

COMPARATIVE CONSTITUTIONAL LAW

DUE PROCESS IN CRIMINAL PROCEDURE: A COMPARISON OF TWO SYSTEMS

JOSEPH M. SNEE, S.J.* AND A. KENNETH PYE†

The initial problem facing the lawyer who attempts to compare the criminal procedure of his own country with that of other nations is the way in which to approach the study of so complex a subject. Too often in the past, the assumption has been made that a meaningful result can be obtained by comparing the language of the statutes or constitutional provisions of one country with those of another and concluding that when the language is the same, the law is the same, and where the language is different, the law is different. The chief advantage of such a comparison is in its simplicity, in that the only variables are the differences in language or the omission of provisions in the law of one nation which is found in the law of another. The overwhelming disadvantage is that such a study often results in misleading conclusions as to the extent of similarities or differences.

The first step in a comparison of laws must be a determination of what the law of one nation is in order that the laws of other nations may be compared with it. This in itself imposes a substantial problem when such a broad field as criminal procedure is the subject of study. There are obviously substantial differences between criminal procedure in our federal courts and the systems of procedure followed in many of the courts of our fifty states. Only the elastic concept of due process of law in the federal constitution and the various provisions of state constitutions restrict experimentation by the states with procedural innovations unknown to the traditional common law sys-

* Professor of Law, Georgetown University Law Center, Washington, D. C. Member of District of Columbia Bar. Co-author, *Status of Forces Agreements and Criminal Jurisdiction* (1957).

† Professor of Law, Georgetown University Law Center, Washington, D. C. Member of District of Columbia Bar. Co-author, *Status of Forces Agreement and Criminal Jurisdiction* (1957).

tem. The restrictions of the Bill of Rights have prevented such extensive procedural change by the federal government, although the Federal Rules of Criminal Procedure have illustrated that significant changes can be made within the comparatively rigid federal structure.

For the purpose of providing a basis of comparison with the laws of other nations, the basic similarities found in our state and federal systems are more important than the interesting differences. In an understanding of these points of similarity we can perhaps determine what Americans regard as the fundamentals of a fair system for the administration of criminal justice.

The hard core of these similarities can be found in the requirements of the due process clause of the fourteenth amendment. The problem then becomes one of determining the meaning of this term. It is one thing to state that due process is "that fundamental fairness essential to the very concept of justice"¹ or to describe it as the embodiment of those rights which are "implicit in the concept of ordered liberty"² or to determine whether it has been violated by deciding whether there has been an abridgment of a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."³ It is a more difficult task to determine the rights to which an accused is entitled.

To determine this question it is obviously necessary to catalogue the cases. This alone is not adequate, however, since not all or even most of the cases were decided by the present Court. It may be argued persuasively that some of the nineteenth century cases would not be decided the same way today. Furthermore, there are many questions which have never been decided. The Supreme Court has held that indictment by grand jury is not necessary,⁴ trial by common law jury is not necessary,⁵ the accused does not have to be afforded the privilege against self-incrimination,⁶ a state court may admit evidence obtained by unreasonable search and seizure,⁷ a conviction may rest in part upon affidavits,⁸ the state may be permitted to appeal on a question of law,⁹ and an accused may be tried without counsel being

¹ *Lisenba v. California*, 314 U.S. 219 (1943).

² *Palko v. Connecticut*, 302 U.S. 319 (1937).

³ *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

⁴ *Gaines v. Washington*, 277 U.S. 81 (1928); *Hurtado v. California*, 110 U.S. 516 (1884).

⁵ *Maxwell v. Dow*, 176 U.S. 581 (1900).

⁶ *Adamson v. California*, 332 U.S. 46 (1947); *Twining v. New Jersey*, 211 U.S. 78 (1908).

⁷ *Wolf v. Colorado*, 338 U.S. 25 (1949); *Cf. Elkins v. United States*, 364 U.S. 206 (1960).

⁸ *West v. Louisiana*, 194 U.S. 258 (1904).

⁹ *Palko v. Connecticut*, 302 U.S. 319 (1937).

provided for him by the state in some cases, without depriving the defendant of due process of law.¹⁰ Each of these factors in a different factual setting might well result in the conclusion that there had not been "fundamental fairness."

Furthermore, the common background of all of our systems of criminal procedure has resulted in uniformity among the states in insuring certain rights. Where every state affords the right to an accused, the Supreme Court is not called upon to determine whether under the due process clause the accused is entitled to such a procedure. Thus the Supreme Court has not been required to determine whether a state could abolish the concept of cross-examination by counsel altogether, could permit the finders of fact to read the grand jury transcript and the police reports prior to the beginning of the trial, could try an accused *in absentia* if he was served with process outside the state, or could alter the rules of evidence so drastically that evidence of bad character, hearsay and opinion evidence could be admitted without objection and form the basis for a conviction. In these areas we can only hope to reason by analogy.

