

## THE INTERSECTION OF TWO SYSTEMS: AN AMERICAN ON TRIAL FOR AN AMERICAN MURDER IN THE FRENCH *COUR D'ASSISES*

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*This study discusses a murder case in France's trial court for the most serious crimes, the Cour d'assises. The case was highly unusual because the person on trial was an American, accused of having murdered other Americans in the United States. For reasons given below, cases in which crimes committed in the United States are tried abroad are likely to become more common. This study describes how such a case proceeds in France, including some of the difficulties that can arise from combining two investigations controlled by very different systems of procedure. An advice section is given for American prosecutors and defense advisers involved in such cases. More broadly, the study sheds light on the differences between the United States and continental legal systems, in part building on existing work in the area of comparative criminal procedure and drawing on French sources. The study emphasizes the effects of judicial control over trial presentation of oral testimony, especially that of the defendant and experts. Drawbacks to the French approach to oral testimony include less vigorous probing of testimony by the parties. Advantages include allowing fact-finders to know more information; permitting a more flexible order of presentation; and fostering dignitary values by letting wit-*

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*nesses speak in their natural voices and by achieving a deeper understanding of the defendant as a unique human being.*

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## I. INTRODUCTION\*\*

*Monsieur le président* (the presiding judge), resplendent in a red robe with ermine trim, was running through a chronology from the dossier in a monotone. As he finished, he took off his glasses and looked searchingly at the defendant. “Monsieur Gaitaud,” he intoned, “you can have any defense you want, but there is a price. If we think you are guilty and you say you are not, we’re going to think you’re a liar and not capable of taking responsibility for your actions—that you’re dangerous. You’re now facing the grandmother of Malinda [one of the victims]. You’ve also been living with the spirits of the young woman, Susan, who was twenty-four years old, and the little girl, Malinda, three years old, and also the little baby in Susan’s womb, who was only about fifteen days from being born—the baby who would have been your son. I’ve seen pictures of the fetus, and it was a real baby, with hands and fingers—Monsieur Gaitaud, now is the time for truth.”

“Yes,” said Thierry Gaitaud.

“Did you kill Susan and Malinda?”

Around the courtroom, everyone was listening with rapt attention. No one seemed the least bit surprised.

“Non, Monsieur le président.” Gaitaud said this in his usual flat tone, with only slightly flushed cheeks to suggest indignation.

*Monsieur le président* took a deep breath and asked Gaitaud to describe what happened.

Thierry Gaitaud’s murder trial before the *Cour d’assises* in Paris in June 1999 was in some respects unusual. Gaitaud is an American citizen. In June 1992, the bodies of Susan and Malinda Belasco, both Americans, were found in Susan’s car in Gaitaud’s San Diego garage. Gaitaud fled immediately, drifted around Europe and Africa for two years, and ultimately was arrested in France under an international arrest warrant. California asked for his extradition, but France responded that Gaitaud was a French citizen—thanks to his parents, who were both French but had long lived in the United States. The United States’ extradition treaty with France expressly permits France to refuse to extradite its own citizens, and France exercised that authority in Gaitaud’s case.<sup>1</sup> France has also been reluctant to extradite suspects who may face the death pen-

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\*\* As Professor Lettow Lerner explains, French courts do not keep written transcripts. Therefore all descriptions and translations of the dialogue come from her notes. Professor Lettow Lerner is able to describe the Gaitaud trial and French courtroom procedures so well because the defense invited her to participate as a witness/consultant in order to help explain the American criminal justice system and methods of investigation. She remained in France, and in the courtroom, throughout the trial. See *infra* note 5.

1. Treaty Between the United States of America and France for the Extradition of Criminals, Jan. 6, 1909, U.S.-Fr., 37 Stat. 1526, 1530; see also Supplementary Convention to the Extradition Convention of January 6, 1909 Between the United States of America and France, Feb. 12–June 11, 1970, U.S.-Fr., 22 U.S.T. 407, 409.

alty.<sup>2</sup> (The Assistant District Attorney for San Diego stated decisively that the prosecution would have asked for the death penalty in this case had it been tried in California.<sup>3</sup>)

France decided that it had jurisdiction to try Gaitaud in Paris, despite the fact that the defendant and the victims were American citizens, and the murders occurred in San Diego. France is well-known for having expansive ideas of its civil jurisdiction in international cases under Article 14 of the French Civil Code. Criminal jurisdiction is no exception; Article 689 of the Code of Criminal Procedure gives French courts jurisdiction where a crime is committed *against* a French citizen by anyone anywhere in the world, and also *by* a French citizen against anyone anywhere in the world.<sup>4</sup> In France, as in most legal systems, once a court determines it has criminal jurisdiction, it follows its own procedural and substantive law. Gaitaud's trial therefore went forward in Paris in June 1999 under French law, with the San Diego D.A.'s office, police department, and medical examiner's office all well represented. I was present as a witness, at the request of defense counsel, to testify about American criminal procedure.<sup>5</sup>

Gaitaud's trial is important for several reasons. First, it shows how a case plays out when other countries are willing to assert jurisdiction over a crime committed in the United States. The number of these sorts of cases is likely to rise. Countries are adopting broader bases of crimi-

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2. French courts, for example, required as a condition of Ira Einhorn's extradition that he not face the death penalty for the murder of his girlfriend in 1977 in Philadelphia. Hope Yen, *U.S. Fugitive Relaxed on Extradition*, A.P. ONLINE, Nov. 9, 1999, at 1999 WL 28137672.

3. See Greg Moran, *Slaying Suspect in Vista Case Held in France*, SAN DIEGO UNION TRIB., Feb. 1, 1994, available at 1994 WL 5459159.

4. The old Article 689 and 689-1 used to make these bases of jurisdiction explicit; the current version of article 689 (effective 1994) refers to Book 1 of the Criminal Code, which lays out this jurisdiction. CODE DE PROCÉDURE PÉNALE [C. PR. PÉN] art. 689 & 689-91; CODE PÉNALE [C. PÉN.] art. 113-6 & 113-7 (Fr.). Jurisdiction over the crimes committed abroad by one's own nationals is more common. This is known as the "nationality principle." *E.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) (1987) ("a state has jurisdiction to prescribe law with respect to . . . the activities, interests, status, or relations of nationals outside as well as within its territory"); *id.* § 421(2)(d) ("a state's exercise of jurisdiction to adjudicate with respect to a person or thing is reasonable if, at the time jurisdiction is asserted . . . the person . . . is a national of the state"). United States courts only have jurisdiction to try criminal cases if the act in question is a crime under U.S. law (e.g., if a U.S. law makes it a crime for a U.S. national to violate the narcotics law of a foreign state). *Id.* § 422(1) reporter's note 3. Jurisdiction over crimes committed against a state's nationals—called "the protective principle"—is more limited. *Id.* § 402(3). The Omnibus Diplomatic Security Act of 1986, 18 U.S.C. § 2331 (1994), for example, provides for the domestic prosecution of persons who kill U.S. nationals abroad when the offense was intended to coerce, intimidate, or retaliate against a government or a civilian population.

5. One of the defense lawyers in Gaitaud's case contacted me about coming to trial to help clarify some issues about American criminal procedure. He requested I be put on the witness list, and the presiding judge approved. Witnesses in France are not designated as either a "defense" or "prosecution" witness. I was sent an official summons by the *Cour d'assises*, and was partly compensated by the French government, although I was working largely pro bono. Officially, both the San Diego Assistant District Attorney and I were fact witnesses, not experts. We were, however, accorded certain privileges that other witnesses were not, such as being seated at a table in front of the bar throughout the trial.

nal jurisdiction, covering crimes committed outside their territory.<sup>6</sup> Dual or even triple nationality is likely to become more common in our age of globalization (*mondialisation* as the French call it).<sup>7</sup> Other countries are increasingly uncomfortable with the death penalty, and so are more likely to refuse extradition to the United States in murder cases and to try such cases themselves.<sup>8</sup> Also, as international crime rings grow, multinational investigations and prosecutions are likely to increase.<sup>9</sup> The

6. See *supra* note 4 (U.S. and French examples); see also Non-Smoker's Health Act, R.S.C., ch. 15, § 12 (1985) (Can.) (extending jurisdiction for offenses committed outside of Canada); Sex Offender's Act, 1997, c. 51, pt. II, § 7 (Eng.) (extending jurisdiction to sex offenses committed outside territory of U.K.).

7. These claims of dual nationality may be based on the nationality of a parent, as in Gitaud's case, and reflect little previous contact with the country to which a suspect fled. Samuel Sheinbein, for example, fled to Israel after a murder and claimed Israeli citizenship based on his father's having been born in British-ruled Palestine in 1944, before the state of Israel was founded. Ethan Bronner, *Israelis Defend Plea Bargain with American*, N.Y. TIMES ABSTRACTS, Aug. 26, 1999, at A13. Israeli courts upheld his claim of citizenship, and he pled guilty there. *Id.* However, because of outrage over the case and U.S. concern, Israel has since amended its laws to allow extradition of nonresidents such as Sheinbein, and even residents as long as they serve their sentences in Israel. Matthew Kalman, *Israel Amends Law, Lets Nonresidents Be Extradited, Won't Apply to U.S. Teenager Who Fled to Avoid Murder Prosecution in Maryland*, U.S.A. TODAY, Apr. 20, 1999, at A11. Other laws and treaties prohibiting extradition of nationals, such as the U.S.-French treaty, remain. *International Law: The Importance of Extradition*, Hearing Before the Subcomm. on Criminal Justice, Drug Policy, and Human Resources of the House Comm. on Government Reform, 106th Cong. 14 (1999), at 1999 WL 16947714 [hereinafter *International Law*] (testimony of Jamison S. Borek noting that many countries are prohibited by their laws from extraditing their own nationals).

8. *International Law*, *supra* note 7, at 15 (State Department official testifying that many countries may decide not to extradite suspects unless they receive assurances that the death penalty will not be imposed). Last April, the U.N. Commission on Human Rights approved a resolution calling for a moratorium on executions and urging states that have received requests for extradition on a capital charge to reserve the right to refuse to extradite if they do not receive assurances that capital punishment will not be carried out. Daniel Leblanc, *U.K., Austria Help Broker Accord on Extradition*, GLOBE & MAIL, Apr. 24, 1999, at A15; *U.N. Panel Seeks Halt to Executions*, A.P. ONLINE, Apr. 28, 1999, at 1999 WL 17061619.

9. See Presidential Decision Directive 42, *International Organized Crime* (Oct. 21, 1995) (ordering federal agencies to increase and integrate their efforts against international crime syndicates and money laundering), available at <http://www.fas.org/index.html>; *International Crime Control Strategy* V.C.1 & 3 (released by the White House May 12, 1998) (noting increase in extradition requests by the U.S. from 1,672 in 1990 to 2,894 in 1996, partly because of the ease of modern travel; explaining goal of promoting cooperation with foreign law enforcement authorities through Mutual Legal Assistance Treaties (MLATs) designed to secure witness statements and testimony, physical evidence, and fruits of crimes from abroad), available at <http://www.fas.org/index.html>; White House Report Submitted in accordance with the Goldwater-Nichols Defense Department Reorganization Act of 1986, *A National Security Strategy for a New Century* 15-19 (Oct. 1998) (recognizing great threat to U.S. security and commerce posed by international organized crime and outlining International Crime Control Strategy including improving bilateral cooperation with foreign governments and law enforcement authorities), available at <http://www.fas.org/index.html>; ETHAN A. NADELMANN, COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT 467-68 (1993) (arguing that cooperation between U.S. and foreign law enforcement agencies has resulted in melting of the two systems of criminal justice); U.S. DEP'T OF STATE, BUREAU FOR INTERNATIONAL NARCOTICS AND LAW ENFORCEMENT AFFAIRS, INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT 44 (1997) (describing joint enforcement efforts); William J. Olson, *International Organized Crime: The Silent Threat to Sovereignty*, 21 FLETCHER F. WORLD AFF., Fall 1997, at 65 (arguing that the problem of international organized crime is so severe as to threaten the political order of many countries); Bruce Zagaris, *U.S. International Cooperation Against Transnational Organized Crime*, 44 WAYNE L. REV. 1401, 1411-19 (1998) (discussing joint law enforcement efforts through the use of liaison officers and MLATs to help smooth cultural and legal differences). There is even a new legal journal entitled *Transnational Or-*

*Gaitaud* case shows how a multinational case proceeds—how American and French law enforcement overlap, and the differences in investigative and trial procedure between the two. Significant problems can arise for both the criminal defendant and the prosecution because of the interplay of the two systems. These will be discussed throughout the narrative, and also in an advice section at the end.

Second, and more broadly, the *Gaitaud* case throws into stark relief differences between the American adversarial criminal justice system and the French inquisitorial system.<sup>10</sup> We are fortunately in the midst of a renaissance in comparative criminal procedure;<sup>11</sup> this study draws on the comparative literature as well as on French sources. The *Gaitaud* trial provides concrete examples that help us to understand how the principles of continental procedure work in practice. The one difficulty with the work that has been done in comparative criminal procedure thus far is that it tends to lay down principles divorced from the context of

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ganized Crime. TRANSNATIONAL ORGANIZED CRIME, available at <http://www.frankcass.com/jnls/toc.htm> (last updated May 16, 2001).

10. There has been an extensive debate in the literature about the use of the terms “adversarial” and “inquisitorial,” with commentators pointing out that most systems use some combination of the two approaches. *E.g.*, Craig M. Bradley, *Overview*, CRIMINAL PROCEDURE: A WORLDWIDE STUDY, at xix–xxi (Craig M. Bradley ed., 1999) [hereinafter Bradley, *Overview*]; Craig M. Bradley, *The Convergence of the Continental and the Common Law Model of Criminal Procedure*, 7 CRIM. L.F. 471 (1996) (book review); William T. Pizzi, *The American “Adversary System”?*, 100 W. VA. L. REV. 847 (1998). While it is true that no system is purely one or the other, the fact remains that U.S. criminal procedure is far over on the adversarial end of the continuum, and France toward the inquisitorial end. Pizzi himself has acknowledged the extreme partisanship of American advocacy. William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT’L L. 37, 44 (1996). A good definition of the terms “adversarial” and “inquisitorial” can also be found in MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 3–6 (1986).

11. Interest in comparative criminal procedure waxes and wanes over the years. In the 1970s and early 1980s, there was an explosion of interest that then died down, but has recently been revived. In one of the first articles of the “new wave,” Richard Frase compiled an extensive list of citations to the first wave. Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 542 nn.1–5 & 7–9 (1990) [hereinafter Frase, *Comparative Criminal Justice*]. I cite to this literature as it is relevant. At one time, Frase himself focused mostly on pretrial procedures and sentencing. He devoted a small section to trial procedure in an appendix at the end. *Id.* at 673–82. Other helpful pieces in the new wave include: Craig M. Bradley, *The Emerging International Consensus as to Criminal Procedure Rules*, 14 MICH. J. INT’L L. 171 (1993); Richard S. Frase & Thomas Weigend, *German Criminal Procedure as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. INT’L & COMP. L. REV. 317 (1995); William S. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE J. INT’L L. 1 (1992); Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403 (1992) [hereinafter Van Kessel, *Adversary Excesses*]; Gordon Van Kessel, *European Perspectives on the Accused as a Source of Testimonial Evidence*, 100 W. VA. L. REV. 799 (1998) [hereinafter Van Kessel, *European Perspectives*] (part of a symposium entitled “Is There a European Advantage in Criminal Procedure?”). Larger works include CRIMINAL PROCEDURE: A WORLDWIDE STUDY (Craig M. Bradley ed., 1999); Bradley’s comprehensive and detailed book is likely to come into widespread use as interest in offering courses on comparative criminal procedure grows. William Pizzi has recently written a book aimed at a more general audience, criticizing American criminal procedure from a comparative viewpoint. WILLIAM T. PIZZI, *TRIALS WITHOUT TRUTH* (1999). His proposal for reform, in particular, should spark much-needed debate.

particular trials.<sup>12</sup> This study addresses this gap. This contextual approach helps bring the principles to life and highlights differences with the American system, differences that were particularly salient in this trial. The very atypicality of this trial brought out the contrasts. There were two criminal investigations of the same case, and often American and French experts testified on the same points. American and French expectations of the trial were poles apart. It is especially important to grasp these different expectations now, when a permanent International Court of Justice is on the horizon and an international system of procedure must be worked out.<sup>13</sup> This will inevitably involve compromises between proponents of the two systems.

The proceedings in the *Cour d'assises* highlighted the consequences of a fundamental difference in the two legal systems: party control versus judicial control of fact investigation and presentation of evidence. The word "inquisitorial" is pejorative to most Americans, but it should be borne in mind that the word simply refers to an official inquiry. In inquisitorial systems the fact-finder inquires into the circumstances of the case, instead of having others present those circumstances to him or her. The use of official inquiry implies a greater reliance on government officials, particularly judges. Supporters of adversarial systems are more distrustful of government power, including judicial power, fearing that it

12. The work of Bron McKillop of the University of Sydney has begun to correct this problem. See Bron McKillop, *Anatomy of a French Murder Case*, 45 AM. J. COMP. L. 527 (1997) [hereinafter McKillop, *Anatomy*] (describing the proceedings in a standard French murder case); Bron McKillop, *Readings and Hearings in French Criminal Justice: Five Cases in the Tribunal Correctionnel*, 46 AM. J. COMP. L. 757 (1998). The differences between the standard murder case McKillop describes and the *Gataud* case are instructive and will be noted throughout the text.

13. See Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (adopted July 17, 1998 at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court), available at <http://www.un.org/icc> (Jan. 11, 2001); Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR. J. INT'L L. 144 (1999) (analysis and endorsement of the proposed International Criminal Court); Danesh Sarooshi, *The Statute of the International Criminal Court*, 48 INT'L & COMP. L.Q. 387 (1999); Ruth Wedgwood, *The International Criminal Court: An American View*, 10 EUR. J. INT'L L. 93 (1999) (critique of the Rome Statute of International Criminal Court). So far, commentary concerning the ICC has focused on jurisdiction and substantive law, not investigative and trial procedure, although there are important procedural questions to be addressed. The International Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR) have had to resolve issues of blending procedural systems. See Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT'L L. 57, 80-81 (1999) [hereinafter Murphy, *Progress and Jurisprudence*]. A recent U.N. report prepared by an independent commission suggested that procedures in these courts should be revamped and that judges should take "a more interventionist role" to speed up proceedings. See Jim Wurst, *Rights: Top Judge Seeks to Speed Up Yugoslav War Crimes Trials*, INTER PRESS SERVICE, Feb. 4, 2000, available at 2000 WL 4089718. The new president of the ICTY, Claude Jorda, a former president of the French *Cour d'assises*, is said to agree with these conclusions. *Id.* (Jorda's predecessor was former U.S. federal judge Gabrielle Kirk McDonald.) Similar issues will arise for ad hoc courts dealing with particular international incidents. See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L L. 161, 174-79 (1999) (discussing procedural compromises associated with potential trial of Libyan Lockerbie bombing suspects by an ad hoc court in the Netherlands). The ad hoc approach blending procedural systems may be taken in other cases, for example if Afghanistan allows extradition of suspected terrorist Osama bin Laden.

breeds corruption, arrogance, and incompetence.<sup>14</sup> They prefer the parties to rely on their own resources to investigate and present evidence.<sup>15</sup> The French are not blind to the problems that can arise in having judges act as the principal investigators and inquirers at trial, and the French system tries to limit these problems in ways that will be highlighted throughout the piece.

One of the most striking results of judicial control seen in the *Gaitaud* case was the very different approach to oral testimony compared to that in the United States' system. The inquiry by the fact-finder has the effect of allowing witnesses—including the defendant—to speak freely, in their natural voices. The French word for trial session—*débats*—suggests this free speech; it means, among other things, debate or discussion. And, indeed, the trial in the *Cour d'assises* resembled an ongoing discussion, directed by the presiding judge (*président*).<sup>16</sup> The presiding judge in the *Cour d'assises* is explicitly charged with maintaining the dignity and the efficiency of trial.<sup>17</sup> The two are viewed as closely linked, with a truth-seeking discussion as the goal.<sup>18</sup> Another important difference that permits witnesses to speak more freely in the French system is the lack of detailed rules limiting admissible evidence. The *président's* control in the *Cour d'assises*, combined with a lack of extensive evidence rules, leads to more narrative testimony and flexible debate, in contrast to our party-controlled, highly structured direct and cross-examination.

There are advantages and drawbacks to the French system of inquiry of witnesses, and these appeared in the *Gaitaud* case. Drawbacks include a reluctance to contest official authority—a reluctance that was marked at certain points in the trial. The advantages relate to informa-

14. These beliefs, as Tocqueville pointed out, run deep in American thought. See ALEXIS DE TOCQUEVILLE, *Public Officers Under the Rule of American Democracy*, in 1 DEMOCRACY IN AMERICA 203–05 (J.P. Mayer ed., George Lawrence trans., 1969) (1835).

15. See JOHN H. LANGBEIN, COMPARATIVE CRIMINAL PROCEDURE: GERMANY 150–51 (1977); Bradley, *Overview*, *supra* note 10, at xvi; Richard S. Frase, Review Essay, *The Search for the Whole Truth About American and European Criminal Justice*, 3 BUFF. CRIM. L. REV. 785, 818–20 (2000) [hereinafter Frase, *The Search for the Whole Truth*]. Mirjan Damaška has explored the greater levels of trust in government officials shown by societies that have inquisitorial systems as opposed to those with adversarial systems. See generally DAMAŠKA, *supra* note 10, chs. 4 & 5. Differences in procedure tend to be connected, he argues, with different overall concepts of government. *Id.* at 10–11. Inquisitorial systems are linked with a desire to have the government find the truth, whereas adversarial systems are linked with a desire to have the government settle disputes among private parties. *Id.* at 3.

