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## CRIMINAL PROCEDURE IN FRANCE

The two features of French criminal procedure which most distinguish it from the Anglo-American system, and the two which have been most frequently criticized in England and the United States, are the preliminary examination (*l'instruction*) of the accused by the *juge d'instruction* and the interrogatory (*l'interrogatoire*) by the presiding judge of the trial court. The former magistrate is designated by the President of the Republic for a term of three years, usually upon the nomination of the chief state's attorney (*le chef du parquet*), that is to say, the examining judge is in effect chosen by the public prosecutor. He may be removed at any time, and there are not wanting cases where *juges d'instruction* have been displaced while conducting examinations because their conduct was not satisfactory to the government.<sup>1</sup> He is usually selected from among the judges of the tribunal of first instance or from the class of non-titulary magistrates, known as *juges suppléants*. They are, therefore, sometimes young and inexperienced magistrates and this has been a subject of some complaint.<sup>2</sup> Except in cases of flagrant *délits* the *juge d'instruction* cannot proceed to an examination on his own initiative but must await the order of the public prosecutor, who has the right of surveillance over the examination as well as a certain power of direction.<sup>3</sup> Indeed, the examining magistrate is so completely under the control

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<sup>1</sup> See an instance mentioned in the *Revue du Droit Public*, vol. 18, p. 77.

<sup>2</sup> Cf. Malepeyre, *La Magistrature en France*, p. 185.

<sup>3</sup> Code d'Instr. Crim., art. 59.

of the public prosecutor that his chamber is sometimes said to be in effect little more than an annex to the *parquet*.<sup>4</sup>

The function of the *juge d'instruction* is to discover whether there is sufficient evidence to justify the indictment and trial of the accused. To that end he has a large power in respect to the issuing of warrants<sup>5</sup>; he may, accompanied by the public prosecutor and the clerk of the court, visit the scene of the alleged crime and make a personal investigation of the place and the surroundings; and the law gives him an extensive power of search.<sup>6</sup> He may make domiciliary perquisitions, subject only to the restriction that the power must be exercised during the day time and in the presence of the accused. This power extends even to the seizure of letters in the post office. Naturally there has been much complaint of abuses in connection with its exercise.<sup>7</sup> He may of course summon any and all persons who have knowledge of the crime or of the circumstances under which it was committed to appear and give their testimony. In most cases, but by no means all, the accused is entitled to be examined within twenty-four hours, not after his arrest, as is sometimes said, but within the twenty-four hours following his incarceration in a *maison d'arrêt* or a *maison de dépôt*. Violation of this rule subjects the warden, the state's attorney or other persons responsible, to punishment for *attentat* against liberty.<sup>8</sup>

<sup>4</sup> Cf. Malepeyre, p. 185; also an article by "X" entitled "Le Juge d'Instruction" in the *Revue du Droit Public*, vol. 18, pp. 67 ff.

<sup>5</sup> Code d'Instr. Crim., Ch. VII; cf. also Garraud, *Précis de Droit Criminel* (6th ed.), pp. 750 ff. Complaints of abuses in connection with the issue of warrants and illegal detentions are not lacking. Cf. Morizot-Thibault, in the *Rev. du Droit Pub.*, vol. 21, p. 49, and Rolland; *ibid.*, vol. 26, pp. 723 ff.

<sup>6</sup> Code d'Instr. Crim., art. 87.

<sup>7</sup> In 1909 there was a stirring debate in the Chamber of Deputies on a bill the purpose of which was to impose greater restrictions on the right of domiciliary visit and search. Loud complaints were made of unwarranted searches on mere suspicion and of the carrying away of private papers. The bill, however, failed to pass the chamber, notwithstanding its advocacy by the minister of justice, Monis. See Esmein, *History of Continental Criminal Procedure*, trans. by Simpson, p. 557; Prudhomme, in the *Revue Penitentiaire*, 1903, pp. 1368 ff.; and Cuche, *ibid.*, 1907, pp. 764 ff.

<sup>8</sup> Code d'Instr. Crim., art. 93. There are, however, complaints that this rule is frequently violated. See the statistics and comment of M. Morizot-Thibault, *De la Détention Préventive*, in the *Revue du Droit Public*, vol. 21, p. 49; also Larnaude in the *Bulletin de la Société Générale des Prisons*,

The examination takes place in the chamber of the judge and is secret. This rule, taken from the ordinance of 1670, was embodied in the code of criminal examination of 1808 and has been retained until this day, although in recent years there has been some agitation in favor of making the examination public. Publicity of examination, it is argued, is more in harmony with modern ideas of criminal procedure and is necessary to protect the accused against the arbitrariness of the judge and to confine him to the rôle of an impartial arbiter.<sup>9</sup> On the other hand, it is argued in favor of the secret examination that it prevents the dissemination of information that would prevent the detection of the guilty and afford an opportunity for escape to the accomplices of the accused who are still at large. Moreover, timid witnesses would hesitate to tell their story in public through fear of intimidation.<sup>10</sup> Until recently the accused was not entitled to be informed by the examining magistrate of the charges against him; nor was he entitled to be confronted by the witnesses; nor to see the papers relating to his case; nor to be represented by counsel. The examination was in the nature of *tête à tête séance* between the accused and a magistrate who by his mental habits and association with criminals was disposed, it was said, to see in every accused person a guilty offender. The only right which the law gave him, says Garraud, was to furnish the chamber of accusation with such *mémoires* as he deemed useful regarding the charges of which he was legally ignorant.<sup>11</sup> About the middle of the last century, the system of examination, which was largely that of the ordinance of 1670, became the object of severe attack by the more liberal jurists of France and when the republicans got in full control

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1901, pp. 185-323; 429-476; 626-681; 1130-1175; 1176-1193; M. Thibault, *L'Habeas Corpus française*, in the proceedings of the academy of moral and political sciences, 1903; Picot in the *Revue des Deux Mondes*, 1903, vol. 16, pp. 241-266; Gigot in the *Revue Penitentiaire*, 1903, pp. 1070 ff., and Garraud, *Précis*, p. 755.

<sup>9</sup> In fact information regarding the proceedings often leak out through the disclosures of witnesses and it is reported in the press. Cf. Pinon (a *juge d'instruction*), *La Réforme de la Procédure Criminelle*, in the *Revue Politique et Parlementaire*, Oct., 1910, p. 88.

<sup>10</sup> "The examination," says Esmein, "must remain inquisitorial and secret; our temperament is hostile to publicity; public examination would handicap the detection of the guilty and prevent many timid witnesses from testifying freely." *History of Cont. Crim. Procéd.* (trans. by Simpson), p. 542.

<sup>11</sup> *Précis de Droit Criminel*, p. 744.

of parliament in the late seventies, they directed their efforts toward reform of the system. The ground had already been prepared by the studies of two parliamentary commissions of 1870 and 1878. The latter under the presidency of the eminent jurist, Faustin Hélie, worked out an elaborate reform bill in 1879, but the minister of justice considered it too radical and refused to take it up. A less elaborate project containing few substantial guarantees to accused persons was voted by the senate but after two discussions by the chamber of deputies in 1884 and 1887 it was abandoned.<sup>12</sup> Other projects were presented from time to time, but no legislation resulted until 1897. The law of 1897 was the first to introduce any substantial modifications in the code of 1808, so far as the procedure of the preliminary examination is concerned.<sup>13</sup> It provided, as has been said, that the accused should be examined in certain cases within twenty-four hours following his detention; that he should be entitled to counsel who should have the right to be present at the examination and with whom the accused might freely communicate; that he should be informed of the charges against him; that all *pièces* relating to the charge should be communicated to him upon his demand; and that he should be confronted by the witnesses and then only in the presence of his counsel.<sup>14</sup> The law makes it the duty of the examining magistrate to inform the accused of his right to refuse to make a declaration and of his right to counsel and in case of his inability to employ counsel to see that a defender is provided for him. His attorney, however, while entitled to be present at the examination is not allowed to speak without the permission of the judge, but in case of refusal that fact must be entered on the record. He is present not to assist at the examination but to watch over the proceedings, to see that no unfair advantage is taken of his client by means of ambiguous or misleading questions and to

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<sup>12</sup>For reviews of the history of these reform measures, see Morizot-Thibault, *Des Réformes de l'Instruction Criminelle*, in the *Rev. du Droit Pub.*, vol. 18, pp. 254-274, and Fournier, *L'Instruction Criminelle et la Nouvelle Loi du 8 Déc.*, 1897, *Revue Pol. et Parl.*, vol. 15, pp. 261-278.

<sup>13</sup>There was, however, some legislation during the Second Empire in respect to bail and preventive detention.