In using the due process clause as the standard we should not lose sight of the fact that it is an arbitrary basis in that it does not embrace all the common elements in the American system. Thus, while the privilege against self-incrimination contained in the fifth amendment has been held not to be included in the requirement of due process of law, the constitution of every state except two protects an accused from self-incrimination by state constitutional provision.¹¹ To say it is not a fundamental right in American criminal procedure simply because it was once held not to be protected by the fourteenth amendment is to ignore reality.

Assuming that a common basis of what American law regards as fundamental can be determined within these limitations, the second step is to determine which other countries should be the subject of study. An ambitious undertaking should include the study of all the nations of the civilized world. Such a project has been undertaken by the International Commission of Jurists in its study of the Rule of Law.¹²

¹⁰ *Betts v. Brady*, 316 U.S. 455 (1942). *Cf.* *Powell v. Alabama*, 287 U.S. 45 (1932). See also *Beane*, *The Right to Counsel in American Courts* (1955).

¹¹ *McCormick*, *Evidence* 256 (1954).

¹² The study has already produced considerable comment in the journals. The developments of the study may be traced in the *Bulletins* and in the *Journals* of the International Commission of Jurists. See also: "Rule of Law in the United States, Germany, Scandinavia, Turkey and Mexico," 9 *Annales de la Faculté de Droit d'Istanbul*, No. 12; Katz, "Rule of Law in Oriental Countries," 6 *Am. J. Comp. L.* 520 (1957); Kiralfy, "The Rule of Law in Communist Europe," 8 *Int. & Comp. L.Q.* 465 (1959); Letourneur & Drago, "The Rule of Law as Understood in France," 7 *Am. J. Comp. L.* 147 (1958).

Questionnaires have been sent to the bench, bar, and to legal educators in all countries belonging to the United Nations. The evaluation of the responses will give much insight into this immense undertaking, although it may be questioned whether the questionnaire method will provide a sufficient basis in itself for definitive conclusions.¹³

Such a project is obviously too vast an undertaking for a single article. Fortunately, such a comprehensive study is not essential in order to gain some understanding of the basic concepts of due process in criminal proceedings.

Two major systems of law are in existence—the civil law system and the common law system. The United States, the British Commonwealth of Nations, and many of the newly emerging nations of the world which were formerly governed by the United Kingdom, have the basis of their criminal procedure in the common law. The remaining nations of Europe, the nations of Latin America, Turkey, and the former Belgian, French and Dutch colonial possessions, have systems based on the civil law. Japan has a civil law background, upon which many American concepts have been engrafted.¹⁴ Nationalist China likewise looks to the civil law for the structure of its criminal procedure.¹⁵

While it is infeasible to discuss the technical provisions of the codes of every nation, it is possible to compare the common elements in American criminal procedure with the common elements in the criminal procedure of the civil law countries. The fact that certain common elements exist is clear from the agreement among the western European nations on an enumeration of the basic rights to which every person accused of crime is entitled—in the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁶

¹³ The American Bar Foundation's Survey of the Administration of Criminal Justice in the United States rejected such an approach in favor of personal observations by trained staff members. See American Bar Foundation, "Plan for Survey" (1955).

¹⁴ Abe, "Criminal Procedure in Japan," 48 *J. Crim. L.* 359 (1957).

¹⁵ Wang, "Chinese and American Criminal Law," 46 *J. Crim. L.* 796 (1956) (primarily concerned with substantive criminal law).

¹⁶ "Convention For the Protection of Human Rights and Fundamental Freedoms (1950)," 45 *Am. J. Int. L.* 24 (1951) [henceforth cited as "The European Convention"]. See Green, "The European Convention on Human Rights," 5 *World Aff.* 435 (1951); Myers, "Human Rights in Europe," 48 *Am. J. Int. L.* 299 (1954); Robertson, "The European Convention for the Protection of Human Rights," 28 *Brit. Y.B. Int. L.* 363 (1951); Triska, "The Individual and His Rights in the European Community, An Experiment in International Law," 31 *Tul. L.R.* 283 (1957). See also, Jenks, *The Common Law of Mankind* (1958); Moskowitz, *Human Rights* (1958). The statement of basic rights in the European Convention should be compared with the report of the Seminar convened by the United Nations Economic and Social Council's Commission on Human Rights to consider rights deemed basic in Far Eastern Countries (E/CN-

We shall adopt this approach and attempt to compare some of the fundamental concepts of American criminal procedure with the basic concepts in the criminal procedure of civil law countries. As a rule, the French Code of Criminal Procedure¹⁷ will be utilized as an example. Significant variations in the procedure of other civil law countries will occasionally be pointed out.¹⁸

4/765, March 5, 1958) and the "Universal Declaration of Human Rights of the United Nations" (1948).

¹⁷ Code d'instruction criminelle (1958).