16. The heading of a section in the French Code of Criminal Procedure describing trial in the *Cour d'assises* is entitled, “On the Production and Discussion of Evidence.” C. PR. PÉN art. 323 et seq. (heading) (emphasis added).

17. See C. PR. PÉN. art. 309 (“The president has control over the courtroom and the direction of the trial. He shall reject everything that tends to compromise the trial’s dignity or to prolong it without producing greater certainty in the results.”).

18. Maintaining dignity, in French jurisprudence, requires that the presiding judge not allow questions to be put to witnesses that distract attention from the issues before the court and impede efficiency. C. PR. PÉN. art. 309(8). Dignity at trial is an important concept in French law generally. Under the Code of Civil Procedure, all people present at trial must behave with dignity and maintain the respect due to the court. See NOUVEAU CODE DE PROCEDURE CIVILE [N.C.P.C.] art. 439 (Fr.).



tion-gathering and dignitary values. Much information is known to the fact-finders: there are not so many exclusionary rules of evidence, and witnesses are often more forthcoming with information when they are not tightly controlled by the parties. There is also a dignitary value in allowing witnesses to speak in their natural voices. Most importantly, the defendant speaks and speaks often. In the American adversarial system, the norms of party control of trial and of protecting a zone of privacy around the defendant prevent this inquiry.<sup>19</sup> French views of what is due the defendant are different, and stress not *freedom from* interference but rather *freedom to* be known.<sup>20</sup> This emphasis is particularly evident in the phase of the trial known as the “personality,” where the defendant’s life history and psychology are explored.<sup>21</sup> This exploration helps ensure that the defendant is not a faceless offender to the fact-finders, but rather a unique human being with circumstances and motivations of his own.<sup>22</sup>

This study begins in part II with an overview of the *Cour d’assises*, followed by a brief account of French investigative procedure in part III, which highlights the judicial role. Part IV discusses the courtroom and personnel of the court. This section emphasizes the different types of French judicial officers, with their forms of training and career incentives, and the ways in which they act as backstops correcting other judges’ mistakes. Part IV also explores the differences between French and American juries. Part V describes the trial itself, with its two different phases of “personality” and “facts.” This section points out the differences between French judicial control and American party control, particularly respecting treatment of witnesses, and shows the interaction of two dissimilar forms of investigation and trial procedure. Enough of the evidence is described to allow the reader to draw his or her own con-

19. These norms affect other areas of U.S. law beyond criminal procedure. Jerry Mashaw has argued that individual dignity should be taken into account in administrative procedure as an important “process value” or “soft variable” apart from simple accuracy of result. Jerry L. Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication in Matthews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 48–52 (1976). His version of dignity includes the right to be heard, but he also emphasizes the importance of protecting “zones of privacy” around individuals. Jerry L. Mashaw, *Dignitary Process: A Political Psychology of Liberal Democratic Citizenship*, 39 U. FLA. L. REV. 433, 439–40 (1987); see also JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* (1985) (setting out a dignitary interests framework for administrative due process analysis).

20. These correspond with the categories of “negative liberty”—freedom from—and “positive liberty”—freedom to—that Isaiah Berlin described in his essay *Two Concepts of Liberty*. ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* (1969). The American criminal procedure regime generally adheres to the idea of negative liberty, emphasizing the defendant’s right to privacy and autonomy, his *freedom from* interference by the state. American procedure, for example, has protections designed to ensure that the defendant can remain silent at trial, free from government questioning. The French, in contrast, stress positive liberty: trial participants’ *freedom to* speak without artificial constraints and of the defendant to be known as a complete human being. *Id.* at 155, 160–62 (linking the desire to be known as an individual with positive liberty).

21. See *infra* Part V.B.

22. This idea is encapsulated in the French saying, “One judges the man, not his deeds” (*on juge l’homme, pas les faits*). *Introduction*, *THE FRENCH CODE OF CRIMINAL PROCEDURE*, at text accompanying note 151 (Gerald L. Kock & Richard S. Frase trans., 1988).

clusions about the correctness of the verdict. Part VI gives advice for Americans working on a case where a crime committed in America is tried in a civil law country. I consider the perspectives of both the defense and the prosecution. The conclusion, part VII, draws on observations made throughout the piece and comments on differences between American and French or inquisitorial procedure.

## II. OVERVIEW OF THE *COUR D'ASSISES*

The *Cour d'assises*, or Assize Court, was established shortly after the Revolution and is the only court in France to sit with a jury.<sup>23</sup> But this jury differs from its Anglo-American counterpart. The nine lay jurors sit together with three professional judges, deliberate with them, and vote with them.<sup>24</sup> Each vote has equal weight. A majority of eight is needed to convict, so that even if all three professional judges are convinced of guilt, a majority of the lay jurors must still agree.<sup>25</sup> The three professional judges consist of the presiding judge (the *président*) and two others, called *assesseurs*. The jurisdiction of the *Cour d'assises* is limited: only offenses for which the minimum punishment is ten years' imprisonment are tried there.<sup>26</sup> Most of the crimes tried in the *Cour d'assises* are murder, rape, and armed robbery; less common are kidnapping, counterfeiting, torture, crimes against humanity, and terrorism. (Lesser but still serious offenses—those for which the maximum punishment is ten years' imprisonment—are tried by the *Tribunal correctionnel*, which sits with three professional judges and no lay jurors.<sup>27</sup>)

In keeping with their judge-controlled system, the French do not place burdens of proof on the parties (as the American legal system does in saying the prosecution must prove its case “beyond a reasonable doubt”). Instead, fact-finders in the *Cour d'assises* are simply asked the question in the charge: “*Avez-vous une intime conviction?*”<sup>28</sup> This is a very difficult question to translate but might be rendered as “Are you

23. See *infra* Part IV.C.

24. C. PR. PÉN. arts. 296 (“The jury is formed of nine jurors when sitting in first resort and twelve jurors when sitting in appeal.”), 355 (“The magistrates and the jurors retire to the deliberation room. They cannot leave it until they have reached their decision.”), 356 (voting procedures).

25. *Id.* art. 359 (if sitting in appeal, ten, out of twelve, jurors must agree).

26. The French call such serious offenses *crimes*, which can loosely be translated as “felonies.” The *Cour d'assises* has exclusive jurisdiction to try *crimes*. Less serious offenses are called *délits* and petty offenses *contraventions*. For a list of the possible prison sentences for a felony conviction, see C. PÉN. art. 131-1 (prison sentences on the following scale: life, no more than 30 years, no more than 20 years, no more than 15 years).

27. In the least serious cases before the *Tribunal correctionnel*, one judge sits alone. The number of cases tried in the *Cours d'assises* in 1997, the latest year for which information is available, was 3,161 (of which 138 acquittals and 3,023 guilty verdicts). MINISTÈRE DE LA JUSTICE, ANNUAIRE STATISTIQUE DE LA JUSTICE, séries 1993–1997, at 101 (1999). For comparison, the number of cases tried in the *Tribunaux correctionnels* in 1997 was 403,885 (of which 21,279 acquittals and 382,606 guilty verdicts). *Id.* While the *Tribunal correctionnel* tries many more cases, they are of course less serious and that court does not have the same cultural significance for the French as the *Cour d'assises*.

28. See *infra* note 189 and accompanying text.

deeply, thoroughly convinced?" Sentencing is done by the entire panel, professional judges and lay jurors alike, voting by secret ballot for one of the possible prison sentences specified by law.<sup>29</sup> A straight majority (seven votes) is needed to impose a sentence; there are rules for arriving at a majority in case one is not achieved on the first ballot.<sup>30</sup> Eight votes are needed to impose the maximum sentence—in this case, life imprisonment.<sup>31</sup>

### III. INVESTIGATION AND CHARGING

The French have many checks before a case arrives in the *Cour d'assises* for trial. In contrast with the American system, French judges are heavily involved at all pretrial stages—the responsibilities of the prosecutor and defense counsel are much reduced. One of the most surprising things about the French criminal justice system, for an American, is the method of investigation. In serious criminal cases, investigation is done not by the parties but by a judge.<sup>32</sup> This judicial control means that defendants are not so dependent on their counsel for a good defense. An indigent defendant is not placed at such a disadvantage, having to rely on a poorly funded legal aid system. And a better-off defendant does not have to spend large amounts of money trying to get the best possible counsel. The system of course depends on having competent and conscientious (and more numerous) judicial officers.

Once a crime is committed, it is brought to the attention of the equivalent of the district attorney (the *procureur de la République*).<sup>33</sup> He or she is the head of the office that represents the government before the trial court of general jurisdiction (the *Tribunal de grande instance*, of which the *Tribunal correctionnel* is the criminal branch) of each geographic administrative division in France (*département*).<sup>34</sup> If the crime is sufficiently serious, and that includes all crimes that could be tried before the *Cour d'assises*, the *procureur de la République* requests a judicial investigation (*instruction judiciaire*).<sup>35</sup>

This request goes to a separate body of judges who are responsible for the charging process: the *Chambre de l'instruction* (until very recently known as the *Chambre d'accusation*).<sup>36</sup> Each panel of the *Cham-*

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29. C. PR. PÉN. art. 362 (discussing sentencing voting procedures).

30. *Id.*

31. *Id.* (effective 2001, if the court is sitting in appeal, ten votes are necessary); *see also supra* note 24 and accompanying text.

32. *See infra* note 39 on the relationship between the investigating judge and the police.

33. C. PR. PÉN. art. 40 (requiring immediate notification of *procureur de la République*).

34. *Id.* art. 39.

35. *See* C. PR. PÉN. arts. 51, 79, 80.

36. The change in name took effect on January 1, 2001. *See* loi du 15 juin 2000; circulaire du 11 décembre 2000. These can be found on the French Ministry of Justice's website, <http://www.justice.gouv.fr>. The change in name is part of a wide-ranging set of reforms to the French

*bre de l'instruction* is composed of three judges.<sup>37</sup> A panel of the *Chambre de l'instruction* appoints a special judge to investigate the case (the *juge d'instruction*). The investigating judge investigates the matters laid out in the prosecutor's request; within those bounds, he is required to look for both exculpatory and inculpatory evidence. He is broadly charged with pursuing all inquiries that he deems useful in discovering the truth (*la manifestation de la vérité*).<sup>38</sup> He directs the "judicial police" (*police judiciaire*) in gathering evidence and interviewing witnesses.<sup>39</sup> When witnesses are interviewed, sometimes the entire exchange—all questions and answers—is taken down in a verbatim transcript. However, verbatim transcripts were not taken in the Gaitaud case; the record was a summary, but there are elaborate procedures for verifying and correcting the summary.<sup>40</sup> The French system is quite different from the American system where witness statements are taken by the police, do not include the questions asked, often do not include exculpatory evidence, and are sometimes written up by the police and signed by the witness months after the interview.<sup>41</sup> (The check in our system is that the defense may attempt to interview witnesses before trial, and of course conduct cross-examination at trial.)

Most astonishing of all are the limitations on partisan evidence gathering. Both the prosecutor and defense counsel are forbidden to in-

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criminal justice system enacted by the legislature in 2000. In general, the reforms are aimed at strengthening the rights of the criminal defendant.

37. C. PR. PÉN. arts. 191.

38. See *id.* art. 81.

39. In France, direct judicial supervision of investigation is rare. Most criminal cases are investigated by the police under the supervision of the prosecutor. Frase, *Comparative Criminal Justice*, *supra* note 11, at 667 n.640; Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J. 240, 250-51 (1977); Van Kessel, *Adversary Excesses*, *supra* note 11, at 421-22. Even in serious cases where the investigating judge is in charge, often he or she delegates considerable power to the police. In particular, questioning of suspects is frequently delegated. K. W. Lidstone & T. L. Early, *Questioning Freedom; Detention for Questioning in France, Scotland, and England*, 31 INT'L & COMP. L.Q. 488, 490 (1982).

Other continental systems rely even less on the investigating judge. For example, Germany did away with the office of the investigating judge in 1975. Frase & Weigend, *supra* note 11, at 325. In theory, in Germany the public prosecutor handles investigation; in practice, except in homicide and a few other cases, the police investigate independently. *Id.* at 323; see also JOHN H. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* 11-12 (1977).

40. C. PR. PÉN. art. 102; see also *id.* arts. 106, 107 (elaborate procedures for verifying and correcting record). Frase suggests that generally the written record (*procès-verbal*) is not a verbatim transcript but simply includes the substance of the interrogation. Richard S. Frase, *France*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* 160 & n.125 (Craig M. Bradley ed., 1999) [hereinafter Frase, *France*] (citing G. STEFANI ET AL., *PROCÉDURE PÉNAL* ¶ 534 (16th ed. 1996)). Each page of the written record is signed by the investigating judge, the clerk of the court, and the witness. The witness is asked to read the record of accuracy.

41. Gordon Van Kessel, who was a prosecutor in San Francisco, reported that in his experience, many police reports of witness interviews are not even reviewed and checked for accuracy by witnesses. At trial, they often do not correspond to the witness' testimony, "to the delight of defense lawyers and the consternation of prosecutors." Letter from Gordon H. Van Kessel to Renée B. Lettow (Oct. 31, 2000) (on file with author).

interview nonparty witnesses;<sup>42</sup> in fact, defense counsel are disbarred if they do.<sup>43</sup> Therefore, witness coaching (or “preparation,” as we call it) is prohibited. The two sides may, however, suggest that the investigating judge interview certain witnesses, ask certain questions, and gather particular physical evidence and run tests on it.<sup>44</sup> If the investigating judge refuses, the prosecutor or defense counsel may appeal to the *Chambre de l’instruction*.<sup>45</sup>

A central feature of this system is the examination of the lead suspect, once one is identified. This is so important that it has its own name, the *mise en examen*.<sup>46</sup> Often, the suspect is examined several times. Thierry Gaitaud, for example, was questioned twice. As with every witness, there are elaborate procedures for checking the accuracy of the written report of these sessions.<sup>47</sup> At the first session, the investigating judge must tell the defendant the legal and factual basis of the offenses being investigated.<sup>48</sup> Great emphasis is placed on the presence of the defendant’s lawyer. If the defendant’s lawyer is present, the investigating judge proceeds with questioning. If the defendant does not yet have a lawyer, the investigating judge must advise the defendant of his right to choose a lawyer or to have one provided by the legal assistance service.<sup>49</sup> The defendant is next advised that he cannot be questioned immediately without his consent.<sup>50</sup> Consent to questioning cannot be given except in the presence of defendant’s lawyer. However, if the defendant wishes to give a statement at that time (without prompting or being questioned), it will be received by the investigating judge.<sup>51</sup> After this first session, the defendant may only be questioned in the presence of his lawyer, unless he waives his right or the lawyer does not appear. Defendant’s counsel receives five days notice before the examination and has the right to consult the dossier beforehand.<sup>52</sup> (After

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42. Only the investigating judge (or his or her deputed) are allowed to question witnesses. See C. PR. PÉN. arts. 101, 102.

43. The prosecutor is not a member of the bar and so cannot be disbarred. For a fascinating and recent account of French legal ethics, see JOHN LEUDSDORF, *MAN IN HIS ORIGINAL DIGNITY: LEGAL ETHICS IN FRANCE* (2001).

44. See C. PR. PÉN. art. 82 (prosecutor’s right to request that the investigating judge take actions); *id.* art. 82-1 (suspect’s and civil parties’ right to request that the investigating judge take actions); *id.* art. 156 (prosecutor’s, suspect’s, and civil parties’ right to request that the investigating judge appoint experts).

45. See *id.* art. 185 (prosecutor’s right to appeal decisions of the investigating judge); *id.* arts. 186 & 186-1 (suspect’s and civil parties’ right to appeal decisions of the investigating judge).

46. The recent rash of corruption trials of French politicians has caused some rethinking of the *mise en examen*. Édouard Balladur, a former prime minister, has even proposed that the *mise en examen* be eliminated altogether. It seems that politicians take notice when they feel the effects of a procedure directly.

47. See *supra* note 41 and accompanying text.

48. C. PR. PÉN. art. 116.

49. *Id.*

50. *Id.*

51. *Id.*

52. C. PR. PÉN. art. 114.

the first appearance before the investigating judge, the defendant need not be informed again of a right not to be questioned without consent; the presence of defendant's lawyer generally means the defendant will be continuously aware of this right.) The nature of the questioner, the careful record-keeping, and the presence of defendant's lawyer limit the questioner's ability to lie about the evidence against the suspect and hold out false hopes of leniency—rather common methods of interrogation in the United States.<sup>53</sup> A defendant cannot be legally compelled to speak during these examinations, or formally punished for refusing.<sup>54</sup> However, there is a strong expectation that defendant will answer questions, and ordinarily counsel urges the defendant to respond to questioning or at least to make a statement.

During Gaitaud's trial, a French policeman who had worked with the San Diego police noted that the investigating judge in France tries to get a deep understanding of the suspect's personality through these extensive interviews. He contrasted this with American investigators, who had in his view a much more superficial understanding of the suspect and "see things in black and white." It certainly is true that, in murder cases at least, the French seemed very concerned with knowing *why* a defendant did something, and not just what he did.

French judicial investigation has its drawbacks. A notable feature of the French criminal justice system is the length of time a suspect can be held while this investigation takes place. In cases of serious crime, delays are especially long. Gaitaud himself was held in custody for five years before trial, and this is not unusual in a murder case.<sup>55</sup> Periodically during recesses in Gaitaud's trial, people being held in preventive detention appeared with their lawyers to formally request that they be released. These included, for instance, two men suspected of armed robbery who already had been held for two-and-a-half years. The *président*,

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53. See DAVID SIMON, *HOMICIDE: A YEAR ON THE KILLING STREETS* 193–223 (1991); Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 873–74 (1995). For a proposal for interrogation in the United States similar to the French model and consistent with an historical interpretation of the Fifth Amendment, see Amar & Lettow, *supra*, at 898–900. Note that the French proceeding known as the *garde à vue* is different. When a suspect is taken into custody at the time of or just after a crime, there is a period not longer than forty-eight hours when he may be held and questioned by police. Because of recent statutory changes, there is now some provision for legal advice for the suspect during the *garde à vue*. C. PR. PÉN. arts. 63–65 (describing *garde à vue* procedures). Because Gaitaud was arrested long after the crime was committed, the procedures of the *garde à vue* did not apply to him. The procedures connected with the *garde à vue* were recently modified to strengthen the right of a detained person to be notified of his rights, particularly his right to counsel. The laws became effective January 1, 2001.

54. Frase, *France*, *supra* note 40, at 60–61.

55. In 1997, the latest year for which statistics are available, the average length of time between the date of the crime and the date of a decision in the *Cour d'assises* was 49.7 months, or slightly over four years. See ANNUAIRE STATISTIQUE DE LA JUSTICE, *supra* note 27, at 101 (showing a steady increase from 39.3 months in 1993). Of course, in some cases a suspect is not held in preventive detention immediately following the crime; he may have been arrested some time into the process of investigation. In contrast, the corresponding 1997 figure for the *Tribunal correctionnel* was 9.1 months. *Id.* at 103.

sitting with the two professional judges, read the court's decision. The court denied all of these requests for release; indeed, such requests are rarely granted. In the United States, preventive detention before trial can stretch for up to two years in some jurisdictions, but such a long detention is rare.<sup>56</sup> Walking into the office of a French investigating judge, one can see part of the reason why these delays might occur. Every possible surface, including the floor, is piled with paper; investigating judges often handle 100 cases at a time. It should be noted that, because the French lack a system of guilty pleas, some of these defendants may be obviously guilty but still have to wait for formal processing and trial.<sup>57</sup> Recently, as part of a set of significant reforms to the French criminal justice system, the National Assembly enacted reforms providing more procedural protections before a suspect can be held in preventive detention and limiting its duration.<sup>58</sup> The new regime is to be overseen by a new type of judge: the "judge of liberties and of detention" (*juge des libertés et de la détention*).<sup>59</sup> Unfortunately, little provision was made for staffing this position and judges are now under great workload pressure as a result.<sup>60</sup>

The investigating judge compiles all the information he collects in the dossier, a key feature of continental procedure.<sup>61</sup> If the investigating judge feels prosecution for a serious crime is warranted, he transfers the dossier to the office of the *procureur de la République*, who in turn gives it to the office of the *procureur général*.<sup>62</sup> The *procureur général*, who represents the government before the Court of Appeals (*Cour d'appel*), handles prosecution in the *Cour d'assises*. (His assistants are called *avocats généraux*.) The *procureur général* first presents the dossier to the *Chambre de l'instruction* with a recommendation for action.<sup>63</sup> A panel of the *Chambre de l'instruction*, composed of three fairly high-ranking

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56. This is simply a point about the *length* of pretrial detention, not *rates* of pretrial detention (that is, whether a suspect is likely to be held in pretrial detention at all). Richard Frase has convincingly argued that France has lower rates of pretrial detention than the United States for comparable cases. See Frase, *Comparative Criminal Justice*, *supra* note 11, at 599–610; Richard S. Frase, *Sentencing Laws and Practices in France*, 7 FED. SENTENCING REP. 275, 278 (1995); see also Richard S. Frase, *Sentencing in Germany and the United States: Comparing Apples with Apples* (unpublished paper) (finding Germany also has lower rates of pretrial detention than the United States for comparable crimes).

57. Another point that should be noted is that guilty defendants may well prefer pretrial over post-conviction confinement, because the former allows them more privileges, less forced work, and more access to their families.

