Nonadversarial Justice: the French Experience

Edward A. Tomlinson

Follow this and additional works at: http://digitalcommons.law.umaryland.edu/mlr
Part of the Criminal Procedure Commons

Recommended Citation
Available at: http://digitalcommons.law.umaryland.edu/mlr/vol42/iss1/9

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.
NONADVERSARIAL JUSTICE: THE FRENCH EXPERIENCE

EDWARD A. TOMLINSON*

TABLE OF CONTENTS

I. THE FRENCH CRIMINAL JUSTICE SYSTEM — AN
OVERVIEW .................................................. 134
A. Basic Characteristics .................................. 134
B. The Ideology of French Criminal Justice .............. 136
C. The Categories of Offenses ............................ 141

II. THE INVESTIGATION AND PROSECUTION OF OFFENSES IN
FRANCE ................................................... 146
A. The Office of the Prosecutor .......................... 146
B. Limitations on Prosecutorial Power .................... 147
C. The Decline of the Examining Magistrate ............ 150
D. The Rise of the Police’s Investigatory Authority ....... 156
E. The Prosecutor’s Dominant Role ...................... 161

III. THE RIGHTS OF THE INDIVIDUAL ...................... 164
A. Comparative Analysis ................................ 165
B. The “Rights of the Defense” and the Stages of the
Criminal Process ........................................ 167
C. The Defendant’s Statutory Rights .................... 174
D. The Defendant’s Right to Fair Treatment ............ 176

IV. JUDICIAL IMPLEMENTATION OF INDIVIDUAL RIGHTS ...... 179
A. The Different Stages of the Process: The Imbert
Decision .............................................. 179
B. The Police Stage: The Isnard Decision .............. 181
C. The Issue of Probable Cause .......................... 184
D. Police Searches: The Trignol Decision ............... 186
E. The Intervention of the Constitutional Council ....... 189

CONCLUSION ............................................... 194

Civil-law systems for prosecuting crime, when viewed from across the Atlantic, appear to offer an attractive alternative to several troublesome aspects of our criminal justice system.1 Particularly appealing is

* Professor of Law, University of Maryland School of Law. The author would like to thank Peter Quint, Bill Reynolds, and Mike Tonry for helpful comments on an earlier draft of this article. The author spent the Fall, 1980, semester on sabbatical at the University of Strasbourg, France.

1. American scholars who have cast admiring glances across the Atlantic include: L.
the image of an impartial judiciary controlling the investigation, trial, and disposition of criminal charges. That picture compares favorably with the prosecutor's dominant role in our system of bargained justice, where the judge usually does little more than ratify the deal struck by the parties. The principal excuse for this reliance on plea bargaining is that because a party-dominated jury trial has become so time-consuming a luxury, we can afford to provide it only to a small minority of criminal defendants. For this reason, the prosecutor's discretionary choices in matters of charge and sentence, and the defendant's willingness to forego his trial rights in return for a more lenient sentence, typically determine a criminal case's disposition. If the Continentals avoid dispensing unequal justice in this fashion through an efficient system of judge-run trials, why should we not follow their example?

The debate in this country over the advantages of the continental criminal justice systems so far has been inconclusive, due in part to a lack of information about their actual functioning. For example, scholars have debated whether judges do in fact exercise a dominant role. This article seeks to fill the information gap for one civil-law country — France — and to further the debate by evaluating that country's criminal justice system by the criterion of the balance it achieves between individual rights and state authority.

Filling the information gap does not by itself resolve the debate over the advantages of the civil-law approach, because the French experience demonstrates that the system's strengths and weaknesses tend to balance each other out if evaluated solely in terms of the role within the system of an impartial judiciary. The system's chief strength is the efficient and generally fair trial afforded all defendants, based on a comprehensive dossier which informs the judge in advance of all the evidence in the case. Guilty pleas are not allowed except for minor
of offenses punishable by a fine; all other criminal prosecutions in France necessarily go to trial. The nonadversarial trial itself is usually an uncomplicated affair: The judges (most continental tribunals are collegial) make a straightforward effort to ascertain the truth, and the only trials likely to last longer than a day are those involving either multiple defendants or a crime victim's claim for substantial civil damages.5

The system's principal weakness is that an individual's rights, when confronted with the state's investigatory authority, are less substantial in France than in the United States. French prosecutors and police exercise greater pre-trial investigatory and charging authority than do their American counterparts; and that authority is not subject to judicial supervision or other external checks. This weakness contributes to the system's chief strength, however, because the absence of significant limitations on the pre-trial gathering of evidence by the prosecutor and the police enables them efficiently to compile a comprehensive dossier.

The French criminal justice system thus presents a standoff between its principal weakness — domination of the investigatory and charging stages by the police and the prosecutor — and its chief strength — judicial control of the disposition of cases at trial. This article seeks to resolve this standoff by evaluating the French criminal justice system under the criterion of the balance it achieves between individual rights and state authority. The French system does not compare favorably with our own when evaluated under that standard.

Striking the necessary compromise between individual rights and law enforcement needs is a central question for any criminal justice system. How a society resolves that question affects not only the system's efficiency but, more importantly, shapes the society itself. This is because the rights at stake belong not just to the criminally accused but to all persons confronted with the state's police power. The French criminal justice system often responds quite differently than our own to the competing claims of individual rights and state authority. Describing the French criminal justice system in terms of the compromise it reaches allows us to determine whether we should emulate the French as we attempt to improve our own criminal justice system.

This article also describes how the French criminal justice system works and seeks to convey a sense of the issues that interest and divide

5. French law permits a crime victim either to join his civil action for damages with the state-initiated prosecution or to initiate a prosecution himself if the state fails to do so. The crime victim who exercises either of these options is called the partie civile and becomes a full-fledged party to the criminal proceeding. On the role of the partie civile in the criminal process, see infra note 52.
criminal justice practitioners in France. Part I provides important background information on the principal procedural characteristics of a civil-law system for prosecuting crime and on the procedural peculiarities of the French system. It also reports on the ongoing political and philosophic debate in France over the approach society should adopt to combat crime. This debate introduces Part II, which discusses the investigatory and charging powers of the prosecutor and the police. Part III of the article describes the individual's rights not only at trial but also during the various pre-trial stages of the process. And finally, Part IV focuses on how judges have implemented individual rights. The article attempts throughout to compare the different ways French and American law seek to limit the state's investigatory and charging powers and to define and to protect individual rights.

I. THE FRENCH CRIMINAL JUSTICE SYSTEM — AN OVERVIEW

A. Basic Characteristics

Basic differences in procedural style between common-law and civil-law systems reflect different ideas on how a trial court should determine a defendant's guilt or innocence. The central idea behind the common-law trial is that of a party contest; the idea behind a criminal trial on the Continent is that of an official inquiry. The common-law trial is the main act of a dispute between two theoretically equal parties who enjoy considerable leeway to determine themselves, through pleadings and stipulations, the limits and outcome of their dispute. The adjudicator plays a largely passive, neutral role until the parties ask him to render a decision. In most instances, the parties are able to settle their dispute through an agreement which they expect the official decider to ratify.

In a civil-law system, on the other hand, the trial culminates an official inquiry whose object is to determine whether the defendant is guilty and, if so, what sanction to impose. The court is responsible for presenting the proofs and is not bound by the parties' positions when it formulates the issues and reaches an ultimate decision. Trial procedures in this nonadversary model are simpler, less technical, and less lawyer dominated than in the adversary model where a complex system of evidentiary and procedural rules governs the parties' judicial duel.

The hierarchical structure of continental criminal justice also dif-
fers from the common-law system's coordinate approach.\textsuperscript{7} The hierarchical model treats the official decider (policeman, prosecutor, judge, etc.) as a technician who must apply clear legal directives to make accurate determinations of fact subject to close supervision by higher officials. Certainty in reaching the correct result is the system's primary goal, and it regards any leeway in official decisionmaking as at best a necessary evil. By contrast, official deciders in a common-law system enjoy more autonomy and view themselves more as problem solvers than as legal technicians. Within the often flexible limits imposed by the law, the decider's role is to render individualized justice.

These distinctions between the trial as an official inquiry and as a party contest and between hierarchical and coordinate structures of authority generally describe the basic differences between French and American criminal procedure. Recently, the French have shown little interest in adopting our approach, although they frequently complain that their own criminal justice system is too complex, formal, and slow. These inefficiencies result in part because their system often deviates from the hierarchical model, despite the greater role in France of authority in general and of the central government in particular.

Given the hierarchical model's theoretical importance, the lack of cohesion among the French system's component parts is surprising. The system divides along ideological, functional, and geographic lines.\textsuperscript{8} The ideological split separates the proponents of the repressive model of crime control from the advocates of the rehabilitative model. The functional split pits the police and the prosecutorial corps against the new cadres of social workers and educators attached to the courts and to the prison system. The latter groups favor the rehabilitative model, and are more influential in urban than in rural France where the more repressive approach of the police and prosecutor prevails. The geographic split distinguishes the informal, justice-of-the-peace style of justice still prevailing in rural France from the formal, impersonal justice dispensed in more urban settings. As a result of these conflicts, the Penal Code has lost its rigorous, determinative character. Especially in urban areas where the substantive and sentencing provisions of the largely nineteenth century Code no longer reflect community morality, judges base their decisions less on law and more on their personal perceptions of the need either to protect society or to help individual

\textsuperscript{7} See Damaska, \textit{Structures of Authority and Comparative Criminal Procedure}, 84 \textit{Yale L.J.} 480 (1975) [hereinafter cited as Damaska, \textit{Structures of Authority}].

defendants.\textsuperscript{9}

B. The Ideology of French Criminal Justice

French jurists\textsuperscript{10} employ the term \textit{politique criminelle} (loosely translated as ideology) to describe the legislature's overall approach or philosophy in protecting society from antisocial behavior.\textsuperscript{11} Reformers of the French criminal justice system have focused on the theories underlying the system's response to crime, overlooking how its hierarchical structure and official inquiry approach affect the achievement of their goals. The Parliament's choice of the appropriate ideology thus has tended to become a major political issue in France. The debate has focused not only on the question of what to do with convicted offenders but also on the proper balance between state authority and individual rights.

The original Penal Code, enacted during the Napoleonic era, adopted an approach (now labelled "classical") based on the twin principles of legality and proportionality. The Code's draftsmen insisted that it define all offenses and punishments and that the punishments reflect the gravity of the offense. The new Code was thus a milestone in criminal justice reform. By contributing to certainty in the law, it helped to deter potential wrongdoers; by providing proportionality, it permitted the rehabilitation of offenders guilty of less serious (i.e., non-capital) offenses; and by defining offenses and punishments in advance, the Code also prevented judicial arbitrariness.\textsuperscript{12}

The nineteenth century produced a flowering of different schools of criminology, but the original Penal Code's classical approach continued to dominate. It was not until well into the twentieth century (and after the Liberation in particular) that a new ideology labelled \textit{La défense sociale nouvelle} (New Social Defense) gained a clear ascendancy among French jurists and secured major legislative changes.\textsuperscript{13} For its

\begin{itemize}
  \item \textsuperscript{9} See id. at 165.
  \item \textsuperscript{10} The French use the word "jurist" (\textit{juriste}) to cover not only professional judges but also prosecutors, private attorneys (\textit{avocats}), and law professors. Thus, a jurist is a person learned in the law.
  \item \textsuperscript{11} I R. \textsc{Merle} & A. \textsc{Vitu}, \textsc{Traité de droit criminel} 96-97 (3d ed. 1978) [hereinafter cited as \textsc{Merle} & \textsc{Vitu}]; G. \textsc{Stefani} & G. \textsc{Levasseur}, \textsc{Droit pénal général} 22-24 (10th ed. 1978) [hereinafter cited as \textsc{Stefani} & \textsc{Levasseur}, \textsc{Droit pénal}]. These standard treatises on criminal law describe how various \textit{politiques criminelles} evolved in France. See especially \textsc{Merle} & \textsc{Vitu} at 98-144.
  \item \textsuperscript{12} A desire to limit judicial power was one of the motivating factors behind the codification movement. Parliamentary abuse of judicial power was commonplace in pre-Revolutionary France.
  \item \textsuperscript{13} The success of this movement in France is attributable in large part to the prestige and eloquence of its leading spokesman, the Honorable Marc Ancel, the first president of
\end{itemize}
principal tenet, this new school affirmed that society must protect itself from antisocial behavior not simply by punishing wrongdoers but also by rehabilitating them. Incarceration therefore should be reduced to the minimum amount needed to incapacitate or to rehabilitate dangerous offenders; and the criminal justice system should develop medical, educational, and social programs to reintegrate the offender into law-abiding society. The linch-pin of this new approach thus was individualized punishment. The court must judge the offender and not the offense, and select the disposition best suited to accomplish the reformed defendant's eventual reentry into society. To fulfill this responsibility, the judges needed greater discretionary powers than the original Penal Code allowed.

The French Parliament responded to the ascendancy of the New Social Defense by promulgating, between 1945 and 1975, a half-dozen or more major laws designed to protect society by rehabilitating offenders. These laws reorganized the juvenile justice system on exclusively rehabilitative lines, instituted a pre-trial release system that both reduced the number of pre-trial detainees and provided immediate treatment measures for those who were detained, and increased significantly the availability of probation (especially supervised conditional probation). Parliament also created a new judicial officer responsible for supervising treatment programs for incarcerated defendants and for deciding whether to grant a prisoner conditional early release on parole.

Parliament at the same time amended the Penal Code to increase the trial court's discretion in selecting the appropriate punishment. The original Penal Code of 1810 had rejected the principle, first adopted in the Revolutionary Code of 1791, of a fixed punishment for each offense. Instead, the 1810 Code's punishment provisions were based on the principle of proportionality and required the court to select a punishment from a relatively narrow range of legislative choices. This principle (i.e., that the punishment should reflect the gravity of the

the French Supreme Court (the Cour de cassation). Ancel summarized its tenets in a lucid bestseller (for a law book) entitled La défense sociale nouvelle, the first edition of which was published in 1954. For an English translation, see M. Ancel, Social Defense: A Modern Approach to Criminal Problems (J. Wilson & M. Ancel trans. 1965).

14. For a description of these laws, see Lavasseur, Réformes récentes en matière pénale dues à l'école de la défense sociale nouvelle, in 2 Aspects Nouveaux de la Pensée Juridique: Recueil d'Études en Hommage à Marc Ancel 35 (1975) [hereinafter cited as 2 Mélanges Ancel].

15. The new judicial officer was called the juge d'application des peines (judge of the application of the punishment).

16. See Lavasseur, Réformes récentes en matière pénale dues à l'école de la défense sociale nouvelle, in 2 Mélanges Ancel, supra note 14, at 50-51; 1 Merle & Vitu, supra note 11, at 944-47.
offense), weakened by nineteenth century amendments to the Code that permitted the court to reduce the minimum punishment by finding the presence of extenuating circumstances, all but disappeared with the post-World War II legislation. The Code as it stood prior to 1981 did not require a court to impose an unsuspended prison term; for most offenses, the court could choose any punishment between the authorized maximum and a five-franc fine.

Despite these legislative successes, the New Social Defense movement failed to achieve one of its major goals: separating the guilt-determining process from the sentencing process. Under French law, the same court judgment both determines the defendant's guilt and selects the punishment. The court has no opportunity following its determination of the defendant's guilt to conduct the equivalent of a pre-sentence investigation or to hold a separate hearing on the appropriate punishment. This fusion of the guilt and punishment decisions is a major obstacle to individualized sentencing. Proponents of the New Social Defense advocate separating the defendant's conviction from the sentencing process in order to permit the former to embody society's righteous condemnation of the offense and to shelter the latter from similar retributive pressures.

During the early and mid-1970's, this failure seemed slight when compared with the new ideology's successes in other areas. The movement's proponents avidly awaited the triumph of their approach in the promulgation of a new Penal Code to replace the often archaic Code of 1810. Throughout the 1970's, a government-appointed Commission of jurists had been hard at work codifying anew the substantive and punishment provisions of the Code. The Commission's draft, which finally appeared in 1976, adopted without reservation the individualized, rehabilitative approach.

17. On the importance of this goal, see Ancel, La césure du procès pénal, in Problèmes contemporains de procédure pénale: recueil d'études en hommage à Louis Hugueney 205 (1964) [hereinafter cited Mélanges Hugueney]. In 1975, Parliament enacted legislation permitting the court in certain cases involving relatively nonserious offenses to delay or even to dispense with the imposition of a punishment. Roujou de Boubée, L'ajournement et la dispense de peine, in Mélanges dédiés à Gabriel Marty 955 (1978).

18. Ancel, La césure du procès pénal, in Mélanges Hugueney, supra note 17, at 217. In 1960, the adherents of the New Social Defense secured legislation authorizing (and for the most serious offenses requiring) a pre-trial inquiry into the defendant's personality. This information is available to the court at trial to aid in determining the appropriate punishment. Although this inquiry provides the court with information relevant to punishment, Ancel has argued that the inquiry's timing may prejudice the defendant's defense on the merits. Id. at 215.