¹⁸ More detailed treatment of the criminal procedure of individual civil law countries may be found in numerous sources: *In General*: Esmein, *History of Continental Criminal Procedure* (1913); Haimson and Plucknett, *The English Trial and Comparative Law* (1952); Calamandrei, *Procedure and Democracy* (1956); Ploscowe, "The Development of Present-Day Criminal Procedure in Europe and America," 48 *Harv. L.R.* 433 (1935); Ploscowe, "The Investigating Magistrate in European Criminal Procedure," 33 *Mich. L.R.* 1010 (1935); Ploscowe, "Measures of Constraint in European and Anglo-American Criminal Procedure," 23 *Geo. L.J.* 762 (1935); Berg, "Criminal Procedure, France, England, United States," 8 *DePaul L.R.* 256 (1959); Ploscowe, "Expert Witnesses in Criminal Cases in France, Germany, and Italy," 2 *Law & Contemp. Prob.* 504 (1935); Razi, "Around The World's Legal Systems," 6 *How. L.J.* 1 (1960); Schwenk, "Comparative Study of the Law of Criminal Procedure in NATO Countries Under the NATO Status of Forces Agreement," 35 *N.C. L.R.* 358 (1957); Biggs, "Procedure For Handling Mentally Ill Offenders In Some European Countries," 29 *Temp. L.Q.* 254 (1956); Symposium: "Conditional Release Pending Trial," 108 *U. of Pa. L.R.* 290 (1960).

China: Wang, "Chinese and American Criminal Law," 46 *J. Crim. L.* 796 (1956).

France: Devlin, "English and French Legal Methods: Crime," 4 *Int. & Comp. L.Q.* 376 (1955); Freed, "Aspects of French Criminal Procedure," 17 *La. L.R.* 730 (1957); Haimson, "The Prosecution of the Accused—English and French Legal Methods," 1955 *Crim. L.R.* 272; Hauser, "Criminal Law in France," 45 *A.B.A. J.* 807 (1959); Howard, "Compensation in French Criminal Procedure," 21 *Mod. L.J.* 387 (1958); Keedy, "The Preliminary Investigation of Crime in France," 88 *U. of Pa. L.R.* 386, 692, 915 (1940); Patey, "Recent Reforms in French Criminal Law and Procedure," 9 *Int. & Comp. L.Q.* 383 (1960); Ploscowe, "Jury Trials in France," 29 *Minn. L.R.* 376 (1945); Ploscowe, "Administration of Criminal Justice in France," 24 *J. Crim. L.* 24 (1933); Ploscowe, "Development of Inquisitorial and Accusatorial Elements in French Criminal Procedure," 23 *J. Crim. L.* 372 (1932); Vouin, "Protection of the Accused in French Criminal Procedure," 5 *Int. & Comp. L.Q.* 1, 157 (1956); Wright, "French Criminal Procedure," 44 *L.Q. Rev.* 324 (1928); Wright, "French Criminal Procedure," 45 *L.Q. Rev.* 92 (1929).

Germany: An excellent summary may be found in the War Office of the United Kingdom's "Manual of German Law" (1952). Eichler, "German Criminal Jurisdiction," 5 *Int. & Comp. L.Q.* 542 (1956); Meyer, "German Criminal Procedure, The Position of the Defendant in Court," 41 *A.B.A. J.* 592 (1955); Sweigert, "Legal System of Federal Republic of Germany," 11 *Hastings L.R.* 7 (1959).

Israel: Shoham, "Sentencing Policy of Criminal Courts in Israel," 50 *J. Crim. L.* 327 (1959).

Japan: Abe, "Criminal Procedure in Japan," 48 *J. Crim. L.* 359 (1957); Abe, "Self-Incrimination, Japan and the United States," 46 *J. Crim. L.* 613 (1956); Meyers, "The Japanese Inquest of Prosecution," 64 *Harv. L.R.* 279 (1950); Appleton, "Reforms

A discussion of the law of the nations of the Communist bloc has been omitted. This has been done for several reasons. Although the laws of these nations are civil law in their origin, the authors are unable to evaluate to what extent the provisions of law are followed in practice. The impact of Communist ideology upon a traditional civil law system has been noted by one astute observer.¹⁹ In the second place, the tradition of the bar at least in Soviet Russia is such that many formal provisions of the Code are of questionable effectiveness. The third reason is that neither of the authors is fluent in the languages of the Soviet bloc nations. The analysis of the law in these countries must be left to other writers.²⁰

Even a general study of the criminal procedure of a foreign nation gives rise to significant difficulties. Initially the problem of terminology must be overcome. The phrase "due process" may not be used at all, but the enumeration of individual rights may in combination add up to the equivalent of due process. In many cases, the rights may not be enumerated in the constitution itself but in the code of criminal procedure. If the rights are enumerated in the code but not in the constitution, under circumstances where history and tradition regard them as a permanent part of the law, should not they be regarded as elements of "due process" to the same extent as if they were formally expressed in the constitution? Sometimes there may be no written enunciation of a due process clause at all, but an unwritten tradition permits the conclusion that due process does exist. Few would question the existence of a constitutional concept of due process in the United Kingdom despite the absence of any document expounding the principle.²¹

Perhaps the most difficult problem exists when the language of the foreign law is the same as that found in American law. Assuming that due process of law is required, does due process mean the same to the foreign lawyer and judge as it does to his American counter-

in Japanese Criminal Procedure under Allied Occupation," 24 Wash. L.R. 401 (1949). In addition to these sources, reference should be made to the "country law studies" of the criminal procedures of the NATO countries and Japan prepared by the United States Army, Air Force and Navy.