58. See loi du 15 juin 2000; circulaire du 20 décembre 2000, at <http://www.justice.gouv.fr>.

59. *Id.*

60. According to one French judge, the work of the new "judge of liberties and detention" is often simply not being done, and judicial anger over being forced to take on these new duties contributed to judges in France recently going on strike. Conversation with Judge Camille Lignières, March 30, 2001.

61. See C. PR. PÉN. art. 81.

62. See *id.* art. 181 (the new law created some intermediate steps, but the transfer to the *procureur général* still occurs).

63. See *id.* art. 194.

judges, decides whether there is sufficient evidence to charge.<sup>64</sup> If they decide there is, then they issue the formal charge (*mise en accusation*) and transfer the case to the appropriate trial court.<sup>65</sup> Once the *Chambre de l'instruction* issues the formal charge, the whole process moves very quickly; trial usually occurs within a few weeks.

The French judicial involvement in investigation prevents a defendant from relying on his own resources or an underfunded public defender system to gather exculpatory evidence.<sup>66</sup> But in a case like Gaitaud's, the very different methods of investigation clash. Gaitaud had no American defense lawyers to gather evidence, and meanwhile the San Diego police were proceeding with a normal American investigation. It was up to the investigating judge to correct this situation, and his effort to do so is examined in part IV.C.3 below.

#### IV. COURTROOM AND PERSONNEL

##### A. *The Courthouse and Courtroom*

The courthouse and courtroom are imposing. Each *département* in France has its own *Cour d'assises*, and naturally the one in Paris is especially impressive. Together with the other courts, it is ensconced in the grand, severe *Palais de Justice*, a seventeenth century building behind a gilded iron gate on the *Ile de la Cité*. Its echoing stone hallways, with big black cylindrical heating stoves marching along the length, have names like "*Gallerie des Prisonniers*." Lawyers in black robes and white cravats sail along with clients. The courtroom itself, up a huge stone flight of stairs, is large and was redesigned in the nineteenth century, with heavy woodwork, green damask walls, and a painting of the coronation of the child Louis XIII.

The design of the *Cour d'assises* reflects a curious mixture of inquisitorial and adversarial features.<sup>67</sup> An inquisitorial court implies, in physical terms, a direct line of communication between the judge and witness, with that line as the courtroom's main axis. In contrast, an adversarial court implies a public duel between two equal parties—prosecution and defense—fought in a symmetrical courtroom with the judge as a mere referee above the fray.<sup>68</sup> The *Cour d'assises* incorporates elements of both these models.

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64. See *id.* arts. 191, 211.

65. See *id.* art. 214.

66. For the difficulties the defense faces in gathering evidence even in an ordinary American case, see PIZZI, TRIALS WITHOUT TRUTH, *supra* note 11, at 114; Frase, *The Search for the Whole Truth*, *supra* note 15, at 808–13.

67. For an account of how the design of the *Cour d'assises* in Paris reflects the aspirations of the French justice system, see KATHERINE FISCHER TAYLOR, IN THE THEATER OF CRIMINAL JUSTICE: THE PALAIS DE JUSTICE IN SECOND EMPIRE PARIS 6–9, 63–66 (1993).

68. *Id.* at 6–8.



As befits an inquisitorial courtroom, there is a direct line of communication between the fact-finders and the witness. The bench is high and wide. It accommodates the *président* in the center, the *assesseurs* to either side of him, and the lay jurors arranged on either side of them. All these sit at the same level, making a formidable array. The floor in front of the bench is entirely open, except for a microphone where witnesses go to testify, standing in the middle and looking up at the bench. There is no lectern or podium, and the witness feels very exposed to the direct inquiry of the inquisitorial judge. In American courts, in contrast, the witness stand is usually to one side of the judge.

But the courtroom of the *Cour d'assises* also has adversarial features. Like an Anglo-American courtroom, it is symmetrically divided. There are similar sets of benches along each of the side walls. The defendant sits along the right-hand wall on a bench raised off the floor. (He is screened from the bench by a glass shield and surrounded by two police officers at all times.) On a bench below him, at floor level, sit his counsel. But here the adversarial layout begins to break down. In a fully adversarial court, one would expect that the benches on the left, opposite the defendant and his counsel, would be occupied by the prosecutor. (This would be similar to the way the defense and prosecution have equal tables in front of the bench in an English or American court.) But this is not the case; the prosecutor does not sit directly opposite the defendant. Instead, members of the press sit on these benches facing the defendant. (During the nineteenth century these benches were occupied by the jury. Later the jury was moved up to the judges' bench.<sup>69</sup>) The prosecutor does indeed sit somewhat to the left more or less facing the defendant, but from a skewed vantage point: he actually sits at a small pulpit-like extension of the bench.<sup>70</sup> This is because he is a type of judge, as will be discussed below. The clerk of the court (the *greffier*, or in this case a female *greffière*) balances the prosecutor at the far right end of the bench, as befits her important role in assisting the president. There are a few benches for witnesses (where the San Diego Assistant D.A. and I sat throughout the trial), and then comes the bar, large and heavy, and rows of benches for the audience beyond that. Further increasing the perception of hierarchy, only the judges and jurors, the prosecutor, and the clerk of the court sit on chairs with backs—everyone else sits on hard benches.

The symmetrical layout of the courtroom thus suggests an adversarial mode that the placement of actors does not fully deliver; the prosecutor is treated more like an inquisitorial judge than an equal party. This disjunction carries into the procedures of the court as well. Some offi-

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69. *Id.* at 31.

70. The prosecutor has other privileges as well. Like the presiding judge, he has an office behind the courtroom, and robes in the robing room with the other judges. Defense counsel has no such office and must arrive at court already robed.

cials (especially the prosecutor) referred to the procedure of the *Cour d'assises* as "adversarial" or "accusatorial." And, indeed, the great reliance on oral testimony in the *Cour d'assises* is similar to our adversarial trials. Still, there was no doubt that the *président* dominated the proceedings. The power of the inquisitorial judge, made visible by his central position with an open floor in front of him, helps him to assert control over the courtroom and keep the lawyers in check. A drawing by Daumier brilliantly captures the unruly alternative, based on a French civil case. Two opposing lawyers are standing at perfectly symmetrical podiums; one is gesturing wildly at his opponent with his mouth open in a roar, the other wears a look of mixed disgust and wounded pride.<sup>71</sup> Despite the oral testimony and informal proceedings in the *Cour d'assises*, the inquisitorial presiding judge maintains the court's civility.

### B. Judges and Lawyers

Heightening the impression of formality and seriousness, a number of figures in the *Cour d'assises* besides the presiding judge wore robes. As mentioned before, *Monsieur le président* was magnificent in his scarlet and ermine, looking like a figure out of the coronation painting. This was no accident—his robe originated as a symbol of royal authority.<sup>72</sup> The prosecutor was the only other figure in the courtroom in red; he wore a red robe with a plain black lining. The *assesseurs*,<sup>73</sup> the clerk of the court, the bailiff (*huissier*) and defense counsel all appeared in black robes with white cravats. Defense counsel in the *Cour d'assises* wear a special strip of black fabric on their shoulder, tipped with white rabbit fur.

Defense lawyers in France are accorded considerable respect but do not carry the great responsibility that American defense lawyers do. (That responsibility falls on the presiding judge instead.) Members of the bar in France are given the title *maître*, literally "master"—a general title of respect that may also be applied, for example, to members of the French Academy. Their training consists of several years of formal study with the law faculty of a university (*cours de faculté*), followed by an apprenticeship-like period with practicing lawyers (*formation d'avocat*).<sup>74</sup>

71. See Honoré Daumier, *Une cause célèbre*, pen, crayon and watercolor, c. 1858–1862, reproduced in TAYLOR, *supra* note 67, at 7.

72. By tradition, the king gave each high-ranking judge his red robe as a hand-me-down and these judges "wore them at the king's funeral to [symbolize] the immortality of sovereignty." TAYLOR, *supra* note 67, at 33. Nevertheless, the *président* did not seem overcome by pomp and circumstance. The first time I saw him outside the courtroom in street clothes, he said I would not recognize him when he was not wearing his "animals."

73. *Assesseurs* are the other two judges besides *Monsieur le président*.

74. Entry into the bar requires the degree of *maîtrise en droit*, which is awarded after four years of study in a university. (French students begin their law studies immediately after graduating from secondary school and passing the *baccalauréat*.) Students must then pass an exam and spend a year receiving practical training in a Regional Center for Professional Development (*Centre régional de formation professionnelle* or CRFPA). After passing another exam, they are officially lawyers, but

Defense counsel in this case, Jean-Yves Garaud and Olivier Saumon, were acting essentially *pro bono*. Because Gaitaud had no money, lawyers were appointed for him through the legal aid service (such lawyers are called *avocats d'office*). The bar association runs this service and assigns lawyers to cases: All lawyers have to take their turn with this kind of work to maintain the privilege of belonging to the bar. Garaud and Saumon have mostly corporate practices, but occasionally do criminal work (particularly Saumon). They are good friends, both in their mid-to-late thirties, and have worked together often before. Garaud is a partner in the Paris office of an American-based international firm and speaks excellent American English, which is one reason why he was assigned to the case. Once the conviction or acquittal becomes final—which can take years—lawyers appointed through legal aid receive about \$1,000 in compensation. This may seem like pitiful incentive to perform well, but in fact the *avocats d'office* appear to work quite hard on their cases. Their professional reputation is on the line, particularly before the *Cour d'assises*, in the small world of the Paris bar. In any event, as will be discussed later, their role in trial and their ability to influence the outcome is much smaller than that of the American defense lawyer.

The prosecutor, sitting at the level of the bench in his red robe, is treated differently from defense counsel because unlike them he is a magistrate.<sup>75</sup> In France, the magistracy includes both sitting judges (*magistrature assise*—also known as *juges du siège*) and prosecutors (“standing magistrates,” or *magistrature debout*—also known as *magistrates du parquet* because they stand on parquet floors to address the court). Because the French place so much responsibility in the hands of their magistrates, care is taken with their training and career incentives. Like the sitting judges, the prosecutor must finish a special thirty-one month judicial training program.<sup>76</sup> Would-be magistrates enter this program after four years of law studies at a university and a rigorous entrance exam. The program consists of classes at the national school for magistrates in Bordeaux (the *École nationale de la magistrature* or ENM),<sup>77</sup> followed by several internships in different

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must still do a two-year internship or *stage*. See JEAN VINCENT ET AL., *LA JUSTICE ET SES INSTITUTIONS* §§ 698–701 (4th ed. 1996). For details on law degrees, see Frase, *Comparative Criminal Justice*, *supra* note 11, at 561 n.90. For a more detailed account of the different types of French lawyers and their training, see RUDOLPH B. SCHLESINGER ET AL., *COMPARATIVE LAW* 340–53 (6th ed. 1998).

75. As William Pizzi has noted, some countries with largely inquisitorial systems—such as Italy—do not even have a word for “prosecutor.” See Pizzi & Marofioti, *supra* note 11, at 29–31. But the French regularly make use of the word *procureur*.

76. For a description of this program, see VINCENT ET AL., *supra* note 74, §§ 483–3 to 486. When they enter the training program, candidates promise they will spend at least ten years in the judges’ corps. *Id.* § 487; see also Frase, *Comparative Criminal Justice*, *supra* note 11, at 561–62.

77. The ENM was founded in 1958 in an attempt to boost the prestige of the judiciary by copying the great success of the *École nationale d’administration* or ENA, founded in 1945. See Anne Boigeol, *Les Transformations des modalités d’entrée dans la magistrature: de la nécessité sociale aux vertus professionnelles*, in *POUVOIRS* no. 74 (Les Juges) (1995). For a description of the program at the ENM, see MARY L. VOLCANSEK & JACQUELINE LUCIENNE LAFON, *JUDICIAL SELECTION: THE CROSS-*

courts. Another exam determines the candidates' class rank, and then the candidates (known as *auditeurs de justice*) choose, in rank order, a post from the list of available openings.<sup>78</sup> At that point, the candidate must decide what "branch" of the magistracy to go into—representing the government (*ministère public*) or becoming a sitting judge. This system of selection and careful training of judges and prosecutors contrasts with the American system of political appointment or election from among the ranks of lawyers, sometimes with input from the locally or nationally organized bar.

The division between ordinary practicing lawyers and magistrates in France is quite strict; it is very difficult for a member of the bar to become a magistrate.<sup>79</sup> Their training and their exams are different. Training for magistrates at the ENM was consciously designed on a civil service model, rather than a lawyerly one. The two are viewed as different professions, with different goals. As one writer put it when arguing that magistrates should not be trained by a period of apprenticeship at the bar (as had been the case): "Practice at the bar could produce a cast of mind which would be a defect in a judge. The lawyer, whose duty is to win the case for his client, is often led not to favor the emergence of the truth."<sup>80</sup> Magistrates' special training in truth-finding at the ENM helps set them apart from the bar and gives them some of the authority needed to hold sway over an inquisitorial courtroom or to represent the government in its truth-seeking function.

Not only is the training of magistrates (including prosecutors) different in France than it is in the United States, but their career incentives are also different. The French have designed career incentives to foster good performance. There is greater scope for upward mobility in the French system, and promotions among sitting judges are based largely on the professional evaluations of fellow judges.<sup>81</sup> Judges can move back

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EVOLUTION OF FRENCH AND AMERICAN PRACTICES ch. 6 (1988); David Applebaum, *Cogestion and Beyond: Change and Continuity in Modern French Legal Education—A Design for U.S. Law Schools*, 10 NOVA L.J. 297, 310–14 (1986).

78. Since a law enacted in 1994, a professional panel recommends to each candidate the positions for which he or she seems especially suited. See loi du 5 février 1994, art. 21, ord. 1958.

79. More than four-fifths of judges (eighty-one percent) came into the profession straight out of the ENM. Only twelve percent of judges came from the practicing bar or other professions. The remaining seven percent were recruited through special examinations or were already judges before 1958. See Boigeol, *Les Transformations*, *supra* note 77, at 38. For details on entrance examinations and training at the ENM, see ROGER PERROT, INSTITUTIONS JUDICIAIRES 288–90 (8th ed. 1998).

80. Maurice Ribert, *Le Système français actuel de recrutement des juges* 38 (1944) (thesis, Paris), quoted in Boigeol, *Les Transformations*, *supra* note 77, at 33.

81. Judicial promotions strive to be meritocratic and are based on three factors: choice, seniority, and professional evaluations. Judges choose whether they wish to be considered for promotion. There are seniority requirements that vary depending on the position sought. Most importantly, a professional evaluation is conducted by a promotion commission consisting of twenty judges. Sixteen of these judges are elected by their peers, and four are ex officio members of the commission. VINCENT ET AL., *supra* note 74, § 502. Judges are protected, however, from interference with their independence; they may not be given a new position, even a promotion, without their consent. *Id.* § 497. There seem to be few complaints about the politicization of French judges (at least concerning the

and forth between being a judge in our sense of the word as a member of a court and a representative of the government.<sup>82</sup> Within the ranks of magistrates, as one authority puts it, “the rule is collegiality,” and reference is made to the “college of judges.”<sup>83</sup> It is entirely possible that one day Philippe Bilger, the prosecutor (*avocat général*) in Gaitaud’s case, will be a *président* of the *Cour d’assises*. The same is very unlikely for defense counsel. In keeping with his training and career incentives as a magistrate, Bilger proved himself to be less adversarial in the course of the trial than a typical American prosecutor.<sup>84</sup>

The “college of judges” is collegial, but also hierarchical. *Monsieur le président*, Yves Corneloup, was by far the most important person in the courtroom aside from the defendant. As Corneloup’s elaborate robe compared with the plain robes of the *assesseurs* graphically demonstrated, he was not first among equals. He was technically a member of the Court of Appeals (*Cour d’appel*), though he often was designated to sit as a *président* of the *Cour d’assises*. Compared with Corneloup, the two *assesseurs* were passive.<sup>85</sup> The *assesseurs* in Gaitaud’s case—one woman, one man—were investigating judges on special assignment to the *Cour d’assises*. (Corneloup was himself an investigating judge for fifteen years before being promoted to his current position.) The *assesseurs* almost never asked questions, and rarely took notes. In fact, they were not even given access to the dossier before the trial; during the trial, like the jurors, they could request from Corneloup permission to see parts of the dossier. Apparently this permission is rarely denied. Before trial, only the *président*, the prosecutor, the defense, and the civil party (if there is one) receive the dossier. The *assesseurs* do, however, have the ability to check the *président* when the three judges act as a panel, for example in resolving issues when one of the parties has made an objection.<sup>86</sup>

Corneloup dominated the entire trial from beginning to end, with the sole exception of closing arguments. He controlled the order in which witnesses were presented; he did the lion’s share of questioning witnesses. He was responsible for maintaining both the flexibility and

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judges who are members of courts), despite the fact that many of them are members of unions. There are several judicial unions, with different political leanings—some left, some right, and some centrist. The prosecutor in Gaitaud’s case, for example, was a member of a leftist union. In general, the method of promotion does not seem to depend on political leanings.

82. Magistrates hop back and forth between the two branches of the magistrature, but it should be noted that each branch is independent of the other and subject to different rules of discipline. See generally Frase, *Comparative Criminal Justice*, *supra* note 11, at 559–60 (describing administrative hierarchy overseeing and disciplining prosecutors), 564–65 (describing appellate review and disciplinary procedures used for sitting judges).

83. JEAN LARGUIER, *PROCÉDURE PÉNALE* 8 (17th ed. 1999).

84. *E.g.*, *infra* Part V.A.1.

85. This is typical of a trial in the *Cour d’assises*. See LARGUIER, *supra* note 83, at 193.

86. Such objections, however, are rare. *Id.*

dignity of the court.<sup>87</sup> Although Corneloup had a powerful physical presence and personality, he largely succeeded in putting the spotlight squarely on the defendant, Thierry Gaitaud.

The personnel of the *Cour d'assises* also includes an important and often overlooked official: the clerk of the court (*greffier* or feminine *greffière*). This position seems not to have been discussed in any detail in the English literature on comparative criminal procedure. Many people connected with the court remarked that much of the success of a *président* of the *Cour d'assises* or of any presiding judge depends on having a good clerk of the court, and this impression is confirmed in the French literature.<sup>88</sup> Often it is the *greffier* who saves the *président* from being overturned later; she acts as a backstop to the *président*. There is no close analogy to this position in the American system: she is a sort of American clerk of the court and super law clerk rolled into one. The French clerk of the court is responsible for making sure the *président* follows correct procedure—from basic ministerial things like reminding him to swear in witnesses to the most arcane points. Madame Germain, the clerk of the court in the *Gaitaud* case, was universally revered and even beloved. More than once she kept the *président* from violating procedural rules.<sup>89</sup> In effect, the clerk of the court freed the *président* from worrying about procedural details and allowed him to focus on the substance of the trial: whether the defendant is guilty or innocent.

Two features of the *Cour d'assises* combine to give the *président* great discretion over the trial: the spare and formal methods that the French use to record cases in that court, and the limited appeal from that court. Throughout the trial, Madame Germain sat at her place at the right end of the bench with a laptop computer; occasionally, but not often, she typed in a notation. There was no court reporter, and no method of oral recording being used. In fact, in the *Cour d'assises* there is no official transcript made of what was said or even a summary of testimony.<sup>90</sup> As Madame Germain explained, and as many others emphasized, the *Cour d'assises* uses a procedure that is “entirely oral” (*procès uniquement oral*).<sup>91</sup> All Madame Germain does in the *Cour d'assises* is to record the bare procedures followed in the trial.

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87. C. PR. PÉN. arts. 309, 310. The French literature on the *Cour d'assises* emphasizes the discretionary power of the president (*pouvoir discrétionnaire*) described in Article 310. E.g., LARGUIER, *supra* note 83, at 193; VINCENT ET AL., *supra* note 74, § 885.

88. According to a leading French treatise, the *greffière* is an increasingly important figure in French courts, and has been vital to the success of the recent civil procedure reforms. VINCENT ET AL., *supra* note 74, §§ 557, 564. The *greffière*'s training consists of a stint at the national school for *greffiers* (*École nationale d'application des secrétariats-greffes*) in Dijon, followed by a series of internships. *Id.* § 560 n.5.

89. E.g., *infra* Part V.C.9.

90. See C. PR. PÉN. arts. 378, 379.

91. This is also known as the “principle of orality” (*oralité*). See LARGUIER, *supra* note 83, at 193.

In addition to this bare bones method of recording cases, at the time of Gaitaud's trial there was no appeal from the *Cour d'assises* in the ordinary French sense. French appeals from most courts are by trial de novo, with no presumption of correctness attaching to the verdict below.<sup>92</sup> But at the time Gaitaud was tried, the only way to overturn a verdict of the *Cour d'assises* was to invoke the equivalent of the French Supreme Court, the *Cour de cassation* (literally "Court of Breaking" because it breaks judgments). This process is so different that it is not even called an appeal (*appel*), but has its own special term, the *pourvoi en cassation*. The *Cour de cassation*, like the American Supreme Court, is quite limited in the questions it hears. It only hears issues concerning errors of law, confined basically to procedural issues.<sup>93</sup> Not having a transcript that lawyers can pour over after a trial limits the claims they can make and gives the trial judge greater discretion. The safeguard in the *Cour d'assises* that is supposed to compensate for this lack of a de novo appeal is the same that is supposed to compensate for the lack of thorough appellate review of facts in our system: the jury.<sup>94</sup> Trust in the sovereign judgment of the *jury populaire* makes such review unnecessary (at least in theory).