<sup>14</sup>Except in cases of urgency resulting from the expected death of a witness or his probable escape, when delay might defeat the discovery of the truth. If the accused renounces his right to counsel, the judge may of course proceed with the examination and confrontations without the presence of counsel.

make suggestions regarding the desirability of expert or other special investigations.<sup>15</sup> The right of the accused to counsel at the preliminary examination was admitted only after long hesitation and even then with much skepticism. It was feared that the presence of an attorney would interfere with the proper conduct of the examination, especially if he were allowed to interpose objections and engage in arguments and colloquies with the examining magistrate. Some distinguished French criminalists still doubt the wisdom of admitting counsel to be present, even for the purpose of observing the proceedings, and they point out that no other important continental state allows the accused such a privilege. As evidence of its unfavorable effect upon the administration of justice, they quote statistics to show that since 1897 there has been a material falling off in the number of cases sent for indictment to the chamber of accusation by the *juges d'instruction*.<sup>16</sup>

The state's attorney is not allowed to be present at the examination, partly because it was feared that the presence of opposing counsel might lead to debates which would interfere with the conduct of the examination and partly, no doubt, because it was felt that the interests of the state would be sufficiently looked after by the judge, who, under the inquisitorial system, is not always an impartial arbiter.

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<sup>15</sup> Compare Garraud, p. 773. The bill as passed by the chamber of deputies in 1884 gave counsel for the accused very extended powers of participation in the examination; but the senate proposed to allow him only the right to receive and examine the papers. The law as finally passed was a compromise between the two views.

<sup>16</sup> See an article by M. Loubat (*Procureur-Général* of Lyon) entitled *La Crise de la Répression*, in the *Rev. Pol. et Parl.*, June, 1911, pp. 446 ff. M. Loubat states that during the five years preceding the enactment of the law of 1897, the average number of *ordonnances de non lieu* (that is decisions holding that there were no grounds for prosecution) averaged 27 per cent of the total. Since 1897 the average has steadily increased, having attained 36 per cent in 1905. This falling off in the number of indictments he attributes to the excessive and unwise privileges allowed the accused by the law of 1897 and particularly the privilege of counsel. "It is permissible to say without exaggeration," says M. Loubat, "that the law of 1897 has given to malefactors rights the need of which is not felt and which are exercised only to the detriment of those of society" (p. 450). On the other hand it might be argued that the increase in the number of *ordonnances de non lieu* is conclusive evidence that before 1897 accused persons were often indicted unjustly because they did not have the benefit of counsel or the other safeguards which the law of 1897 allows.

The examination by the *jugé d'instruction* is thorough and searching, often covering the whole past life of the accused. There are no doubt cases in which he is sometimes browbeaten and intimidated with a view to extorting confessions of guilt. The dramatist Eugène Brieux in *La Robe Rouge*<sup>17</sup> has given us a picture of a merciless and gruelling examination conducted by a magistrate who, we should like to believe, is not a typical representative of the *juges d'instruction*. Whether he is or not, the methods and spirit of the examination are widely criticized in France,<sup>18</sup> and a thorough-going reform of the system was advocated by an extra parliamentary commission appointed by the minister of justice in 1910, and of which Senator Alexander Ribot was president.

Nevertheless, when all is said against the methods of the French *jugé d'instruction* that can be said, it must be admitted that the principle of the inquisitorial system is logical, scientific and based on common sense and there are not lacking American lawyers, who rarely mention the French system except to criticize, who see much to approve in the principle if not in the method by which the French judge endeavors to get at the truth.<sup>19</sup>

If the *jugé d'instruction* finds that there are sufficient grounds for prosecution he issues an ordinance *de renvoi* by which the case (if the offense charged is a crime and not a *contravention*

<sup>17</sup> Act I, Scene 7, examination of Etchepare by Mouzon.

<sup>18</sup> Compare the views of a *jugé d'instruction* (Pinon) in the Rev. Pol. et Parl., Oct., 1910, p. 83, and of M. Thibault in the Rev. du Dr. Pub., vol. 18, pp. 254 ff.; see also the note by Zedyx, *ibid.*, vol. 9, pp. 329 ff.

<sup>19</sup> Compare the remarks of Mr. F. R. Coudert, who is familiar with the French procedure, in an article in this Journal for March, 1910, p. 2. Speaking of American prejudice against the inquisitorial system, he observes: "I dare say that the most conservative stickler for the common law would not hesitate to question the office boy whom he suspected of pilfering his desk or pockets and would assume this to be the most natural method of ascertaining the truth. Yet when society wishes to protect itself against crime this obvious method becomes unconstitutional and abhorrent." He also refers to the fact that Mr. Taft found the inquisitorial system in the Philippines and saw much in it to approve. Compare also the remarks of Professor W. E. Mikell: "We may yet find it necessary to adopt something corresponding to the examination of the French *jugé d'instruction*. Introduction to Simpson's Trans. of Esmein, *op. cit.*, p. xxxi. See also the opinion of Edmond Kelly, The French Law of Evidence, American Law Review, vol. 19, p. 398.

or *délit*) is sent to the chamber of accusation (*chambre des mises en accusation*), which is the indicting body. It is composed not of laymen, as in England and America, but of five judges of the court of appeals.<sup>20</sup> If it decides to put the accused on trial it issues an *arrêt de renvoi*, a voluminous document containing a statement of the grounds of the prosecution, a specification of the charges, the warrant of arrest and the order of detention or imprisonment. But this is not the indictment (*acte d'accusation*). The latter is a separate document which contains in addition to an exact reproduction of the *arrêt de renvoi* a long *exposé* of the crime and a recital of the circumstances, aggravating or extenuating. It must terminate with the words: "in consequence N—— is accused of having committed such and such a murder, such and such a theft, or such and such other crime under such and such circumstances."<sup>21</sup> The draft of the indictment is made by the public prosecutor (*procureur-général*). It will be quashed by the Court of Cassation for violation of the law, for example, if it is not signed by all the members of the chamber of accusation or if it fails to contain an exact reproduction of the *arrêt de renvoi*, but it will not be quashed for immaterial verbal flaws as in the United States. The indictment is a voluminous *exposé* having much of the character of a speech for the prosecution (*réquisitoire*). The public prosecutor may put into it whatever he may wish to say against the accused, may even examine and refute arguments in his favor.<sup>22</sup> Both the content and partisan character of the indictment have been the subject of much criticism in France. M. Cruppi, one of the leaders of the Paris bar and a former minister of justice, says of the indictment: "what the law contemplates is a summary; but it is a novel that has been substituted." He complains, as many other jurists do, that in practice it has been perverted

<sup>20</sup> The revolutionists introduced a body corresponding to the English grand jury, but it was abolished by Napoleon along with other English institutions which gave the accused too many safeguards. Garraud, p. 792.

<sup>21</sup> Code d'instr. Crim., art. 241. The indictment of Mme. Caillaux in 1914 concluded as follows: "In consequence Rainouard, Geneviève-Joséphine-Henriette, wife of Caillaux, is accused of having committed at Paris, March 16, 1914, a voluntary homicide on the person of Gaston Calmette, with this circumstance, that the homicide in question was committed with premeditation, a crime according to articles 295, 296 and 302 of the penal code."

<sup>22</sup> Baudat, De la Réforme de la Procédure Pénale, pp. 9 ff.

into a speech for the prosecution,<sup>23</sup> the unfairness of which is increased by the fact that it takes place before the witnesses have been heard. There has been much agitation in favor of abolishing it and substituting the less partisan *arrêt de renvoi* and this reform was recommended by the Ribot commission in 1910.<sup>24</sup>

If the offense charged is a crime it is tried by the court of assizes, composed of three judges and a jury of twelve laymen. The presiding judge chooses the jury and administers the oath, presides over the trial, interrogates the accused and the witnesses, frames the questions for the jury, consults with them when summoned to their room, receives their verdict, pronounces the penalty, etc. His two colleagues are mute spectators who fulfill no function except to deliberate with the presiding judge in determining the punishment if the accused is convicted.

The first step after the audience opens is the selection of the jury by the presiding judge, who draws twelve names from an urn containing the names of thirty-six persons. Both the state and the accused are entitled to challenge any juror, without alleging cause, until the panel of thirty-six names less twelve has been exhausted. No further challenges are allowed. If the trial is likely to be of long duration, one or two supplementary jurors are added. They sit with the other jurors, and in case one of the twelve is obliged to leave on account of sickness or other cause one of the substitutes takes his place, thus avoiding the necessity of beginning the trial anew. Juries are selected rapidly as in England. The long-drawn-out examinations of jurors and the resulting delays such as are a common feature of American trials are unknown in France as in England.