By 1980, everything had changed. That spring, the government disavowed the Commission’s draft on the grounds that its approach was untimely given the need to repress crime more effectively. Recodification of the Penal Code along the lines suggested by the Commission became a dead issue in the Parliament. This turnabout, although distressing to the advocates of the New Social Defense, did not surprise them. Since 1977, penal legislation had reflected a new ideology which sought to reduce the incidence of antisocial behavior by repressing crime rather than by rehabilitating criminals. This new approach emphasized more effective law enforcement, the deterrent effect of prison terms, and the need for longer prison terms to protect law-abiding persons from violent offenders, particularly recidivists.

The culmination of this wave of repressive legislation was the law

---


21. Among the repressive laws passed by Parliament were: a 1977 law (subsequently declared unconstitutional by the Constitutional Council) that expanded the police’s powers to search motor vehicles, a 1978 law that established a system of maximum security prisons devoid of rehabilitative services, and a second 1978 law that required defendants convicted of violent crimes to serve one-half of their sentence before they could obtain any form of release from prison. In addition, the latter 1978 law limited the power of the supposedly lax *juges d’application des peines* by transferring the initial release decision for most violent offenders from that official to a three-man commission composed of a *juge d’application des peines*, a prosecutor, and a prison warden.


The American reader will find useful a brief description of the French reporting system. The *Receuil Dalloz-Sirey* is an unofficial reporter which publishes in its case law or *Jurisprudence* section a selection of decisions by the various French courts. French cases are normally cited by the name of the court and the date of the decision rather than by the names of the parties. This reporter also includes case notes and articles on legal topics by leading French jurists. The case notes accompany the text of the decisions while the articles appear in a separate section designated *Doctrine* or *Chronique*. Dalloz-Sirey also has a *Législation* section containing the texts of statutes and decrees. Its chief competitor, *Juris-Classeur périodique, la semaine juridique* (J.C.P.), has a similar format.

The highest court in the regular court system is the *Cour de cassation* or Supreme Court. The various Chambers of that court render over 14,000 decisions per year. The great majority of the decisions are not published and are of interest only to the parties. The academic commentators, however, annually select several hundred decisions for publication in the unofficial reporters. These commentators usually determine a particular decision’s
"Security and Liberty" proposed by the rightist government of former Prime Minister Raymond Barre in the late spring of 1980. Despite the bitter and public opposition of many jurists (including sitting judges), the Parliament adopted this highly controversial law in modified form at the end of the year and the President promulgated it in early 1981. The vote in Parliament was largely along party lines: the rightist majority supported the government, while the Socialist and Communist opposition voted against it. The new law reduced the court's discretion in determining the punishment to impose upon violent offenders in three ways. First, the legislature established floors (planchers) that defined mandatory minimum prison terms. Second, the Parliament sharply restricted the availability of probation, and third, the new law required the court to impose still more severe punishments on a broadened category of recidivists. The new law's message was plain: the solution to the crime problem is prison. Longer, more certain prison terms are needed to deter potential criminals and to incapacitate actual ones.

The reasons for this about-face in ideology are not easy to determine. French crime statistics are not particularly informative, but most French experts on this subject believe that the 1970's did not witness any major increase in violent crime and that there was even a decline in 1979. According to these experts, the long-term rise in the number of

importance on the basis of the novelty of the issue and the strength of the court's reasoning. The court itself publishes roughly twenty percent of its decisions in its official Bulletins.

The Conseil d'etat is France's highest administrative court. In France, a separate system of administrative courts has exclusive jurisdiction over most noncriminal litigation involving the state or its instrumentalities. Citations to the decisions of the Conseil d'etat normally include the names of the private parties.


23. Raymond Barre, prime minister from 1976 to May, 1981, was the last prime minister to serve under former President Giscard d'Estaing. He resigned after the presidential election of May 10, 1981, in which the Socialist candidate François Mitterrand defeated Giscard in his bid for a second term.


25. See P. Boucher, Le Monde, May 27, 1980, at 10 (views of experts within Ministry of Justice); Le Clerc, Chronique pénologique, 1979 Revue Administratif 451 (analysis of police crime statistics). The Revue administratif is one of the leading French journals on administrative law.
The success of the new repressive ideology may be short lived. The Socialist François Mitterrand defeated the incumbent Giscard d'Estaing in the May, 1981, presidential election, and the Socialist Party won control of the National Assembly in the legislative elections that followed. Although economic issues dominated both campaigns, the Socialists attacked the law "Security and Liberty" and promised to secure its repeal. After a year and a half of vacillation, the Socialist government of Prime Minister Pierre Mauroy finally introduced legislation to repeal part of the law. That legislation is likely to pass the Socialist Parliament during 1983. It is uncertain at this point whether the Socialists will go further in reviving the rehabilitative approach by enacting a new Penal Code or other reform legislation.

This brief description of the political and legislative struggle in France between competing ideologies for combating crime indicates that the debate has not considered the implications of either the official inquiry model for prosecuting crime or the hierarchical model for organizing official deciders within the criminal justice system. A central issue in that debate is very similar to one of the central criminal justice issues in this country: how to achieve a proper balance in investigating and prosecuting offenses between society's interest in repressing crime and the individual's interest in his own personal liberty. Resolving that issue is no easier in France than in the United States and may actually be more difficult because of the fragmented nature of the French criminal justice system. Although it may seem paradoxical that a system based on the official inquiry and hierarchical models should encounter difficulties in resolving policy issues and implementing the decisions reached, these phenomena are more understandable given the functional and geographic dichotomies within the system and the tripartite jurisdictional structure for trying offenses described below. It is difficult to formulate or implement a cohesive policy when so many different units are involved and no one unit has ultimate control.

C. The Categories of Offenses

The most visible cleavage within the French criminal justice sys-
tem is the jurisdictional division of offenses into three categories of descending gravity (crimes, délits, and contraventions) and the establishment of separate court systems, each governed by its own set of procedural provisions, for trying cases in each category. An understanding of this division is essential because an offense's category often determines the authority of the prosecutor and the police as well as the rights of the individual.

The tripartite division dates from the Napoleonic Codes, the Penal Code of 1810, and the Code of Criminal Procedure of 1808.26 Today in France, as during the First Empire, each of the country's ninety-odd departments has a cour d'assises to try defendants charged with the most serious offenses (crimes),27 a tribunal correctionnel to try defendants charged with middle-range offenses (délits),28 and usually at least five or six tribunaux de police to try defendants charged with the least serious offenses (contraventions).29 The following chart depicts the tripartite jurisdictional structure:

---

26. The Penal Code (Code pénal) is still in force today. Although amendments in the intervening years have greatly changed its punishment provisions, its substantive definitions and categories of offenses have remained largely unchanged. In 1958, a new Code of Criminal Procedure (Code de procédure pénale) replaced the Napoleonic Code, but the new Code did not change the tripartite structure for the trial of offenses. The Napoleonic Code was called the Code d'instruction criminelle. For purposes of this article, both of the procedural Codes are referred to as Codes of Criminal Procedure.

27. The category of a particular offense normally is determined by the accompanying punishment provision. For example, an offense is a crime if it is punishable either by life imprisonment or by a term of years when that punishment is designated as a détention or réclusion criminelle. Code pénal [C. pén.] arts. 1, 6–8 (79e ed. Petits Codes Dalloz 1981–82). Normally, an offense will be designated a crime if the court may impose a prison term exceeding five years. Certain crimes were also punishable by death prior to the abolition of capital punishment in 1981.

28. An offense is a délit if it is punishable by a prison term (emprisonnement) in excess of two months or a fine in excess of 6000 francs. Code de procédure pénale [C. pr. pén.] art. 381 (23e ed. Petits Codes Dalloz 1981–82). Traditionally, the legislature authorized a maximum prison term of no more than five years for a délit, but the legislature may exceed that limit by labeling the punishment an emprisonnement and not a détention or réclusion criminelle. The legislature has done this frequently in recent years, particularly for recidivists. As a result, a tribunal correctionnel may impose a prison term of ten or even twenty years in some circumstances. The legal distinction between emprisonnement and détention or réclusion criminelle does not directly affect the housing of prisoners, which at present is an administrative matter.

29. An offense is a contravention if it is punishable by a prison term of two months or less or a fine of 6000 francs or less. C. pr. pén. art. 521 (23e ed. Petits Codes Dalloz 1981–82). A tribunal de police may not impose a punishment in excess of those limits.
<table>
<thead>
<tr>
<th>Trial Court</th>
<th>Type of Offense</th>
<th>Authorized Punishment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cour d'assises</td>
<td>Crime</td>
<td>Death (prior to the abolition of capital punishment in 1981), life imprisonment, or a prison term in excess of five years.</td>
</tr>
<tr>
<td>Tribunal correctionnel</td>
<td>Délit</td>
<td>A prison term in excess of two months but not in excess of five years, or a fine in excess of 6000 francs.</td>
</tr>
<tr>
<td>Tribunal de police</td>
<td>Contravention</td>
<td>A prison term of two months or less, or a fine of 6000 francs or less.</td>
</tr>
</tbody>
</table>

Each court system has its own ambiance and rhythm which is even more apparent to the observer than the Code suggests. In a cour d'assises, a mixed panel of three professional judges and nine lay jurors determines both the defendant’s guilt or innocence and the appropriate punishment. The formality and solemnity of the procedure reflect the seriousness of the charge, and the procedure follows a ritual that varies little from one case to the next. After impaneling the lay jurors and reading the charging document, the president of the court examines the defendant on his curriculum vitae or personality and on the merits of the charge. The president then calls the witnesses whom the parties have designated in advance. Unlike the defendant, the witnesses give their depositions under oath and are questioned by the president only after they have described what they know about the defendant or the charges against him. The prosecutor, defense counsel, counsel for the crime victim, and the members of the mixed panel may request the president to address additional questions to a witness. The president almost always obliges and sometimes allows the interrogator to pose the question directly to the witness. The number of questions proposed by the other participants is usually quite limited, however, and the president plainly dominates the courtroom proceeding. Following

---

30. The president has the discretionary authority to designate additional witnesses on his own initiative. Unless the parties consent, these witnesses do not testify under oath. C. PR. PÉN. art. 336 (23e ed. Petits Codes Dalloz 1981–82).

31. On the role in the criminal process of the crime victim or partie civile, see infra note 52.

32. Most presidents do not encourage questions from other panel members. After the testimony of each witness, the president asks the prosecutor, the counsel for the partie civile,
the president's presentation of the proof, the prosecutor, counsel for the crime victim, and defense counsel make their oral pleadings, emerging for a brief while from their subordinate roles to display the verbal eloquence for which French advocates are so well known. The mixed panel of twelve members then withdraws to deliberate together to reach a decision; at least eight panel members (none of whom need be professional judges) must agree for the panel to make a determination adverse to the defendant.

The trial of a délit before a three-judge panel in a tribunal correctionnel lacks the same ritual. The procedure flows less smoothly and the participants are more harried because they realize the courtroom is overflowing with counsel, witnesses, or even defendants for other cases that are scheduled for trial the same day. The dossier before the president is less likely to contain a complete account of the alleged offense than a dossier before a cour d'assises, which will necessarily have been prepared by an examining magistrate. Counsel, the parties, and witnesses often interrupt the regular order of the proceeding in an effort to determine what actually did occur. The president's examination of the defendant plays a crucial role because instead of calling the prosecutor's witnesses to give oral testimony, the president often summarizes their prior statements contained in the dossier. Any witnesses that the president does examine are most likely those designated by the defendant under a Code provision allowing him to do so simply by presenting the witnesses to the court on the day of trial. In all but the simplest cases, the court usually adjourns to announce its decision at a future date because its written judgment must contain findings of fact and applications of law. The judgment is a formal, elaborate, reasoned document contrasting sharply with the unexplained judgment of the cour d'assises.

The trial of a contravention before a tribunal de police resembles in many respects the trial of a délit before a tribunal correctionnel. The principal differences are the presence of a single judge rather than a three-judge panel and the need for even greater haste in disposing of cases. In addition, the Code explicitly provides that the police reports in the dossier are presumed true absent proof to the contrary. The
operation of this presumption obviates the need in most cases for the prosecution's witnesses to appear at trial. The judge simply informs the defendant of the proof against him in the dossier and affords him an opportunity to respond.

The overwhelming majority of cases in the tribunaux de police, however, do not go to trial but are disposed of through the simplified procedure of the ordonnance pénale. The prosecutor implements this procedure by transmitting to the court the dossier of a proceeding along with his request for a particular disposition. After examining the dossier, the court may either acquit the defendant, send the defendant's case to trial, or draft a judgment (the ordonnance pénale) convicting the defendant of an offense and assigning a particular fine as a punishment. If the punishment differs from that requested by the prosecutor, he may oppose the judgment. Otherwise, the defendant may terminate the prosecution by paying the sum requested or may himself oppose the judgment and go to trial. Few prosecutors and even fewer defendants choose to go to trial. The principal benefit gained by the defendant who pays the fine is that he is spared the bother of a day in court. The prosecutor plays a dominant role in instituting this simplified procedure and in recommending a particular punishment, but the statutory provision restricting its use to cases where the punishment imposed is a fine sharply limits the scope of the prosecutor's power. Many prosecutor's offices invoke this simplified procedure as a matter of bureaucratic routine to prosecute common petty offenses like shoplifting and uttering bad checks. This practice is not analogous to plea bargaining because the prosecutor acts unilaterally and because the defendant who asserts his right to trial is unlikely to receive a harsher sentence than that proposed in the ordonnance pénale.

primarily the procès verbaux prepared by the officiers de la police judiciaire. See infra text accompanying note 85.

37. For the statutory provisions on the ordonnance pénale, see C. PR. PÉN. arts. 524 to 528-2 (23e ed. Petits Codes Dalloz 1981–82). The prosecutor's suggestion of a specific punishment is not unusual. All three court systems permit, and the cours d'assises expect, the prosecutor to request a specific punishment in his oral pleading to the court.


39. For most traffic offenses, the procedure is even simpler. The court need not draft an ordonnance, and the defendant who has received a traffic ticket may terminate the prosecution by paying a set fine. 2 R. MERLE & A. VITU, TRAITÉ DE DROIT CRIMINEL 754–55 (3d ed. 1979) [hereinafter cited as 2 MERLE & VITU].

40. French scholars have not addressed these issues in published sources. The author discovered no evidence of bargaining between defense counsel and the prosecutor before the latter's initiation of the simplified procedure. The absence of any concern over differential punishment provides strong evidence that such a practice has not developed.
II. THE INVESTIGATION AND PROSECUTION OF OFFENSES IN FRANCE

In France today, the prosecutor dominates both the investigation and the prosecution of offenses. The Code of Criminal Procedure originally was designed to prevent any single official from dominating the criminal process by dividing authority among three offices: the prosecutor, the examining magistrate, and the trial judge. This separation of functions proved to be too cumbersome at the pre-trial stage of the process, and prosecutors found ways to circumvent it. That development may have resulted in more efficient law enforcement, but it also has diluted individual rights. Efforts to limit the prosecutor's powers have been largely ineffective.

A. The Office of the Prosecutor

The public prosecution of offenses in France is the responsibility of professional prosecutors who, unlike their American counterparts, make a lifetime career in the prosecutorial corps. The prosecutorial corps is in theory a judicial one; prosecutors are magistrates separate and distinct from the private bar of avocats. In the courtroom, French prosecutors are less adversarial than American ones. They view their role as one of aiding the court to determine the truth and they strive to distinguish themselves from the more partisan avocats who are seeking to protect the interests of a client. Prosecutors, however, enjoy less independence and prestige than judges. They do not share the same protection from removal afforded French judges, and their written presentations to the court must conform to the instructions of their hierarchical superiors. Outside the courtroom, their designation as magistrats is even less significant, and they are in fact career civil servants within the Ministry of Justice.

Prosecutorial supervision of the police is quite intensive by American standards. The Code of Criminal Procedure places the police's in-

41. The distinction is often made between the magistrats debouts — the prosecutors who stand while pleading in court — and the magistrats assis — the judges who sit. In a French courtroom, the prosecutor's table is at the same level as the judges' bench and above the table reserved for the lawyers for the private parties (avocats). J. CHAZAL, LES MAGISTRATS 61-62 (1978).