Recently, the National Assembly has enacted criminal justice reforms that allow for an appeal from a judgment of the *Cour d'assises* without disturbing the notion of jury decision making. But the method chosen is an expensive one: to have a second trial de novo before another *Cour d'assises* designated by the *Cour de cassation*.<sup>95</sup> To bolster the impression of legitimacy in this second, appellate *Cour d'assises*, twelve lay jurors are used instead of nine.<sup>96</sup> Otherwise, the procedures used in the "appellate" *Cour d'assises* are essentially the same as those used in the first. A verdict of outright acquittal cannot be appealed; the intention of this reform is mainly to give the defendant a second chance.<sup>97</sup>

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92. From the *Tribunal correctionnel*, for example, there is an appeal to the Court of Appeals (*Cour d'appel*), which takes the form of a trial de novo on the appealed issues before three professional judges. C. PR. PÉN. arts. 496–520 (describing the appellate process and procedures). Either the prosecution, the defense or both may appeal. *Id.* art. 497. After that phase, a dissatisfied party may attempt to invoke the *Cour de cassation* (literally—Court of Breaking, the Supreme Court). While appeal by trial de novo might seem to be a wasteful system, in fact these appeals are relatively quick because cases before the *Tribunal correctionnel* rely on written material from the dossier much more heavily than the *Cour d'assises*. At the *Tribunal correctionnel*, the clerk of the court takes down a brief summary of each witness's testimony.

93. C. PR. PÉN. arts. 567 to 567-1.

94. Adversarial systems have also tried to compensate for this lack of thorough appellate review of facts by broadening the definition of legal error to include such things as verdict against the weight of the evidence (rarely granted) and by enforcing elaborate procedural rules (regularly used to reverse a verdict). To some extent, the *Cour de cassation* has proved willing to go this latter route as well, overturning some decisions of the *Cour d'assises* based on what would seem to be highly technical grounds. See LARGUIER, *supra* note 83, at 191.

95. C. PR. PÉN. arts. 380-1 to 380-15.

96. See C. PR. PÉN. art. 296. The number of votes needed to find the defendant guilty becomes ten in the "appellate" *Cour d'assises*. C. PR. PÉN. art. 359.

97. *Id.* art. 380-1.

But any other sort of verdict can be appealed by the defendant, the prosecutor, or the civil party.<sup>98</sup> The judgment of the “appellate” *Cour d’assises* overrides that of the first, whether it is more favorable to the defendant or less; no presumption of correctness attaches to the first decision. The judgment of the “appellate” *Cour d’assises* can then be the subject of review by the *Cour de cassation (pourvoi en cassation)*.<sup>99</sup> Because Gaitaud’s trial occurred before this law was enacted, he did not get the benefit of this form of appeal, with its continued emphasis on the *jury populaire*.

### C. The Jury

The jury is of course a very uninquisitorial feature. It swept into French law on a tide of revolutionary fervor and anglomania in 1791; philosophers and anglophiles such as Voltaire championed the jury as an excellent English way to free the criminal justice system from improper pressure.<sup>100</sup> But this institution was such an anomaly in French law that it was quickly absorbed into the inquisitorial system.<sup>101</sup> Professional judges and lay jurors are treated more as colleagues and collaborators than as independent forces.<sup>102</sup>

In keeping with the notion of jurors as temporary judges, they are treated with respect. The parties are not allowed to pick them over with a fine-tooth comb; voir dire is brief and remarkably unintrusive. The potential jurors appeared, forty-five people, and the prosecutor and defense counsel had been given in advance essentially the same information about the venire as they would get in a U.S. federal court: name, age, address, occupation. The crucial difference was that was all the information they ever got, apart from a juror’s appearance. There is no ques-

98. *Id.* art. 380-2.

99. *Id.* art. 370.

100. See PERROT, *supra* note 79; see also Adhémar ESMEIN, *HISTOIRE DE LA PROCÉDURE CRIMINELLE EN FRANCE* 399-480 (1882).

101. One leading commentator captures the French ambivalence about the jury, even as limited to the *Cour d’assises*: “Fundamentally, the jury system only makes sense in a civilization that has a mystical character; therefore, it no longer corresponds exactly with our contemporary mind set.” PERROT, *supra* note 79, at 283. The mixed panel of professional and lay judges helps to confine the discretion of lay jurors. See PIZZI, *TRIALS WITHOUT TRUTH*, *supra* note 11, at 226-28; Gerhard Casper & Hans Zeisel, *Lay Judges in the German Criminal Courts*, 1 J. LEGAL STUD. 135 (1972) (reporting results of studies exploring the role of lay judges in German criminal courts); John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 1981 AM. B. FOUND. RES. J. 195 (observing the German mixed-court structure creates more efficiency in the criminal system than the Anglo-American jury system). It also helps to make the process of jury trial more efficient. Bradley, *Overview*, *supra* note 10, at xxiii.

102. Perhaps in this way they more nearly attain the true purpose Tocqueville thought the American jury served: To educate lay people about the law and government. It is easier to learn when you are treated with respect and receive good guidance. Tocqueville, who was of course a French aristocrat, expressed doubt about the jury’s ability to render good decisions but was sure of its educational value: “I do not know whether a jury is useful to the litigants, but I am sure it is very good for those who have to decide the case.” TOCQUEVILLE, *supra* note 14, at 275. Furthermore, he praised strong judges as good educators and models for the jury to follow. *Id.*



tioning of any kind. This is *voir dire* in its elemental sense; *voir*—"to see"—the two sides see the jurors, and *dire*—"to say"—the two sides must say immediately whether the juror stays or goes. The names of jurors are drawn randomly, and the prosecution and defense have the time the juror stands up until the juror walks to his or her seat to decide whether to use a peremptory strike. The defense gets five peremptories and the prosecution four;<sup>103</sup> in Gaitaud's case the defense used four out of five, while the prosecution did not use any. One defense counsel said a friend of his once tried a case in which his best friend was on the jury. It is even possible that someone could be on the jury who was a friend of the defendant.

Lest this approach to jury selection seem oblivious to dangers of bias, it is important to remember two things: first, three professional judges deliberate and vote with the jurors, and second, unanimity is not required. There are, therefore, substantial checks on biased jurors. The French system of *voir dire* also saves a great deal of time and money. The whole process took well under ten minutes, and a challenge cannot be raised later based on a particular juror's answers to questions and whether he or she should have been struck for cause.<sup>104</sup> No one ever uses jury consultants in France—defense counsel was surprised at being asked. The value of such consultants would be limited because of the slight information available about each juror, and French legal culture is not hospitable to such elaborate gamesmanship. Defense counsel said they simply acted on gut instinct, striking for example young people who might not be "mature enough to accept that wild and ugly things may happen in life." Besides saving time and money, the method of striking and the relatively low number of people struck helps to prevent two opposite problems endemic in our system: first, members of the *venire* who exaggerate their answers because they want to avoid jury service, and second, those who, struck after questioning, are resentful because they wanted to serve and feel rejected.

In the end, the jurors in the *Gaitaud* case consisted of five women and four men. They seemed to be, for the most part, intelligent, well-educated, and serious about their responsibilities.<sup>105</sup> The jurors are selected from the session list called for that term of court. Session lists consist of forty jurors and ten alternates, drawn by lot from an annual list of prospective jurors for each *Cour d'assises*, which is based on voter regis-

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103. See C. PR. PÉN. art. 298.

104. On difficulties that rules about juror challenges pose for the American criminal trial, see PIZZI, TRIALS WITHOUT TRUTH, *supra* note 11, at 79–82.

105. The journalists who attended the trial had definite opinions about Parisian as opposed to provincial juries, which may have reflected their own Parisian biases. Some of the journalists had been covering the *Cour d'assises* in various parts of the country for years, and said that this sort of sophisticated jury—intelligent and at a high social level—is common in Paris. But the story can be different *en province*. In the provinces, they said, sometimes it is obvious from juror expressions and questions that they do not understand anything.

tration lists.<sup>106</sup> Qualifications for being a juror include being at least twenty-three years old and having the ability to read and write in French.<sup>107</sup> High government officials and police officers are excluded.<sup>108</sup> The French criminal justice system often takes seriously the job of educating these jurors to perform their functions. According to one French judge I spoke with, jurors on the session list in her area are taken to visit a prison before they sit on an actual jury in the *Cour d'assises*, to give them a sense of what a prison sentence means.

The French system treats jurors as if they were responsible human beings with serious duties. It is particularly sad that despite all the lip service we Americans pay to the jury system, we often demean jurors in actual practice. Jurors in France are not forced to wait through interminable voir dire sessions and told to answer personal and embarrassing questions about their political and religious beliefs and life experiences. They enter the courtroom by the same door and at the same time as the judges, and as has been noted, they sit at the bench with them. They are not constantly sent out of the room while evidentiary objections are being thrashed out, or screened out of bench conferences by white noise. Indeed, no evidence is kept from them that is not kept from the *assesseurs* also, which comes to very little because the French do not have many rules of evidence beyond relevancy and privileges.<sup>109</sup> It has been argued that the complicated American rules of evidence are largely based on distrust of the jury, the idea that they need to be screened from information they will not be able to handle properly.<sup>110</sup> Juror note-taking is allowed in France; all of the jurors in the *Gaitaud* case took notes at one time or another, and some took notes frequently.<sup>111</sup> They were permitted to ask questions, which they all did from time to time, and usually these were quite thoughtful, the sort of question that would be important if one were determining guilt or innocence. The *président* had power to check a juror question that was irrelevant or biased, but he never had to do so. The jurors therefore posed their questions directly to a witness or

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106. C. PR. PÉN. art. 266 (this reflects a change made effective in Jan. 2001; previously, session lists consisted of thirty-five jurors and ten alternates). For a greater description of jury selection procedures, see C. PR. PÉN. art. 259-67.

107. *Id.* art. 255.

108. *Id.* art. 257.

109. Even privileges were not seen much at this trial. Generally, continental legal systems have a much broader notion of privilege than ours. Not only spouses but also children and parents are often allowed to claim a privilege not to testify. Here, Gaitaud's son, mother, father, and sister were expected to testify, but they were not put under oath.

110. A large part of the problem is that we do not know whether jurors handle certain evidence properly or not in a particular case because jurors do not give reasons for their decision. The default solution has been to exclude evidence that might be problematic. John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1194-95 (1996).

111. Several states, of which Arizona was one of the earliest, now have in place permanent or experimental reforms that allow jurors to take notes and ask questions through the judge.

the defendant. In nearly every respect, they were treated as the peers of the *assesseurs*.

## V. THE TRIAL

### A. *Flexibility of Trial*

Jury selection over, trial got underway immediately. Trials in France are not divided into “the prosecution’s case” and “the defense’s evidence,” as they are in the United States’ adversarial system. The American division is a result of its strict burdens of production; the prosecution goes first, then the defense moves for acquittal and, if denied, usually goes on to present evidence. Often this results in going over the same ground from a different perspective twice or even three times, frequently at periods in the trial far removed from each other. Because American trials are often quite long, it is especially difficult to remember all of the evidence that has been brought out on a given point.

The French look at evidence more holistically; they try to address one issue in the case at a time, and to bring to bear all the evidence on that point at once.<sup>112</sup> It is possible to achieve this in part because the *président*, Corneloup, coordinated the trial and determined the order in which witnesses would appear. Moreover, this order was flexible; Corneloup proved willing to change it if evidence came up that suggested someone should appear earlier, and he often instructed witnesses to be available on several different days to answer to points as they came up.

#### 1. *Explaining American Criminal Procedure: Witnesses Before the Cour d’Assises*

A good example of this flexibility appeared at the beginning of the *Gaitaud* trial. In France, normally the first person to testify in a trial is the defendant himself. But this was not a normal French trial. Because of the San Diego investigation, there were issues of American criminal procedure to be dealt with, and Corneloup decided to address the questions up front. The first day of the trial, Friday, he called the San Diego Assistant District Attorney, Mary Ellen Barrett.<sup>113</sup>

Introduction of each witness was minimal. Corneloup rattled off a list of questions—“name, age, occupation, address”—and then asked each witness: “What do you have to tell us?” There was no direct or cross-examination as we know it. The witness started off testifying in narrative form, usually for several minutes without interruption, assuming the witness was reasonably coherent. When the witness finished his

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112. *E.g., infra* Part V.C.2 and V.C.3.

113. The French provided plenty of translators for the Americans. The translators had a difficult job throughout the trial and performed admirably.

or her story or the testimony got murky, Corneloup began asking questions, directing the witness's attention to key points. He often read the former statements of a witness from the dossier in framing his questions. When he was done, he turned to the *assesseurs* and the jurors to see if they had any questions, then to the prosecutor, then to defense counsel. Bilger and defense counsel usually asked between one and three questions each. Their tone was almost never dramatic or hostile but rather matter-of-fact. In answer to these questions, the witness was permitted to give a full explanation and was not limited to the sharp "yes" or "no" of American cross-examination. One result was that the witnesses were relatively relaxed and often more forthcoming with information.

Ms. Barrett gave an overview of the San Diego investigation and a description of criminal procedure in California, naturally putting it in a favorable light. She assured the court that the police and prosecution have a duty to investigate exculpatory evidence, and did so thoroughly in this case. She pointed out California's criminal discovery rules, which require the prosecution to turn over any exculpatory evidence it uncovers.<sup>114</sup> Corneloup was surprised at how much independence the San Diego police have to investigate so serious a case, with virtually no prosecutorial supervision.

I was called to testify next. It was a relief to be able to speak without being hemmed in by questions on direct and cross-examination.<sup>115</sup> I explained that the California prosecutor and police are not quite like the French investigating judge (which Corneloup seemed in danger of believing). While they do have some duty to investigate exculpatory evidence, at least in theory, generally they do so only to satisfy themselves that they have the right defendant (or at least a plausible one) and possibly to rebut defense evidence.<sup>116</sup> The main burden to investigate exculpatory evidence, I noted, falls on defense counsel—who usually has a duty to do so according to ineffective assistance of counsel cases decided under the U.S. Constitution.<sup>117</sup>

The extent of defense counsel's responsibilities surprised both Corneloup and Bilger. They asked whether defense counsel could interview witnesses or gather physical evidence, and whether defense counsel could

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114. CAL. PENAL CODE § 1054.1 (Deering 2001).

115. The less adversarial nature of the questioning seemed to encourage witnesses to be less defensive and partisan and more objective, to admit that the other side had a point where otherwise one would say nothing about it. Even with the best intentions, it is difficult to remain objective while being badgered and impugned by one side.

116. I also pointed out that while California prosecutors have a duty to turn over witness statements, those statements do not necessarily record all exculpatory information a witness has given. The police themselves write these statements sometimes months after the interview, in contrast to the French system of recording verbatim all witness interviews, including questions and full answers. This difference was important because sometimes Corneloup sought to rely on statements from the American investigation as if they were the product of a French investigating judge's work. For more detail on California discovery rules, see *infra* note 181.

117. *E.g.*, *Strickland v. Washington*, 466 U.S. 668 (1984).

do so even if the defendant had fled. It was not easy to convince them how much our system depends on having good defense counsel—the French are so used to relying on judicial officers. In the end, Corneloup seemed to understand that the investigation done by the San Diego police and prosecutors was not like a normal French investigation; he declared that the results of the San Diego investigation “were not a dossier.” But he did not seem to fully grasp how adversarial an American prosecutor usually is at trial until much later. He was too steeped in the French notion that prosecutors are judicial officers.

## 2. *The Civil Party*

The surprise appearance of a civil party in Gaitaud’s case showed how quickly the *président* could adapt to new circumstances at trial and how his control over trial helped to accommodate interests beyond those of the prosecution and defense. (The incident is taken out of chronological order to introduce this important figure early on.) Several days into the trial, an American, Mrs. Belasco—Susan Belasco’s ex-mother-in-law and Malinda’s grandmother—appeared in the courtroom. She was understandably intimidated by being in a foreign court not knowing the language or procedure and without a lawyer, but nonetheless determined. She wore a large orange button showing a picture of Malinda. (This is a common practice among relatives of victims in the United States, but one not yet seen in France. Because French victims’ relatives are formally represented in court, they have less need to resort to such devices to make their viewpoint known.) Mrs. Belasco asked to “represent” her son and family before the court, got out a type-written piece of paper, and tried to read a statement in English. Corneloup was surprised but took it in stride. He gently explained that she could not read the statement because the *Cour d’assises* uses an entirely oral procedure (once again, the phrase *procès uniquement oral*). Through a translator, he asked her if she wanted to be a civil party in the case (*partie civile*).

The French allow the criminal and civil proceedings against the defendant to be combined, with the latter known as the *action civile*, brought by the “civil party.”<sup>118</sup> This is done for two reasons. First, it is

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118. Ordinarily, the civil party is the victim or a relative of the victim. But it is possible for a non-profit organization to be a civil party. This might occur, for instance, in a child abuse case where the court could allow an abused children’s protection society to be a civil party. See C. PR. PÉN. art. 2-3. Various other organizations are eligible. *Id.* arts. 2-1, 2-2, 2-4, 2-6, (including but not exclusively, those organizations fighting against racism, *id.* at 2-4, and “discrimination based on sex or morals,” *id.* at 2-6). The main restriction is that these organizations must have existed officially at least five years before the facts occurred that gave rise to the case. The German legal system borrowed the concept of the civil party from the French, but the institution has not been as popular there as in France. German judges have vigorously exercised their powers to decline to hear civil cases combined with criminal ones, partly because German courts are highly specialized, with criminal court judges having little experience in civil matters, and partly because hearing civil claims at the same time slows down criminal cases. LANGBEIN, *supra* note 39, at 111–15. Pizzi, however, reports that German victims are much

cheaper for the civil party (and more efficient for the justice system as a whole) to combine the civil and criminal proceedings rather than having two separate cases. The civil party can “free ride” on the evidence at the criminal trial, and so be compensated at less expense.<sup>119</sup> Second, the civil party serves to push the investigating judge (or prosecution if there is no investigating judge) into vigorous investigation and presentation of the case. The French literature emphasizes this second point; French legal writers often use the phrase “conquering the inertia of the prosecutor” to describe the civil party’s role.<sup>120</sup> Even if the civil party is not able to recover damages, he or she is allowed to participate in pretrial and trial, for exactly this reason. Normally, the civil party is involved from the beginning of the investigation, and may even bring a formal complaint that initiates investigation.<sup>121</sup> (For form’s sake, this is routed through the prosecutor’s office, but the prosecutor does not have discretion to quash it.<sup>122</sup>) Like the defense, the civil party may suggest leads that the investigating judge should follow.<sup>123</sup> The theory is that the investigating judge will be encouraged to do his duty in uncovering incriminating evidence by the civil party on the one hand, and exculpatory evidence by the defense on the other.

The civil party actively participates not just in the pretrial investigation but during trial as well. She either pays for a lawyer or has one assigned to her if she is too poor to pay.<sup>124</sup> At trial, the civil party’s lawyer may ask witnesses questions relevant to her interests—after the *assesseurs* and jurors, and before the prosecutor—and also participates in closing arguments.<sup>125</sup> The civil party may ask for a money judgment if defendant is convicted. The three professional judges, without the jurors,

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more likely to exercise their rights to be civil parties in sexual assault cases. Pizzi & Perron, *Crime Victims*, *supra* note 10, at 55.

119. VINCENT ET AL., *supra* note 74, § 820.

120. LARGUIER, *supra* note 83, at 110; VINCENT ET AL., *supra* note 74, § 820. Another phrase often used to describe the civil party’s purpose is “corroborating [or strengthening] the prosecution.” LARGUIER, *supra* note 83, at 109.

121. See C. PR. PÉN. arts. 85, 86.

122. See LARGUIER, *supra* note 83, at 123. The French are alive to the possibility that the civil party’s ability to initiate prosecution may be abused to the detriment of justice. This is a growing concern now that standing to be a civil party has grown much broader and includes organizations as well as individuals. Larguier, one of the most vigorous French critics of the civil party, has identified several problems. The civil party may initiate a charge against someone maliciously, to harass or pressure him or her. Also, charges initiated by civil parties tend to burden criminal investigating regimes and, as a result, judges delegate more of their responsibilities to experts. *Id.* at 110. Remedies for these problems include the prosecutor being able to request under Article 86 of the Code of Criminal Procedure that the investigating judge hold a hearing to determine whether the civil party’s complaint justifies further investigation; the defendant and the prosecutor being able to contest the existence of a civil party in the case; the supposed victim being subject to civil and criminal liability if charges are malicious; and the defendant having certain rights to clear his name in the press if charges are groundless. See C. PR. PÉN. art. 86.

123. See C. PR. PÉN. art. 82-1.

124. See C. PR. PÉN. art. 88(5) and Appendice I (Dalloz 2001) (Fr.) (discussing legal aid provisions).

125. C. PR. PÉN. arts. 312, 346.

determine the amount.<sup>126</sup> If defendant is judgment-proof, there is a public fund of money available to satisfy judgments (*Fonds de garantie*).<sup>127</sup> This fund can be drawn upon to varying degrees depending on the seriousness of the crime and its effects; for lesser crimes, the financial situation of the victim is taken into account and the amount of reparations is capped. For crimes resulting in death there are no such restrictions. However, there is one important limitation, relevant to the *Gaitaud* case: to receive reparations from the public fund, the civil parties must be French, even if the crime was committed abroad.<sup>128</sup>

Victims' rights, of course, have become a salient issue in U.S. criminal procedure. Recently, the Senate Judiciary Committee approved, with bipartisan support, a proposed amendment to the U.S. Constitution guaranteeing certain rights to victims.<sup>129</sup> These rights would include the right to be notified of public proceedings relating to the crime, to attend all public proceedings, to be heard at "crucial stages" in the process, and to get an order of restitution.<sup>130</sup> A full comparison of the victims' rights proposals and the French civil party is impossible here, but a word of caution is in order. The French institution of the civil party and the civil party's active participation at trial is made much easier because French trials are controlled by an inquiring president, not by the two parties. The structure of United States' trials as an adversarial contest between prosecution and defense makes it very difficult to accommodate the interests of a third party. The defense would resent the presence of another party with adverse interests, and even the prosecution might resent interference with the presentation of its case. But the inquiring judge in continental countries can easily fit in the civil party, allowing his or her voice to be heard while controlling a spirit of vindictiveness and keeping

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126. *Id.* art. 371.