After the selection of the jury the presiding judge asks the accused his name, age, profession, residence, and place of birth.<sup>25</sup> He then warns counsel that they must say nothing against their conscience or against the respect due for the laws and that they

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<sup>23</sup> La Cour d'Assises, p. 73. Sir James Stephen (Hist. of the Crim. Law, I, 538) compares the French indictment to the opening speech of counsel for the Crown in England. He adds that "it is drawn with great literary skill and reads like pungent and painted abstracts of French novels."

<sup>24</sup> Baudat, p. 14. See also Speyer, Les Vices de notre Procédure en Cour d'Assises, pp. 6 ff.; Lailler et Venoven, Les Erreurs Judiciaires, pp. 176-180; and Cruppi, op. cit., pp. 71-74.

<sup>25</sup> Code d'Instr. Crim., art. 310.



must express themselves with decency and moderation.<sup>26</sup> He then addresses the jury, who stand uncovered, as follows: "Do you swear and promise before God<sup>27</sup> and before man to examine with the most scrupulous attention the charges which shall be made against N——, that you will neither betray the interests of the accused, nor those of society which accuses him; that you will not communicate with any person until after your verdict is declared; that you will give ear neither to hatred nor malice, nor fear nor affection; that you will decide according to the charges and the evidence, following your conscience and intimate conviction, with impartiality and the firmness which becomes a free and upright man?" Each juror is called individually, and responds with uplifted hand: "I swear" (*je le jure*).<sup>28</sup> The president of the court thereupon warns the accused to be attentive to that which he is going to hear. He then directs the clerk to read the *arrêt de renvoi* and the *acte d'accusation*.

The code declares that after the reading of these two documents, the president shall explain to the accused the charges against him and shall say: "There is what you are accused of; you will hear the evidence which is going to be given against you." It then declares that the *procureur-général* shall explain the subject of the accusation,<sup>29</sup> and present the list of witnesses to be heard. But instead of the explanation by the *procureur-général* to which article 315 refers, the president of the court

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<sup>26</sup> Ibid, art. 311. Many members of the bar complain of this requirement as useless because at the time of their admission to the bar they take an oath in similar terms and this oath is renewed annually by the *bâtonnier* in the name of his confrères. Moreover, it touches their *amour propre* and diminishes their importance in comparison with the judge. The Ribot extra-parliamentary commission of 1910 recommended the abolition of the rule except for counsel who are not *avocats*.

<sup>27</sup> French jurors have frequently objected to taking an oath involving an appeal to God, and some have refused to do so, for which they were fined and excused. In 1906 when Briand was minister of justice he introduced a bill to modify the oath by striking out the words "before God and man" on the ground that the exaction of such an oath was a violation of liberty of conscience. *Rev. du Droit Pub.*, vol. 24, p. 353. There have been other similar bills before parliament. Garraud, *Précis*, p. 843, n. 1. The oath required of witnesses does not contain a reference to God.

<sup>28</sup> Code d'Instr. Crim., art. 312.

<sup>29</sup> A useless requirement because the facts are fully set forth in the indictment. In practice it has, in consequence, fallen largely into desuetude. Cf. Garraud, p. 843, and Cruppi, p. 75.

now intervenes, throws himself into the struggle and subjects the accused to a prolonged and searching interrogatory similar to that which he has already been put through by the *juge d'instruction* on the occasion of the preliminary examination. If the case is an important one the interrogatory may extend over several days.<sup>30</sup> It covers the whole past life of the accused, including the facts of his domestic and social life; if he has been charged with a former crime, the facts relating thereto are fully gone into and to this end the information contained in his *casier judiciaire* is drawn upon along with the testimony of the police and other persons who may have knowledge of his past life.<sup>31</sup>

Before 1881 there were signs of a tendency among many judges to confine the interrogatory to more reasonable limits or even to abandon it entirely; but in the latter year a law was passed prohibiting the summing up by the judge at the close of the trial (*le résumé*). Deprived of the opportunity which the summing up afforded for expressing his opinions, the judge revived the interrogatory, so that much of what he formerly said in the *résumé* at the close of the trial he now says during the interrogatory at the beginning.<sup>32</sup>

The interrogatory is sometimes carried to lengths which are so manifestly unfair to the accused that it provokes spirited protests from the bar. M. Poittevin, a distinguished criminalist, in an address before the General Prison Society on February 16, 1910, cited the following example:

*The President*—On the first of the month while your mistress heard a stifling cry at Mme. V's you heard nothing?

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<sup>30</sup>In two cases (those of Mayve and Joniaux) cited by Speyer in *Les Vices de notre Procédure en Cour d'Assises*, p. 72, the interrogatory lasted 17 hours and continued through four days. The interrogatory of Mme. Steinheil lasted several days. The judge began by asking her about an elopement 20 years before, and the entire first day was devoted to her past life. Frederic R. Coudert, *French Criminal Procedure*, Yale Law Journal, Mar., 1910, p. 10.

<sup>31</sup>Compare Pinon, *La Réforme de la Procédure Criminelle*, *Rev. Pol. et Parl.*, Oct., 1910, p. 77; Loubat, *La Crise de la Répression*, *ibid.*, July, 1911, p. 25; Baudat, *op. cit.*, pp. 29 ff.; Lawson, *Amer. Law Review*, vol. 47, pp. 302 ff.; Coudert, *art. cited*, p. 10; Cruppi, *op. cit.*, p. 132; Esmein, *op. cit.*, p. 562.

<sup>32</sup>See on this point Cruppi, *La Cour d'Assises*, p. 141; Baudat, *op. cit.*, p. 27; Bérard des Glajeux, *Souvenirs d'une Président d'Assises*, p. 166, and the *Rev. Pen.*, vol. 34, pp. 320-321.

*The Accused*—I was asleep; I had fever.

*The President*—If you had fever, you were not asleep.

*The Accused*—I was half asleep; I heard only the doors close.

*The President*—That is inadmissible.

At this point M. Henri Robert, counsel for the accused, rose and made the following protest: "Mr. President, you cannot say 'this is inadmissible.' Your high impartiality forbids you from saying that. This struggle is exclusively between the prosecution and the defense. I am convinced of the innocence of the accused. You have no right in the interrogatory to say that the accused is guilty; what he has said is perfectly admissible."<sup>33</sup>

The interrogatory is not prescribed by the code, and there is much opinion in France in favor of the view that it is not legally authorized, certainly not in the form in which it is practiced by many judges. Those who defend the legality of the practice rely on articles 267, 268, 319, 327, and 405 of the code, which give the judge a discretionary power to employ whatever means he may deem proper to discover the truth and to demand of the accused as well as the witnesses explanations or elucidations (*éclaircissements*), but this view is contested by some French jurists.<sup>34</sup> Whatever may be the views of the commentators as to the legality or expediency of the interrogatory, the right of the judge is upheld by the Court of Cassation, as a part of his discretionary power in the conduct of the trial and one which may be exercised at any stage of the proceedings.<sup>35</sup> Naturally the *interrogatoire* like the *instruction* has been the subject of much criticism in France, and in England and the United States it has found no defenders.<sup>36</sup> Even when resorted

<sup>33</sup> Rev. Pen., vol. 34, p. 338. In the case of Berthomieu before the court of assizes of the department of Aude in January, 1890, the presiding judge allowed himself to say, "It is not sufficient to affirm. Prove (*démontrez*) that you were at home at the time of the crime. Baudat, (p. 28) remarks that the president seems to have forgotten that the burden of proof rests upon the prosecution, not upon the accused.

<sup>34</sup> Compare on this point, Garraud, p. 844; Labourd, Cours de Droit Criminelle, sec. 1051; Reulos, Du Rôle du Président d'Assises; and Baudat, pp. 19-20. "The only persons subject to an examination," says Cruppi, "are the witnesses." La Cour d'Assises, p. 78.

<sup>35</sup> See the cases cited by Baudat, p. 21, n. 2; also Gautier, in the Revue Penale Suisse, 1899, pp. 317 ff., and Speyer, Les Vices de notre Procédure en Cour d'Assises, pp. 67 ff. Baudat criticizes the doctrine of the Court of Cassation as legally unwarrantable.