43. When addressing the court orally, an individual prosecutor may express his own personal convictions, even though they are contrary to his superior's instructions and to the written submissions of his office. 2 MERLE & VITU, supra note 39, at 246-47. Prosecutors rarely exercise this liberty, however.
vestigatory activity under the direction of the local prosecutor;\textsuperscript{44} and in actual practice, the French prosecutor works more closely with the police than does his American counterpart, particularly during the early stages of an investigation. In addition, the Code requires the police to inform the prosecutor promptly of any offenses known to them and to forward to him the dossier they prepare during the course of their investigation.\textsuperscript{45} Members of the prosecutor's office normally arrive at the scene of a serious offense soon after the police. In such cases, the Code of Criminal Procedure explicitly confers on the prosecutor the investigatory powers of a police officer and authorizes him to direct the investigation.\textsuperscript{46}

French prosecutors have broad discretionary powers to initiate a prosecution on behalf of the state and thus differ from prosecutors in West Germany and other continental countries who are subject to mandatory prosecution provisions for the most serious offenses.\textsuperscript{47} More important, the prosecutor's statutory authority\textsuperscript{48} to decide whether to initiate a prosecution is exercised by him and not by the police. Except for the most minor or straightforward matters, the closing of a police investigation without the initiation of a prosecution is a prosecutorial and not, as is often the case in this country, a police decision.

B. Limitations on Prosecutorial Power

Both French and American law seek to limit the investigatory and charging power of the prosecutor and the police, but the two systems approach the same task in strikingly different ways. In the United States, the applicable limitations take two principal forms, both of which are intended to protect the individual from the abuse of governmental authority. The first type of limitation is a screening device which checks the prosecutor's charging authority by requiring him to obtain the approval of a supposedly independent body before he may bring a defendant to trial on felony or other serious charges. The most common screening devices in this country are the grand jury and the preliminary hearing. The second type of limitation in America explicitly sets forth ind-

\textsuperscript{44} C. PR. PÉN. art. 12 (23e ed. Petits Codes Dalloz 1981–82). The chief prosecutor in each department is the \textit{procureur de la république}.

\textsuperscript{45} C. PR. PÉN. art. 19 (23e ed. Petits Codes Dalloz 1981–82). In practice, most prosecutors do not insist that the police observe these formalities with respect to minor offenses.

\textsuperscript{46} C. PR. PÉN. art. 68 (23e ed. Petits Codes Dalloz 1981–82).


\textsuperscript{48} C. PR. PÉN art. 40 (23e ed. Petits Codes Dalloz 1981–82).
individual rights which the prosecutor and the police must respect when investigating and prosecuting offenses. The most important examples are federal and state constitutional provisions recognizing the rights of all persons to be free from unreasonable searches and seizures and compelled self-incrimination. Courts have enforced these provisions by barring the prosecution from using at a criminal trial evidence obtained in violation of the defendant's constitutional rights. In addition, statutes that define individual rights, such as the right of privacy, may explicitly restrict the investigatory activity of law enforcement officials, and may overlap and even may exceed constitutional restrictions. Federal and state statutory provisions defining and punishing crimes such as burglary, trespass, and assault also restrict the investigation and prosecution of crime, because they normally apply to the conduct of law enforcement officials as well as to that of private persons.

The French legal system takes the opposite approach to limiting the investigatory and charging powers of the prosecutor and of the police acting under him. Although screening devices play a role, French lawmakers primarily have sought to limit the prosecutor's power by


52. For a discussion of the check on the prosecutor's discretion to prosecute provided by the examining magistrate, see infra text accompanying notes 64-67.

One important check on the French prosecutor's discretion not to bring charges that has no counterpart in this country is the crime victim's right to initiate a criminal prosecution by becoming a partie civile in the criminal court. In this way, he may obtain both the defendant's conviction and compensatory damages for himself. Because the court may order a partie civile to pay money damages to the defendant and a substantial fine to the state for initiating an unmeritorious prosecution, however, crime victims prefer to join a prosecution that the public prosecutor has already initiated. By this device, the partie civile represents only his own interest in obtaining compensation.

The presence of the partie civile and his lawyer is thus commonplace in French criminal trials. By allowing him to become a parasite on the prosecutor's proof, a criminal prosecution initiated by the public prosecutor affords the crime victim a speedy and simple means of obtaining compensation. The partie civile nevertheless imposes a considerable strain on the French criminal justice system because a large number of personal injury cases (e.g., automobile accident and medical malpractice cases) are tried exclusively in the criminal courts on the basis of the offense allegedly committed by the defendant driver or doctor. This phenomenon forces the criminal court to resolve difficult issues of causation, damages, and comparative fault which it could otherwise leave to civil litigation. Although the victim may choose to bring an independent lawsuit in the civil courts, that civil case must await the outcome of any criminal prosecution and is controlled by the result. To the French legal
creating an office of narrowly defined authority. The French legal sys-
tem thus defines what the prosecutor and the police may do rather than
recognizing various individuals rights that they may not infringe at all
(e.g., the privilege of self-incrimination) or that they may not invade
unless they have good cause to do so (e.g., the right to be free from
unreasonable searches and seizures).

This emphasis on statutory authority limits prosecutorial power in
two ways, neither of which has proved to be particularly effective.
First, the Code of Criminal Procedure authorizes the prosecutor to do
certain things, and if he does something outside of that authorization
his actions are extralegal at best and most likely illegal. The French
prosecutor's and police's practice of citing specific statutory authority
for every official act attests to the prevalence of this approach. As will
be seen, however, they have not always restricted their activities to the
areas of their legal authority. Moreover, the Parliament from time to
time has delegated broad investigatory authority to prosecutors and the
police.

In addition to enumerating what the prosecutor may do, French
law also requires that he not perform functions delegated to another
type of official. Treatise writers on French criminal procedure have
derived from the structure of the Code of Criminal Procedure the basic
principle of the separation of functions between la poursuite (the prose-
cution), l'instruction (the pre-trial judicial investigation of an alleged
offense by an examining magistrate), and le jugement (the trial). Under this tripartite separation of functions, the charging function is
part of the prosecutor's office and the investigative function belongs to
a professional judge — the examining magistrate.

The Code confers broad investigatory powers on the examining
magistrate to conduct searches and seizures, to question witnesses, and
to detain and interrogate suspects. The draftsmen of the 1808 Code
conferred these coercive investigatory powers on a judge rather than on
a prosecutor because they considered the exercise of these powers to be

mind, the vindication of the public's interest in the criminal trial is paramount, and the
result reached in that supposedly superior forum binds the civil courts.


55. Examining magistrates normally serve in that capacity for about three years before moving on in their judicial career to a higher position in the trial or appellate courts.
The examining magistrate's statutory authority has not changed much over the years, but the separation of functions principle has not proved strong enough to prevent the prosecutor and the police from acquiring coercive investigatory powers similar to those of the examining magistrate.

C. The Decline of the Examining Magistrate

The Code of Criminal Procedure of 1808 assigned to the examining magistrate a dominant role in investigating offenses and in bringing defendants to trial. Under the Code's classic separation of functions approach, the prosecutor's decision to charge an individual with an offense was followed not by a trial but by a judicial investigation (instruction préparatoire) conducted by an examining magistrate. The examining magistrate gathered the evidence into a dossier and determined whether there was sufficient cause to remand a defendant to trial.

The office of the examining magistrate still exists in France, but the magistrate no longer plays a dominant role. The police, under the prosecutor's supervision, investigate most offenses and prepare trial dossiers; and the prosecutor has devised ways to circumvent the magistrate's check on his charging authority. It is nevertheless important to understand the process of instruction because the examining magistrate performs a number of functions that affect the prosecutor's authority and an individual's rights.

The prosecutor initiates a judicial investigation by filing a charging document (réquisitoire) before the examining magistrate requesting him to investigate the facts alleged therein. Once charged, a suspect has the right to know the proofs against him, and the magistrate must afford him an opportunity to be heard with counsel in his own de-

56. G. Bergognan-Esper, La séparation des fonctions de justice répressive 19-20 (1973); G. Denis, L'enquête préliminaire 51-55 (1974); 1 Merle & Vitu, supra note 11, at 310. In the minds of the draftsmen, investigation was a judicial prerogative because judges historically had exercised that function and because the assignment of the investigating power to the judiciary furthered individual security.

57. 1 Merle & Vitu, supra note 11, at 181-83, 191-92. See also authorities cited supra note 56.


59. A crime victim may also initiate a judicial investigation, and thus avail himself of the state's investigatory machinery, by intervening as a partie civile before an examining magistrate.
Under the separation of functions principle, the examining magistrate operates independently of the prosecutor and of the trial courts in conducting the investigation, although he cannot open an investigation on his own initiative. The prosecutor may request but not require the magistrate to proceed with the investigation in a particular fashion; he may also obtain review of the magistrate’s unfavorable rulings by a panel of appellate judges (the *chambre d’accusation*). That body supervises the judicial investigations conducted within its territorial jurisdiction and has broad powers to revise the examining magistrate’s rulings. The trial courts, on the other hand, are normally bound by the magistrate’s rulings and must try all defendants remanded for trial.

In what is recognized as a derogation of the separation of functions principle, the examining magistrate does enjoy some independent charging authority. The prosecutor’s charging document, which opens the investigation, confers on the examining magistrate a jurisdiction *in rem* to investigate the facts alleged therein. Although the prosecutor normally names one or more suspects and charges a violation of a particular Code provision, the magistrate has the authority to remand to trial other individuals for the same facts and to modify the charges. In all cases, however, the magistrate may investigate only those facts alleged by the prosecutor in the charging document and may remand a defendant for trial only on the basis of those facts. In addition, the magistrate lacks the authority to remand a defendant to trial for a *crime* (the most serious category of offenses). The *chambre d’accusation* must review the magistrate’s investigation and decide whether to file an accusation against the defendant in a *cour d’assises*.

The following chart depicts the processing of a case through this complex system:

---

60. The suspect acquired these rights in 1897 when the Parliament adopted the famous *loi Constans*. See infra text at note 140.


62. A *réquisitoire* against *X* or persons unknown is also permissible.

63. For *délits* and *contraventions*, the process of *instruction* is somewhat simpler than it is for *crimes*: a magistrate may remand the defendant to trial without the intervention of the *chambre d’accusation*, and the defendant may not appeal the remand to the *Cour de cassation* as he could if he were charged with a *crime*. 
**Police Stage**

Police
(enquêtes préliminaires, enquêtes de flagrance)

Prosecutor
charging document or réquisitoire

**Judicial Investigation Stage**

or Instruction Préparatoire

Chambre d’accusation
(review mandatory for crimes; optional for other offenses)

Examining magistrate or juge d'instruction

discount

**Trial Stage**

accusation of a crime

remand for trial

Cour d'assises (crimes)

Tribunal correctionnel (délits)

Tribunal de police (contraventions)

charging document or citation

alternative procedure for charging délits and contraventions
A judicial investigation is a mandatory step in bringing a defendant to trial for a *crime* before a *cour d'assises*. This requirement in theory significantly limits the prosecutor's charging authority. An independent judicial check on prosecutorial discretion is potentially a far more effective safeguard than that supplied in this country by the grand jury or by the committing magistrate. The grand jury does not function as an effective screening device due to the prosecutor's dominant role before that body, and the effectiveness of the preliminary hearing often is impaired by the defendant's inability or reluctance to put on a defense at that stage of the process. In France, on the other hand, the magistrate is under a statutory obligation to investigate thoroughly the prosecutor's factual allegations and to hear the defense. The magistrate also has the stature and legal knowledge to resist a prosecutor who presses unwarranted charges. Finally, the formal accusation charging the defendant with a *crime* must recite the facts found by the magistrate and correctly apply the law to them, and the defendant may obtain pretrial review of the accusation's legal sufficiency from the Supreme Court (*Cour de cassation*).

The check on prosecutorial discretion provided by the judicial investigation has in fact proved to be too effective because it is too cumbersome to be used in all but the most serious cases. The prosecutor in large part has circumvented this limitation by the long-standing practice of *correctionalisation*: he charges a defendant who has committed a *crime* with only a *délit* or a *contravention*. For the prosecution of *déits* or *contraventions*, a judicial investigation is optional, and the prosecutor may directly invoke the trial court's jurisdiction by filing a charging document (a *citation*) with the court.

The severity of the punishment provisions in the penal Code and the relative formality of a trial in the *cour d'assises* have further encouraged the development of this extralegal practice. For example, the Penal Code defines as *crimes* most forms of aggravated theft (e.g., theft by violence, by breaking and entering, or by an employee). A busy prosecutor views with distaste the prospect of trying all such offenses under the cumbersome procedures of the *cour d'assises*. His response to the legislature's "overcriminalization" is to charge the defendant

---

64. *Hearings on H.R. 94 Before the Subcomm. on Immigration, Citizenship and Interna-


with the délit of simple theft by ignoring the aggravating factor (e.g., the breaking and entering or the defendant's status as the victim's employee) in those cases where he believes the authorized punishment for the délit to be sufficient. Through this discretionary, unilateral determination, the prosecutor avoids the necessity of a judicial investigation and may bring the defendant to trial before a tribunal correctionnel without subjecting his decision to prosecute to any screening device.

In this fashion, the great majority of crimes committed in France are in fact prosecuted and punished as délits. Although both the defendant and the judges of the tribunal correctionnel may object to this deception, they usually do not because an objection would run counter to their own best interests. The defendant would expose himself to greater punishment in the cour d'assises; and the judges, who also sit in the cour d'assises, would increase their own workload by increasing the number of cases tried under the more formal procedures in that court.

Despite recourse to correctionalisation, in some cases the prosecutor cannot as a practical matter avoid a judicial investigation because the examining magistrate possesses coercive authority that the prosecutor lacks. The expansion of the police's investigatory powers has reduced the importance of the magistrate's authority to order searches and seizures. But, at least prior to the enactment in 1981 of the controversial law "Security and Liberty," the magistrate's intervention was essential if the prosecutor wished to secure pre-trial restrictions on the defendant's liberty.

By American standards, the magistrate's authority to detain a suspect prior to trial is extremely broad. The examining magistrate rather than the trial court determines the individual's pre-trial status. This jurisdictional distinction results from the heavy emphasis in French law and practice on investigatory justifications for pre-trial detention.

67. In one recent widely publicized case a defendant did successfully challenge the jurisdiction of a tribunal correctionnel. Charged with the délit of involuntary homicide for using excessive force to protect his dwelling from a burglar, the defendant argued that his offense, if any, was the crime of premeditated or intentional murder. On appeal, the cour d'appel acquitted him of involuntary homicide and initiated the steps necessary to bring him to trial for the crime of murder before a cour d'assises. Judgment of Nov. 9, 1978, Cour d'appel, Reims, 1979 D.S. Jur. 192 note J. Pradel. The defendant preferred a trial in a cour d'assises because he wished to submit his defense of self-defense to a mixed panel whose lay majority he believed would be more sympathetic to his plight than the professional judges who convicted him in the tribunal correctionnel. For further discussion of this case, see Levasseur, Crimes et délits contre les personnes, 1979 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PENAL COMPARÉ [R.S.C.] 329. The Revue de science criminelle et de droit pénal comparé is the leading French journal on criminal law and criminal procedure.

68. See infra note 73.
likelihood of the suspect's flight, the sole legitimate basis for pre-trial detention in this country, is only one of several grounds available to the French magistrate. When investigating a délit, the magistrate also may order a suspect detained to protect him from a hostile community, to prevent him from repeating the offense, and to assure his presence for interrogation. The necessities of the investigation provide additional grounds for pre-trial detention: a magistrate may order a suspect detained to keep him from destroying evidence, from intimidating witnesses, or from concocting a false defense with accomplices.

Despite its coercive powers, the office of the examining magistrate has suffered a severe decline in twentieth century France, particularly in the post-war years, and its investigatory role largely has been assumed by the police. Examining magistrates are in short supply and the crimes and the délits that they do investigate constitute less than seven percent of the offenses reported annually by the police. The prosecutor usually refers to the examining magistrate only the more serious délits that require either extensive investigation (the offender is unknown or at large) or pre-trial restrictions on the defendant's liberty. In other cases, the prosecutor naturally prefers to use the police to compile the trial dossier because they are subject to his control and are likely to proceed more quickly than the overworked examining magistrates who are usually burdened with the most difficult or politically sensitive cases. Even more important from the prosecutor's perspective, the police are not subject to the same legal formalities as is an examining magistrate and the defendant enjoys few rights during a police investigation. As a result, the police, subject to the prosecutor's supervision, today largely are responsible for investigating offenses and preparing trial dossiers.

