possessing evidence relevant to commission of, a contravention.<sup>217</sup> Third, an identity check must be authorized by an OJP.<sup>218</sup> Fourth, French suspects who have been stopped cannot be held incommunicado.<sup>219</sup> Finally, there are limitations on the taking of photographs and fingerprints and on the creation of permanent police records of the encounter.<sup>220</sup>

#### 4. *Miranda Rights During Police Interrogation*

Although some French suspects do have *Miranda*-like rights<sup>221</sup> to

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211. This is especially true in the case of traffic stops. See *People v. Ingel*, 36 N.Y.2d 413, 420, 330 N.E.2d 39, 44, 369 N.Y.S.2d 67, 74 (1975) (required basis for traffic stop is "minimal. An actual violation of [traffic laws] need not be detectable. . . . All that is required is that the stop be not the product of mere whim, caprice, or idle curiosity.").

212. See, e.g., *INS v. Delgado*, 466 U.S. 210 (1984) (no stop occurred when INS agents entered factory and questioned employees about their citizenship while other agents remained stationed near exits).

213. See, e.g., *State v. Gobely*, 366 N.W.2d 600 (Minn.) (upholding frisk of a person entering an apartment being searched who refused to identify himself, tried to leave, was "obviously" acquainted with at least one of known suspects, and "could" have been one of the armed robbery suspects not yet identified), *cert. denied*, 474 U.S. 922 (1985). But see *Ybarra v. Illinois*, 444 U.S. 85 (1979) (no basis to frisk patrons of bar being searched for evidence of drug sales).

214. See, e.g., *Michigan v. Long*, 463 U.S. 1032 (1983) (after stop of suspect believed to be dangerous, police could search passenger compartment of his automobile for places where a weapon might be hidden, even though suspect had stepped out of the vehicle).

215. See generally FRENCH SYSTEM, *supra* note 41, at 12.

216. See Proc. Code art. 78-3[3].

217. See *id.* art. 78-2[1]. However, it is possible that article 78-2[2] of the Procedure Code, discussed at *supra* note 208, will be interpreted broadly to allow identity checks intended to prevent "public order" offenses which are only contraventions (for example, disturbing the peace, or solicitation of prostitution, see *supra* note 145). On the other hand, the last clause of this provision, referring to "security of persons and property," suggests that nonviolent breaches of public order may not be covered.

218. Proc. Code art. 78-2[1].

219. *Id.* art. 78-3[1].

220. *Id.* art. 78-3[1], [5].

221. *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring police to inform arrestees of their fifth amendment rights, including their right to presence of counsel during custodial interrogation).

counsel and silence warnings during interrogation by the examining magistrate,<sup>222</sup> no such rights apply during police interrogations, which are much more frequent.<sup>223</sup> On the other hand, French defendants have the right, in theory at least, to withdraw any pretrial confession given to the police or examining magistrate prior to or at the time of trial.<sup>224</sup> In addition, certain procedural protections applicable to French police interrogations are not required by American constitutional law or by local rules and statutes in most jurisdictions: in France the investigatory detention records must note the dates and times of interrogation, rest, and release, and they must also document that the suspect was advised after twenty-four hours of his or her right to a medical examination.<sup>225</sup> These records must also be shown to the suspect and signed by him or her.<sup>226</sup>

Furthermore, there is some question regarding how useful the broader *Miranda* right is to most American defendants. The available empirical evidence suggests that *Miranda* warnings are often not fully given to suspects in custody,<sup>227</sup> and that they are frequently misunderstood when given.<sup>228</sup> The evidence also suggests that the right to counsel is rarely invoked,<sup>229</sup> and that suspects continue to confess almost as frequently as they did before *Miranda* was decided.<sup>230</sup> However, it is possible that these studies were conducted too soon after the *Miranda* decision to fully reflect police assimilation of, and compliance with, that ruling.

On the other hand, more recent decisions of the Supreme Court

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222. See FRENCH SYSTEM, *supra* note 41, at 14-15 (warnings must be given to suspects as to whom there exist "grave and concordant indications of guilt").

223. In 1980, 262,289 persons were held by police in investigatory detention. LA CRIMINALITÉ EN FRANCE, *supra* note 39, at 64. Only about 66,000 criminal matters were referred to examining magistrates in that year. ANNUAIRE STATISTIQUE, *supra* note 39, at 107.

224. 2 R. MERLE & A. VITU, *supra* note 40, § 976. These authors also state, however, that trial judges remain free to consider the validity of the retraction, applying the same broad discretion applied in weighing the confession itself. *Id.*

225. Proc. Code arts. 64 to 65. See generally FRENCH SYSTEM, *supra* note 41, at 10 (citing examples of procedural safeguards).

226. Proc. Code art. 64[2].

227. The best known studies include the following: Note, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519, 1550-52 (1967) (empirical study of practices in New Haven police station pre/post *Miranda*); Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347, 1362-64 (1968) (empirical study of pre/post *Miranda* conduct in the District of Columbia). But cf. Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 DEN. L.J. 1, 10 (1970) (Denver County Jail study found warnings always given).

228. Griffith & Ayres, *A Postscript to the Miranda Project: Interrogation of Draft Protesters*, 77 YALE L.J. 300, 310-11 (1967) (interviews with arrested divinity students); Leiken, *supra* note 227, at 15-18; Medalie, Zeitz & Alexander, *supra* note 227, at 1372-75.

229. Griffith & Ayres, *supra* note 228, at 310-11; Leiken, *supra* note 227, at 27; Medalie, Zeitz & Alexander, *supra* note 227, at 1352 nn. 21-23, 1372 table 8.

230. Medalie, Zeitz & Alexander, *supra* note 227, at 1352 n.20. But see Seeburger & Wettick, *Miranda in Pittsburgh—A Statistical Study*, 29 U. PITT. L. REV. 1, 10-13 (1967).

have substantially undercut *Miranda* itself. Thus, statements obtained in violation of the *Miranda* rules are admissible for impeachment of the defendant if he or she testifies.<sup>231</sup> This highly foreseeable and valuable use therefore gives the police considerable incentive to omit *Miranda* warnings altogether.<sup>232</sup> Moreover, recent cases narrowing the scope of suppressible "fruits" of *Miranda* violations give the police much more reason to hope that unwarned statements will lead to evidence admissible in the case-in-chief.<sup>233</sup> Finally, even if no statement is obtained, omission of the warnings allows a defendant's silence to be used to impeach his or her testimony at trial.<sup>234</sup> In short, it appears that the post-*Miranda* case law strongly encourages police to omit the warnings in exactly those cases where such warnings would be most likely to prevent a suspect from making an incriminating statement.

At the same time, the Supreme Court has continued to limit *Miranda*'s scope. Thus, warnings are not required prior to interrogation of a suspect who "voluntarily" comes to the police station at the request of police and is consequently not considered to be in custody.<sup>235</sup> The requirement of "interrogation" is not met when a suspect in custody "volunteers" a statement in response to booking, other routine police activity, or "subtle compulsion."<sup>236</sup> It is true that *Miranda* has now been supplemented by the sixth amendment right-to-counsel theory first applied in *Massiah v. United States*,<sup>237</sup> and that this protection, where

231. *Oregon v. Hass*, 420 U.S. 714, 723-24 (1975) (interrogation improperly continued after warnings given and suspect asked for a lawyer); *Harris v. New York*, 401 U.S. 222, 226 (1971) (defective *Miranda* warnings).

232. Similarly, if warnings are given and the suspect requests counsel, the police have nothing to lose and much to gain by continuing to press for a statement. *See Hass*, 420 U.S. at 725 (Brennan, J., dissenting).

233. *See Oregon v. Elstad*, 470 U.S. 298 (1985) (second, warned statement obtained approximately one hour after unwarned statement not necessarily suppressible fruit if neither statement shown to be involuntary; lower court and dissenters noted that suspects are very likely to confess again, once "the cat is out of the bag." *Id.* at 334 (Brennan, J., dissenting)); *see also New York v. Quarles*, 467 U.S. 649 (1984) ("public safety" exception to *Miranda*). Justice O'Connor's concurring and dissenting opinion in *Quarles* goes even further, arguing that physical evidence obtained as a result of a voluntary, but unwarned, statement should always be admissible, even where the statement itself is inadmissible. *Quarles*, 467 U.S. at 660.

234. *Fletcher v. Weir*, 455 U.S. 603, 607 (1982) (per curiam) (permitting impeachment use of post-arrest silence when no *Miranda* warnings were given); *cf. Doyle v. Ohio*, 426 U.S. 610, 619 (1976) (impeachment use of silence impermissible when silence followed giving of *Miranda* warnings).

235. *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (parolee who agreed to meet police officer at the state patrol office near the parolee's apartment was not in custody); *see also Berkeimer v. McCarty*, 468 U.S. 420, 435-40 (1984) (roadside questioning during "ordinary traffic stop" is not custodial); *Minnesota v. Murphy*, 465 U.S. 420, 433-34 (1984) (probationer required to meet with probation officer was not in custody during such meeting); *Beckwith v. United States*, 425 U.S. 341, 347 (1976) (suspect who was clearly the focus of a criminal investigation by tax agents was not "in custody" when interrogated in a private home where he occasionally stayed).

236. *Rhode Island v. Innis*, 446 U.S. 291, 301, 303 (1980).

237. 377 U.S. 201 (1964) (use of "wired" informant treated as post-arrest interrogation without

applicable, may be more successful at preventing suspects from making self-incriminating statements to police.<sup>238</sup> However, the *Massiah* doctrine applies only after the defendant has been charged or has appeared in court,<sup>239</sup> whereas most police interrogation takes place at earlier stages.<sup>240</sup>

Apart from *Miranda* guarantees and their relative ineffectiveness, it might be argued that the French police have greater power to obtain admissible statements because of their broad powers to seize and interrogate suspects without any showing of probable cause, and because there is no requirement for judicial review of the detention or even judicial advice of rights and appointment of counsel. The investigatory detention (*garde à vue*) procedure, applicable primarily in the investigation of "flagrant" felonies and delicts, permits OJPs to seize, detain, and interrogate suspects for up to twenty-four hours (or forty-eight hours with the approval of the prosecutor).<sup>241</sup> In the United States, suspects may not be held this long unless the police had probable cause to arrest.<sup>242</sup> In addition, state and federal rules of procedure require that arrested defendants

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counsel). This doctrine was resurrected in *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (emotional appeal by police which elicited statement violated right to counsel), and was extended further in *United States v. Henry*, 447 U.S. 264, 274 (1980) (use of "jail plant" informant violated right to counsel). But see *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986) (jail plant's "merely listening" does not trigger *Massiah* protections).

238. Although some lower courts had held that waivers of the *Massiah* right should be judged by stricter standards than waivers of *Miranda* rights, see, e.g., *United States v. Molabir*, 624 F.2d 1140, 1153 (2d Cir. 1980) (dictum) (waiver ineffective unless judicial officer has given explanation of *Massiah* right's significance), the Supreme Court has now held that *Miranda* warnings generally suffice for waiver of both rights, *Patterson v. Illinois*, 487 U.S. 285, 292-300 (1988). However, the Court indicated that there are still some cases where a waiver valid for *Miranda* purposes will not be valid under *Massiah*. *Id.* at 296 n.9 (sixth amendment protection of attorney-client relationship extends beyond *Miranda*'s fifth amendment right to counsel).

239. *Massiah*, 377 U.S. at 206; *Kirby v. Illinois*, 406 U.S. 682, 688 (1972). The Court suggested that such procedures include "formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* at 689; see also *Brewer v. Williams*, 430 U.S. 387, 398-99 (1977) (*Massiah* right applied where arrest warrant had been issued and defendant had been arraigned on the warrant). The *Brewer* Court cited *Kirby v. Illinois*, 406 U.S. 682 (1972), which held that the analogous *Wade-Gilbert* right to counsel at lineups "attaches only at or after the time that adversary judicial proceedings have been initiated . . . whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby*, 406 U.S. at 688-89.

240. See W. LAFAYE & J. ISRAEL, *supra* note 126, § 1.4(e) (noting that questioning of suspect, while rare, generally takes place after arrest and booking and before charging and arraignment in court). Indeed, interrogation occurs at this early stage almost by definition, since it is often necessary to question the suspect before a charging decision can be made. Similar reasons appear to explain the early timing of most identification procedures. See *infra* note 252 and accompanying text.

241. See *supra* note 161.

242. A prolonged *Terry* stop will be treated as a de facto arrest which is invalid if the police lack probable cause. W. LAFAYE & J. ISRAEL, *supra* note 126, § 3.8(b). Any confession obtained as a result of such an invalid arrest may be suppressible, even if *Miranda* warning and waiver requirements have been met. *Brown v. Illinois*, 422 U.S. 590, 604-05 (1975).

be arraigned in court "without unnecessary delay,"<sup>243</sup> and arrests require judicial review of probable cause prior to extended pretrial detention.<sup>244</sup>

However, each of these American requirements is subject to important limitations and exceptions. The standard of probable cause has become less strict in recent years.<sup>245</sup> Furthermore, if the police can show that a subsequent interrogation was sufficiently "attenuated" from the illegal arrest that led to detention, the fact that an arrest was conducted without probable cause will not result in exclusion.<sup>246</sup> The requirement that arraignment proceed "without unnecessary delay" still allows substantial periods of prearraignment interrogation.<sup>247</sup> Similarly, the constitutionally required judicial review of probable cause may take place several days after arrest,<sup>248</sup> and such hearings may be held *ex parte*, with no need for counsel or other adversary procedures.<sup>249</sup>

### 5. *Right to Counsel at Line-Ups*

Pretrial line-ups in France, whether conducted by the police or the examining magistrate, are not protected by the right-to-counsel requirement recognized by the U.S. Supreme Court in the landmark *Wade* and

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243. See, e.g., MINN. R. CRIM. P. 3.02 (person arrested on a warrant shall be taken "promptly before the court that issued the warrant if it is in session," and otherwise shall be brought before another judge of such court "without unnecessary delay"); MINN. R. CRIM. P. 4.02(5)(1) (*discussed at infra* note 247); see also FED. R. CRIM. P. 5(a) (person arrested with or without a warrant shall be taken "without unnecessary delay before the nearest available federal magistrate" or other authorized judicial officer); *Mallory v. United States*, 354 U.S. 449, 451-53 (1957) (applying rule 5(a) to exclude confession obtained as result of unnecessary delay in taking suspect before magistrate).

244. *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975).

245. See *supra* text accompanying notes 184-86.

246. See, e.g., *Rawlings v. Kentucky*, 448 U.S. 98, 106-10 (1980) (arguably illegal detention did not taint confession obtained 45 minutes later, where defendant had received *Miranda* warnings, the detention was accompanied by a "congenial atmosphere," defendant's admissions were "apparently spontaneous reactions" to police discovery of his drugs in his girlfriend's purse, and any illegality in the detention did not "rise to the level of conscious or flagrant misconduct").

247. See, e.g., MINN. R. CRIM. P. 4.02(5)(1) (requiring that person arrested without a warrant be taken to court in the county where the offense occurred "without unnecessary delay, and in any event, not more than 36 hours after the arrest, exclusive of the day of arrest, Sundays, and legal holidays, or as soon thereafter as such judge or judicial officer is available"). If read broadly, this rule would often allow court appearance to be delayed for several days (for example, from Friday afternoon to noon on Monday); if read narrowly, the rule would require appearance, where feasible, in less than 36 hours, and the Minnesota Supreme Court has stated in dicta that statements obtained during such "unnecessary" delays might be excludable. See *State v. Wiberg*, 296 N.W.2d 388, 391-93 (Minn. 1980) (arraignment after two and one-half days in custody held to constitute unnecessary delay). Under FED. R. CRIM. P. 5(a), which contains only the general "unnecessary delay" language, it appears that confessions obtained within 6 to 24 hours of the start of federal custody are generally admissible if they are voluntary and *Miranda* compliant. 8 J. MOORE, W. TAGGART & J. WICKER, *MOORE'S FEDERAL PRACTICE* ¶ 5.02[6] (2d ed. 1989).

248. See *Williams v. Ward*, 845 F.2d 374, 386-87 (2d Cir. 1988) (upholding 72-hour delay between arrest and *Gerstein* (probable cause) hearing).

249. *Gerstein v. Pugh*, 420 U.S. 103, 120-23 (1975).

*Gilbert* cases.<sup>250</sup> However, the American right to counsel only applies after the commencement of "adversary judicial proceedings" against the defendant,<sup>251</sup> and most police line-ups are conducted before this point. Line-ups before the right to counsel attaches are necessary almost by definition, since it is often only on the basis of the line-up that a decision to commence judicial proceedings can be made.<sup>252</sup> In any case, police and prosecutors have considerable incentive to time the line-up, charging, and arraignment procedures in order to eliminate the counsel requirement. Even where the narrow *Wade* right to counsel applies, it does not appear to be strictly enforced: Courts have "readily avoided reversing convictions by stretching, often beyond reason and logic, the doctrines of independent source and harmless error."<sup>253</sup> As discussed more fully below, lax enforcement is a general problem not limited to line-ups.

## 6. Exclusionary Rules

Even if substantive rights related to search and seizure, interrogation, and line-ups are not really very different under French and American law, it might be argued that French rights are worthless because of the narrow scope of exclusionary remedies available in that country.<sup>254</sup> Moreover, although some American observers have suggested that French rights are effectively enforced by means of administrative discipline,<sup>255</sup> the French themselves are skeptical of such remedies: "[E]xperience proves that the sole ordinary sanction is exclusion."<sup>256</sup>

250. *United States v. Wade*, 388 U.S. 218, 236-37 (1967) (establishing right to counsel at post-indictment line-up); *Gilbert v. California*, 388 U.S. 263, 272-74 (1967) (requiring exclusion of in-court testimony concerning prior line-up identifications where line-up violated accused's right to presence of counsel at line-up).

251. See *supra* note 239 and accompanying text.

252. See Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 210-12 (1984), and authorities cited therein.

253. Grano, Kirby, Biggers & Ash, *Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?*, 72 MICH. L. REV. 717, 722 (1974) (criticizing weakening of right-to-counsel doctrine and suggesting reform).

254. See FRENCH SYSTEM, *supra* note 41, at 4, 16. The Procedure Code contains only a few explicit exclusionary rules, which apply primarily to judicial investigations and certain police searches. Thus, most violations give rise to exclusion only if they are found to have violated "substantial" provisions of the Code, especially "the rights of the defense" (a vaguely defined group of procedural guarantees, often not based on any particular Code provision, which are deemed to be implicit in principles of justice and equity). Violations of the latter type do not necessarily lead to exclusion of evidentiary "fruits," and violations of either type usually require a showing of prejudice to the defendant's interests. Finally, lower courts have limited authority to exclude evidence. *Id.*; see also 2 R. MERLE & A. VITU, *supra* note 40, §§ 1271-1281; Pakter, *supra* note 8, at 8-15, 24-29, 33-38, 52 (noting lack of French exclusionary rule for due process violations and noting increase of exclusion in search and seizure cases).

255. See, e.g., Langbein & Weinreb, *supra* note 2, at 1555.

256. See 2 R. MERLE & A. VITU, *supra* note 40, § 1272, at 541 n.2 (further noting that "it is unfortunate that, at least in serious cases, personal penalties are not imposed [on transgressors]"); accord J.-C. SOYER, *MANUEL DE DROIT PÉNAL ET PROCEDURE PÉNALE* 285 (6th ed. 1984).



Because there are now so many exceptions and limitations to the American exclusionary rules, one could argue that the rules have little impact on police behavior. To begin with, strict standing requirements prevent defendants from objecting to even outrageous violations of another person's rights.<sup>257</sup> Moreover, even where the defendant's own fourth, fifth, or sixth amendment rights are violated, the prosecution may still introduce derivative "fruits" of the violation: (1) if there is sufficient "attenuation" of the causal link between the illegality and the fruits;<sup>258</sup> (2) if the fruits have a legal "independent source";<sup>259</sup> or (3) if the prosecution successfully argues that the fruits would have been "inevitably" discovered by lawful means.<sup>260</sup> Furthermore, the defendant him- or herself is never a suppressible "fruit"<sup>261</sup> no matter how illegal the arrest: only physical or other evidence *derived* from the arrest is suppressible.

Any constitutional illegality must also be shown to be the product of "state action."<sup>262</sup> Thus, the prosecution may make use of evidence obtained by private parties who have conducted searches and seizures without a warrant or probable cause, or who have interrogated the defendant in the absence of counsel. Furthermore, evidence illegally obtained by the police is almost always admissible to impeach the defendant's testimony at trial,<sup>263</sup> and may be almost as useful to the prosecution in this supposedly limited use—or as a means of keeping the defendant

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(discussing nullification as a remedy for unorthodox or improper acts during adjudication); *see also* J. PRADEL, *supra* note 40, § 464 ("the most effective sanction is [not disciplinary but] procedural: exclusion").

257. *See, e.g.,* *Rawlings v. Kentucky*, 448 U.S. 98 (1980) (ownership of drugs seized from companion's purse not sufficient basis to challenge search of purse); *United States v. Payner*, 447 U.S. 727 (1980) (defendant lacked standing to object to government use of illegal search of third party's briefcase); *Rakas v. Illinois*, 439 U.S. 128 (1978) (passenger of car lacks standing to object to search of car); *United States v. Underwood*, 717 F.2d 482 (9th Cir. 1983) (defendant, who had no expectation of privacy in third party's home, could not object to lack of search warrant when police entered home and arrested him).

258. *See, e.g.,* *United States v. Ceccolini*, 435 U.S. 268, 279-80 (1978) (testimony of witness first questioned by the police because of an illegal search need not be suppressed); *Wong Sun v. United States*, 371 U.S. 471, 491 (1963) (connection between defendant's confession and his prior illegal arrest was sufficiently attenuated, in light of defendant's release from custody and voluntary return to meet with police several days later).

259. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (dictum); *see also* *United States v. Crews*, 445 U.S. 463, 471-74 (1980) (in-court identification of robbery defendant not suppressible fruit of defendant's illegal detention, although preliminary identification by victim was based on photograph taken during illegal detention).

260. *Nix v. Williams*, 467 U.S. 431, 447 (1984) (body located using information illegally obtained from suspect was admissible since search parties were close to body's location and thus would have discovered it anyway).

261. *United States v. Crews*, 445 U.S. 463, 474 (1980).

262. *See, e.g.,* *Burdeau v. McDowell*, 256 U.S. 465, 475-76 (1921) (no governmental action where search conducted by agents of defendant's employer).

263. *United States v. Havens*, 446 U.S. 620, 628 (1980) (illegally seized evidence admissible for impeachment, even though defendant did not clearly contradict that evidence until prosecutor brought it up during cross-examination); *Harris v. New York*, 401 U.S. 222, 226 (1971) (*Miranda*

off the stand—as it would be if introduced in the case-in-chief. The “good faith” exception to the fourth amendment exclusionary rule allows evidence to be admitted whenever the police have “reasonably” relied on a statute or on a search or arrest warrant.<sup>264</sup> If all else fails, courts are inclined to find that any improper evidence was harmless error,<sup>265</sup> provided—as is usually the case—that there is other substantial evidence of guilt.

The results of recent empirical studies of the implementation of exclusionary rules mirror the cumulative impact of all of these exceptions and limitations: Fourth, fifth, and sixth amendment violations have almost no impact on the outcome of federal criminal cases and have very little impact in state cases. Studies of the federal system show that only 0.4% of matters that U.S. Attorneys declined to prosecute were rejected primarily because of a search and seizure problem.<sup>266</sup> Of prosecuted federal defendants, only 11% filed a motion to suppress on fourth amendment grounds; evidence was excluded on such grounds in only 1.3% of cases, and half of the cases in which evidence was excluded still ended in conviction.<sup>267</sup>

Similarly, a four-year study of California district attorneys found that only 5% of felony complaints rejected for prosecution were rejected primarily for search and seizure problems; such search and seizure rejections comprised less than 1% of total felony arrests reported by the police.<sup>268</sup> A study of several state court systems found that “due process”-related reasons not limited to search and seizure violations accounted for 1 to 9% of prosecutor rejections at initial screening, and 1 to 12% of postfiling dismissals, mostly in drug cases.<sup>269</sup> Another study of 7,500 cases in three states found that motions to suppress were filed, granted, and resulted in no conviction with the following frequencies:<sup>270</sup>

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violation admitted to impeach); *Walder v. United States*, 347 U.S. 62, 65-66 (1954) (illegally seized evidence used to impeach defendant's testimony).

264. *Illinois v. Krull*, 480 U.S. 340, 359-61 (1987) (reliance on statute); *United States v. Leon*, 468 U.S. 897, 913 (1984) (reliance on warrant).

265. See generally R. FRASE, *CRIMINAL EVIDENCE: CONSTITUTIONAL, STATUTORY, AND RULES LIMITATIONS* 13-14 (1989).

266. COMPTROLLER GEN. OF THE U.S., *IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS* 8-9, 11, 13-14 (1979) (two-month study of case dispositions on fourth amendment grounds in 42 U.S. Attorneys' offices).

267. *Id.*

268. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611, 632-33. Looking at the cumulative effect of the exclusionary rule through all stages of the adjudication process, about 2.4% of felony arrests were dropped due to illegal searches. *Id.* at 635.

269. K. BROSI, *A CROSS-CITY COMPARISON OF FELONY CASE PROCESSING* 18-20 (U.S.G.P.O. 1979) (data for 1977). Similar data were reported for 1979 in B. BOLAND, E. BRADY, H. TYSON & J. BASSLER, *THE PROSECUTION OF FELONY ARRESTS*, 1979, at 9 (U.S. Dep't of Justice 1983).

270. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585, 593-602, tables 2, 8, 12 [hereinafter Nardulli 1983]; see also Nardulli, *The*

Type of Evidence	Percent of All Cases		
	Motion Filed	Granted	No Conviction
Physical Evidence	4.6 <sup>271</sup>	0.69	0.56
Identifications	4.8	0.08	0.01
Confessions	6.6	0.16	0.07

In all these studies, moreover, it must be recognized that many of the cases rejected by prosecutors or dismissed in court would not have led to conviction in any event, because of other evidence problems or policy reasons for nonprosecution.<sup>272</sup> Studies of prosecutors' reasons for declining prosecution suggest that they prefer to cite evidentiary problems rather than purely policy reasons.<sup>273</sup>

### 7. Other Police Investigative Powers

In addition to the broad search powers exercised by Officers of the Judicial Police (OJPs) in the course of a flagrant offense investigation, OJPs have several other important powers not formally granted to American police: the power to detain any person on the scene; the power to summon witnesses to testify (not under oath); and the power to designate expert witnesses to conduct scientific or technical examinations. Viewed in the aggregate, the powers of the OJP rival those of an investigating grand jury in the United States, though French procedure appears to be faster and more efficient.<sup>274</sup>

It would seem that the broad powers of the OJP ought to improve the ability of the French police to solve crimes and present sufficient evidence to obtain conviction. As the discussion below indicates, however,

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*Societal Costs of the Exclusionary Rule Revisited*, 1987 U. ILL. L. REV. 223, 239 [hereinafter Nardulli 1987] (reporting similar results from a later study of Chicago courts, and also concluding that unsuccessful suppression motions "play no systematic role in the guilty plea process").

271. Most of these were drug or weapons cases. Nardulli 1983, *supra* note 270, at 585, 594 table 5.

272. *Id.* at 600; see also Davies, *supra* note 268, at 655.

273. See, e.g., PROSECUTION OF ADULT FELONY DEFENDANTS, *supra* note 38, at 60-68 (following adoption of official office policy permitting assistant district attorneys to charge felony drug cases as misdemeanors, reasons offered by assistants for charging a misdemeanor shifted dramatically from evidentiary reasons to policy reasons); Frase, *supra* note 38, at 264-68, 306-08; see also Nardulli 1987, *supra* note 270, at 234-37 (majority of cases "lost" due to the exclusionary rule would probably not have ended in conviction in any event; if convicted, "vast majority" would not have received a custody sentence; most suppression cases involved drug possession offenses).

274. Another technique available to the French examining magistrate during the investigation is the "confrontation" of witnesses who have provided contradictory accounts. The examining magistrate calls the witnesses before him and asks them to repeat their own account and comment on others' accounts. See H. ABRAHAM, *THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE* 102 (5th ed. 1986) (claiming that this technique is "unlike anything in Anglo-American legal procedure," and that, because of it, "perjured testimony in criminal cases has been almost eradicated"). However, except for problems of obtaining *Miranda* waivers from all witnesses who are also suspects, it is unclear why American police could not use a similar technique; perhaps they do.

the available evidence does not support this hypothesis. One reason may be that American police have no need for such formal powers. Police crime lab technicians may function much like expert witnesses in practice, and the powers to arrest and detain suspects and witnesses can be exercised without formal authority.<sup>275</sup> As discussed below, another reason that seemingly broader investigative powers have little effect on law enforcement effectiveness may be that the investigatory process itself has certain inherent limitations.

### C. Comparative Crime Control Effectiveness

If the investigative powers of the French authorities are much broader than those of American police, one would expect to find that French "clearance" rates—the percentage of known crimes that the police believe they have solved—are also significantly higher than those reported by American police. However, this does not appear to be the case. Although French and American offenses are not defined identically, the following offenses seem sufficiently comparable to permit at least a rough comparison of clearance rates, by offense, in France and the United States:

<u>Offense</u>	<u>1980 Clearance Rates</u> (percent)	
	<u>France</u> <sup>276</sup>	<u>U.S.</u> <sup>277</sup>
Murder & Non-Negligent Homicide	79 <sup>278</sup>	72
Forcible Rape	77	49
Robbery	26 <sup>279</sup>	24
All Burglary & Theft <sup>280</sup>	17	17

As indicated in the accompanying note, the French clearance rate for homicide would be lower than the American rate if some French

275. For example, defendants lack standing to object to another's arrest and detention, and can move to suppress only evidence derived from their own arrest. See *supra* text accompanying notes 257 & 261.

276. LA CRIMINALITÉ EN FRANCE, *supra* note 39, at 60-61.

277. CRIME IN THE U.S.—1980, *supra* note 134, at 182.

278. This percentage is based on 2,253 offenses known, including 1,751 "nonvillainous homicides" (clearance rate equal to 89%). The latter category may include some negligent homicides, which are excluded from the American statistics; excluding them all would lower the French clearance rate to 46%. Another 598 homicides, labeled "suspicious deaths not solved" (clearance rate of zero), are excluded from computation of the French clearance rate shown in the text, since it is not clear how often such deaths are included in American homicide statistics. If they were all included (increasing total offenses known to 2,851), the rate shown in the text would drop to 63%.

279. Includes armed robbery and all other "theft with violence."

280. Includes burglary, larceny/theft, and motor vehicle theft. These have been combined to minimize the effect of differing offense classifications. Forgery, bad checks, other frauds, embezzlement, and receiving stolen property are excluded.

offenses of questionable comparability were excluded (or if others were included). The very large difference in rape clearance rates for the two countries is harder to explain, although it may simply reflect the fact that police statistics for this offense are notoriously unreliable due to variations in rates of victim reporting and police "unfounding."<sup>281</sup> Police statistics for robbery, burglary, and theft are probably more reliable,<sup>282</sup> and the French and American clearance rates for these offenses are quite similar. Although much more research needs to be done here,<sup>283</sup> these preliminary results suggest that the French system is not substantially more effective at solving crimes than the American system.

However, perhaps the advantage of the French system lies not in identifying suspects but in apprehending and convicting them. The broader investigative powers of French authorities, combined with what are commonly believed to be more relaxed standards of proof at trial,<sup>284</sup> may substantially increase the proportion of "cleared" offenses leading to conviction. Unfortunately, the data needed to make such comparisons are not available, but the limited data suggest that overall conviction rates are not significantly different in the two countries. In France, during the two-year period 1979-80, the total number of adult convictions for robbery, burglary, larceny, and motor vehicle theft equaled about 7% of the total number of these crimes known to the police.<sup>285</sup> Although comparable figures are not available for the United States as a whole, the available data suggest very similar conviction rates as a percentage of

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281. "Unfounding" occurs when a police investigation of the complaint shows that no offense occurred or was attempted. See F. ZIMRING & R. FRASE, *supra* note 34, at 67. For a discussion of the problems of police statistics in general, see *id.* at 46-81.

282. Major theft offenses—especially burglary and motor vehicle theft—are more likely to be consistently reported to the police because of the possibility of collecting insurance, and the consequent need to document the offense. See *id.* at 61; LA CRIMINALITÉ EN FRANCE, *supra* note 39, at 5.

283. In addition to problems of offense comparability, it is not clear whether the police in the United States and France employ comparable standards for determining when they have "solved" a crime. The French statistics state that an offense is considered cleared (*élucidé*) when "the proof allows it to be imputed to one or more identified persons . . . without consideration of subsequent decisions of the courts." LA CRIMINALITÉ EN FRANCE, *supra* note 39, at 5. Nevertheless, it is conceivable that French police only consider an offense cleared when conviction seems highly probable. Other possible sources of non-comparability between French and American clearance rates include differences in victim reporting and/or police "unfounding" rates. See *infra* text accompanying note 290.

284. See *infra* text accompanying notes 703-36.

285. The number of offenses known to police in 1979 was compared with the average number of convictions per year for these offenses in 1979 and 1980 (a two-year average was used because offenses known in a given year are not all brought to trial within that year). In 1979, 1,461,410 cases of *vol* (robbery, burglary, and larceny of all types) were reported known by French police. ANNUAIRE STATISTIQUE, *supra* note 39, at 99. In 1979 and 1980, 195,081 persons were found guilty of one of these offenses. *Id.* at 111, 115. The average number per year, 97,541, equals 6.7% of offenses known in 1979.

offenses known.<sup>286</sup>

The conviction-rate data thus lend considerable support to Professor Zeisel's conclusion that "one may easily overestimate the effect of procedural differences," and that "[h]owever much the details of criminal procedure may vary from country to country, the loss between arrest and conviction appears to be the unavoidable result of the judicial safeguards built into all Western law enforcement systems."<sup>287</sup> Based on the clearance rate data presented earlier, it appears that much the same could be said about the loss between offense-reporting and arrest. It remains to be seen whether the first two links in the law enforcement process—the reporting of offenses to and by the police—are comparable in France and the United States. Given the greater rights accorded crime victims in French criminal cases,<sup>288</sup> one might expect higher rates of victim reporting. Similarly, the supposedly greater professionalism of the French police<sup>289</sup> might make them less likely to under report crimes known to them. If such differences in reporting exist, they could distort comparisons of clearance and conviction rates since such rates would be inflated for the country in which a lower proportion of difficult-to-prove cases were reported to and by the police. However, the limited available evidence suggests that French and American reporting rates are quite similar.<sup>290</sup>

286. There are no nationwide, offense-specific statistics on the numbers of persons found guilty in the United States. However, the FBI formerly reported data for selected cities on the disposition of persons charged by the police. In 1977, the last year for which this information was reported, the data was based on a sample of 1,847 cities with a total estimated population of 30,123,000 in 1977. See FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES—1977, at 218 (1978) [hereinafter CRIME IN THE U.S.—1977]. For robbery, burglary, larceny/theft, and motor vehicle theft a combined total of 1,518,464 offenses were reported known to police in these cities: 297,854 of these offenses were cleared; 260,203 persons were "charged," and 93,458 persons were found guilty as charged or guilty on lesser charges. The latter figure represents 6.2% of the 1,518,464 offenses known. As with the French data in the previous note, juveniles are included in the number of offenses known, but are excluded from the numbers of persons convicted. It is not known how representative these 1,847 cities were of the country as a whole, although both the crime rates and the clearance rates reported for these cities were slightly higher than the national averages for that year. *Id.* at 161, 218; see also H. ZEISEL, THE LIMITS OF LAW ENFORCEMENT 8, 18 (1982) (for New York City in 1971, only 6.7% of total felony offenses reported to police led to conviction for a felony or a lesser offense).

287. H. ZEISEL, *supra* note 286, at 25 (conclusion based on comparison of American, German, and Austrian prosecution rates).