127. LARGUIER, *supra* note 83, at 86-87. In the United States, the Victims of Crime Act of 1984 established a Crime Victims Fund that distributes money gained from fines, penalties, and bond forfeitures to state victim compensation funds and to victim assistance projects. See Pub. L. No. 98-473, 98 Stat. 2170-74 (1984). For a comparison of victim compensation in France and the United States before the Act, see Patrick Campbell, *A Comparative Study of Victim Compensation Procedures in France and the United States: A Modest Proposal*, 3 HASTINGS INT'L & COMP. L. REV. 321 (1980).

128. See LARGUIER, *supra* note 83, at 87. There is an exception to this rule: if the crime was committed in France, a citizen of a European Union country or a person who regularly stays in France may receive reparations from the public fund. *Id.*

129. See S.J. Res. 3, 106th Cong. (1999) (approved by the Senate Judiciary Comm. Sept. 30, 1999), available at <http://thomas.loc.gov>. The proposed amendment was first introduced three years ago by Senators Jon Kyl (R-Ariz.) and Dianne Feinstein (D-Calif.). *Id.*; see also *Symposium: Crime Victims' Rights in the Twenty-First Century*, 1999 UTAH L. REV. 285-552. The House Committee on the Judiciary is considering a similar but not identical measure, and the Justice Department has recommended changing the language to protect the rights of the criminal defendant and also the interests of law enforcement. See *DOJ Representative Voices Objections To Proposed Victims' Rights Amendment*, 68 U.S.L.W. 2502-03 (Feb. 29, 2000).

130. See S.J. Res. 3, 106th Cong. (1999), available at <http://thomas.loc.gov>.

the trial moving smoothly. Corneloup effectively managed these tasks in the *Gaitaud* case.<sup>131</sup>

Mrs. Belasco was at first a bit confused by the concept of the civil party, but rapidly agreed that was what she wanted to be. This posed a problem because she had no lawyer, she was not given a copy of the dossier in advance as a civil party normally would be, and the defense had no notice that there would be a civil party. Defense counsel immediately pointed this out to Corneloup and objected to the presence of a civil party. The *président* thought this over for a moment. He asked me if such a thing as the civil party exists in the United States, and I explained that it does not, that the United States has separate civil proceedings. He stroked his chin a bit and decided that Mrs. Belasco could be a civil party after all. The court appointed a lawyer for her, the capable Maître Lévy, a young lawyer who had lived several years in the United States and had a masterful command of English. She appeared in court a few days later with a copy of the dossier. Later in the trial Mary Beniche, Susan Belasco's mother, joined Mrs. Belasco as a civil party, with Maître Lévy representing both.

### B. The Personality Phase

The first phase of a trial in the *Cour d'assises* reflects the French interest in the psychology and personal circumstances of the defendant, and is called the "personality" (*personnalité*).<sup>132</sup> The defendant's life history and personality are explored over the course of a day or two. (In the *Tribunal correctionnel*, this phase comes at the end and lasts a much shorter period of time, perhaps an hour or so.<sup>133</sup>) The French do not share American concerns about character evidence and poisoning the well, reflected in the United States' elaborate rules of evidence.<sup>134</sup>

131. William Pizzi has suggested important points for the U.S. victims' rights movement to consider based on German procedure; most of the points he makes could be drawn from French procedure as well. See Pizzi & Perron, *Crime Victims*, *supra* note 10.

132. A similar concern with the "personal and economic circumstances" of the defendant appears in German criminal procedure, which requires the judge to begin the trial by examining the defendant on these matters. THEODOR KLEINKNECHT, STRAFPROZESSORDNUNG § 243, at 689 (32d ed. 1975), *cited in* LANGBEIN, *supra* note 39, at 71. If the defendant refuses to answer questions about his personal circumstances, "the court may establish these matters by referring to the pretrial dossier." *Id.*

133. In the *Tribunal correctionnel*, the judge or three-judge panel begins by reviewing the dossier, then moves to the facts (*faits*), and briefly covers the personality at the end of the trial. The personality phase before the *Tribunal correctionnel* does not necessarily include a psychiatrist's testimony; it might just be a few questions to the defendant about his life. There have been various debates about putting the personality at the end of the trial in the *Cour d'assises* rather than at the beginning. McKillop notes that the socialist government, prior to losing power in May 1993, sought in their criminal justice reforms to put the *personnalité* at the end of trial, but conservatives countermanded this on gaining power. McKillop, *Anatomy*, *supra* note 12, at 580. The socialist government of Lionel Jospin has not put the *personnalité* at the end.

134. FED. R. EVID. 404(a) (evidence of a person's character not admissible to prove action in conformity therewith, subject to narrow exceptions such as defendant opening the door by introducing evidence of his character); FED. R. EVID. 404(b) (evidence of other crimes, wrongs, or acts not admissible to show action in conformity therewith, but may be admissible for other purposes); FED. R.



Rather, they want to get as full an understanding as possible of the person on trial. In part, the French may be less concerned about poisoning the well because the information is not entrusted to a lay jury alone, but to a mixed panel with professional judges who can warn lay jurors about the danger. This information is relevant to the fact-finders at sentencing; in France there is no separate sentencing hearing as in a typical American court. Jean Pradel, a leading French writer about the personality phase, notes that the information it gives “is very useful at the moment of fixing the sentence.”<sup>135</sup>

The vision of sentencing to which the *personnalité* corresponds is far broader than that of most American courts. American courts at the sentencing phase often use a somewhat inquisitorial procedure, as in the federal courts where a government official prepares a presentencing report that is something like the investigating judge’s dossier. American judges also tend to take a more active role at sentencing. However, in the federal courts much of the information contained in the French *personnalité* would not be considered relevant.<sup>136</sup> The personality as it exists today in the French courts was born of a movement called *défense sociale* (literally “social defense”), which is virtually unknown in the United States but has been powerful abroad. The movement succeeded in making a personality investigation mandatory under the French Code of Criminal Procedure in 1958.<sup>137</sup> Marc Ancel, one of the leaders of the social defense movement, has described its goals as

first, a concern to ensure the protection of society, over and above the infliction of merely expiatory punishment; second, the desire to bring about the improvement, if not the re-education, of the offender . . . ; [and] finally, the insistence that penal justice . . . should promote or preserve the concept of the human person, as one to which only truly humane treatment may be applied.<sup>138</sup>

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EVID. 608, 609 (ability to impeach a witness based on character evidence or prior conviction is limited). The Federal Rules of Evidence have recently been changed to create a general exception to these rules for sex offense cases—allowing in more evidence of similar crimes. FED. R. EVID. 413, 414.

135. JEAN PRADEL, *LE JUGE D’INSTRUCTION* 30–31 (1996).

136. The U.S. SENTENCING GUIDELINES MANUAL (1999) forbids federal judges to consider the following factors in determining whether a downward departure from the guidelines is warranted: race, sex, national origin, creed, religion, and socio-economic status, *id.* § 5H1.10; lack of guidance as a youth and similar circumstances, *id.* § 5H1.12; physical condition (except in very limited circumstances), including drug dependence and alcohol abuse, *id.* § 5H1.4; and to some extent coercion and duress, *id.* § 5K2.12. The closest parallel in U.S. criminal procedure to the amount of information about the defendant collected in the French *personnalité* phase is the sentencing phase of a capital case. The collection and presentation of evidence in such proceedings, however, are typically adversarial.

137. In 1959 the French amended the Code of Criminal Procedure to require the investigating judge to inquire into the defendant’s personality together with his “financial, family, and social situation.” C. PR. PÉN. art. 81. On the role of the social defense movement in obtaining this reform, see MARC ANCEL, *SOCIAL DEFENSE: THE FUTURE OF PENAL REFORM* 169–70 (Thorsten Sellin trans., 1987) (La Défense Sociale Nouvelle, 3d ed. 1981); PRADEL *supra* note 135, at 30. The social defense movement, together with the writings of sympathetic authors such as Camus (*Reflections on the Guillotine, The Stranger*), helped eventually to end the death penalty in France.

138. ANCEL, *supra* note 137, at 7–8.

The French thus have, at least in theory, strong rehabilitation and dignitary goals.<sup>139</sup> To achieve these ambitious ends of individualized justice, the French justice system seeks as much information as possible about the defendant; this relates to the “truth-seeking discussion” model of a French trial. Pradel says that the *personnalité* “is a question of obtaining a sort of portrait of the person on trial,” of “understanding the behavior of the person” and “the motive powers that caused him to act.”<sup>140</sup> The *personnalité* is, therefore, an affirmation that the person before the court, though accused of a grave crime, is a human being with a unique life story that deserves to be told and understood, not a faceless monster. In keeping with this notion, Corneloup, at several points in his inquiry, expressed sympathy for (or at least empathy with) Gaitaud.

### 1. *The Most Valuable Testimonial Resource: The Defendant*

Gaitaud himself was called and asked to describe his life. He stood up in his place to speak; the defendant does not go to the witness stand, in part because he is called on to speak so often at trial that it would be inconvenient. The amount of talking a defendant does in a French criminal trial is, apart from the dominance of the presiding judge relative to the lawyers, the most striking aspect of the trial for an American observer. A French defendant is encouraged to speak for himself, to tell his side of the story.

Among American criminal defense lawyers, the received wisdom in most situations is not to put a defendant who is probably guilty on the stand.<sup>141</sup> Supreme Court interpretations of our Fifth Amendment help to shield a defendant from the normal consequences of not testifying; in *Griffin v. California* the Court held that the jury is not to draw inferences of guilt from a defendant’s failure to testify, and the prosecutor is not to comment on it.<sup>142</sup> Defendants need not even assert the Fifth Amendment in the jury’s presence, to avoid drawing attention to it. The result is, as John Langbein puts it, to deprive the fact-finder of a valuable testimonial resource—in fact, often the most valuable.<sup>143</sup> The defendant always knows information important to the fact-finder—if nothing else, where

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139. There is some question about how important the French justice system considers the *personnalité* to be in practice. The criminal chamber of the *Cour de cassation* has made clear multiple times that the inquiry into the *personnalité* mandated in Article 81 “does not detract from the fundamental rule that judicial investigators have the right and the obligation to close the investigation once they consider it to be complete.” See PRADEL, *supra* note 135, at 31. To Pradel, this indicates ambivalence about the role of the *personnalité*. However, he does note that in felony cases (*crimes*), the investigation of the personality is systematic. *Id.*

140. PRADEL, *supra* note 135, at 30–31.

141. One frequent exception is murder cases. According to American defense counsel lore, juries are ordinarily not too inclined to draw inferences of guilt from a failure to testify except when there is a dead body to be explained.

142. 380 U.S. 609, 615 (1965).

143. See generally John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047 (1994) (discussing the value of testimony).

he was at the time the crime was committed. In everyday life, our methods of finding out the truth normally include talking with a suspected person to hear his side of the story.

The French have arranged their system to provide incentives for the defendant to testify, to engage in discussion at trial. They thus gather information from this valuable testimonial resource. To be sure, they do not require a defendant to testify; he will not be tortured or thrown in jail if he does not. But a defendant is not informed at trial that he has the right to remain silent (although in fact he may refuse to answer particular questions).<sup>144</sup> Indeed, the tone of the president's questions to him indicates that a reply is expected, and that adverse inferences will be drawn if he does not answer. This tone was evident, for example, in Corneloup's remarks to Gaitaud described at the beginning of this article.<sup>145</sup> There is no doubt that, in practice, a refusal to testify would be devastating. In the French legal culture, defendants are expected to speak. Defense counsel in France encourage their clients to speak; this is in sharp contrast with our system, where defense counsel are constantly hushing their clients and speaking for them. Speaking appears to help a French defendant in several ways. For one thing, if he confesses guilt, the panel is likely to be more lenient in sentencing. Corneloup basically told Gaitaud this would be the case in his remarks quoted at the beginning of this article. (This could be viewed as a form of plea-bargaining, although it differs from the American approach because a trial, albeit in abbreviated form, would still be held and votes cast to determine guilt.) But even if the defendant does not outright confess, describing his thoughts or actions might in some cases make him appear more sympathetic or at least understandable to the panel. The French, both in legal and social spheres, seem to prefer those who are forthcoming in conversation. The stoic, silent type is not their ideal.<sup>146</sup>

Besides allowing inferences to be drawn from a failure to testify, the French add a number of other incentives to allow or encourage a defen-

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144. Frase, *France*, *supra* note 40, at 176.

145. Some commentators have argued that French jurisprudence, in theory, prohibits an adverse inference being drawn from the defendant's silence. *E.g.*, COMPARATIVE CRIMINAL PROCEDURE 32 (John Hatchard et al. eds., 1996) ("French jurisprudence maintains that silence cannot be regarded as evidence of culpability."). But there is little evidence of such a prohibition in theory, and none in practice. As Van Kessel notes, in practice the expectation at trial clearly is that defendant will speak, and speak often, and that adverse inferences will be drawn if he does not. Van Kessel, *European Perspectives*, *supra* note 11, at 821–23. The fact that the defendant is the first person called to testify suggests the importance of his speaking at trial. McKillop found a similar expectation that defendant will speak in the trial he saw. McKillop, *Anatomy*, *supra* note 12, at 577. Where the legal culture creates an expectation that defendant will speak, it is quite likely that an adverse inference will be drawn from silence. See also Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 527 (1973).

146. The French are known for highly prizing good conversation, and they themselves mention this very often as one of their defining cultural characteristics. Trial in the *Cour d'assises* appears to be no exception.

dant to speak freely.<sup>147</sup> For example, a defendant does not have to worry about his criminal record coming in as a result of testifying; it comes in anyway. A defendant's criminal record is automatically part of the dossier and past convictions and indeed character in general are discussed in the *personnalité*.<sup>148</sup> Thus, the defendant has an incentive to explain himself that does not necessarily exist in the U.S. system. In Gaitaud's case, Corneloup questioned Gaitaud about information from the dossier, not directly related to the murder, that he had earlier stolen a gun and a small amount of money from a neighbor. Gaitaud admitted this prior crime to Corneloup, but said he did so to protect himself from agents of the U.S. government who were persecuting him.

Another difference that encourages the defendant to testify is the absence of American-style cross-examination. American cross-examination does much to prevent witnesses from speaking freely in a civilized way. It is often deliberately designed to produce confusion, fear, or rage in the witness. In Gaitaud's trial, questioning could be sharp and even exasperated at times, but this was rare and occurred only if Gaitaud was being exceptionally evasive. For the most part, the tenor of the questions that Corneloup and Bilger put to Gaitaud was matter-of-fact, or curious in the *personnalité*. With the exception of the exchange described at the beginning, the questioners did little striving for drama. (The question "Did you do it?" is a staple of French trials, normally asked at some point.) Gaitaud was allowed to explain himself fully, and was not limited to simply answering "yes" or "no." There was little possibility that Gaitaud would be tripped up unaware or that a question would make a truthful response appear false. While Wigmore described Anglo-American cross-examination as "the greatest legal engine ever invented for the discovery of truth,"<sup>149</sup> it can also prove very dangerous to the truth. Many a skilled trial lawyer has boasted that he is able to make a truthful witness look like a liar or a fool.<sup>150</sup>

In addition, the defendant is not under oath (he is not *sous serment*). He therefore is not subject to prosecution for perjury should he lie.<sup>151</sup> This removes the "cruel trilemma," where a defendant is faced with a choice of incriminating himself, committing perjury, or being sub-

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147. For a discussion of some of the reasons why the rule against drawing adverse inferences from silence is a good idea in our current criminal justice system—reasons the French have addressed—see Amar & Lettow, *supra* note 53, at 866.

148. There is another, more Anglo-American solution to the problem of prior convictions coming in when the defendant testifies: to simply exclude them in that situation. Montana has taken this approach, which should help encourage defendants to testify. See MONT. R. EVID. 609 (prior convictions not admissible to attack credibility).

149. 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367 (James H. Chadburn rev. 1976).

150. See FRANCIS L. WELLMAN, THE ART OF CROSS-EXAMINATION 142–67 (4th ed. 1936) (discussing the "fallacies of testimony" whereby the testimony of honest witnesses can be broken down).

151. There is thus some question whether a French defendant's giving evidence at trial should ever be called "testifying."

ject to contempt for failure to answer. The cruel trilemma is often cited as a rationale for the Fifth Amendment privilege against self-incrimination,<sup>152</sup> and indeed Professor Alschuler has written that at the time of the Founding this was the main reason for the privilege (fear of eternal damnation of one's soul being added to the perils of perjury).<sup>153</sup> He has noted that the concerns of the Framers that led them to embrace the privilege would be satisfied if the defendant were permitted to testify not under oath.<sup>154</sup> We know from many sources that this was the practice in eighteenth-century England and America, so the French practice is close to our roots.<sup>155</sup>

The defendant's not being under oath has interesting implications for the attorney-client relationship in France. It is permissible to advise the defendant to lie, and in fact defense lawyers in France sometimes recommend it on certain points. Of course, these lies may be found out and make things worse for the defendant, so the strategy is very risky.<sup>156</sup> Gaitaud (almost certainly not on the advice of defense counsel) often changed his story during the trial and claimed not to remember things it would be impossible to forget.<sup>157</sup> This in itself was very valuable to the fact-finders. A defendant need not be truthful to reveal a great deal, as all detectives know. A good American detective, working behind closed doors in a police station and often using deceit about the evidence against the suspect or holding out promises of leniency, can get a confession written down that contains telling contradictions. But such statements make much more of an impact in open court, coming directly from the mouth of defendant himself.

Gaitaud, speaking French fluently but with a strong American accent, began describing his life: how his parents divorced and his mother got most of the property, how he spent his six years in the U.S. Marines, how his own marriage ended when Theresa, his wife and mother of his four children, would not end her affair with another man despite Gaitaud's entreaties. After his break with Theresa, Gaitaud described a few brief relationships with other women before he began seeing Susan Belasco seriously. They quickly moved in together, she became pregnant

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152. See Amar & Lettow, *supra* note 53, at 890.

153. Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2648–53 (1996).

154. *Id.* at 2653.

155. The practice of having defendant speak, but not under oath, began to disappear in the nineteenth century as states gradually did away with the traditional prohibition on defendant testifying under oath. See *Ferguson v. Georgia*, 365 U.S. 570, 577 n.6 (1961) (listing the dates when states permitted criminal defendants to testify); George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 662–71 (1997) (detailing the disappearance of the rule barring defendant testimony in criminal cases).

156. The pretrial questioning of the suspect limits the effectiveness of defendant lying at trial. When he is questioned pretrial, he has not had plenty of time and access to the dossier to invent false stories. The *président* will read defendant's pretrial answers from the dossier if they contradict what he says at trial.

157. *E.g., infra* at Part V.C.1.

with his child, then he said they had to live separately because his son Nicholas and her daughter Malinda did not get along.

After Gaitaud's narrative, the testimony took the form of a dialogue between him and the *Monsieur le président*. Corneloup seemed convinced that Gaitaud had a bad image of women because his father was a "victim" of his first wife and Gaitaud was a "victim" of his ex-wife. Corneloup is famed among lawyers and journalists for his psychological theories; his nickname is "Mireille Dumas," an Oprah-like French talk-show host known for trying to probe the inner psyches of her guests. At one point Corneloup asked Gaitaud, sympathetically, "You have suffered?" Gaitaud forced a smile and said, "There's no point in being a victim."

While Gaitaud denied he was a victim, he had no trouble claiming to be persecuted. His work in the U.S. Marines as a technician had involved access to some secret information about weapons systems, and, until his flight, he had worked in a security-sensitive position with a defense contractor. He also claimed to have transmitted top-secret information about the Lockerbie bombing for the U.S. government to unknown parties. Throughout the trial, he maintained that various agents of the U.S. government—from the CIA, NSA, FBI, and the armed forces—were pursuing him to keep him quiet about various things he had learned. In fact, he said, he was convinced they had killed Susan and Malinda Belasco to intimidate him.

Corneloup was interested in the large number of locks Gaitaud had all over his house, as an indication of his secretive nature.

"If there were a symbol of your life, would it be a lock?" he asked Gaitaud.

"It would be my job," said Gaitaud.

"But the locks?"

"Lots of locks, that goes with all my jobs."

After Corneloup, the jurors, and Bilger finished with Gaitaud, defense counsel tried to bring out his better side.

"How did you discover that your wife was cheating on you? Did Theresa come to you and tell you that she had fallen in love with another man?"

"No. I found them in bed together."

"What did you do then?"

"Later I asked Theresa to stop seeing Jim so we could start over again, but eventually she decided she didn't want to."