70. C. PR. PÉNAL art. 144 para. 2 (23e ed. Petits Codes Dalloz 1981-82).
71. Id. para. 1. In the investigation of a crime, the magistrate need not specify his grounds for detaining a suspect prior to trial but may exercise that authority whenever he believes it necessary to further the investigation or to protect the public. Id. arts. 137, 146.
72. Today, there are less than 600 examining magistrates in all of France responsible for conducting between 60,000 to 70,000 judicial investigations per year. While all of the approximately 1,300 cases tried annually in the cours d'assises are investigated by an examining magistrate subsequent to the prosecutor's decision to prosecute, almost no contraventions and only about 60,000 of the 1,000,000 or more délits reported annually by the police undergo that process. The 60,000-plus délits include, however, many of the more serious offenses in that category. For more information on the number of offenses, see Stefani & Levassieur, Droit pénal, supra note 11, at 1-6.
73. Article 31 of the recently enacted law "Security and Liberty" surely will accentuate this phenomenon. That provision amends § 397 of the Code of Criminal Procedure to permit the prosecutor to obtain from a tribunal correctionnel or its president restrictions on the defendant's liberty prior to trial if the defendant is charged with a délit punishable by no
D. The Rise of the Police's Investigatory Authority

The French Parliament has long been hesitant to give the police explicit authority to investigate Penal Code violations. The investigatory powers that the police actually exercised in the past were mostly unauthorized or extralegal; the police simply did what they believed to be necessary for effective law enforcement. Most of the recent legislation on this subject has done no more than legalize what the police already were doing. This overt recognition of police authority came slowly because their new role ran counter to the separation of functions principle which entrusted the investigatory function to a judge and not to the police, who were considered agents of the prosecutor. That principle proved to be an ineffective limitation, however, and the police eventually obtained the necessary statutory authority.

Despite the separation of functions principle, the draftsmen of the Code of Criminal Procedure of 1808 realized that a judicial investigation was not the appropriate procedure for investigating all offenses. Articles 41 to 46 of the Code provided that in a number of narrowly defined situations when the police caught an offender red-handed (en flagrance), they could exercise on the spot and for a reasonable time thereafter basically the same investigatory powers as an examining magistrate. Even this authority, necessitated by the urgency of the situation, was limited by article 32 to offenses subject to an infamous punishment. Although the courts and commentators generally understood this statutory limitation to cover only conduct that arguably could be classified as a crime, the police did not hesitate to conduct such an inquiry (enquête) in the case of a délit if they apprehended the offender en flagrance.

The Code of Criminal Procedure of 1958 extended the authority of the police to conduct this enquête de flagrance to cover those délits that were punishable by imprisonment. The Code defined flagrant offenses to include offenses in progress, offenses just committed, or offenses committed very near in time to the apprehension of a suspect pursued by the public clamor or found possessing indicia of the offense. Upon discovering such an offense, the police may immediately

more than five years imprisonment. The new Socialist majority is not seeking to repeal this provision because it recognizes that a judicial investigation causes a delay that only prolongs the pre-trial detention.

74. 2 Merle & Vitu, supra note 39, at 326 n. 3.
75. Id. at 326-27; G. Denis, L'Enquête préliminaire 61 (1974).
77. Id. art. 53. The same article adds to the category of flagrant offenses those crimes or délits committed in a dwelling whose head requests the police to investigate.
open an informal inquiry. During that inquiry, the officers qualified to conduct it may secure the scene of the offense, question witnesses and suspects, conduct forcible searches and seizures, and hold in custody for twenty-four hours (extendable in certain cases for another twenty-four hours with the prosecutor's approval) any witness or suspect whose detention is necessary for purposes of the inquiry (the notorious garde à vue). The Code does not provide a cut-off time for the exercise of these powers, and in practice the police exercise them for three or four days if the inquiry opens in a timely fashion and continues without interruption.

The coercive investigatory powers enjoyed by the police during an enquête de flagrance are limited not only by the temporal constraints outlined above but also by statutory restrictions on the police officers authorized to execute them. Some background on the structure of the French police is necessary for an understanding of these important limitations. The French police today are divided between the national police under the Minister of the Interior and the gendarmerie under the Minister of Defense. The national police operate in most urban areas, while the gendarmerie are found in rural France. French law also divides the police into functional categories, distinguishing between the administrative police (police administrative) and the judicial police (police judiciaire). The function of the administrative police is to prevent crime or, more generally, to protect public security, health, and tranquility. The judicial police's function, on the other hand, is to investigate offenses by gathering proof and apprehending offenders. The distinction is functional and not institutional: the same police officer may act as a member of the administrative police one moment and as a member of the judicial police the next. Whether a particular police action belongs to one category or another (or perhaps to both) depends

78. Article 54 of the Code of Criminal Procedure requires the police officer who opens the inquiry to notify the prosecutor, but that notification is not essential to the inquiry's legality.


80. 2 MERLE & VITU, supra note 39, at 334–35. Although defense counsel often argue that an enquête de flagrance may not continue for more than twenty-four hours after the commission of an offense, the French Supreme Court (Cour de cassation) has upheld the legality of an uninterrupted inquiry that lasted forty-eight hours. Judgment of Oct. 5, 1976, Cour de cassation, Chambre criminelle [Cass. crim.]. See the discussion in Chambon, L'ouverture forcée du coffre des véhicules automobiles, 1980 Juris-Classeur périodique, la semaine juridique [J.C.P.] Doctrine I No. 2983.

81. 2 C. DEBASCH, INSTITUTIONS ET DROIT ADMINISTRATIFS 60 (1978).

82. C. PR. PÉN. art. 14 (23e ed. Petits Codes Dalloz 1981–82); 2 MERLE & VITU, supra note 39, at 278–79.
largely on its purpose (i.e., on the motivation of the officer). 83

The French Parliament has not authorized all police officers to exercise the coercive powers associated with the enquête de flagrance, but has delegated that authority only to a special category of police officers known as officiers de la police judiciaire (OPJs). 84 Although most gendarmes with five or more years experience are OPJs, the majority of the national police are not. The relatively small percentage of OPJs within that force are concentrated at the higher ranks or in special brigades. Although other police officers, functioning as members of the judicial police, may assist an OPJ in conducting an enquête de flagrance or may on their own initiative gather information in a noncoercive fashion, only an OPJ may open such an inquiry, secure the scene of an offense, search for and seize evidence without the subject’s consent, and detain witnesses and suspects. The OPJ must prepare immediately a procès verbal for that case describing each operation accomplished by him. 85

The extensive police powers described above apply only to the investigation of “flagrant” offenses. Despite the silence of the Code’s text and the presence of much adverse legislative history, there developed during the nineteenth century the extralegal practice for investigating nonflagrant offenses called the enquête officiouse (official inquiry). 86 This practice grew out of the need to furnish the prosecutor with an evidentiary basis for his charging decision for nonflagrant offenses. The prosecutor who received a denunciation or complaint for such an offense could always request an examining magistrate to investigate because French law has never imposed a probable cause or similar requirement to open a judicial investigation. Although this procedure relieved the prosecutor of the burden of gathering sufficient proof to bring a defendant to trial, it was too cumbersome to be practicable.

83. 2 C. DEBBASCH, INSTITUTIONS ET DROIT ADMINISTRATIFS 62–63 (1978). The category of a particular police activity has many important consequences. For example, police officers are responsible to a separate system of administrative courts for their administrative functions and to the regular courts for their judicial functions. The two systems of courts apply two separate bodies of law, so the legality of a police action may depend on whether a police officer is exercising an administrative or judicial police function.

84. C. PR. PÉN. art. 16 (23e ed. Petits Codes Dalloz 1981–82); 2 MERLE & VITU, supra note 39, at 277.

85. C. PR. PÉN. art. 66 (23e ed. Petits Codes Dalloz 1981–82). The misnomer “procès verbal” dates from the Middle Ages when illiterate royal investigators reported orally to the royal tribunals. Today all procès verbaux are written documents.


87. A denunciation is the report of an offense to the police or to the prosecutor; a complaint is a denunciation by a crime victim. No special form is required in either case, and the distinction is significant only because the the complainant has the right to initiate or to join a criminal prosecution as a partie civile. 2 MERLE & VITU, supra note 39, at 298–99.
The prosecutor therefore relied on the police to conduct the inquiry into most lesser offenses, for which recourse to the examining magistrate was optional. Relying on the police was less effective, however, because absent any legal basis for the inquiry, they had no coercive powers and had to rely on the consent of the inquiry's subjects.

In the Code of Criminal Procedure of 1958, Parliament finally legalized the enquête officieuse under the new rubric of the enquête préliminaire (preliminary inquiry).88 The predominant view at the time seemed to be one of resignation: because you cannot preclude the police from investigating nonflagrant offenses, it is better to legalize the practice and at the same time to restrict its exercise.89 The Parliament therefore authorized most police officers (not just OPJs) to open a preliminary inquiry on their own initiative or on instructions from the prosecutor. The Parliament attempted to limit this concession by denying the police any coercive powers in conducting the inquiry other than the OPJs' authority to detain a witness or suspect under a garde à vue.90 In addition, the new Code required the police officers conducting a preliminary inquiry to obtain a subject's express written consent before searching his dwelling.91 In actual practice, the police have had little difficulty securing the cooperation of witnesses and suspects because the availability of the garde à vue provides the police with considerable leverage. The police also may encourage a subject's consent to a search by informing him that his refusal probably will result in a judicial investigation and a nonconsensual or forcible search authorized by the examining magistrate.92

The police also have acquired the principal investigative role in the 60,000-plus cases each year that are investigated by an examining magistrate. A preliminary inquiry or an enquête de flagrance conducted by the police normally precedes the magistrate's investigation because the prosecutor invokes the magistrate's jurisdiction only when the initial police investigation proves ineffective or when the prosecutor decides to charge a person with a crime. In conducting the judicial investigation, the magistrate almost always invokes articles 151 to 155 of the Code of Criminal Procedure, which allow him to issue a commission delegating to an OPJ the authority to investigate in his name.93

---

91. Id. art. 76.
93. On the use of commissions, see 2 MERLE & VITU, supra note 39, at 427–33.
This general delegation authorizes the police to exercise the magistrate's powers as they see fit to determine the truth of the factual allegations that the magistrate himself has jurisdiction to investigate. Although the magistrate may give the police specific instructions on which buildings to search and which witnesses to question, the long-standing use of general delegations has resulted in a progressive flow of the magistrate's discretionary investigatory powers to the police. The only thing that an OPJ operating under a commission cannot accomplish in the magistrate's name is the interrogation of a suspect against whom there is strong evidence of guilt.

The investigation of offenses in France therefore has become predominantly a police function. The police's statutory authority, augmented over the years by amendments to the Code, exceeds in most situations the combination of common-law and statutory powers of the police in this country. In addition, French law (unlike American law) has not sought to limit police activity during an otherwise lawful investigation by requiring that the police respect an individual's rights to...


96. The principal exception to this generalization is the absence of police arrest powers in France comparable to the power of the police in this country to make a warrantless, probable cause felony arrest. United States v. Watson, 423 U.S. 411, 417 (1976). But see Payton v. New York, 445 U.S. 573, 589–90 (1980) (arrest warrant required to arrest felon in his home absent exigent circumstances). Under the French Code of Criminal Procedure, the seizure of a person for the purpose of requiring him to answer a charge is a judicial function assigned to the examining magistrate, not to the police. See C. PR. PEN. arts. 122–136 (23e ed. Petits Codes Dalloz 1981–82) (authority of magistrate to issue warrants); id. arts. 144 to 148-5 (authority of magistrate to order pre-trial detention). Even the garde à vue procedure, which allows the police to detain a person who is lawfully in their presence, does not permit the police either to enter a building or other private place or to bring a person before a tribunal. Blondet, L'enquête préliminaire dans le nouveau Code de procédure pénale, 1959 J.C.P. Doctrine No. 1513.

This limitation on police powers has not proved to be particularly significant. In the case of flagrant offenses, the Code authorizes any person to apprehend the offender and to bring him before the nearest OPJ, and it requires all OPJs to bring before the prosecutor any person against whom there are "gravés and concordants" proofs of guilt. C. PR. PEN. arts. 73, 63 (23e ed. Petits Code Dalloz 1981–82). The prosecutor then may initiate a prosecution by filing a charging document before an examining magistrate or by proceeding directly before a tribunal correctionnel. In the case of nonflagrant offenses, the police use the garde à vue to bring the suspect before the prosecutor. Even though the police are not authorized to enter a private building or to handcuff a person during a garde à vue, few Frenchmen decline an OPJ's invitation to appear at the police station. 2 MERLE & VITU, supra note 39, at 319–20. Such a refusal always arouses the police's suspicions. Also, in the case of flagrant offenses, the police, with the prosecutor's approval, may escort a witness forcibly to the stationhouse if the witness declines an invitation. C. PR. PEN. art. 62 (23e ed. Petits Codes Dalloz 1981–82).
silence and to counsel or by requiring that they have adequate cause to justify any intrusion upon individual liberty.

The police authority to detain a person under a garde à vue illustrates these two points. An OPJ may detain a person whenever “necessary” for the purpose of a police inquiry.97 No further specification of reasons for the detention, analogous to the probable cause requirement for an arrest in this country, is necessary. The person detained may neither consult with an attorney nor obtain a judicial determination on the detention's validity. Moreover, there is no French equivalent to the Anglo-American writ of habeas corpus. The threat to detain or the actual detention of an individual is thus a potent weapon for inducing him to furnish a statement or to consent to a search. Use of the garde à vue for this purpose is not considered abusive under French law because it is intended to serve as an investigatory tool, enabling the police to immobilize a person during a critical stage of the inquiry and to subject him to incommunicado police interrogation.98 Although instances of the third degree (le passage au tabac) are relatively rare in present day France, the institution of the garde à vue still appears from an American vantage point to legalize excessive intrusions on individual liberty.

E. The Prosecutor's Dominant Role

The prosecutor, who supervises the work of the judicial police (except when the police are acting under a commission from an examining magistrate) thus dominates both the investigatory and the charging stages of the French criminal process. The choices he makes significantly affect the defendant's rights, although they do not have as great an impact on the ultimate disposition of cases as do the plea agreements struck by American prosecutors. For example, a prosecutor's decision to "correctionalize" a crime by prosecuting it as a délit exposes the defendant to less serious punishment but more informal procedures. The judges still determine the defendant's guilt and the appropriate lesser punishment. The overwhelming majority of defendants consider this trade-off to be a net benefit.

Prosecutorial domination of the pre-trial detention decision, on the other hand, is more troublesome because the defendant suffers a loss of liberty and an impairment of his ability to prepare for trial without obtaining any offsetting diminution in sentence liability. Despite several recently enacted reform measures, excessive pre-trial detention re-

98. See the authorities cited supra note 96.
mains a major problem in France.99

The examining magistrate and, since 1981, judges of the tribunaux correctionnels, make the actual detention decision.100 They usually accommodate a prosecutorial request to incarcerate a suspect, however, not only because the grounds for pre-trial detention are quite broad, but also because many magistrates believe that persons charged with serious offenses should be confined before trial if there is strong evidence of guilt.101 The decision to detain is widely acknowledged to have a significant impact on punishment, because judges are more likely to return to prison a convicted defendant who is already incarcerated (even under pre-trial detention) than to send to prison one who is at liberty at the time of conviction.102 Judges view the latter defendant as a safer bet to remain in the community where he may receive better rehabilitative services than are available in prison.

In the prosecution of délits, the Code of Criminal Procedure confers additional discretionary powers on the prosecutor to determine how suspects are brought to trial. This authority derives from an 1863 amendment to the Code which originally applied only to offenders apprehended by the police in the course of an enquête de flagrance.103 In 1981, Parliament extended these provisions to apply in somewhat modified form to the prosecution of most all délits.104 Under the old law, the prosecutor could interrogate the suspect (normally held by the judi-

---

99. On January 1, 1981, detainees comprised 44.5% of the prison population in France (15,849 out of 35,655 prisoners). The number of convicts in prison has increased only slightly over the last decade, while the number of detainees has increased almost 50% from a low of 10,899 in 1970 to a high of 15,849 in 1980. Tournier, Analyse statistique de l'évolution de la population pénale métropolitaine depuis 1967, 1980 R.S.C. 743, 752. The statistics published by the French prison authorities include in the category of detainees incarcerated defendants whose convictions have not yet become final.

100. See supra note 73.


102. H. LAFONT & P. MEYER, JUSTICE EN MIETTES: ÉSSAI SUR LE DÉSORDRE JUDICIAIRE 89 (1979). The examining magistrate does not always grant the prosecutor's request to detain a defendant prior to trial. Representatives of the rehabilitative model (social workers, probation officers, or even a juge de l'application des peines) sometimes intervene informally to secure the pre-trial release of an individual with whom they have had previous contact in the system. These informal interventions, which are usually not recorded in the dossier, reflect the importance that the various actors attach to the magistrate's decision. Id. at 102-03.

103. The 1863 amendment was codified in former articles 71, 71-1 to 71-3, and 393 to 397 of the Code of Criminal Procedure. For the text of these now repealed articles, see C. PR. PÉN. arts. 71 to 71-3, 393-97 (22e ed. Petits Codes Dalloz 1980-81) (repealed 1981-82).

104. Article 51 of the law "Security and Liberty" repealed former articles 71 to 71-3 and 393 to 397 of the Code and promulgated new articles 393 to 397. For the full citation to the new law, see supra note 22.
cial police under a *garde à vue*) after advising him of his right to counsel. The prosecutor also could retain the suspect in custody and issue an arrest warrant ordering him to appear for trial before the next session of the *tribunal correctionnel*. The new law no longer authorizes the prosecutor to interrogate a suspect or to issue an arrest warrant, but these changes are of little significance because the prosecutor is still authorized to receive any declarations the suspect chooses to make and to bring the suspect before the court for trial the very same day. Moreover, although the new law authorizes the prosecutor only to receive the suspect's declarations and not to interrogate him, the suspect is no longer entitled to the assistance of counsel before he makes a declaration.