288. See *infra* text accompanying notes 651-68.

289. See *supra* text accompanying notes 48-76.

290. Research on these issues is hampered by the fact that the French have not conducted the kinds of broad victim surveys undertaken in the United States since 1973. Cf. F. ZIMRING & R. FRASE, *supra* note 34, at 71-81 (describing U.S. government survey of victimization of individuals and commercial establishments). However, reporting rates may be estimated for property crimes, based on international Gallup polls and police statistics. See Minneapolis Star & Tribune, Nov. 15, 1984, at 23A, col. 1 (in both France and the United States, 9% of adults surveyed reported "home broken into" in the past 12 months; for "money or property stolen," the figures were 11% for France, and 12% for the United States); see also MINISTÈRE DE L'INTÉRIEUR, LA CRIMINALITÉ EN

Perhaps the ultimate measure of crime control effectiveness is the incidence of crime itself. As indicated in the following table, the 1980 American property crime rate (burglary, larceny, and motor vehicle theft combined) was about twice that of France, and the American violent crime rate (murder, rape, and robbery) was about four times higher.<sup>291</sup>

Reported Crime Rates (per 100,000 population) in 1980

	<u>U.S.</u>	<u>France</u>	<u>Ratio</u>
Murder & Non-			
Negligent Manslaughter	10	4	2.5:1
Rape	36	4	9:1
Robbery	244	66	3.7:1
Subtotal: Murder, Rape & Robbery	290	74	3.9:1
Burglary	1,668	512	3.3:1
Motor Vehicle Theft	495	399	1.2:1
(Other) Theft	3,156	2,031	1.6:1
Subtotal: Burglary & All Thefts	5,319	2,942	1.8:1

Of course, crime rates are determined by many factors other than law enforcement effectiveness. Until we learn more about the nature and causes of crime in both countries, we cannot assess the effects attributable to differences in police powers. Indeed, the causal relationship may actually be the reverse: More crime may cause less effective law enforcement because police and courts become overloaded and break down. Viewed in this light, American clearance and conviction rates compare

FRANCE EN 1984, at 66 (1986) [hereinafter MINISTÈRE DE L'INTÉRIEUR] (4,006 cases per 100,000 population, of burglary, larceny, and motor vehicle theft known to police); FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES—1984, at 41 (1985) [hereinafter CRIME IN THE U.S.—1984] (4,492 cases per 100,000 population, of these property offenses). The victimization *percentages* reported in the Gallup polls can be made comparable to the police statistics (reported crime *rates* per 100,000 population) by multiplying the former by 100,000. For example, if 9% of the French say they have been burglarized, this is equivalent to a victimization rate of 9,000 crimes per 100,000; if 11% say money or property was stolen, this yields a rate of 11,000, for a combined burglary/theft rate of 20,000. We can then divide *reported* crime rates by victimization (or “actual”) rates; this yields an estimated reporting rate of 20% for France (4,006 divided by 20,000 (9,000 + 11,000, *supra*)), and 21% for the United States (4,492 divided by 21,000 (9,000 + 12,000)).

291. See CRIME IN THE U.S.—1980, *supra* note 134, at 41; LA CRIMINALITÉ EN FRANCE, *supra* note 39, at 56 (figures rounded to the nearest whole number). The FBI’s “violent crime” index includes a fourth offense: aggravated assault. These offenses were excluded from the table in the text because no comparable offense category exists in French police statistics.

By 1984 the differences shown in the text had narrowed dramatically; the American violent crime rate was “only” twice (2.1 times) as high as France’s, and the American property crime rate was almost the same (1.1 times higher). CRIME IN THE UNITED STATES—1984, *supra* note 290, at 41; MINISTÈRE DE L'INTÉRIEUR, *supra* note 290, at 66.

even more favorably with those of France, for we perform almost as well—with a much heavier caseload. If American authorities are handcuffed, then they must all be Houdinis!

## V

### ARREST AND PRETRIAL DETENTION

The power to arrest and detain suspects is one of the most critical and problematic aspects of any criminal justice system. Custodial arrest is usually embarrassing and inconvenient, involving the sudden, forcible interruption of one's activities, a thorough search of one's person and effects,<sup>292</sup> and the use of handcuffs, holding cells, and other intrusive security and investigative measures.<sup>293</sup> Even temporary detention in the typical American jail is a significant hardship, since the facilities tend to be old, poorly maintained, overcrowded, and insufficiently staffed to prevent assaults by other inmates.<sup>294</sup> Prolonged detention also aggravates the problems of plea bargaining by significantly increasing the price of demanding and waiting for a full trial.<sup>295</sup>

Although jail and plea bargaining reforms ease some of these problems, unnecessary arrest and pretrial detention still deplete scarce public resources and violate precious rights of physical liberty and the presumption of innocence. Unwarranted arrest and detention unnecessarily divert police manpower to transporting and booking arrestees and increase the expense of building, maintaining, and operating jails and detention cells. Arrest and detention also disrupt stabilizing family and community ties, and replace these associations with the criminalizing effects of enforced idleness in the company of other criminals. Finally, perhaps the greatest cost is the bitterness of the substantial number of detainees who eventually receive probation or dismissal of their charges.<sup>296</sup>

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292. See *supra* text accompanying notes 178-81.

293. Formal arrest also creates a law enforcement record which may adversely affect the citizen, not only during the pendency of charges but long after the criminal charges have been dropped. *Paul v. Davis*, 424 U.S. 693, 735 n.18 (1976) (Brennan, J., dissenting) ("[M]any employers will treat an arrest the same as a conviction and deny the individual employment or other opportunities on the basis of a fact that has no probative value with respect to actual criminal culpability."); G. TRUBOW, *PRIVACY AND SECURITY OF CRIMINAL HISTORY INFORMATION: AN ANALYSIS OF PRIVACY ISSUES* 19-20 (U.S.G.P.O. 1978).

294. For a discussion of the conditions of American jails, see R. GOLDFARB, *JAILS: THE ULTIMATE GHETTO* (1975), and Mattick, *The Contemporary Jails of the United States: An Unknown and Neglected Area of Justice*, in *HANDBOOK OF CRIMINOLOGY* 785 (D. Glazer ed. 1974).

295. For a discussion of the effect of pretrial detention on plea bargaining and sentencing, see H. ZEISEL, *supra* note 286, at 47-48, 217-27 (noting that pretrial detention encourages suspects to plead guilty in exchange for "time served" sentences). See also Frase, *Defining the Limits of Crime Control and Due Process*, 73 CALIF. L. REV. 212, 233-44 (1985) (analyzing the limitations and policy implications of Zeisel's data).

296. One study found that almost half of those detained in New York City in the early 1970s



The broad powers of French law enforcement officials, who are unhampered by any general probable cause and warrant requirements,<sup>297</sup> suggest that arrest and pretrial detention rates would be higher in France. If these rates were in fact higher, it would be no surprise, since a number of other aspects of the French system seem to rely on an enhanced role for pretrial detention. In particular, without explicit plea bargaining<sup>298</sup> one would expect increased reliance on pretrial custody to permit thorough police interrogation and to "encourage" confession and other forms of cooperation. Furthermore, liberal pretrial discovery by the defense<sup>299</sup> increases the risk that defendants who see the strength of the prosecution's case would flee or tamper with the evidence if it were not for pretrial detention. This risk is heightened because courts could not punish flight without violating the general prohibition on consecutive sentences.<sup>300</sup>

Thus formal rules and systemic needs both suggest that pretrial custody is used more in France than in the United States. It is difficult to empirically test whether this use is in fact greater, however, given the procedural differences between the two countries and the limited data available for each country as a whole. Nonetheless, analogous statistical comparisons can be made using measures based on the timing of and purposes served by preconviction custody in each country. Specifically, the "arrest rate" for each country will be defined as the number of persons taken into preconviction custody at any stage, divided by the number of persons charged by the police. The "pretrial detention rate" will be defined as the number of persons held for initial or continued court appearances divided by the total number of prosecuted defendants.

The remainder of this Part briefly summarizes French arrest and detention procedures and then analyzes each of these measures in turn. These analyses suggest that the French use arrest and pretrial detention much *less* often than we do. The discussion concludes with a review of the aspects of French procedure that appear to account for these differences, and that may suggest possibilities for useful reform of American procedures. In closing, I also note areas where more research is needed.

#### *A. Overview of French Arrest and Detention Procedures*

Except for the brief detentions permitted during the course of an identity check or an investigatory detention, or pending an "immediate

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either had their cases dismissed or received a non-custodial sentence. See H. ZEISEL, *supra* note 286, at 219; Frase, *supra* note 295, at 239 n.61.

297. See *supra* text accompanying notes 167-72.

298. See *infra* text accompanying notes 467-562.

299. See *infra* text accompanying notes 669-77.

300. See *infra* text accompanying notes 424-37.

appearance" in correctional court,<sup>301</sup> arrest or pretrial detention must be judicially approved by either the examining magistrate<sup>302</sup> or the assize or correctional court. These judicial authorities may also order conditional release ("pretrial supervision").<sup>303</sup>

Persons charged with a felony may be detained on the examining magistrate's warrant of arrest or confinement.<sup>304</sup> Written justification for such detention is not required; however, an adversary hearing must be held.<sup>305</sup> The magistrate may issue a warrant of confinement against suspects charged with a delict only if the maximum sentence for the offense is at least two years' imprisonment (or one year or more for "flagrant" delicts). The magistrate must also find that pretrial supervision is insufficient and that detention is necessary to prevent interference with the evidence or witnesses, further crime, flight of the accused, or harm to the accused.<sup>306</sup> The order must state reasons and is limited to four months, but it may be extended for additional periods of up to four months each.<sup>307</sup> If the accused's current offense and prior convictions are not very serious, total pretrial detention may not exceed eight months.<sup>308</sup>

At the termination of the judicial investigation, suspects referred for trial in police court must be released from pretrial detention or supervision.<sup>309</sup> If there was no judicial investigation, defendants are simply

301. Identity checks and investigatory detention are described at *supra* notes 161 & 163. The immediate appearance procedure was formerly applicable only to certain "flagrant" offenses (defined at *supra* note 161), but it was expanded in 1986 to include nonflagrant offenses punishable by at least two-years imprisonment provided the prosecuting attorney believes that "the assembled charges are sufficient and that the matter is ready to be tried." Proc. Code art. 395[1]. When this procedure is used, the defendant is held for arraignment in correctional court instead of being released on his promise to appear. If arraignment is not possible on the same day, a judge of the correctional court may authorize continued detention for up to two additional working days. *Id.* art. 396.

302. This summary states the law as of June 1989, and does not incorporate further limitations on pretrial detention which will result from the Law of July 6, 1989, No. 89-461, J.O. July 8, 1989, 109 G.P. No. 5, at 323-25.

303. Proc. Code arts. 138 to 143 (examining magistrate may order pretrial supervision for suspects facing possible imprisonment).

304. In a judicial investigation of any offense, examining magistrates may issue four types of warrants: (1) a warrant for appearance (similar to a summons); (2) a warrant of attachment, which permits forcible arrest of the accused and temporary jailing until he can be interrogated; (3) a warrant of arrest, which is similar to the preceding but is used only if the accused is in flight or lives outside the country; and (4) a warrant for confinement (pretrial detention order). *Id.* art. 122.

305. *Id.* art. 145[2]-[8].

306. *Id.* arts. 144[1], 145. The examining magistrate may also order pretrial detention if the defendant violates the conditions of pretrial supervision. *Id.* art. 144[2].

307. *Id.* arts. 145[1], 145-1.

308. *Id.* art. 145-1[2] (maximum six months' detention during the judicial investigation, consisting of initial four-month detention plus an extension not to exceed two months). *Id.* art. 179[4] (additional two months' detention between end of judicial investigation and defendant's appearance in correctional court).

309. *Id.* arts. 178, 213[3], 531; see also *id.* art. 179[1]-[2] (when judge finds that facts indicate a delict, he or she may remand to correctional court; a procedural order terminates pretrial detention or supervision).

issued citations to appear in police court.<sup>310</sup> In contrast, suspects charged with felonies may be, and usually are, held in custody while pending review by the indicting chamber,<sup>311</sup> and before and during the trial.<sup>312</sup> In cases of delict, the examining magistrate may continue—or “exceptionally” initiate—pretrial detention for up to two more months, pending the accused’s appearance in correctional court.<sup>313</sup> The correctional court itself may *continue* pretrial detention<sup>314</sup> (and may continue or initiate pretrial supervision),<sup>315</sup> but the court may only *initiate* pretrial detention if the accused has either violated the obligations of pretrial supervision,<sup>316</sup> or been brought to court under the “immediate appearance” procedure.<sup>317</sup>

### B. Arrest Rates

The most comprehensive measure of the extent of pretrial custody is the proportion of suspects who are subjected to custodial arrest at some point in the criminal process prior to conviction. French and American “arrest rates” cannot be directly compared, however, since the French use both police investigatory detention<sup>318</sup> and examining magistrates’ arrest and detention orders to place suspects in custody. Indeed, there are no published French statistics on “arrests” as such. Instead, the following figures are reported: (1) the number of investigatory detentions (*gardes à vue*); and (2) the number of pretrial detention orders issued by examining magistrates, or issued in the course of the immediate appearance procedure. Thus, estimates of French “arrests” must be based on the combined totals of these figures.

In 1980 the number of persons placed in investigatory detention was about 38% of the total number of suspects charged by French police

310. *Id.* art. 531. The defendant may also make a voluntary appearance. *Id.*

311. This three-judge court reviews all felony cases before they can be sent to trial in assize court. It also hears appeals from certain orders of the examining magistrate. *See FRENCH SYSTEM, supra* note 41, at 17; *see also infra* text accompanying notes 638 & 649-50.

312. Proc. Code arts. 181[2], 215[2]; A. SHEEHAN, *supra* note 41, at 51-52 (detention almost automatic for offenses classified as “crimes” (felonies, *see supra* note 132)).

313. Proc. Code art. 179[3]-[4].

314. *Id.* art. 464-1.

315. *Id.* art. 141-1 (conferring on the correctional court power to impose, modify, or withdraw pretrial supervision).

316. *Id.* art. 141-2[2].

317. *Id.* arts. 395 to 397-7. Upon appearance in correctional court, if the defendant does not consent to be tried (or if the case is not ready for trial), the case is continued for two to six weeks. Judgment on the merits must occur within two months of initial appearance in court, or else the accused will be released. *Id.* arts. 397-1, 397-3[3].

318. *See supra* note 161. The express statutory approval given to identity checks under the law of February 2, 1981, may encourage French police to use this procedure rather than investigatory detention. If so, this will complicate statistical comparisons for later years, since there are no published nationwide statistics on the use of the identity check procedure (which, unlike American *Terry* stops, can lead to detention for up to four hours, *see supra* note 163).

with felonies and nontraffic delicts.<sup>319</sup> The number of persons jailed by examining magistrates in that year was approximately 7% of the total number charged by police,<sup>320</sup> thus yielding an overall estimated arrest rate of 45%.<sup>321</sup> The true figure is lower, however, since the statistics above exclude all contraventions, many of which are offenses that are included in American arrest statistics (for example, minor assaults, disorderly conduct, and pimping).<sup>322</sup> While there are no published French statistics on persons "charged by police" with contraventions, using the available contravention *conviction* statistics as a proxy lowers the estimated French arrest rate to 37%, and the true rate is probably even lower.<sup>323</sup>

American statistics pose further problems. "Arrest" figures include both custodial arrests and persons issued citations or summonses to appear.<sup>324</sup> Moreover, although the FBI used to publish statistics for selected cities on the proportions of persons "arrested" and "summoned" by court summons or police citation to all persons "charged" by the police, no source reports the relative proportions of these methods on a national level. However, the available partial data suggest that custodial arrest is far more frequently imposed in the United States than in France.

319. LA CRIMINALITÉ EN FRANCE, *supra* note 39, at 64 (262,289 persons detained out of 686,354 persons "charged"). The definitions used in this source are discussed at *supra* notes 133 & 161.

320. COMPTE GÉNÉRAL, *supra* note 39, at 21 table 7 (65,784 persons jailed, of whom 47,179 were detained by examining magistrates and 18,605 involved the immediate appearance procedure applicable to "flagrant" offenses, *see supra* note 301). The immediate appearance statistics are excluded here because they are reflected in the numbers of persons held in investigatory detention. The statistics on examining magistrate detentions do not explicitly exclude traffic cases, but judicial investigations are probably rare in such cases.

321. This figure is only approximate. On the one hand, some suspects placed in pretrial detention had undoubtedly already been subject to investigatory detention in the same case and thus are counted twice. On the other hand, the French statistics do not include defendants who are detained pending interrogation by the examining magistrate and then released without ever having been placed in investigatory or pretrial detention. *See* Proc. Code arts. 122, 125 to 133.

322. For a discussion of the legislative and administrative downgrading of these offenses in France, *see supra* notes 138-46 and accompanying text.

323. In 1980 there were 152,137 convictions for contraventions of the fifth class, most of which appear to be non-traffic offenses of the kind included in American arrest statistics. ANNUAIRE STATISTIQUE, *supra* note 39, at 123. Adding these cases to the arrest rate denominator ("persons charged by police"), *supra* note 319, yields a new total of 838,491 "suspects" and lowers the arrest rate to 37%. As for the numerator ("persons arrested"), no adjustment is needed since neither investigatory nor pretrial detention is authorized in contravention cases. *See infra* text accompanying notes 360-61.

Another 1,952,246 convictions were reported for contraventions of the first four classes (excluding parking), ANNUAIRE STATISTIQUE, *supra* note 39, at 121, and many of these cases probably also involved non-traffic offenses included in American arrest statistics. Of course, the number of convictions is undoubtedly lower than the number of "persons charged by police" with contraventions.

324. *See* CRIME IN THE U.S.—1980, *supra* note 134, at 189. I assume that American arrest statistics include virtually all suspects taken into custody.

In 1977, the last year for which the FBI published this information, about 68% of suspects charged with nontraffic offenses were arrested.<sup>325</sup> The data were based on information for 1,380 cities with a 1977-estimated population of 17,979,000,<sup>326</sup> and it is possible that the arrest-versus-summons rates in those cities were not representative of the nation as a whole.

The data available from individual American jurisdictions, however, lend some support to the 68% national estimate. For example, a study of law enforcement in New York City in the early 1970s found that about 60% of "police apprehensions" for felonies and nontraffic misdemeanors were by arrest.<sup>327</sup> This figure is not significantly lower than the FBI's national estimate, especially considering that New York City had pioneered broader use of police citation release beginning in the mid-1960s.<sup>328</sup> Finally, a study of pretrial detention practices in eight jurisdictions in the late 1970s found that 73% of defendants charged by police—excluding charges in minor traffic cases—were not even *eligible* to be released before their first court appearance.<sup>329</sup> Thus, although not definitively shown, the available data indicate a substantially higher arrest rate in the United States than in France.

### C. Pretrial Detention Rates

The analysis above focused on law enforcement decisions to take the suspect into custody for evidence-gathering and/or preventive purposes: interrogation, identification, searches incident to arrest, interruption of ongoing criminal activity, and prevention of flight or interference with the evidence or witnesses. Once the initial investigation is completed, however, the question arises whether the suspect should remain in custody pending trial or other court disposition. This later detention may serve many of the same purposes as initial detention, but the emphasis shifts from evidence gathering to the other concerns suggested above,

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325. CRIME IN THE U.S.—1977, *supra* note 286, at 217. The percentage in the text excludes drunk-driving cases in order to make the American figures more comparable to the French (which exclude all traffic cases). Figures for individual offenses ranged from a high of 97% arrested (murder and nonnegligent manslaughter) to a low of 39% (liquor violations). Many nonviolent offenses had relatively high arrest rates. For example, the arrest rate for burglary, larceny, and motor vehicle theft combined was 69%.

326. *Id.*

327. See H. ZEISEL, *supra* note 286, at 101. In the same study, fully 100% of felony defendants were arrested; 42% of misdemeanor defendants were arrested; and 18% of violators in lesser offenses (infractions and violations) were arrested. *Id.*

328. See W. THOMAS, BAIL REFORM IN THE UNITED STATES 7-8, 202, 251 (1976).

329. M. TOBORG, PRETRIAL RELEASE: A NATIONAL EVALUATION OF PRACTICES AND OUTCOMES 8 (U.S. Dep't of Justice 1981); see also D. WHITCOMB, B. LEWIN & M. LEVINE, CITATION RELEASE 5 (U.S. Dep't of Justice 1984) (citation utilization rates *after* custodial arrest for "all misdemeanors," presumably including traffic offenses, varied between 17 and 55% in five jurisdictions reporting for varying time periods from 1975 through 1981).

namely the prevention of flight, further crime, and evidence-tampering. This Section examines the available data on French and American "pre-trial detention rates"—the percentage of all prosecuted defendants who are held in custody pending initial or continued court hearings.

The most recent multijurisdictional study of American pretrial detention rates<sup>330</sup> found that, from 1976 to 1978, 77% of defendants who appeared in court at least once had not been released prior to their first appearance. Furthermore, 11% were not released before disposition of the charges.<sup>331</sup>

Comparable French pretrial detention rates are calculated by dividing (1) the number of persons held in pretrial detention by order of examining magistrates or pursuant to the "immediate appearance" procedure<sup>332</sup> by (2) the total number of prosecuted defendants. One difficulty with this approach, however, is that published French police court statistics are not sufficiently offense-specific to permit calculation of a figure for total prosecuted defendants which would be comparable to the base used for the American pretrial detention rates (that is, all defendants except those in "minor traffic cases").<sup>333</sup> Excluding *all* police court prosecutions yields the following estimated French pretrial detention

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330. M. TOBORG, *supra* note 329. This study covered 3,488 "arrests"—including field citations, but excluding "minor traffic offenses"—in eight jurisdictions: Baltimore City; Baltimore County; Washington, D.C.; Dade County (Miami, Fla.); Jefferson County (Louisville, Ky.); Pima County (Tucson, Ariz.); Santa Cruz County (Cal.); and Santa Clara County (San Jose, Cal.). The time periods covered ranged from mid-1976 to mid-1978. *Id.* at 3-5. These sites were chosen not only for geographic dispersion, but also to reflect "a wide range of release types and broad eligibility for program participation (especially in terms of criminal charges)." *Id.* at 3. Thus, release rates may have been *higher* in these jurisdictions than for the country as a whole. On the other hand, certain variations in statistical compilation may have affected the overall detention rates for the eight-site sample: One site included only felony cases, and another excluded field citations. *Id.* at 64 n.3.

331. *Id.* at 8 fig. 1. The percentages in the text are computed by excluding the 3.8% of defendants whose charges were dismissed without any court appearance. This makes the American figures more comparable to the French data, reported at *infra* text accompanying notes 334-37. If these defendants were included, the percentages would be: 74.5% not released prior to first appearance (not eligible (73.3%), or failed to post scheduled bail (1.2%)); and 14.7% never released prior to disposition (3.8% dismissed prior to first court appearance, 3% no release conditions set, 4.5% held without a bail revision hearing, and 3.4% held after such a hearing).

The percentages in the text were computed as follows. First compute the adjusted total (the denominator—those defendants appearing in court at least once):  $100\% - 3.8\% = 96.2\%$ . The 77% figure in the text (percent not released prior to first appearance) equals the 74.5% figure cited above divided by 96.2%. To compute the 11% figure in the text (percent not released prior to disposition), remove the 3.8% precourt dismissals from the 14.7% figure cited above, and divide the result (10.9%) by 96.2%.

332. See *supra* note 301 and accompanying text. These figures thus exclude investigatory detention (*garde à vue*), making them roughly comparable to American statistics for suspects detained until their first court appearance.

333. M. TOBORG, *supra* note 329, at 5. The Toborg study does not define "minor traffic offenses." The offense-specific tables provided for the study do not list any traffic offenses other than "driving while intoxicated" (545 defendants). *Id.* at 70. Other categories not defined are "minor local offenses" (66 defendants) and "other offenses" (97 defendants). *Id.*

rates for the same period (1976-1978): The number of persons subject to any pretrial detention represented about 18% of defendants prosecuted in correctional or assize court (excluding minor traffic cases);<sup>334</sup> less than 10% of such defendants had not been released by the time of disposition.<sup>335</sup> However, police court prosecutions are quite numerous and never involve pretrial detention,<sup>336</sup> so the true detention rates for all prosecuted defendants (excluding only minor traffic cases) are undoubtedly much lower. Only about 10% are ever held in pretrial detention, and only about 5% are not released by the time of disposition.<sup>337</sup>

#### D. Discussion

Although each of the statistical comparisons considered above has its problems, the available data suggest that the French impose custodial arrest and pretrial detention much less often than we do in the United States. Several key aspects of French procedure serve to reduce unnecessary pretrial custody, and each of them suggests possibilities for useful reform in the United States.<sup>338</sup>

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334. During this three-year period in France, a total of 179,591 defendants were detained, of whom about one-fourth were held pursuant to the immediate appearance procedure. See COMPTE GÉNÉRAL, *supra* note 39, at 21 table 7. For the same three-year period, the total number of convictions and acquittals in assize and correctional courts was 1,301,213. *Id.* at 25 table 11. However, many of these cases may have been "minor traffic offenses" and thus excluded from the Toborg study. See *supra* note 333. Traffic offenses other than drunk driving accounted for about one-fourth of all assize and correctional court convictions during the same three-year period. See ANNUAIRE STATISTIQUE, *supra* note 39, at 109-19. The 18% estimated detention rate cited in the text—179,591 divided by 975,909 (1,301,213 multiplied by 0.75)—assumes that minor traffic offenses comprised about one-fourth of convictions in assize and correctional courts, and further assumes that the proportion of defendants convicted for such offenses provides a sound estimate for the proportion of defendants prosecuted for the same offenses.

335. Fifty-two percent of all releases from pretrial detention in 1978 occurred at final disposition by dismissal, acquittal, or conviction. COMPTE GÉNÉRAL, *supra* note 39, at 98 table A.7. Assuming this figure to be representative of the 1976-1978 period, 18% of these releases multiplied by 0.52 yields a figure of 9.4% of defendants never released prior to disposition.

336. See *supra* text accompanying notes 309-10.

337. Adding the number of convictions for fifth class contraventions (excluding traffic) plus the number of jail sentences imposed for first to fourth class contraventions to the denominator ("prosecuted defendants") yields a new total of 1,360,728 defendants, which lowers the estimated detention rates to 13% detained and 7% never released. See ANNUAIRE STATISTIQUE, *supra* note 39, at 123. With this adjustment, the denominator still excludes all acquittals for fifth class contraventions, and all first to fourth class contravention defendants not sentenced to jail. Many of the latter are comparable to American defendants in non-"minor traffic" cases such as disturbing the peace, passive soliciting, and brawling, all of which are contraventions under French law. C. PEN. arts. R.34(8), (13), R.38(1). For the period 1976-78, almost 6,000,000 defendants were sentenced to a fine only for first through fourth class contraventions (excluding parking). ANNUAIRE STATISTIQUE, *supra* note 39, at 121-23 (penal orders plus trial convictions). The estimated French pretrial detention rates are further overstated as compared to American rates in that the numerator used to compute the French rate includes an unknown number of suspects who were neither prosecuted nor did they ever appear in trial court.

338. Another feature of the French system which may discourage pretrial detention is that defendants who eventually obtain dismissal or acquittal may receive compensation if their pretrial

### 1. *Prosecutorial Screening and Supervision*

As noted in Part II, French prosecutors have more authority to supervise police investigations than do most American prosecutors.<sup>339</sup> Such supervision reduces the incidence of unnecessary arrest and detention by allowing the prosecutor to stop an investigation, prevent investigatory detention, or order release of suspects already detained.<sup>340</sup> Moreover, French prosecutors apparently decline or reduce charges at least as often as do their American counterparts.<sup>341</sup> However, since their declination authority is often exercised *before* any suspect has been taken into custody—or at least before imposition of any extended period of detention—French prosecutors can prevent unnecessary arrest and detention of suspects who will not be prosecuted. Similarly, French prosecutors generally exercise their broad discretion to reduce the level of charges (for example, by “correctionalizing” a case charged by the police as a felony) prior to the imposition of any pretrial detention.<sup>342</sup> As discussed more fully below and in Part VI,<sup>343</sup> Americans may be able to create analogous detention and screening procedures that would more effectively balance the competing interests of justice at this stage: the need for some investigatory detention; the goal of minimizing pretrial detention; and the values of early but well-informed screening.

### 2. *An Explicit, Functional Approach to Detention Authority*

Although French law enforcement officials are not subject to general probable cause and warrant requirements, their arrest and detention authority may actually be more limited than similar powers in the United States. French police have no general power to make warrantless arrests; rather, they have a series of specific, time-limited powers to detain for identification or interrogation.<sup>344</sup> Judicial arrest powers only apply during judicial investigation, which is infrequently employed, and pretrial detention is also primarily confined to defendants subject to such an

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detention caused them “a manifestly abnormal harm of particular gravity.” Proc. Code art. 149. The award is charged to the State as “a cost of criminal justice.” *Id.* art. 150. However, it is not known how often or in what amounts such compensation is awarded.

339. See *supra* text accompanying notes 64-76.

340. Such powers are not alien to the United States, see, e.g., MINN. R. CRIM. P. 4.02(2)-(4) (following warrantless arrest, prosecuting attorney may order defendant to be released from custody; police must notify prosecutor of the arrest “as soon as practical”), but it is unknown how frequently they are actually exercised.

341. See *infra* text accompanying notes 396-405 & 438-57.

342. Correctionalization (and the analogous procedure of “contraventionalization”) are discussed more fully at *infra* text accompanying notes 483-506. Such charge reductions must take place prior to the opening of a judicial investigation and, thus, prior to the imposition of any pretrial detention. Once made, such reductions preclude subsequent pretrial detention except under the “immediate appearance” procedure, described at *supra* note 301.

343. See *infra* text accompanying notes 409-21.

344. See *supra* notes 161-63.



investigation.<sup>345</sup>

Given these limited powers and the limited actual use of pretrial custody, how do the French achieve all the important investigative and preventive purposes of arrest and pretrial detention?<sup>346</sup> The answer may be that, unlike American arrest and detention powers, the French powers are more explicitly tied to the functions that custody serves at the different stages of investigation and prosecution. Whereas American police have a general power to arrest on probable cause—usually without a warrant<sup>347</sup>—but no express power to detain unarrestable persons for interrogation<sup>348</sup> or identification,<sup>349</sup> French police have explicit but time-limited authority to detain suspects for each of these purposes through the investigatory detention and identity check procedures.

From the citizen's perspective, French arrest rules have at least two major advantages over U.S. rules. First, arrest in the United States is seen as the first stage of prosecution; it therefore has no fixed and limited duration. Thus an American suspect who is arrested for purposes of interrogation or positive identification ("booking") is likely to be held, often overnight and in jail, *after* these purposes have been achieved.<sup>350</sup> American police have authority to release suspects at this time, unconditionally or on citation, but the police may be reluctant to do so, either because this would suggest that the arrest was illegal, or because they hope that further detention will yield additional evidence from the accused.

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345. About three-quarters of defendants subject to pretrial detention are ordered held by examining magistrates; the remainder are held pursuant to the "immediate appearance" procedure. See *supra* note 334.

346. See *supra* text accompanying notes 298-300 & 330 (discussing the purposes of arrest and pretrial detention).

347. See *supra* text accompanying notes 175-207.

348. Detention for interrogation generally requires either the consent of the detainee, or formal arrest. See *supra* text accompanying note 242. But see *Berkeiner v. McCarty*, 468 U.S. 420, 435-42 (1984) (brief detention during "routine traffic stop" allowed questioning without *Miranda* warnings).

349. It is still unclear whether the police may insist on proof of identity, or at least interrogate the suspect for that purpose, during an investigative stop under *Terry v. Ohio*, 392 U.S. 1 (1968). Justice White's concurring opinion in that case suggested that "the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest." *Id.* at 34 (White, J., concurring). More recently, the Supreme Court invalidated a California "stop and identify" statute on vagueness grounds but declined to decide whether a person lawfully stopped under *Terry* can be forced to identify himself. *Kolender v. Lawson*, 461 U.S. 352, 361 (1983). But cf. *Hayes v. Florida*, 470 U.S. 811, 816-17 (1985) (dictum that on-the-scene fingerprinting might be permissible during a *Terry* stop).

350. Requirements of "prompt appearance" in court and charging at the first appearance place some limits on postarrest detention. However, certain U.S. rules still allow substantial periods of preappearance detention, see *supra* note 247, and sometimes several days of postappearance, precharging detention as well. See, e.g., MINN. R. CRIM. P. 4.02(5)(3) (no complaint required at first appearance on inisdeineanor charge; if complaint is then demanded, it must be filed within 48 hours if defendant is in custody).

Second, an American arrest record may be more damaging to a suspect than a French record of investigatory detention or an identity check. French records appear to be more limited in detail and dissemination.<sup>351</sup> Moreover, because probable cause is not required, and because witnesses as well as suspects may be detained, neither procedure implies the degree of police suspicion inherent in an American arrest record. If further research on American and French detention practices and records confirms these hypotheses, we should consider restructuring American procedures to allow more explicitly for a period of investigatory detention which would be time-limited<sup>352</sup> and not recorded as an "arrest."

Similar to investigatory detention and identity checks, French pre-trial detention authority is more explicitly tied to the purposes underlying such detention. On paper, American rules are restrictive: In most states, defendants in noncapital cases have the right to have nonexcessive bail set,<sup>353</sup> and courts have limited authority to order "preventive detention" of defendants believed to be dangerous.<sup>354</sup> In practice, however, judges can and do achieve de facto preventive detention—as well as other less legitimate purposes, such as punishing the offender before trial—simply by setting money bail at a figure higher than the defendant can afford.<sup>355</sup> Thus, it may very well be that we would detain fewer defendants if, like the French, we abandoned the money bail system,<sup>356</sup> or at

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351. During an identity check, fingerprinting and photographing are permitted only with judicial or prosecutorial approval, and solely if they are "the only means" of establishing identity. Proc. Code art. 78-3[4]. No permanent record of any kind may be kept unless further criminal investigation results. *Id.* art. 78-3[9]. In contrast, detailed local police records of investigatory detention must be maintained. *Id.* arts. 64 to 65. It appears, however, that only statistical summaries are transmitted to the national level. For example, there is a nationwide system (*casier judiciaire*) for recording all convictions (excluding first through fourth class contraventions). *Id.* arts. 768 to 781.

352. Cf. Barrett, *Police Practices and the Law—From Arrest to Release or Charge*, 50 CALIF. L. REV. 11, 53 (1962) (proposing such a 48-hour period); see also *infra* text accompanying notes 409-21 (discussing the relationship between investigatory detention and the timing of the initial charging decision).

353. This right is guaranteed under the constitutions or statutes of most states, at least in noncapital cases. See D. FREED & P. WALD, *BAIL IN THE UNITED STATES*: 1964, at 2 n.8 (1964) (working paper for National Conference on Bail and Criminal Justice). However, the federal constitutional prohibition of excessive bail does not necessarily create a right to have bail set in all noncapital cases. See *United States v. Salerno*, 481 U.S. 739, 752-55 (1987).

354. See B. GOTTLIEB, *PUBLIC DANGER AS A FACTOR IN PRETRIAL RELEASE: A COMPARATIVE ANALYSIS OF STATE LAWS 9-12* (U.S. Dep't of Justice 1985) (15 states plus District of Columbia authorize preventive detention based on current (noncapital) charge, prior conviction, or judicial finding of dangerousness; another 9 states only allow such detention when the current offense was committed while on bail).

Since 1984, defendants charged with federal crimes may be preventively detained under provisions of the Bail Reform Act of 1984, 18 U.S.C. §§ 3141-3143 (1988).

355. The problems of bail and its reform are analyzed extensively in F. ZIMRING & R. FRASE, *supra* note 34, at 296-349 (reviewing history, underlying rationale, and problems that accompany use of money bail, and exploring possible alternatives).

356. The French have not entirely abolished money bail, but it is imposed on less than 2% of

least limited bail to what each defendant could afford,<sup>357</sup> and gave American judges express but narrowly defined<sup>358</sup> authority to order preventive detention in high-risk cases. Such explicit authority might be less frequently invoked and easier for appellate courts to review than the highly discriminatory "right to bail" traditionally recognized in the United States. The continued use of high-money bail to prevent the release of persons who *might* be dangerous—with no evidence, argument, or trial court findings directed to that issue—may even result in the detention of only the poorest defendants, not necessarily the most dangerous ones.

### 3. *No Arrest or Pretrial Detention in Minor Cases*

Although American rules sometimes seem designed to discourage arrest and continued detention in less serious cases,<sup>359</sup> the French rules reach further: Where the most serious charge is a contravention (maximum sentence of two months), investigatory detention is not authorized.<sup>360</sup> Pretrial detention is limited to felonies and delicts punishable by at least one year's imprisonment.<sup>361</sup> Adoption of a similar approach in the United States would substantially reduce arrest and detention rates

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defendants subject to a judicial investigation (and, necessarily then, a far lower percentage of all prosecuted defendants). See COMPTE GÉNÉRAL, *supra* note 39, at 21-23 (in 1980, 937 cases of bail, compared with 47,179 suspects detained, plus another 14,490 held under pretrial supervision with no detention).

357. The Bail Reform Act of 1984 grants federal judges explicit preventive detention authority, but it also purports to create a statutory "right to affordable bail": Federal magistrates and judges "may not impose a financial condition [of release] that results in the pretrial detention of the [defendant]." 18 U.S.C. § 3142(c)(2) (1988).