¹⁹ Nemes, "Hungarian Law of Criminal Procedure In the Light of the Mindzenti Trial," 17 Jurist 157 (1957).

²⁰ Semmes, "Justice Behind the Iron Curtain: Polish Lawyers Fight for the Criminally Accused," 43 A.B.A. J. 697 (1957); Kiralfy, "The Rule of Law in Communist Europe," 8 Int. & Comp. L.Q. 465 (1959); Brinkley, "The Rule of Law: The New Soviet Criminal Procedure," 46 A.B.A. J. 637 (1960); Grzybowski, "Soviet Criminal Law, Reform of 1958," 35 Ind. L.J. 125 (1960).

²¹ As Justice Jackson pointed out in his dissenting opinion in *Shaughnessy v. United States, ex rel. Mezzei*, 345 U.S. 206, 223-224 (1953), with the British, "due process is a habit, if not a written constitutional dictum."

part? Particularly where the meaning of due process is being determined inductively by combining the individual rights enumerated, the student must be careful that "the right to counsel," "confrontation," etc., mean the same in a foreign code as in an American code.

Another important limitation must be noted. Even assuming an understanding of what due process means in our law and what it or its equivalent means in the law of a foreign nation can be ascertained, a further basis of comparison must be used. Any analysis must be incomplete without a consideration of how these provisions work in practice. It is one thing to know that due process requires that the judge who has the duty to determine guilt should not be paid from fines.²² Such knowledge is incomplete, however, unless one knows whether states still utilize such a procedure.²³ Study of the law in action in the criminal courts of the United States often reveals a wide divergence between what the law provides and what actually occurs.²⁴ The same is true in other countries. Yet the importance of due process rests in the rights which a citizen receives, not the rights which a constitution or statute says he should receive. Such factors as the traditions of the bar and the integrity of the police may be more important than a grandiose statement of the rights of an accused in the constitution. Unfortunately, an appreciation of these factors requires intensive personal observation of the bench, bar, and actual court proceedings. Such a study is now being conducted in the United States by the American Bar Association.²⁵ Our personal observations have been confined to the United States, Germany, Italy, France, Turkey, and the United Kingdom.²⁶

One further observation should be made. The student should not hasten to the conclusion that, because differences are found to exist between the procedures of two nations, that necessarily means—or even probably means—a different result will be reached in a criminal prosecution by one sovereign rather than by the other. It

²² *Tumey v. Ohio*, 273 U.S. 510 (1927).

²³ See Lee, "The Emergence and Evolution of a Constitutional Right to a Fair Trial Before a Justice of the Peace," 20 Fed. B.J. 111 (1960).

²⁴ See Institute of Legal Research, University of Pennsylvania Law School, "A Study of the Administration of Bail in New York City (1958)," reprinted in 106 U. Pa. L.R. 685 (1958).

²⁵ See American Bar Foundation, "Plan for Survey [of the Administration of Criminal Justice in the United States]" (1955); National Commission on Law Observance and Enforcement, "Report on Criminal Procedure" (1931).

²⁶ Our observations in the European countries are summarized in "Report of the Actual Operation of Article VII of the NATO Status of Forces Agreement" (1956); and in "Status of Forces Agreements: Criminal Jurisdiction" (1957).

has been pointed out by a distinguished authority²⁷ that the result in any trial depends upon the application of a principle of law to facts found to be true through the use of a particular procedure. The substantive law may differ or the procedure may differ. However, all systems have in common the fact that human beings must determine what the facts are and apply the principles to these facts. Human beings as a rule seek to achieve a just result, whatever their nationality. Often this human equation will occasion similar results in the sense of acquittals or convictions where an academic comparison of the substantive and procedural law would have revealed considerable differences.

These factors, the difficulty in determining our law, the difficulty in ascertaining foreign law, the difference between the law in the books and the law as it is applied to accused in the courts, and the effect of the human equation—all conspire to prevent any definite findings or conclusions. What is sought is insight into the concept of due process of law and an appreciation of the possible effects upon a defendant which may result from differing views of what rights are fundamental.

We shall first consider those procedures and rights which are required by the due process clause in an American criminal proceeding. We shall also consider some of the rights which although not required to be afforded an accused by the due process clause are nevertheless considered characteristic American criminal procedure. Finally, we shall consider some of the rights which are considered basic in the procedure of civil law countries but which are considered of less importance in the United States.

DEFINITE STANDARD OF GUILT

A primary requisite for due process of law in a criminal prosecution is that the statute alleged to be violated must set forth a specific and definite standard of guilt. A penal statute creating a new offense must be sufficiently explicit to inform those subject to it just what conduct will render them liable to its penalties; and a statute forbidding or requiring the doing of an act, in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, is repugnant to due process.²⁸

Though this principle is not generally stated in express terms, its substance is part of the civil law jurisprudence. In civil law, the

²⁷ Frank, "Civil Law Influences on the Common Law—Some Reflections on 'Comparative' and 'Contrastive' Law," 104 U. Pa. L. Rev. 887, 896-910 (1956).