This summary procedure has long been one of the less fortunate aspects of French criminal justice. Its extension in 1981 to most all *délits* was one of the most controversial aspects of the law "Security and Liberty." By invoking this procedure, the prosecutor may promptly bring to trial a suspect held by the judicial police under a *garde à vue*. The trial normally takes place the same day that the defendant first appears in court, although the defendant has the right to a continuance of at least five days to secure a lawyer and to prepare his defense. Prosecutors use this procedure most frequently in urban areas to prosecute street crimes not involving serious bodily injury (e.g., property destruction, thefts, weapons offenses, illegal demonstrations, resisting or insulting a police officer, etc.). A special chamber of the

105. A 1975 amendment to article 71 of the Code gave the suspect the right to the presence of counsel during this interrogation and required the prosecutor to provide counsel if requested by the suspect. This reform proved difficult to implement because counsel often was unavailable at the time of the interrogation. 2 Merle & Vitu, supra note 39, at 363.

106. C. PR. PEN. art. 71-1 (22e ed. Petits Codes Dalloz 1980–81) (repealed 1981–82). This was the sole provision granting executive arrest powers in French criminal procedure.

107. Provisions in both the old and new law authorize the prosecutor to release the suspect after verbally notifying him that he is to appear before the *tribunal correctionnel* for trial at a date set not less than three days nor more than a month from the date of the suspect's release. The Code treats this verbal notification (colloquially known as the *rendezvous judiciaire*) as the equivalent of a *citation*, and the defendant receives no further notice of the charges against him until the day of trial. C. PR. PEN. art. 71-2 (22e ed. Petits Code's Dalloz 1980–81) (repealed 1981–82). The new provision is C. PR. PEN. art. 394 (23e ed. Petits Codes Dalloz 1981–82).

108. See supra note 22. The new Socialist government has decided to retain this summary procedure (relabeled *procédure d'urgence*), but proposes to limit it once again to *flagrants délits*. See Le Monde, July 26–27, 1982, at 5.


110. For bringing defendants to trial, the prosecutors in these areas rely on the *citation* or on the related procedure of the *rendezvous judiciaire* described supra note 107. The prosecutor invokes the jurisdiction of the examining magistrate if he believes pre-trial detention is warranted.
tribunal correctionnel in Paris does nothing but try these offenses (sixty per day with twenty percent or more of the defendants sentenced to prison). 111

The purposes of this system are: first, to provide greater deter-
rence through swift and certain punishment, and second, to avoid wast-
ing judicial time and effort on cases where guilt is plain because the defendant was caught red-handed. Although most Frenchmen appear to share these goals, observers are uniformly troubled by the spectacle of the summary trial. 112 The crowded courtrooms, the harried partic-
pants, the thinness of the dossiers, the rapidity of the trials, and the unpreparedness or absence of defense counsel do not inspire confidence in the system's fairness. French judges are sensitive to this problem, and the direct confrontation at trial between the panel of judges and the defendant at least permits the judges quickly to reach the merits of any claim by the defendant that he was the victim of a mistake. 113

The prosecutor's ability to control how a defendant is brought to trial thus has significant consequences for individual rights. The French criminal justice system seeks to limit the prosecutor's power through the screening device of an examining magistrate, but the prose-
cutor has devised effective strategies for circumventing that check. The structure of the system also attempts to limit prosecutorial authority by enumerating those powers that the prosecutor may exercise and by as-
igning the investigative function to the judiciary. This check also has proved ineffective as the police and consequently the prosecutor gradu-
ally have come to dominate the investigation of offenses, with a reluc-
tant legislature eventually giving its imprimatur. The result of these developments is a criminal justice system in which the defendant's pre-
trial rights are eroded to a degree many in this country would find unpalatable.

III. THE RIGHTS OF THE INDIVIDUAL

In the abstract, the French and American approaches to protecting the rights of the individual in the criminal process appear to have much in common. Both systems seek to protect what are essentially the same

113. French judges are sensitive to claims of innocence and to the presence of mitigating circumstances and make an effort to separate these cases from the great mass of cases involv-
ing defendants who are plainly guilty. The opportunity to interrogate the defendant person-
ally makes this possible. See the examples in Le Figaro cited supra note 111.
rights. In practice, however, the French approach has proved to be a less effective safeguard of individual liberty, largely because the system is unwilling to recognize an individual’s rights at the early stages of the criminal process. Further, the French system’s formalism reduces its protection of an individual’s rights; the legality of an investigatory practice often depends on whether it satisfies formal criteria rather than on its impact on the individual.

A. Comparative Analysis

In the United States, an individual’s rights during the investigatory process and at trial provide substantial checks on the power of the state. First and foremost, the criminal defendant has the right to due process of law. This right requires the state to proceed against the defendant only in accordance with the law of the land, i.e., under pre-existing constitutional and statutory provisions as interpreted by court decisions. Due process also provides the defendant with a right to reasonable notice of the charges against him and to an opportunity to be heard in his own defense. The defendant’s day in court includes at a minimum the right to examine the prosecution’s witnesses, to offer testimony, and to be represented by counsel. This right arises from the state and federal due process clauses and from the sixth and fourteenth amendments to the United States Constitution, which the Supreme Court has interpreted to constitutionalize the right to present a defense. Constitutional due process further requires that the state proceed against an individual in a manner that is fundamentally fair. State action violating an individual’s dignity in a shocking fashion or affecting the reliability or fairness of the guilt-determining process violates the individual’s right to due process of law. Finally, an individual’s rights include the privilege against self-incrimination and the prohibition against unreasonable searches and seizures, both of which are recognized by state and federal constitutions. These rights explicitly restrict the state’s gathering of evidence against an individual. The state may neither compel an individual to give incriminating testimony, nor search for or seize incriminating evidence unless it has a

116. Id.
reasonable basis for doing so.¹²¹

What are the rights of the individual in France? The suspect or
the defendant, like his American counterpart, has a right to have
the state proceed against him in a lawful fashion (i.e., in accordance with
the provisions in the Code of Criminal Procedure). The French
Supreme Court (Cour de cassation) has also recognized a general re-
quirement of fairness in the gathering of proof analogous to an Ameri-
can's right to be treated in a fundamentally fair fashion. In addition to
this bundle of statutory rights and this judicially created right to fair
treatment, a defendant is also entitled to what the French call the
"rights of the defense" (les droits de la défense).

Although the "rights of the defense" have in fact proved to be the
principal limitation on the state's repressive authority, the precise
source and scope of this concept are unclear. It does not derive from
any particular Code provision; rather, French jurists regard it as ema-
nating from the Code's entire structure. Specific Code provisions
merely exemplify the more general principle. Untroubled by the
vagueness of the "rights of the defense" concept, French courts have
not defined it further but instead have applied it on a case-by-case ba-
sis. At a minimum, however, the "rights of the defense" concept re-
quires that the defendant receive notice of the proofs against him (i.e.,
access to the dossier) and an opportunity to defend himself with the
assistance of counsel.

The rights described above do not have constitutional stature. Al-
though the French Constitution does recognize a number of rights ap-
plicable to the criminal process (i.e., the presumption of innocence),¹²²
an individual may not invoke these rights before the regular courts,
which must apply only the statutory law. Enforcing constitutional
rights is the exclusive responsibility of a special Constitutional Coun-
cil.¹²³ The expanding but still limited role of that body will be dis-
cussed in Part IV.

¹²¹ Terry v. Ohio, 392 U.S. 1, 9 (1968).
¹²² The Fifth French Republic of 1958 has a written Constitution which incorporates by
reference the individual rights recognized in the preamble to the 1946 Constitution of the
Fourth Republic and in the Declaration of the Rights of Man and of the Citizen of 1789.
GODECHOT, LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789 at 411 (1970). The presump-
tion of innocence is found in Article 9 of the Declaration of 1789.
¹²³ The Constitutional Council recently decided that the "rights of the defense" princi-
ple is of constitutional stature. Judgment of Jan. 19-20, 1981, Con. const., reprinted in Philip,
on the limited effect of this decision, see infra text accompanying notes 212-31. For a dis-
cussion of the basis of the decision, see infra note 219.
B. The "Rights of the Defense" and the Stages of the Criminal Process

The "rights of the defense" concept has not effectively limited state authority because the protection it affords the individual varies from one stage of the criminal process to the next. During a judicial investigation, and to a greater extent during the trial itself, the "rights of the defense" offer the defendant his greatest protection. On the other hand, the "rights of the defense" do not apply at all during the earlier stage of a police inquiry. Police officers may question both witnesses and suspects, including those held under a garde à vue, and a suspect against whom the police have strong evidence of guilt has no right to know the proofs against him or to defend himself with the assistance of counsel. In this country, the Supreme Court has sought to protect the suspect's rights during police interrogation by permitting counsel to be present and by requiring the police to warn persons in custody of their rights to silence and to the presence of counsel before interrogating them. French law imposes no such requirement on the police, although they must observe the statutory formalities for a garde à vue if they are interrogating a person so detained, and it is contrary to the ethics of French lawyers to have any contact with the judicial police on behalf of a client during the course of a police inquiry. The "rights of the defense" thus fail to protect the individual when he needs protection the most—during the police investigation.

As one aspect of the right to conduct his own defense, the French defendant also has a privilege against self-incrimination, inasmuch as the Code does not require him to respond to police or judicial interrogation by incriminating himself. The defendant thus is free to choose silence as his best defense. Comparison shows, however, that this privilege is less substantial than its American counterpart.

French jurists uniformly condemn the physical abuse of persons subject to police interrogation and conclude that confessions obtained in such a fashion are inadmissible at trial. That protection is of lim-
ited value, however, because the physical abuse of suspects is in fact quite rare. The inherently coercive effect of most police interrogations of suspects, on the other hand, is beyond dispute, yet the French system does little to protect the defendant in that more common situation. Suspects who are unaware of the police's case against them and of their right not to incriminate themselves make damaging admissions when confronted by stern officials who plainly expect answers to their questions. A suspect's incriminating answers become part of the dossier and are considered by the trial court as an item of proof against the defendant if the statements appear to be true.

This protection against compulsory self-incrimination is substantially less than that afforded suspects in this country even under the pre-Miranda voluntariness test for the admissibility of confessions. Under that test the confession's truth did not determine its admissibility; the relevant inquiry was whether the police's interrogation techniques overbore the suspect's will. Protracted incommunicado police interrogation normally led to a judicial determination that any resulting confession was involuntary and thus inadmissible.

French jurists themselves are troubled by the coercive aspects of police interrogation, especially when conducted under a garde à vue. Although some have defended present practices on grounds of practical necessity in fighting crime, others have condemned them for subverting the "rights of the defense" during the judicial investigation and at the trial itself. From an American vantage point, the latter position is more persuasive. Of what value are the defendant's rights at later stages of the prosecution if he may be convicted on the basis of a confession obtained by the police when he was ignorant of his rights?

---


131. Id. at 69-70; 2 Merle & Vitu, supra note 39, at 309-10, 315; Stefani & Levasseur, Procédure pénales, supra note 54, at 270-72.


136. 2 Merle & Vitu, supra note 39, at 309-10.

137. Supreme Court Justices often have asked themselves this question and have reached
Civil-law systems may well be superior to our own when, in a civilized fashion, they encourage suspects and defendants to contribute what they know to the proceedings, but that encouragement should take place in a setting where an individual knows the choices open to him and has available the assistance of counsel.

Until the reforms initiated in 1897 by the famous law "Constans," a judicial investigation was also an inquisitorial proceeding where the "rights of the defense" did not apply. That law recognized for the first time the suspect's right to defend himself during the course of the investigation. Under the present Code provisions deriving from that reform, the examining magistrate must formally "inculpate" the suspect (i.e., notify him of his status as a suspect and of his right to counsel) before interrogating him. The term "suspect" covers not only all persons named by the prosecutor in his charging document, but also any person against whom there exist "grave and concordant" proofs of culpability.

French law thus resembles the recently abandoned "focus test" of Escobedo v. Illinois by requiring the magistrate to treat any person against whom the magistrate has collected a certain quantum of proof as a formal suspect entitled to the "rights of the defense." This approach affords potentially greater scope to the "rights of the defense" than does the Supreme Court's present test for determining when a person becomes constitutionally entitled to the assistance of counsel because it concentrates on the risk to the defendant of prosecution. In the United States, a suspect has a right to be treated as a criminal defendant and to receive the additional protection of that status only when the obvious conclusion: none. See Watts v. Indiana, 338 U.S. 49, 53-55 (1949) (Frankfurter, J., plurality opinion); Spano v. New York, 360 U.S. 315, 324-26 (1959) (Douglas, J., concurring); Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964) (Goldberg, J. for the Court).


139. Id. at 377. Professor Schlesinger cites a 1964 German statute that recognizes the rights of the defense during a police investigation.


142. Id. art. 105. The statutory language on this quantum of proof is: "des indices graves et concordants de culpabilité."


144. The additional protection consists primarily of the right to the assistance of counsel during noncustodial interrogation and during other critical pre-trial stages where counsel's presence is necessary to assure the fairness of the trial itself. See Henry v. United States, 447
the state formally has charged him with an offense or otherwise has initiated adversary judicial proceedings against him. American law today thus looks to the proceeding’s formality rather than to the risk of prosecution in determining when rights attach.

Despite its potentially expansive scope, France’s statutory “inculpation” requirement has failed to remedy the practice of coercive police interrogation. The requirement does not apply at all until a magistrate opens a judicial investigation at the request of the prosecutor who simply may delay or avoid making a request. Once an examining magistrate has opened an investigation, the police no longer may conduct their own inquiry with respect to the same facts, but they normally continue their investigation under a general commission from the magistrate. At this stage of the prosecution the police may question witnesses but no longer may interrogate suspects against whom there are “grave and concordant” proofs of guilt. The police in large part have avoided this latter limitation by continuing to question a person as a witness when the proof against him indicates that he should be considered a suspect.

The Code permits this subterfuge because it forbids the police acting under a magistrate’s commission to question a suspect with “the design to defeat the rights of the defense.” Thus, the test for determining whether a person is a suspect is a subjective one. It does not matter whether the police in fact have sufficient evidence of guilt as long as they do not proceed in bad faith. Findings of police bad faith are rare, and French jurists generally concede that the subjective focus test has been ineffective in limiting the police interrogation of suspects during a judicial investigation.

Once the magistrate designates a person as a suspect, that per-


146. This subterfuge is not possible if the suspect is named in the prosecutor’s charging document. C. PR. PÉN. art. 104 (23e ed. Petits Codes Dalloz 1981-82).

147. See the authorities cited in 2 MERLE & VITU, supra note 39, at 443–44 n.5.


149. A magistrate also may be tempted to delay “inculpating” a suspect so that he may interrogate him as a witness. Magistrates, however, are less prone to this abuse than are the police.
son's rights during the subsequent judicial investigation are substantial. At the suspect's initial appearance the magistrate must notify him of the facts imputed against him, of his right to remain silent at that time, and of his right either to choose his counsel or to have the court designate one for him.\textsuperscript{150} If the suspect (now an \textit{inculpé}) elects to be assisted by counsel, he has the right to communicate freely with his counsel and to have counsel present when the examining magistrate interrogates him. In addition, counsel (but not the suspect) has the right to obtain access to the dossier at least twenty-four hours before the suspect is interrogated.\textsuperscript{151}

Although the suspect knows the proofs against him, his right to respond during the judicial investigation is limited. Counsel may submit written argument in support of a nonsuit, but neither counsel nor the suspect may present any proofs other than the suspect's unsworn responses to the examining magistrate's questions. Interrogating the suspect on the facts therefore provides both an investigatory tool and an important means of defense, and a suspect cannot be remanded for trial unless the magistrate first formally inculpates him and receives any unsworn statement he chooses to make.