358. Although upheld against facial attack in *United States v. Salerno*, 481 U.S. 739 (1987), the Bail Reform Act is not necessarily good policy, and it may not be constitutional as applied. In particular, the Act's broad eligibility rules, limited standards of procedural due process, and ambiguous right to "affordable bail" appear to have caused an *increase* in detention rates. See U.S. GEN. ACCOUNTING OFFICE, CRIMINAL BAIL: HOW BAIL REFORM IS WORKING IN SELECTED DISTRICT COURTS 3-4 (1987).

359. See, e.g., MINN. R. CRIM. P. 3.01(3) (upon filing of a formal complaint, a summons rather than arrest warrant must be issued if offense is punishable by fine only); MINN. R. CRIM. P. 6.01, subd.1(1)(a) (officer making warrantless arrest for fine-only arrest must "ordinarily" release defendant on citation); MINN. R. CRIM. P. 6.01, subd.1(1)(b) (if such a defendant is brought to the police station or county jail, he must then be released on citation). The Minnesota rules applicable to jailable misdemeanors (maximum term of 90 days) express a strong presumption in favor of summons or citation, but permit arrest and continued detention if there is a risk of nonappearance, bodily harm to the accused or another, or further criminal conduct. MINN. R. CRIM. P. 3.01, 6.01, subds.1(1)(a)-(b). At the first court appearance in all cases, including felonies, there is a presumption of release on recognizance unless the court finds such release "will be inimical of [sic] public safety or will not reasonably assure" defendant's appearance. MINN. R. CRIM. P. 6.02, subd.1.

360. Unless the suspect is already in custody, investigatory detention generally applies only to a "flagrant" felony or delict. See *supra* notes 161-62.

361. See *supra* text accompanying notes 304-08. In cases initially charged as felonies or delicts, any detention terminates upon referral of the matter to police court. See *supra* text accompanying note 309.

and would solve two specific problems. First, it would eliminate situations inherently likely to result in conviction of the factually or legally innocent: those in which persons charged with relatively minor offenses are detained for a few weeks or months and then are offered immediate release in return for a guilty plea.<sup>362</sup> Second, a prohibition on arrest and detention for minor offenses would greatly reduce the number of cases in which detention exceeds the sentence likely to be imposed upon conviction. Such cases are quite common in some jurisdictions,<sup>363</sup> and along with detention of unconvictable defendants, these cases result in the glaring injustice of undeserved imprisonment.<sup>364</sup>

#### 4. *Possibility of Trial in Absentia*

In all delict and contravention cases, when the accused has received proper notice of the trial date and fails to appear without a valid excuse, he or she may be tried and sentenced in absentia; the results will be as binding on the defendant as if he or she had been present.<sup>365</sup> There are no published statistics on the exact frequency of trials of this kind, but they seem to occur with some regularity.<sup>366</sup>

362. See H. ZEISEL, *supra* note 286, at 47-48, 225-27 (plea of guilty in exchange for sentence of "time already served"). Some states try to avoid this problem by means of strict speedy trial rules applicable to detained misdemeanor defendants. See, e.g., MINN. R. CRIM. P. 6.06 (defendant in custody must be tried within 10 days of his demand; if not, he must be released on nonmonetary conditions). However, such rules often permit a longer period of total detention. See MINN. R. CRIM. P. 4.02 (36 hours from arrest to first appearance in court, excluding day of arrest, Sundays, and legal holidays, followed by 48 hours to file the complaint—after all of which speedy trial may be demanded); MINN. R. CRIM. P. rule 34.01 (if time limit expires on Saturday, Sunday, or legal holiday, it extends to end of next court day). Moreover, since most misdemeanor sentences involve no actual jail time, even the shortest speedy trial limit fails to eliminate pressures to plead guilty in exchange for release from jail. M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 186-87 (1979) (over 90% of those convicted in New Haven Court of Common Pleas do not receive a jail sentence).

363. See H. ZEISEL, *supra* note 286, at 219 (in New York City 25% of convicted defendants who did not make bail received probation or other noncustodial sentences).

364. The New York City study, *id.*, found that about half of detained defendants were never found legally deserving of custodial punishment, either because they were not convicted or because they received a noncustodial sentence. See *supra* note 296.

365. Proc. Code arts. 410, 544. If proper notice was not received, or felony charges are involved, a default judgment may be entered which allows the defendant under certain conditions to relitigate all the issues determined in his absence. See FRENCH SYSTEM, *supra* note 41, at 23, 27, 29-30.

366. I observed several trials of this kind during my trips to the city of Lyon in 1982 and 1986. Published statistics group most nonvoidable trials in absentia together with those where the defendant is present, but separate figures are provided for each of the following: 1) voidable "default" judgments (defendant not properly notified, see *supra* note 365); 2) rehearings of such default judgments; and 3) repeated default judgments (failure to appear at rehearing). Repeated default has the same binding effect as trial in absentia, since the defendant, in having requested a rehearing, is deemed to have had notice of the trial date.

In 1978, out of all convictions for felony, delict, and contraventions of the fifth class, 21% were voidable defaults, 4% were rehearings of defaults, and 2% were repeated defaults. COMPTE GÉNÉRALE, *supra* note 39, at 28 table 14. Defendants who do appear seem to receive lighter

The availability of such a procedure significantly undercuts one of the major justifications for pretrial detention: flight risk. This especially applies in minor cases, where flight risk (as opposed to dangerousness) is usually the *only* reason for detention. Americans may feel that trial in absentia is unjust, but we should ask ourselves: Is pretrial detention really better?<sup>367</sup> We may not wish to adopt all the French rules here,<sup>368</sup> but we should seriously consider loosening the requirement that the defendant be present, especially in less serious cases. Such reforms might necessitate revisions in applicable rules of criminal procedure,<sup>369</sup> but would not require reinterpretation of constitutional doctrines.<sup>370</sup>

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sentences than those who do not. Overall, 17% of the above convictions involved an executed custody sentence, but the custody rates for defaults, rehearings, and repeated defaults were 27, 24 and 51%, respectively. *Id.* at 29 table 15.

367. Of course, there is a third alternative: Release the defendant, continue his trial if he fails to appear, and issue a bench warrant for his arrest. In addition to the cost and inconvenience to witnesses, attorneys, and court personnel, this "solution" results in delayed justice, trials based on stale evidence, and even dismissal of some or all charges.

368. In particular, it does not seem either necessary or fair to provide that the defendant's counsel may not be heard in cases of unexcused failure to appear. *See, e.g.*, Proc. Code art. 411[2] (in case of minor offense, written demand to be tried in absentia permits defense counsel to be heard); *id.* art 417[1] (defendant who *appears* has the right to counsel); *see also* Judgment of Oct. 29, 1970, Bull. Crim. No. 284 (applying article 411[2]); Judgment of May 5, 1970, Bull. Crim. No. 153 (same). Americans might also wish to limit trials in absentia to less serious cases than do the French (for example, to misdemeanors only). We might further choose to provide that defendants may be tried, but not sentenced, in absentia. This distinction has long been recognized under the federal rules, *see infra* note 369, apparently because there is less need to allow sentencing in absentia. Sentencing is often postponed even when the defendant is present, and delayed sentencing causes fewer problems than delayed trial due to the limited number of witnesses at sentencing, greater use of documentary evidence, and so on.

369. *See, e.g.*, FED. R. CRIM. P. 43 (providing that "[t]he further progress of the trial to and including the return of the verdict shall not be prevented . . . whenever a defendant, initially present, is voluntarily absent after the trial has commenced"). Virtually all federal appellate courts have interpreted rule 43 to prohibit sentencing in absentia. *See, e.g.*, *United States v. Songer*, 842 F.2d 240, 241 (10th Cir. 1988) (citing *United States v. Villano*, 816 F.2d 1448, 1452 (10th Cir. 1987) (defendant's right to be present at sentencing under rule 43 is "fundamental to the entire law of criminal procedure")). The rule might also be read to bar trial in absentia if the defendant was not present at the start of trial, but some courts have upheld trial in absentia in such cases. *See, e.g.*, *United States v. Schocket*, 753 F.2d 336 (4th Cir. 1985) (defendant was told of trial date at arraignment two months earlier, and no evidence indicated that absence from trial was involuntary).

370. The right to be present at trial is most closely associated with the sixth amendment right of confrontation, U.S. CONST. amend. VI, but trial in absentia may also involve waiver or "forfeiture" of general due process rights or of other specific rights which are inevitably exercised at the trial itself (for example, the right to testify and the right to effective assistance of counsel). Although the Supreme Court has not yet ruled on a case where the defendant failed to appear at the start of trial, it has upheld trial in absentia when the defendant failed to return to a trial in progress. In *Taylor v. United States*, 414 U.S. 17 (1973), the Court declined to require a showing that the defendant had been expressly warned of his right to be present and notified that the trial would continue in his absence, saying that it was "wholly incredible" that a defendant who was present for the opening of the trial would have any doubts on either score. *Id.* at 20. The same could be said of many defendants who fail to appear at the start of trial, at least if they *were* expressly warned at their arraignment and in any subsequent notice to appear of their rights and of their obligations to appear.

For general discussions of these issues, and the cases upholding trial in absentia under various

### 5. *Broader Admissibility of Documents and Depositions*

Another justification for pretrial detention in the United States is to prevent the defendant from threatening important prosecution witnesses or tampering with the evidence.<sup>371</sup> The French seem to avoid these problems by means other than pretrial detention—in particular, by trial evidence rules permitting liberal introduction of witnesses' pretrial statements.<sup>372</sup> American constitutional rules and evidence codes do not necessarily exclude such statements,<sup>373</sup> especially where threats by the defendant can be shown.<sup>374</sup> Thus we can potentially move further in this direction so that no defendant is detained on the basis of protecting witnesses and evidence alone, at least absent risk of serious bodily harm. As with trial in absentia, we must ask ourselves whether the loss or limitation of confrontation and cross-examination rights outweighs the costs of pretrial detention, particularly in less serious cases where such detention may equal or exceed any sentence likely to be imposed.<sup>375</sup>

### 6. *Less Severe Sentencing Laws and Practices*

The risks of flight and witness intimidation are likely to be lower in cases where the defendant expects to receive only a fine, a term of probation, or a short custody sentence if convicted. This relationship between probable case disposition and the risks of release is presumably one of the reasons why we rarely impose pretrial limitations on civil defendants, and it provides an additional basis for prohibiting detention entirely in minor criminal cases. This relationship, however, has implications for more serious cases as well.<sup>376</sup> As discussed in Part VIII, French sentencing laws and practices seem generally less severe than in most American

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circumstances, see Cohen, *Trial in Absentia Re-Examined*, 40 TENN. L. REV. 155 (1973); Starkey, *Trial in Absentia*, 53 ST. JOHN'S L. REV. 721 (1979); Note, *Criminal Trials in Absentia: A Proposed Reform for Indiana*, 56 IND. L.J. 103 (1980) (authored by Myra L. Willis). See also *Brewer v. Raines*, 670 F.2d 117 (9th Cir. 1982) (upholding Arizona procedure under which defendant, expressly warned at arraignment, was both tried and sentenced in absentia).

371. See, e.g., *United States v. Gilbert*, 425 F.2d 490 (D.C. Cir. 1969) (per curiam) (trial court may detain suspect to protect future witnesses, as long as afforded opportunity at a hearing to refute allegations that he may threaten witnesses).

372. Trial evidence rules are discussed at *infra* text accompanying notes 703-36.

373. See generally Graham, *Witness Intimidation*, 12 FLA. ST. U.L. REV. 239 (1984) (discussing the major constitutional and evidence code requirements and proposing additional rules and procedures to deal with witness statements).

374. See, e.g., *State v. Black*, 291 N.W.2d 208, 214 (Minn. 1980) (defendant who threatened and thus caused absence of witness forfeited right to confront that witness; trial court properly admitted witness' unsworn pretrial statements to police, as well as her testimony at her own trial).

375. See *supra* text accompanying note 296 (discussing the public costs of arrest and pretrial detention).

376. At the other end of the continuum of severity, the relationship between the likely sentence and the risks of release has been offered as one justification for the traditional rule denying bail to defendants charged with a capital offense. See W. LAFAYE & J. ISRAEL, *supra* note 126, § 12.4(a).

jurisdictions,<sup>377</sup> and this may be another reason why overall French pre-trial detention rates are lower. Long statutory maximum sentences are significant even if the maximum is rarely imposed (or if imposed, is rarely served in its entirety); misinformed or anxious defendants may fear the worst, and may thus be encouraged to flee or tamper with the evidence.

Given the well-established American tradition of authorizing and imposing substantial custodial sentences, it may be unrealistic to hope that we could soon reduce the average severity of our sentences, particularly during the current era of "determinate sentencing,"<sup>378</sup> in which substantial prison terms are viewed as a convenient means of defining and uniformly imposing "just deserts." However, determinate sentencing reforms may still help to reduce the risks of pretrial release, and consequently the need for pretrial detention, by making clear to defendants the actual and relatively short "real time" they would serve if convicted. In addition, such sentencing reforms can specify that certain classes of offenders may not, or presumptively should not, receive any custodial sentence; in such cases, arrest and pretrial detention would also be presumptively inappropriate.<sup>379</sup>

## 7. Other Explanations

Future research should explore other differences between the French and American systems that may help to explain the apparently lower rates of arrest and pretrial detention in France. For example, the American system seems to process a much higher proportion of violent crime and drug offenders, who arguably must be detained for reasons of public safety. The limited available data suggest that such differences in "offense mix" do not explain the observed custody rate differences,<sup>380</sup> but

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377. See *infra* text accompanying notes 563-629.

378. See generally von Hirsch & Hanrahan, *Determinate Penalty Systems in America: An Overview*, 27 CRIME & DELINQ. 289 (1981) (overview and assessment of the various approaches to determinacy); Zimring, *Making the Punishment Fit the Crime: A Consumers' Guide to Sentencing Reform*, 6 HASTINGS CENTER REP. 3, 13 (Dec. 1976) (summarizing and discussing the implications of proposed structural reforms in sentencing).

379. Cf. MINN. R. CRIM. P. 6.06 advisory committee's comment ("[A] person should not be taken into custody for an offense for which he could not be incarcerated even if found guilty.").

380. See *supra* table at notes 133-36 (showing that 9.3% of persons charged by French police with felonies and non-traffic delicts were charged with violent offenses, including arson and weapons, whereas such offenses accounted for about 12.8% of American non-traffic arrests). However, the most violent offenses (murder, rape and robbery) accounted for about equal proportions of persons charged in France and the United States (2.3 and 2.2%, respectively). See LA CRIMINALITÉ EN FRANCE, *supra* note 39, at 59-61; CRIME IN THE U.S.—1980, *supra* note 134, at 191. The denominators used in these comparisons are not strictly analogous since the French statistics exclude all contraventions, some of which correspond to offenses included in American arrest figures. However, French arrest and detention rates for felonies and non-traffic delicts are lower than American rates based on arrests. See *supra* text accompanying notes 320-23 & 334-37. Thus, for a

further research using offense-specific arrest and detention data<sup>381</sup> is needed to resolve the issue.

## VI

### PROSECUTORIAL CHARGING DISCRETION<sup>382</sup>

The aspect of continental criminal procedure that first attracted the attention of recent American reform-oriented scholars was the limitation on the European prosecutor's decision whether to file charges.<sup>383</sup> Decisions not to charge are particularly problematic in the United States<sup>384</sup> because they are less likely to be successfully challenged by courts or by interested parties (police, complainants, or other suspects who were denied similar leniency).<sup>385</sup> Thus, American scholars took particular interest in the "rule of compulsory prosecution" found in West

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group of French cases containing an equal proportion of the most violent offenses, the arrest and detention rates are *lower*.

As for drug cases, which are clearly much more numerous in the United States than in France, see *supra* table at notes 133-36, American pretrial detention rates are actually *lower* than for many property crimes, and *much lower* than for violent crimes. See M. TOBORG, *supra* note 329, at 70 table A-1.

381. See *infra* text accompanying notes 600-08 & 627 (discussing examples of the methodological problems that remain even when statistics are analyzed within seemingly comparable offense categories).

Another possible explanation for low arrest and detention rates is harder to analyze empirically. It is perhaps much more difficult for suspects to "disappear" in France as a result of the greater degree of government regulation, a less transient population, the centralized national police forces, and the simpler extradition procedures within the country. On the other hand, American police may have equal or better access to nationwide, computerized records of "wanted" persons, thus making it equally difficult for an American suspect to "disappear." To clarify these issues, future research should examine the precise steps taken in each country to deal with persons who fail to appear as required, and should calculate the proportions of such persons who succeed in avoiding recapture.

382. Although closely related to the charge-bargaining issues discussed in Part VII, "Plea Bargaining and Its Analogues," *infra* notes 467-562 and accompanying text, this Part focuses on the discretion of prosecutors to file or dismiss charges independent of the defendant's willingness to cooperate. Even unconditional charging discretion raises problems of discriminatory enforcement, underenforcement, and overenforcement (failure to promptly screen out weak or inappropriate charges).

383. See K. DAVIS, *supra* note 1, at 191-95 (discussing American assumption that prosecutorial discretion must be discretionary, and offering the West German system of compulsory prosecution as a viable alternative); Herrmann, *supra* note 7 (discussing theoretically and practically the extent, limits, and patterns of prosecutorial discretion in the United States and Germany); Langbein, *Controlling Prosecutorial Discretion*, *supra* note 2 (discussing the West German system of controlling prosecutorial discretion and suggesting criteria for the adoption of parts of that system into American procedure).

384. K. DAVIS, *supra* note 1, at 188-91 (arguing that American prosecutors' discretionary power is excessive and uncontrolled, and should be subject to public review); Abrams, *Prosecutorial Charge Decision Systems*, 23 UCLA L. REV. 1, 47-48 (1975) (suggesting limited judicial review of decisions not to charge).

385. K. DAVIS, *supra* note 1, at 170-72; Frase, *supra* note 38, at 246-47, 299-301.



Germany,<sup>386</sup> and in the active role in the charging process given to victims and/or judicial authorities in many European countries.<sup>387</sup>

Despite perceptions to the contrary, French prosecutors are granted and appear to exercise broad discretion to refuse to invoke the criminal law, or to charge fewer or less serious crimes than the evidence would permit.<sup>388</sup> In practice, they may also exercise some control over dropping charges in the trial court. At the same time, though, it appears that prosecutorial charging discretion is significantly *more* restrained in France than in the United States, and that some of the rules and procedures used to achieve this restraint in France could be adapted to the American context. Indeed, the "failure" of French procedures to contrast sharply with our own is not, from a reform perspective, cause for disappointment, but rather for optimism: It is much easier to "borrow" small differences than big ones.

Although prosecutorial charging discretion is often discussed as if it were a single decision at a single point in time, prosecutors actually make a variety of charging decisions in each case. Initial decisions include whether even to file charges, and if so, how many and at what level of severity. Later decisions may also involve the possibility of dropping all or some charges, or reducing the severity of charges. The following discussion examines each of these forms of prosecutorial charging discretion, describing the procedures used in France, the implications of these findings for reform of American procedures, and the areas in which more research is required. The first three Sections below examine decisions not to prosecute. Decisions made at different stages of the charging process, but having the same effect—for example, rejections of all charges—are discussed together because they raise similar policy issues and are subject to analogous methods of control in France. Moreover, analysis of the French system suggests that stricter controls over later charging decisions may indirectly serve to improve the quality of earlier decisions.

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386. See Goldstein & Marcus, *Myth of Judicial Supervision*, *supra* note 4, at 272-76. For example, West German prosecutors have no discretion to decline prosecution of felony charges "in cases where adequate incriminating evidence is at hand," and may decline provable misdemeanors only if the accused's guilt is "minor" and "there is no public interest in prosecuting." J. LANGBEIN, *supra* note 7, at 89-98 (quoting German rule of compulsory prosecution, STRAFPROZESSORDNUNG [StPO] § 153(I) (W. Ger.)). Although misdemeanor declinations theoretically require court approval, in practice this requirement has proven to be a mere formality. *Id.* at 99. However, crime victims in West Germany may themselves prosecute for a narrow class of misdemeanors if the prosecutor has exercised his discretion under StPO § 153 and refused to act. J. LANGBEIN, *supra* note 7, at 101-02.

387. K. DAVIS, *supra* note 1, at 194-95 (victim's role); Pugh *supra* note 2, at 959-61 (judicial role); *id.* at 966 (victim's role).

388. Goldstein & Marcus, *Myth of Judicial Supervision*, *supra* note 4, at 247, 277.

### A. *The Decision Not to File Any Charges or to Dismiss All Charges*

The American prosecutor has broad discretion both over initial decisions to decline to file charges, and over postfiling decisions to drop all charges. Some states retain the common law *nolle prosequi* power, giving the prosecutor complete discretion to drop charges at any time before trial.<sup>389</sup> Other states and the federal system nominally require leave of the court to dismiss serious charges,<sup>390</sup> but permission is rarely denied.<sup>391</sup> The American prosecutor's ability to "change his mind" at virtually any point prior to trial causes American declination decisions to occur either too early or too late. They may occur too early and too hurriedly when prosecution is declined at the initial case screening stage, which is usually shortly after arrest but before the detained suspect first appears in court.<sup>392</sup> At this point, the prosecutor may know too little about the suspect or the offense to justify making a final screening decision,<sup>393</sup> yet declinations entered here are rarely reexamined. On the other hand, declination decisions may occur too late when the original decision to file a complaint was made simply to retain the option of prosecution or to extend investigatory detention. In such cases, declinations are often delayed until shortly before trial, as part of the plea bargaining process. The delay is especially likely to occur in misdemeanor cases, since they are generally not subject either to initial screening or to later preliminary hearing and formal charging procedures requiring prosecutorial attention,<sup>394</sup> but delay can also occur in felony cases.<sup>395</sup>

Like the American prosecutor, the French prosecutor is granted

389. See W. LAFAVE & J. ISRAEL, *supra* note 126, § 13.3(c).

390. See, e.g., FED. R. CRIM. P. 48(a) (dismissal of indictment, information, or complaint requires leave of court); MINN. R. CRIM. P. 30 (dismissal of indictment requires leave of court); see also W. LAFAVE & J. ISRAEL, *supra* note 126, § 13.3(c).

391. See A. GOLDSTEIN, *THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA* 14-24 (1981).

392. See also *infra* note 420 (examples of state and federal rules of procedure). See generally F. MILLER, *PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME* 24-43 (1969) ("The Warrant Standard"); Abrams, *supra* note 384, at 2-4 (discussing the impact of initial decision to file a complaint).

393. Cf. W. McDONALD, *PLEA BARGAINING: CRITICAL ISSUES AND COMMON PRACTICES* 48 (U.S. Dep't of Justice 1985) (screening may be more effective when conducted at later stage and based on fuller investigation—for example, 3 to 10 days after arrest—rather than between arrest and initial charging). See generally Abrams, *supra* note 384, at 11-29 (discussing the trade-offs between early versus high-quality screening).

394. See W. LAFAVE & J. ISRAEL, *supra* note 126, § 1.4(f)-(i).

395. In Minnesota, for example, the Rules of Criminal Procedure abolish separate preliminary hearings in felony cases, rarely require prosecution by indictment, and allow the initial complaint to serve as the formal charge at trial. MINN. R. CRIM. P. 8, 10, 11, 17. Thus felony and gross misdemeanor cases are initially reviewed when a complaint is filed, at or prior to the first court appearance, MINN. R. CRIM. P. 4.02(5)(2), and need not be reviewed again until the omnibus hearing if defendant files a motion to dismiss for lack of probable cause, MINN. R. CRIM. P. 11.03, or just before trial if no such motion is filed.

broad power over initial charging decisions. Article 40 of the French Code of Criminal Procedure states simply that "[t]he prosecuting attorney shall receive complaints and denunciations and decide what to do with them."<sup>396</sup> This language is interpreted to permit nonprosecution even in cases of provable guilt.<sup>397</sup> In theory, prosecutorial discretion is limited by the rights of crime victims to file charges directly in police or correctional court, or to file with an examining magistrate.<sup>398</sup> Furthermore, the victim can appeal the magistrate's refusal to investigate or dismissal on the merits.<sup>399</sup> However, crime victims do not appear to exercise these rights frequently.<sup>400</sup>

On the other hand, postfiling decisions to dismiss all charges are much more limited in France than in the United States. French prosecutors have no formal *nolle prosequi* power to drop charges once the matter has been sent to a trial court or examining magistrate. Rather, the court or magistrate has sole discretion to decide whether the charges fit the facts alleged by the prosecutor or disclosed by further investigation.<sup>401</sup>

In 1980 French prosecutors screened over 15,000,000 matters involving charges of felony, delict, or contravention (including traffic) and made the following dispositions:<sup>402</sup>

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396. Proc. Code art. 40[1].

397. 2 R. MERLE & A. VITU, *supra* note 40, § 1096, at 343-44; J. PRADEL, *supra* note 40, §§ 344-346; G. STEFANI, G. LEVASSEUR & B. BOULOC, *supra* note 40, at 539-41.

398. See FRENCH SYSTEM, *supra* note 41, at 20. A third limitation on the discretion to drop charges arises when the prosecutor concludes that a screening decision cannot be made immediately and that the case must be transferred to an examining magistrate to obtain pretrial detention or to gain access to the greater investigatory powers of the magistrate. Opening a judicial investigation terminates the prosecutor's power to decline prosecution, as well as his power to file fewer or less serious charges. See *infra* text accompanying notes 401, 412 & 441-45.

399. Proc. Code art. 186[2].

400. One study found that in 1970 only about two of every 1,000 criminal prosecutions in Paris were initiated by such a "*partie civile*," but about 20% of all criminal actions had civil actions joined to them. A. SHEEHAN, *supra* note 41, at 21 n.34, 22 n.38. One reason more cases are not instituted by civil parties may be the requirement of an advance security deposit for the costs of the proceedings (unless the magistrate decides to dispense with the deposit requirement for destitute parties). If the case is subsequently dismissed for lack of sufficient evidence, the civil party may be required to pay costs, and even damages, to the accused. Proc. Code arts. 88, 91[1].

401. 2 R. MERLE & A. VITU, *supra* note 40, § 1097, at 344-45; J. PRADEL, *supra* note 40, § 345, at 399-400; G. STEFANI, G. LEVASSEUR & B. BOULOC, *supra* note 40, at 541-42. Notwithstanding these formal barriers, one study indicates that trial courts never continue a case if the prosecutor asks that it be dropped. See A. SHEEHAN, *supra* note 41, at 18. Trial courts, however, appear to have very limited formal power to dismiss charges, and the rules of procedure contemplate that most cases, once filed, will proceed to trial and a verdict of conviction or an acquittal. See Proc. Code art. 363 (assize courts); 2 R. MERLE & A. VITU, *supra* note 40, § 1451, at 757 (except where correctional or police court lacks personal or subject matter jurisdiction, the final decision of the court is an order of conviction, acquittal, or absolution).

402. ANNUAIRE STATISTIQUE, *supra* note 39, at 107.

	<u>Number</u>	<u>Percent</u>
Prosecution Declined	4,164,000	27.3
Referred to Examining Magistrate	67,000	0.4
Referred to Juvenile Court	62,000	0.4
Referred to Correctional Court	557,000	3.7
Referred to Police Court	<u>10,393,000</u>	<u>68.1</u>
TOTAL	15,243,000	100.0

If contraventions of the first four classes are excluded (since none are actively screened, and many are parking violations), the percentage of cases in which prosecution is declined increases to about 80%.<sup>403</sup> This figure is similar to the American declination rate of 75 to 80% for *federal* criminal matters, which, like French matters, are most often declined without any arrest being made.<sup>404</sup> Comparable figures for state criminal matters are not available, but the declination rates for felony arrests tend to be lower—usually between 30 and 50%.<sup>405</sup>

The French appear to have conducted relatively little detailed research on the specific reasons for declining prosecution. One study reported that in Paris in 1970, 28% of complaints received (excluding all contraventions) involved unknown subjects,<sup>406</sup> and presumably a large number of cases were also screened for other types of evidence insufficiency, such as missing or reluctant witnesses and inadmissible evidence. Observers of the French system seem to agree that the following factors also account for substantial proportions of declinations: restitution or other compensation to the victim; cessation of illegal activities by the defendant; absence of any legally proscribed conduct; existence of

403. See COMPTE GÉNÉRAL, *supra* note 39, at 18 (declination rate for 1978). The COMPTE GÉNÉRAL does not give a figure for 1980, but the rate can be estimated as follows: Start with the 1980 overall declination data shown in the table above (number declined divided by total matters); exclude all police court referrals from the denominator and add back in the 152,000 convictions for fifth class contraventions in 1980. ANNUAIRE STATISTIQUE, *supra* note 39, at 121. The result is an 83.2% declination rate. See also A. SHEEHAN, *supra* note 41, at 42 (1970 declination rate in Paris, excluding all contraventions, was 86% (81% excluding unknown-subject cases)).

404. See Frase, *supra* note 38, at 251.

405. See, e.g., K. BROSI, A CROSS-CITY COMPARISON OF FELONY CASE PROCESSING 7 (U.S. Dep't of Justice 1979) (1977 declination plus dismissal rates in five U.S. jurisdictions were 29%, 44%, 49%, 52%, and 55%); see also BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: TRACKING OFFENDERS, 1984, at 2 tables 1 & 2 (1985) [hereinafter TRACKING OFFENDERS] (in 11 states representing about 38% of the U.S. population, 16% of felony arrests did not result in any prosecution, and another 19% (23% of prosecuted cases) were later dismissed, for a total declination-plus-dismissal rate of 35%).

Although the figures above include dismissals as well as initial declinations, they are comparable to the French declination rates cited in the text because later dismissals are relatively rare in the French system. See *infra* text accompanying notes 441-45 & 455-57.

406. A. SHEEHAN, *supra* note 41, at 42. Unknown subject cases comprised about one-third of the cases in which prosecution was declined. *Id.* Another 40% of declined cases involved bad checks. *Id.* at 43.

amnesty or statute of limitations; triviality of the offense; sufficiency of informal sanctions, treatment, or warnings; and other circumstances leading to the conclusion that the overall "cost" of criminal prosecution outweighs any potential benefits.<sup>407</sup> These factors are very similar to the reasons for declination found in studies of American prosecutors.<sup>408</sup>

French declination decisions are the product of a multistage screening process inherent in the structure of the rules governing investigation, arrest, and detention. Throughout these processes, French prosecutors must make a series of decisions tailored to specific issues and the availability of information relevant to those issues. I will present these decisions in the order they arise.

(1) The earliest decisions generally involve police requests to continue investigatory detention for a second twenty-four-hour period;<sup>409</sup>

(2) at the end of the initial or extended investigatory detention, the prosecutor must decide whether to invoke the "immediate appearance" procedure<sup>410</sup> or to release the suspect. In the latter case, the prosecutor may give the suspect a notice to appear in court,<sup>411</sup> or the prosecutor may decline prosecution or defer the screening decision;

(3) whether or not investigatory detention is involved, prosecutors must often decide at an early stage whether to request the immediate opening of a judicial investigation to obtain an arrest or pretrial detention order, to invoke the additional investigative powers of the examining magistrate, or to make those felony charges that seem warranted.<sup>412</sup> A large number of screening decisions probably involve police referral of unsolved cases, as to which the prosecutor must either request further police investigation, order a judicial investigation, or decide to decline prosecution; and

(4) finally, when neither the immediate appearance nor the judicial investigation procedure has been invoked at an early stage, the prosecutor must eventually make a final screening decision either to decline all prosecution, to prefer felony charges (which requires opening a judicial investigation), to request such an investigation to obtain further information, or to send the case directly to trial in correctional, police, or juvenile court.

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407. See 2 R. MERLE & A. VITU, *supra* note 40, §§ 1092-1097; A. SHEEHAN, *supra* note 41, at 42; see also *id.* at 196-98 (examples of screening examinations in 11 "flagrant offense" cases).

408. See PROSECUTION OF ADULT FELONY DEFENDANTS, *supra* note 38, at 63-68; Frase, *supra* note 38, at 248, 256, 262-69.

409. See *supra* note 161.

410. See *supra* note 301.

411. Proc. Code art. 394 (procedure known as "convocation by official reports"). Defendant's first appearance in correctional court must occur within 2 months, but no sooner than 10 days. *Id.*

412. See *supra* note 164.

What can Americans learn from these French practices and procedures? The similarities between French and U.S. declination rates and reasons suggest that the two systems are not so fundamentally different as to preclude reform borrowing. At the same time, these similarities do not necessarily mean that screening decisions are identical in both countries. Indeed, there are several reasons to hypothesize that French decisions are more rational and uniform than in most American jurisdictions. First, as discussed more fully in Part II, the hierarchical, career-oriented nature of the French prosecution system suggests that French screening decisions are likely to be made in a more consistent manner, based on established prosecution policies and subject to internal, supervisory review.<sup>413</sup> Some American prosecutors follow similar practices, requiring a combination of written internal prosecution policy, written reasons for declination, and supervisory review of files and/or reasons for declination.<sup>414</sup> Since such practices can improve the quality of screening decisions, they warrant wider application. Further research on the French system may also reveal other effective administrative procedures which could be adapted to the American context.

Second, the crime victim in France plays a role—albeit a limited one in practice—that serves as a useful check on actual or perceived abuses of the discretion to decline prosecution. We should consider giving American crime victims a greater opportunity to participate in these decisions. While it is neither feasible nor desirable to give American victims all the benefits accorded to French victims (for example, rights to compel or join the prosecution as a party; the possibility of combining criminal and civil cases), it would be fairly easy to create an administrative review mechanism whereby dissatisfied victims (and perhaps also police officers) could be given more formal or explicit rights to appeal declination decisions to a supervising prosecutor.

Third, the multistage screening process described above appears to give French prosecutors more time for careful selection or rejection of charges, without unduly prolonging detention of suspects.<sup>415</sup> Final screening decisions are made several weeks after the suspect is initially identified by the police;<sup>416</sup> earlier decisions are limited to the need for

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413. See *supra* text accompanying notes 77-103.

414. See generally Frase, *supra* note 38 (U.S. Attorney's office in Chicago consistently applied reasonable albeit unwritten declination policies by means of a "reasons and review" approach).

415. See generally Abrams, *supra* note 384, at 14-20 (discussing the conflict between the goals of encouraging careful—and therefore slower—screening, and minimizing unnecessary detention of suspects who will not be prosecuted, which requires the earliest possible screening).

416. See COMPTE GÉNÉRAL, *supra* note 39, at 17 table 2 (chart showing by year the estimated average duration of prosecutor screening). For the years 1979 through 1981, respectively, the figures were 1.09, 0.95, and 1.11 months. *Id.* Screening by examining magistrates appears to take even longer. See *id.* at 19 table 5 (average duration of judicial investigations for the years 1979 through 1981, respectively, was 8.88, 9.08, and 9.18 months).

continued custody rather than the issue of prosecution.<sup>417</sup> Allowing more time for screening allows for decisionmaking based on more complete information about the suspect and the offense, and reduces the need for subsequent reappraisal of decisions in favor of prosecution. Moreover, because French prosecutors lack the power to drop charges that have been filed in court,<sup>418</sup> they have a strong incentive to make careful screening decisions prior to that point.

The French charging process suggests several means for improving American screening practices. The possibility of limiting the American prosecutor's power to drop filed charges is discussed in a later section of this Article.<sup>419</sup> A system allowing more time for initial screening decisions could be implemented in several ways. The easiest method would be for prosecutors and police to establish a two-step declination process: Cases in which complaints are not issued initially would be held open by the police and "re-screened" by a different prosecutor several weeks later. A second approach designed to minimize the duration of precharge detention might require that the prosecutor's complaint be filed at the first appearance if the defendant has not yet been released; if he or she has been released, the complaint would not have to be filed for another thirty days. A third approach is to change the rules of procedure to provide that the complaint need not be filed at the first appearance in court,<sup>420</sup> but that it must be filed within forty-eight hours thereafter if the defendant remains in custody, or within thirty days if released.<sup>421</sup> Such a rule would achieve a workable compromise between the three interrelated interests of criminal justice at this stage: the need for some period of investigatory, precharge detention; the goal of limiting the duration of such detention; and the value of less hurried, more well-informed initial charging decisions. Allowing more time to file the complaint also reduces the incentive for police and prosecutors to delay the suspect's initial appearance (and release) in order to gain extra time for charging.

### *B. The Decision to Decline or Drop Additional Counts or Charges*

In addition to the discretion to decline prosecution entirely, American prosecutors also have broad discretion to decline to file or drop additional counts or charges ("horizontal" charging discretion). This discretion is implicit in the power to decline or dismiss all charges,

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417. See *supra* text accompanying notes 409-11.