²⁸ *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

maxim, *Nullum crimen, nulla poena sine lege*,²⁹ is sacrosanct. This fundamental principle is reinforced by another: *Poenalia sunt restringenda*. If there exists any doubt as to the meaning or the extension of a statute to certain activities, this doubt must be resolved in favor of the accused, and any extension by analogy is forbidden.³⁰

The approach, however, differs from that taken by the Supreme Court in the *Lanzetta* case. There, the Court struck down a conviction obtained under a vague and indefinite statute, without considering whether *Lanzetta's* activities could have been prosecuted under a more precise statute.³¹ A civil law court would, we think, be more likely to consider whether the activity of the accused fell within the definition of the acts prohibited by the statute and was within the intent of the legislature. In such case, the civil law court would punish the accused, leaving to future determination the question of innocent activity which fell within the wording of the statute.³²

EX POST FACTO LAWS—RETROACTIVITY OF PENAL LAW

In the United States, the constitutional prohibition against ex post facto laws on either the federal³³ or the state³⁴ level has made it unnecessary for the courts to consider such laws in the light of the due process clause of either the fifth or fourteenth amendments. The general repugnance to such laws throughout the civilized world is,

²⁹ The provision to this effect is usually found at the beginning of the penal codes of civil law countries, e.g., art. 4 of the Code pénal of France. See art. 7 of the European Convention:

- (1) No one shall be guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offense was committed.
- (2) This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.

³⁰ See Bouzat, *Traité de droit pénal*, § 68 (1951). A significant, although temporary deviation from this principle was found in laws of Nazi Germany which did punish offenses by analogy. Hall, "Nulla Poena Sine Lege," 47 *Yale L.J.* 165 (1937); Schwenck, "Criminal Codification and General Principles of Criminal Law in Germany and the United States—A Comparative Study," 15 *Tul. L.R.* 541 (1941); Note, "The Use of Analogy in Criminal Law," 47 *Col. L.R.* 613 (1947). It may be argued persuasively that certain states of the United States violate at least the spirit of this prohibition in prosecutions for common law misdemeanors. For an article defending the concept of the common law misdemeanor, see Kline and Hitchler, "Common Law Misdemeanor Doctrine," 59 *Dick. L.R.* 343 (1955).

³¹ *Thornhill v. Alabama*, 310 U.S. 88 (1940).

³² *Cf. People of the State of New York ex rel. Hatch v. Reardon*, 204 U.S. 152 (1907).

³³ U.S. Const. art. I, § 9.

³⁴ U.S. Const. art. I, § 10.

however, the clearest indication that such laws violate a fundamental right "implicit in the concept of ordered liberty."³⁵ By dictum in an early case³⁶ the Supreme Court of the United States stated that the constitutional prohibition against ex post facto laws includes the following:

- (a) laws which make an action done before the passing of the law, and which was innocent when done, criminal;
- (b) laws that aggravate a crime or make it greater than it was when committed;
- (c) laws that change the punishment and inflict a greater punishment than the law annexed to the crime when committed; and
- (d) laws that alter the legal rules of evidence, and receive less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender.³⁷

In the civil law jurisprudence the phrase "ex post facto law" is not generally used—possibly because of the dubious nature of its Latinity. Equivalent concepts are, however, expressed in the civil law penal codes. Thus, the French code is quite explicit: "No petty offense, no misdemeanor, no felony can be punished with penalties which have not been established by law prior to the time they were committed."³⁸ There is no doubt that this provision of the French code bars prosecution under laws of the first two kinds enumerated in *Calder v. Bull*; it would also bar prosecution under a law of the third type, since an increase in penalty raises the grade of the offense.³⁹ On the other hand, laws which change the competence of courts or introduce procedural reforms are given retroactive effect, the one exception being a law which would, if applied retroactively, deprive an accused of an appellate remedy to which he was formerly entitled.

French jurisprudence, moreover, generally gives retroactive effect to penal laws whenever this will benefit the accused or convicted person.⁴⁰ A conviction will not be sustained under a law which has been

³⁵ The phrase is that of Mr. Justice Cardozo in *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

³⁶ *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798); see also *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866); *Burgess v. Salmon*, 97 U.S. 381, 384 (1878).

³⁷ This does not include a statute enlarging the class of competent witnesses. *Hopt v. Utah*, 110 U.S. 574, 589 (1884).

³⁸ Code Pénal, art. 4.

³⁹ *Id.*, art. 1.

⁴⁰ See Bouzat, *Traité de droit pénal*, §§ 1519-1536 (1951).

abrogated since the offense was committed. If a new law reduces the penalty or the grade of an offense, it will be applied retroactively; and if a new law reduces the period for the running of the statute of limitations, a criminal prosecution may be barred under the new statute even though it would otherwise be possible under the old law. But if the new law increased the time for the running of the statute of limitations, the old law will be applied.⁴¹ While these retroactive effects are certainly not required by a concept of due process, the civil law countries are generally inclined to give to the accused the benefit of any change in the law.