## 2. *The Other Personality Witnesses: Psychiatrists, Psychologists, and Family Members*

After Gaitaud spoke, experts testified about his personality. The *personnalité* is so important in the *Cour d'assises* that a psychiatrist rou-

tinely examines the defendant before trial.<sup>158</sup> In this case, three mental health professionals testified: a psychiatrist who had examined Gaitaud, a psychologist who had done the same, and a psychologist who evaluated various psychiatric tests administered to Gaitaud. The experts had taken an oath different from that of fact witnesses, and unlike them were permitted to look at their notes during their testimony. Discussion of the experts' qualifications was perfunctory. After all, these were not witnesses put forward by one party or the other—they had been appointed by the judiciary.<sup>159</sup>

The expert psychiatrist in Gaitaud's case said privately that there were a number of differences between American and French psychiatry,<sup>160</sup> and these appeared in the course of the experts' testimony. The French prefer "softer," more metaphorical and subjective categories. French psychiatrists do not use the DSM-IV,<sup>161</sup> the main reference guide for American psychiatrists, which has done away with the category of neurosis. The psychiatrist who examined Gaitaud testified that he was "borderline psychotic/neurotic with a persecution complex" but that his mental problems were not so grave as to reduce his criminal responsibility. He said that Gaitaud did not have a very firm sense of self and helped bolster it by imagining that he was being pursued. His years in the U.S. Marines, according to this theory, provided the structure that he so desperately needed to give him an identity. Corneloup harked back to his theory of Gaitaud's image of women. The psychologist who analyzed Gaitaud's responses to tests said that his answers in the Rorschach tests, particularly his reaction to the color red, indicated fear of women. Defense counsel made an effort to bring out the vagueness of psychiatric analysis in general by pointing to contradictions among the three experts' testimony and their inability to say whether he would necessarily be dangerous in the future. But they did not go deeply into testing the bases of the experts' theories or methods, for example by probing the value of a Rorschach test. It was difficult to determine what impact, if any, the psychiatric and psychological testimony had on the outcome of the trial or sentence because the panel in the *Cour d'assises* does not give reasons for its decisions.

Gaitaud's father was called; like Gaitaud himself, he did not take an oath. Family members and employees cannot be sworn, the idea being that the emotional or financial pressure on them to lie is too great to subject them to the risk of perjury. This rule extends to relatives by marriage and even ex-spouses. These people are thus encouraged to speak freely. The father started off on his narrative, but quickly became

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158. PRADEL, *supra* note 135, at 31.

159. The role of experts will be discussed in more depth *infra* Part V.C.5.

160. At the time, he had just returned from an international conference of psychiatrists in Washington, D.C.

161. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994).

bogged down in his distrust of the American government born of his own miserable divorce proceedings and “what they did to Thierry” (apparently he was convinced his son was poisoned in the marines). Corneloup cut him off and questioned him about his family life. It turned out that the father had been reasonably successful in business but had lost his main asset—an apartment building—to his wife during his divorce. Even before the divorce, he feared and resented her as the dominant figure in the household. Corneloup glowed with the vindication of his theory: like father like son.

### C. *The Facts Phase*

#### 1. *Defendant Again at Center Stage*

The *personnalité* now over, the “facts” phase began. Certain elements in the beginning of the facts phase were standard procedure, but after that the *président* determined the order unconstrained by tradition. Corneloup ran through a chronology of facts from the dossier. It was at this point that he posed the dramatic question described in the beginning, asking Gaitaud if he killed Susan and Malinda. After that exchange, Corneloup gave Gaitaud his chance to describe the facts. Corneloup let him go for a while, and Gaitaud gave a confused chronology up to the point when he fled to the Ivory Coast and was injured by a robber there (Gaitaud said he thought that the U.S. government sent the robber after him). Corneloup then stopped him and said,

“You’ve changed your story about when you found the bodies. You said before [consulting the dossier] that you found them on the morning of the 16th, and now you say the 17th.” Corneloup made that very French reproving sound, “Tch, tch, tch. It’s going to be difficult if you keep changing your story.”

Gaitaud insisted that it was in fact the 17th, that he must have been confused earlier. From then on, there was a dialogue back and forth between Corneloup and Gaitaud. A few days before the murders, Gaitaud had bought huge amounts of cleaning fluid and bleach and had begun cleaning his wall-to-wall carpets. When the police found the bodies (in Susan’s car in the garage), the carpets in several rooms were soaking wet and had been bleached almost white along a path through one room. Corneloup noted that Gaitaud had also changed his story about why he was cleaning the carpets. Gaitaud had said in his pretrial examination it was because the toilets had overflowed; at trial he said it was because the previous occupant of the apartment had lots of cats who had made a mess. Corneloup quoted from the dossier the statements of neighbors who said Gaitaud told them the toilets had overflowed. Gaitaud responded,

“You can ask anyone, sir. The person living in the apartment before me had lots of cats who made a mess.”



Disagreements between Gaitaud's testimony and that of the other witnesses were dealt with immediately after they arose. Often these disagreements produced a dialogue between the witness and Gaitaud. Mary Beniche, Susan's mother and a civil party, testified that she called Gaitaud at 6:30 in the evening on Tuesday, June 16. (According to the medical evidence, the killings took place in the evening or night of June 16 or early the morning of June 17.) Beniche said she asked Gaitaud where Susan was, and Gaitaud told her she was with a friend. Gaitaud said *he* called *Beniche* about that time and asked her where Susan was, that they had arranged to meet but she had not shown up. Corneloup asked to see the phone records. The San Diego police searched for a bit, then declared they couldn't find the records but they might be in their hotel room. (The San Diego police were unprepared for the fast pace and flexibility of the French trial; they were used to a more regimented system.) Corneloup sighed and moved on. A day or two later, the records were found and showed a call from Beniche's house to Gaitaud's number, but not vice versa, about that time.

The more detailed the examination of the facts became, the deeper the trouble for Gaitaud. Several times Corneloup asked him to respond to issues raised in others' testimony. His answers grew more and more confusing; often he implausibly said he could not remember. An insurance agent testified that a few weeks before the murders, Gaitaud took out policies on his own life and Susan's life, with himself as the beneficiary in case of Susan's death and Malinda as a beneficiary in case of his death. Gaitaud vaguely suggested these policies were meant to provide for Malinda. The San Diego police testified that a day or two before the murder, he had withdrawn all his money from his savings account. They showed his bank records. Corneloup asked Gaitaud why he withdrew all the money from his account.

"I can't remember" (for about the tenth time).

Corneloup would not let this one go by. "When the judge asks you a question, all you can do is mix up the dates or say you don't remember. When do you ever tell the truth?"

## 2. *Lack of Rules of Evidence: Treatment of Hearsay*

There are virtually no U.S.-style rules of evidence in a French trial.<sup>162</sup> All sorts of evidence comes in, including hearsay.<sup>163</sup> This pre-

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162. On the lack of formal rules of evidence in continental systems generally, see Damaška, *supra* note 145, at 514. However, this relaxed approach is starting to change, thanks to recent interpretations of the European Human Rights Convention, by both French courts and the European court of Human Rights. These have expanded the defendant's rights to require witnesses to appear and to testify in person. Frase, *France*, *supra* note 40, at 183.

163. The International Criminal Tribunal for the Former Yugoslavia has stated that it is charting a middle course between the common law and civil law systems with respect to admitting hearsay. Murphy, *Progress & Jurisprudence*, *supra* note 13, at 80-81 (citing Blaškic, Jan. 21, 1998; Tadic, Aug. 5,

vents time-consuming conferences between the judge and lawyers about admissibility, from which jurors are excluded. It also prevents objections from interrupting the flow of a witness's testimony. French jurors thus hear all the evidence, and trials move faster.

The French system mitigates the American concern about the jury giving too much weight to hearsay evidence in several ways. First, the judges sit with the jurors during deliberations and can remind them of hearsay's unreliability. Second, the reliability of a second- or third-hand statement can be tested immediately by asking other witnesses and checking documents, even if the original declarant is not in court.<sup>164</sup>

A particular incident shows how hearsay is used in a French trial and how this testing works. A statement was read of a witness who was dead, an older man and friend of Susan's who said Susan complained that Gaitaud had beaten her. Corneloup asked Gaitaud about this; Gaitaud said he had never beaten Susan. Corneloup then asked Mary Beniche (Susan's mother) if Susan had ever told her that Gaitaud had beaten her. Mrs. Beniche said no, perhaps, she speculated, because Mrs. Beniche had been beaten herself in a previous marriage and maybe Susan was ashamed to admit that it had happened to her also. Mrs. Belasco (Susan's ex-mother-in-law) said that her son Maurice had said to her that he had seen bruises on Susan and that he had told Susan that if he ever learned that Gaitaud had beaten Susan or Malinda, Gaitaud would have to answer to him.<sup>165</sup> Mrs. Belasco said Maurice said Susan did not say anything in response, but started crying and left. Defense counsel asked Mrs. Beniche how often she saw Susan and if she had ever seen bruises on her. Mrs. Beniche said she saw Susan sometimes, but not often, and that she had never seen bruises on Susan. The statement of Jennifer, Susan's best friend who saw her frequently, said that Susan never said Gaitaud had beaten her and that Jennifer had never seen bruises on Susan.<sup>166</sup>

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1996). But in practice hearsay is rarely excluded. ICTY Rule 89(c) (The basic rule of evidence is for a trial chamber to "admit any relevant evidence which it deems to have probative value."). These judges seem to be taking a more civil law approach, including ordering witnesses to appear and testify although they were not called by either party. See ICTY Rule 98; Rod Dixon, *Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 81, 97-98 (1997); Murphy, *Progress and Jurisprudence*, *supra* note 13, at 80 (citing Kupreškic, Sept. 30, 1998 (witness not called by either party ordered to appear)).

164. In other French and continental courts, another check would be the requirement of making detailed findings of fact with reasons given.

165. Maurice Belasco, oddly, never came to the trial despite being Susan's ex-husband and Malinda's father; there didn't seem to be anything pressing keeping him away. From comments made at trial, he appeared to be a happy-go-lucky type who rarely held down a steady job and spent most of his time surfing.

166. Shortly thereafter, there was testimony that Maurice, and indeed the whole Belasco family, were very sensitive to the possible dangers posed by Gaitaud and his son. Defense counsel asked Mary Beniche how suspicion arose that Gaitaud's son Nicholas was molesting Malinda. Mrs. Beniche said one day Maurice was undressing Malinda and when he was taking off her underpants she said "owie." Maurice then asked whether anyone had touched her there, and she said "Nicki Nicki Nicki." The Belascos then, according to Mrs. Beniche, set in motion all sorts of investigations into child moles-

3. *The Investigating Judge Testifies: Correcting a Deficient American (and French) Investigation*

The defense lawyers said privately that the investigating judge in a serious case is usually quite competent and thorough. In fact, they said, normally when you put a question to a witness in the *Cour d'assises* you already know what the answer will be because of the very complete witness interviews that the investigating judge did.<sup>167</sup> In this case, however, they often had no idea what a witness would say. Written material from the dossier is normally more important than it was in this case. It was evident this particular investigating judge relied too heavily on the work of the San Diego police. This is one of the difficulties with an inquisitorial system—it depends greatly on the competence and thoroughness of judicial personnel. Fortunately, to some extent a *président* can act as a backstop and compensate for an incomplete investigation at trial.

The investigating judge responsible for investigating Gaitaud's case, Monsieur Humetz, briefly took the stand after Gaitaud finished his main testimony. Monsieur Humetz explained how he went to California for a little less than two weeks as the head of a rogatory commission (*commission rogatoire*) and found the San Diego police to be extremely cooperative. They freely turned over all evidence, he said, and had done a terrific job of investigating. Monsieur Humetz proved to be quite friendly with the San Diego law enforcement contingent, joining them at different points in the trial, which he occasionally attended, for lunch and drinks. Before the trial began, he greeted them warmly, but walked past defense counsel without the customary (indeed, in France, almost sacred) “Bonjour” and a handshake. This raised eyebrows; after all, the investigating judge has a strict duty to be neutral and to investigate impartially both sides of the case.

During Monsieur Humetz's testimony, defense counsel pressed him on what additional investigation he had done beyond the San Diego police. They pointed out that, under American law, the police and prosecution are not obliged to do a thorough investigation of exculpatory evidence, and often leave this material out of witness statements, which the police themselves draft. They noted the role of defense counsel in the United States in investigating exculpatory evidence, and said that because they were prohibited from doing that investigation, it was Monsieur Humetz's responsibility. Monsieur Humetz said he had interviewed all the witnesses that the San Diego police had who were available, and had asked them if they had anything to add to their original statements.

“You didn't ask them any additional questions?”

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tation. It was clear that Mrs. Beniche thought the Belascos had blown the incident out of proportion in order to get custody of Malinda. This testimony cast doubt on Maurice's description and interpretation of events, as reported by his mother.

167. McKillop confirms this view of the thoroughness of normal dossiers in the *Cour d'assises*. McKillop, *Anatomy*, *supra* note 12, at 565–67.

"A few, but for the most part, no. The witness statements taken by the San Diego police were very thorough."

"You didn't try to interview other witnesses? For example, Maurice Belasco, Susan Belasco's ex-husband?"

"No. I didn't see the need. And some people were not available."

One of the *assesseurs* followed up: "Did you interview Thierry Gaitaud's mother?"

"No."

Corneloup: "Did you interview Theresa, Gaitaud's ex-wife?"

"No."

Defense counsel was indignant—but quietly, by American standards. He strongly suggested that this is not the way a proper French judicial investigation is done and that the witness statements taken by the San Diego police should not be treated the way statements taken by an investigating judge would be—read in court and generally relied on. Corneloup intervened, implying that Monsieur Humetz properly transformed an American police investigation into a French judicial investigation by interviewing the witnesses himself.

But during the trial, Corneloup's skepticism about the thoroughness of the American (and French) investigation clearly grew. He appointed experts for the defense to investigate physical evidence even during the trial, at one point granting a "rest period" during trial to allow this to happen.<sup>168</sup> After the verdict, he said privately that this was an exceptionally difficult trial because, in effect, he was having to act as an extra investigating judge while the trial was going on. To a certain extent, therefore, a presiding judge can compensate for an incomplete investigation.

#### 4. *Testimony of French Versus American Police*

The testimony of the French and American police could hardly have been more different, both in terms of how they viewed their role in investigating and their manner of testifying. French police view their role in serious cases as one of understanding the defendant's psychology, as well as gathering physical evidence and interviewing other witnesses. American police focus on the facts of what happened in a particular case. Together with this difference in the substance of testimony went a striking difference in the manner of giving it. French police are used to speaking in narrative form, at least at first, without interruption. American police, on the other hand, are trained to give short, direct answers, and not to volunteer information, especially on cross-examination. The different styles and substance split the *Gaitaud* trial into American and

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168. See *infra* text accompanying note 180. In granting this "rest period," Corneloup was perhaps stretching the rules. He could not formally suspend trial because of the "principle of continuity" of trial in the *Cour d'assises*. See C. PR. PÉN. art. 307 ("The trial may not be interrupted and must continue until the case is ended by the verdict of the *Cour d'assises*.").

Gallic segments—voluble Frenchmen described Gaitaud's relationship with his mother, while gruff Americans described what they found at the crime scene. The French police did not hesitate to express themselves, expansively at times, and they were not as guarded in response to questioning from defense counsel.

After Monsieur Humetz had finished, a French policeman testified. He had been one of the principal policemen working on the case and had gone to California with Monsieur Humetz. He testified a good deal longer than Monsieur Humetz, and seemed to view his role almost as that of a psychoanalyst. He launched into a discussion of Gaitaud's psychology, reviving themes from the *personnalité*. He said that Gaitaud was a good deal like his father, that both father and son were suspicious of the American government and also suspicious of American women. The judge in Gaitaud's divorce case was a woman—in Gaitaud's eyes, yet another American woman who was against him, and a representative of the American government to boot. Nicholas, Gaitaud's oldest son, shared some of this suspicion and dislike. At one point, when Susan and Gaitaud were living together, Nicholas burned all of Malinda's toys. The Belasco family accused Nicholas (then thirteen years old) of sexually molesting Malinda. (Gaitaud had testified earlier that this was the crisis that led him to live separately from Susan.) The policeman described the very close relationship between Gaitaud and Nicholas.

At this point Corneloup turned to Gaitaud. "I've seen the photos of the fetus—it was a little boy—a rival of Nicholas. You had to get rid of him, didn't you?"

Defense counsel rose. "We've been quiet throughout this whole trial while you've expounded your psychological thesis, Monsieur le président. But now I'm going to say something. Monsieur Gaitaud asked for custody of all his children; he didn't treat them differently. He told you he loved all his children."

Mrs. Belasco rose and said in a trembling voice, "I want to ask Thierry Gaitaud—how could he be a good father when he let Nicholas molest Malinda?"

Corneloup told her, "You can't ask that. You should ask Nicholas about that; these things aren't proven."

The San Diego police next took the stand. They did not refer to the inner workings of Gaitaud's mind or to his relationship with his children; they had not interviewed available witnesses to find out about Gaitaud's family life. As with all the witnesses, Corneloup started by asking them to tell what they knew. Instead of giving the usual narrative, the American police officers gave a very short, introductory answer and stopped. Further questions elicited the same clipped sort of answers. Corneloup was getting visibly impatient with them. Exasperated, he complained to me in the corridor during the lunch-break, "I seem to terrorize all the American witnesses!" I told him it was not terror, it was just the Ameri-

can style of trial. Police officers are trained to wait for questions from the lawyers before answering, and then to answer only the question and not to volunteer information, especially on cross-examination. Otherwise, they are attacked on cross-examination ("ripped apart," as the Assistant D.A. later described it). Corneloup shook his head in wonder.

### 5. *Differences in Expert Testimony*

Differences in testimony between the American and French experts were one of the most fascinating parts of the trial. The differences paralleled the differences in police testimony, but were even more striking because the American and French experts were basing their opinions on exactly the same evidence—the same photographs, x-rays, and tissue samples. Like the American police, the American experts gave short, narrowly focused answers, being used to adversarial direct and cross-examination. They also were guarded about answering definitively important questions calling for their opinion—such as what the cause of death was. In contrast, the French experts gave their opinions clearly and provided detailed explanations for them. They were not under suspicion of partisan taint, because the parties did not choose them, the judicial authority did. They were not anxious to hedge their opinion because they did not fear American cross-examination. In short, they spoke with little reserve, as in a discussion.

Experts appointed by the judiciary have traditionally played a large role in French adjudication and are given considerable deference. Their appointment and duties are so significant that there is a special term for expert inquiry into facts: the *expertise*. In civil cases, French judges often will delegate inquiry into factual issues that are at all complex to experts. These experts in effect hold a mini-trial on the subject and give the judge a detailed report together with conclusions on the application of law to facts.<sup>169</sup> In criminal cases, the investigating judge initiates an *expertise*, and parties can request that he do so.<sup>170</sup> Experts are chosen from either a national list established by the bar of the *Cour de cassation*, or from lists compiled by the regional *Cours d'appel*.<sup>171</sup> They have great leeway in expressing their opinions; while the presiding judge is forbidden to express his opinion on defendant's guilt at trial,<sup>172</sup> experts may even say "This

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169. See James Beardsley, *Proof of Fact in French Civil Procedure*, 34 AM. J. COMP. L. 459, 480–85 (1986) (noting that experts are vested with broad powers, and that findings often extend beyond issues of fact into matters of law).

170. See C. PR. PÉN. art. 156. If an investigating judge refuses the request of a party for an *expertise*, he must give his reasons in writing and the parties may appeal the decision to the *Chambre de l'instruction*. *Id.* art. 185 to 186-1.

171. *Id.* art. 157. The experts on these lists take an oath before the *Cour d'appel* of their domicile that they will use their skills in the service of justice on their honor and their conscience. This oath is taken once and for all, and is not renewed at each appearance at court, emphasizing the experts' role as a government official. *Id.* art. 160.

172. *Id.* art. 328.

man has killed.”<sup>173</sup> However, there is a growing tendency for lawyers to call people who are really technical experts as ordinary witnesses to dispute the results of the official expert’s report.<sup>174</sup> Defense counsel did not do so in Gaitaud’s case.

The police went over the discovery of the bodies in detail. The San Diego medical examiner who performed the autopsies testified, as did French pathologists who had reviewed the results. They showed the photos of the bodies, both as found and during autopsy.<sup>175</sup> Several jurors cringed at the sight. There was evidence of blows to the head of Susan Belasco before death, and of marks on the backs of her hands suggesting she may have tried to protect herself by covering her head. The head wounds probably bled a great deal, but were not deep; the skull was not fractured. Both the San Diego medical examiner and the French pathologists agreed that these could not have caused death. There were no marks at all on Malinda.

So what was the cause of death? The American medical examiner was cautious in giving his opinion. The American suggested that it may have been asphyxiation, because there was no other obvious cause, but he would not say for sure that was it. In contrast, the main French expert said confidently that it was asphyxiation and explained the autopsy evidence that led her to that conclusion. The American acknowledged the evidence but staunchly maintained his agnosticism.

Ms. Barrett, the San Diego Assistant District Attorney, later said in private that unless a fact is almost absolutely certain and indisputable, medical examiners are often cautious in giving their opinions and hedge, so as not to allow any opening for the other side to attack them on cross-examination. French experts, like the French police compared to American, give their opinions much more freely.<sup>176</sup> They are not subject to

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173. LARGUIER, *supra* note 83, at 195.

174. See VINCENT ET AL., *supra* note 74, § 627. The Code provides for the situation in which a witness contradicts the conclusions of an official expert or suggests new considerations from a technical point of view. In that case, the *président* judge must ask for the observations of the official experts, the prosecutor, the defense counsel, and the civil party. He must then issue a written decision with reasons on whether to continue with the trial or to postpone it to a future date. C. PR. PÉN. art. 169.

175. Sometimes a French trial can be more adversarial behind the scenes. One evening after the trial session, Corneloup held a contentious conference with Bilger and the defense lawyers over whether photos of the bodies should be shown. Defense counsel strenuously argued that there would be no point in showing them because the bodies were simply decomposed; it was not the manner of death that caused the photos to be disgusting. Corneloup decided they would be shown anyway, saying, “*La mort c’est la mort*—these things exist, we can’t ignore them.”