The "rights of the defense" are more extensive at the trial stage of the proceeding than during a judicial investigation. The basic source of the "rights of defense" at trial is the noninquisitorial trial procedure first established by the Code of Criminal Procedure of 1808. That Code rejected the old Regime's secret, written, and "noncontradictory" trial procedure and substituted a new form of trial that was public, oral, and "contradictory" (i.e., that allowed the defendant to challenge the proofs against him).\textsuperscript{152} The provisions in both the Napoleonic Code and the Code of Criminal Procedure of 1958 implementing these three basic principles were often incomplete, skeletal, and uncertain in scope.\textsuperscript{153} The courts, spurred by the treatise writers, nonetheless have interpreted both codes to confer upon the defendant the basic rights to be present throughout his trial, to hear the witnesses against him testify live in the courtroom, and to contradict the proofs against him through

\textsuperscript{150} C. PR. PÉN., art. 114 (23e ed. Petits Codes Dalloz 1981–82).
\textsuperscript{151} Id. arts. 116, 118.
\textsuperscript{152} 2 Merle & Vitu, supra note 39, at 693-99; Stefani & Levasseur, Procédure pénale, supra note 54, at 33–36, 564–68.
\textsuperscript{153} For example, article 427 of the present Code, which governs the trial of \textit{délits} in a tribunal correctionnel, does no more than provide in general terms that "[t]he judge may base his decision only upon the proofs which have been brought to the trial and contradictorily debated before him." The Napoleonic Code of 1808 did not even contain an analogous provision explicitly recognizing the defendant's right to contradict the proof against him when on trial for a \textit{délit}. 
his own denial or proofs.\textsuperscript{154}

Once again the uncertain scope of these basic principles does not trouble the French legal mind. The French system largely leaves the case-by-case implementation of the principles that a criminal trial must be public, oral, and contradictory to the discretion of the trial courts. The tribunal correctionnel and the tribunal de police enjoy considerable flexibility in implementing these principles because, upon appeal to a cour d'appel, the losing party receives in effect a trial de novo where any defects in the original trial may be readily cured. Although this double degree of trial court jurisdiction paradoxically is not available for the most serious offenses tried in a cours d'assises (i.e., the losing party may not "appeal" the jury's verdict to a cour d'appel but may only seek review on legal questions before the French Supreme Court or Cour de cassation), that court's more formal procedures traditionally have implemented the principles of publicity, orality, and contradictoriness to their greatest extent.

The Cour de cassation regards the implementation of these principles as largely a factual matter properly left to the trial courts.\textsuperscript{155} For this reason, the Cour de cassation, whose jurisdiction over the judgments of both the cours d'appel and the cours d'assises is limited to questions of law, rarely finds it necessary to quash a conviction on the basis of these basic principles. An observer trained in the common law might question, however, whether the tribunal correctionnel's heavy reliance on the dossier in most trials for délits adequately respects the principle of orality. Most French jurists respond that these proceedings receive all the time they are worth and that if the defendant's counsel believed that reliance on the dossier rather than live testimony prejudiced his client, he could pursue the matter successfully with the

\textsuperscript{154} See the authorities cited supra note 152. Although continental scholars refer to this type of trial process as "accusatorial" in order to distinguish it from the "inquisitorial" model of pre-Revolutionary France, the use of this term is somewhat confusing to common-law lawyers who would reserve the word "accusatorial" for adversary-type procedures. The imprecision of the label notwithstanding, the important point is that French jurists (both those who drafted the Code and those who subsequently interpreted it) recognize that the Code respects certain basic rights of the defense. For the use of the term "accusatorial," see I MERLE & VITU, supra note 11, at 163-65, 181-83.

\textsuperscript{155} G. BERGOIGNAN-ESPER, LA SÉPARATION DES FONCTIONS DE JUSTICE RÉPRESSIVE 98-100 (1973). The author cites numerous nineteenth century decisions of the Cour de cassation upholding trial court references to depositions of prosecution witnesses found in the dossiers, even though the trial courts made no effort to call the witnesses to testify at the trials. Most of these decisions involved the trial of a délit before a tribunal correctionnel. More recently, the Cour de cassation has gone further and has upheld convictions based in part on evidence in the dossier that the trial court did not expressly refer to at trial. In this way, the court can prevent the defendant from contesting the use of the evidence. See Judgment of Dec. 5, 1978, Cass. crim., 1979 D.S. Jur. I 50 note S. Kehrig.
The interrogation of the defendant, which opens the proceedings, remains the central feature of the French criminal trial. The president questions the defendant directly, without waiting for him to take the stand and without first warning him of his right to silence, all of which naturally encourages the defendant to respond. Counsel of course informs the defendant of his rights at trial, but it would be most unusual for counsel to advise the defendant not to answer the president’s questions. The defendant is not deterred from testifying, as he often is in this country, by evidentiary rules providing that evidence particularly damaging to the defendant (e.g., prior convictions) may be admitted only if the defendant chooses to testify. In France, the proofs admissible against the defendant are the same regardless of whether the defendant chooses to speak in his own defense.

Despite its inquisitorial aspects, the court’s interrogation of the defendant is also an important part of the “rights of the defense.” The Code provisions requiring the court to interrogate the defendant on the

156. A striking recent example in which the Cour de cassation quashed a conviction for a violation of the principle of contradictoriness codified in article 427 of the Code is Judgment of Dec. 5, 1978, Cass. crim., 1979 D.S. Jur. I 50 note S. Kehrig. For the text of article 427, see supra note 153. In that case, a cour d'appel had increased the defendant's punishment on the basis of a prior conviction mentioned in the dossier, but had not brought that conviction to the defendant's attention at trial so that he could contest its use as an aggravating circumstance. The court's omission was particularly serious because, unlike a similar omission by an initial trial court, it could not be rectified on appeal.

157. The court's interrogation of the defendant was the subject of controversy in France during the 1950's when the Parliament was in the process of enacting a new Code of Criminal Procedure. The controversy centered on the questioning of the defendant by the president of the cour d'assises, which traditionally involved, on the basis of the dossier, a thorough examination into the defendant's life history as well as into the merits of the charge. The principal objection to this practice was that it reduced the orality and freshness of the trial by permitting the dossier (prepared by the examining magistrate) to dominate the proceeding. In addition, it encouraged prejudgment on the part of the president, who often in effect became an accuser seeking to extract a confession from the defendant. Vouin, L'interrogatoire de l'accusé par le Président de la Cour d'assises, 1955 R.S.C. 43, 44-47. Despite these objections, the draftsmen of the new Code retained this interrogation as the centerpiece of the trial, but expressly prohibited any premature expression of opinion by the president. C. PR. FÉN. art. 328 (23e ed. Petits Codes Dalloz 1981-82). See Vitiu, La Cour d'assises dans le Code de procédure pénale, 1959 R.S.C. 539, 556-58. In practice, the president's interrogation of the defendant has become less rigorous. The president now is more inclined to accept the defendant's answers without pressing him and to leave the task of identifying inconsistencies and contradictions to the prosecutor or counsel for the partie civile. M. Essaid, La présomption d'innocence 267-81 (1973).

158. On the advantages of these and other devices that encourage, in a civilized fashion, criminal defendants in civil-law systems to contribute to the truth-seeking process, see Schlesinger, Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience, 26 Buffalo L. Rev. 361, 377-81 (1977).

merits without imposing an oath\textsuperscript{160} afford him the opportunity to respond to the accusation without confronting the dilemma of either contributing to his own conviction by acknowledging his guilt, or of facing additional charges for perjury or contempt.\textsuperscript{161} The defendant therefore enjoys the power or option (\textit{la faculté}) to lie and also the right to silence if he believes that the latter course provides his best defense.\textsuperscript{162}

In most cases, neither choice offers the defendant much advantage. Where the proof of guilt is strong, a defendant's confession is often his best defense, because he may avoid thereby a heavier sentence.\textsuperscript{163} Falsehoods may prove to be the worst defense, because the defendant normally has been interrogated by the police or by an examining magistrate before trial, and his pre-trial statements provide fertile material with which to contradict his statements at trial. Although it is uncertain whether a confession results in more lenient punishment, it is widely accepted in France that the defendant caught by the court or prosecutor in a tangle of contradictions and falsehoods receives the most severe punishment.\textsuperscript{164} The infrequently exercised defense of silence, on the other hand, exposes the defendant to whatever inferences the court chooses to draw.\textsuperscript{165}

C. The Defendant's Statutory Rights

The French system has attempted to protect individual rights through numerous statutory provisions designed to ensure a proceeding's regularity. This approach has proved unsuccessful, however, largely because the Code does not provide, and the courts have failed to devise, effective measures for enforcing these provisions.

The Code provisions rely heavily on formalism. This is especially true of the procedures governing the judicial investigation and the trial of \textit{crimes}. For example, the Code provides in detail for the designation of court-appointed experts, the selection of lay jurors, and the clerk's notation of various judicial acts (such as imposing an oath on a witness). The Code also contains provisions that are intended to further

\textsuperscript{160} C. PR. PÉN. art. 328 (23e ed. Petits Codes Dalloz 1981-82) (trials in a \textit{cours d'assises}); \textit{id.} art. 442 (trials in a \textit{tribunal correctionnel}); \textit{id.} art. 536 (trials in a \textit{tribunal de police}.

\textsuperscript{161} M. ESSAID, \textit{LA PRÉSOMPTION D'INNOCENCE} 272-73 (1973).

\textsuperscript{162} \textit{id.} at 273.


\textsuperscript{164} \textit{id.} at 10. See also R. THEVENIN, \textit{MEUTRIERS SANS AVEUX: LES GRANDS PROCÉS D'ASSISES} 1970 vii-viii (1971). Raymond Thevenin was the long-time judicial correspondent for \textit{Le Figaro}. Prior to his death in 1980, he was one of France's most respected lay commentators on criminal justice.

\textsuperscript{165} M. ESSAID, \textit{LA PRÉSOMPTION D'INNOCENCE} 276 (1973).
other goals, such as the protection of personal privacy or human dignity. For example, articles 55 to 59 contain detailed provisions limiting most dwelling searches by the police to the daytime, requiring the head of the household or other witnesses to be present during the search, and protecting private papers from unnecessarily intrusive searches. Articles 63 and 64 likewise contain provisions intended to prevent police abuse of the garde à vue. In addition to establishing the basic twenty-four hour time limit for the police garde à vue, these articles mandate that the police keep detailed records on such matters as the time periods during which the detainee was interrogated, provide for medical examinations of the detainees, and require the police to bring the detainee personally before the prosecutor in order to obtain the latter's approval for a twenty-four hour extension of the garde à vue.

The Cour de cassation, unlike our Supreme Court, has eschewed exclusionary rules as a means of remedying and deterring official misconduct. The French court instead has developed an immense and confusing body of case law relating to harmless error. Although the predominant French view is that proof not obtained or presented in the proper legal form is null and does not belong in a dossier, both the Parliament and the Cour de cassation have developed rules for limiting the instances when the latter must quash a conviction. Since the early 1960's, the Cour de cassation has quashed convictions only where it has found a violation of the "rights of the defense." In other words, the defendant must establish that a statutory violation prejudiced his more general right to present a defense. In 1975, the French Parliament codified this case-law requirement of prejudice in an amendment to the Code of Criminal Procedure.

The Cour de cassation is reluctant to conclude that the nonobservance of a particular statutory formality prejudiced the rights of the de-

166. C. PR. PÉN. arts. 55-59 (23e ed. Petits Codes Dalloz 1981-82). Articles 95 to 100 impose additional formalities on dwelling searches authorized by an examining magistrate.

167. Id. arts. 63-64.


The requirement of prejudice does not apply to the violation of a statutory provision the observance of which is required in the public interest (e.g., jurisdictional limitations). In these instances a judgment may be quashed without a showing of prejudice. See Judgment of Apr. 17, 1980, Cass. crim., 1981 J.C.P. Jur. II No. 19632 note W. Jeandidier.

169. Loi no. 75-701 du août 1975 (codified at C. PR. PÉN. art. 802 (23e ed. Petits Codes Dalloz 1981-82)).
fense. This is particularly apparent with respect to the judicial investigation, in which defects often are cured by the subsequent trial process itself. The court is even more reluctant to find prejudice in a statutory violation during a police inquiry when the person's right to defend himself against known charges has not yet attached. Thus, the Cour de cassation normally has refused to quash convictions on the basis of irregularities in the garde à vue even though those irregularities may have prompted a confession subsequently used against the detainee at trial.

D. The Defendant's Right to Fair Treatment

The requirement of fairness in the gathering of evidence, although enforced through an exclusionary rule, has had a limited impact in deterring investigatory excess. Its ineffectiveness is due mainly to the courts' failure to develop a flexible standard applicable to a variety of situations. This shortcoming has left the right a protector more of formality than of fairness.

The requirement of fairness has no explicit statutory basis but has been formulated by the Cour de cassation as a general principle of law applicable to civil as well as criminal proceedings and to proof-gathering by private persons as well as by police officers and examining magistrates. The right to fair treatment thus applies during the police inquiry stage when the "rights of the defense" have not yet attached. Although the full scope of this right is uncertain, it does bar the acquisition of proof through brutal or deceptive means similar to those condemned by our Supreme Court as fundamentally unfair.

In addition, the French courts have gone further and have barred as unfair proof against an individual acquired in violation of the substantive provisions of the Penal Code protecting the sanctity of the domicile, private correspondence, and private wire communications. Al-

---

170. See the notes by M.R.M.P. cited supra note 168.
175. Judgment of Feb. 19, 1964, Tribunal correctionnel, Blois, 1964 G.P. Jur. I 359 (proof excluded because it was obtained by a private person in violation of the sanctity of the
though an examining magistrate lawfully may authorize searches and seizures that intrude into these areas, an OPJ may not proceed forcibly on his own authority; if he does, he himself has committed an offense, normally a délît.  

A procès verbal recording such an illegal operation is void and must be stricken from the dossier (i.e., the court must not consider it when determining the defendant's guilt).  

Although the courts therefore reject proof that the state obtains by committing a délît, they have not fashioned any rules comparable to the American doctrine of "the fruit of the poisonous tree." It is widely acknowledged in France that the police always have done a good deal of illegal wiretapping and have used the information they obtain as leads for the subsequent acquisition of the same information in a legal fashion. The procès verbal presented to the court reflects only the second operation and is thus in proper legal form. The courts generally have shown little interest in probing into the sources for the second,}

---

176. An OPJ lawfully may conduct a nonconsensual dwelling search in the course of an enquête de flagrance. C. PR. PÉN. art. 56 (23e ed. Petits Codes Dalloz 1981–82).


apparently legal police operation. Their concern is primarily to preserve the legal formalities and not to regulate police behavior. The latter concern is collateral to a particular defendant's guilt or innocence, and the French courts have always been hostile to collateral issues because they deflect the official inquiry from its central task. The French and other continental systems have a greater commitment to the determination of truth than does a common-law system. For this reason, they impose fewer restrictions on investigatory powers and limit the defendant's opportunity to enforce through exclusionary rules those restrictions that they do impose.

The weakness of the accompanying exclusionary rule is not the basic reason why the general principle of fairness fails to serve as a significant check on the state's investigatory powers. The more general problem with the French approach is that the substantive standard itself is weak. Although the fairness principle does forbid certain investigatory techniques, it does not ban much police activity beyond hardcore brutality and illegality. Of course, the fundamental fairness requirement in the United States affords even narrower protection. Here, however, it is no longer intended to play a significant role; rather, it serves as a fall-back limitation where no other constitutional or statutory provision applies. The principal limitation on police investigatory powers in this country is the fourth amendment's prohibition against unreasonable searches and seizures. Rather than banning searches and seizures, the fourth amendment limits them by insisting that the state have a reasonable basis for proceeding with a particular search or seizure. Very few searches or seizures or other investigatory techniques are unfair in the abstract or in all cases, but most are intolerable intrusions on personal dignity and privacy unless the state has a reasonable basis (normally probable cause) for believing that the intrusion is necessary to protect the searcher or to seize evidence of crime.

This balancing of governmental needs and individual rights, initially developed by the common law and subsequently constitutionalized in the fourth amendment, focuses not so much on what the government does as on the evidentiary basis justifying the government's action. This approach is intended to protect the innocent individual from the intrusions that legitimate law enforcement needs would justify imposing on one reasonably believed to possess seizable evidence. In France, on the other hand, the primary concern is with the inquiry's regularity (i.e., the authority of the officials conducting it). The French courts' failure to inquire into the state's need to exercise

180. Damaska, Evidentiary Barriers, supra note 6, at 580-87.
authority in a particular case explains in large part why the defendant's right to fair treatment, as well as his right to the observance of statutory formalities, are not significant limitations on the state's investigatory powers.

IV. JUDICIAL IMPLEMENTATION OF INDIVIDUAL RIGHTS

The preceding parts of this article provide an overview of the French criminal justice system. Part II describes how the prosecutor and the police have come to dominate the investigation of offenses and the manner in which defendants are brought to trial. Part III discusses how French law recognizes and protects individual rights. That discussion concludes that French devices for limiting state authority do not compare favorably with their American counterparts. This Part describes several attempts by the French judiciary to determine the rights of the individual in the criminal process. Given the system, it should not be surprising that the decisions define those rights quite narrowly. Furthermore, the court system itself contains a structural deficiency that hinders the judicial recognition of individual rights. The body responsible for protecting an expanding category of constitutional rights — the French Constitutional Council — is jurisdictionally isolated; its decisions do not bind the regular courts.