Similar provisions against the retroactivity of penal law, unless more favorable to the accused, are found in other civil law countries. Thus, under Italian law, "No one may be punished for an act which, under the law prevailing at the time it was committed, did not constitute an offense."⁴² Subsequent legislation favorable to the accused is given retroactive effect.⁴³ Punishment adjudged under a statute which is subsequently abrogated is not to be executed.⁴⁴ The Turkish Criminal Code⁴⁵ contains identical provisions.

Interesting divergences from the general practice can, however, be found, for example, in Denmark. Though the maxim, *Nullum crimen, nulla poena sine lege*, is in general followed in Danish jurisprudence, the Danish Penal Code⁴⁶ provides that any conduct, though not specifically denounced, may be punished if it is fully equal to conduct for which criminal liability is determined by law. The Code also directs that criminal liability, as well as the measure of sentence, shall be determined by the criminal law in effect at the time that sentence is passed, unless this would result in a more severe sentence than was imposable under the prior legislation.⁴⁷ In June 1945, the Danish Parliament enacted two clearly ex post facto laws for the punishment of acts committed by Danish quislings during World War II. The death penalty was reestablished for that purpose, procedural laws were changed, and the right of appeal was restricted. These laws were, of course, extraordinary enactments politically in-

⁴¹ A contrary result has been reached in the United States, *United States v. Powers*, 307 U.S. 214 (1945), *rehearing denied* 308 U.S. 631 (1939).

⁴² Codice di Procedura Penale, art. 2. See also Costituzione delle Repubblica Italiana, art. 25.

⁴³ Codice di proc. pen., art. 2.

⁴⁴ *Ibid.*

⁴⁵ Turkish Criminal Code, art. 1-2 (English Translation issued by Hq., USAFE, 1 May 1960).

⁴⁶ Art. 1.

⁴⁷ Danish Civil Penal Code, § 3, par. 1.

spired and may be considered deviations from the general principle against *ex post facto* laws.⁴⁸

BILLS OF ATTAINDER

A bill of attainder or, where a penalty less than death is decreed, a bill of pains and penalties is a legislative act which inflicts punishment without a judicial trial. The Constitution of the United States forbids both the federal government⁴⁹ and the states⁵⁰ to inflict criminal penalties in this manner. While the prohibition against bills of attainder and bills of pains and penalties is the subject of express provisions in the text of the federal constitution, there can be no doubt that the infliction of criminal penalties by a political organ of government runs counter to deep-rooted concepts of due process in Anglo-American jurisprudence.

So far as the civil law countries are concerned, the question of bills of attainder or of pains and penalties can be disposed of with dispatch. French law, the modern prototype of the civil law systems, knows nothing of the bill of attainder or bills of pains and penalties. All criminal process is judicial process. This principle is so strongly engrained in French jurisprudence that, under the Constitution of 1946, even impeachment of the President of the Republic, although initiated by the National Assembly, was to be tried by the High Court of Justice rather than by the assembly.

The European Convention specifically provides that "no one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."⁵¹ The article which follows makes it clear that a judicial trial is also required before lesser penalties can be imposed.⁵²

NOTICE AND PREPARATION

In all federal prosecutions in the United States, the sixth amendment assures to the accused the right "to be informed of the nature and cause of the accusation." The indictment or information must charge the crime with such reasonable certainty that he can make his defense and protect himself after judgment against another prosecution for the same offense.⁵³ Cases arising under the due process clause of the fourteenth amendment have tended to speak in terms of the

⁴⁸ Cf. European Convention, art. 7, *supra* note 29.

⁴⁹ U.S. Const. art. I, § 9; *Ex parte Garland*, *supra* note 36.

⁵⁰ U.S. Const. art. I, § 10; *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866).

⁵¹ Art. 2.

⁵² Art. 6.

⁵³ *United States v. Cruikshank*, 92 U.S. 542, 544 (1876).

vagueness or indefiniteness of the statute under which prosecution is brought, rather than in terms of the right of the accused to be informed of the nature and cause of the accusation. The language used in these cases, however, would indicate that a vague statute is unconstitutional precisely because it prevents the accused from knowing the nature and cause of the accusation.⁵⁴

A further right, inherent in the due process clauses of both the fifth and the fourteenth amendments, is adequate time and opportunity for preparation of a defense. Again, these cases are couched in terms of the right to counsel, but the language of the Court leaves no doubt that the opportunity to prepare an adequate defense is fundamental.⁵⁵ As with the right to counsel, the extent of the opportunity to prepare the defense seems to depend on the circumstances of the individual case.⁵⁶

Codes of the civil law countries generally contain detailed provisions designed to provide the accused with specific information as to the charges against him and to afford adequate opportunity for preparing his defense. Thus, the French Code of Criminal Procedure requires the investigating magistrate, at the very outset of the hearings, to inform the accused of the charges against him and of his right to counsel in the preparation of his defense,⁵⁷ and all documents must be made available to the accused or his counsel at least twenty-four hours prior to each hearing.⁵⁸ Any failure to observe these requirements nullifies the proceedings and the documents may not be used against the accused.⁵⁹ The accused may at all times communicate freely with his counsel,⁶⁰ who must be present at any interrogation or confrontation of the accused.⁶¹ All reports or statements of expert witnesses are to be made available to the accused,⁶² and he is to be informed within twenty-four hours of the decision of the investigating magistrate whether to dismiss the charges or refer them for trial.⁶³

Unlike grand jury proceedings in the United States, the French code provides ample opportunities for notice and representation to an accused who is charged with a felony before the *chambre d'accusation*—the civil counterpart of the common law grand jury. Notice

⁵⁴ See *Winters v. New York*, 333 U.S. 507, 509-510 (1948).