418. See *infra* text accompanying notes 441-42 & 455-57.

419. See *infra* text accompanying notes 502-06.

420. Cf. FED. R. CRIM. P. 5 (when person arrested without a warrant is brought before a magistrate, complaint must be filed "forthwith"); MINN. R. CRIM. P. 4.02(5)(2) (in felony and gross misdemeanor cases, complaint must be filed at or before first appearance).

421. Cf. MINN. R. CRIM. P. 4.02(5)(3) (providing similar time limits in misdemeanor cases, although the defendant may waive the filing of a formal complaint).

discussed above, and raises similar problems.<sup>422</sup>

Horizontal charging discretion is somewhat more limited in France, at least in theory. The discretion to decline all charges gives French prosecutors broad power to decline to file additional counts or charges.<sup>423</sup> On the other hand, the lack of formal *nolle prosequi* power to dismiss all filed charges means that French prosecutors also lack formal power to dismiss selected counts or charges. However, it is not known whether practice conforms to theory in this respect. Since published statistics contain no information on the disposition of specific counts or collateral charges, it is possible that some charges are dropped in the trial court, with or without the prosecutor's recommendation.

Even if substantial post- as well as prefiling screening of collateral charges does exist in France, these discretionary decisions probably cause fewer problems than in the United States. The screening is likely to be more consistent in France for many of the reasons previously discussed: the hierarchical prosecution function; the victim's right to participate in charging and disposition; the multistage screening procedures, allowing more time for careful selection of charges; and the absence of a formal *nolle prosequi* power to discourage initial overcharging.

Moreover, even if collateral charges are declined or dropped inconsistently or excessively, the results are less problematic than in the United States because French *sentencing* law provides that the number of collateral charges has little effect on the defendant's present or future sentence. Under the "rule of noncumulative punishments," consecutive sentences are almost never allowed; nor may charges be serialized to evade this rule. Only *one* sentence for the most serious current or previously sentenced offense may be pronounced.<sup>424</sup> Furthermore, the maximum sentence for the most serious current offense may not be enhanced on the basis of another current charge; the allowable enhancements only apply where a second offense is committed after the defendant has been *convicted* of the first offense.<sup>425</sup>

The reasons for these rules are twofold. First, like the more limited American rules forbidding consecutive sentences for offenses arising out

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422. See *supra* notes 382-85 and accompanying text.

423. Note that French courts and examining magistrates have no independent power to expand the scope of the prosecution to new offenses unrelated to the criminal acts alleged in the petitions filed by the prosecutor. In order to expand the prosecution in this manner, the prosecutor must submit a new petition. Proc. Code art. 80; 2 R. MERLE & A. VITU, *supra* note 40, § 1143; A. SHEEHAN, *supra* note 41, at 44; G. STEFANI, G. LEVASSEUR & B. BOULOC, *supra* note 40, at 765-67. The jurisdiction of trial courts—but not of the examining magistrate—is also limited to the persons named in the prosecutor's petitions. *Id.* at 767.

424. See FRENCH SYSTEM, *supra* note 41, at 32.

425. *Id.* (discussing concept of "legal recidivism").



of a "single behavioral incident,"<sup>426</sup> the French rules recognize that consecutive sentencing can easily exaggerate the offender's culpability.<sup>427</sup> Second, the requirement of an intervening conviction before the application of recidivism enhancements is based on the idea that such a conviction serves as a solemn, formal warning to the accused, the disregard of which increases the defendant's culpability for subsequent offenses. Conversely, the absence of an intervening conviction may have served to encourage the defendant to continue his or her criminal activities.<sup>428</sup>

Conviction on multiple charges also has a limited impact on the defendant's *future* sentences. Although the maximum (and sometimes the minimum) penalty for subsequent offenses may be enhanced under the rules for legal recidivism,<sup>429</sup> these rules are based solely on the *severity*, not the frequency, of the defendant's prior convictions; the same is true of the rules that allow prior crimes to limit future eligibility for probation, parole, or expungement of conviction.<sup>430</sup> In this respect, French recidivism rules operate less harshly than do American rules and statutes, which often enhance subsequent sentences based solely on the frequency of prior convictions.<sup>431</sup>

In France, collateral charges can affect current or future sentences

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426. Cf. MINN. STAT. ANN. § 609.035 (West 1987) (barring both serial prosecution and cumulative punishment when "a person's conduct constitutes more than one offense"). This provision covers not only single acts violating several statutes, *id.*, but also multiple acts "manifesting an indivisible state of mind or coincident errors of judgment," or motivated by a "single criminal objective." *State v. Zuehlke*, 320 N.W.2d 79, 81-82 (Minn. 1982) (quoting *State v. Sailor*, 257 N.W.2d 349, 352 (Minn. 1977)) (conviction for open bottle in car barred later prosecution for furnishing liquor to minors in the car). *But see State v. Gartland*, 330 N.W.2d 881 (Minn. 1983) (upholding consecutive sentences for two counts of criminal negligence where drunk driver caused death of two persons in another vehicle).

Except where limited by such statutes, American sentencing judges have broad discretion to choose between concurrent and consecutive sentences. *See infra* note 434. Although consecutive sentences appear to be the exception, they substantially increase sentence duration when they do occur. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: FELONY SENTENCING IN 18 LOCAL JURISDICTIONS 8 (1985) [hereinafter *FELONY SENTENCING*] (only one out of nine multiple conviction cases involved consecutive sentences, but average prison durations in these cases were over twice as long).

427. *See* 1 R. MERLE & A. VITU, *supra* note 145, § 790, at 946-47; G. STEFANI, G. LEVASSEUR & B. BOULOC, *DROIT PÉNAL GÉNÉRAL* 581 (12th ed. 1984) [hereinafter G. STEFANI, G. LEVASSEUR & B. BOULOC, *DROIT PÉNAL*].

428. *See* G. STEFANI, G. LEVASSEUR & B. BOULOC, *DROIT PÉNAL*, *supra* note 427, at 581.

429. C. PEN. arts. 56 to 58, 474.

430. Proc. Code arts. 734-1, 735, 720-2, 729 to 733-1.

431. *See, e.g., Rummel v. Estelle*, 445 U.S. 263 (1980) (upholding mandatory life sentence for felon with two prior felony convictions for fraud totaling \$108.36); MODEL PENAL CODE §§ 6.07, 7.03, 7.04 (Proposed Official Draft 1962) (extended terms for repeat offenders); MINNESOTA SENTENCING GUIDELINES COMM'N, MINNESOTA SENTENCING GUIDELINES AND COMMENTARY at I.B, IV (1988) [hereinafter *MINNESOTA SENTENCING GUIDELINES*] (duration of prison term and presumptive prison commitment both depend in part on "criminal history score," which is based primarily on the number of prior convictions at time of sentencing, including convictions entered earlier that day).

by encouraging judges to sentence more harshly *within* the maximum range of penalties authorized for the most serious current or subsequent offense. However, the absence of consecutive sentencing powers and the limited availability of extended term and mandatory minimum sentencing powers significantly reduce the "worst case" sentencing impact of collateral charges. Moreover, it appears that the basic maximum sentences for French offenses are lower than for their American counterparts (for example, three years for simple larceny, regardless of the value or nature of the property stolen).<sup>432</sup> In fact, French sentences in general may be more lenient than those in this country.<sup>433</sup>

These sentencing rules and practices suggest important directions for further research and reform efforts in this country. By reducing the sentencing impact of multiple convictions as the French have done, we could substantially eliminate the injustices caused by variations in horizontal charging over time, between different prosecutors, and across geographic regions. Such reforms—general prohibition of consecutive sentences,<sup>434</sup> less severe habitual offender and mandatory minimum sentencing laws<sup>435</sup>—would also simplify trials and sentencing proceedings. Furthermore, we might even conclude that the sheer frequency of violations—especially when committed in "sprees" or pursuant to a "common scheme"—is not sufficiently linked to our sentencing goals to justify the

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432. C. PEN. art. 381 (penalty for "simple" larceny); *cf. id.*, arts. 382 to 398 (providing higher penalties for theft accompanied by violence, entry into various structures, or carrying a weapon). For a comparison of maximum French and American sentences for other crimes, see *infra* notes 569-71 and accompanying text.

433. See *infra* text accompanying notes 563-617.

434. The "common law" rule applied by federal and most state courts gives trial courts broad discretion to impose consecutive sentences. See, e.g., *Whalen v. United States*, 445 U.S. 684, 692 (1980) (under double jeopardy clause, whenever two charges are not the "same offense," courts assume that Congress intended to permit consecutive sentences); see also Cirillo, *Windows for Discretion in the Pennsylvania Sentencing Guidelines*, 31 VILL. L. REV. 1309, 1334 n.91 (1986) (citing illustrative Pennsylvania cases); Robinson, *Legality and Discretion in Criminal Sanctions*, 25 HARV. J. ON LEGIS. 393, 407-08 (1988).

A few jurisdictions have attempted to limit consecutive sentences. See, e.g., MINN. STAT. ANN. § 609.035 (West 1987) ("single behavioral incident" rules); U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES app. A, §§ 3D1.1-3D1.4 (Supp. 1988) [hereinafter FEDERAL SENTENCING GUIDELINES] (multiple conviction offenses are first placed in groups of "closely related counts"—for example, same victim or transaction; the offense severity level for each group equals the highest level applicable to any offense in the group, or the highest level produced by aggregating the amounts for offenses in one group; the combined offense level for all groups increases according to a formula, with a maximum increase of five levels above the group with the highest offense level); MINNESOTA SENTENCING GUIDELINES, *supra* note 431, at II.F. (presumptive requirement of concurrent sentences for multiple felonies except in cases of escape or multiple "person" (violent) offenses involving different victims); see also FEDERAL SENTENCING GUIDELINES, *supra*, at app. A, § 1B1.3(a) commentary at 1.18-1.20 (in determining severity levels, "relevant conduct" includes all acts in furtherance of the conviction offense, all aggregable theft, etc. amounts which were part of the same course of conduct, and all resulting harms or risks caused at least negligently—even if defendant was not formally charged with any of these acts or results).

435. See *supra* text accompanying notes 429-433.

problems caused by imposing significant current and future sentencing enhancements on such defendants.

Of course, any such sentencing reforms must overcome a major barrier: the chronic inability of American legislators ever to reduce, or even appear to reduce, criminal sentences.<sup>436</sup> However, this barrier could perhaps be overcome by a reform "package" that also included proposals likely to *increase* certain sentences. One such reform proposal, discussed below,<sup>437</sup> would involve sharply restricting the ability of prosecutors to dismiss provable, more serious charges, in return for a guilty plea.

### C. *The Decision Not to File More Serious Charges or to Reduce Charge Severity*

As they do with other charging decisions, American prosecutors exercise broad pre- and postfiling discretion over the level of charge severity ("vertical" charging discretion). American prosecutors can reduce postfiling charge severity<sup>438</sup> by moving to amend the complaint or information<sup>439</sup> or by filing a *nolle prosequi* and refiling with less serious charges.

The availability of such reductions inevitably leads to initial overcharging because it eliminates any need to screen cases carefully at the outset; indeed, American prosecutors actually have an incentive to exaggerate initial charges so as to leave more room for later plea bargaining concessions. Overcharging, in turn, distorts arrest and pretrial detention decisions and adds to caseload pressures in those courts handling the most serious offenses against persons and property. At the same time, postfiling charge reductions also raise a risk of eventual undercharging, if initially correct and provable charges are routinely reduced in return for a guilty plea. Routine reductions seriously undercut the consistency, rationality, and effectiveness of criminal sentences in three ways: They understate the seriousness of the defendant's crimes and distort criminal history records; they allow prosecutors to exercise sentencing power directly, often without benefit of any independent presentence investigation; and they evade sentencing and parole rules tied to specific conviction offenses.<sup>440</sup>

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436. See, e.g., Zimring, *supra* note 378, at 13-14 (political considerations prevent legislators from endorsing low presumptive sentences, even where actual time served in prison would not be reduced).

437. See *infra* text accompanying notes 441-57 & 500-06.

438. See A. GOLDSTEIN, *supra* note 391, *passim*.

439. See W. LAFAVE & J. ISRAEL, *supra* note 126, § 19.2(g) (prosecutor may amend pleadings to charge lesser included offense).

440. See sources cited at *infra* note 479; see also Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 757-72 (1980) (arguing that unfairness, inefficiency, and other problems point "definitively" to unsoundness of any attempt to base guideline sentences on "real" rather than

French prosecutors have much less vertical charging discretion. They have no formal postfiling charge reduction power; nor do they appear to exercise any such power in practice, at least not in cases initially filed as felonies.<sup>441</sup> Further research is needed to determine whether charges are often reduced in correctional and police courts, but it seems unlikely for several reasons. First, that practice has not been noted in the literature, despite extensive discussions, by both French- and English-speaking authors, of *prefiling* charge reductions.<sup>442</sup> Second, the absence of explicit plea bargaining<sup>443</sup> makes postfiling charge reductions less valuable to French prosecutors than to their American counterparts.

At the prefiling stage, however, it appears that French prosecutors often do decline to file the highest charge supported by the evidence, even though the practice is said to be illegal.<sup>444</sup> Thus, the French prosecutor often chooses to treat as a *delict* an offense that could have been prosecuted as a felony (a process known as "correctionalization"). The case is then sent directly to correctional court, thereby avoiding judicial investigation, review by the indicting chamber, and the more formal trial procedures of the *assize* court. An analogous procedure—"contraventionalization"—allows provable *delicts* to be sent to police court and tried as contraventions.<sup>445</sup>

It is difficult to estimate the quantitative significance of these practices, since there are no published statistics on the levels of offenses charged by the police in cases sent to correctional and police courts. Furthermore, the police may overcharge some cases. French observers report, however, that correctionalization of aggravated theft offenses is particularly common.<sup>446</sup> The practical reasons favoring correctionalization and contraventionalization are varied: the desire not to inundate the

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conviction offense). *But see* FEDERAL SENTENCING GUIDELINES, *supra* note 434, § 1B1.3(a) (adopting concept of "relevant conduct" substantially broader than conviction offense).

The dropping of provable *collateral* charges ("horizontal" charge reductions) can cause many of the same problems noted in the text, but the problems can also be addressed by means of the French-inspired sentencing reforms discussed at *supra* text accompanying notes 424-37.

441. *See* 2 R. MERLE & A. VITU, *supra* note 40, § 1096, at 344-45; *see also id.* § 1395, at 682 (reduction of charges by the *assize* court was more common prior to a 1960 reform of the Penal Code broadening that court's power to impose a *delict* sentence based on "extenuating circumstances" upon conviction for felony).

442. *See, e.g.,* sources cited at *infra* note 444; A. SHEEHAN, *supra* note 41, at 6-7, 18; Goldstein & Marcus, *Myth of Judicial Supervision*, *supra* note 4, at 251-53.

443. *See infra* text accompanying notes 467-76.

444. *See* 2 R. MERLE & A. VITU, *supra* note 40, §§ 1393, 1396 (correctionalization violates principles of subject matter jurisdiction since it effectively allows correctional courts to try felony cases); accord G. STEFANI, G. LEVASSEUR & B. BOULOC, *supra* note 40, at 497; *see also* J. PRADEL, *supra* note 40, §§ 91-92 (better for legislature to reduce commonly correctionalized felonies to *delicts*, but need for some individualized decisions by prosecutors remains).

445. *See* COMPTE GÉNÉRAL, *supra* note 39, at 26 n.5.

446. *Id.* at 26 n.4; *see also id.* at 41; M. VERON, DROIT PÉNAL SPÉCIAL 22 (1976) (increased use of correctionalization in theft cases is implied by statistics showing that the number of convictions

assize courts with excessive numbers of felonies, (many dating from the 1810 Penal Code and no longer considered serious); the expectation that the assize court, viewing felony penalties as excessive, would refuse to convict or at most would impose no more than a delict sentence; the prosecutor's own belief that a felony conviction or sentence would be excessive under the particular circumstances or in light of the defendant's prior record;<sup>447</sup> and the desire to speed up the process of conviction and punishment as well as to avoid the inconsistencies of assize court sentences.<sup>448</sup>

The limitations on French prosecutorial discretion discussed above<sup>449</sup> would probably not effectively prevent the practices described above. First, hierarchical controls may make undercharging more uniform, but they do not prevent it since the decisions are widely viewed as appropriate and also fiscally imperative. Second, crime victims may not object if the undercharging generally operates in their favor, for example by speeding up the award of damages, or by ensuring that the defendant remains *out* of jail and can thus earn the money to pay the award.<sup>450</sup> Third, while the multistage screening process does give prosecutors plenty of time to consider filing more serious charges, it does not otherwise encourage such filing. Fourth, the active role of the examining magistrate in the investigation and charging processes may actually *discourage* felony prosecution, since prosecutors conceivably prefer to retain complete control over these decisions, thus minimizing outside scrutiny of their work. Fifth, once the case has been filed in assize, correctional, or police court, those courts have very limited power to expand the scope of the prosecution to include more serious charges.<sup>451</sup> Finally, the French sentencing rules do not serve to minimize the importance of

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for aggravated theft (*vol qualifié*) in the assize courts fell steadily in the late 1960s, while the number of convictions for simple theft in correctional courts continued to rise).

447. In 1978, the last year with complete data, the proportion of convicted defendants in each court with at least one final conviction prior to the date of the current offense was 49.6% in assize courts, 36.4% in correctional courts, and 23.6% in police courts. *ANNUAIRE STATISTIQUE*, *supra* note 39, at 111, 119, 125.

448. 2 R. MERLE & A. VITU, *supra* note 40, § 1394; J. PRADEL, *supra* note 40, § 92, at 95-96; G. STEFANI, G. LEVASSEUR & B. BOULOC, *supra* note 40, at 498.

449. See *supra* text accompanying notes 77-103 & 408-15.

450. Goldstein & Marcus, *Myth of Judicial Supervision*, *supra* note 4, at 253. To the extent that standards of proof are looser in police court than in correctional court, see FRENCH SYSTEM, *supra* note 41, at 27-31, contraventionalization also serves the victim's interests by making conviction—and therefore, the award of damages—more certain. However, correctionalization does not have this benefit, since assize court rules, unlike those in correctional and police courts, permit damages to be awarded even if the accused has been acquitted. *Id.* at 26, 29.

451. Trial courts have *in rem* jurisdiction over all criminal acts alleged in the petitions filed by the prosecutor, see *supra* note 423. However, if the prosecutor fails to cite a specific aggravating circumstance, the trial court may not, without the defendant's consent, expand the prosecution to include that circumstance. See Judgment of Oct. 1, 1987, Cass. crim., Fr., 108 G.P. No. 3, at 395. If the circumstance increases the level of the crime, the correctional or police court would lack

the level of conviction offense; on the contrary, the rules governing recidivism enhancements and eligibility for probation, parole, and expungement of conviction depend directly on the severity of current or prior convictions.<sup>452</sup>

In spite of these apparent failures of the French system to fully enforce the criminal law, undercharging may not, in fact, pose a serious threat to that system. For one thing, rejection of more severe charges does not necessarily result in a less severe sentence: Even when felony charges are retained, about one-half of all defendants found guilty in assize court receive sentences no more severe than they could have received if they had been tried in correctional court.<sup>453</sup> Perhaps even more importantly, the timing and the unconditional nature of French vertical charge reductions probably make these decisions more consistent than analogous decisions in the United States. The absence of formal "vertical" charge bargaining in France, discussed in the next Section,<sup>454</sup> means that French charging is not distorted by extraneous plea bargaining pressures. Prosecutors are free to focus exclusively on charging considerations—the seriousness of the offense, the availability of the evidence, and the resource limitations. At the same time, the French prosecutor's limited power to reduce filed charges, even unconditionally,<sup>455</sup> serves to discourage overcharging, with its serious potential for abuse.<sup>456</sup> Finally, the rules allowing more time for initial charging<sup>457</sup> permit well-informed selection of charge severity, which, in turn, allows the system to impose strict limits on later charge reductions.

If further research on the French system confirms these features of the vertical charging process, this aspect of French procedure certainly merits consideration for adoption in the United States. Specifically, American prosecutors, like their French counterparts, should be denied the power to reduce charges after a given point in the pretrial process. However, because this aspect of charging discretion is so closely related to the problems of plea bargaining, my proposed limitations on vertical charge reduction are reserved for discussion in Part VII.<sup>458</sup>

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jurisdiction to try it. The court would thus have to declare itself incompetent and remand the case to the prosecutor, who might very well decide to dismiss all charges. Proc. Code arts. 469, 540.

452. See *supra* text accompanying notes 424-30.

453. In 1980, 51% of sentences in assize courts were to "correctional" imprisonment (that is, five years or less, see FRENCH SYSTEM, *supra* note 41, at 2 n.4). ANNUAIRE STATISTIQUE, *supra* note 39, at 111. Correctional sentences may be imposed either because the assize court convicts only on delict charges, or because it finds "extenuating circumstances," thus shortening the prison term to as little as one year. FRENCH SYSTEM, *supra* note 41, at 34.

454. See *infra* text accompanying notes 483-506.

455. See *supra* text accompanying notes 441-42.

456. See *supra* text accompanying note 440.

457. See *supra* text accompanying notes 415-18.

458. See *infra* text accompanying notes 483-506.

*D. Decisions to Prosecute*

Although decisions to forego or drop charges have been especially difficult to regulate in the United States,<sup>459</sup> decisions to go forward with prosecution also raise important problems. If weak or baseless charges are not promptly reviewed and dismissed, defendants may face unnecessary hardship and embarrassment, and everyone involved—witnesses, parties, and public officials—is subjected to needless expense. Insufficient screening and intentional overcharging also aggravate the problems of plea bargaining: Extra cases and counts add to the court congestion traditionally seen as necessitating plea bargaining, and additional charges (even weak ones) increase the pressure on defendants to bargain rather than to risk potentially far greater punishment by going to trial on the original charges.

In France, the decision to prosecute on felony charges is strictly regulated. Decisions by French prosecutors to file felony charges are subject to review by both the examining magistrate and the indicting chamber.<sup>460</sup> The examining magistrate may decide that the evidence will not support any charges or will only support charges of delict or contravention, and he or she may thus order dismissal or transfer for trial in correctional or police court.<sup>461</sup> If the examining magistrate concludes that the facts constitute a felony, the entire file is then sent for review to the indicting chamber. The indicting chamber is also empowered to order a dismissal or a trial on lesser charges, but the chamber usually approves the felony charges.<sup>462</sup> It then issues a decree of indictment, and the matter is set for trial in assize court.

However, if the prosecutor decides to file only delict or contravention charges, the matter is sent directly to the correctional or police court with no judicial screening whatsoever.<sup>463</sup> For these cases—many of which are comparable to Anglo-American felonies<sup>464</sup>—there is no counterpart to the American preliminary hearing or grand jury review.

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459. See *supra* text accompanying notes 384-85.

460. See generally FRENCH SYSTEM, *supra* note 41, at 3.

461. In 1980, out of 64,786 decisions by examining magistrates, 20% were dismissals for insufficient evidence, 6% were joinders and other procedural dismissals, 3% were referrals to the indicting chamber, 65% were referrals to correctional court, 4% were referrals to juvenile court, and 1% were referrals to police or other courts. ANNUAIRE STATISTIQUE, *supra* note 39, at 107. The prosecutor may appeal the magistrate's order to the indicting chamber. Proc. Code art. 185.

462. There are no published statistics on indicting chamber dispositions. However, impressionistic studies and the statistics on overall caseloads of indicting chambers and assize courts both suggest that the indicting chamber almost always approves the felony charges recommended by the examining magistrate. See *infra* text accompanying note 650.

463. See FRENCH SYSTEM, *supra* note 41, at 17, 27-31.

464. Delicts are punishable with imprisonment for up to five years (or longer, for recidivists). See FRENCH SYSTEM, *supra* note 41, at xix, 2. Many delicts—for example, "simple" theft, see *supra* note 432—would be felonies under most American state laws, which define a felony as any offense

Since felony trials constitute less than one percent of all contested trials in France,<sup>465</sup> and all other decisions to prosecute are unreviewed prior to trial, how do the French avoid the problems of insufficient screening and intentional overcharging? Again, the answer may lie in the combination of structural safeguards—hierarchy and a multistage screening process—and the absence of explicit *nolle prosequi* and plea bargaining practices. The prosecution hierarchy makes possible degrees of training, supervision, specialization, and accountability likely to produce maximum screening efficiency. Because decisions to prosecute are often made weeks, rather than days, after the police identify the suspect, these decisions are more likely to be based on a complete investigation that may have revealed weaknesses in testimony and new evidence. Perhaps most importantly, the lack of formal *nolle prosequi* powers gives prosecutors maximum incentive to screen cases carefully before filing, and the absence of explicit plea bargaining removes a major incentive for prosecutors to overcharge when they do file.

Each of these mechanisms controlling prosecution decisions in France suggests possibilities for useful reform of American procedures. Reform would be particularly valuable in states where, whether by law or by custom, large numbers of felonies and misdemeanors are not subject to either preliminary hearing or grand jury review prior to being filed in the trial court. Indeed, even where review is available, there is reason to question its effectiveness<sup>466</sup> and to consider adopting alternative screening controls.

## VII

### PLEA BARGAINING AND ITS ANALOGUES

The issue that has received the most attention in the reform-oriented comparative criminal procedure literature of the past fifteen years is the extent to which continental systems depend on practices analogous to American plea bargaining. This focus is not surprising: Plea bargaining is central to the American system and has been widely attacked by liberals and conservatives alike. At times it has been accused of involving unfair coercion, prosecutorial overcharging, imposition of penalties for asserting constitutional trial rights, increased risk of convicting the

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punishable by imprisonment for more than one year. See W. LAFAVE & J. ISRAEL, *supra* note 126, § 1.2(c).

465. In 1980 there were a total of 1,029,432 convictions in contested trials (excluding parking and penal orders). Of these, 2,255 were in assize courts, 472,397 were in correctional courts, and 554,780 were in police courts. *ANNUAIRE STATISTIQUE*, *supra* note 39, at 109, 115, 121.

466. See Arenella, *supra* note 3, at 482-84, 539; Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1537-38 (1981).



innocent, or unjustified charge and sentence disparities.<sup>467</sup>

American reformers began to look to foreign systems in the hopes of finding ways to cut back or to eliminate our dependence on plea bargaining. Some scholars, notably Professors John Langbein and Albert Alschuler, concluded that continental countries had indeed avoided the overt form of this practice—explicit trading of charge or sentence concessions for the defendant's guilty plea.<sup>468</sup> Professor Langbein concluded that West Germany has avoided both overt forms and implicit or tacit analogues of plea bargaining.<sup>469</sup> The West Germans avoid plea bargaining by simplifying and streamlining trial procedures, thus reducing the sheer economic necessity of negotiating with defendants to waive their trial rights, and by sharply curtailing prosecutorial control over charging decisions.<sup>470</sup>

Other scholars, however, claimed to have found both explicit and implicit forms of plea bargaining in these continental systems.<sup>471</sup> The explicit forms consist of penal orders and other "fine-only" dispositions offered to defendants on condition that they admit guilt and waive any hearing or trial. One implicit form of sentence bargaining is the "uncontested trial," in which defendant's confession before or at trial permits a rapid "finding" of guilt at a proceeding that is hardly more probing than an American court's hearing to determine the voluntariness and factual basis of a defendant's guilty plea.<sup>472</sup> The French practice of "correctionalization" of felonies could also be viewed as a form of implicit charge bargaining.<sup>473</sup> By agreeing to a charge reduction, the defendant limits both the maximum sentence he or she can receive and the collateral consequences of conviction on felony charges.

As applied to France, both sides of this debate seem partially in the right. On the one hand, it is clear that (1) there is no "plea" bargaining as such because there are no defendant "pleas"; (2) there is also very little explicit trading of leniency for admissions of guilt, at least in serious cases; (3) French trials *are* simpler and quicker, thus reducing the need to minimize trial adjudication; and (4) French prosecutors have less control over charges than do most American prosecutors. On the other hand, it seems equally clear that (5) French trials can be made even more

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467. See generally W. LAFAYE & J. ISRAEL, *supra* note 126, § 20.1(d)-(f); Alschuler, *supra* note 7, at 932-34.

468. See Alschuler, *supra* note 7, at 970-75, 1010; Langbein, *Land Without Plea Bargaining*, *supra* note 2, *passim*.

469. Langbein, *Land Without Plea Bargaining*, *supra* note 2, at 205.

470. See *id.* at 206-12.

471. See, e.g., Goldstein & Marcus, *Myth of Judicial Supervision*, *supra* note 4, at 277-79.

472. See *id.* at 268.

473. *Id.* at 250-53.

simple and rapid—and, in minor cases, be avoided entirely—if defendants confess or otherwise cooperate; and (6) French courts and prosecutors do retain substantial unregulated discretion to be lenient with defendants who cooperate.

However, it also seems highly likely that some of the features of the German and French systems that prevent or regulate plea bargaining and its analogues are too foreign to American traditions to be successfully “transplanted” in the near future. Such features include the German rule of compulsory prosecution,<sup>474</sup> and most of the specific devices used to “streamline” trials in Germany and France: the limited role of lay jurors; the use of nonadversarial, judge-run trials; the elimination of many evidentiary and exclusionary rules; and the practice of calling the defendant as the first witness.<sup>475</sup>

In the discussion below, I will identify each of the major forms of explicit and implicit plea (or “cooperation”) bargaining in the French system, focusing separately on charging and sentencing concessions. Most of these forms appear to be less susceptible to abuse than typical American plea bargaining practices, but they are not so foreign to our traditions as to make unrealistic the proposals for their adoption in the United States. Some French practices already exist in American criminal procedure in at least rudimentary form; others find counterparts in our civil procedure and could be readily adapted to the criminal context. Thus, reform can easily “build on what we [already] have.”<sup>476</sup>

### A. French Charge Bargaining

To reform-oriented comparativists dissatisfied with the abuses of American plea bargaining, one of the clearest examples of the superiority of European procedures is the absence of most forms of charge bargaining. All forms of plea bargaining may raise serious problems,<sup>477</sup> but charge bargaining—especially “nonevidentiary” charge bargaining (the dropping of *provable* charges in return for a plea)<sup>478</sup>—is particularly susceptible to abuse. Charge bargains tend to understate the true severity or

474. STPO §§ 152-153; see also Langbein, *Land Without Plea Bargaining*, *supra* note 2, at 211 (“German law requires that all felonies . . . and all misdemeanors that cannot be excused under the two statutory criteria of pettiness must be prosecuted whenever the evidence permits.”).

475. These specific French trial procedures, and the problems of trying to adopt them in the United States, are discussed at Appendix, *infra* text accompanying notes 678-736.

476. See Morris, *supra* note 3, at 1369 (arguing that reform proposals must recognize the improbability of completely altering the American criminal system).

477. See *supra* text accompanying note 467.

478. Cf. FEDERAL SENTENCING GUIDELINES, *supra* note 434, § 6B1.2(a) (“Policy Statement”) (court may accept charge bargain if it finds, on the record, that “the remaining charges adequately reflect the seriousness of the actual offense behavior, and that accepting the agreement will not undermine the statutory purposes of sentencing”). Under a proposed Department of Justice plea bargaining policy pursuant to these guidelines, federal prosecutors “may not stipulate away a true

frequency of the defendant's crimes and distort his or her criminal history record. Furthermore, these bargains allow prosecutors to exercise sentencing power directly—an authority properly belonging to the court—often without benefit of any detailed, independent, presentence investigation. Finally, charge bargaining effectively undercuts sentencing and parole reforms linked to specific conviction offenses.<sup>479</sup>

Charge bargaining may also be more difficult for judges to control than sentence bargaining. Sentencing decisions have traditionally been relegated to judges, who must take primary responsibility for those decisions, whereas charging decisions have traditionally been considered a matter of prosecutorial discretion.<sup>480</sup> Moreover, even if judges wanted to place limits on nonevidentiary charge bargains, it is difficult for them to identify those bargains. Given the limited means available to courts to assess the strength of charges that the prosecutor wishes to drop, often a judge's easiest course is to presume that the charges were not provable and thus defer to the prosecutor's request.

The central reason for the absence of charge bargaining in Europe is that continental prosecutors lack the common law prosecutor's *nolle prosequi* power to drop pending charges. Moreover, in several countries, notably in West Germany, prosecutorial discretion is also tightly controlled *prior* to the filing of charges in court.<sup>481</sup> In France, however, prosecutors enjoy broad charging discretion in the prefiling context.<sup>482</sup> Furthermore, as discussed more fully below, there do appear to be analogues of charge bargaining in France. Nevertheless, because these forms are still preferable to those found in the United States, they merit further study and efforts to move American practices closer to those of the French.

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fact or a readily provable fact." *Justice Department Views*, 42 Crim. L. Rep. (BNA) 2340 (1988); see also *State v. Haner*, 95 Wash. 2d 858, 631 P.2d 381 (1981) (affirming court's rejection of proposed charge bargain); WASH. REV. CODE ANN. § 9.94A.450(1) (1988) ("[D]efendant will normally be expected to plead guilty to the charge or charges which adequately describe the nature of his or her criminal conduct or go to trial").

479. See Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 563-77 (1978); see also Frase, *supra* note 295, at 231-32. While evidentiary charge bargaining—dropping weak charges in return for a guilty plea—raises fewer of these problems, it is fundamentally dishonest, encourages initial overcharging of the case, and probably produces the widest sentencing disparities. *Id.* at 232. As suggested at *infra* text accompanying notes 503-06, weak charges should be dropped *unconditionally*.

480. See *supra* text accompanying notes 438-39.

481. See Goldstein & Marcus, *Myth of Judicial Supervision*, *supra* note 4, at 272-73; Langbein, *Land Without Plea Bargaining*, *supra* note 2, at 210-11.

482. See *supra* text accompanying notes 396-400.

### 1. *Vertical Charge Bargaining (Correctionalization)*<sup>483</sup>

Some commentators have argued that this French practice bears no resemblance to American charge bargaining for three reasons: these charge reductions do not affect the method of adjudication since defendants still receive a trial;<sup>484</sup> the reductions are not "bargained" for—rather, they are made unilaterally and usually occur before the defendant has an attorney;<sup>485</sup> and they are not conditioned on either the defendant's confession (which can be withdrawn later anyway) or on his or her cooperation.<sup>486</sup>

Each of these points has some validity, but none should be overstated. First, although defendants in correctional court still receive a "trial," they do not enjoy the greater procedural protections associated with prosecution on felony charges. Specifically, the defendants lose any chance that the examining magistrate will help uncover evidence in their favor or will dismiss all charges.<sup>487</sup> Defendants also subject themselves to the looser evidentiary standards permitted in correctional court.<sup>488</sup> Finally, defendants in correctional court forfeit the possible value of lay participation in the assize court.<sup>489</sup> Second, while it is true that French prosecutors do not openly "bargain" for correctionalization, the possibility of less explicit "exchanges" is not ruled out. So-called "tacit bargains"<sup>490</sup> are well-known in the United States: Defendants cooperate with the expectation that they will receive charging leniency, and they are rarely disappointed. Thus the critical issue is whether French correctionalization decisions are conditioned on a defendant's cooperation.

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483. The following discussion disregards the analogous practice of "contraventionalizing" delicts (sending provable delicts to police court to be tried as contraventions). This practice has received less attention from both French and American commentators. To the extent that it involves defendants' giving up the procedural protections available in one particular court in return for a lower charge and sentencing range, the discussion of correctionalization in the text is applicable to contraventionalization.

484. Langbein & Weinreb, *supra* note 2, at 1557-58.

485. *Id.* at 1558; Weigend, *supra* note 3, at 409.

486. Langbein & Weinreb, *supra* note 2, at 1558; Weigend, *supra* note 3, at 408-09. The utility of attempting to withdraw a confession is questionable, however, since the French trial court retains broad discretion to evaluate and reject the retraction. See 2 R. MERLE & A. VITU, *supra* note 40, § 976.

487. As noted in the previous section, these dismissals happen quite frequently during the judicial investigation (although undoubtedly some of these dismissals involve unknown persons). See *supra* note 461 and accompanying text.

488. See generally FRENCH SYSTEM, *supra* note 41, at 23-30 (providing a description of trial procedures and evidentiary standards in both assize and correctional courts).

489. Cf. Casper & Zeisel, *supra* note 7, at 185-91 (suggesting that German lay judges have a slight prodefendant effect on determination of guilt, and a somewhat stronger mitigating effect on sentence).

490. See PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS 108, 111-12 (1967) [hereinafter TASK FORCE REPORT] (describing the tacit bargain as it appears in the United States).