A. The Different Stages of the Process: The Imbert Decision

The principle of fairness recognized by the French courts contains a variable standard for determining the legitimacy of investigatory techniques similar to the standard used for determining the "rights of the defense." It is permissible for the police to do certain things (e.g., to use pressure or trickery to obtain a confession) that are not permissible when done by an examining magistrate, and the examining magistrate may do certain things (e.g., interrogate the suspect without allowing counsel to interrupt) that a trial judge may not do. The limitations on official power increase as the process progresses through the police, the examining magistrate, and the trial stages. Although most writers defend this triple standard in terms of the judiciary's need to preserve its dignity, others more bluntly argue that the police are society's first line of defense against crime and must be allowed to play a certain amount of hardball in order to meet the offender in his own

Both of these points are well demonstrated by the aftermath of one of the Cour de cassation's better known criminal procedure decisions, Imbert. In that case, an examining magistrate opened, at the prosecutor's request, a judicial investigation into allegations of bribe taking by public officials and commissioned the police to conduct the investigation on his behalf. Although the magistrate was conducting the investigation against persons unnamed, a public employee named Imbert was plainly a target of the investigation. An OPJ, operating under the magistrate's commission, had a witness (who claimed that Imbert had solicited bribes from him) telephone Imbert and ask him specific questions which the OPJ had prepared in advance. The officer eavesdropped on the conversation by listening to the witness's écouteur (the second receiver found on most French telephones) and immediately prepared a procès verbal of Imbert's incriminating responses. This information provided the principal proof against Imbert at his trial for bribery. The Cour de cassation quashed Imbert's conviction on the grounds that in executing the judge's commission the OPJ had employed an unfair ruse or trap which violated the defendant's rights. The officer's procès verbal was therefore a nullity and could not provide a basis for the trial court's judgment.

The Imbert decision attracted considerable attention at the time because the court, rather than condemning the officer's investigatory technique because it violated a specific Code provision, concluded that the technique did not respect the defendant's right to fair treatment in the gathering of proof against him. The commentators uniformly interpreted the decision to apply only to judicial investigations; the decision did not impose similar restrictions on investigations conducted solely by the police (i.e., an enquête préliminaire or an enquête de flagrance). An OPJ operating under a commission, on the other hand, exercises the same powers as the examining magistrate and, as the court


183. Judgment of June 12, 1952, Cass. crim., 1952 J.C.P. Jur. No. 7241 note J. Brouchot (the Imbert decision). On the role of the academic commentators in publicizing judicial decisions, see supra note 21. The Cour de cassation and the lower courts do not cite prior decisions but only applicable statutory provisions and, occasionally, general principles of law. It is the commentators who synthesize the development of the jurisprudence (case law) and trace whether subsequent decisions are consistent with earlier decisions. The Imbert decision has been the subject of an immense body of scholarly comment. On the role of precedent in French law, see infra note 225.

in *Imbert* expressly noted, is subject to the same obligation to avoid any deception or ruse that taints the judicial function.

The restrictive interpretation of the *Imbert* decision has prevailed.\(^{185}\) The police may and do employ ruses and other deceptive techniques analogous to those condemned by the court in *Imbert*. Despite the commentators' urging, the *Cour de cassation* has refused to invoke the general principle of fairness to place similar limits on purely police investigations.\(^{186}\) That principle still does impose some limitations on the police, but the courts rarely apply it.\(^{187}\)

**B. The Police Stage: The Isnard Decision**

In the year following its decision in *Imbert*, the *Cour de cassation* rendered another major decision which attracted considerable attention because it placed a limitation on police searches.\(^{188}\) In that case, an examining magistrate in Nice had closed an unfruitful investigation into off-track betting without remanding any of the suspects for trial. An OPJ subsequently seized one of the suspects (Isnard) on the street and conducted a body search which produced incriminating gambling paraphernalia. Confronted with this proof while subsequently held by an OPJ under a *garde à vue*, Isnard confessed to his participation in the gambling operation. The trial dossier contained the *procès verbaux* of both the seizure and the confession. The *Cour de cassation* held that the search was illegal and quashed Isnard's convictions for gambling offenses. The court ruled that the illegality of the search rendered unusable as a basis for judgment the *procès verbal* not only of the seizure but also of the confession. The court reasoned that the police

---


\(^{186}\) See especially Blondet, *supra* note 182; 2 Merle & Vitu, *supra* note 39, at 320–22. In one well-known decision, a *cour d'appel* did exclude a confession obtained by the police during a *garde à vue* when the irregularities of the procedure were so great (namely the absence of any recordkeeping) that the court could not determine whether the confession was fairly obtained. Judgment of Dec. 12, 1962, *Cour d'appel*, Douai, 1963 G.P. Jur. 1407. Although this decision is a favorite of the academic commentators, the courts normally have refused to exclude evidence on similar grounds. G. Denis, *L'enquête préliminaire* 246–48, 352–56 (1974).

\(^{187}\) Academic writers have argued vigorously that the courts should not consider confessions that the police obtain through unfair methods of interrogation (e.g., the use of hypnosis or truth serum) because their reliability is questionable. See Bouzat, *La loyauté dans la recherche des preuves*, in Mélanges-Hugueney, *supra* note 17, at 155, 162–64; Léauté, *Les principes généraux relatifs aux droits de la défense*, 1953 R.S.C. 47, 53. Even though there is little case law to support the position of these academics, many jurists accept their analysis. 2 Merle & Vitu, *supra* note 39, at 168–69. The absence of any case law may indicate that the police also question the reliability of this type of evidence.

action was a single unit and the confession was not freely given but was promoted by the illegal seizure.\textsuperscript{189}

The court's reasoning on the illegality of the search illustrates the scope of the police power to search and seize. Although the Code of Criminal Procedure contains no express reference to searches of the person, the court ruled that the search of Isnard belonged to the general category of searches (perquisitions) covered by article 56 of the Code. Article 56 authorizes an OPJ to conduct a search only in the context of an \textit{enquête de flagrance}. Absent a "flagrant" offense, the officer had no authority forcibly to search Isnard's person. Although Isnard in fact was committing an offense in the officer's presence (possessing betting slips), the officer had no basis for opening an \textit{enquête de flagrance} before the search because he did not observe any external sign of the offense (\textit{aucun indice}). The officer therefore lacked legal authority to search Isnard without the latter's consent.

The commentators quickly identified the limited scope of the Isnard decision.\textsuperscript{190} First, if the OPJ had observed an external sign of an offense, he could have opened immediately an \textit{enquête de flagrance} into that offense and he could have searched the subject's person for the proofs thereof. To open that inquiry, the officer must observe something incriminating (e.g., a furtive exchange indicating a gambling transaction or a suspicious bulge indicating a concealed weapon); information supplied by an informant is not alone sufficient.\textsuperscript{191} Second, nothing in the decision limited the authority of an OPJ investigating a nonflagrant offense (an \textit{enquête préliminaire}) to seek the subject's consent for a search. In the alternative, the officer could seek the prosecutor's assistance in requesting an examining magistrate to open a judicial investigation and to issue a commission authorizing a forcible police search. Third, the decision did not affect the police's power to search a person taken into custody under a \textit{garde à vue} or arrested under an examining magistrate's warrant. These routine searches, the legality of which was not contested, serve a protective as well as an investigatory purpose and permit the police to maintain security at places of deten-

\textsuperscript{189} The Isnard decision comes as close as any French decision to recognizing an exclusionary rule for illegally obtained evidence. The concept of taint adopted by the Isnard court does not reappear in later decisions where the court examined each \textit{procès verbal} separately to determine its regularity.

\textsuperscript{190} In addition to the sources cited supra note 188, see Pédamon, \textit{La fouille corporelle}, 1961 R.S.C. 467; Langlois, \textit{L'enquête de flagrant délit; son point de départ et sa durée}, 1961 J.C.P. Doctrine 1611.

\textsuperscript{191} The Isnard court explicitly rejected as a basis for opening an \textit{enquête} Isnard's reputation as a gambler. See also Judgment of Jan. 13, 1975, Tribunal correctionnel, Aix-en-Provence, 1975 G.P. Jur. II 711.
tion. Fourth, the decision only restricted investigatory searches by the judicial police aimed at apprehending offenders and did not affect preventive searches by the administrative police designed to protect society from potential offenders. Because the same officer may exercise both functions, he often will be able to accomplish in his administrative capacity what he is forbidden to do while wearing his judicial hat.

This duality of police functions has permitted the police to avoid in large part the limitations imposed by the *Isnard* decision. The courts have upheld, as a lawful crime-prevention function of the administrative police, the widespread practice of searching a person in the course of an identity check. If that search discloses an incriminating item of proof, an OPJ may immediately open an *enquête de flagrance* and seize the item. The *Cour de cassation*, in its widely publicized *Friedel* decision, has limited its approval of identity checks and administrative searches of the person to "exceptional circumstances" and has not explicitly authorized the police to detain a person at the station house for identity check purposes. The lower courts nevertheless have not always recognized these limitations, and the police have interpreted "exceptional circumstances" quite broadly. Identity checks thus have become a routine police operation in high crime areas or during tense political demonstrations. The legality (as well as the desirability) of identity checks and accompanying searches nevertheless remained a live issue until 1981 when the Parliament, as part of the law "Security and Liberty," authorized the administrative detention of a person for no more than six hours for the purpose of carrying out an identity check. The new law did not address directly the police's authority to search detainees, but the administrative police have always had the authority to undertake protective searches of persons in police custody.


193. See supra note 192.


C. The Issue of Probable Cause

The Isnard decision nevertheless is significant because it does impose a limitation analogous to probable cause on the initiation of a coercive official inquiry. The procès verbal for a search of the person and a subsequent seizure of proofs must indicate the external signs that led the officer to open an enquête de flagrance if one had not been opened previously. To an American observer, it is surprising that there is no body of case law on the sufficiency of various external signs to justify police action comparable to the immense body of law in this country on what constitutes probable cause. It is also surprising that the statutory provision governing the conduct of searches during an enquête de flagrance — article 56 — has not been interpreted to impose a probable cause type requirement. That provision authorizes an OPJ during the course of the inquiry to seize papers, documents, or other objects from persons "who appear to have participated in the crime or délit or to hold proofs or objects relevant to the facts under investigation." The Cour de cassation has not construed the verb "appear" to require some external sign that a search is likely to prove fruitful before the OPJ commences the search.

The court likewise has not developed another potential probable cause type requirement applicable to searches conducted during a judicial investigation. Article 94 of the Code of Criminal Procedure authorizes the examining magistrate to effectuate searches in places where seizable objects "may be found." While this provision seemingly limits searches to places where the magistrate expects to find seizable objects, there is no case law and little, if any, discussion in the scholarly literature on the question of what information provides a sufficient basis for the magistrate's belief. In the absence of bad faith or fraud, the examining magistrate exercises unreviewable discretion in determining the advisability of a search.

In practice, it is an OPJ operating under a general commission who normally makes the decision to search a particular place or person during the course of a judicial investigation. In another portion of its Isnard decision, the Cour de cassation approved this practice and abandoned its previous requirement that the examining magistrate specify in the commission itself the dwellings to be searched instead of leaving that determination to the OPJ. Thus, whether a particular search or seizure (including a dwelling search) is a justifiable means for further-

198. The French wording is "peuvent se trouver."
199. 2 MERLE & VITU, supra note 39, at 405 n.1.
ing the investigation is left to the OPJ's discretion (*libre appréciation*).\textsuperscript{200} There are no real limits on the investigation other than the conscience of the investigator who must restrict his actions to the facts alleged in the prosecutor's charging document.

There are two reasons for this lack of interest by the French courts and commentators in the probable cause issue. The "official inquiry" model for the investigation and trial of offenses provides the more straightforward explanation. The existence of probable cause for an investigatory action is collateral to the determination of the defendant's guilt or innocence and therefore is not normally litigable in the criminal process. The official inquiry model's commitment to determine the truth, however, is a commitment to do so within legal forms. The dossier must establish that the police properly opened an *enquête de flagrance* before conducting a forcible search authorized only in the course of such an inquiry. To do so, the police must identify the offense they are investigating. A "flagrant" offense is normally observable, and the mention in the *procès verbal* of an external sign confirms the inquiry's legality. As with most statutory limitations on official authority, this requirement of an observable external sign therefore reflects a greater concern for satisfying formalities than for justifying the intrusion into individual liberty.\textsuperscript{201} With respect to police searches conducted under a magistrate's commission, the prosecutor's charging document provides the formal legal basis for the investigation.

The second explanation for the lack of interest in probable cause questions involves the separation of functions principle. To the French jurist, it is simply not appropriate for a trial court or for the *Cour de cassation* to review a prosecutor's or a magistrate's decision on how to proceed in the course of an otherwise lawful investigation. This view contrasts sharply with the approach in this country where trial and appellate courts must review the adequacy of the justification for a police officer's or a magistrate's decision to conduct a particular search or seizure.\textsuperscript{202}

In accordance with the separation of functions principle, the prosecutor's authority (including the authority to supervise the preliminary police inquiries which serve as a basis for determining whether to initi-


\textsuperscript{201} See the discussion in Part III on the Code's formalistic approach to defining the defendant's rights, *supra* notes 166-172 and accompanying text.

ate a prosecution) is separate from the examining magistrate's authority to gather the proofs for trial, which in turn is separate from the trial court's authority to judge the defendant. In this framework, the judges would be usurping another official's function if they reviewed an OPJ's or a magistrate's determination on the necessity or desirability of a particular search or seizure. The judges of course must insure that the investigators observe the necessary legal formalities and may even hold them civilly and criminally responsible in cases of bad faith, fraud, or other serious fault. The court, however, may not otherwise question the investigator's discretionary determinations. This separation of functions analysis is confirmed by the scholarly criticism of the portion of the Isnard opinion that allowed the OPJ to select the dwellings to be searched under the general commission. The critics condemned on policy grounds the court's allowing a police officer rather than a magistrate to make such an important decision during the course of a judicial investigation, but they did not challenge the court's assumption that regardless of who made the decision to search the court would not subsequently review the decision on the merits.\footnote{203} 

D. Police Searches: The Trignol Decision

The absence of a probable cause requirement for forcible police searches conducted during an enquête de flagrance or a judicial investigation, combined with the leverage enjoyed by the police to obtain a subject's consent to a search and seizure in other contexts, contribute to the high incidence of police searches in France.\footnote{204} A more recent decision of the Cour de cassasion,\footnote{205} which for a judicial decision in France


204. The October, 1980, police investigation into the desecration of various Jewish monuments in Paris, which included the bombing of a synagogue resulting in four deaths, provides a particularly vivid example of this phenomenon. Operating in the context of an enquête de flagrance or under commissions from an examining magistrate, the police searched the dwellings of 60 or more extreme rightists in Paris. The basis for the searches was the police's belief (shared by the general public) that the perpetrators of the bombing were connected with several right-wing, anti-Semitic organizations which had recently experienced a minor resurgence in membership and public attention. The searches, however, did not produce any proof of the offenses under investigation. Indiscriminate police searches based on such scant evidence plainly are illegal in this country, even during investigations of equally serious offenses. The legality of these searches, however, was never questioned in France. In fact, the press (especially the left-wing press) demanded more vigorous police action against suspected right-wing terrorists.

received unprecedented attention in the popular press, further augmented police powers.

In that case, a tribunal correctionnel in Paris convicted and fined a motorist named Trignol for refusing to submit to a search of his car trunk by an OPJ who had stopped Trignol’s vehicle on the public highway. The incident that gave rise to the prosecution occurred in Paris on January 27, 1978. Four days previously, armed kidnappers had seized a prominent French industrialist several kilometers from the spot where Trignol subsequently was stopped. At the time Trignol was stopped, the kidnappers still held their victim captive in an unknown location, and the OPJ who stopped Trignol’s car was one of the hundreds of officers conducting the enquête de flagrance into the continuing offense of the industrialist’s kidnapping. The officer forced open the trunk of Trignol’s car after Trignol refused to open it with a key, but the search that followed proved unfruitful. The officer, on orders from his superiors in the Ministry of Justice, was conducting an operation colloquially known as a coup de poing (literally, “punch”) whereby thousands of motorists in Paris during the week after the kidnapping were stopped and subjected to identity checks and car searches. The Minister of the Interior, Michel Poniatowski, had deliberately adopted this strategy as a technique to combat terrorist violence. Trignol, for reasons that will be developed later, was one of the few (if not the only) French motorists to refuse to submit to the search.

To the consternation of the academic commentators, the cour d'appel of Paris again convicted Trignol on appeal (at his trial de novo) and the Cour de cassation rejected his appeal from the conviction. The reasoning of both courts was quite simple: In the context of an

206. The enquête de flagrance did not end until February 3, 1978, when the prosecutor requested an examining magistrate to open a judicial investigation into the still unsolved crime.