<sup>36</sup> See the severe criticism by Sir James Stephen in his "History of the Criminal Law," vol. I, p. 543.

to in moderate and restricted form it is criticised as unfair to the accused because it precedes the hearing of the witnesses. In this respect the interrogatory in the correctional courts is less objectionable because it is required to be made after the hearing of the witnesses and not at the beginning of the trial<sup>37</sup> as is the practice in the court of assizes. On the other hand it is argued that if the interrogatory is absolutely impartial and conducted with a view to bringing out facts that are favorable to the accused as well as those which are unfavorable, it not only violates no substantial right of his, but, on the contrary, if he is innocent it may be a positive benefit to him.<sup>38</sup> The American rule that the accused may sit silent throughout the trial and that the jury may not take into consideration his refusal to respond to questions addressed to him seems to be losing some of its sacrosanctness and there are signs of a reaction in favor of inquisitorial methods.<sup>39</sup>

The danger of the French procedure, however, lies in the difficulty of conducting the interrogatory with absolute fairness to the accused. The French judges enjoy a reputation in their own country for being remarkably sympathetic and lenient toward those accused of crime and there is good reason to believe that the number who endeavor to obtain the conviction of innocent persons is very small, but it is almost inevitable that with their mental habits and daily contact with criminals they should lose the spirit of impartiality and emphasize aggravating rather than extenuating circumstances. In any case, it is almost impossible for them to avoid having their impartiality suspected.

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<sup>37</sup> Moreover, the interrogatory is expressly authorized by the code (Art. 190) in trials before the correctional tribunals, so that there is no doubt as to the legal right of the judge to employ it.

<sup>38</sup> In the much discussed trial of Colonel Lorenzo at Poitiers several years ago the interrogatory of the accused was dispensed with. His counsel, M. Henri Robert, was much impressed with the conduct of the case and has often referred to it as an example of how a trial should be conducted. Colonel Lorenzo was acquitted, but some of his friends complain that the omission of the interrogatory operated to his disadvantage since it deprived him of an opportunity to "reveal the traits of his admirable personality to the jury" and had he been convicted he might justly have complained that the failure to interrogate him had deprived him of a substantial benefit. *Rev. Pen.*, vol. 34, pp. 447, 451.

<sup>39</sup> See, for example, a resolution adopted by the Wisconsin Branch of the American Institute of Criminal Law and Criminology in 1910, recommending the abolition of the present rule. *Journal of the American Institute of Criminal Law and Criminology*, vol. I, p. 809.

The result is the French judges have never been able to gain the public confidence or to acquire an influence over juries to the same extent that the English judges have. In too many cases, therefore, the interrogatory serves to arouse the sympathy of the jury for the accused and lead to acquittals where the evidence clearly shows guilt. Many French writers have dwelt upon this fact as one of the strongest arguments in favor of the abstention of the judge from active participation in the trial.<sup>40</sup> Aside from the possible unfairness to the accused, dignity of court is compromised by the inevitable lack of respect for a magistrate who engages in spirited colloquies with the accused, and is suspected, whether rightly or not, of endeavoring to secure his conviction. For this reason, if for no other, it would seem that if the examination of the accused is to be retained it should be conducted by counsel as is done in England<sup>41</sup> and the United States when the accused voluntarily takes the witness stand and subjects himself to cross-examination. In France the interrogatory was revealed in its worst form in the trial of Mme. Steinheil, since which time there has been much agitation in favor of abolishing it,<sup>42</sup> but the idea of a *judge*

<sup>40</sup> Compare especially Cruppi, 132, and Pinon, article cited, pp. 77-78.

<sup>41</sup> Under the Criminal Evidence Act of 1898.

<sup>42</sup> The Ribot Commission recommended this reform. See Senator Ribot's severe criticism of the interrogatory in the *Revue Penitentiaire*, vol. 34, pp. 331-333. The abolition of the interrogatory was demanded as early as 1828 by the great jurist Bérenger (*De la Justice Criminelle en France*) and by Blanqui in 1849. The question of the reform of the interrogatory was the subject of extended discussion by a group of distinguished criminalists, magistrates, and members of the bar, before the *Société Générale des Prisons* in February and March, 1910 (*Revue Penitentiaire*, 1910, vol. 34, pp. 313-348; 433-487). A considerable number of the speakers, including Senator Ribot, and MM. Cruppi, Poittevin, Garçon, Laborde, and Prudhomme, advocated the suppression of the practice. M. Henri Robert, the leader of the French criminal bar, was quoted as being in favor of this reform (pp. 446, 448). The other speakers who defended the principle of the interrogatory advocated its restriction to narrower limits. Most of them admitted that the interrogatory had degenerated in practice to a prolonged *exposé* which was often unfair to the accused, compromised the dignity of the court and provoked acquittals by the jury. In general, however, an impartial interrogatory confined strictly to the putting of questions and without the *exposé* of the judge was defended as a useful and proper means of discovering the truth—one which served to aid the jury in reaching a verdict and one which resulted in a positive benefit to the accused, if innocent. Cf. especially the views of MM. Thibault, Chenu, Lyon-Cahen, Demange, Senator Bérenger and the *bâtonnier* Bétolaud of the Institute.

*soliveau*—a magistrate who merely presides as an umpire and leaves the trial to be conducted by counsel—has never impressed the French people as a whole. It is not improbable that in the near future legislation will be enacted with a view to preventing abuses of the interrogatory, but the principle itself is too ancient and strongly entrenched to be uprooted bodily.

After the interrogatory the hearing of the witnesses takes place. Those for the prosecution are heard first, then those for the civil party, if there be one, and finally, those for the defense.<sup>43</sup> Each witness is required to take an oath to speak without hate or fear and to tell the whole truth and nothing but the truth.<sup>44</sup> The code prescribes that witnesses shall testify orally and spontaneously, and that they shall not be interrupted<sup>45</sup> except that the presiding judge may demand of them any explanations (*éclaircissements*) which he thinks necessary for the establishment of the truth.<sup>46</sup> This provision furnishes authority for the practice commonly followed by French judges of prolonged interrogatories of the witnesses.<sup>47</sup> The French defend this practice on the ground that it furnishes a means of obtaining the testimony of ignorant witnesses who are unable to tell their story coherently or who from timidity need the stimulus of the question. The practice has manifest advantages but its danger lies in the fact that it may be made the means in the hands of a partial judge of drawing from the witness damaging rather than favorable testimony and of leading him to say what he does not intend to say; besides, it has the disadvantage of introducing the judge into the contest and of leading to undignified colloquies between him and the witness. Like the interrogatory of the accused, it has therefore been the subject of much criticism by French jurists.<sup>48</sup> The Ribot extra-

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<sup>43</sup> Code d'Instr. Crim., art. 321.

<sup>44</sup> Ibid., art. 317.

<sup>45</sup> But the Court of Cassation holds that if the witness rambles or digresses the president may compel him to confine his testimony to the "object of the accusation."

<sup>46</sup> Ibid., art. 319.

<sup>47</sup> In three cases out of four, says Cruppi (*La Cour d'Assises*, p. 82) the spontaneous deposition is reduced to three or four words, after which the witness is subjected to a long interrogatory by the president of the court.

<sup>48</sup> For example, by M. Cruppi who contends that the witness should be allowed to tell his own story without interruption, and this, he says, is what the law contemplates. According to the law, says Cruppi, the testimony must be spontaneous; the witness must be *heard* and not *questioned*.

parliamentary commission in its report of 1910 recommended the abolition of the practice.

Jurors are free to ask questions of the witnesses but in practice the right is rarely exercised. The Anglo-American procedure of cross-examination does not exist in France. The code allows the accused (or his counsel) and the civil party to question the witnesses, not directly, however, but only through the mouth of the presiding judge. On the other hand, the state's attorney is allowed to put his questions to the accused direct after asking the permission of the judge—a request which cannot be refused.<sup>49</sup> This undoubtedly gives the prosecution an advantage over the defense.<sup>50</sup> Sir James Stephen in his "History of the Criminal Law"<sup>51</sup> has pointed out that questions addressed to the witness lose their character and fail of their purpose when instead of being put directly they are addressed through the mouth of an intermediary who may not state them exactly as the accused himself would. The Ribot Commission of 1910 recommended the modification of the existing practice so as to allow the accused and the civil party the same right in this respect as is allowed the prosecution.<sup>52</sup>

A singular feature of the French procedure is an almost total lack of rules of evidence. The code contains few provisions regarding relevancy or competency. Long-drawn-out contests over questions regarding the admission or exclusion of evidence, such as are a common feature of American trial procedure, are therefore unknown in France. There one rarely if ever hears the familiar words of American counsel: "I object."

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Only after he has completed his deposition may he be requested to furnish *éclaircissements*. La Cour d'Assises, p. 81. Compare also Baudat, *op. cit.*, pp. 69-70; Speyer, *op. cit.*, p. 233; and Faustin Hélie, *Traité de l'Instruction Criminelle*, vol. VII, sec. 3529. See also the portraiture in M. Brioux's drama, *La Robe Rouge*, Act I, scene 9.