There are at least two ways in which correctionalization could be linked to the defendant's cooperation. First, cooperation, especially a full confession, simplifies the case,<sup>491</sup> often obviating the need to open a judicial investigation (with the attendant possibility that the examining magistrate will insist on felony charges). However, no research to date has produced any evidence that a French defendant confesses in the hope that the case will be correctionalized. Furthermore, as noted above, defendants rarely have counsel at this stage, so a defendant may not necessarily perceive his or her confession as a permissible bargaining chip. Consequently, if there is any explicit or implicit inducement to cooperate and thus avoid or minimize judicial investigation, it probably focuses more on the defendant's desire to avoid further detention, and not on the desire to avoid felony charges.

The second link between a defendant's cooperation and correctionalization is stronger. The defendant's cooperation is necessary because correctionalization cannot take place over the defendant's objection, once he or she appears for trial in correctional court. Since that court lacks jurisdiction to try a felony,<sup>492</sup> the accused, by pointing out the facts of the case which would justify felony charges, can force the correctional court to declare itself incompetent.<sup>493</sup> Although this is very rare in practice,<sup>494</sup> it does occur.<sup>495</sup> Given that the defendant has this legal right, the minimum elements of a tacit vertical charge bargain do seem to exist: The defendant receives a charge reduction in return for his or her "cooperation" in not insisting on the greater procedural protections associated with felony charges.

In spite of these similarities, however, correctionalization is less subject to abuse than American vertical charge bargaining. As noted above, French defendants do not give up nearly as much as American defendants who plead guilty. While American defendants offered a charge reduction must make a full, irrevocable confession of guilt, French defendants still receive a trial at which they can fully contest the charges. Moreover, the odds of conviction in correctional court are only slightly higher than in felony court.<sup>496</sup> In these respects, correctionalization bears some similarity to another practice found in the United States:

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491. Goldstein & Marcus, *Myth of Judicial Supervision*, *supra* note 4, at 276-78.

492. Proc. Code arts. 381, 382, 469.

493. Langbein & Weinreb, *supra* note 2, at 1552.

494. Goldstein & Marcus, *Myth of Judicial Supervision*, *supra* note 4, at 253.

495. See, e.g., Judgment of Feb. 9, 1984, Cour d'appel, Rouen, Fr., 104 G.P. Nos. 272-73, at 15-16 (defendant refused correctionalization, preferring to raise his self-defense claim before a jury in assize court).

496. For the years 1960 through 1978, median conviction rates for assize and correctional courts were 92.7 and 95.2%, respectively. COMPTE GÉNÉRAL, *supra* note 39, at 25.

"jury-waiver bargaining."<sup>497</sup> However, correctionalization is still preferable because it gives the defendant a charge reduction which, under American constitutional principles, justifies the application of lower procedural standards.<sup>498</sup> Jury-waiver bargaining, on the other hand, generally asks defendants to accept adjudication and conviction on serious charges<sup>499</sup> without the most important procedural protection normally associated with such charges.

If correctionalization is similar but in some ways superior to its American analogues, how can we adapt American procedures to make them more like the French ones? I have two alternative proposals. First, American prosecutors should be encouraged to examine charge severity carefully and make any necessary charge reductions *unilaterally*, without waiting for the defendant to agree to plead guilty. It is important to stress that this would *not* necessarily require prosecutors to give defendants "something for nothing." In many cases, reduction of charge levels—for example, felony to gross misdemeanor, or misdemeanor to petty misdemeanor—will invoke less complex pretrial and trial procedures, such as those involving grand jury, preliminary hearings, discovery, jury size, voir dire procedures, and jury and counsel rights, thus making it easier and/or cheaper to obtain a conviction even if the defendant insists on trial. Moreover, the lower penalty range may itself persuade defendants not to insist upon a trial. Prosecutors could be encouraged to use this approach if we took further steps, as the French have done, toward "making the procedure fit the crime"—for example, by eliminating jury rights under state law for misdemeanors not subject to federal constitutional jury rights (punishable by six months' imprisonment or less).

One problem with the above proposal, however, is that it might encourage some prosecutors to reduce the charges even where the higher charge is easily provable, thus raising many of the problems of "nonevidentiary" charge bargaining.<sup>500</sup> Also, the proposal would not *prevent* American prosecutors from trading charge reductions for a defendant's agreement to plead guilty. In France, these problems are less likely to

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497. See Alschuler, *supra* note 7, at 1024-43 (describing implicit procedures in Philadelphia and Pittsburgh whereby defendants generally receive substantially diminished sentences in return for waiving their right to a jury trial); see also Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984).

498. See *Baldwin v. New York*, 399 U.S. 66 (1970) (criminal offenses carrying a maximum prison sentence of six months or fewer can be tried without a jury); cf. *Scott v. Illinois*, 440 U.S. 367 (1979) (no right to appointed counsel because, although conviction offense was punishable by up to one year in prison, defendant's actual punishment was only a \$50 fine).

499. In most instances American defendants who waive their right to a jury trial simply receive the probability of a more lenient sentence. However, such defendants occasionally receive a reduced charge in exchange for waiver of a jury trial. Alschuler, *supra* note 7, at 1029.

500. See *supra* text accompanying note 479.

arise because prosecutors have limited power to reduce the charges once they are filed with the court.

The broad power of American prosecutors to reduce pending charges at any time before trial, with little if any judicial scrutiny,<sup>501</sup> also raises two related problems. First, such charge reductions are likely to occur at a time when the defendant has an attorney and is prepared to plead guilty, thus making charge bargaining almost inevitable. Second, the closer to the trial stage that we permit charge reductions, the more likely it is that the prosecutor doing the screening will be the trial prosecutor. The result may very well be a nonevidentiary charge bargain caused by a sudden scheduling conflict, a particular defense attorney or judge, laziness, lack of trial experience, or other penologically irrelevant factors.

The solution to these problems is clear, although my second proposal is more difficult to implement than the first. The American prosecutor's power to reduce—or increase<sup>502</sup>—charges must, as in France, be sharply limited after some stage of pretrial procedure.<sup>503</sup> On or before a prescribed “charging cutoff” date—for example, after completion of discovery and suppression hearings—the prosecution would be expected to make its final screening decisions, reducing all charges that it does not intend to pursue or cannot maintain at trial. After that, further charge revisions could only be ordered by the court under strict standards (perhaps supported by some system of costs or other incentives). Although this rule would involve a major change in existing American practices, it is by no means unprecedented. Existing rules of procedure in many jurisdictions already recognize a fundamental distinction between pre and postfiling prosecutorial discretion,<sup>504</sup> and there is some evidence of a

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501. See *supra* text accompanying notes 389-91.

502. A proscription on this power is necessary to prevent prosecutors from threatening to file more serious charges if a defendant refuses to plead guilty. Cf. *Bordenkircher v. Hayes*, 434 U.S. 357, 362-65 (1978) (filing of habitual offender charge—carrying mandatory life sentence—after defendant refused to plead guilty to forgery and receive a five-year sentence did not violate due process absent showing of vindictiveness by prosecutor).

503. See Alschuler, *supra* note 7, at 967-68 (proposing a 30-day waiting period between any charge reduction and entry of guilty plea, to reduce the possibility of implicit agreements and assure compliance by both parties); see also FEDERAL SENTENCING GUIDELINES, *supra* note 434, § 6B1.2 commentary (court should review plea-contingent charge reductions and dismissals, but defer to prosecutor on unconditional reductions); A. GOLDSTEIN, *supra* note 391, at 66-67 (arguing that courts should more actively review charge bargains and develop a “common law of prosecutorial discretion”); Parnas & Atkins, *Abolishing Plea Bargaining: A Proposal*, 14 CRIM. L. BULL. 101, 119-21 (1978) (proposing an early charge-setting hearing after which charges could only be reduced or altered at the preliminary hearing, or under “exceptional circumstances” as a result of “significant new information not previously available”); Schulhofer, *supra* note 440, at 772-98 (proposing that judges should have greater formal power to limit or reject charge bargains, but not to order unconditional charge reductions or dismissals).

504. See, e.g., FED. R. CRIM. P. 48(a) (dismissal of charge requires leave of court); see also *State ex rel. Unnamed Petitioners v. Connors*, 136 Wis. 2d 118, 128-30, 401 N.W.2d 782, 786-87 (1987)

trend toward greater willingness of courts in these jurisdictions to exercise their power to review postfiling dismissals.<sup>505</sup>

To prevent charge bargaining in the period before cutoff, it may be necessary to prohibit the entry of a plea to reduced charges during that period. This will ensure that, as in France, the prosecution will be bound by its final charges before the defendant is in any way bound by his or her plea. If the cutoff date were sufficiently in advance of trial, a defendant could then make an informed plea decision, and it seems quite likely that most defendants would continue to plead guilty.<sup>506</sup> Unlike our present system, however, the plea would be based on the "real" charges likely to lead to conviction at trial and thus would not be influenced by charging threats or offers. At the same time, the quality of charging decisions before cutoff would substantially improve. If the decisions had to be made on a "plea-blind" basis (and less subject to sudden calendar pressures), prosecutors would be free to base their charging decisions exclusively on the merits of the case—evidence, aggravating and mitigating factors, alternatives to prosecution, and so on—as well as on general resource limitations. Under these circumstances, it would thus be possible to minimize the incidence of overcharging, undercharging, and inconsistent charging.

## 2. *Horizontal Charge Bargaining*

Another common form of charge bargaining in the United States involves the prosecutor's agreement to drop or decline to file other counts or charges in return for the defendant's cooperation. Horizontal charge bargaining raises many of the same problems as vertical charge bargaining.<sup>507</sup> However, the proposal of a charging cutoff is less feasible in the horizontal charging context, since the prosecutor can simply hold

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(distinguishing between pre- and postfiling judicial review of decisions not to prosecute), *overruled on other grounds*; *State v. Unnamed Defendant*, 150 Wis. 2d 352, 441 N.W.2d 696 (1989). *See generally supra* note 390 and accompanying text (some states require leave of court to dismiss serious charges).

505. *See United States v. Bean*, 564 F.2d 700 (5th Cir. 1977) (no abuse of discretion where district court rejected defendant's plea of guilt to theft and agreement to cooperate in the investigation of other suspects in return for dismissal of a burglary charge; the district court had found the bargain did not impose a penalty commensurate with the offense); A. GOLDSTEIN, *supra* note 391, at 17-24 (illustrating trend in the federal courts and some state courts toward greater judicial control over postfiling dismissals); Schulhofer, *supra* note 440, at 773-78 (arguing for formal power vested in the courts to review and reject postfiling dismissals, and indicating state trend in this area).

506. *Cf. Alschuler, supra* note 7, at 949-52 (arguing that, apart from bargained concessions, most misdemeanor defendants plead guilty because of remorse, lack of defenses, and/or "process costs" of trial which outweigh any benefits). The same is probably true in many felony cases. *See id.* at 943-44 (suggesting that lack of defenses and process costs might lead to significant numbers of guilty pleas in felony cases without plea bargaining).

507. *See supra* text accompanying note 479 (discussing problems associated with charge bargaining).



back collateral charges and threaten to bring them later if the defendant refuses to plead guilty.<sup>508</sup>

The question whether French prosecutors engage in similar practices has received very little attention in the literature. American researchers may have assumed that any form of horizontal charge bargaining is impossible in European systems given the absence of formal *nolle prosequi* powers and, in West Germany, the existence of the rule of compulsory prosecution. However, as noted previously, it is not known whether French practice conforms to theory in this context.<sup>509</sup> If French prosecutors and/or courts do retain some postfiling power to drop collateral charges, this power could be used to reward defendants who confess or otherwise cooperate at trial. In any case, the French prosecutor's broad control over the filing of initial charges allows him or her to forego collateral charges in return for prefilings cooperation (for example, confessions given to the police), and to threaten to bring additional charges later in retaliation for the defendant's failure to cooperate at the pretrial or trial stages.

I am not aware of any reported research, in either French or English, suggesting that French prosecutors actually exercise their powers in this way. But if they do—or if defendants and their lawyers think that they do—the practice probably raises fewer problems in France than it does in most American jurisdictions. As noted in the previous Section,<sup>510</sup> French *sentencing* law significantly limits the “worst case” impact which collateral charges can have on the defendant's current and future sentences. As a result, French defendants have much less incentive to cooperate in the hope of avoiding conviction on collateral charges, and prosecutors have less incentive to drop or forego such charges to induce cooperation. Thus, as Americans search for ways to control the problems of horizontal charge bargaining, we should also look to the sentencing laws of other Western nations. By reducing the sentencing impact of multiple convictions as the French have done, perhaps we can

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508. It might be possible to draft a broad compulsory joinder rule applicable to all offenses “known” to the prosecution at the time of the charging cutoff date, but such a subjective standard could prove difficult to enforce when the collateral charges do not arise out of the same incident, scheme, or investigation.

In the vertical charging context, while prosecutors might argue that they were previously unaware of the true seriousness of the offense, they cannot claim complete ignorance of it. Moreover, double jeopardy rules also limit later filing of more serious charges based on the same incident. See Schulhofer, *supra* note 440, at 788 n.218. In the horizontal charging context, existing joinder rules tend to be permissive, see, e.g., FED. R. CRIM. P. 8, except in the case where “a person's conduct constitutes more than one offense.” See, e.g., MINN. STAT. ANN. § 609.035 (West 1987), discussed at *supra* note 426.

509. See *supra* text accompanying notes 423-24.

510. See *supra* text accompanying note 424.

at least ameliorate, if not eliminate, the problems of horizontal charge bargaining.

### B. French Sentence Bargaining

As with charge bargaining, sentence bargaining in the United States may be either explicit or implicit.<sup>511</sup> Explicit forms of sentence bargaining include: prosecutorial agreements to recommend or not to oppose a lenient sentence or sentence "cap"; "agreed" sentences that are jointly recommended by prosecution and defense (usually with the understanding that the defendant may withdraw his or her plea if the court refuses to be bound by the agreed-upon sentence); and judicial agreements on a particular sentence or sentence cap. Implicit or tacit sentence bargains involve unbargained-for expectations that the defendant's cooperation will be rewarded with a more lenient sentence. Such leniency is extended for the same reasons that judges and prosecutors explicitly offer lenient treatment to defendants who cooperate: the perception that such defendants deserve less punishment, that lesser punishment is necessary to induce an acceptable number of guilty pleas, or for both these reasons.<sup>512</sup>

Sentence bargaining circumvents some of the problems associated with charge bargaining.<sup>513</sup> It does not distort the seriousness or frequency of the defendant's crimes; nor is it as likely to encourage overcharging or prosecutorial usurpation of judicial sentencing power. Sentence bargaining is also easier for judges to control, and it is more susceptible to regulation by means of sentencing or parole reforms based on conviction offense. Still, sentence bargaining can produce unjustified sentence disparities and penalties for the assertion of constitutional rights. Extreme disparities between pleas and eventual trial sentences may lead to conviction of the legally or factually innocent and may also be perceived as unfairly coercive.

Although studies of the French criminal justice system have not yet revealed any evidence of explicit sentence bargaining, several forms of tacit bargaining seem to exist. However, as discussed more fully below,<sup>514</sup> it appears that most of these forms are subject to fewer abuses than typical American forms of sentence bargaining. At the same time,

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511. See generally TASK FORCE REPORT, *supra* note 490, at 108-12 (discussing the various types of charge and sentence bargains).

512. See generally 3 A.B.A., STANDARDS FOR CRIMINAL JUSTICE Standard 14-1.8(a) (2d ed. Supp. 1986) (listing four reasons defendants who plead guilty might be found to deserve charge or sentence concessions). The original version of these standards contained a slightly broader list of justifications for such concessions, based both on presumed deserts and on the need to induce guilty pleas. See STANDARDS RELATING TO PLEAS OF GUILTY § 1.8(a) (Approved Draft 1968); see also *infra* note 528.

513. See *supra* text accompanying notes 477-79.

514. See *infra* text accompanying notes 523-24.

several of the French practices are similar enough to existing American procedures that they may feasibly be adopted here.

### 1. *The (More or Less) Uncontested Trial*

As noted at the outset of this discussion, skeptical American researchers assert that the basic issues of a case are uncontested in most European trials, and that such trials closely parallel tacit plea bargaining. In a typical case, the defendant's confession before or at the outset of a trial permits a rapid "finding" of guilt at a cursory proceeding. Empirical research on trials in West Germany supports the existence of this phenomenon. German defendants made a "full confession" in 41% of all trials (another 26% involved "partial" confessions), and full confession reduced the adjudication phase of the trial by about 50%.<sup>515</sup> Additionally, the crucial quid pro quo of plea bargaining—sentencing leniency in return for cooperation—is assumed by both skeptics and supporters of the German system, for the defendant's cooperation is almost always considered a mitigating factor in sentencing in continental systems.<sup>516</sup>

Similar empirical data are lacking for French trials, but the universal impression left with Anglo-American observers is that French trials, particularly in correctional and police courts, are *typically* uncontested, at least in part,<sup>517</sup> and that calling witnesses other than the defendant is the exception rather than the rule.<sup>518</sup> The uncontested nature of such

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515. Casper & Zeisel, *supra* note 7, at 146-47, 151 table 20; see also Weigend, *supra* note 3, at 411 (citing study of lower court trials in which defendant's confession reduced the average trial from 70 to 50 minutes, or only about 30%).

516. M. DAMAŠKA, *supra* note 25, at 193 (arguing that sentencing concessions are routinely granted to cooperating defendants in all continental systems of criminal justice); Goldstein & Marcus, *Myth of Judicial Supervision*, *supra* note 4, at 272-73, 278-79 (asserting that cooperation and confessions are considered in sentencing in both Germany and France); Langbein, *Land Without Plea Bargaining*, *supra* note 2, at 221-22 (acknowledging that German courts "sometimes" consider confessions as a mitigating factor in sentencing); Weigend, *supra* note 3, at 411; see also J. LANGBEIN, *supra* note 7, at 55 (example of a German formal judgment order treating defendant's confession as a mitigating factor). But see Alschuler, *supra* note 7, at 986-87 (most civil law jurists interviewed denied that confessions, especially late ones, are "systematically" rewarded).

517. See, e.g., A. SHEEHAN, *supra* note 41, at 202-10 (in summary of 11 correctional court trials, of the 9 completed trials, only 2 involved total denials of guilt, 3 involved partial denials, and 4 involved complete confessions or the equivalent); see also S. BEDFORD, *THE FACES OF JUSTICE: A TRAVELER'S REPORT* 303-08 (1961) (summarizing trials observed in correctional court).

518. In the Spring of 1982 and 1986, I observed about 50 correctional court trials in Lyon, France's second largest metropolitan area, with a 1982 population of about 1 million. See A. POLITICAL HANDBOOK OF THE WORLD: 1988, at 195 (A. Banks ed. 1988). Trials preceded by a judicial investigation almost never involved live witnesses; other trials occasionally did. The few police court trials I was able to observe involved no witnesses other than the defendant. See also sources cited at *supra* note 517 (noting that in these summaries typically no witnesses other than defendant were called).

Assize court adjudications resemble more closely what Americans think of as a "real" trial. All available prosecution witnesses are summoned, if available, and defense witnesses are frequently cited and heard. See S. BEDFORD, *supra* note 517, at 277-98 (summary of one assize court trial);

trials, however, is apparently *not* due to the court's control over the calling and questioning of witnesses, for French defendants clearly have the legal right to insist that any or all prosecution or defense witnesses be called and questioned at trial.<sup>519</sup> Rather, it appears that defendants and their attorneys *choose* not to contest some or all of the state's case.

It is unclear why French defendants do not insist on the full measure of the adversary trial procedures available to them. In his observations of the West German system, Professor Langbein has suggested that German defendants confess at trial for several reasons: many cases are "open and shut"; "[p]eople do not like to be caught lying"; guilty defendants prefer to focus the court's attention on the mitigating factors affecting sentencing; and courts "sometimes" show leniency to defendants who confess.<sup>520</sup> Although French trials have not been studied as carefully, similar factors may explain the willingness of French defendants to confess to some or all of the charges against them. While French courts clearly *may*, if they wish, treat a defendant's cooperation as a mitigating factor in sentencing,<sup>521</sup> it is unclear how often and to what extent they actually do so. This is certainly an area where further empirical research is needed, and the research should also consider other factors encouraging defendants to cooperate at trial.<sup>522</sup>

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FRENCH SYSTEM, *supra* note 41, at 24-26 (general description of trial in assize court); A. SHEEHAN, *supra* note 41, at 211-19 (summary of three assize court trials). There is still some room for defense "cooperation" in these trials (for example, defendant admissions, limited defense direct and cross-examination), but much less so than in correctional and police court trials. The remainder of this discussion focuses on correctional court procedures, since there the procedural differences and the possibilities of useful borrowing seem greatest.

519. See FRENCH SYSTEM, *supra* note 41, at 28 (prosecutors will normally cite any witnesses requested by the defense); A. SHEEHAN, *supra* note 41, at 29 (prosecution, defense, and civil parties all have equal right to cite witnesses).

520. Langbein, *Land Without Plea Bargaining*, *supra* note 2, at 218-21.

521. In my informal discussions with French lawyers, judges, and law professors in Lyon during Spring 1982, 1986, and 1990 I was universally informed that the defendant's confession or cooperation would lighten the sentence. See also sources cited at *supra* note 516.

The French courts have considerable discretion regarding length of sentences. See 1 R. MERLE & A. VITU, *supra* note 145, § 763, at 922 (discussing the complete discretion courts have to find "extenuating circumstances," thus allowing them to impose less than the minimum sentence for the level of offense). Except where prior crimes limit the suspension of a sentence, French courts have even broader discretion in fixing the sentence *within* the authorized range for each offense level. See FRENCH SYSTEM, *supra* note 41, at 32-36.

522. One factor is the possibility of avoiding or minimizing the imposition of court costs. See *infra* text accompanying note 524. Other factors may include certain rules of trial procedure or evidence that might encourage French defendants to testify and thereby "cooperate" by making admissions or by opening themselves up to questioning. As the first witness, the defendant is forced to face questions; inferences from silence are not prohibited; defendants are not placed under oath and need not fear perjury charges; there is no separate sentencing hearing; and the defendant's prior record is always known to the court—conceivably not just for purposes of impeaching his testimony. However, as discussed more fully in the Appendix, *infra* text accompanying notes 703-36, it is not clear how much of a difference the American rules make in practice.

At present, my own hypothesis is that tacit "cooperation bargaining" has a relatively modest effect on sentencing in France. I base this assumption on three closely related aspects of French procedure. First, there is evidence suggesting that French sentences are generally more lenient than American sentences,<sup>523</sup> which accordingly reduces the range within which cooperation can affect the sentence. Second, French courts are much more likely to require payment of the costs of prosecution,<sup>524</sup> thus encouraging solvent defendants to avoid contesting issues without good reason. Third, the structure of French criminal trials facilitates the exchange of *modest* sentence concessions for *modest* degrees of cooperation. Since defendants do not enter formal pleas of guilty or not guilty, they may choose to contest *part* of the case against them. They thus avoid the all-or-nothing choice which often confronts American defendants: Admit all elements of the charge (even those strongly disputed), or go to trial on all of these elements (even those that were never disputed).<sup>525</sup> In turn, American sentence concessions are probably larger than French ones: The more issues the defendant concedes, the greater the need to reward him or her, and vice versa.<sup>526</sup>

Assuming that my hypothesis is correct, the French system of limited, tacit sentence concessions should provide a useful model for reform of American plea bargaining practices. Although some opponents of plea bargaining insist upon complete abolition of sentencing concessions,<sup>527</sup> I do not believe this has been achieved in European systems, and I frankly doubt that it can ever be achieved in the United States; the human tendency to reward people who cooperate is simply too strong to be completely controlled. Indeed, rewards for cooperation may be

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523. See generally *infra* Part VIII, text accompanying notes 563-629 ("Sentencing Laws and Practices").

524. See CODE DE PROCEDURE PÉNALE [C. PR. PEN.] arts. R.91-R.249 (tariffs and procedures for collecting costs in criminal cases). See generally FRENCH SYSTEM, *supra* note 41, at 26, 29 (such costs *must* be assessed against all convicted defendants, unless specifically excused by the court in a special decision stating reasons). Costs may be collected by any means, including imprisonment for payment. *Id.* at 33. The code provides specified prison terms—for example, five days for unpaid amounts between 1,000 and 3,000 francs—but these terms may not be executed against insolvent defendants or defendants who post security for the unpaid amount. Finally, imprisonment does *not* satisfy the debt. *Id.*

525. American defendants sometimes have more choice, such as pleading guilty to a lesser included offense, or to some but not all counts or charges. See W. LAFAYE & J. ISRAEL, *supra* note 126, § 20.1(a).

526. Cf. Langbein, *Land Without Plea Bargaining*, note 2, at 222 (arguing that, since West German trials are simple, defendants who admit guilt—thus making the trial even simpler—need only be offered minor concessions); Schulhofer, *supra* note 497, at 1092 (concessions needed to induce jury waivers will necessarily be smaller than guilty plea concessions, since defendant in former situation gives up less).

527. Cf. Alschuler, *supra* note 7, at 978-79 (suggesting that a system which merely substitutes implicit bargaining for explicit is not a "promising model for reform").

appropriate<sup>528</sup> so long as they are not so large that they risk conviction of the innocent, unfair coercion, distortion of criminal records, or major disparities in sentencing.<sup>529</sup>

Using aspects of both French and American procedures as models, we can devise a system that effectively limits the magnitude of sentence concessions.<sup>530</sup> Unlike the conclusions of most previous researchers,<sup>531</sup> my suggestion is not that the United States adopt European nonadversary trial procedures, such as: trial before a "mixed" court of judges and jurors; defendant called as the first witness, allowing the court to focus the remaining trial on the contested issues; other witnesses called and questioned by the presiding judge who is fully familiar with the investigative file; and few formal rules limiting the admissibility of evidence. These rules and procedures are so different from American traditions that there is virtually *no chance* that they could ever be adopted.<sup>532</sup> Indeed, proposals to relax evidentiary and procedural standards at trial might actually aggravate the plea bargaining problem. Such relaxation would presumably make it easier for the prosecution to allege a *prima facie* case; this in turn, would tend to encourage prosecutors to file some of the weak cases they now dismiss, thereby increasing case volume and thus the need for plea bargaining! Moreover, we should also hesitate to eliminate completely the option of a "full due process" trial, for in highly contested or political cases, this right still provides an essential safeguard against unjust prosecution and conviction.

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528. It is usually assumed that any "deserved" leniency for defendants who plead guilty is based on the concepts of remorse, contrition, or "willingness to assume responsibility for his or her conduct." See 3 A.B.A., STANDARDS FOR CRIMINAL JUSTICE, *supra* note 512, Standard 14-1.8(a)(i); see also FEDERAL SENTENCING GUIDELINES, *supra* note 434, § 3E1.1 ("Acceptance of Responsibility").

The problem with these theories is that most defendants who plead guilty probably do so largely or entirely to receive lenient treatment, not because they are remorseful, contrite, or more responsible. See Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 652-56, 661-69 (1981). But the same point could be made whenever moral culpability is assessed: We assume that defendants who commit less serious offenses are less blameworthy, even though their actions may have been motivated in whole or in part by fear of the greater penalties imposed for more serious offenses. A separate question is whether such assessments should be made categorically (all guilty pleas), or case-by-case. Both the American Bar Association's STANDARDS FOR CRIMINAL JUSTICE, *supra* note 512 (establishing particular requirements beyond a guilty plea for sentence reductions) and the FEDERAL SENTENCING GUIDELINES, *supra* note 434, § 3E1.1(c) ("A defendant who enters a guilty plea is not entitled to a sentencing reduction under this section as a matter of right."), opt for the latter approach. However, case-by-case assessments may be neither sufficiently reliable nor worth their cost.

529. See *supra* note 467 and accompanying text.

530. See, e.g., C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 285-86, 298-300 (1978); Schulhofer, *supra* note 440, at 791-95 (discussing implementation of guidelines to control judicial and prosecutorial discretion over charge reductions and guilty plea concessions).

531. See, e.g., Alschuler, *supra* note 7, at 1010.

532. These aspects of the French system are discussed more fully in the Appendix, see *infra* text accompanying notes 637-742.

I offer the following three suggestions based on French procedures for the reform of American plea and sentence bargaining. First, we should eliminate large sentence-bargaining differentials by adopting sentencing reforms that more closely limit the range of penalties available to the judge for each offense.<sup>533</sup> Second, we should expand the use of charging costs in criminal cases, thereby reminding solvent defendants that trials are expensive and that unnecessary litigation should be avoided.<sup>534</sup> Indigent defendants could perform community work as a substitute for monetary payments. Third, we should develop alternatives to our "all-or-nothing" approach to the adjudication of criminal charges. While we should not abandon the traditional common law guilty/not guilty plea concept, we should experiment with issue-narrowing procedures analogous to those used in European criminal cases. Although American law and tradition probably preclude adoption of the European procedure itself—including calling the defendant as the first witness—other approaches are possible.

One idea, modeled after American rules of civil procedure, is to employ pretrial "requests for admission."<sup>535</sup> The prosecution would serve the defendant and his or her counsel with a request after the completion of all pretrial discovery<sup>536</sup> and suppression hearings. The request could track the elements of each offense charged,<sup>537</sup> or it could be more

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533. A number of states have recently adopted such reforms, and they seem to work. *See, e.g., MINNESOTA SENTENCING GUIDELINES COMM'N, THE IMPACT OF THE MINNESOTA SENTENCING GUIDELINES: THREE-YEAR EVALUATION* (1984); Miethe, *Charging and Plea Bargaining Practices Under Determinate Sentencing: An Investigation of the Hydraulic Displacement of Discretion*, 78 J. CRIM. L. & CRIMINOLOGY 155, 161-76 (1987) (concluding that unregulated prosecutorial decisions did not circumvent goals of the *Minnesota Sentencing Guidelines*); *see also* Sentencing Reform Act of 1981, WASH. REV. CODE ANN. §§ 9.94A.010-9.94A.910 (1989) (creating commission to develop the sentencing guidelines and prescribing sentencing guidelines which became effective July 1, 1984).

534. American courts often have authority to impose costs on convicted defendants. *See, e.g.,* 28 U.S.C. § 1918 (1988); MINN. STAT. ANN. § 631.48 (West 1989); *see also* Commonwealth v. Hower, 267 Pa. Super. 182, 406 A.2d 754 (1979) (upholding assessment of court costs (\$635.22) and prosecutor's "necessary and reasonable" trial preparation expenses (\$4,174) in a vehicular homicide case, and rejecting arguments that such assessments unconstitutionally burden vigorous defense efforts or the privilege against self-incrimination). This authority, however, seems to be rarely used; the categories of taxable costs are limited, and no fixed prison terms are specified for solvent defendants who refuse to pay. *See generally* O'Malley, *The Assessment of Costs in Federal Criminal Prosecutions*, 31 ST. LOUIS U.L.J. 853 (1987) (commenting on the federal statute and its application in *United States v. Burchinal*, 657 F.2d 985 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981), which upheld imposition of costs on one of four defendants who refused, with no apparent reason, to stipulate to foundational aspects of government's exhibits).

535. FED. R. CIV. P. 36.

536. This proposal would probably work better in jurisdictions allowing broad pretrial discovery in favor of the defense, as is allowed in France, *see infra* notes 669-77 and accompanying text. In those jurisdictions, defendants would be more willing to "throw in the towel" on some or all issues once they saw how warm the water was. However, in jurisdictions allowing more limited defense discovery, the proposal should still work at least as well as current plea bargaining practices, which require defendants to admit *all* of the case against them.

537. For example, the defendant in an assault case would be asked to admit or deny—or allege

detailed and fact-specific—approaching the pleading and discovery rules found in American civil procedure and in the criminal procedures of some foreign countries.<sup>538</sup> Defendants could, in turn, request that the prosecution either drop certain elements of the charge, or admit certain elements of the defense case.<sup>539</sup> Admitted matters would not have to be proved at trial unless the court subsequently allowed the admitting party to withdraw or amend his or her admissions.<sup>540</sup> Moreover, failure to

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inability to admit or deny—the elements of identity, intent to injure, causation of injury, and extent of injury produced. Common defenses not already included in pretrial notice requirements might also be listed. *Cf.* *Williams v. Florida*, 399 U.S. 78 (1970) (upholding notice-of-alibi statute against fifth and fourteenth amendment challenges).

538. See generally Harnon, *Criminal Procedure in Israel—Some Comparative Aspects*, 115 U. PA. L. REV. 1091, 1107-08 (1967) (“[D]efendant receives a narrative statement of the facts constituting the offense . . . [and is asked] whether he admits or denies all or any of the facts alleged in the statement of charge.”).

A somewhat analogous issue-narrowing procedure exists in England, where the committing magistrate may “conditionally” summon witnesses for trial if their previously recorded testimony or statements are unlikely to be disputed. The witnesses are not actually required to attend the trial unless the prosecution or the defense serves notice insisting on attendance. *M. GRAHAM, supra* note 9, at 44. Some observers believe that this procedure is not used widely enough in England and have proposed to add a “requests to admit” procedure similar to that discussed in the text. See 2 JUSTICE, THE TRUTH AND THE COURTS: BRITISH SECTION OF THE INT’L COMM’N OF JURISTS, WRITTEN EVIDENCE TO THE ROYAL COMMISSION ON CRIMINAL PROCEDURE (PART II) 13-15 (1980); see also FEDERAL SENTENCING GUIDELINES, *supra* note 434, § 6B1.4(b) (policy statement governing stipulations of facts relevant to sentencing; stipulation shall identify facts that are disputed); *M. GRAHAM, supra* note 9, at 270 (proposing “mandatory admission at trial of witness statements concerning either undisputed or inconsequential matters”).

539. A separate and much more difficult question is whether defendants should be allowed to admit certain matters over the prosecutor’s objection. This strategy can be especially useful to the defense where it serves to avoid the prosecutor’s introduction of highly prejudicial matter, such as prior convictions made relevant by an enhancement statute, or gruesome details of a homicide. Selective admissions also allow the defendant to avoid taking the stand to admit these matters, thus subjecting himself to cross-examination, impeachment by prior convictions, and impeachment by illegally seized evidence. See, e.g., *Harris v. New York*, 401 U.S. 222 (1971) (holding that statement otherwise inadmissible against defendant in prosecution’s case may be used to impeach).

On the other hand, the prosecution will often argue that the defendant should not be allowed to make selective, “self-serving” admissions not subject to cross-examination; or the prosecutor asserts that the admitted matter is relevant to disputed issues or adds persuasiveness and coherence to the prosecution’s case. Thus, in practice, most trial courts hold that the prosecution may not be forced to accept a stipulation. See, e.g., *People v. McClellan*, 71 Cal. 2d 793, 457 P.2d 871, 80 Cal. Rptr. 31 (1969) (prosecution did not have to accept stipulation that if the shots fired during an armed robbery caused the death, and the jury found that the defendant was one of the armed robbers, then he was guilty of first degree murder). But see *State v. Davidson*, 351 N.W.2d 8 (Minn. 1984) (trial court erred in refusing to accept defendant’s stipulation to his prior felony conviction, where jury should have been instructed that defendant admitted he had no right to possess pistol and that the sole issue was possession).

540. The standard for withdrawal or amendment would be similar to that applied under American civil procedure rules governing answers to requests for admission. See, e.g., FED. R. CIV. P. 36. The admitting party would have to show mistake or changed circumstances; the other party could object by showing detrimental reliance (for example, witness no longer available). *Cf.* *R. HAYDOCK, D. HERR & J. STEMPER, FUNDAMENTALS OF PRETRIAL LITIGATION* §§ 8.12-8.13 (1985) (examining provisions concerning admissions under Federal Rules).



admit facts subsequently proved at trial would, as in American civil procedure, subject the nonadmitting party or his or her attorney to possible assessment of the costs of such proof.<sup>541</sup> Finally, the failure to admit might also be taken into account at sentencing, as seems to be done in France.

Within the limits imposed by the charging and sentencing reforms suggested above,<sup>542</sup> the parties would be free to negotiate explicitly the exchange of defense admissions for either prosecution admissions or sentence recommendations. In addition, the opposing party could, under some circumstances, use the proponent's earlier unwithdrawn admissions or failures to admit in order to impeach conflicting evidence offered at trial.<sup>543</sup> Although neither perjury nor contempt sanctions would apply, each side would have an incentive to admit matters not seriously in dispute in order to increase the credibility of its case on the contested issues.

A further advantage of the procedure outlined above is that much of it could be implemented without changing any state rules of criminal procedure. Prosecutors and defense counsel already engage in less structured forms of "stipulation bargaining" over issues such as chain of custody and authentication of records. Nothing prohibits prosecutors from

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541. See, e.g., FED. R. CIV. P. 11, 16(f), 26(g), 37(c). Indigent defendants would have to perform community work as a substitute for payment of costs.