⁵⁵ See *Powell v. Alabama*, 287 U.S. 45, 66, 71 (1932).

⁵⁶ See *Betts v. Brady*, 316 U.S. 455, 462-463 (1942).

⁵⁷ Code d'instr. crim., art. 114 (France).

⁵⁸ *Id.*, art. 118.

⁵⁹ *Id.*, art. 170.

⁶⁰ *Id.*, art. 116.

⁶¹ *Id.*, art. 118.

⁶² *Id.*, art. 167.

⁶³ *Id.*, art. 183.

of such hearings must be given to the accused or his counsel, after which a minimum of forty-eight hours must elapse before the hearing, if the accused is in detention, and otherwise a minimum of five days.⁶⁴ The accused has the right to file memoranda in his behalf with the *chambre d'accusation*,⁶⁵ which may also in its discretion allow the accused to appear personally.⁶⁶ If the *chambre d'accusation* orders a supplementary investigation, the file of the proceedings is to be deposited in the office of the clerk, the parties are to be notified, and the accused is to have access to this file.⁶⁷ This file must remain in the clerk's office for at least forty-eight hours if the accused is in detention, and otherwise for at least five days.⁶⁸ Notice of the decision of the *chambre d'accusation* must be given to the accused within twenty-four hours.⁶⁹

In the trial of felony cases before the *cour d'assises*, the French code requires that the accused be notified of the decision of referral and that a copy thereof be served on him.⁷⁰ After a preliminary examination of the accused by the president of the court,⁷¹ at least five days must be given to the accused to prepare his defense before the start of the trial.⁷² Meanwhile, and at all times, the accused must have free access to the files in his case and has the right to communicate freely with his counsel.⁷³ He must be given a free copy of the *procès-verbal* containing the statements made by the witnesses against him in the preliminary investigations.⁷⁴ He must receive twenty-four hours' notice of the list of prosecution witnesses⁷⁵ and forty-eight hours' notice of the list of jurors,⁷⁶ evidently with a view to determining whether any of these latter are to be challenged.⁷⁷ The French code also requires notice of the charges and reference to the statute to be served on the accused in the case of misdemeanors to be tried by the *tribunal correctionnel*,⁷⁸ as well as in the case of petty offenses

⁶⁴ *Id.*, art. 187.

⁶⁵ *Id.*, art. 158.

⁶⁶ *Id.*, art. 199.

⁶⁷ *Id.*, art. 208.

⁶⁸ *Id.*, art. 209.

⁶⁹ *Id.*, art. 217.

⁷⁰ *Id.*, art. 268.

⁷¹ *Id.*, art. 272.

⁷² *Id.*, art. 277.

⁷³ *Id.*, art. 278.

⁷⁴ *Id.*, art. 279.

⁷⁵ *Id.*, art. 281.

⁷⁶ *Id.*, art. 282.

⁷⁷ For challenge to jury, see Code d'instr. crim., art. 297-301 (France).

⁷⁸ *Id.*, art. 389.

to be tried by a single magistrate.⁷⁹ While misdemeanors detected *flagrante delicto* may be brought to trial without delay,⁸⁰ the court must inform the accused of his right to request a continuance; and if such request is made, at least three days must elapse before the case may be brought to trial.⁸¹

The civil law system, as exemplified by the French code, makes ample provision for notice to the accused of the specific offense charged against him and affords adequate opportunity for preparing his defense. The rationale of these provisions is clearly the conviction that lack of such notice and opportunity would be unfair to an accused, and the provisions are therefore grounded upon the concept of due process, even though this phrase is nowhere used in reference to them. Indeed, it may be said that the French procedure, which allows access to the pre-trial investigations, gives greater opportunity for discovery and the preparation of a defense than does the American procedure.

Compare the position of the accused under federal criminal procedure. He has no right to appear before the grand jury.⁸² He has no right to see the grand jury transcript.⁸³ He may inspect the documents, books, papers, photographs, or other tangible objects in the hands of the Government only if the objects belonged to him or were obtained from others by seizure or process.⁸⁴ In most federal courts he cannot obtain inspection of his confession.⁸⁵ He cannot obtain inspection of statements of government witnesses before they take the stand.⁸⁶ He has no right to see any memoranda prepared by government agents as a result of investigating the case.⁸⁷ He can ascertain the identity of an informant in an appropriate case.⁸⁸ He has no right even to obtain the name of witnesses whom the Government intends to call except in capital cases, and then he may learn their identity only three days before trial.⁸⁹ It is doubtful if any civil law country would consider that such a state of law meets the requirements of fundamental fairness. American military law is much closer to the civil law viewpoint, providing free access to the defense.⁹⁰

⁷⁹ *Id.*, art. 532.