207. The prosecution plainly wished to make a test case out of Trignol’s refusal to open his trunk, and the manner in which it did so was questionable. A subject’s verbal objection or passive resistance to an OPJ’s proper search normally is not an offense, although the officer may use whatever force is necessary to accomplish the search. Trignol was prosecuted under article 4 of the Highway Code, which requires a motorist to submit to all police verifications concerning the condition of his vehicle. Commentators on the Trignol decision have argued forcefully that article 4 was intended to punish refusals to submit to safety and related inspections by the administrative police, not passive refusals to submit to investigatory searches by the judicial police. An officer functioning as part of the administrative police, unlike an OPJ conducting an enquête de flagrance, needs the criminal sanction in article 4 because he may not employ force to accomplish his objective. Chambon, L’ouverture forcée du coffre des véhicules automobiles, 1980 J.C.P. Doctrine I No. 2983.

enquête de flagrance, an OPJ may lawfully execute a search without the subject's consent, and by refusing to submit to the search, Trignol violated the special statutory provision under which he was prosecuted. The commentators were dismayed by the courts' failure to place any nontemporal limits on police searches during the course of an enquête de flagrance. It was beyond dispute that the police had properly opened an inquiry into the kidnapping and, given the ongoing nature of the offense, were properly continuing their investigation. The Cour de cassation's analysis in Trignol plainly suggests that an OPJ who is conducting a proper enquête de flagrance is authorized to search any individual, vehicle, or dwelling within his territorial jurisdiction provided he recites in his procès verbal that his purpose in searching was to uncover proofs of the offense. Moreover, nothing in the decision limits its applicability to the investigation of offenses like an ongoing kidnapping where broad search powers appear justifiable. Trignol thus alerted French jurists to what they should have known all along: police powers during an enquête de flagrance are extremely broad.

Trignol's critics have argued that the courts must protect individual liberty by further limiting police searches during an enquête de flagrance. The statutory materials at hand, however, are not well suited for that task. Although the reference in article 56 to persons who "appear" to have participated in any offense or to possess seizable evidence provides a potential limitation, reliance on that section would require the courts to determine whether appearances justified the policing action. Perhaps recognizing the difficulties with such an approach, the critics instead have chosen to argue that, under the definition of a "flagrant" offense in article 53 of the Code, an external sign of the offense is required not only to open an enquête de flagrance but also to execute a search during an inquiry already opened. This argument may be more appealing to French jurists because it focuses on the search's regularity. But it appears to be inconsistent with the Code's formalistic approach in that other aspects of the enquête de flagrance (e.g., the questioning of a witness) may continue in the absence of an external sign once the police properly have opened the inquiry.

209. See supra note 207. The statutory provision was "special" because it was limited to vehicle searches. Thus, a homeowner's refusal to assist an OPJ in a dwelling search by unlocking the door is not an offense. The judicial police may, of course, break down the door if necessary to gain entrance.


211. See supra note 210.
E. The Intervention of the Constitutional Council

The failure of the Code and the regular courts effectively to limit investigatory searches has encouraged a resort to constitutional arguments for protecting individual rights, but it remains to be seen whether the recent judicial recognition in France of the individual's constitutional rights will provide a significant check. Trignol had based his refusal to open his automobile trunk on a recent decision by the French Constitutional Council (the Conseil constitutionnel) declaring unconstitutional a law adopted by the Parliament that authorized an officer or agent of the judicial police to search any vehicle on the public highway.212 The Court held that the "breadth" of the power to search that the law conferred on the police violated the constitutional right to individual liberty. The law in effect authorized almost every police officer in France213 to search any vehicle on the public highway for any reason whatever or for no reason at all. The only limitation in the law was the requirement that the search take place in the presence of the owner or driver of the vehicle. Trignol, a professor who was familiar with the Constitutional Council's decision, believed that the operation coup de poing involved the same arbitrary, random searches condemned by that court.214 He refused to open his trunk on that basis and argued in his defense that he could not be convicted for refusing to submit to an unconstitutional search.

To understand the regular (i.e., the nonconstitutional) courts' rejection of Trignol's argument and the limited effect that the newly recognized constitutional rights of the individual have had on the official inquiry model, it is necessary to describe briefly the judicial review of statutes in France for constitutionality.215 The French revolutionary tradition has always recognized the sovereignty of the law (i.e., statutory law). Constitutional texts such as the Declaration of the Rights of Man and of the Citizen of 1789 were intended to inspire the people and

213. The power to search was not limited to OPJs but also was conferred on a broader class of agents de la police judiciaire who, unlike OPJs, normally lack coercive powers. Most members of the national police and of the gendarmerie with more than one or two year's experience are agents de la police judiciaire.
to guide the legislature but were not considered to be judicially enforceable. Fear of government by judges led French Republicans to deny the regular courts the authority to review the legality of executive or legislative action. Thus, French courts traditionally could not declare a statute unconstitutional.

The 1958 Constitution which founded the Fifth Republic broke with that tradition by establishing a separate Constitutional Council. That body's primary function was to protect the autonomous law-making powers that the new Constitution conferred on the executive from Parliamentary infringements.\(^2\) The Council was to perform this function by determining the constitutionality of a law passed by Parliament prior to its promulgation by the President of the Republic. For ordinary laws, only the President of the Republic, the Prime Minister, or the Presidents of the National Assembly or Senate could invoke the jurisdiction of the Council.

The Council performed its primary function of protecting the executive from legislative encroachments in relative calm until 1971 when for the first time it struck down a law because the law violated an individual constitutional right (in this case the liberty of association).\(^2\) Although the decision recognized the enforceability of a constitutional right against the legislature, the Council acted not at the behest of an individual who wished to exercise the right, but at the request of the President of the Senate who had opposed the law's enactment. In the years that followed, the Council held that other individual rights mentioned in the Preamble to the Constitution of 1958 were enforceable against the legislature.\(^2\)

The Council's role expanded further with the adoption in 1974 of an amendment to the Constitution which allowed sixty Deputies or sixty Senators to invoke the Council's jurisdiction to determine whether a law conformed to the Constitution. This change allowed the opposition to challenge the constitutionality of allegedly repressive legislation sponsored by the government.\(^2\)


The Preamble to the Constitution of 1958 in turn adopted by reference the Preamble to the Constitution of 1946 and the Declaration of the Rights of Man and of the Citizen. *Id.*

\(^2\) By American standards, the Council's body of constitutional law is still quite undeveloped. The Council has had a limited number of opportunities to render decisions and has had difficulty determining which constitutional provisions are judicially enforceable. Further interpretative difficulties arise from the recognition in the Preamble to the Constitution of 1946 of the vague category of "Fundamental Principles Recognized by the Laws of the Republic," which, once identified by the Council, are enforceable against the legislature.
The Constitutional Council's 1977 decision declaring unconstitutional the law authorizing unlimited vehicle searches was one of the most striking examples of the Council's new role as a protector of individual liberties. At the opposition's behest, the Council struck down a major piece of legislation sponsored by the governmental majority as part of its program to repress crime. The majority's acceptance of this defeat demonstrated that judicial review of legislation for constitutionality has become an accepted part of French political life. The presence of this check on the legislature nevertheless is surprising to many French jurists committed to the Republican tradition. It was only in the course of its functioning over the years that the Council resolved the initial ambiguity in the constitutional text whether the Council is simply a super-legislature or is really a judicial body. The members of the Council have earned a reputation as judges by acting like judges in hearing legal arguments and in rendering reasoned decisions.

The limited impact of the Constitutional Council's decision on vehicular searches derives not from the newness of the Council's approach or from doubts about the Council's legitimacy but from the Council's jurisdiction as a court of revision. Although the Council may declare a new law unconstitutional prior to its promulgation, neither a public official nor an affected private individual may invoke the Council's jurisdiction to determine the constitutionality of a law once it has been promulgated by the President. Those laws therefore are invulnerable to constitutional challenge; there is no way private litigants may appeal from the regular courts to the Constitutional Council. Novel questions therefore arise when the regular courts are asked to apply statutory provisions, often promulgated before the existence of the Constitutional Council or before its adoption of an approach that protected individual liberties, the constitutionality of which is doubtful under the Council's more recent decisions.

The precedential effect of a decision of the Constitutional Council

---

Recently, the Council decided that the "rights of the defense" was a fundamental principle of constitutional stature and declared unconstitutional the articles in the law "Security and Liberty" that conferred discretionary authority on the president of the court to exclude summarily from a trial an avocat whose "attitude compromised the serenity of the proceedings." Philip, La décision sécurité et liberté des 19 et 20 janvier 1981, 1981 R.D.P. 651, 657-59, 682.

French jurists have been surprisingly gentle in their criticism of the Council's work. The widely cited biannual commentaries by Louis Favoreu and Loic Philip in the Revue du droit public are intended primarily to assist the Council in developing a body of constitutional law. For a more critical appraisal, see Logchak, Le conseil constitutionnel, protecteur des libertés publiques? 1980 POUVOIRS 7-15.


can be viewed either restrictively or broadly. Article 62 of the Constitution provides that the "decisions" of the Council are binding on public officials and on all administrative and judicial authorities. The binding effect plainly covers the *dispositif* portion of the Council's decision (i.e., the Council's declaration or judgment that the particular law before it is unconstitutional), and, under the broad view, the decision's binding effect extends also to the Council's *motif* or reasoning (e.g., the breadth of the police power to search vehicles violated the motorist's constitutional right to individual liberty), which provides the necessary support for the disposition. If the restrictive view is the correct one, a decision of the Constitutional Council invalidates only the law before it. If the broad view is the correct one, the regular courts seemingly must refuse to apply other statutory provisions similar in scope to the law condemned by the Constitutional Council.

The supporters of the Constitutional Council have argued forcefully for the expansive approach.\(^\text{222}\) In support of their position, they have argued that the *Cour de cassation* recognizes the binding effect of both the dispositive portion of its judgments and the underlying reasoning.\(^\text{223}\) The *Cour de cassation*, however, has adopted this approach only for purposes of determining the law of the case (the binding effect of its judgment on the lower courts on the second remand of a case) or of applying principles of res judicata when new litigation arises between the parties, not for the purpose of fashioning a rule of precedent.\(^\text{224}\) The notion of a binding precedent is even more foreign to French law than the notion of judicial review of legislation; the French judges are not bound by what other judges have held in different cases even if the latter judges are their judicial superiors.\(^\text{225}\)

Given this background it is not surprising that the regular courts have refused to recognize the binding effect of the reasoning in the decisions of the Constitutional Council. In a 1974 decision, the *Cour de cassation* adopted the position that under the French Constitution the regular courts were bound by the law (i.e., the statute) and had to apply it even though the reasoning of a decision of the Constitutional Council

\(^{222}\) See generally F. Luchaire, Le conseil constitutionnel (1980).
\(^{223}\) Id. at 48–49.
\(^{225}\) French judges nevertheless are aware of prior decisions and strive to achieve uniformity in interpreting Code provisions. With the help of the commentators (and also of a computer data bank), they have developed in many areas well-established rules (*jurisprudence constante*). 1 J. Ghestin & G. Goubeaux, Traité de droit civil 312–14, 326–27 (1977).
would invalidate the law on constitutional grounds. This approach is troublesome because it permits the application of unconstitutional laws simply because no forum is available for challenging their constitutionality. For example, a 1975 decision of the Constitutional Council invalidated a law authorizing the trial of délits in a tribunal correctionnel before a single judge rather than a three-judge panel. Despite this decision, thousands of defendants are tried each year in a tribunal correctionnel before a single judge under a similar law enacted by Parliament in 1972 at the behest of the governmental majority. That law escaped review by the Constitutional Council because there was no way at that time for the opposition to invoke the Council's jurisdiction.

The Cour de cassation's approach notwithstanding, the tribunal correctionnel that initially convicted Trignol adopted the unusual step of distinguishing the proceeding before it from the vehicle searches condemned by the Constitutional Council. To do so, the court cited the Council's decision and paraphrased its language condemning the breadth of the searches authorized by Parliament outside the context of any official inquiry into an offense. The Constitutional Council had in fact noted that the police power to search under the law which it found unconstitutional did not depend on the commission of an offense. The tribunal correctionnel relied on this language to argue that the Constitutional Council's decision did not invalidate searches conducted during an official inquiry but only condemned random, general searches where the police were not investigating a particular offense. Thus, the decision did not provide a basis for challenging the constitutionality of the police power to search during an enquête de flagrance. Neither the cour d'appel nor the Cour de cassation in Trignol's case repeated this analysis, but in ruling that an OPJ properly could search Trignol's vehicle during an enquête de flagrance, they implicitly adopted the same reasoning.

The reasoning of the tribunal correctionnel has considerable appeal to a common-law lawyer accustomed to distinguishing precedents, especially precedents such as the Constitutional Council's invalidation of the vehicle search law that are a court's first venture into a new area of law. The French commentators were less favorably impressed and

228. 2 MERLE & VITU, supra note 39, at 592.
condemned the decisions of the nonconstitutional courts in *Trignon* for interpreting the statutory provisions on the authority of the police during an *enquête de flagrance* so broadly as to permit the same random, arbitrary searches condemned by the Constitutional Council. There is force to this argument, but ultimately it sweeps too far. As shown in this article, in many areas the judicial police or an examining magistrate enjoy broad investigatory powers unchecked by notions of probable cause or individual liberties. These powers derive from the official inquiry model and from the Code provisions formalizing that model without placing effective limits on it. The reasoning of the Constitutional Council, with its emphasis on individual liberties, is more consistent with the American approach, but to impose that approach on the French criminal justice system would be inconsistent with that system's structure. Perhaps the legislature should opt for those changes, but it is unrealistic to expect the regular courts to change the entire system on their own.

**CONCLUSION**

This study of the French criminal justice system has focused primarily on the balance achieved within the system between individual rights and state authority. The rise and fall of competing *politiques criminelles* or ideologies for combating crime has influenced the balance struck, but that balance has remained remarkably stable over time. French police, prosecutors, and examining magistrates have greater authority to detain, to interrogate, and to search than do American law enforcement officials; and individual Frenchmen have fewer rights, when confronted with assertions of investigatory authority, than persons in this country at the present time. On the other hand, the rights of the French criminal defendant at trial compare favorably with


231. A 1980 decision of the Constitutional Council accentuated the conflict between the constitutional rights recognized by the Council and the statutory provisions applied by the regular courts in criminal cases. Judgment of Jan. 9, 1980, Con. const., 1980 D.S. Jur. I 249 note J. Auby; Judgment of Jan. 9, 1980, Con. const., 1980 G.P. Jur. II 532 note L. Hamon. In that case, the Council held unconstitutional a statutory provision approved by the Parliament authorizing a seven-day administrative detention of aliens facing expulsion, on the grounds that it violated article 60 of the 1958 Constitution, which recognizes the judiciary as the guardian of individual liberty. At the same time the Council upheld a statutory provision authorizing a two-day administrative detention of aliens rejected at the frontier. This decision of the Constitutional Council provides a constitutional basis for challenging the police *garde à vue*. Once again, however, defendants before the regular courts who seek to challenge the *garde à vue* will encounter difficulties so long as those courts refuse to apply the Constitutional Council's individual rights model.
those of the American defendant. In particular, the court controls the disposition of the case, and the defendant is not subject to pressure from the prosecutor to forego his trial rights in order to secure more lenient punishment.\textsuperscript{232}

This article has criticized the scope of the state's investigatory authority in France and the usurpation of that formerly judicial power by the prosecutor and the police. The authority of the police (and of the examining magistrate) to detain individuals for purposes of investigation and to search without probable cause seems excessive from the perspective of effective law enforcement and harmful to the individual’s liberty. The widespread police practice of incommunicado interrogation of counselless suspects also appears to give the state too much of an advantage over the individual. On the other hand, the trial stage of the process has received less attention (and praise) in this article than many readers may think it deserves. But the trial does not play the same central role in France as it does in this country in those cases where the defendant denies his guilt. Although in France all cases go to trial, there is a certain element of anticlimax to the trial because the dossier usually shapes its course and determines its outcome. The rights enjoyed by the defendant at trial are substantial but are of lesser importance to the ordinary citizen than the more modest and often inadequate protection afforded individuals at the earlier investigatory stage.

For these reasons the balance struck by the American system seems to be the preferable one. Our system is not perfect, but neither is the French. Perhaps the best justification for studying the French system is that it gives us a perspective from which to appreciate the strengths of our own system.

\textsuperscript{232} The Socialists' victories in the elections of May and June, 1981, are unlikely to change the balance significantly. After more than a year's vacillation, the new Socialist government finally introduced legislation to repeal portions of the much-abused law “Security and Liberty.” \textit{Le Monde}, July 25-26, 1982, at 5. The legislation, which is likely to pass both houses of Parliament by the end of the year, primarily repeals the prior law's punishment provisions but retains largely intact the procedural provisions on identity checks and on the summary prosecution of \textit{délits}. The Socialists therefore have done very little so far to affect the basic characteristics of the system. While there is some talk of a more radical rewriting of the Code of Criminal Procedure to afford greater protection to the individual, the continued public concern over security, especially from terrorist attacks, and the government's focus on the country's economic crisis, make it unlikely that the Socialist Parliament will be active in this area.