<sup>49</sup> Code d'Instr. Crim., art. 319.

<sup>50</sup> Compare Baudat, p. 72. It is ridiculous, says M. Garcon, that the law should give the accused the right to compel witnesses to testify and yet deny him the right to question them. M. Garcon maintains with obvious justice that the accused and the prosecution should be on a footing of equality in respect to their right to address questions direct to the witnesses. *Rev. Pen.*, vol. 34, p. 470.

<sup>51</sup> Vol. I, p. 547.

<sup>52</sup> It should be said that in practice judges often, instead of transmitting to the witnesses questions asked by the accused allow them to be put direct. Thus the judge will say to the witness: "you have heard the question of the accused, respond." Cf. Baudat, p. 72.

Any person except a near relative is a competent witness and hear-say testimony is admitted with little or no restriction. "Among us," says M. Cruppi, "hear-say witnesses (*témoins par ouï-dire*) come by legions, bringing to the trial vain and dangerous rumors and gossip without foundation to make an impression. . . . They come to deliver themselves of hate and passion . . . it is no longer the accused alone but his children, his wife, his relatives, his domestic servants, whose private life is to be aired by slander and calumny."<sup>53</sup> There has been much complaint of the practice and the alleged abuses have occasioned more than one debate in parliament. The presiding judge, as *directeur des débats*, and in virtue of the duty imposed upon him by the code<sup>54</sup> "to exclude all matter which tends to prolong unnecessarily the discussion" (*débats*), may, undoubtedly, refuse to admit hear-say evidence or irrelevant testimony if he wishes.

When the hearing of the witnesses is finished, the public prosecutor delivers his *réquisitoire*—an address in which he develops the arguments in favor of the guilt of the accused and demands a verdict of conviction. His speech does not take the wide range which it does in America, and, as in England, it is less partisan.<sup>55</sup> It is ordinarily a brief summary and appeal to the jury. His comparative inaction throughout the trial contrasts singularly with the rôle played by the American prosecutor. As has been said, he does not examine the witnesses for the state, nor cross-examine the witnesses for the defense and never objects to the admission or exclusion of testimony.<sup>56</sup> Sometimes he sits through the entire trial without ever asking a question, raising an objection, or making an observation of any kind. American critics explain his inactivity by saying that the interests of the prosecution are sufficiently looked after

<sup>53</sup> La Cour d'Assises, p. 82.

<sup>54</sup> Art. 270.

<sup>55</sup> In England the object of the prosecuting attorney is not solely to obtain a conviction. His endeavor is to get at the truth whether it results in conviction or acquittal. He sometimes puts questions that are favorable to the accused and points out extenuating circumstances. Cf. Lawson and Keedy, *Criminal Procedure in England*, Jour. of the Amer. Institute of Crim. Law and Criminology, vol. I, p. 748.

<sup>56</sup> "Who would believe," asks Cruppi, "that he is charged (by the code) with producing the proof? He sits silent, he listens, he may intervene but it is not good taste to do so; that is dangerous. It is singular that his rôle is precisely that of the English judge during the trial." *Op. cit.*, p. 162.



by the judge, who is the chief actor in the trial. French commentators say he refrains from taking an active part in the trial from the fear of provoking the hostility of the jury and arousing their sympathy for the defendant.

After the *réquisitoire* of the *procureur-général* the address of counsel for the civil party, if there be one, follows, and then the plea of counsel for the defense. To this latter address the prosecuting attorney may reply, but the code<sup>57</sup> expressly declares that the defense shall always have the last word if he demands it—a provision which insures the accused a substantial advantage. Until 1881 the presiding judge, as has been said, had the privilege of summing up (*le résumé*) in a concluding speech in which he reviewed the testimony, sifted out the material from the immaterial evidence, and even expressed his opinion on the weight of the evidence. This practice, like other features of early French trial procedure, was borrowed from England at the time of the Revolution and was incorporated in the code of criminal examination of 1808.<sup>58</sup> But the English respect for the impartiality of the judge has never gained a foothold in France and as time passed the summing up came to be regarded as a final address for the prosecution, delivered from the bench, and one to which the accused could not reply—a belief, says Esmein, often justified.<sup>59</sup> When the Republicans got control of parliament the abolition of the summing up became one of the first articles in their programme of procedural reform<sup>60</sup> and by the law of 1881 it was enacted that the president should not, under

<sup>57</sup> Art. 335.

<sup>58</sup> As is well known, the English judges still have this power and it is fully exercised. It is popular in England and is defended as a means of helping the jury to reach a decision in difficult cases where the evidence is voluminous and confusing. The great respect in England for the learning and impartiality of the judge has largely preserved the practice from attack. Compare Lawson and Keedy, *Criminal Procedure in England*, op. cit., pp. 756-7.

<sup>59</sup> *History of Continental Criminal Procedure* (trans. by Simpson), pp. 534-560. The summing up, says Esmein, tended to become an amplification of the *réquisitoire* of the state's attorney. "However strong the desire of the judge to be impartial, he too often became the auxiliary of the prosecution." "The origin and mode of appointment of the presiding judge," says Cruppi, "his habits and the traditions of the *milieu* in which he lives, his constant and familiar relations with the public prosecutor, all tended necessarily to make him favorable to the prosecution." Op. cit., p. 142.

<sup>60</sup> Cruppi, p. 141.

pain of nullity, sum up the evidence for the prosecution or the defense.<sup>61</sup> As has been said, however, the effect of the abolition of the summing up was to revive in extreme form the interrogatory so that now the judge says in the interrogatory much that he formerly said in the summing up. It must be admitted that the French are not entirely consistent when they forbid the judge to sum up because of his want of impartiality yet allow him to participate actively in the trial through the interrogatory.

The code declares that after the close of the *débats* the president shall call the attention of the jury to the functions which they are to fulfill and shall submit to them the questions which they are to decide. In France juries are never allowed to decide questions of fact as they are in some American states.<sup>62</sup> Nor has the French jury any direct power in the determination of the punishment; but under the provisions of a law enacted in 1832 it has the right to find a verdict with extenuating circumstances, in which case the court is bound to impose a lighter penalty than that which the law attaches when the crime has been committed without extenuating circumstances.<sup>63</sup> This right is freely exercised and the instances in which the benefit of extenuating circumstances is not accorded are very rare.

The French judge does not instruct the jury on the law governing the specific case which they are to decide and hence there are no prolonged arguments as in this country between counsel as to what instructions shall be given. There are, however, certain general rules<sup>64</sup> printed on a card which is posted in a conspicuous place in the jury room, and before beginning their deliberations the foreman is required to read them to the jury. These rules lay down certain vague principles by which the jury must be guided in reaching a verdict. Thus they are

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<sup>61</sup>The summing up was abolished in Belgium as early as 1831. It is forbidden by the German code of criminal procedure (sec. 30) and is of course unknown in the United States. The Court of Cassation interprets the law of 1881 as forbidding everything which the president may say directly or indirectly after the close of the arguments, either in the form of explanation or estimation of the charges or grounds of defense and which would have an influence upon the jury. See the decisions cited by Garraud, p. 846.

<sup>62</sup>Concerning jurors as judges of the facts in the United States see Harker in the Illinois Law Review, vol. V, pp. 468 ff.

<sup>63</sup>Code Pénale, art. 463.

<sup>64</sup>Embodied in art. 342 of the Code d'Instruction Criminelle.

admonished to consider the question in silence and contemplation and to seek in the sincerity of their consciences the impression made on their minds by the evidence.

The verdicts of French juries are not general in character as in the United States and England. Before retiring the presiding judge hands them a list of questions each of which they are to answer by a simple "yes" or "no" and in case the verdict is against the defendant, they are to find whether there are extenuating circumstances. Garraud thinks the French practice of categorical answers to specific questions is more practical and more in harmony with the aptitudes of lay jurors who are not qualified like magistrates to formulate general declarations.<sup>65</sup> The rules governing the formulation of the questions are quite complex, and often it is a difficult problem to frame them in such a way as to cover all the charges, without making them complex and confusing.<sup>66</sup> Sometimes the list of questions is long and confusing, and not infrequently the responses of the jury are so contradictory that it has to be sent back for a restatement of the verdict.<sup>67</sup> The list of questions once formulated is handed to the foreman of the jury, together with a copy of the indictment, the *procès verbale* and other essential *pièces*. The jury then retire to their room, which they cannot leave until a verdict has been reached. During their deliberations no one is allowed to enter the jury room except by permission of the presiding judge, given in writing. This provision of the code has always been construed as authorizing the presiding judge himself to enter upon invitation of the foreman, for the purpose of furnishing explanations on points of law

<sup>65</sup> Précis, p. 846. It has been proposed by some French jurists, however, that the questions be submitted to the jury before the *réquisitoire* of the state's attorney, as is the practice in Germany, rather than at the close of the trial. Cf. Prieur in Prudhon's *Le Jury Criminelle*, p. 24.