176. The reticence of American experts as opposed to the French also appears in an incident concerning a computer. Corneloup asked when a particular document was written, or at least modified for the last time. The FBI agent was extremely reluctant to assign any date to the computer file, and wouldn’t even say for sure that it had been written before a certain date. The French computer expert, in contrast, said it must have been saved for the last time before April 30, 1992, for various reasons. The FBI agent didn’t take issue with this analysis, and in the end agreed. Once again, it appeared the American expert was extremely reluctant to give an opinion, based on experience with the American system where he would be skewered if there were the slightest chance he was wrong.

hard-hitting, probing, American-style cross-examination.<sup>177</sup> (Indeed, Bilger and the defense counsel asked few questions. Corneloup, on the other hand, was in his element and asked many questions; having been an investigating judge for so long, he was familiar with medical evidence.) Because the judiciary has appointed the French experts, the experts are not as vulnerable to charges of partisanship. There are dangers inherent in deference being given to these official experts and weaknesses in their testimony may not be exposed. On the other hand, this system may prove to be a net benefit to defendants compared to the American method of parties providing experts. Normally, the prosecution in our system has more resources than the defendant and can pay for expert testimony more easily—testimony that is often decidedly partisan in nature.<sup>178</sup>

The jurors asked several questions. “Could the blows have come from more than one person?” one asked. “Yes,” was the answer. Ms. Barrett was also allowed to ask questions after the civil party and before the French prosecutor; once or twice she did. “Is it possible the bodies were moved after death?” she asked. “Yes, as long as it was done within three hours of death.” Corneloup asked if any fingerprints were found on Susan’s car inside the garage where the bodies were found. The San Diego police said that they lost the fingerprint cards, but they assured Corneloup that the only fingerprints found on the car were Susan’s. They threw out a bootie, a child’s shoe presumably belonging to Malinda that was found in the car, as irrelevant to the investigation, once again prompting Corneloup’s amazement.<sup>179</sup>

#### 6. *Lapses in Dignity*

In a trial like this, it was sometimes hard to maintain dignity and efficiency at the same time. On Wednesday, the fourth day of trial, Corneloup kept the session late into the night to keep the trial on schedule; it finally ended at 9:30. Later, the newspapers reported that he was impatient with everyone—Americans, French, experts, translators—and chided him for it. In his anxiety to keep on schedule, he pushed witnesses and other trial participants too hard and contributed to a certain

177. See *supra* text accompany notes 149–50 (discussing the effects of American cross-examination on witness testimony).

178. Arguments for and against the adoption of court-appointed experts are found in M. N. Howard, *The Neutral Expert: A Plausible Threat to Justice*, 1991 CRIM. L. REV. 98; J. R. Spencer, *The Neutral Expert: An Implausible Bogey*, 1991 CRIM. L. REV. 106.

179. Corneloup was often astonished at the way the San Diego police treated physical evidence. At some point, a roadside cleaning crew reported that they had found two wallets together on the side of a highway not on the path of Gaitaud’s flight—one belonging to Susan Belasco and the other a child’s wallet with the name “Megan” on it. Corneloup was dismayed to learn that the police had not made an effort to figure out when the cleaning crew found these and that the police had thrown out the “Megan” wallet. One policeman explained that he thought these were a diversionary tactic on the part of Gaitaud and not important. Of course, problems with conserving evidence are not unique to this case.



lapse of dignity himself. He knew it, and the next day he was calmer and more patient.

Family drama began to take center stage as witnesses from America trickled in. For the Gaitaud family, this was an odd sort of reunion—besides Gaitaud’s father, his mother, sister, ex-wife, and son Nicholas arrived. Many of these people had not seen each other for years. Technically, the witnesses were not allowed to speak with each other until after they had testified, but Bilger gave his permission for the Gaitauds to meet because they had not seen each other for so long. Nearly all the women—including Mrs. Belasco and Mary Beniche—burst into tears at some point on the witness stand.

#### 7. *Physical Evidence in the Inquisitorial System: The Computer*

A particular episode, involving Gaitaud’s personal computer, demonstrates how Corneloup attempted to correct for some of the problems caused by combining an American and French investigation. It also shows how more evidence can come into a French court, thanks to a judicial rather than a partisan investigation. Gaitaud’s home personal computer was supposed to be sent from San Diego as physical evidence. On Friday, a box arrived: the French police unpacked it and found the monitor and the keyboard, but not the central processing unit with the hard drive. Corneloup naturally asked for the computer to be sent as soon as possible. The next Monday it arrived. An FBI agent, brought in by the San Diego police because of his technical expertise, had already investigated the contents of the hard drive and found a fictional story about the murder of a woman named Theresa (the name of Gaitaud’s ex-wife), whose body was found in the murderer’s garage. The FBI agent testified that the San Diego police instructed him only to look for the keywords “murder” and “secretive” or “secret.”

Defense counsel argued to Corneloup that this was not a sufficient investigation of the computer and asked to have French experts appointed who would look for additional words, such as “Malinda,” “Susan,” “Belasco,” “NSA,” “insurance,” etc. Corneloup agreed and said he was exercising his discretion to appoint two French computer experts (an appointment that the investigating judge normally would make before trial), who were promptly sworn in. Corneloup granted a “rest period” Monday afternoon to allow the experts to do the work.<sup>180</sup> The two French experts worked alongside the FBI agent and a translator all through the night.

The additional work turned up several other relevant documents, including letters that Susan wrote lambasting the Belasco family, and one dated February 1992 saying how happy she was and how well she was

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180. See *supra* note 168 on the principle of continuity of trial in the *Cour d’assises*.

getting along with Gaitaud's children. Unfortunately for the defense, the work also turned up another story, this one about a man killing his girlfriend for insurance money. In many American trials, this story never would have seen the light of day. The prosecution would have missed it and the defense, if it had found it, never would have revealed it.<sup>181</sup> As it was, the defense had no choice because court-appointed, not party-retained, experts did the work. Damning as it was, the evidence came in.

8. *An Alternative Killer?: An Attempt to "Take the Fifth"*

The dramatic appearance of Nicholas Gaitaud showed the clash between the American and the French legal and social culture at its sharpest. Nicholas was the image of a disrespectful American youth, confronted with a culture that respected government authority and expected witnesses to answer questions in official inquiries. Nicholas did not hesitate to assert his "rights," but he was no match for Corneloup. In the end, Corneloup did not confront Nicholas as forcefully as he might have but got the information he wanted through indirect questioning. Corneloup clearly felt some anguish about the way he had to treat Nicholas; he worried about having offended Nicholas' dignity.

By the time of the trial, Nicholas was a young man of twenty, with delicate good looks bolstered with an arrogant swagger. The translators nicknamed him "California cool." He spoke no French. A question arose as to whether Nicholas might, in fact, have written the story about Theresa being killed and put in the garage. Gaitaud earlier had said that he did not recall this story at all and said that he did not write it. Asked who may have written it, he said possibly Nick, because Nick had access to the computer and Gaitaud had been teaching him how to use it. The story was read aloud in translation; Corneloup puzzled over whether it could have been written by a thirteen-year-old boy.

Nicholas did nothing to dispel suspicion in his first appearance in court. He slouched up to the witness microphone with his hands stuffed in baggy cargo pants. The translator told him to take his hands out of his pockets, that it was very disrespectful. At one point in Nicholas's testimony, Corneloup noted information from the dossier that Nicholas had been in prison. Corneloup asked why, and Nicholas said, "None of your business." An audible gasp went up from the audience. Testimony went

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181. States with liberal reciprocal criminal discovery rules, such as California, might possibly be an exception. See CAL. CONST. art. I, § 30(c) ("In order to provide for fair and speedy trials, discovery shall be reciprocal in nature."). But even there, it could be argued that the prosecution had full access to the piece of physical evidence in question—the computer—and could have found out the same information. The two sides might not have to disclose everything they discovered about the piece of evidence in question. In general, California's reciprocal discovery rules focus on evidence the parties intend to present at trial. See CAL. CONST. art. I, § 30(c); CAL. PENAL CODE § 1054 (West 2001); *Izazaga v. Superior Court*, 815 P.2d 304 (Cal. 1991).

on with Nicholas giving odd answers, and Corneloup ultimately asked him,

“Did you kill Susan and Malinda Belasco?”

“No.”

“Were you capable of killing them?”

“Of course. Anyone would have been capable of killing them.”

Gaitaud rose and said Nick was not capable of killing them.

Corneloup started to question Nicholas about how far away he was from Gaitaud’s house at the time of the killings, whether he had a bicycle, etc. After this, Bilger attacked Gaitaud.

“You said that you love your children, Monsieur Gaitaud. Then why didn’t you stand up during Nick’s questioning and shout out, ‘Leave him alone! He didn’t do it!’”

Gaitaud pointed out that he did say Nick was not capable of killing them and that he could not very well stop Corneloup from questioning someone. Bilger sat down with a disgusted look.

Tuesday afternoon the computer experts reported their findings and stated that the story named “Theresa” was found in the file named “Nick.” Again, Nicholas shuffled into court in cargo pants trailing on the floor, sandals, and a huge T-shirt that showed the massive tattoos covering his slender arms. Corneloup gave him the story about Theresa to read in English. Nicholas read for a few minutes and looked up.

Corneloup asked, “Did you write this story?”

“I don’t remember.”

“Were you capable of writing this story?”

“Yes. I’d been watching movies like this since I was ten.”

“Did you kill Susan Belasco and Malinda?”

“I’m not going to answer. I refuse to answer.”

Stunned silence in the courtroom. Corneloup looked in the direction of Ms. Barrett and me, searching for enlightenment.

“Is there something about American procedure that’s causing this?” he asked.

Ms. Barrett and I rose. We told him that the Fifth Amendment to the U.S. Constitution allows a witness to refuse to answer questions that might incriminate him, even if he is being asked to answer in someone else’s criminal trial.<sup>182</sup>

Corneloup turned to Nicholas. “You’re in France, in a court using French procedure. You are French. I ask you to answer the question.”

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182. Unlike the Fifth Amendment proper, *Miranda v. Arizona*, 384 U.S. 436 (1966), seems to be well-known in France, thanks to American movies. A person who clerked for a French judge said that a French defendant in a criminal case complained that the French police officer who arrested him did not “read him his rights,” and tell him he had the right to remain silent. This argument did not get the defendant very far.

"No. I renounce my French citizenship. I'm not coming back again."

Silence again settled over the courtroom. Corneloup thought for a moment and then took a different tack. He did not return to the direct question of whether Nicholas committed the murders but rather questioned him about where he was on the evening of the sixteenth and morning of the seventeenth. Nicholas ended up admitting he was at his mother's house, thus implicitly denying that he committed the murders. Several calls from the cheerful thirteen-year-old boy recorded on Gaitaud's answering machine tape on the evening of the sixteenth, placed Nicholas with his mother and asking the whereabouts of his father, supporting Nicholas's testimony. The testimony of Theresa McCarthy, Gaitaud's ex-wife and Nicholas's mother, confirmed that Nicholas was with her. The Nicholas drama was deflated, but not without the *président's* careful inquiry. After the trial, Corneloup said it was painful to have to ask Nicholas those questions, but he felt he had a duty to do so.

9. *Reliance on the American Prosecutor: Defense Counsel Timidity*

At various points, Corneloup showed Ms. Barrett, the San Diego Assistant D.A., considerable deference, almost as if she had been a French judge-prosecutor. So strong is the French desire for official authority, that he tended to defer to anyone who represented an American state. At times, he was in danger of ignoring the American prosecutor's adversarial role at trial. Defense counsel were reluctant to raise this point with Corneloup, fearing they might annoy him. One of the drawbacks of the inquisitorial system is that the *président* might go astray, especially in an unusual case. But some checks do exist on a *président's* power. Sometimes, as in the *Gaitaud* case, the *greffière* acts as a back-stop, preventing the *président* from violating procedural rules.

During the discussion of the computer story about killing Theresa, Corneloup debated whether the story was more like something written by an adult or a child. He turned to Ms. Barrett and asked her the question. Ms. Barrett said it seemed to have been written by an adult because it was complicated. I did not think it seemed all that complicated, and it was possible to imagine many older children or teenagers capable of writing it. In any event, it seemed a question he should have been asking someone else. Defense counsel showed no signs of acting. I stood up.

"Monsieur le président, it would be better to ask that question to someone neutral."

Corneloup said, "You're supposed to be neutral. Madame Barrett is supposed to be neutral. You've both taken the same oath, the oath every other witness takes."

Bilger said, "Madame Lettow doesn't seem very neutral to me."

I said to Corneloup, “It doesn’t have to be me. But it should be someone other than Ms. Barrett. The role of the American prosecutor is much more adversarial than here, and it’s hard to forget that normal role in the heat of trial. I understand one of the court translators is American. You could ask her.”

Unfortunately, she was not in the courtroom at that moment, and Corneloup did not want to be held up waiting for her. Corneloup sighed and said, “There are no neutral Americans here.”

Afterward, defense counsel said they were glad I had done something. They had been holding their fire for some time about Corneloup’s deference to Ms. Barrett for fear of irritating him. Before that incident, they said, Corneloup had even asked Ms. Barrett if she wanted to do a closing argument. Defense counsel decided not to object to avoid rangling Corneloup. Fortunately for them, Madame Germain, the *greffière*, pointed out to Corneloup a procedural rule that forbids a witness from giving a closing argument. (This was yet another example of how the *greffière*, or clerk of the court, is invaluable to the *président* and saves the proceedings from being overturned.) Corneloup himself said after the trial that I was right to object to his asking Ms. Barrett that question. He had to make a number of unusual decisions in this trial, he said, and was bound to get one wrong occasionally.<sup>183</sup>

#### D. Closing Arguments: Plaidoiries and Réquisitoire

Testimony was now at an end, and a long-anticipated phase of the trial began. These are the famous closing arguments—the *plaidoiries* and *réquisitoire*.<sup>184</sup> They are a venerable institution in France; this is the only time when the lawyers get a chance to shine rhetorically, to make their case free from judicial interference. Unlike Anglo-American lawyers, who have opening arguments and lengthy cross-examinations throughout the trial, French lawyers are continually under the *président*’s thumb until the closing arguments. During the closing arguments, they may talk for hours without fear of interruption. And, often they do. Stories abound of famous *plaidoiries*. Madame Marie-France Garaud, who is the mother of defense counsel Jean-Yves Garaud (and who was recently elected to the European Parliament), told of being spellbound as a child listening to the *plaidoirie* of the great Michel Garçon in the *Cour d’assises*. Garçon was a very learned and cultured man, a member of the

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183. It was true that this error was by no means fundamental to the question of Gaitaud’s guilt or innocence. Nonetheless, it was interesting that Corneloup felt so comfortable admitting a mistake. Possibly the method of appellate review had something to do with this. See *supra* notes 92–94 and accompanying text.

184. The closing arguments of the civil party’s lawyer and defense counsel are called the *plaidoiries*; the closing argument of the prosecutor is called the *réquisition* or *réquisitoire*.

revered *Académie française*.<sup>185</sup> But his logic and rhetoric were so powerful that the *plaidoirie* appealed even to a schoolgirl. “When you heard him, you believed everything he said was the way it had actually happened—that his client was innocent.”

As Madame Garaud’s account suggests, the *plaidoiries* often attract large audiences and are viewed as great entertainment. This is where the adversarial and rhetorical side bubbling under the surface of a French trial can finally break out into the open, channeled into this one segment instead of permeating the entire trial the way it does in the American system. This method of channeling keeps it under control, but still gives it its due.

Jean-Yves Garaud and Olivier Saumon spent countless hours preparing their *plaidoiries* for Gaitaud’s case. This seemed to be exhausting them; they looked pale during the last week of trial. On Sunday, before the last week, they met with a former professor of Saumon’s, Stéphan Ben-Simon, now a professor of rhetoric at a school for continuing legal education. From mid-afternoon he helped them work out arguments to defend Gaitaud, finally leaving at 2:00 a.m.<sup>186</sup> Garaud and Simon stayed to continue working. On Monday, they fell asleep in the library of the *Palais de Justice* preparing their *plaidoiries*.

At last the moment arrived, late on Tuesday afternoon. Maître Lévy, for the civil parties, was first to give her *plaidoirie*. She spoke on the floor, near the witness microphone, but moved back and forth. Using no notes, she talked for about ten minutes. She described how young and beautiful Susan was, how she tried to be a good mother to Gaitaud’s children. But the ungrateful Gaitaud did her in. Her voice sometimes shook with emotion. Her last image was that of Susan’s laugh—bubbling, irrepressible, unmistakable—now silenced forever by Gaitaud.

Maître Lévy initially had planned to ask for one million francs in damages for the civil parties, but she did not mention money at all in her *plaidoirie*. In fact, she could not ask for damages because French law considered Susan and Malinda to be financial dependents, not money-earners (Susan had quit her job in anticipation of the baby’s birth), and so the civil parties could not receive compensation for their deaths. The French do not consider future earnings the same way Americans usually do in calculating damages. The civil parties did ask for nominal damages of one franc. Even if they had been awarded large damages, they could not have collected them because Gaitaud had no money and the public judgment fund covers only French civil parties.<sup>187</sup>

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185. The fact that a lawyer best known for his *plaidoiries* would be elected to the *Académie française*, which is almost sacred in French culture, suggests in what high regard that skill is held.

186. I helped out with pieces of Americana. For example, I explained that it is not so unusual for an American to be in as much debt as Gaitaud was at the time of the murders (a few tens of thousands of dollars, an amount that staggered the French), and that there are twelve inches to a foot, not ten.

187. See *supra* notes 127–28 and accompanying text.

The next morning, Wednesday, Bilger began his *réquisitoire*. He spoke from his pulpit-like seat on the left end of the bench, using notes but not often referring to them. He started quietly, reflectively. He talked of Gaitaud's many deceptions, culminating in his attempts to deceive the court. Building up emotionally, almost to a shout, he said it was a pity Nicholas had to be questioned about whether he did the killings, but Gaitaud's insinuations had made it necessary. He then launched into a discussion of the unusual proceedings in the case, claiming that there was no problem with using American investigative procedure in this way and suggesting that American "oral" procedure is not too different from that used in the *Cour d'assises*, which he described as adversarial (*procédure contradictoire*). He argued that "in spite of the theoretical objections of Madame Lettow," the truth in this case was clear. He went on to imply that Madame Lettow was deliberately throwing up smokescreens to protect Gaitaud. In contrast, he thanked "our American friends" in law enforcement and said that this mixture of American and French criminal procedure was an admirable way to get to the truth.

Turning to the facts of the case, he gave a chronological description of Gaitaud's life, stressing his close relationship with Nicholas, which he termed "corrupt and rotten." He moved closer to the events surrounding the deaths, noting that there were elements of doubt concerning guilt—for instance, Gaitaud beginning to clean his carpets before the deaths took place. But he emphasized Gaitaud's lies about making a call to Mary Beniche on the sixteenth about where Susan was, when in fact Beniche made a call to him. His voice then dropped very low, almost to a whisper. "You have to understand what it is to asphyxiate a human being. It takes three, sometimes even four minutes." Gaitaud decided he could not leave Malinda alive—she was old enough to tell others what had happened—so he did the same to her. In the same low voice, Bilger invoked Courneloup's fascination, "the baby about to be born—you should see the photos."<sup>188</sup> Returning to a normal voice, he asked, "Why did he commit this crime? His defense about the American agents is absurd, and when pressed for details, he can only say 'I don't remember.'" Bilger said he did not think the motives of this crime were economic. Rather they were psychological, based on "a double image of women" as idealized and yet worthy of disdain. This double image, combined with his desire to make Nicholas the center of his life and his problems with Susan, pulverized his ability to relate to people and brought out the savage in Gaitaud. Bilger thus played to the French fascination with psychological theory, especially Corneloup's interest.

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188. Killing the fetus could be charged in California as an additional murder. CAL. PENAL CODE § 187(a) (West 2001); Greg Moran, *DA Investigator Wins Honor in Multinational Murder Probe*, SAN DIEGO UNION-TRIB., Sept. 9, 1995, at B8. Under French law, it could not be considered a separate murder.

Nearing the end, Bilger tackled the question of premeditation. The closure of Gaitaud's accounts, the Theresa story on the computer, and the life insurance—all done very maladroitly—indicated premeditation. However, Bilger said he did not think Gaitaud premeditated that particular place and time for the murder: that is, Gaitaud's apartment with Malinda present. He told the panel, "You can consider the killing of Susan to be an unlawful killing (*meurtre*) and of Malinda to be a murder (*assassinat*), because the latter was done to save his skin. Or you can consider both to be murders. In any case, I'm asking for life imprisonment (*perpétuité*)." He concluded, "I'm going to end by giving you my own personal impression of Gaitaud. I started the trial thinking he was an unstable personality. I ended up thinking he was utterly without morals, especially in the last days of the trial when the second most important person came: Nicholas. Notice how Gaitaud tried to insinuate things about Nicholas, all the while saying he didn't believe he could have done it." Bilger closed by invoking the asphyxiation of Malinda in graphic detail and asking for life imprisonment.

Bilger's *réquisitoire* had lasted about an hour and a half, rather short by *Cour d'assises* standards. Garaud and Saumon divided the defense's *plaidoirie* between them. No rebuttal is allowed the prosecutor, unlike the American system, so the defense has the last word. At this point, Garaud and Saumon needed every possible advantage. Defense counsel spoke standing in their places, on the bench beneath Gaitaud, with notes. Garaud came first. His assignment was to be cool, unemotional, and logical, "computer Garaud," as he called it. Calmly he pointed out that using this mixture of American and French procedure caused many problems. Many leads were missing, many pieces of evidence were not tracked down. "I've never seen an investigation in the *Cour d'assises* done like this." Nicholas was never thoroughly investigated, there was not even an attempt to interview Maurice Belasco, let alone investigate him. This latter omission was especially troubling, because Susan's letters about her ex-husband were very critical—she said he was violent, lazy, and did drugs. He concluded by questioning whether a man as intelligent as Gaitaud could have made such stupid mistakes in committing a murder, such as leaving the bodies in his garage.