542. See *supra* text accompanying notes 502-08, 530, & 533-34.

543. Use of the defendant's answers to impeach his trial testimony does not violate the fifth amendment privilege if such answers are not "compelled." Compare *Harris v. New York*, 401 U.S. 222 (1971) (permitting impeachment with pretrial statements obtained in violation of *Miranda* rule, but which were not shown to be coerced or involuntary) with *New Jersey v. Portash*, 440 U.S. 450 (1979) (testimony compelled under grant of immunity could not be used to impeach). Several aspects of the proposal in the text argue against a finding of compulsion here: (1) defendants are not subjected to the "cruel trilemma of self-accusation, perjury or contempt," *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964) (reversing contempt charges against state witness who refused to testify because he was granted only state, and not federal, immunity); and (2) such requests are not "inherently coercive" since, unlike the police interrogation context addressed in the *Miranda* line of cases, defendants may answer the questions at their leisure, with full advice of counsel, on the basis of full pretrial discovery and defense investigation. Nor do such requests unfairly "burden" the decision to testify, cf. *Brooks v. Tennessee*, 406 U.S. 605, 612 (1972) (Tennessee statute requiring the defendant to "testify first for the defense or not at all" violated the fifth and fourteenth amendments because it denied defendants freedom of choice and advice of counsel), for defendants themselves could still testify in any way they wished. Use of the defendant's "silence"—that is, his failure to admit—to impeach his trial testimony would also not violate his fifth amendment privilege, since such silence is not "induced" by the government. See, e.g., *Jenkins v. Anderson*, 447 U.S. 231 (1980). Nor would impeachment violate due process, since the defendant would not have been implicitly assured that silence would carry no penalty. See *Fletcher v. Weir*, 455 U.S. 603 (1982) (absent *Miranda*-like affirmative assurances, no violation of due process to permit cross-examination on prearrest silence after defendant takes stand); cf. *Doyle v. Ohio*, 426 U.S. 610 (1976) (violation of due process to use postarrest silence to impeach since defendants had received *Miranda* warnings). Indeed, defendants could be explicitly warned that their failures to admit *could* be used against them at trial. Such warnings are less problematic here than in the *Doyle* context, where they would add to the "inherently coercive" atmosphere of police interrogation in the absence of counsel.

broadening the subject matter of such stipulations,<sup>544</sup> and nothing prevents the defense from accepting such proposals or from serving its own requests for admission. Once broader use of such issue-narrowing procedures is established, changes in criminal rules or statutes could foster their operation by clarifying the role of the court and the precise consequences of admission or failure to admit.

To summarize, the proposed request-for-admission procedure (or some other system of "partial guilty pleas," expanded "stipulation-bargaining," or modified "civil" pleading) could streamline criminal trials. Courts could then concentrate on the issues that are genuinely in dispute. These trials would save time and money, reduce the burdens of testifying, and allow the court or jury to focus more clearly on the dispositive issues. The availability of "partial" trials might also make litigation of genuinely contested issues more affordable, thereby encouraging the parties to litigate key issues that should not be plea bargained away. Even if there were no net change in the total number of witnesses and trial days, the result would be a more rational use of trial resources and a more accurate resolution of the issues. Finally, any pressures, abuses, or constitutional problems stemming from this system would be fewer than those inherent in current plea bargaining practices: in the proposed system, less is at stake in any given "bargain." European criminal and American civil courts have long operated successfully using similar issue-narrowing procedures; American criminal courts should follow suit.

## 2. *Pretrial Release Bargains*

As suggested earlier,<sup>545</sup> some French defendants are probably strongly encouraged to confess to, or otherwise cooperate with, the examining magistrate in order to avoid the latter's disfavor and to obtain release from pretrial detention.<sup>546</sup> Such "pretrial release bargains" are analogous to the notorious "time served" guilty plea, in which American defendants plead guilty to avoid continued pretrial detention.<sup>547</sup> Indeed, the French approach is potentially *worse* than its American counterpart

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544. Of course, since any such admissions by a defendant are tantamount to a partial or complete guilty plea, they must be based on the defendant's consent, thus representing a voluntary waiver of trial rights. See *Brookhart v. Janis*, 384 U.S. 1, 7 (1966) (agreement not to contest state's prima facie case was "practical equivalent" of guilty plea); cf. *United States v. Ferreboeuf*, 632 F.2d 832, 836 (9th Cir. 1980) (when stipulation to "crucial fact" is made in open court in presence of defendant and agreed to by his counsel, and defendant does not object, court may assume defendant agrees to and is thereby bound by the stipulation), *cert. denied*, 450 U.S. 934 (1981).

545. See *supra* text accompanying notes 491-95.

546. See Schlesinger, *supra* note 2, at 381 n.90. Similarly, defendants may also be encouraged to cooperate with police authorities to obtain release from investigatory detention, although the strictly limited duration of the latter (48 hours, in most cases) limits the coercive potential of such bargains. See *supra* note 161.

547. See sources cited at *supra* note 295.

in two respects: French defendants are pressured to cooperate at an earlier stage, and the French law enforcement official offering the "bargain" also has direct control over whether the pretrial detention will continue. In contrast, American "time served" pleas must, at least in theory, be approved by a trial judge independent from the investigation.<sup>548</sup> Yet the opportunity for such coercive bargains in the French system is limited. Examining magistrates are involved in all felony cases but take part in fewer than 10% of delict cases and have virtually no role in contravention cases.<sup>549</sup> Nevertheless, this is clearly an important area for future research. To the extent that the French system relies heavily on a form of highly coercive "confession bargaining" at the investigative stage, its adjudication procedures become less impressive. And the alternative of eliminating the objectionable procedures before transplant to this country may cause the entire system to work less successfully.<sup>550</sup>

### 3. Penal Orders, Scheduled Fines, and Plea Bargaining

Another form of tacit sentence bargaining in France is the use of penal orders and scheduled fines.<sup>551</sup> Each of these procedures avoids the necessity for trial in police court, provided the defendant agrees to pay the fine set in the penal order or prescribed in a fine schedule. It is not clear, however, whether defendants who refuse to pay these fines face a substantial risk of more severe penalties upon conviction at trial, such as higher fines, loss of driving privileges, or imprisonment. Some researchers claim that a trial "tariff" exists in the similar West German penal order procedure,<sup>552</sup> others maintain that a sentence differential of that

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548. Moreover, although French defendants can, in theory, later "withdraw" their confessions, the trial court retains broad discretion to "evaluate" the validity of such retractions. See *supra* note 486.

549. See FRENCH SYSTEM, *supra* note 41, at 12-13. Investigatory detention, however, is widely used. See *supra* note 161. During detention—or even without it—police and/or prosecution authorities could still obtain confessions by threatening to open a judicial investigation (and then seek pretrial detention of the accused).

Until recently, Parisian prosecutors engaged in another form of pretrial release bargaining in the context of the "immediate appearance" procedure, described at *supra* note 301. Prosecutors would agree not to insist on further detention, provided defendants agreed to reappear for trial within the 48-hour limit applicable to detention cases (rather than the two-week period applicable to released defendants). This procedure was struck down by the Paris Correctional Court as violating the formalities required in immediate appearance cases, and because of doubts that the defendant's waiver was "perfectly free" of coercion. See Judgment of Sept. 22, 1986, Trib. gr. inst., Paris, 1987 RECUEIL DALLOZ [D.S. JUR.] 58; see also *id.* note J. Pradel (accompanying easenote by Professor Jean Pradel praising the decision for putting a stop to this form of "North American plea bargaining" (his term), but conceding its practical value in dealing with overloaded courts and jails).

550. See *supra* text accompanying note 36.

551. See *infra* note 587. See generally FRENCH SYSTEM, *supra* note 41, at 31.

552. See Goldstein & Marcus, *Comment*, *supra* note 4, at 1575 n.18.

Note that the French and German penal order procedures differ in three important respects: (1) the French police court drafts the penal order and sets the proposed fine, which must then be accepted by the prosecutor, whereas the opposite is true in Germany, see J. LANGBEIN, *supra* note 7,

kind would be illegal and does not in fact exist.<sup>553</sup>

Although further research is needed, it does appear that French defendants risk a higher penalty if they refuse to pay the proposed fine. The Code of Criminal Procedure explicitly states that any fine imposed after trial *may not be less than* the amount of the scheduled fine that the accused previously declined to pay.<sup>554</sup> No such formal rule applies to penal orders, but French treatise writers note that penal order fines are kept very low and that defendants almost never refuse to accept them.<sup>555</sup> In addition, any costs assessed as part of the penal order<sup>556</sup> are presumably less than they would be after trial—thus producing, in effect, a lower fine.

In any case, even if some sentence or court cost differentials exist in these French procedures, they need not be very great to minimize trial demands effectively. Research on the disposition of petty offenses in the United States suggests that the principal reason French defendants agree to pay the penal order or scheduled fine is to avoid the collateral “process costs” associated with going to trial—lost time and wages, defense costs, prolonged anxiety, humiliation, and notoriety.<sup>557</sup> Assuming this to be true, what are the implications for reform of American procedures? Can we adopt a version of these streamlined French procedures to unburden our lower trial courts and to help defendants minimize the costs of pleading guilty?

Although some American reformers have suggested that we adopt the penal order procedure,<sup>558</sup> something closer to the scheduled fine approach offers greater promise for useful and feasible reform. Scheduled fines are preferable to penal orders because they bypass the expense and possible abuses of case-by-case fine-setting. Where minor violations lend themselves to a uniform fine approach, the fines should be set by general court order rather than by individual judges or prosecutors. If certain kinds of offenses require individualized judicial assessment of the fine or nonfine penalties, the scheduled fine approach could be coupled

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at 96-97; (2) French penal orders can only be used in contravention cases, whereas in Germany this procedure can apply to any misdemeanor (roughly comparable to French delicts), *id.*; Herrmann, *supra* note 7, at 484; and (3) French penal order sanctions are limited to fines, whereas in Germany suspension of a driver's license, for example, may also be ordered, *see* J. LANGBEIN, *supra* note 7, at 97.

553. W. FELSTINER & A. DREW, *supra* note 7, at 20-21; Langbein, *Land Without Plea Bargaining*, *supra* note 2, at 213-18.

554. Proc. Code art. 530-1[2].

555. 2 R. MERLE & A. VITU, *supra* note 40, § 1448, at 753 (1% refusal rate in Northeast departments); J. PRADEL, *supra* note 40, §§ 539-540.

556. Proc. Code art. 526.

557. J. LANGBEIN, *supra* note 7, at 218; Alschuler, *supra* note 7, at 952-56. *See generally* M. FEELEY, *supra* note 362.

558. *See, e.g.*, M. FEELEY, *supra* note 362, at 296-97; Alschuler, *supra* note 7, at 956-57; Pugh, *supra* note 2, at 969. *Contra* W. FELSTINER & A. DREW, *supra* note 7, at 20-22.

with a prosecutorial screening procedure analogous to the German and French prosecutorial control exercised over the initiation of the penal order procedure. The scheduled fine procedure would be invoked only if the prosecutor concluded that this disposition was appropriate given the facts of the case.<sup>559</sup>

An equally important reason for preferring the preset fine approach is that it builds on an institution already well-established in this country: payment of scheduled fines for traffic and other petty infractions at the municipal court violations bureau.<sup>560</sup> Indeed, some local jurisdictions have already expanded the use of this approach to permit payment of scheduled fines for a wide variety of petty and nonpetty misdemeanor violations.<sup>561</sup> These expedited procedures appear to be working well, and we should consider further expanding their use. Nor is it necessary, as some have suggested, to decriminalize or downgrade offenses to petty infractions before subjecting them to the violations bureau approach.<sup>562</sup> There is no contradiction in providing an expedited, "administrative" procedure to dispose of nonserious "criminal" charges so long as the defendant may still insist on a trial under standard criminal rules. This is, after all, essentially what we now do by means of plea bargaining. The violations bureau procedure would merely allow us to achieve the same results with greater consistency, and with less delay and expense for all concerned.

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559. The French only use the scheduled fine approach for very minor offenses such as non-jailable contraventions of the first four classes, and prosecutors have no control over the invocation of this approach. Proc. Code art. 529. For more serious contraventions, only the penal order procedure is available. *Id.* art. 524. But since some American jurisdictions have applied a scheduled fine type of procedure to jailable offenses, *see infra* text accompanying notes 560-61, it is not clear why these jurisdictions could not also choose to adjudicate the offenses by combining elements of the scheduled fine and penal order.

560. *Cf.* Langbein, *Land Without Plea Bargaining*, *supra* note 2, at 218 ("real parallel" of German penal order procedure is the "short-form American citation practice for traffic offenses: 'Pay this fine or appear in court.'"). However, as suggested in the text, this comparison overlooks the distinction between preset fines and case-by-case fine setting.

561. *See, e.g.,* HENNEPIN COUNTY (MINNESOTA) SCHEDULE OF REQUIRED COURT APPEARANCES AND FINES (rev. ed. 1988). Among the offenses with scheduled fines payable at the Violations Bureau are those involving fish and game, public parks, and various regulatory offenses (such as housing, zoning, fire, building, food, refuse, weights and measures, and health). *Id.* Most of these offenses are classified as misdemeanors under state or municipal law, and they carry a maximum penalty of \$700 and/or 90 days, with rights to jury trial and appointed counsel. *Id.* at 7.

562. *See, e.g.,* N. ABRAMS, *supra* note 155, at 5; M. FEELEY, *supra* note 362, at 296; W. FELSTINER & A. DREW, *supra* note 7, at 23-26; NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT ON COURTS 168 (1973) (Standard 8.2: "Administrative Disposition of Certain Matters Now Treated as Criminal Offenses"); Alschuler, *supra* note 7, at 993-94.

## VIII

## SENTENCING LAWS AND PRACTICES

A. *The Sentencing Severity Hypothesis*

Many American observers have suggested that European systems make much lighter use of imprisonment as a penal sanction than do most American jurisdictions.<sup>563</sup> This assessment, if it is correct,<sup>564</sup> has important implications for reform of American sentencing practices. In the debate over the purposes of punishment and the alternatives available to achieve those purposes, we must know whether other Western nations have been able to impose just and effective punishment by means of sentencing alternatives that are less costly and more humane than our own.<sup>565</sup> And although American traditions and legal processes make it difficult to reduce—or even *appear* to reduce—the rate or duration of custodial sentences,<sup>566</sup> international comparisons may at least help legislators resist short-term political pressures to increase the use of penal sanctions. Finally, apart from the issue of sentencing reform itself, less severe foreign sentencing practices would affect other topics of reform-oriented comparative research, since sentencing variations may explain additional differences between foreign and domestic systems.<sup>567</sup>

The hypothesis that French sentences are less severe is plausible in light of several characteristics of the French system. First, the French

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563. See, e.g., J. LANGBEIN, *supra* note 7, at 59 (citing Professor Hans Zeisel's suggestion that "each month of imprisonment in Continental sentencing corresponds to a year's imprisonment in American sentencing"); A. ROSETT & D. CRESSEY, *JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE* 182 (1976) (U.S. sentence severity out of step with other "civilized" nations); Cole, Mahoney, Thornton & Hanson, *The Use of Fines by Trial Court Judges*, 71 JUDICATURE 325, 326 (1988) (noting increased use of fines in England, Sweden, and West Germany); Herrmann, *supra* note 7, at 473-74 (West German sentencing practices); Morris, *Lessons From the Adult Correctional System of Sweden*, 30 FED. PROBATION 3, 4 (1966).

564. In his study of sentencing severity in England, Canada, and West Germany, Professor Lynch found that only West Germany had substantially lower offense-specific incarceration rates (estimated) than did the United States, and only for certain offenses. Lynch, *supra* note 9, at 194-95. For burglary, larceny, and motor vehicle theft combined, the arrest-based incarceration rates for the United States and West Germany were 11.8% and 4.2%, respectively. *Id.* at 195. For robbery, the incarceration rates were 36.4% and 21.5%, but this difference might be entirely explained by the much lower proportion of German robberies which involved the use of a firearm. *Id.* at 196-97. However, the incarceration rate for homicide was slightly *higher* in Germany (76.6% versus 70.6%). *Id.* at 195. Some methodological problems with these comparisons are discussed at *infra* note 593, and at *infra* text accompanying notes 621-27.

565. See generally N. MORRIS, *THE FUTURE OF IMPRISONMENT* 59-62 (1974) (discussing the principle of "parsimony": criminal sentences should be no more severe than necessary to achieve the purposes of punishment).

566. See *supra* note 436 and accompanying text.

567. In previous sections of this Article, I have suggested some of the ways in which less severe sentencing practices in France might explain lower rates of pretrial detention, see *supra* text accompanying notes 376-79, as well as less need for formal limits on prosecutorial discretion, see *supra* text accompanying notes 424-37, and plea bargaining, see *supra* text accompanying notes 453 & 523.

have downgraded a large number of consensual and public order offenses so that, by statute or enforcement practice, they are punishable by a fine only.<sup>568</sup> Second, the maximum authorized sentences for many prevalent property offenses appear to be somewhat lower than for their American counterparts.<sup>569</sup> In the case of violent crimes and drug-related crimes, however, French and American maximum terms are more similar,<sup>570</sup> although it should be noted that France, like all other European countries, has abolished the death penalty.<sup>571</sup> Third, French sentencing law generally forbids the imposition of consecutive sentences,<sup>572</sup> and the sentence enhancements applicable to recidivists are based solely on the severity, not the frequency, of the defendant's prior convictions.<sup>573</sup> Fourth, French law authorizes courts to impose a wide variety of non-custodial sanctions<sup>574</sup>—not only fines, community work orders, probation, or stayed imprisonment, but also several other sentencing options rarely used in the United States. These include banishment from the

568. See *supra* text accompanying notes 146-55 & 551-57.

569. For example, the *Code pénal* and the American Law Institute's MODEL PENAL CODE § 6.06 (Proposed Official Draft 1962) specify the following maximum penalties (in years) for these crimes:

Offense	French Penal Code	ALI Model Penal Code
Forgery	3 or 5 (arts. 150-153)	5 or 10 (§ 224.1)
Larceny		
(non-petty)	3 (art. 381)	5 (§ 223.1(2))
Embezzlement	2 (art. 408(1))	5 (§ 223.1(2))

As is true in most American jurisdictions, French sentences are subject to "good time" reductions and parole. A French convict is generally eligible for parole after serving half of his sentence (reduced by good time allowances of up to three months per year served). FRENCH SYSTEM, *supra* note 41, at 39. Thus good time also effectively reduces the maximum term.

570. Compare C. PEN. arts. 309 to 310 (aggravated assault maximum sentences are 2, 4, 10, or 15 years, depending on circumstances) with MODEL PENAL CODE § 211.1(2) (5 or 10 years for aggravated assault); C. PEN. arts. 332 to 333-1 (maximum sentences for various rape offenses are 5, 10, 20 years, or life imprisonment) with MODEL PENAL CODE § 213.1 (5 or 10 years, or life imprisonment); C. PEN. art. 384 (maximum for robbery causing serious injury or death is 20 years; sole penalty for armed robbery is life imprisonment) with MODEL PENAL CODE § 222.1 (10 years or life imprisonment).

Drug crimes are covered by the CODE DE LA SANTÉ PUBLIQUE. For offenses involving illegal narcotics and other stupeficients, the maximum sentences are 10 or 20 years. *Id.* art. L.627. For other drugs, the maximum is two years. *Id.* art. L.626. But see *id.* art. L.628 (one-year maximum for illegal "usage" of narcotics or other stupeficients).

571. Law of Oct. 9, 1981, No. 81-908, J.O. Oct. 10, 1981, 64 Bulletin législatif Dalloz [B.L.D.] 347, La Semaine Juridique (Juris-Classeur Périodique) [J.C.P.] III No. 51,862 (1981). See generally F. ZIMRING & G. HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 3-25 (1986) (discussing the general trend among Western democracies in the twentieth century toward de facto or de jure abolition of the death penalty).

572. See *supra* text accompanying note 424.

573. See *supra* text accompanying notes 425-33.

574. See generally FRENCH SYSTEM, *supra* note 41, at 32-36.

country, city, or certain districts;<sup>575</sup> confiscation of vehicles or weapons,<sup>576</sup> and suspension of privileges to drive, hunt, or carry arms (which can be ordered even when the current offense did not involve these objects or privileges);<sup>577</sup> day fines;<sup>578</sup> automatic imprisonment for solvent convicts who fail to pay their fines;<sup>579</sup> and dispensation from any punishment whatsoever.<sup>580</sup> Finally, French law contains liberal expungement-of-record provisions,<sup>581</sup> and periodic amnesty statutes also benefit many defendants.<sup>582</sup>

### B. Empirical Support for the Hypothesis

While the rules and procedures summarized above suggest that sentencing is more lenient in France than in the United States, what happens in actual practice in either country may be another matter. Unfortunately, the available empirical data on French and American sentences are neither sufficiently detailed nor sufficiently comparable to prove or disprove the sentencing severity hypothesis. The following discussion examines the available data for each country, explains the problems of detail and comparability raised by the data, discusses the limited support which the available data lend to the sentencing severity hypothesis, and suggests the additional data needed to prove or disprove the hypothesis.

The available aggregate data on French sentences indicate that custodial penalties are rare and are usually of short duration. Instead, French courts dispose of the vast majority of cases by imposing a fine. In 1980, for example, French criminal courts imposed the following sentences:<sup>583</sup>

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575. C. PEN. arts. 44 to 55-1.

576. *Id.* arts. 43-3, 52 (confiscation of vehicle used to commit crime); *id.* art. 52-1 (confiscation of weapon used to commit crime). The provisions for seizing vehicles were added in 1975 but were little used until 1983, when courts were given the option of ordering *temporary* seizure. See Cotte, *Sanctions pénales: Alternatives pour la peine privative de liberté*, in CRIMINAL LAW IN ACTION: AN OVERVIEW OF CURRENT ISSUES IN WESTERN SOCIETIES 315, 324-27 (1986).

577. C. PEN. art. 43-3.

578. *Id.* art. 43-8.

579. Proc. Code arts. 749 to 762; see also *supra* text accompanying note 524.

580. Proc. Code arts. 469-1 to -3.

581. See FRENCH SYSTEM, *supra* note 41, at 33, 39.

582. *Id.* at 39-40; see also *supra* note 39 (discussing the effects of the 1981 Presidential Amnesty Decree, Law of Aug. 4, 1981, on the number of convictions from 1981 to 1983).

583. ANNUAIRE STATISTIQUE, *supra* note 39, at 109-25. See generally FRENCH SYSTEM, *supra* note 41, at 34-36. These statistics do not include scheduled fines imposed for parking and other minor offenses. See *infra* note 587.



	Number	%
Executed Custody Sentences .....	111,984	4.3
— of less than 3 months .....	57,260	
— 3 months to less than 1 year .....	40,383	
— one year to less than 5 years .....	12,949	
— five years or more .....	1,392	
Executed Fines .....	2,313,147	89.7
— imposed after trial .....	763,544	
— imposed by penal order .....	1,549,603	
Fully Suspended, <sup>584</sup> and Other .....	153,904	6.0
Total Convictions <sup>585</sup> .....	2,579,035	100.0

Aggregate American sentencing patterns may be equally dominated by the use of fines and by short jail terms. However, we cannot verify this because there are no national sentencing statistics for all offenses. Indeed, even the available felony sentence statistics cover less than half the states<sup>586</sup> and tell us nothing about sentencing of misdemeanors and other minor offenses in those jurisdictions. The French statistics above clearly include a large proportion of less serious offenses, although they do exclude many minor moving traffic violations and all parking fines.<sup>587</sup>

584. Partially suspended custody sentences and fines are lumped together with fully executed sentences of each type. Thus, the data on custody sentence length shown in the table in the text overstates the duration of actual sentences.

585. For the total number of convictions, 2,255 of the sentences (0.1% of the total) were imposed by assize courts (felony charges), and 472,397 (18.3%) were imposed by correctional courts (delict charges). *ANNUAIRE STATISTIQUE*, *supra* note 39, at 109-25. The remainder (2,104,383 or 81.6%) were imposed by police courts (contraventions); of these, 554,780 (21.5% of the total) were imposed after trial, and 1,549,603 (60.1%) were penal orders (described at *infra* note 587). *ANNUAIRE STATISTIQUE*, *supra* note 39, at 109-25.

586. See, e.g., *TRACKING OFFENDERS*, *supra* note 405 (documenting the disposition of felony arrests in 11 states whose combined populations represent only 38% of the U.S. population as a whole); *FELONY SENTENCING*, *supra* note 426 (describing sentences imposed during 1983 in 18 "predominately urban" jurisdictions). But see *BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS—1986 (1989)* [hereinafter *FELONY SENTENCES, 1986*] (in first nationally representative survey of felony sentences, sample of 51,594 cases from 100 of the nation's 3,109 counties produced a nationwide estimate of 583,000 felony convictions in 1986).

587. The table in the text includes all convictions entered after a court hearing, plus penal orders. The latter procedure may be used in any contravention case: The prosecutor initiates the procedure, and the court without a hearing recommends a specific dollar amount (representing the fine plus costs). If the prosecutor agrees and the defendant does not object, the defendant is ordered to pay the amount and the case is disposed of without any hearing or trial. *Proc. Code. arts. 524 to 528-2*. Given the volume of these orders (see text), it appears likely that a great many are minor traffic offenses.

However, most minor traffic offenses and all parking offenses are disposed of by payment of scheduled fines (which are excluded from the table in the text). Prior to October 1, 1986, the scheduled fine procedure applied to contraventions of the first four classes which were violations of the traffic and national parks codes and punishable by fine only. *C. PR. PEN. art. 529*. Since that date, the procedure has also applied to violations of regulations relating to freight, public transportation, and motor vehicle insurance. *Law of Dec. 30, 1985, No. 85-1407, tit. II, ch. III, J.O. Dec. 31, 1985, 4 Actualité Législative Dalloz [A.L.D.] 125, 128, J.C.P. III No. 58, 135 (amending C.*

Even if we excluded all the penal order cases—most of which are probably minor moving traffic violations<sup>588</sup>—the remaining French data would have no U.S. statistical counterpart. In fact, there are no nationwide (or even multijurisdictional) U.S. statistics on the number of misdemeanor convictions,<sup>589</sup> let alone misdemeanor sentences.

While we do have considerable data on the “stock” of sentenced inmates in local jails, such as one-day counts and average daily populations,<sup>590</sup> no national data exist on the number of sentenced offenders admitted to jails in a given time period (“flow” data). The latter are essential for any comparison of the frequency of custodial sentences since inmate “stock” data inevitably confound the distinct issues of frequency and duration of custody sentences.<sup>591</sup> In any case, all jail-based data—whether based on “stock” or “flow” of sentenced prisoners—inherently understate the incidence and duration of jail sentences, because many defendants serve some or all of their “sentence” while being held in pre-trial detention.<sup>592</sup> What is needed is *court-based* sentencing data.<sup>593</sup>

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PR. PEN. art. 529). There are no published data on the total number of scheduled fines paid each year, but they must substantially outnumber penal orders. For example, in 1980 there were 6,657,458 augmented parking fines (*amendes pénales fixes*). ANNUAIRE STATISTIQUE, *supra* note 39, at 121. Those fines were imposed only after a person failed to pay or to protest the scheduled fine amount within the required time limit. See C. PEN. app. C, at 568-69 (86th ed. Petits Codes Dalloz 1988) (CODE DE LA ROUTE (vehicle code) arts. L.27-L.28).

588. See *supra* note 587.

589. Cf. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: CASE FILINGS IN STATE COURTS 1983, at 2 (1984) (trial courts in 46 states and the District of Columbia reported approximately 10,500,000 “criminal” (felony and misdemeanor) filings, and 57,300,000 traffic filings in 1983). For 24 selected states, misdemeanor filings comprised between 68-95% of criminal filings, with most jurisdictions falling in the 85-95% range. *Id.* at 4.

590. See, e.g., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: JAIL INMATES 1986 (1987).

591. See Lynch, *supra* note 9, at 182-83 (noting the importance of distinguishing between these two dimensions of “punitiveness,” as well as a third: the conditions of incarceration—maximum versus minimum security, work release, and so on). The need to explore other ways to measure the use of imprisonment are also discussed in NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, RESEARCH IN ACTION: MEASURING THE USE OF IMPRISONMENT (1986).

592. When a defendant held in pretrial detention is convicted and sentenced to a jail term to be served in the same jail, administrators may not count him as “entering” again. In any case, the duration of his remaining term—and thus, his chances of being included in sentenced “stock” data—will be substantially reduced if he receives credit for “time already served” in pretrial detention. Moreover, if a defendant's *entire* custody sentence consists of credit for time already served, he will be released without ever appearing as a “sentenced” inmate in either “stock” or “flow” statistics. Given the prevalence of “time served” guilty pleas, see *supra* note 295 and accompanying text, such cases could constitute a large proportion of the total number of “jail sentences” in misdemeanor cases, and perhaps even in felony cases.

593. Notwithstanding the problems noted above, one recent study attempts to use available jail population (“stock”) data to estimate the total number of U.S. jail sentences per year (“flow”) for FBI index offenses. See Lynch, *supra* note 9, at 204-06. These estimates are then compared to (divided by) total FBI arrests for each index offense, and the results are compared with arrest-based custody sentence rates for England, Canada, and West Germany. *Id.* Apart from the “time served” problem, see *supra* note 592, and the question of whether the number of arrests alone provides a

Of course, even aggregating U.S. court-based sentencing data for all offenses included in the French data above would not definitively establish which country has more severe sentences. To make such aggregate comparisons, we would have to assume that the offense *mix* in each country is similar in terms of offense severity, criminal history of offenders, and so forth. If, for example, American judges sentence a much higher percentage of violent offenders, we would expect the judges to impose more, and longer, custodial sentences.<sup>594</sup> Clearly, comparative sentencing research must examine French and American sentencing patterns *by offense*, and must also take into account any other major national differences in factors known to significantly influence sentencing severity, such as an offender's prior record.

Existing French and American sentencing statistics do include a considerable amount of offense-specific data, but the data are neither published nor even collected in a form permitting meaningful comparison of French and American sentencing severity. There are several reasons for this "noncomparability." The most obvious reason involves differences in offense definition: For example, in France, burglary and robbery are considered aggravated forms of larceny (*vol*).<sup>595</sup> And although French police statistics report separate figures for burglary and for robbery, sentencing and prison statistics usually do not.<sup>596</sup>

A second related problem concerns differences in the grading of offenses. The dividing line between French felonies and delicts (maximum sentence more, or less, than five years, respectively) does not correspond to the American felony/misdemeanor dividing line of one year. In the case of burglary or robbery, French felony crimes of *vol* include only the most serious robberies and burglaries, and French delict crimes of *vol*

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sufficiently precise "base" for such comparisons, *discussed at infra* notes 622-25 and accompanying text, Professor Lynch's data clearly show how small errors in estimated jail sentence rates can have a very dramatic impact on estimates of overall sentencing severity. For nonviolent property offenses (burglary, larceny, and motor vehicle theft combined), Lynch's jail "correction" factor accounts for almost two-thirds of his estimate of total U.S. custody sentences. Lynch, *supra* note 9, at 208-09 tables D, E.

594. The limited available data does not entirely support this hypothesis. Although violent offenders in France constitute a lower proportion of persons charged by police with non-traffic offenses, *see supra* table in text accompanying note 133, the proportions of persons charged with homicide, rape, or robbery are about equal in both countries. *See supra* note 380. The comparability of both sets of proportions, however, is unclear; the French statistics exclude all traffic offenses and contraventions, whereas the American statistics exclude only traffic offenses.

595. *Compare* FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES—1987, at 315 (1988) (listing separate definitions for robbery and burglary) *with* C. PEN. arts. 379, 382 (prescribing same penalty for larceny (*vol*) committed with violence or by unauthorized entry into a building).

596. *Compare* LA CRIMINALITÉ EN FRANCE, *supra* note 39, at 56 (chart showing separate crime figures for burglary, theft with a firearm, theft with violence, and other thefts) *with* ANNUAIRE STATISTIQUE, *supra* note 39, at 111, 115 (reporting sentences, by offense, in assize and correctional courts; for each court, all thefts (*vols*) are reported in a single category).

include some robberies, burglaries, and American felony larcenies, as well as many other larcenies which would be misdemeanors in the United States.<sup>597</sup> Another consequence of these grading differences is that sentencing statistics often contain inconsistent categories. In American statistics, any sentence of *exactly* one year is generally defined as a "misdemeanor" sentence and is lumped together with *shorter* terms,<sup>598</sup> whereas in France, one-year sentences are lumped together with *longer* terms, as in the table above.<sup>599</sup>

A third problem of comparability, and perhaps the most difficult to overcome, involves differences in prosecutorial charging practices. Even if offenses are defined and graded similarly in both countries, they may be charged very differently. The result is that seemingly comparable categories of sentenced offenders will include very different kinds of cases. For example, French and American sentencing statistics both report data for rape, but it is well known that in France a substantial portion of felony rapes—both forcible (*viol*) and statutory (*attentat à pudeur sans violence*)—are correctionalized,<sup>600</sup> that is, prosecuted in correctional court under various delict statutes.<sup>601</sup> The same process often occurs in the United States,<sup>602</sup> but there is no way to determine from sentencing statistics alone whether an equally high proportion of offenses is reduced, or to what charges. Thus, it is quite possible that sentenced "rape" cases in one country consist of a much narrower, more aggravated group of offenses than sentenced "rape" cases in the other. Nor can we aggregate sentences for rape and various lesser offenses, since the latter include an unknown number of cases which are not "really" rape cases. One solution to these problems is to analyze the sentences imposed on all offenders originally charged by police with the same offense. Such "offender-based transaction statistics" (OBTS) now exist for a number of American states,<sup>603</sup> but they are not yet available for France.

597. Similar problems arise in cases of assault. French "felony" assaults correspond to only the most serious American "aggravated" assaults, while French "delict" assaults include both American felonies and misdemeanors. See C. PEN. arts. 309(1)-(2), 310.

598. See, e.g., TRACKING OFFENDERS, *supra* note 405, at 3 (tables reporting sentences of one year or less, and of more than one year); see also *supra* note 464 (felony/misdemeanor dividing line).

599. See *supra* table at text accompanying note 583.

600. See *supra* text accompanying notes 445-52 & 483-506.

601. COMPTE GÉNÉRAL, *supra* note 39, at 26 n.4. Forcible rape and attempted rape are often charged as nonsexual assault (*violen*ce), indecent assault (*attentat à la pudeur avec violence*), or public indecency (*outrage public à la pudeur*). J. PRADEL, *supra* note 40, § 91, at 94; M. VOUIN, *supra* note 139, at 200. Statutory rape is charged as assault on a minor (*violen*ce à l'enfant). *Id.* at 204.

602. See, e.g., VERA INST. OF JUSTICE, FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK CITY'S COURTS 10 (1977) (chart showing that, of persons convicted by plea who were originally arrested on rape or other sex felony charges, 30% plead to a lesser felony and 34% plead to a misdemeanor).

603. See TRACKING OFFENDERS, *supra* note 405. The limitations of OBTS data are discussed at *infra* text accompanying notes 621-27.

In light of the problems noted above, we can only conclude with certainty that the United States and France both have some "catching up" to do in the area of criminal justice statistics. American authorities need to gather more information about misdemeanor sentences; the French need to begin gathering offender-based transaction statistics; and both countries need to work toward making their offense and sentence definitions more uniform, at least for statistical purposes, in order to facilitate international comparisons.<sup>604</sup>

Before turning to a more detailed discussion of the new data needed on both French and American sentencing practices, we should consider whether the existing data can tell us anything. Are French sentences more lenient in some respects? I believe the answer is a qualified "yes." Given the severe problems of data availability and comparability discussed above, only a few rough comparisons of French and American sentencing severity are possible. The limited purpose of such comparisons is to encourage further, more detailed research, to confirm or disprove these preliminary findings.

As noted above, sentencing comparisons should, whenever possible, be offense-specific. Among the offenses for which sentencing data are available for both countries, there appear to be only two that are defined, graded, and prosecuted in similar enough fashions in both countries to permit even rough comparisons. Nonnegligent homicide and drug trafficking are generally only prosecuted and convicted at the felony level in the United States, and they are also separately identified in French conviction statistics. As shown in the following table, French defendants convicted of each of these offenses are slightly less likely to receive a custody sentence than are their American counterparts.

Percentage of Convicted Defendants Who  
Received a Jail or Prison Sentence

Conviction Offense	U.S. <sup>605</sup>	France <sup>606</sup>
Non-Negligent Homicide	95%	85%
Drug Trafficking	64%	55%

604. Greater research and uniformity have already been achieved, to some extent, in the area of police statistics. See *supra* text accompanying notes 133-36, 276-83 & text accompanying and table at note 291 (reporting French and American arrest and clearance rates for FBI index offenses). The need for more uniform sentencing statistics is also discussed in Lynch, *supra* note 9, at 199-201.