<sup>66</sup> The rules are fully described by Garraud, pp. 856-864.

<sup>67</sup> See some examples in an article, by a president of the court of assizes, in the *Revue Hebdomadaire*, Nov. 9, 1912, p. 165. The old jurist Merlin, in his day, is said to have counted 26,000 questions put to a single jury (he was doubtless speaking ironically). Cruppi, *op. cit.*, 98, commenting on the story, remarks that the number no longer attains such proportions although "it often enough reaches 260." Mr. F. R. Coudert, in the article already cited, p. 11, says, "I have known a case in which the jury was asked to pass on 24 questions." In the Caillaux case two questions were submitted: (1) Did the accused commit a voluntary homicide on Gaston Calmette, Mar. 16, 1914? (2) Was it committed with premeditation?

concerning which the jury desire information. The exercise of this privilege, however, was formerly the subject of much complaint and in 1908 a law was passed<sup>68</sup> authorizing the president to enter the jury room when summoned by the foreman and then only when accompanied by counsel for the accused, the state's attorney and the clerk of the court. In practice the judge is often called in by the jury not to give explanations on doubtful points of law but to give assurances that a lighter punishment will be inflicted in case a verdict of conviction is returned.<sup>69</sup> Juries frequently desire to convict but they wish to let the offender off with a lighter punishment than that which the law attaches to the crime charged; the judge is therefore summoned and asked to give a promise that if the accused is found guilty he will be leniently punished or accorded the benefit of suspended sentence (*sursis*) in pursuance of the Béranger law. But as the president cannot bind his two colleagues, who are not admitted to the jury room yet who have a share in the fixing of the punishment, the result of such interviews is often fruitless or unsatisfactory to the jury, and in order to make sure that the accused will not receive a punishment which they consider excessive they return a verdict of acquittal or convict with extenuating circumstances. This has grown to be an abuse against which there is wide-spread complaint.

When the deliberations begin the foreman reads the questions, beginning with the principal one and concluding with the question of whether there are extenuating circumstances. The jurors vote on each question separately and by secret ballot.<sup>70</sup> In

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<sup>68</sup> Now embodied in art. 343 of the Code d'Instruction Criminelle. This provision was taken from the Austrian code of criminal procedure, sec. 327.

<sup>69</sup> In practice this has come to be almost the sole reason for calling the judge into consultation. French juries are very sensitive in regard to their rights; they are deeply impressed with their omnipotence and believe themselves fully competent to settle questions which arise in the course of their deliberations, without explanations from the judge. Cf. Henri Berr, *Ce qu'est le Jury Criminelle*, Rev. Pol. et Parl., Sept., 1907, p. 500. This writer remarks that he was never able to persuade a jury on which he sat to summon the judge to furnish explanations on points of law.

<sup>70</sup> The rule which requires secret voting has often been criticized as one which destroys the responsibility of the jury, and there has been some demand for the abolition of the rule. Cf. Cruppi, p. 107. Originally the jurors voted openly, the foreman calling each in turn and taking down his response. This method was abolished, however, in 1835 on the ground that it put a restraint on timid jurors. Esmein, *op. cit.*, p. 531.

France, as in various other continental countries, a bare majority is sufficient to return a verdict. Mistrials on account of "hung" juries are therefore impossible. There is little sentiment in France in favor of the Anglo-American unanimity requirement, and it must be admitted that there is much to be said in favor of the French rule.<sup>71</sup> When the verdict is agreed upon it is signed by the foreman, the jury reënter the court room preceded by the bailiff and followed by counsel, the judges take their seats and the president asks the foreman what is the result of their deliberations. Rising and placing his right hand upon his breast, he responds: "Upon my honor and my conscience before God and before men, the declaration of the jury is so and so." The accused is not present at this reading of the verdict, although his counsel is. The verdict when read by the foreman is handed to the president, who with the clerk signs it. The accused is then brought in and the clerk reads it in his presence.

The announcement of the verdict in important cases which have excited wide-spread interest and which have aroused popular sympathies and passions is frequently followed by demonstrations which greatly compromise the dignity of French procedure and which would not be tolerated by an English or American court.<sup>72</sup> Before discharging the jury the president usually expresses the thanks of the court for their services to the cause of justice, compliments them for their zeal and expresses the hope that they may carry away favorable impressions of the court.<sup>73</sup>

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<sup>71</sup> The unanimity rule, however, was advocated by the great orator and advocate, Odillon Barrot, for capital offenses, in his book, *L'Organisation Judiciaire en France* (1872), p. 159. The size of the majority required has been changed many times, the present rule being established in 1853.

<sup>72</sup> When the verdict in the case of Mme. Caillaux was announced, "the scene which followed," says the *Matin* (July 29, 1914), "was indescribable in its violence and scandal. Not within the memory of *avocats* or journalists had the walls of the court room ever heard such clamors." The president was powerless to maintain order. The judges withdrew without attempting to order the room cleared. Finally a lieutenant of the guard succeeded in clearing the room, whereupon the court returned and pronounced the discharge of the prisoner.

<sup>73</sup> A curious practice of French juries consists in formulating before they are dismissed their opinions (*voeux*) on legal and judicial reforms which they consider desirable. These recommendations are transmitted to the minister of justice, who usually communicates them to the press. Cf. *Notes sur le Jury, par un Président d'Assises*, *Rev. Hebdom.*, Nov. 9, 1912, p. 167.

After the reading of the verdict, the court fixes the punishment and the amount of the costs and also the damages, if there is a civil party, each of the three judges having an equal voice. This is almost the only function in which the two assessor judges have a share. If the verdict is irregular, incomplete, obscure or contrary to law, the court may send the jury back for a reformulation of the same, otherwise it will be quashed by the Court of Cassation. Before judgment is pronounced the accused or his counsel must be given an opportunity to present his observations. He may plead that the act was not punishable by law or that it does not merit the punishment demanded by the state's attorney. The court then considers the plea, if such there be, and renders a judgment either of absolution or condemnation.

In France as in the United States there is much complaint of the results of trial by jury and there are some who favor abolishing it outright as Napoleon wished to do in his day.<sup>74</sup> But this sentiment is by no means general and no government since 1808 has dared propose it.<sup>75</sup> On the contrary, there is considerable demand for the extension of the jury system to the trial of correctional offenses and even to the trial of civil cases.<sup>76</sup> There is also much sentiment in favor of giving the jury a share with the court in fixing the punishment and in granting the benefit of suspended sentence in pursuance of the Béranger law. As

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<sup>74</sup> See the severe criticism by M. Faguet in his "Cult of Incompetence," translated by Barstow, pp. 103 ff. See also the discussion in Garraud, p. 817; Desjardins, *Rev. des Deux Mondes*, vol. LXXV, pp. 510 ff.; Tarde, *Philosophie Pénale*, ch. vii; and Joly, *Le Combat contre le Crime*, pp. 15, 50 ff.

<sup>75</sup> See the fine eulogy of the jury by Esmein, *op. cit.*, pp. 425, 563. Cf. also Prudhon's *Le Jury Criminelle*, a symposium of views by distinguished French criminalists and jurists. See especially the opinions of M. Poincaré in the preface and of M. Garçon, p. 113. Cf. also Loubat in the *Rev. Pol. et Parl.*, May, 1912, p. 261.