Saumon spoke next, much more emotionally than Garaud. "This crime is horrible," he said, "it is very hard on all the families. I can't stand here and tell you he is innocent. But there is a serious doubt about guilt; this investigation was not sufficient, especially to give such a drastic punishment." He picked up his teacher Ben-Simon's line of argument. "Before 1992, Gaitaud was more or less normal. Sure, he had had various shocks, but you can reconstruct yourself after your parents' divorce—I did." He invoked the complicated situation surrounding Thierry and Susan, with pressure coming from all sides. In conclusion,



he said, it would be crazy to commit a murder the way Thierry Gaitaud was said to have done, and so he was either innocent or profoundly mentally unbalanced. Garaud and Saumon together spoke for about an hour and a half, the same length as the prosecutor. They ended at about 3:30 in the afternoon.

### *E. Charge, Deliberations, and Verdict*

The height of formality at the trial came during the charge. After the *plaidoiries*, the atmosphere in the courtroom became very solemn. The *président* asked Gaitaud if he had anything to add. Gaitaud stood up and said simply, “I am innocent.” (Defense counsel later said this was a great improvement on what Gaitaud had originally intended to say. They had discouraged him from arguing that the killer was really someone else altogether, a shadowy figure hardly mentioned at trial.) The *président* then gave the charge to the panel—including, of course, himself. He slowly read out the formal allegations against Gaitaud: First, the unlawful killing of Susan Belasco; second, with premeditation; third, the unlawful killing of Malinda Belasco; fourth, with premeditation. He paused, and intoned the famous words of Article 353 of the French criminal code, the charge to the *Cour d’assises*:

The law does not ask an accounting from judges of the grounds by which they became convinced; it does not prescribe for them rules on which they must make the fullness and sufficiency of a proof particularly depend; it requires of them that they ask themselves, in silence and reflection to seek out, in the sincerity of their conscience, what impression the evidence reported against the accused and the ground of his defense have made on their reason. The law asks them only the single question, which encompasses the full measure of their duties: “Are you thoroughly convinced? [Avez-vous une intime conviction?]”<sup>189</sup>

Thus charged with their responsibilities, the panel went to deliberate. There was no elaborate exposition of the law; the professional judges can answer questions as they arise in deliberations. It should be noted that the lack of a requirement to give reasons for a decision is virtually unique to the *Cour d’assises*; elsewhere in the French system, judges must give reasons for reaching a particular decision (*jugement motivé*).<sup>190</sup> This failure to require reasons from the *Cour d’assises* is connected with its oral proceedings; and the use of lay jurors.

The panel deliberated at an oval table in a comfortable, well-appointed room just behind the courtroom, with a marble bust of an eminent jurist set in a niche along the wall and a copy of Article 353

189. THE FRENCH CODE OF CRIMINAL PROCEDURE at 90 (Gerald L. Kock & Richard S. Frase, trans., rev. ed. 1988) (internal quotations omitted).

190. This is true for other continental systems as well. LANGBEIN, *supra* note 39, at 63.

prominently displayed. The table was solid wood and the chairs large and well-stuffed. The whole atmosphere was far from the dingy or at best utilitarian American jury rooms, and impresses the onlooker with a sense of weighty deliberations taking place there. Once the panel went in to deliberate, they could not leave until they reached a verdict.

How deliberations are conducted is, like so much else, within the discretion of the *président*. Corneloup later said his approach was not to say anything himself. He thought the *assesseurs* and jurors had heard him speak enough already. He read the first charge, then went around the table asking what each person, both the jurors and the *assesseurs*, had to say about that charge. This was one of the opportunities for the *assesseurs* and jurors to engage in the French ideal of civilized discussion. Corneloup said it was surprising how much certain jurors who had been almost silent the entire trial talked during deliberations.

Then each member of the panel cast a vote on the first charge, a formal procedure in which a written ballot is put into a wooden box. The ballot is a little sheet of paper stating: "On my honor and my conscience, my verdict is \_\_\_\_." The ballots are anonymous. (The casting of this ballot is required.<sup>191</sup>) The votes are then counted. The group repeated this procedure for each of the charges. This relatively simple procedure works because a super-majority of eight is required to convict, not unanimity. Everyone has an opportunity to speak to each issue, and no one is unduly pressured.

Meanwhile, in the courtroom, the waiting began. The ever-reliable *greffière*, the clerk of the court, said that deliberations would last about four or five hours; the panel retired at about 4:00.

Shortly after 8:00, the panel emerged from deliberations and the members took their seats in the courtroom. The *président* announced that there were at least eight guilty votes for all four charges and that the sentence was life imprisonment. Everyone looked at Gaitaud. His face was expressionless. After the panel rose to leave he turned to Garaud and Saumon. "I'm very angry," he said calmly, "Let's keep in touch." The police officers then escorted him back to prison. Gaitaud's family was also quite calm. "When is he going to get out?" they asked.

#### F. Postmortem

Garaud, Saumon, and Bilger went to the deliberations room for the traditional post-trial debriefing with Corneloup and the *assesseurs*, and I accompanied them.

Bilger was courteous, and very interested in American adversarial procedure. We discussed the differences between American and French trials. He said (out of earshot of Corneloup) that he hoped France

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191. C. PR. PÉN. art. 357.

moves to a system of American-style courtroom procedure, with lawyers asking most of the questions. The current procedure in France, he said, depends too heavily on the *président*. Garaud separately gave the same opinion. Doubtless the American approach is very attractive to lawyers abroad, because lawyers have much more control over the courtroom.

Corneloup said this was a difficult trial for him, because he had to act more like an investigating judge than a *président*. He was very interested to know whether he had done anything that “shocked your American sensibilities.” He was especially concerned about his questioning of Nicholas. He discussed the Nicholas episodes at length, saying he was sorry to ask him those questions but he felt he had to.

Corneloup and the *assesseurs* all agreed that it was very difficult to do the closing argument for the defense. Corneloup assured Garaud and Saumon that they could not have done better. Garaud and Saumon said they thought the jurors to the female *assesseur*’s left had already made up their minds early in the trial, based on their questions and reactions. Corneloup and the *assesseurs* all shook their heads vigorously, saying nothing could be further from the truth. Corneloup added, “You never can tell with jurors.” Corneloup would not say what the actual votes were on each count; he is in fact prohibited from doing so.<sup>192</sup> As with the American use of lay jurors, the content of deliberations is kept under wraps; it may not be probed.<sup>193</sup>

Garaud and Saumon, a little shaken, told Corneloup and the *assesseurs* that they thought the sentence was harsh, because Gaitaud is clearly mentally unbalanced. Corneloup said that, although Gaitaud was sentenced to life imprisonment (*perpétuité* or *perpét* for short), he could even get out in fifteen years, minus the five he had spent in pretrial detention, assuming he confessed and behaved well.<sup>194</sup> As Garaud and Saumon agreed later, from Gaitaud’s point of view, it was a definite improvement over the California death penalty. Even if he were not sentenced to death in California, most likely he would have received a sentence of life imprisonment without possibility of parole in a California prison if convicted.<sup>195</sup>

As noted in part IV.B above, at the time of Gaitaud’s trial there was no regular appeal from a decision of the *Cour d’assises*. The only hope of overturning Gaitaud’s conviction lay in invoking the equivalent of the Supreme Court of France, the *Cour de cassation*. This proved to be diffi-

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192. C. PR. PÉN. art. 365.

193. *Id.*

194. The French Criminal Code specifies that a person sentenced to ten or more years of imprisonment must serve at least half the sentence; this is known as the “security period.” C. PÉN. arts. 132–133.

195. Jim Whitman examined the great differences between prison sentences in the United States and Europe. He attributes the lower prison sentences in Europe to the European’s greater concern with dignity values. James A. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1395–98 (2000).

cult for Gaitaud, in part because counsel who represented him before the *Chambre d'accusation* (as it was then known) may have failed to preserve certain procedural arguments related to the American investigation.

## VI. ADVICE FOR AMERICANS WORKING ON A MULTINATIONAL CRIMINAL CASE

The differences between American and French or inquisitorial procedure mean that Americans should ordinarily play a significant role in a multinational trial to ensure that the trial runs smoothly and fairly. As noted in the introduction, cases in which crimes committed in the United States are tried abroad are likely to become more common because of the growing tendency to have dual nationality, the reluctance of many countries to extradite to the United States because of the death penalty, and the increase in international crime. Both the defense and the prosecution need to be wary of certain pitfalls. This section summarizes the various difficulties that can arise and offers suggestions for how to cope with them.

### A. *The Defense*

For the defense, the main concern will be educating French judges in the adversarial nature of American investigations and procedure generally. This process should begin as early in the case as possible. As soon as the case is assigned to them, foreign defense counsel should secure the services of an American lawyer or law professor to advise them on American criminal procedure. Of course, ideally, this adviser should know both the foreign language in question and something about the particular foreign legal system. Otherwise, important differences between the two legal systems may slide by undetected until the last minute.

Well before the formal accusation is issued, counsel should give the *Chambre de l'instruction* or its equivalent a detailed memorandum discussing the differences in methods of American and French investigation. This memorandum should particularly focus on: methods of witness questioning and statement taking by American police; the American police's lesser duty to investigate exculpatory evidence compared with that of the French investigating judge; American rules of discovery in criminal cases that may allow the police and prosecution to withhold arguably exculpatory evidence; and the important role American defense counsel plays in investigating the facts. It is important to convey this information to the investigating judge, particularly the one heading up a rogatory commission to the United States. As always, defense counsel should give the investigating judge names of additional witnesses to question and questions to ask of those witnesses. But, in

addition, the investigating judge should re-interview thoroughly all witnesses interviewed by the American police, as if they were being interviewed for the first time. Statements taken by the American police should not be treated as if they were part of a European dossier and quoted at trial.

At trial, if at all possible, the American adviser should be present throughout. Questions about American procedure come up during all parts of the trial, and trial flexibility is such that the presiding judge does not hesitate to ask questions of witnesses at any time. The American adviser needs to educate judges and jurors at the trial as well as pretrial. Defense counsel should request that the American adviser be allowed to testify about differences between American and French procedure early in the trial, preferably even before defendant speaks, in order to set the stage for what follows. This is also important because the adviser may not be allowed to be present at trial until he or she has testified. In addition to the points made to the *Chambre de l'instruction*, at trial the adviser needs to emphasize that the role of the American prosecutor is more adversarial than that of the French prosecutor. It should be noted that the American prosecutor is not a judge. In cases where the rogatory commission has not adequately done its job, defense counsel should not hesitate to ask for additional investigation of physical evidence during the trial itself.<sup>196</sup>

### B. The Prosecution

For the American prosecutor's office, concerns will focus on the presentation of witnesses (especially experts) and evidence, and to some extent on the civil party. Of course, in the investigation stage, full cooperation with the French investigating judge and turning over all results of the investigation is important for building trust and ensuring thorough collection of evidence. As with the defense adviser, American law-enforcement witnesses and possibly even experts should be prepared to attend trial for several days, because the *président* may ask these witnesses to comment as new issues arise. The judiciary may even ask the witnesses to do new physical investigation, as Corneloup asked of the FBI computer expert in the middle of Gaitaud's trial. Counsel should prime these witnesses for a very different style of questioning than in a U.S. trial. They should expect most of the questioning to come from the presiding judge, and to give answers in longer form, really a narrative, and not the choppy responses common in an American trial. The tone should be almost conversational. They should feel free to give their

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196. An interesting question arises as to whether an American defense lawyer might do some investigation, even after the French courts had asserted jurisdiction, and hand the results over to the French investigating judge. This might be a risky strategy; if there were questions of coordination between the American and French lawyers, the French lawyers might be disbarred for participating in an unauthorized investigation.

opinion on scientific questions, without fear that they will be criticized in a harsh cross-examination for failing to address remote possibilities.

In terms of physical evidence, American police should be especially careful not to discard any evidence that might remotely be relevant, and to preserve it in good condition. Otherwise, doubt might be cast on the entire investigation. Also, police should take considerable care to transport all of it to the trial in a timely way.

The prosecution should also inform the victim of the crime (or the relatives of the victim, in case of a homicide) that they may become civil parties in the criminal case. It is important to do this well before trial, to allow the civil party time to find a foreign lawyer or to have one appointed and to review the dossier. This would prevent situations such as the surprise appearance of Mrs. Belasco, which was trying for her and somewhat disruptive for the court. Different continental countries have different rules about the civil party, with France allowing the most active participation.<sup>197</sup> The prosecutor should make an effort to find out what these rules are and to inform the victim or relatives. Any potential civil party should pay attention to the different rules about compensation, and in particular to the fact that the French public fund covering judgments against indigent defendants only covers French civil parties, except in certain narrow circumstances.

## VII. CONCLUSION

The *Gaitaud* trial threw into relief some of the principal differences between inquisitorial, or inquiring, procedure and party-controlled adversarial procedure. While the French consider the procedure of the *Cour d'assises* to be like Anglo-American adversarial procedure in its emphasis on oral testimony, the rights of the defense, and the use of juries, the differences were more striking than the similarities. The French inquiry into the *Gaitaud* case was conducted mainly by the investigating judge before trial and the presiding judge during trial. Others also played a role in the inquiry: besides the defense and the prosecutor, both the *assesseurs* and the jurors asked questions of witnesses. Especially noteworthy is the French idea of the jurors as temporary colleagues of the judges; they are treated with respect during jury selection and throughout the trial, where they play an active role. Although American juries have a great deal of power over the result of the case, the parties pick over them during voir dire and shut them out of questioning during trial.

Systems where the parties control the trial have a tendency to eliminate the voices of anyone but the state's lawyers and the defendant's lawyers. Everything else becomes subordinate to the adversarial

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197. See Pizzi & Perron, *Crime Victims*, *supra* note 10, at 55-63 (discussing victims' right to participate in German trials, with references to victim participation in other continental systems).

contest. In contrast, judicial control over trial allows the voices of the jurors to be heard, in the form of inquiry. It also allows jurors to consider the interests of victims. In an American trial, Mrs. Belasco could not have asked questions of witnesses nor had her lawyer make a closing argument presenting her viewpoint. Although she was not compensated financially for her loss, it appeared to mean a great deal to her to participate in trial. It would be very difficult for the victims' rights movement in the United States to achieve anything like the civil party in France, because of our powerful tradition of party control of trial. It takes a strong judge to accommodate the interests of the civil party in a flexible trial format and yet keep motivations of vengeance in check.

Judicial control both makes possible a flexible order of trial and allows witness testimony to resemble a discussion. Witnesses can directly respond to the statements of other witnesses, in a sort of dialogue. They also are permitted to speak in their natural voices, initially in narrative form. Neither party has carefully coached them before trial, the parties' direct and cross-examinations do not constrain them, and their statements are not interrupted by evidentiary objections. As a result, witnesses are more relaxed and often forthcoming with information. Even apart from the pursuit of information, there are dignitary values inherent in freedom to participate in discussion in one's own voice. These values differ from the Anglo-American interest in preserving a zone of privacy (freedom from inquiry), but sometimes even the *président* worried that his inquiry had been inappropriate, as with Gaitaud's son Nicholas.

The discussion at a French trial notably includes the defendant himself; the defendant speaks constantly and the focus remains on him. In an American trial the defendant rarely speaks, and the focus tends to be on his lawyers—their skill (or lack thereof) matters much more.<sup>198</sup> U.S. criminal procedure has the effect of discouraging the defendant from testifying—by not permitting inferences to be drawn from silence, by often excluding his criminal record if he does not testify and does not open the door, by subjecting him to fierce cross-examination, and by requiring him to speak under oath if at all. French procedure has in effect eliminated each of these disincentives, and as a result it takes advantage of this valuable testimonial resource. Gaitaud spoke often, and revealed a great deal as he did so.

The *personnalité* in the *Cour d'assises* shows the broad scope of the official inquiry and the interest in the defendant. This phase seems extraordinary to Anglo-American lawyers who often have difficulty grasping the significance of this wide-ranging inquiry into the defendant's upbringing, family life, education, job history, financial situation, and psychological makeup. It seems to be a distraction from the facts of the crime. The *personnalité* is of course partly connected to sentencing;

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198. See Van Kessel, *European Perspectives*, *supra* note 11, at 839–41 (suggesting that there has been a trend toward fewer defendants taking the stand at trial in the United States).

French trials do not have separate sentencing hearings. Yet the vision of sentencing to which the *personnalité* responds is different from that of most U.S. courts; it is much more individualized, taking into account the unique circumstances of the particular person before the court. It also has a strong rehabilitative streak, derived in part from the *défense sociale*—a movement that has received almost no recognition in American scholarship. The *défense sociale* movement seems to have as one of its goals the affirmation of the defendant as an individual human being worthy of society's concern, as opposed to treating the defendant as a faceless offender. Beyond sentencing, French public officers showed a strong desire to understand *why* Gaitaud committed this crime, almost for the sake of the knowledge itself. The mental health experts, the police, the *président*, and the prosecutor all strove to understand why Gaitaud would have done this, and between them seemed to settle on a theory of Gaitaud's flawed image of women derived from his parents' relationship. (Corneloup was well-known for trying to find psychological explanations, but this interest was by no means limited to him—see the policeman's testimony in part V.C.4.) The *personnalité* and its relationship to the *défense sociale* movement, sentencing, and the desire of French officials to arrive at a psychological explanation of a crime all need to be studied in more depth.

The *Gaitaud* case revealed some of the pitfalls of judicial control. One grave problem is the amount of time suspects spend in preventive detention, waiting for the judicial investigation to be completed. Gaitaud spent five years in preventive detention, a not unusual length of time in a murder case. Reforms recently enacted by the National Assembly limit the duration and provide other safeguards, but the new system requires an amount of judicial supervision that seems to be unworkable at present. It is also possible that the investigating judge might not do a thorough job. In the *Gaitaud* case, the investigating judge was largely prepared to rely on the evidence that the San Diego police collected, without doing much of an independent investigation to counteract the effects of partisan evidence gathering. To some extent, the *président* can compensate for a defective investigation at trial, by ordering additional witnesses to be heard and examinations of physical evidence. In effect, Corneloup acted as a second investigating judge in his questions to Nicholas and in ordering further examination of the computer. He thus can act as a backstop for the investigating judge.

There are also problems associated with the control of the *président*. While his power makes possible the flexibility of trial and the ability of witnesses to speak freely, it also may lead to abuse of discretion. Corneloup was, for example, deferential to the Assistant D.A. at trial. Defense counsel hesitated to object because they did not want to irritate Corneloup. (It appears to be a common complaint among continental lawyers that they hesitate to speak up forcefully for fear of antagonizing



the presiding judge.) In this case, the *greffière* acted as a backstop, pointing out to Corneloup procedural rules that limited the Assistant D.A.'s involvement in the trial. It is also possible that one of the *assesseurs* could remind him of such a rule. More delicate questions arise when there is no procedural rule. Early in the *Gaitaud* case, for example, it seemed that Corneloup had developed a psychological theory about Gaitaud, which Corneloup believed the reports of the mental health experts confirmed. Defense counsel did not push the psychology and psychiatry witnesses hard in questioning, as would likely have been done on cross-examination in an American trial. Deference to experts, whom the judiciary selects, is another feature of judicial control, and sometimes this deference may come at the cost of careful probing. (There are also distinct advantages to judicial appointment of experts.) It seems unlikely, however, that either Corneloup's deference to the Assistant D.A. or his psychological theory affected the outcome of the trial.

The French have tried to develop solutions to the problems associated with judicial control. They have many different types of judicial officials, who are able to act as backstops for each other. And they recognize the importance of having intelligent, fair, and well-trained judges in their system. Their judges, including prosecutors, undergo rigorous selection, training, and promotion processes. In contrast, the American system of party control of cases and independent juries is designed to avoid reliance on judges to the greatest extent possible. But Americans may be too cynical about the capabilities of judges. With some adjustments, there might be less call for cynicism.<sup>199</sup> We currently do very little to train judicial officers, for example, or to select or promote them in a way that rewards merit more than political allegiance. Indeed, we can hardly conceive of judicial merit as something separate from politics.

Even if it were desirable, it would be difficult for American criminal justice systems to adopt large portions of French trial procedure.<sup>200</sup> We are hemmed in by federal and state constitutional rules and also by our longstanding political traditions and even popular culture. The dominance of a single inquisitorial judge might not be viewed as fair. But we might at least consider the beneficent influence of a strong and fair trial judge, not afraid to enforce basic rules of civility and enabling trial participants to speak without undue hindrance.<sup>201</sup> He or she can do much to

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199. Indeed, it may be possible for American judges to help compensate to some extent for inadequate investigation and preparation by defense counsel. Frase, *The Search for the Whole Truth*, *supra* note 15, at 831–33.

200. See Frase, *supra* note 11, at 664; Van Kessel, *Adversary Excesses*, *supra* note 11, at 487–510.

201. Occasionally, a court in the United States strikes a small blow for dignity and civility. A recent opinion of the Ninth Circuit affirmed a district court's finding a lawyer in contempt for repeatedly violating his orders. The orders sprang from the district court's desire for the criminal trial "to be dignified and not an exercise in combat." *United States v. Galin*, 222 F.3d 1123, 1124 (9th Cir. 2000). I am indebted to Gordon Van Kessel for this reference.

promote both dignity and efficiency, leaving all participants more satisfied with the criminal justice system.