605. The American statistics are from FELONY SENTENCES, 1986, *supra* note 586, at 2 table 2. Even though it covers a different time period than the French data, see *infra* note 606, this source provides the best comparison to French statistics because earlier American sources employed broader definitions of homicide offenses. See, e.g., FELONY SENTENCING, *supra* note 426, at 3 table 1 (custody sentence rates for homicide and drug trafficking in 1983 were 91% and 64%, respectively); see also *id.* at 7 table 7 ("homicide" includes negligent manslaughter, which had lower custody rates than other homicides).

606. The source for the French data is the COMPTE GÉNÉRAL, *supra* note 39, at 102, 122-23 (data for 1978).

For both offenses, the difference is small enough to be easily explained by variations in the offenses themselves,<sup>607</sup> but at least the differences are both in the same direction. It is also possible that the two countries differ more in the *duration* than in the frequency of custodial sentences, or that the variations in duration and/or frequency are greater (or less) for other offenses. To examine these possibilities, however, we must resort to aggregate, nonoffense specific comparisons based on correctional, instead of court-based, statistics.

The most reliable sentence-related data available for both countries are the total number of persons held in custody ("stocks") at any given point in time. Comparison of sentenced stocks provides an overall measure of sentencing severity, although, as noted previously,<sup>608</sup> it does not allow us to evaluate separately the rate of imprisonment and the duration of custody terms. However, we cannot simply compare raw numbers of prisoners, since the population of the United States is four times larger; nor can we compare prisoners per unit of population since American crime rates are higher.<sup>609</sup> Instead, we need to compare the number of prisoners relative to some other meaningful base.

One such base is the number of persons charged by police with serious offenses against persons and property, or with drug offenses. Police statistics on these offenses are fairly comparable, and these are also offenses most likely to result in large numbers of custody sentences. Using them as a base thus provides a rough index of the total number of "custody sentence eligibles" in each country. The following table analyzes American and French sentenced inmate populations as a percentage of the number of persons charged with drug and FBI index offenses:

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607. Although all murders are of course serious, perhaps American murders, or murder convictions, are more "aggravated." In 1980, 24.4% of all murders were known or believed to have involved other felonies, and in 62.4% the weapon used was a firearm. CRIME IN THE U.S.—1980, *supra* note 134, at 11-13. Comparable data on French homicides are not available.

As for drug trafficking, the available data suggest that French cases are at least as serious. In 1980, 70% of American drug arrests—which include possession as well as trafficking—involved marijuana. *Id.* at 191. In the same year, marijuana violations accounted for only about 50% of persons charged by French police with drug offenses. LA CRIMINALITÉ EN FRANCE, *supra* note 39, at 36-37, 60-61 (5,472 out of a total 10,958 persons charged; the separate figures reported are 518 out of 771 drug traffickers, and 4,954 out of 10,187 drug users).

608. See *supra* note 591 and accompanying text.

609. See *supra* text accompanying note 291.

	<u>U.S.</u>	<u>France</u>	<u>Ratio</u>
Number of Prisoners on 12/31/80 <sup>610</sup>	418,814	21,689	19:1
Number of Persons Charged in 1980: <sup>611</sup>			
— FBI Index Violent Crimes <sup>612</sup>	197,690	15,873	13:1
— Drug Crimes	580,900	10,958	53:1
— FBI Index Property Crimes <sup>613</sup>	<u>1,843,500</u>	<u>241,621</u>	<u>8:1</u>
Total	2,622,090	268,452	10:1
Prisoners as a Percentage of Persons Charged: <sup>614</sup>			
— Unweighted Base (Totals, Above)	16.0%	8.1%	2:1
— Weighted Base A (Violent × 10)	9.5%	5.3%	1.8:1
— Weighted Base B (U.S. Prison Rates)	11.8%	6.3%	1.9:1
— Weighted Base C (U.S. Time-Served)	29.6%	15.7%	1.9:1

The different base weightings used in this table reflect the assumption that certain offenses, especially violent crimes, are likely to have a disproportionate impact on prison populations. Persons convicted of such offenses are more likely to receive very long prison terms, causing them to accumulate in prison far out of proportion to the number of offenses, arrests, convictions, or custody sentences for these crimes.

610. The French data are from *ANNUAIRE STATISTIQUE*, *supra* note 39, at 183. However, the category of "sentenced" prisoners reported in these statistics apparently does not include prison-sentenced convicts who have already or may still file an appeal. See Daville, *Les juges d'instruction de nouveau sur la sellette*, 107 G.P. 692-94 (Nov. 10, 1987). That study found that such cases accounted for about 14% of pretrial detainees (*prévenus*). *ANNUAIRE STATISTIQUE*, *supra* note 39, at 183. Accordingly, the French figure shown in text includes the number of sentenced prisoners reported in *Annuaire statistique* plus 14% of the number of pretrial detainees reported in that source. *Id.*

The American data are taken from two sources, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: JAIL INMATES 1982, at 1 table 1 (1983) [hereinafter JAIL INMATES 1982] (data as of June 30, 1982, which was the first time since February 1978 that U.S. jail populations had been surveyed); U.S. DEP'T OF JUSTICE, PRISONERS IN STATE AND FEDERAL INSTITUTIONS ON DECEMBER 31, 1980, at 2 (1982).

611. CRIME IN THE U.S.—1980, *supra* note 134, at 191 (persons arrested or cited); LA CRIMINALITÉ EN FRANCE, *supra* note 39, at 60-61 (persons *mises en cause*, see *supra* note 133).

612. These statistics include murder and nonnegligent homicide, rape, and robbery. Aggravated assault is excluded because there are no comparable French figures. See *supra* notes 595-97.

613. These statistics include burglary, larceny, and motor vehicle theft, but not arson.

614. The *unweighted*-base percentages are computed by dividing the number of prisoners (line one) by the total number of persons charged (line five of figures). The denominators used to compute the three sets of *weighted*-base percentages are as follows: Base A equals total persons charged, after multiplying the number charged with violent crimes by 10; Base B equals the number of persons charged with each of the Index and drug offenses, weighted (or multiplied) by the percentage sentenced to prison for more than one year in the United States for that offense, see TRACKING OFFENDERS, *supra* note 405, at 2 table 1; Base C equals the number of persons charged with each offense, weighted (or multiplied) by the percentage sentenced to any period of incarceration, *id.*, times the median number of months served in prison for that offense in 1981, see BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: PRISON ADMISSIONS AND RELEASES, 1981, at 3 table 1 (1984) [hereinafter PRISON ADMISSIONS AND RELEASES, 1981].

Regardless of the base used, however, the results are remarkably consistent: Overall custodial sentencing severity (rate plus duration) in 1980<sup>615</sup> was almost twice as high in the United States as in France.

There is one further problem with the above comparisons, however, which relates to the *numerator* (number of prisoners), rather than the denominator or base used. As noted previously, many defendants serve some or all of their sentences in pretrial detention, thus spending little or no time as "sentenced" prisoners.<sup>616</sup> If this phenomenon is more common in one country than in the other, it would affect the comparisons above, since a larger proportion of custody-sentenced defendants would fail to be included in the "sentenced" prisoner stocks for that country. Any such bias can only be eliminated by including *all* pretrial detainees in the numerator—in effect, treating them all as "sentenced" prisoners. This adjustment narrows the gap between French and American sentencing severity shown in the table above, but American sentencing still remains about 50% more severe.<sup>617</sup>

### C. Future Research on French and American Sentencing Severity

The data summarized above, in addition to the lenient French sentencing rules discussed at the outset,<sup>618</sup> lend considerable support to the sentencing severity hypothesis, but they fall short of proving it. Furthermore, even if the hypothesis is correct as a general proposition, we also need to know precisely when and in what ways French sentences are more lenient. For example, are French sentences more lenient for some (such as nonviolent) offenses, but not others? Are sentences more lenient

615. Since 1980, the number of sentenced prisoners in France has risen substantially, but the American sentenced population has gone up even more. By the end of 1987, the U.S. prison population had reached 581,609. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: PRISONERS IN 1987, at 1 (1988). The most recent jail survey in mid-1986 found 127,067 sentenced inmates. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: JAIL INMATES 1986, at 2 (1987). The total of these figures (708,676) is roughly 70% higher than the 1980 figure shown in the table in the text. In France, the number of convicted prisoners (including those with unexpired appeal rights, *see supra* note 610) had risen to 30,838 by mid-1987, Daville, *supra* note 610, at 7, which represents only a 42% increase over the 1980 figure shown in the text.

616. *See supra* note 592.

617. Statistics on the number of American pretrial detainees are taken from JAIL INMATES 1982, *supra* note 610, at 1 table 1. The number of French pretrial detainees is derived from ANNUAIRE STATISTIQUE, *supra* note 39, at 183 (reduced by the estimated proportion representing convicts awaiting appeal, *see supra* note 610). With these prisoners added to the numerator, the last four lines of the table in the text would be as follows:

	<u>U.S.</u>	<u>France</u>	<u>Ratio</u>
Prisoners as a Percentage of Persons Charged:			
— Unweighted Base	20.5%	13.0%	1.6:1
— Weighted Base A	12%	8.8%	1.4:1
— Weighted Base B	15%	10.0%	1.5:1
— Weighted Base C	38%	25.8%	1.5:1

618. *See supra* text accompanying notes 568-82.



with respect to rates of incarceration, the duration of custody terms, or both? Which noncustodial sanctions are used?

To prove or disprove conclusively the sentencing severity hypothesis—as well as to clarify its scope—new data on each country are needed. The earlier discussion of the limitations of current statistics<sup>619</sup> identified four major difficulties of comparison: 1) differences in offense definition and grading; 2) potential differences in prosecutorial charging practices; 3) the lack of multijurisdictional data on American misdemeanor sentencing; and 4) the lack of police-charge, offender-based transaction statistics (OBTS) for France. Therefore, the most efficient, short-term research strategy would be to start with existing American OBTS data, select a comparable group of French offenses (using the OBTS definitions), and collect OBTS-type statistics on the sentencing outcomes for persons charged by French police with those offenses. In the long run, of course, it would be highly desirable to encourage prosecutors and courts in France, the United States, and other countries to standardize their official offense definitions and statistics.<sup>620</sup> But the likelihood of achieving such uniformity in the near future seems quite remote, given the national differences in criminal laws, procedures, and statistical traditions.

Future research must also recognize the limitations of American OBTS data. First, American OBTS data generally fail to take into account the important dimension of sentence *duration*—that is, length of time actually served in custody.<sup>621</sup> Existing information on median time-served-to-first-release<sup>622</sup> is insufficient because it is not arrest-based; it thus provides no measure of the impact of nonconviction and noncustody sentences, or of conviction on lesser charges. Unless this dimension is added to OBTS data in the near future, some other durational measure must be devised.

Another limitation of OBTS data is both more fundamental and more difficult to correct. Arrest-based analysis assumes that groups of persons charged by police with crime *X* are comparable across jurisdictions. However, existing OBTS data do not include many critically important variables such as weapon use, victim injury, victim-offender relationship, offender's prior record, and strength of the evidence. The

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619. See *supra* text accompanying notes 586-604.

620. Cf. Lynch, *supra* note 9, at 199-201 (suggesting steps to facilitate more and higher quality cross-national research on criminal justice practices).

621. See, e.g., TRACKING OFFENDERS, *supra* note 405, at 2 (reporting proportions of offenders sentenced to more than one year, and one year or less, with no further specification of maximum sentence or the actual time to be served). Information on actual time to be served is omitted because OBTS sentencing data are collected at the point of final disposition in trial court, or before trial—owing to prosecutorial decision not to charge. *Id.* at 5. Thus only the maximum custody term is known, and not the time that will actually be served.

622. See, e.g., PRISON ADMISSIONS AND RELEASES, 1981, *supra* note 614.

latter variable is especially critical, since the police in different countries—and even within one country—may apply very different standards in deciding when and how they should charge a suspect. Consider, for example, the crime of burglary. If, in a given jurisdiction, most persons found in possession of property recently taken in a burglary are charged by police with burglary—and not just with possession of stolen property—then 100 “burglary” arrests in that jurisdiction will contain substantially more weak cases than in a jurisdiction with stricter police charging standards. A high proportion of weak cases will in turn translate into apparently greater sentencing leniency on “burglary charges”: Many more burglary arrests will result in nonconviction or conviction on lesser charges (with sentences appropriate to those charges), and sentencing judges may take evidentiary weakness into account even if the burglary charge is retained through conviction. Finally, the statistical impact of seemingly minor differences in police charging policy can be dramatic, because borderline cases are often the most numerous within any offense category.<sup>623</sup>

Differences in offense details, victim or offender characteristics, and evidentiary strength can sometimes be measured and controlled statistically.<sup>624</sup> Otherwise, the differences must be identified through careful interviews of police officials in each jurisdiction. An alternative—or supplemental—strategy would be to develop a series of hypothetical fact situations incorporating varying offense details, victim and offender characteristics, evidentiary strength, and so on, and pose these hypotheticals to American and French judges, prosecutors, and defense attorneys. These sentence “predictions” can be used both to examine sentencing variables that are not included in existing statistics, and to corroborate and explain those statistics.<sup>625</sup>

A third major problem with existing OBTS data, as well as with most other published sentencing studies, is the failure to consider the interaction between pretrial detention and short-term custody sentences. This interaction can bias disposition-based estimates of sentencing severity in both directions. An overestimate of sentencing severity results when large numbers of defendants who would not have received custody

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623. See F. ZIMRING & R. FRASE, *supra* note 34, at 78 (two-dimensional graph of frequency by severity yields bottom-heavy pyramid shape, even for narrowly defined offense categories).

624. For an example of a multiple regression model of sentencing that includes measures of gun use, injury, prior record, and evidentiary strength (for example, physical evidence, number of lay witnesses, defendant arrested at scene or within one day of offense), see Rhodes, *Plea Bargaining: Who Gains? Who Loses?*, reprinted in F. ZIMRING & R. FRASE, *supra* note 34, at 550-58.

625. Obtaining sentence predictions from prosecutors and defense attorneys can corroborate the reliability of the judges' proposed sentences. Some studies have found that simulated criminal justice decisions sometimes differ substantially from observed real decisions by the same officials. See, e.g., Ebbesen & Konecni, *Cognitive Algebra in Legal Decisionmaking*, reprinted in F. ZIMRING & R. FRASE, *supra* note 34, at 303-08 (bail-setting).

sentences (or who would have received shorter terms) if they had been released pending trial are given time-already-served custody "sentences" designed merely to legitimate the time spent in pretrial detention.<sup>626</sup> In these cases, the real problem is overuse of pretrial detention—not overuse of custody sentences. Pretrial detention can also cause sentencing data to underrepresent sentencing severity. This occurs when defendants who would have received a custody sentence if they had been released pending trial are given probation, or are dismissed without conviction,<sup>627</sup> because they are deemed to have been sufficiently punished by the time spent in pretrial detention.

The two opposing pretrial detention effects described above may or may not cancel each other out, and the net effect may be different across jurisdictions even within a single country. It is difficult to assess these effects statistically, since they depend on what the sentence *would have been* in the absence of pretrial detention. But with sufficiently large samples and sophisticated multiple regression techniques, it should be possible to measure comparative sentencing severity independent of pretrial detention effects, essentially by examining sentences in nondetention cases and taking into account all other factors known to influence sentencing severity. Thus, future OBTS and other sentencing studies should include measures of pretrial detention status and duration. And, as suggested previously, pretrial detention variables could also be incorporated in studies employing hypothetical fact patterns.

#### D. Conclusion

The problems discussed above demonstrate the critical importance of systemic analysis of criminal justice processes. Decisions at the sentencing stage are often largely dependent upon earlier decisions, such as police charging, prosecutorial charging, and pretrial detention. Thus, we cannot understand, let alone compare, sentencing severity without taking into account these earlier decisions and their consequences. Systemic interdependence also has important implications for reform, since attempts to encourage the use of noncustodial sentences will fail if simultaneous efforts are not made to minimize the rate and duration of pretrial detention. The opposite is also true: Sentencing reforms that discourage or eliminate custodial penalties can help reduce the use of pretrial detention.<sup>628</sup>

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626. See H. ZEISEL, *supra* note 286, at 47.

627. See *id.* at 219 (in New York City, 32% of defendants held in pretrial detention were not convicted, and of the 68% who were convicted, 25% did not receive a custody sentence; thus 49% of all detained defendants received no formal custody sentence).

628. See *supra* text accompanying notes 377-79.

An equally important conclusion to be drawn from the methodological problems discussed above is that they are probably *not* unique to international comparisons. To a very substantial extent, they arise in any cross-jurisdictional study of sentencing levels, whether the comparison is between cities, states, or nations. Many of the same problems (for example, finding comparable offense categories) also confront comparative studies of other criminal justice processes, such as pretrial detention and prosecutorial screening. Thus, until we develop more reliable and uniform measures of criminal justice, researchers should interpret the available data with caution, and must, whenever possible, employ multiple, overlapping measures.<sup>629</sup>

## IX

### CONCLUSION

French criminal justice differs from American law and practice in many important respects; yet there are major similarities as well. The differences suggest possibilities for useful reform of American procedures, and the similarities suggest that transplants may be feasible. A number of such reforms have been proposed in the legal literature of the past fifteen years, but the academic response so far has generally been chilly, and the progress toward implementing these reforms—glacial. To a large extent, this apparent stalemate is due to the fact that the transplants most often suggested are actually the least desirable or feasible,<sup>630</sup> whereas other, more modest reform possibilities have been overlooked or misunderstood.

Of course, it is more exciting to propose drastic changes than to allow existing similarities to guide reform suggestions. It also seems far easier to approach research and reform piecemeal, issue by issue, or from a formalistic or “families of law” perspective, rather than with the single-country, system-wide, empirically based methodology adopted in this Article. Yet such a methodology is essential. The systemic interrelatedness of criminal justice is an undeniable fact that researchers and reformers must not fail to take into account. Similarly, the surprising results of some of the statistical comparisons presented in this Article<sup>631</sup> demonstrate the grave risks of assuming that law-in-action conforms to law-on-the-books.

But, in the end, are international comparisons ever really valid? Or are all systems of criminal justice (perhaps even those within a single

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629. See H. ZEISEL, *supra* note 44, at 190 (“triangulation of proof”).

630. For a discussion of several other important features of the French system, noting some of the problems of attempting to transplant these features to the American context, see the Appendix, *infra* text accompanying notes 637-742.

631. See, e.g., *supra* text accompanying notes 133-36, 276-83 & 319-37.

country) basically not comparable? Criminal justice research and reform are hard enough to achieve in this country, much less with the additional barriers of language, culture, and distance, as well as the further demands of a system-wide, empirically based methodology. So why conduct such comparative research? And what remains of this Article's "working hypothesis" that selective transplants are possible?<sup>632</sup> If procedures are inevitably interrelated but simultaneous reform of our entire system is unlikely (and perhaps even undesirable), what chance is there of "borrowing" procedures found in other systems, foreign *or* domestic? Once this question is posed, initial optimism fades, the stalemated debate is abandoned, and off we go in search of new "solutions" for the problems of our criminal justice system.

And yet there is much that American reformers can learn from a careful study of foreign systems.<sup>633</sup> At the very least, such study opens our minds to new reform possibilities by showing that there are different approaches to the problems of criminal justice. At the same time, comparative study should always lead us back to a closer analysis of our own system. When guided by the insights of comparative study and a systemic, empirical methodology, such analysis often reveals that our own system is not as different in practice from foreign systems as we had thought. This conclusion is cause for further optimism since, as stressed throughout this Article, it is much easier to "borrow" small differences than big ones, thereby building on what we already have.

Sometimes comparative research reveals that foreign criminal procedures have counterparts in American civil, not criminal, practice.<sup>634</sup> In many respects, of course, the gulf between our civil and criminal procedures is at least as wide as the ocean separating France and the United States, but from time to time we need to re-explore these seemingly "natural" boundaries to see whether all the distinctions made are necessary and desirable. Thus, ironically, another important lesson of comparative research may be that criminal justice reformers need to look across the courthouse hall as well as across the ocean for new ideas.

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632. See *supra* text accompanying note 36.

633. Of course, comparative research has value independent of questions of domestic reform. Beyond its usefulness to lawyers and judges faced with the occasional "foreign law" question, a better understanding of how criminal processes work in other countries helps avoid international misunderstandings over how particular cases are handled, especially those involving our own countrymen or political prisoners. In addition, the "science" of comparative law, see *supra* note 32, may eventually contribute to a better understanding of the essential nature and limits of governments and their laws. For all of these purposes—except, perhaps, judicial rulings on foreign law questions—a systemic, empirically based methodology is as essential as it is for reform purposes. We can never hope to understand foreign systems by studying formal rules alone or by examining only parts of these systems in isolation.

634. See *supra* text accompanying notes 535-41 (noting similarities between French criminal and American civil practice in the area of narrowing of disputed issues at trial).

But whatever the source of our new ideas—international, domestic criminal, domestic civil, or sheer imagination—research and reform efforts must strive to remain both idealistic and realistic. However much we believe that our criminal justice system can and should be fundamentally changed, we must constantly keep in mind that such reform is difficult and slow; modest, incremental change is the most we can hope to achieve. It is useless to pretend that we have dictatorial powers, capable of simultaneously changing major institutions of justice, constitutional interpretations, and state statutes or criminal rules. Yet this is precisely what would be required to implement many recent reform proposals,<sup>635</sup> including some not derived from comparative study.<sup>636</sup>

I believe that successful reform proposals generally share the following characteristics: First, they can be implemented one at a time, or at least in fairly small “packages,” by individual prosecutors or defenders, or by single acts of the legislature or rules-drafting body, and they require no major, simultaneous changes in other areas of law or practice. Second, they build on institutions or practices already existing in some form within the same jurisdiction. Third, they have elements that can appeal to both prosecution and defense interests, thus ensuring the “bipartisan” support needed for adoption and successful implementation.

In this Article, I have sought to identify aspects of the French criminal justice system that suggest feasible reforms meeting each of the three requirements stated above. I have also indicated the most important areas where further research is needed on French and/or American practices. Although my primary goal has been to encourage and facilitate research in these specific areas, the Article also has several broader aims: to encourage reform-oriented comparative studies generally, expanding to other procedures or other countries; to identify the methodological principles that should guide all comparative studies—even those within a single country; and to suggest some of the inherent barriers to criminal justice reform, even when reform is not inspired by comparative study.

Whichever procedures are selected for scrutiny, researchers must examine the entire system within which each procedure operates. Researchers must consider all available sources of quantitative and descriptive data on the operation of that system, and they must subject

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635. See, e.g., M. GRAHAM, *supra* note 9, at 279 (recommending a sweeping overhaul of U.S. criminal procedure, including Supreme Court promulgation of rules and eschewing case-by-case adjudication of the rights of the accused); see also *supra* text accompanying notes 14-17 (Professor Weinreb's proposal calling for changes in many fundamental American practices). Weinreb states that his proposal was inspired by his observations of the French system, but that he favors it not because “something similar has worked acceptably elsewhere, but [because] that is where our own principles and experiences lead.” L. WEINREB, *supra* note 2, at x.

636. See, e.g., Dripps, *supra* note 15 (multilevel proposal for compelled interrogation of defendant at preliminary hearing, total prohibition of use of any statements made to police after arrest, and “disincorporation” by the U.S. Supreme Court of fifth amendment privilege).

domestic procedures and systems to equally comprehensive scrutiny before making any comparisons. On the other hand, when it comes to designing reform proposals, almost the opposite approach is necessary. Reform proposals must remain modest, building incrementally upon existing law and tradition. These lessons, it seems to me, are the legacy of past research and reform efforts: researchers must “think big”; reformers must “think small”; and reform-oriented researchers must do both.

APPENDIX  
OTHER IMPORTANT FEATURES OF THE FRENCH SYSTEM

*This Appendix briefly discusses several other distinctive features of the French criminal justice system. These features deserve lower research and reform priority for two reasons: They are less likely to suggest feasible American reforms, and they are severable from the French practices suggesting such reforms.*

As noted at the outset, this Article emphasizes those features of French criminal justice that appear to have the most significance for reform purposes. Each of the features examined in detail in Parts II through VIII suggests desirable and feasible adaptations for the American system. The subjects discussed in Parts II (criminal justice officials) and IV (evidence-gathering limits) are also important for another reason: These two features might be seen as so fundamental to the French system, and so incompatible with our own, that they pose insuperable barriers to the adoption of other French practices with which they are inseparably linked.

The object of this Appendix is to call the reader's attention to other, less significant features of the French system. These other features deserve lower priority in both this Article and future research efforts because they are not likely to suggest feasible American reforms; nor are they inextricably linked to the French practices that do suggest such reforms. Future researchers and reformers are not required to study these features of the French system in detail, but neither should they ignore them. Future research and reform should focus instead on the possible impact of these features on other parts of that system.

*A. Pretrial Judicial Investigation and Review of Charges*

One of the most distinctive institutions of French criminal procedure is that of the examining magistrate, and some American scholars have proposed creating a similar office in this country.<sup>637</sup> A related French institution is the indicting chamber, in which a panel of three judges performs functions analogous to those performed in the American preliminary hearing and by the indicting grand jury.<sup>638</sup> Although each of these institutions has attractive features, I doubt that either offers desirable and feasible reforms for this country; nor is it crucial to the functioning of other aspects of the French system.

Having an examining magistrate allows for more direct and efficient

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637. See, e.g., L. WEINREB, *supra* note 2, at 131-38, 147-64. A related but more limited proposal involves the use of judicially supervised pretrial interrogation. See Alschuler, *supra* note 7, at 1007 n.351.

638. See FRENCH SYSTEM, *supra* note 41, at 17.



judicial control over both police and prosecutorial discretion at the investigatory and charging stages. In France, as in the United States, this judicial involvement is assumed to improve the quality of these decisions; moreover, judicial involvement may more readily accommodate the participation of defense counsel.<sup>639</sup> Nevertheless, the French today make relatively little use of this procedure,<sup>640</sup> and when they do, much of the actual control of the investigation is delegated to the police who often operate with minimal guidance from the judge.<sup>641</sup>

The French have expressed increasing dissatisfaction with the decisions still controlled directly by examining magistrates and have recently sought to reform this institution substantially. Under a 1985 law, the functions of the examining magistrate would be performed by a collegial body of three judges, which would avoid the inconsistencies, errors, and abuses attributed to individual magistrates.<sup>642</sup> Because this new regime would have been much more costly, the original effective date was postponed, and the law was almost completely repealed in 1987;<sup>643</sup> however, the fact that it was enacted at all is perhaps a warning to those tempted to borrow the concept of the examining magistrate. It is also noteworthy that the West Germans abolished their version of this office in 1975,<sup>644</sup> and that proposals to do likewise in France are again being heard.<sup>645</sup>

There is also considerable doubt whether the office of the examining magistrate could be feasibly adapted to American political and constitutional traditions. Since the office combines the functions of police, prosecutor, investigating grand jury, and committing magistrate, it violates

639. L. WEINREB, *supra* note 2, at 131.

640. See ANNUAIRE STATISTIQUE, *supra* note 39, at 106 (in 1984, for every 10,000 matters screened by prosecutors, 386 were tried in assize or correctional court; of the latter, only 31 (8.0%) were preceded by a judicial investigation). The percentage of matters referred to examining magistrates has been falling in recent years. *Id.* at 99, 107 (for the years 1974 through 1984, the number of matters referred remained fairly constant, while crime rates and direct referrals to correctional court increased).

641. See *supra* note 164 (use of rogatory commissions).

642. Law of Dec. 10, 1985, No. 85-1303, 105 G.P.L. 801 (1985), J.O. Dec. 11, 1985, at 14,391, 4 A.L.D. 32 (1986) (creating the investigating chamber, "*chambre d'instruction*"). This law contemplated that the chamber would designate one or more of its members to act as examining magistrate for each matter, *id.* art. 3, but most decisions of that magistrate would be reviewed by the entire chamber. *Id.*

643. See Law of Dec. 30, 1987, No. 87-1062 art. 2, 108 G.P.L. 19 art. 2 (1988), J.O. Dec. 31, 1987 art. 2 (1988) (repealing the provisions of Law No. 85-1303, discussed at *supra* note 642, and requiring that examining magistrates submit all requests for pretrial detention to a three-judge panel); Law of Jan. 13, 1989, No. 89-18 art. 1, 109 G.P.L. 68 art. 1 (1989), J.O. Jan. 14, 1989, at 542 art. 1, 7 A.L.D. 86, 87 art. 1 (1989) (postponing the effective date of Law 87-1062, *supra*); Law of July 6, 1989, No. 89-461 art. 23, 109 G.P.L. 323, 325 art. 23 (1989), J.O. July 8, 1989, at 8,538 art. 23, 7 A.L.D. 225, 227 art. 23 (1989) (repealing the provisions of Law 87-1062, discussed *supra*).

644. Goldstein & Marcus, *Myth of Judicial Supervision*, *supra* note 4, at 248 n.22; Langbein & Weinreb, *supra* note 2, at 1551 n.6.

645. See, e.g., Baue, *Le juge d'instruction en question*, 107 Gazette du Palais, *Doctrine* [G.D.P.] 334 (1987).

fundamental American principles of the separation of powers. Although such combinations of functions are not unheard-of in this country,<sup>646</sup> the United States Supreme Court's decision in *Lo-Ji Sales v. New York*<sup>647</sup> suggests that police and judicial functions must be kept separate. In that case, the judge issued a warrant to search an adult bookstore and seize pornographic materials—most of which were not specifically listed on the warrant until after the search. The judge accompanied the police to the bookstore, viewed a large number of films and magazines, and specified the materials to be seized. The Supreme Court held that the warrant lacked sufficient particularity at the time it was issued, and that it was further invalidated by the judge's active participation in its execution. When the judge "allowed himself to become a member, if not the leader, of the search party which was essentially a police operation, . . . he was not acting as a judicial officer but as an adjunct law enforcement officer," and was therefore not acting as the "neutral and detached judicial officer" required under the fourth amendment.<sup>648</sup> This case thus seems to invalidate both modes of operation followed by French examining magistrates: direct involvement in the investigation, and broad delegation of investigatory authority to the police.

What, then, of the other half of the French model: the indicting chamber? Although few American researchers have suggested that we adopt this procedure, it might seem more efficient and effective than its American counterparts—the preliminary hearing and indicting grand jury.<sup>649</sup> Here too, however, there is reason to doubt the value of the indicting chamber in the French system. Impressionistic studies and the available statistics indicate that the chamber almost always approves the felony charges recommended by the examining magistrate.<sup>650</sup> Similarly, one might ask how often three *American* judges would decide, based largely on the paper record, to overrule the determinations of the police, the prosecutor, and an investigating judge that there is probable cause to bring felony charges to trial. *Without* the institution of the examining magistrate, such a panel of judges might very well take a much more

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646. See, e.g., *In re Oliver*, 333 U.S. 257, 261 & n.4 (1948) (describing the Michigan "one-man grand jury" procedure, and noting that 10 other states had concurrent statutes with "some similarities"). The current Michigan version is codified at MICH. COMP. LAWS §§ 767.3, 767.4 (1982 & Supp. 1990). See also S.D. CODIFIED LAWS ANN. § 23A-14-11 (1988); WIS. STAT. § 968.28 (Supp. 1988).

647. 442 U.S. 319 (1979); see also Goldstein, *supra* note 188, at 1192-93.

648. *Lo-Ji Sales*, 442 U.S. at 327-28.

649. See *supra* text accompanying note 466.

650. A. SHEEHAN, *supra* note 41, at 68; Goldstein & Marcus, *Myth of Judicial Supervision*, *supra* note 4, at 263 n.58. The number of defendants tried in assize courts averages about 30% more than the number of matters referred to the indicting chamber, so it seems unlikely (even allowing for multidefendant matters) that very many are dismissed by the chamber. See COMPTE GÉNÉRAL, *supra* note 39, at 20, 25 (for the years 1974-78, 7,087 matters were referred to indicting chambers, and 9,459 defendants were convicted or acquitted in assize courts).

active role, but if we are to consider adopting such a "collegial" preliminary hearing, we must look first to our own experiences, not to those of France.

### B. *The Rights of Crime Victims in France*

The space limitations of this Article, in addition to considerable doubts about the feasibility of granting American crime victims all the rights enjoyed by victims in France, were equally important reasons for my giving this topic less attention. In recent years, the United States has witnessed a virtual explosion of writing and law reform in the area of victim's rights,<sup>651</sup> and the topic deserves more detailed treatment than is possible in a broad, survey article.

The French "civil party" procedure<sup>652</sup> gives crime victims three analytically distinct rights: (1) the right to initiate prosecution; (2) the right to participate and be heard as a party in any prosecution; and (3) the right to attach a "pendent" claim for civil damages to the prosecution. As indicated in the earlier discussion of prosecutorial discretion,<sup>653</sup> the first of these rights serves as an important check on the power of public officials to decline prosecution. Americans thus ought to consider giving victims at least the right to obtain administrative review of declination decisions—that is, right to appeal to higher level prosecutors. To do more than this, however, would be problematic in the American system, where both the pretrial investigation and the presentation of evidence at trial are completely controlled by the police and prosecution. The viability of victim-initiated prosecutions in France may depend

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651. See, e.g., PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT (1982); Abrahamson, *Redefining Roles: The Victim's Rights Movement*, 1985 UTAH L. REV. 517; Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515 (1982); Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937 (1985); Welling, *Victim Participation in Plea Bargains*, 65 WASH. U.L.Q. 301 (1987); Note, *The Victim's Veto: A Way to Increase Victim Impact on Criminal Case Dispositions*, 77 CALIF. L. REV. 417 (1989) (authored by Karen L. Kennard). See generally *Perspectives on Proposals for a Constitutional Amendment Providing Victim Participation in the Criminal Process*, 34 WAYNE L. REV. 1 (1987); *Special Issue: Criminal Victimization and Crime*, 33 CRIME & DELINQ. 435 (1987).

As of 1983, Congress and over two-thirds of the states had passed some form of victim's rights or assistance legislation. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE: THE DATA 26 (1983).

652. See generally FRENCH SYSTEM, *supra* note 41, at 20-21 (discussing rights of civil party injured by commission of a crime); Campbell, *supra* note 7, at 323-32 (describing French procedure (*action civile*) by which a party may institute a civil suit against a defendant in criminal court); Pugh, *supra* note 2, at 965-66 (commenting on civil party's occasional domination of state interest in prosecution, and noting that French appellate courts spend approximately 20% of their time on civil aspects of such "mixed" cases).

653. See *supra* text accompanying notes 414-15; see also Note, *Private Challenges to Prosecutorial Inaction: A Model Declaratory Judgment Statute*, 97 YALE L.J. 488 (1988) (authored by Stuart P. Green) (proposing victim's right to seek advisory declaratory judgment that non-prosecution constituted abuse of discretion).

heavily upon the active roles of the examining magistrate and presiding trial judge. Indeed, there is some question how viable this procedure is even in France, where it appears to be very rarely invoked.<sup>654</sup> Although infrequent use could mean that the procedure is highly successful in goading prosecutors to file charges, an equally plausible explanation may be that French victims are deterred by the array of procedures designed to prevent filing of frivolous charges, such as the requirement of posting bond and the risk of being held liable for costs and damages.<sup>655</sup>

The second aspect of the French civil party procedure, the right to participate in the prosecution, has already been adopted in a number of American states.<sup>656</sup> Unlike the French procedure, where the victim enjoys the status and many of the rights of a party,<sup>657</sup> American statutes generally confer only the right to be notified of the progress of the case, and the right to be heard at various stages, with no concomitant right to call witnesses or to appeal.<sup>658</sup> On the other hand, American procedures put somewhat greater emphasis on the victim's right to be heard on the disposition of the criminal charges (for example, use of pretrial diversion, plea bargains, and sentencing); instead, the French procedures emphasize the victim's civil claim. Field studies of American procedures suggest that they have not had much effect on case dispositions,<sup>659</sup> although they may help some victims understand and accept the ultimate disposition. However, American victims might actively participate more often if greater emphasis were placed on investigation and pursuit of their civil claims.

The third aspect of the French procedure—the right to demand an award of civil damages from the criminal court—also has a well-established American counterpart: the victim's right to request restitution. However, the French right is broader in several important respects. First, the French victim can insist that the examining magistrate investigate and help document the victim's civil claim.<sup>660</sup> Second, French trial courts *must* rule on the civil claim, whereas American courts generally

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654. A. SHEEHAN, *supra* note 41, at 22 n.38 ("In 1970 in Paris, about 2 out of every 1,000 criminal prosecutions were initiated by a 'partie civile.'").