<sup>76</sup> This is one of the standing reforms demanded by the Radical Party. See Buisson, *La Politique Radicale*, p. 180; also Berr, *Rev. Pol. et Parl.*, Sept., 1907, p. 509. There is also much complaint that trial by jury for crimes has been greatly reduced by the process of "correctionalization" by which many offenses designated as crimes by the *code pénale* are sent to the correctional tribunals for trial as *délits* without juries instead of to the court of assizes. Statistics show that the number of crimes tried by jury in France fell from 5000 in 1850 to 2185 in 1909, whereas the number of cases tried by the correctional tribunals has greatly increased. See the statistics in Cruppi, p. 4; Loubat, *Rev. Pol. et Parl.*, June, 1911, p. 435, and Feb'y, 1913, p. 199; and Yvénes, *La Justice en France*, (1903).

has been said above, the presiding judge is frequently called into the jury room to give assurances that in case of conviction a lighter penalty than that prescribed for crimes committed without extenuating circumstances will be imposed. In consequence of the inability or refusal of the judge to make binding promises of this nature, the jury often acquits or convicts with extenuating circumstances in the face of evidence which shows guilt, sometimes without extenuating circumstances.<sup>77</sup> In order to diminish this crying abuse, remove a source of frequent misunderstanding between the judge and the jury, as well as to harmonize the practice with the law, Briand, when minister of justice in 1906, introduced and advocated a bill giving the jury a share with the court in the determination of the penalty. This reform has been advocated by some distinguished criminalists like M. Henri Robert,<sup>78</sup> but it is opposed on various grounds, principally because it would involve a confusion of the functions of the judge and the jury, and would introduce grave inequalities in the punishment imposed for similar crimes in different parts of the country.<sup>79</sup>

Most of those who defend the system of trial by jury, however, favor reform in the mode of selection and the establishment of higher qualifications for jury service. There is much complaint regarding the method of choice by lot and even of arbitrariness in the preparation of the jury list by which certain classes are excluded because of their political opinions.<sup>80</sup> There is also general criticism, as in the United States, of the low intellectual *niveau* of the average jury and in some cases of their absolute illiteracy, an evil which may be aggravated by the Briand law of 1908 making laborers (who were formerly

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<sup>77</sup> In a recent case reported in the Temps three young bandits who had robbed and murdered a deaf old woman were put on trial, and the evidence clearly showed that they were guilty. But because of their youth the jury did not wish to see the death penalty imposed. They accordingly called in the presiding judge and asked him to give a promise that if a verdict of guilty were returned the court would accord the benefit of suspended sentence. The president refused to give the assurance demanded, whereupon the jury promptly returned a verdict of acquittal.

<sup>78</sup> See his opinion in Prudhon, *Le Jury Criminelle*, p. 21. It is also advocated by the Radical party. Buisson, *op. cit.*, p. 80.

<sup>79</sup> Compare on this point M. Poittevin in Prudhon's *Le Jury Criminelle*, p. 94; Loubat in the *Rev. Pol. et Parl.*, June, 1911, p. 452, and Pinon, *ibid.*, Oct., 1910, p. 79.

<sup>80</sup> Cf. Buisson, p. 179.

excused from jury service) eligible to jury service.<sup>81</sup> The principal criticism of the French jury, however, is its leniency and indulgence toward criminals, not to say its outright lawlessness in acquitting notorious criminals in the face of the most conclusive evidence of their guilt or in convicting with extenuating circumstances when there are none.<sup>82</sup> In recent years this practice has become a crying abuse in France and the columns of the newspapers are frequently filled with editorial denunciations of "scandalous acquittals." Statistics published by the minister of justice show that the number of acquittals by French juries is now nearly four times as great as the number of acquittals by the correctional courts which try without juries. Between 1906 and 1909 the average number of acquittals by juries was 33 per cent (in 1909 it had risen to 38 per cent) of the cases tried—57 per cent in cases of abortion, which caused a well-known publicist to remark that the "French jury is Malthusian"—whereas the number of acquittals by the correctional tribunals average only 9 per cent.<sup>83</sup> According to a summary of the report of the minister of justice for the year 1911,<sup>83a</sup> 2,963 persons were tried by juries in France; of these, 1,044 were acquitted; whereas, of 139,251 persons tried by the correctional tribunals

<sup>81</sup> See the severe criticisms of M. Faguet in his "The Dread of Responsibility" (trans. by Putnam), p. 79, and "The Cult of Incompetence" (trans. by Barstow), p. 103; of M. Cruppi, *op. cit.*, p. 25; and of M. Loubat, *Rev. Pol. et Parl.*, June, 1911, p. 454, and July, 1911, p. 24. M. Loubat, who is a *procureur-général*, says: "I have seen a foreman of the jury who was incapable of reading and of pronouncing the verdict. I have found on the jury an anarchist, a man whose wife had a house which was a notorious *rendez-vous*, another who had been convicted of vagabondage and others who had been convicted of outraging women." See also his article in Prudhon, pp. 78 ff. But others express a more favorable opinion of the intellectual and moral character of French juries. For example, Garcon, in Prudhon, p. 115.

<sup>82</sup> Esmein, who is an ardent defender of the jury system, admits that French juries are "very impressionable" and are much influenced by moral proofs and that they follow their personal sentiments and impressions rather than the evidence. *Op. cit.*, p. 563.

<sup>83</sup> See the statistics quoted by M. Loubat, in *La Crise de la Répression*, in the *Rev. Pol. et Parl.*, June, 1911, pp. 463-464, and in *Le Programme Minimum des Réformes Pénales*, *ibid.*, Feb., 1913, p. 450; also those of Cruppi, p. 55. The distrust of jury trial to which this practice has given rise doubtless explains why so many crimes are now being sent by the process of "correctionalization" to the correctional tribunals where trial by the judges insures a larger proportion of convictions.

<sup>83a</sup> Published in the *Temps* of April 28, 1913.



without juries, only 14,580 were acquitted. These statistics indicate that the chances of escape are tremendously greater when the trial is by jury instead of by the court.

The reputation of Parisian juries for leniency is especially bad; *en province* convictions are much more frequent.<sup>84</sup> But throughout France generally there are certain offenses for which juries rarely convict. Such are the so-called "passional" crimes, press and political offenses, crimes committed by strikers, cases under the unwritten law, cases of abortion and infanticide by women and generally those in which women are the defendants, especially where they are charged with killing their lovers on account of jealousy or for betrayal, the mistresses of their husbands and the editors of newspapers who have maligned their characters. M. Labori, in his plea for the acquittal of Mme. Caillaux in 1914, dwelt upon the practice of French juries in acquitting women charged with killing newspaper editors, and he cited the case of Mme. P. who in 1898 after several ineffectual attempts to interview M. Millerand, the editor of the *Lanterne*, shot his secretary instead. Her counsel told the jury that if she were traduced before all the juries in France no one could be found to convict her. She was promptly acquitted.<sup>85</sup> Mme. Clovis Hughes was acquitted for a similar offense in 1885 and the acquittal of Mme. Caillaux in 1914 for killing the editor of the *Figaro* is still fresh in the public mind. The acquittal of Mmes. Steinheil, Lamberjack, Bloch and Pascal are other well-known cases that may be cited.<sup>86</sup>

As has been said, French juries since 1832 have had the power when pronouncing verdicts of conviction to accord the benefit of extenuating circumstances (*circonstances atténuantes*), in which case the court is required to impose a lighter penalty. It was

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<sup>84</sup> One writer, Berr, *Ce qu'est le Jury Criminelle*, Rev. Pol. et Parl., Sept., 1907, p. 497, however, questions whether provincial juries are less indulgent than those of Paris for the reason that they are subject to stronger local influences, and in some communities, like the mountainous regions, public sentiment tolerates acquittal for certain crimes which are condemned in the metropolis.

<sup>85</sup> See an account of this case in the *Figaro*, Sept. 24 and 27, 1898.

<sup>86</sup> The murder of her husband while he was asleep and also of his aunt, by Mme. Pascal, was particularly atrocious. The prosecuting attorney asked the jury to convict with extenuating circumstances on the ground that she was afflicted with hysteria and was a victim of her imagination. But the jury acquitted her. See statement of the facts in the *Temps* of May 13, 1912.

felt that in many cases where there were mitigating circumstances the penalty prescribed by law would be excessive and that juries would acquit rather than see the offender unduly punished; it would therefore be better to make an exception to the general rule and give the jury an indirect share in the fixing of the punishment, by allowing it to find a verdict which carried a less severe penalty.<sup>87</sup> In practice, however, the right has been greatly abused, as I have said, and one hears in France loud complaints of the excessive liberality with which it is used. M. Loubat asserts that it is allowed to parricides, vitriol throwers, and other atrocious criminals.<sup>88</sup> Statistics cited by him show that it is granted in 73 per cent of all cases in which there are convictions; in cases of assault and battery it is accorded in 75 cases out of a hundred; for crimes against morality, in 82 per cent of the cases; for convictions for fraud, 95 per cent.<sup>89</sup> The fact that the jury is not required to give any reasons for finding extenuating circumstances is a subject of criticism.<sup>90</sup>

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<sup>87</sup> The English and American practice which allows the jury to recommend the accused to the mercy of the court would seem to be preferable to the French rule which deprives the court of its discretion and makes the imposition of a lighter penalty obligatory when a verdict with extenuating circumstances is returned. Cf. the remarks of Stephen, *Hist. of the Crim. Law*, vol. I, p. 561.