655. See FRENCH SYSTEM, *supra* note 41, at 20-21.

656. See, e.g., CAL. PENAL CODE § 1191.1 (West Supp. 1989); MINN. STAT. ANN. §§ 611A.03-04 (West 1987).

657. See, e.g., Proc. Code arts. 183, 197, 217 (right to notice of rulings and hearings); *id.* arts. 198, 281, 315, 316, 346, 454, 460 (right to be heard); *id.* arts. 186, 186-1, 497 (appeal rights). It should be noted, however, that French victims may only appeal as to the *civil* aspects of the case. *Id.* art. 497.

658. See, e.g., CAL. PENAL CODE § 1191.1 (West Supp. 1989); MINN. STAT. ANN. §§ 611A.03-04 (West 1987).

659. See, e.g., E. VILLMOARE & V. NETO, VICTIM APPEARANCES AT SENTENCING UNDER CALIFORNIA'S VICTIMS' BILL OF RIGHTS (U.S. Dep't of Justice 1987).

660. See FRENCH SYSTEM, *supra* note 41, at 13, 20.

retain broad discretion to decide whether or not to order restitution.<sup>661</sup> Third, French damages awards are enforceable not only as a condition of probation<sup>662</sup> but also as civil judgments.

The first of these features—the right of the crime victim in France to require the examining magistrate's assistance—could not be directly adopted in the United States since it depends on the existence of the office of examining magistrate (which, as noted previously, is not likely to be adopted in this country). However, there are certainly other ways to provide American victims with improved civil investigatory resources. For example, this could be achieved through better coordination with existing legal aid and publicly funded crime victim reparation programs,<sup>663</sup> which all too often remain unknown or unavailable to victims seeking orders of restitution. Similarly, American victims could easily be given greater rights to demand and enforce restitutionary claims. Indeed, some American sentencing statutes already require the court to state reasons why a request for restitution was granted or denied.<sup>664</sup> In addition, some statutes explicitly make restitutionary claims enforceable as civil judgments.<sup>665</sup>

How far we want to take this reform would depend in part on the resolution of some related legal and policy issues—for example, the scope of federal and state civil jury trial rights;<sup>666</sup> the problem of jury confusion of civil and criminal issues; the desirability of retaining specialized criminal court judges; and the jurisdictional amount limitations in lower courts. Ultimately, we must decide how much we value the goal of victim compensation by defendants and the subsidiary goal of encouraging victims to cooperate with the criminal justice system. The answer may also depend on how we choose to view the entire process: If restitution is “punishment,”<sup>667</sup> can it be substituted for some or all of the criminal

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661. Compare Proc. Code arts. 371, 464 (requiring French courts to rule on a crime victim's civil claim) with D. MCGILLIS, CRIME VICTIM RESTITUTION: AN ANALYSIS OF APPROACHES 1-2 (U.S. Dep't of Justice 1986) (noting that, despite growing interest in awarding restitution to crime victims, recent programs have encountered several obstacles including failure of American courts to order restitution).

662. C. PR. PEN. art. R.58(6) (*Rèlements d'administration publique*).

663. See, e.g., MINN. STAT. ANN. §§ 611A.51-.68 (West 1987).

664. See, e.g., *id.* § 611A.04 subd.1(c).

665. See, e.g., 18 U.S.C. § 3663(h) (1988); MINN. STAT. ANN. § 611A.04 (West 1987).

666. See *United States v. Welden*, 568 F. Supp. 516, 534 (N.D. Ala. 1983) (holding that federal statute permitting court-ordered restitution to be enforced as a civil judgment violated the defendant's rights under the seventh amendment), *rev'd sub nom.* *United States v. Satterfield*, 743 F.2d 827, 838 (11th Cir. 1984) (holding that the same statute did not “contravene congressional intent, convert the restitution aspect of the sentencing hearing into a civil proceeding, or deny the defendant his right to a jury trial under the seventh amendment”), *cert. denied*, 471 U.S. 1117 (1985).

667. Cf. *Kelly v. Robinson*, 479 U.S. 36, 52-53 (1986) (holding that restitution orders are not dischargeable in bankruptcy because, like fines, they are imposed more for rehabilitation and punishment than for compensation).

penalty? If it is not punitive, and if the goals of compensation and punishment often conflict (for example, employable defendants who would not be able to make restitution if sent to prison), which goal is more important? Is it possible to pursue both goals in a single proceeding without inevitably confusing and compromising them? The French approach—joinder of legally distinct criminal and civil actions<sup>668</sup>—may help to avoid confusion of compensation and punishment goals, but it does not eliminate the risk that one or both will be compromised.

### C. Broad Pretrial Defense Discovery Rights<sup>669</sup>

In France, counsel for the defendant has an absolute right to inspect the full *dossier* of the case prior to trial<sup>670</sup> and at certain stages of pretrial procedure.<sup>671</sup> In contrast, American defendants and their attorneys have traditionally received far less information about the nature of the prosecution's case. However, the uniform trend of the last twenty years has been toward increasingly broader discovery on behalf of both the defense and the prosecution.<sup>672</sup> Indeed, the revised ABA standards now advocate what is essentially an "open files" policy: "Upon the request of the defense, the prosecuting attorney shall disclose to defense counsel all of the material and information within the prosecutor's possession or control . . . ."<sup>673</sup>

Thus, American courts may already be well on the way to adopting broad defense discovery rules similar to those found in France.<sup>674</sup> Whether we can expand discovery as far as the French have, however,

668. Another approach to these problems is essentially the opposite of the French civil party procedure—the award of punitive damages in civil cases, payable in part to the state. *See* Geller & Levy, *The Constitutionality of Punitive Damages*, 73 A.B.A. J. 88, 91 (1987).

669. This Section focuses on defense discovery of the prosecution's case, as opposed to "investigatory" discovery (for example, discovery of pro-defense evidence or witnesses known to the government but not included in the *dossier*, or defense depositions). As to defense depositions, French defendants have few recognized rights; however, some of the purposes of a defense deposition can be achieved by requesting that the examining magistrate interview particular witnesses (for example, those who may disappear or who refuse to talk to the defense). American defendants can generally obtain depositions only to preserve testimony, *see, e.g.*, FED. R. CRIM. P. 15(a), but they may have somewhat greater rights to discover favorable evidence or witnesses. *See* *United States v. Bagley*, 473 U.S. 667, 674-84 (1985). *But see id.* at 675 n.7 (asserting that the Constitution does not require the prosecution to deliver its entire file to defense counsel).

670. Proc. Code arts. 278[2], 279, 280, 393[3].

671. *Id.* art. 118 (interrogations and confrontations of the accused or civil party, conducted by the examining magistrate, *see supra* text accompanying note 222); *id.* art. 197[3] (review by the indicting chamber, *see supra* text accompanying note 638).

672. *See* Y. KAMISAR, W. LAFAYE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 1147-53 (5th ed. 1980) (summarizing arguments for and against expanded defense discovery in criminal cases, and describing liberalizing trend which began in the late 1960s); *see also* *Williams v. Florida*, 399 U.S. 78 (1970) (holding that notice-of-alibi statute did not violate defendant's constitutional rights).

673. 2 A.B.A., *STANDARDS FOR CRIMINAL JUSTICE* Standard 11-2.1(a) (2d ed. Supp. 1986).

674. Reforms in this area are suggested in Schlesinger, *supra* note 2, at 372-77.

may depend on whether we are willing to adopt certain other aspects of the French system. In particular, the willingness of the French to allow defense counsel to inspect the entire *dossier* prior to trial may depend on several factors. These include: (1) the existence of detailed pretrial depositions and other recorded witness statements and the ease of gaining admission of these statements at trial if the witness fails to appear or recants;<sup>675</sup> (2) the possibility that French police and examining magistrates, unhampered by *Miranda* and other American limitations, are more likely to have obtained detailed pretrial statements from the defendant which can be used to impeach him if he tries to "tailor" his trial testimony to the prosecution evidence contained in the *dossier*;<sup>676</sup> and (3) the availability of trial in absentia<sup>677</sup> for defendants who flee after discovering the strength of the prosecution's case.

#### D. Nonadversary, Judge-Run Trials

Another distinctive feature of the French and other "civil law" systems is the active role of the presiding trial judge.<sup>678</sup> By contrast, in the United States evidence is presented by the parties, and the judge's role is that of a passive "umpire," responding to objections or acting on requests by one or both parties for a ruling.<sup>679</sup> As a result, important evidence occasionally is not heard because each side had some reason to prevent its admission. Adversary presentation of the evidence may also be more confusing for juries and inherently biased in comparison to the civil law's seemingly logical and neutral marshalling of the evidence on both sides of each issue. Finally, as noted previously,<sup>680</sup> judicial control of the taking of proof, combined with the practice of calling the defendant as the first witness, allows the proof of guilt to focus only on the contested issues, thus improving the speed and quality of the guilt determination process.

For all these reasons, several American observers have suggested adopting some version of the civil law, nonadversary trial procedure.<sup>681</sup>

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675. See *infra* text accompanying notes 703-06.

676. But see *supra* text accompanying notes 222-49 (suggesting that, in practice at least, American police have interrogation powers as broad as those exercised by French investigators).

677. See *supra* text accompanying notes 365-70.

678. See *supra* text accompanying note 15.

679. See, e.g., cases cited *infra* note 686; cf. M. GRAHAM, *supra* note 9, at 83-84, 94-95 (discussing the more active role of British judges, in comparison to their American counterparts, in questioning witnesses, preventing improper questions, summarizing evidence, and commenting on credibility, even though several of these judicial powers are rarely invoked). See generally A. GOLDSTEIN, *supra* note 391.

680. See *supra* text accompanying notes 531-34.

681. See, e.g., L. WEINREB, *supra* note 2, at 139-40; Alschuler, *supra* note 7, at 1003-05; Frankel, *supra* note 15, at 1053-54.

It is usually understood that the presiding judge would have to be familiar with both the prosecution's file and the proposed witnesses for each side in order to understand the issues and evidence, to know which witnesses can supply which evidence, and to identify the issues that are likely to be critical to the outcome. However, allowing the presiding judge to study the prosecution file in advance of trial assumes that there is a sufficiently detailed, written file to study. Ideally, this file would be similar to that compiled by the French examining magistrate,<sup>682</sup> or it would resemble a more detailed version of the police and grand jury files that currently exist in most American criminal cases. Absent these changes, though, judge-run trials would not work well in the American system.<sup>683</sup> Finally, even if American judge-run trials were feasible, with or without the detailed *dossier* available in France, I doubt that American defense attorneys and prosecutors would agree to give up the control they now possess over the order and presentation of evidence.

Apart from practical and political feasibility, there are also legal and philosophical objections to allowing the presiding judge to study the prosecution and defense claims, conduct the trial, and then (in bench trials) sit in judgment of the facts. A basic assumption of Anglo-American criminal jurisprudence seems to be that the factfinder should remain ignorant of the prosecution's case until the witnesses and evidence are introduced at trial.<sup>684</sup> Jury trials avoid this problem,<sup>685</sup> but frequent claims of lack of judicial impartiality would still arise if judges

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682. L. WEINREB, *supra* note 2, at 139. But see Alschuler, *supra* note 7, at 1004 (suggesting that a European-style detailed pretrial *dossier* would be unnecessary if parties gave the judge a list of proposed witnesses and a summary of expected testimony). Alschuler further suggests that the prosecutor should reveal the names of persons whose testimony he or she considers "unnecessary" but who the prosecutor believes possess "relevant information," *id.* at 1004 n.339, but the means of enforcing this prosecutorial duty are not spelled out. There is also some doubt whether such witness lists and testimony summaries would give the trial judge a sufficiently coherent view of the case to conduct the trial even if, as Alschuler suggests, cross-examination were left to the parties. See *id.* at 1004; see also M. GRAHAM, *supra* note 9, at 83-84 (more active British judges receive a "bundle" of evidentiary documents before trial).

683. See *supra* text accompanying notes 637-48.

684. This may be of less concern in France, where there are fewer discrepancies between the prosecution's file and the evidence at trial, owing to the looser standards of admissibility of evidence. Yet it is highly unlikely that American admissibility standards will soon change to approximations of the looser French rules. See *infra* text accompanying notes 703-36.

685. Indeed, a judge-run trial with a common law jury presents fewer "bias" problems than in France, where factfinding is dominated by judges. See FRENCH SYSTEM, *supra* note 41, at 2-3 (single judge in police court; single judge or three-judge panel in correctional court; mixed court of three judges and nine lay jurors in assize court). The common law jury remains sole judge of the facts, and any bias on the part of the presiding judge can only affect legal rulings and instructions. Moreover, since the common law trial judge traditionally rules on admissibility of evidence, he or she is presumed to be capable of hearing prejudicial, inadmissible evidence without becoming biased in favor of the proponent of that evidence. See, e.g., *United States v. Kelley*, 712 F.2d 884, 889-90 (1st Cir. 1983) (extra-record facts learned by judge while acting in his judicial capacity in another case cannot serve as basis for disqualification for bias).



were to take a more active role in presenting the evidence.<sup>686</sup> Finally, it does not appear that American defendants could constitutionally be compelled to disclose their own proposed testimony or that of other witnesses prior to trial;<sup>687</sup> without this information, the presiding judge could only present half the case.

Despite these problems, there may still be something we can learn and adopt from the French approach. American trial judges could be given more explicit authority to call their own witnesses or to question party witnesses whenever this would serve the search for truth.<sup>688</sup> Indeed, judges in some jurisdictions already possess these powers,<sup>689</sup> and they need only be encouraged to use their authority more often. Nevertheless, the very fact that such powers exist but are rarely used<sup>690</sup> suggests the difficulty of employing nonadversary measures in an adversarial trial system.

### E. The "Mixed Court" of Lay and Professional Judges

American observers of the French and German "mixed court" have sometimes recommended its adoption in the United States.<sup>691</sup> The potential advantages of this institution include: (1) sentencing by a collegial body that includes lay persons; (2) reduced risk that jurors will vote to acquit in order to avoid too harsh a sentence; (3) lessened need to instruct the jury in advance on complex legal issues; (4) lessened need to exclude evidence for fear that jurors will misapply it; (5) shorter deliberations, with fewer deadlocked juries; (6) lessened need for separate trials

686. See, e.g., *United States v. Singer*, 710 F.2d 431, 437 (8th Cir. 1983) (holding that judge's active role denied defendant fair trial by giving jury the impression that judge favored the prosecution; trial judge should "'seldom'" intervene in questioning, and "'should never assume the burden of direct or cross-examination'" (quoting *United States v. Bland*, 697 F.2d 262, 265-66 (8th Cir. 1983)), cert. denied, 479 U.S. 883 (1986); *Marshall v. State*, 291 Md. 205, 213-14, 434 A.2d 555, 560 (1981) (reversing conviction where, out of jury's presence during break in cross-examination, trial judge admonished defendant to tell the truth or be charged with perjury, after which defendant changed his testimony).

687. See cases cited *supra* note 543.

688. For example, American judges could avoid potential partisanship in selection of expert witnesses by making greater use of court-appointed experts. See generally Weinstein, *Improving Expert Testimony*, 20 U. RICH. L. REV. 473 (1986) (proposing state-licensed experts, possibly subject to disciplinary measures).

689. See, e.g., *Marshall*, 291 Md. at 213, 434 A.2d at 560; FED. R. EVID. 614(a) (calling court witnesses); FED. R. EVID. 614(b) (questioning any witness); FED. R. EVID. 706(a) (court appointing expert witnesses).

690. Weinstein, *supra* note 688, at 489-90; see also *id.* at 494 (noting that federal and many state judges also have, but rarely use, their "extensive power" to comment on the weight of the evidence). One practical impediment to broader use of powers to call and question witnesses is the trial judge's relative ignorance of the basic facts of the case. See Frankel, *supra* note 15, at 1042-45; see also *supra* text accompanying notes 681-83.

691. See L. WEINREB, *supra* note 2, at 139; Alschuler, *supra* note 7, at 997-1003; Langbein, *Mixed Court and Jury Court*, *supra* note 2, *passim*.

of offenses and offenders to avoid jury confusion of issues; and (7) reduced emphasis on time-consuming juror selection procedures.

Each potential advantage gained, however, has its negative side. In particular, there is a risk that judges would completely dominate the jurors, thus defeating most of the purposes served by the common law jury.<sup>692</sup> It is also questionable whether Americans would be willing to substantially relax trial evidence rules in proceedings before a mixed court; we have not done this even in nonjury trials, at least as a matter of formal law.<sup>693</sup> In any case, I doubt that a mixed court could ever be adopted in this country, at least so far as this involved *substituting* the mixed court for the common law judge and jury system.<sup>694</sup> Americans view the jury with a degree of reverence and respect which is unlikely to be easily transferred to such a novel institution<sup>695</sup> as the mixed court, and trial lawyers seem even less likely to accept a reform that might revolutionize trial practice and strategy.

There are also major constitutional impediments to overcome. In *Duncan v. Louisiana*,<sup>696</sup> the Supreme Court, in holding that the jury right is "fundamental to the American scheme of justice"<sup>697</sup> and therefore implicit in fourteenth amendment due process, stressed the deep historical roots of the jury right, the unanimous judgment of the states to preserve the right in serious cases, and the jury's critical role in protecting citizens from governmental oppression and the abuses of individual prosecutors and judges.<sup>698</sup> State and federal constitutional jury rights thus represent "[t]he deep commitment of the Nation" to this particular safeguard, and "a profound judgment about the way in which law should

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692. See generally H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966). For an empirical analysis of the impact of lay judges on guilt determinations and sentences in the German mixed court, see Casper & Zeisel, *supra* note 7, at 185-91.

693. See, e.g., FED. R. EVID. 1101; see also *infra* text accompanying notes 703-36 (discussing trial evidence rules).

694. It might, however, be possible to offer such mixed panels to defendants willing to waive their right to trial by common law jury. This approach has some of the advantages claimed by those who propose substituting "jury waiver bargaining" for plea bargaining, see *supra* note 497 and accompanying text, without entirely eliminating the role of lay persons in the determination of guilt.

695. A court of this kind is not totally unprecedented in this country. See Casper & Zeisel, *supra* note 7, at 191 n.50 (describing the county courts of Vermont). These courts, now known as superior courts, consist of two lay judges ("assistant" or "side" judges) elected every four years, VT. CONST. ch. II, § 53, and one professional judge. VT. STAT. ANN. tit. 4, §§ 71(a), 112 (1988). See generally Note, *A Farewell to Side Judges; Or, Are We Available?*, 10 VT. L. REV. 321 (1985) (authored by Richard H. Contant). However, this institution seems to be of less and less importance in Vermont. The mixed court includes assistant judges only "if available," which they often are not. Such judges rule only on sentences and on questions of pure fact, *not* "mixed questions of law and fact," and only in cases *not* tried before a common law jury. Finally, the superior court itself receives almost no criminal cases. *Id.* at 322, 340-42, 347-48.

696. 391 U.S. 145 (1968).

697. *Id.* at 149.

698. *Id.* at 151-54.

be enforced and justice administered.”<sup>699</sup> Although the Court suggested in a footnote that the states are free to substitute “alternate guarantees and protections” serving the same purposes as the jury,<sup>700</sup> it maintained that the entire American criminal process is built around the jury right, thus implying that major modifications in that process would be required if the jury right were to be substantially changed.<sup>701</sup>

Thus, I seriously question whether American legislators, judges, and trial lawyers would be willing to redefine fundamentally the meaning of “trial by jury.” The fact that the French are satisfied with their definition is probably a reflection of the lower value they place on citizens’ participation in the adjudication process in general.<sup>702</sup>

#### *F. Relaxed Trial Procedures and Evidence Rules*<sup>703</sup>

There are without question far fewer limitations on the admissibility of evidence in French criminal trials than in American ones. The defendant’s prior criminal record is always admissible; hearsay testimony and documents are frequently admitted; and, in general, there are few formal rules governing the form or scope of admissible evidence.<sup>704</sup> Moreover, the rule providing for the general admissibility of the defendant’s prior record, as well as certain other procedural and evidentiary rules, appear to make it much more likely that defendants will testify and thus provide another important source of evidence. A number of American observers

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699. *Id.* at 155-56.

700. *Id.* at 150 n.14.

701. *Id.* (“In every State . . . the structure and style of the criminal process—the supporting framework and the subsidiary procedures—are of the sort that naturally complement jury trial, and have developed in connection with and in reliance upon jury trial.”).

702. For example, civil cases are tried exclusively by professional judges, there is no grand jury of citizens, and only the most serious criminal cases are triable before the mixed court. *See FRENCH SYSTEM, supra* note 41, at 1-3; *see also supra* note 132 (five-year minimum penalty for cases tried in assize court). In contrast, the American constitutional jury right applies to any offense with a maximum sentence greater than six months, *Baldwin v. New York*, 399 U.S. 66 (1970), and many states grant even broader jury rights. Compared to France, West Germany seems to have a greater commitment to citizens’ participation: All nonpetty offenses are tried by a mixed court. *Casper & Zeisel, supra* note 7, at 141-43. It should be noted, however, that the German mixed courts, usually consisting of three or five “judges” who need not decide unanimously, *id.*, would not meet minimum U.S. constitutional requirements. *See Burch v. Louisiana*, 441 U.S. 130 (1979) (six-person jury must reach unanimous decision); *Ballew v. Georgia*, 435 U.S. 223 (1978) (five-person jury unconstitutional).

703. The focus of this Section is on what Professor Langbein calls “common law” evidence rules (for example, those excluding hearsay and prior convictions), as opposed to “constitutional” exclusionary rules (relating to the products of police interrogations, search and seizures, line-ups, and so forth). *See J. LANGBEIN, supra* note 7, at 68-69. The latter group of rules is discussed in Part IV, *supra* text accompanying notes 157-291.

704. *See FRENCH SYSTEM, supra* note 41, at 21-31; Pugh, *supra* note 35, at 22-24, 26 (court may consider all properly acquired material within the *dossier*). *See generally* Damaška, *Evidentiary Barriers, supra* note 7 (comparing evidentiary rules of common and civil law systems).

have proposed that we adopt some or all of these evidentiary and procedural rules, not only to maximize the amount of relevant information available to the factfinder,<sup>705</sup> but also to achieve several additional advantages. Broader admission of pretrial statements by absent witnesses would lessen the witness-intimidation problems caused by expanded pretrial defense discovery,<sup>706</sup> and general relaxation of trial evidence rules would make trials more "affordable," thereby reducing our dependence on plea bargaining.<sup>707</sup>

With respect to admissibility of evidence, although American rules should be simplified, I think it is unrealistic to expect that we could adopt anything close to the French approach. First, the French have less need for elaborate evidence rules largely because French factfinding is dominated by professional judges; as noted previously, Americans are unwilling to substantially reduce the role of lay jurors in criminal cases. Second, even those reformers who have proposed substantial reduction of hearsay limitations have recognized the constitutional and policy arguments favoring these limitations in criminal cases and have noted the lack of any real progress in hearsay reform, even in civil cases.<sup>708</sup> As for the defendant's prior record, since as many proposals have been made to *limit* the admissibility of such evidence<sup>709</sup> as to expand it, it seems quite unlikely that sufficient "bipartisan" support can be obtained to achieve substantial reform in either direction. Finally, as suggested before, relaxed trial evidence rules might simply encourage prosecutors to file more weak cases, thereby increasing court congestion and the need for plea bargaining.<sup>710</sup>

There is also some question whether the rule allowing the admission of a defendant's prior record and other French rules seeming to promote

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705. See, e.g., Alschuler, *supra* note 7, at 1007-09, 1020-22; Schlesinger, *supra* note 2, at 382-85.

706. See Damaška, *Evidentiary Barriers*, *supra* note 7, at 520 n.20; Schlesinger, *supra* note 2, at 375-76. To some extent, American courts already admit pretrial statements from threatened witnesses. See *supra* notes 373-74 and accompanying text.

707. See Alschuler, *supra* note 7, at 1010; Langbein, *Land Without Plea Bargaining*, *supra* note 2, at 206-10.

708. See, e.g., Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 51-104 (1987).

709. See, e.g., M. GRAHAM, *supra* note 9, at 244-46, 263-64, 273-74; Beaver & Marques, *A Proposal to Modify the Rule on Criminal Conviction Impeachment*, 58 TEMP. L.Q. 585 (1985); Murphy, *The Connecticut Law on Prior Convictions to Impeach an Accused*, 7 U. BRIDGEPORT L. REV. 275, 322-26 (1986); Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845 (1982); see also *People v. Allen*, 429 Mich. 558, 420 N.W.2d 499 (1988) (narrowing admissibility of prior convictions).

710. See *supra* text accompanying notes 532-33; see also *supra* text accompanying notes 284-86 (available data suggest that, despite seemingly looser standards of evidence and trial procedure in France, overall conviction rates for robbery, burglary, and theft are no higher than in the United States).

the use of a defendant's testimony or silence at trial are really so different, in practice, from American rules. On the surface, French and American rules are dramatically different. The French defendant is the first witness in every trial, and must at least stand mute while the presiding judge poses questions suggesting the defendant's guilt.<sup>711</sup> Moreover, French law does not forbid drawing adverse inferences from the defendant's silence,<sup>712</sup> and silence in response to specific questions is said to be more damning than a refusal to testify at all.<sup>713</sup> Furthermore, French defendants are not placed under oath; hence they need not fear perjury charges.<sup>714</sup> The absence of a separate sentencing hearing further encourages them to testify during the guilt determination phase of the trial.<sup>715</sup> Finally, French defendants need not fear impeachment with their prior criminal record since it is admissible whether or not they choose to testify.<sup>716</sup>

In contrast, American defendants have an absolute right not to take the witness stand,<sup>717</sup> and the exercise of this right may not be a basis for adverse comment by the court or the prosecutor.<sup>718</sup> The defense may also require the court to instruct the jury to disregard the defendant's silence at trial.<sup>719</sup> American defendants are, however, placed under oath and are subject to perjury, and defendants may be impeached with prior convictions if they testify. Yet they retain the option to testify as to guilt after hearing the prosecutor's case, or to testify only as to sentencing issues after being found guilty.

Once again, however, we must be careful not to overstate the differences between French and American procedure. The Supreme Court has held that prosecutors have an independent right to demand over the defendant's objection a "no-inference-from-silence" instruction, even though the instruction has the effect of *inviting* the jury to make the prohibited inference.<sup>720</sup> Thus, there is reason to question the effectiveness of

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711. See FRENCH SYSTEM, *supra* note 41, at 22.

712. See *id.* at 22 n.156.

713. See Damaška, *Evidentiary Barriers*, *supra* note 2, at 527.

714. See FRENCH SYSTEM, *supra* note 41, at 22; see also Schlesinger, *supra* note 2, at 380 (regarding West German procedures).

715. See FRENCH SYSTEM, *supra* note 41, at 25-30; see also Schlesinger, *supra* note 2, at 380.

716. See FRENCH SYSTEM, *supra* note 41, at 21-22.

717. *Griffin v. California*, 380 U.S. 609 (1965).

718. *Id.* at 615.

719. *Carter v. Kentucky*, 450 U.S. 288 (1981).

720. *Lakeside v. Oregon*, 435 U.S. 333, 339-41 (1978). The defendant in *Lakeside* argued that such an instruction "is like 'waving a red flag in front of the jury.'" *Id.* at 340 (quotations in original); see also J. KUNEN, "HOW CAN YOU DEFEND THOSE PEOPLE?" THE MAKING OF A CRIMINAL LAWYER 243 (1983) ("[W]e figured the jury *wanted* to hear [defendant] and would draw negative inferences if he didn't testify, especially because the judge would instruct them not to."); cf. *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) ("The naive

this rule.<sup>721</sup> In any case, given the limited role of lay jurors in the French system,<sup>722</sup> the absence of a no-inference-from-silence rule is probably less damaging to the defense than it would be in the American context.<sup>723</sup>

It is also said that French defendants are disadvantaged by being required to decide whether to testify before any of the prosecution evidence is introduced;<sup>724</sup> American defendants, by contrast, can wait until the close of the prosecution's case—or even the close of the defense<sup>725</sup>—and then decide whether and how to testify. However, the disadvantaged position of the French defendant is significantly reduced by the broad pretrial discovery permitted to the defense,<sup>726</sup> and the thorough pretrial investigations that are conducted and then documented in the official *dossier*.<sup>727</sup> Interrogation at the outset of the trial thus holds few surprises. Moreover, American defendants typically face this dilemma at earlier stages—during plea bargaining—when the defendant has even less knowledge of the strengths and weaknesses of the prosecution's case.

The absence of a separate sentencing hearing in France may be more significant because it arguably forces most French defendants to expose themselves to questioning on issues of guilt in order to ensure that they will be heard on issues of punishment. There is at present no empirical data on this question, and any future research should keep in mind that American and French "trials" are not directly comparable: Most American defendants do "testify" as to guilt by pleading guilty, so American trials are only comparable to the most contested of French trials, not to all French trials.<sup>728</sup> Nevertheless, within comparable groups of cases, it may well be that French defendants are more likely to submit to questions relating to guilt than are American defendants.<sup>729</sup>

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assumption that prejudicial effects can be overcome by instructions to the jury all practicing lawyers know to be unmitigated fiction.") (citations omitted).

721. When an American defendant chooses to testify as to some but not all matters at issue, the *Griffin* and *Carter* rules may not apply. See, e.g., *People v. Perez*, 65 Cal. 2d 615, 422 P.2d 597, 55 Cal. Rptr. 909 (1967) (when defendant testified and provided an alibi as to two counts, prosecutor properly cross-examined defendant as to the other two counts charged, and the court properly instructed the jury that it could draw adverse inferences from defendant's selective silence).

722. See *supra* text accompanying note 702.

723. This assumes that professional judges are more familiar with the reasons why an innocent person might choose not to testify, and judges are therefore less likely to draw unwarranted inferences of guilt from defendant's silence. Cf. *supra* note 720.

724. Damaška, *Evidentiary Barriers*, *supra* note 7, at 528-30.

725. See *Brooks v. Tennessee*, 406 U.S. 605 (1972) (defendant cannot be required to testify (or waive his right to testify) before any other defense witnesses are heard).

726. See *supra* text accompanying notes 669-77.

727. FRENCH SYSTEM, *supra* note 41, at 9.

728. A further problem in selecting "comparable" groups of French and American trials is that "contested" French trials appear to display more *degrees* of "contestedness" than are found in American trials. See *supra* text accompanying notes 525-26.

729. Indeed, it is claimed that "almost all continental defendants choose to testify." Damaška, *Evidentiary Barriers*, *supra* note 7, at 527.

However, it is far from clear what accounts for this apparent difference between French and American defendants. Unless an American defendant believes that cross-examination as to issues of guilt would significantly increase his or her chances of conviction, a defendant should present any mitigating facts *both* at trial and at the time of sentencing. Favorable defense evidence could cause the jury to acquit or convict on a lesser offense, and sentencing judges may be unsympathetic to defendants who wait until the last possible moment to speak up. On the other hand, if the French defendant refuses to answer questions during the initial interrogation at trial, he or she can still present mitigating evidence through the testimony of other witnesses. Furthermore, the French defendant always has the "last word" after all the evidence is in and the attorneys have made their final arguments.<sup>730</sup>

Another explanation for American defendants' reluctance to testify at trial is that some are discouraged by the risk of being charged with perjury. Of greater practical significance, however, is the court's power to increase the sentence of defendants who are *suspected* of having lied, with no requirement that perjury be formally charged or proved beyond a reasonable doubt.<sup>731</sup> Since this informal sanction is probably also available in France,<sup>732</sup> the absence of formal perjury sanctions in that country may not be so significant.<sup>733</sup>

The remaining commonly offered explanation for the reluctance of American defendants to testify is that they fear impeachment with a prior criminal record.<sup>734</sup> However, American prosecutors are often able to use a defendant's criminal record as substantive evidence in the case-in-chief,<sup>735</sup> and they are thus able to introduce the prior record even without the defendant's testimony. Moreover, even if a defendant's "impeachable" offenses were not admitted in the case-in-chief, their

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730. See FRENCH SYSTEM, *supra* note 41, at 23. The French defendant, however, is disadvantaged by not being allowed to wait until the trier of fact has found him guilty before deciding whether and how to present mitigating facts.

731. United States v. Grayson, 438 U.S. 41 (1978).

732. Damaška, *Evidentiary Barriers*, *supra* note 7, at 528 n.44.

733. Of equal or greater significance, perhaps, is the lack of oath itself: does this lead French jurors and judges to give less weight to the defendant's testimony? Cf. Pugh, *supra* note 35, at 25 (testimony of unsworn witnesses "is viewed with skepticism, in light of their interest"). It may be that the lack of oath *discourages* French defendants from testifying (but makes it easier to convict them when they do testify).

734. FED. R. EVID. 609; see also H. KALVEN & H. ZEISEL, *supra* note 692, at 159-62 (when jurors knew or suspected that the defendant had a prior record, they were much more likely to convict).

735. A prior criminal record is often introduced in the prosecution's case-in-chief to identify the defendant as the author of the current offense, to establish motive or intent, or to show lack of mistake or accident. See FED. R. EVID. 404(b). Many courts interpret this rule (and similar state laws) broadly. See, e.g., United States v. Estabrook, 774 F.2d 284, 287 (8th Cir. 1985); see also R. FRASE, *supra* note 265, at 180-91 (Minnesota case law); Uviller, *supra* note 709, at 877-79.

admission as impeachment may do little *additional* damage to the defendant beyond that already done by the prosecution's admission of prior crimes. Given the current broad admissibility of "prior crimes" evidence, it would indeed be interesting to see if there has been an increase in the willingness of defendants to testify at trial. In this respect, as in many others, American and French practices may be less dissimilar than they once were.<sup>736</sup>

### G. Broader Defense and Prosecution Appeal Rights

Except for the statistically rare cases tried in assize court, all issues of law, fact, or sentencing decided in French trial courts are appealable by both the defendant and the prosecution.<sup>737</sup> In contrast, the American prosecutor has very limited rights to appeal on legal issues without risking double jeopardy. Furthermore, neither side can appeal on most issues of fact except in minor offenses, where trial *de novo* is provided. Finally, prosecution sentence appeals have only recently been permitted in the federal system and in some states, and only a bare majority of states permit defendant sentence appeals.<sup>738</sup>

The recent trend toward broader use of sentence appeals, usually in connection with reforms aimed at reducing sentencing disparity,<sup>739</sup> suggests relatively little need to look abroad for guidance in this area. Similarly, aspects of the French appeal system, such as prosecution appeals and defense appeal of factual issues, are not so closely linked to other features considered in detail in this Article that they merit either extended discussion or a high degree of reform-oriented research. Prosecution appeal of jury acquittals seems too incompatible with our common law and constitutional traditions<sup>740</sup> to gain acceptance in this country. Broader defense appeals—for example, of factual determinations underlying a conviction—would also probably be barred by "mutuality" considerations as well as by the fundamental American tradition of limiting appeals to *legal* issues.<sup>741</sup> Finally, the limited frequency of criminal appeals in France<sup>742</sup> suggests that broad appellate review does not

736. Similarly, defendants in some states may have been further encouraged to testify by recent narrowing of impeachment rules. See, e.g., *People v. Allen*, 429 Mich. 558, 420 N.W.2d 499 (1988).

737. See FRENCH SYSTEM, *supra* note 41, at 36.

738. See generally W. LAFAVE & J. ISRAEL, *supra* note 126, §§ 1.3(b), 24.1-4, 25.2(f), 26.3.

739. *Id.* § 25.2(f) (federal prosecutor appeals); see also MINN. STAT. ANN. § 244.11 (West Supp. 1990) (authorizing two-way sentence appeals).

740. See W. LAFAVE & J. ISRAEL, *supra* note 126, § 24.3(c).

741. See generally 5 AM. JUR. 2D *Appeal & Error* §§ 820-821, 838-839 (1962).

742. Only about 5% of final delict convictions are pronounced by the courts of appeal; for contravention convictions, the figure is 0.5%. ANNUAIRE STATISTIQUE, *supra* note 39, at 115, 121. These figures include prosecution as well as defense appeals. There are no published statistics on the number of appeals not leading to conviction (that is, successful defense appeals and unsuccessful prosecution appeals). One might speculate, however, that successful defense appeals are not that



play a major role in their system.

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much more frequent than unsuccessful ones, since any increase in the former tends to increase the latter. There are also several procedural deterrents to the filing of defense appeals: Witnesses other than the accused are rarely heard, *see* FRENCH SYSTEM, *supra* note 41, at 37, and the filing of a defense appeal consistently provokes a prosecution cross-appeal, thus permitting the sentence to be increased. *See* A. SHEEHAN, *supra* note 41, at 90-91. In addition, the defendant will be ordered to pay costs if the court finds that his appeal was not well founded. Proc. Code art. 514[2], [3].