<sup>88</sup> The case of Samsoen reported in a recent number of the *Temps* confirms the truth of this statement. Samsoen had murdered his wife for having left him on account of his brutality and intemperance. At the trial he was defiant and cynical, but because he had once served in the army in a colonial campaign the jury found extenuating circumstances and he was let off with life imprisonment.

<sup>89</sup> *La Crise de la Repression*, *Rev. Pol. et Parl.*, June, 1911, p. 463, and *Programme Minimum des Réformes Pénales*, *ibid.*, Feb., 1913, p. 214. Statistics cited by M. Yvernes, *Justice en France*, p. 17, show that in 1900 extenuating circumstances were accorded in 1497 convictions out of 1972, or about 76 per cent. They were granted in every case of conviction for infanticide, arson, and fraud; in 97 out of a hundred cases of counterfeiting; in 93 per cent of the cases of bankruptcy and assassination.

<sup>90</sup> The congress of criminal law at Grenoble in 1912 unanimously adopted a resolution recommending that the jury be required to give reasons in each case for finding extenuating circumstances. Notwithstanding the criticism there is a movement in France for enlarging still further the benefit of extenuating circumstances by allowing the jury to find *circonstances très atténuantes*, in which case the court shall be required to reduce the penalty an additional degree. The advocates of this change argue that the punishments prescribed by the code are generally excessive, a fact

In case of conviction, the accused has the remedy of recourse in cassation (*pouvoir en cassation*) to the supreme court. In that case, however, the court is limited to passing on errors of law; it cannot review questions of fact. It merely determines whether the verdict of the jury and the judgment of the lower court were legal, i. e., whether all the provisions of the law governing the trial have been observed and properly applied. If not the criminal section of the Court of Cassation quashes the judgment and sends the case back for retrial.

Until comparatively recent times appeal properly speaking (*pouvoir en revision*) was not admitted. The supreme court was designed primarily to be a Court of Cassation and not a tribunal of revision—a third degree of jurisdiction—with power to review and revise *au fond* the judgments of the lower courts. Nevertheless in exceptional cases the Court of Cassation has been given the power of revision in respect to errors of fact and instead of quashing the judgment and sending the case back for retrial it may pronounce judgment itself. There are four such cases: (1) where two individuals have been convicted of the same crime, when the two judgments are irreconcilable; (2) where there is a subsequent conviction of a witness for perjury, when his false testimony resulted in or contributed to the conviction of the accused; (3) where new evidence is discovered after a condemnation for homicide tending to show that the supposed victim is alive; and (4) where new evidence comes to light tending to establish the innocence of the person convicted.<sup>91</sup> In these cases the supreme court is a tribunal of review with power to re-examine and pass on questions of fact and to reform the judgment of the lower court without sending the case back for retrial.<sup>92</sup> French authorities are not wanting, how-

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which lends to acquittals where otherwise convictions would be found. See the discussion by the Société Générale des Prisons in 1902, *Rev. Pen.*, 1902, pp. 356-397.

<sup>91</sup> The first three grounds of revision were created by law in 1867; the last mentioned in 1895. The law of 1867 was passed to enable the daughter of one Lesurques, who had been condemned to death in 1796, to bring up the question of revision, it being alleged that several subsequent judgments condemning other individuals for the same offense were irreconcilable with the conviction of Lesurques. The Court of Cassation having decided, however, that two convictions of different persons for the same offense were not necessarily irreconcilable, the law of 1867 was passed mainly to allow reparation for a gross miscarriage of justice, seventy years before.

<sup>92</sup> Compare Garraud, p. 970; Esmein, p. 567.

ever, who deplore the conferring of the *pouvoir en revision* on the supreme court, whose natural rôle, they say, is that of a tribunal of cassation.<sup>93</sup>

By a law of 1895 a system of reparation for judicial errors was created for the benefit of persons wrongfully convicted. The law provides that the judgment of revision establishing the innocence of the victim shall be widely advertized in the locality where he was convicted or that of his last residence, if dead, and this at the expense of the state. It also provides that the judgment of review may award the victim, or his relatives within a certain degree, if he be dead, pecuniary damages because of the error.<sup>94</sup> The amount is paid by the state, subject to the right of recovery from the civil party, the informer, or the false witness on whose testimony the conviction was found.<sup>95</sup> This is a very admirable feature of the French system and is found in many countries of Europe but unfortunately as yet it has not been introduced into England or the United States. The case of Adolph Beck, who was wrongfully convicted and imprisoned for seven years in England, and of Andrew Toth, who was convicted of murder in Pennsylvania and after having served twenty years was recently found to be innocent, illustrate the possibility of judicial errors in the administration of justice and the need of providing by legislation for indemnifying, as far as they may be indemnified, the unfortunate victims of such errors.<sup>96</sup> There have been a number of cases in which indemnities were

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<sup>93</sup> Such is the view of Faye, *La Cour de Cassation*, pp. 46-47.

<sup>94</sup> It may be remarked in this connection that the accused who has been acquitted may recover damages against the civil party if there be one in the case, provided he be at fault, or against his denunciators (informers), the liability and amount being determined by the court. *Code d'Instr. Crim.*, arts. 358, 366.

<sup>95</sup> *Code d'Instr. Crim.*, art. 446. See also Esmein, pp. 568-9. The principle of pecuniary reparation for judicial errors existed in ancient French law but the victim recovered not from the state but from the judge, the public prosecutor or the informer. It disappeared at the time of the Revolution, only to be revived under a new form a hundred years later.

<sup>96</sup> See the valuable report of Edwin M. Borchard, on "The European Systems of State Indemnity for Errors of Criminal Justice," *Sen. Doc. No. 974*, 62d Cong., 3d Sess. (1912). In the case of Beck referred to above, parliament granted him a gratuity of \$25,000, but the state legislature of Pennsylvania refused to make an appropriation to indemnify Toth. Through the generosity of Mr. Andrew Carnegie he was given a pension of \$40 a month.

awarded for wrongful convictions in France since the enactment of the law of 1895.<sup>97</sup>

Another feature of the French system which might well be adopted in America is that which allows the victim of a crime, or any other injured party, or his heirs, to constitute himself a *partie civile* by the side of the *partie public* and bring an action of damages against the accused before the same court and in the same proceeding as that by which he is tried for crime. In the United States a separate action in such cases before a civil court is necessary. In France the two may be joined and heard together—a proceeding that has obvious advantages of economy and dispatch. The civil party, however, is exposed to some disadvantages. If the case is tried before a correctional tribunal he must assume the entire cost of the action, even the expenses of his adversary in case he (the civil party) loses, and also the expense of the prosecution.<sup>98</sup> But if he wins he may recover from his adversary, a remedy often illusory. The code provides<sup>99</sup> that when the case is tried before the court of assizes, the civil party who triumphs shall be relieved from the payment of costs, but the Court of Cassation holds that he is reputed as having succumbed whenever the accused is acquitted, notwithstanding the fact that the court may have awarded him damages as is not infrequently done.<sup>100</sup> In such a case the costs are, therefore, assessed upon him although he has in fact triumphed. This rule has been criticized as illogical and unjust.<sup>101</sup> Moreover, the witnesses of the civil party are not allowed under the decision of the Court of Cassation to testify, this on the principle

<sup>97</sup> For example, the case of Pierre-Vaux, whose children in 1897 were awarded 100,000 francs in consequence of his wrongful conviction; that of Petit (1899), who was awarded 15,000 francs for having been wrongfully condemned for libel, although he had sustained no material injury; and that of Druax, whose wife was awarded 40,000 francs. See on the subject Garraud, p. 974, and Lailier et Venoven, *Les Erreurs Judiciaires et Les Causes*.

<sup>98</sup> Code d'Instr. Crim., arts. 162, 194. This requirement is criticized by Baudat, p. 99. The Ribot extra-parliamentary commission of 1910 recommended that the civil party be relieved from paying the costs when the accused is convicted and damages are awarded.

<sup>99</sup> Art. 368.

<sup>100</sup> Thus Prince Napoleon was acquitted in 1870 for killing the journalist Victor Noir, but the court awarded his mother \$40,000 in damages. There have been other cases of the kind.

<sup>101</sup> Baudat, p. 101.

that equity does not permit one to be a witness in his own case. Finally, the decisions of the Court of Cassation do not recognize the right of the civil party to challenge jurors.<sup>102</sup> It is clear, therefore, that the civil party is at a serious disadvantage as compared with the prosecution and defense, but in spite of these restrictions his facilities for recovering damages against the criminal by whom he has been injured are much greater than in the United States.

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<sup>102</sup> Also criticized by Baudat (p. 102) as unjust and illegal because the list of disqualified witnesses enumerated in art. 322 does not mention the witnesses of the civil party. See also Labourde, *op. cit.*, p. 669.