⁸⁰ *Id.*, art. 393.

⁸¹ *Id.*, art. 396.

⁸² 18 U.S.C. § 3005 (1958).

⁸³ Federal Rules of Criminal Procedure, Rule 6.

⁸⁴ *Ibid.*

⁸⁵ Federal Rules of Criminal Procedure, Rule 16.

⁸⁶ *Schaffer v. United States*, 221 F.2d 17 (5th Cir., 1955).

⁸⁷ 18 U.S.C. § 3500 (1958).

⁸⁸ *Palermo v. United States*, 360 U.S. 343 (1959).

⁸⁹ *Roviaro v. United States*, 353 U.S. 53 (1957).

⁹⁰ 18 U.S.C. § 3432 (1958).

ASSISTANCE OF COUNSEL

By federal statute,⁹¹ a person indicted for treason or other capital offenses in a federal court is entitled to the assistance of counsel for his defense; and on his request, the court must assign him counsel. Under the Federal Rules of Criminal Procedure,⁹² the court must assign counsel in *all* cases, unless the accused expressly waives the right to counsel or is able to retain counsel. The opinion of the Supreme Court in *Johnson v. Zerbst*⁹³ indicates that these may not be constitutional, as distinguished from statutory, requirements in *all* federal cases. It is clear that the sixth amendment guarantees to an accused the right to retain counsel of his own choice in all cases. In view of the decision in *Powell v. Alabama*,⁹⁴ based on the due process clause of the fourteenth amendment, it would seem that the duty to assign counsel to indigent defendants at least in capital cases is required by the due process clause of the fifth amendment, if not by the provisions of the sixth, since the states cannot be held to a higher standard than the federal government in such matters. So far as trials in state courts are concerned, the *Powell* case clearly requires the assignment in all capital cases, on due process grounds; and on the same basis there is a constitutional right to assigned counsel in other cases where the circumstances are such that the assistance of counsel is necessary for the preparation and presentation of an adequate defense.⁹⁵ To date, however, the Supreme Court has not made the assignment of counsel a universal requirement as a matter of due process.⁹⁶ Certainly in most cases the accused may waive his right to the assistance of counsel, retained or assigned, provided this is done intelligently. The trial judge could, of course, refuse to permit such waiver where he considered the assistance of counsel essential for a proper defense.

The accused does not have a right to be represented by counsel during the police investigation.⁹⁷ Apparently the absolute right to counsel⁹⁸ occurs only after indictment, and thus far the Supreme Court has not required that the states appoint counsel to advise an

⁹¹ See Kent, "The Jencks Case—The Viewpoint of a Military Lawyer," 45 A.B.A. J. 819 (1959).

⁹² Rule 44.

⁹³ 304 U.S. 458 (1938).

⁹⁴ 287 U.S. 45 (1932).

⁹⁵ *Moore v. Michigan*, 335 U.S. 155 (1957); *Gibbs v. Burke*, 337 U.S. 773 (1949).

⁹⁶ *Bute v. Illinois*, 333 U.S. 640 (1948); *Betts v. Brady*, 316 U.S. 455 (1942).

⁹⁷ *Cicenia v. La Gay*, 357 U.S. 504 (1958); *Crooker v. California*, 357 U.S. 433 (1958). Cf. practice in military law, *United States v. Gunnels*, 8 USCMA 130, 23 CMR 354 (1957).

⁹⁸ *Spano v. New York*, 360 U.S. 315 (1959).

indigent after indictment but before trial. Even the mandate of the sixth amendment apparently does not require the appointment of counsel at all stages of the pretrial investigation.⁹⁹

The civil law codes quite generally provide for the assistance of counsel in the defense of an accused person.¹⁰⁰ Thus, the French code provides that the examining magistrate, at the outset of the preliminary investigation, must explicitly inform the accused of his right to retain counsel; he must also appoint counsel for the accused, if the latter so requests.¹⁰¹ At the preliminary investigations, the accused may be heard or confronted only in the presence of his counsel.¹⁰² Under the code, these are jurisdictional requirements: failure to observe them nullifies all subsequent proceedings.¹⁰³ While the accused may waive these rights, such waiver must be explicit and is to be made only in the presence of counsel or upon notice to the latter.¹⁰⁴ Counsel is also required to be present when the seals on real evidence are removed by the examining magistrate.¹⁰⁵

While neither the accused nor his counsel has the right to appear before the *chambre d'accusation* (any more than in the United States they would have the right to appear before a grand jury), nevertheless the petitions of the prosecution to the *chambre* are to be made available to the accused or his counsel,¹⁰⁶ and the accused is entitled, *pro se* or through his counsel, to submit to the *chambre* such memoranda as he may wish.¹⁰⁷

⁹⁹ Apparently there is no obligation to appoint counsel for an indigent for a preliminary examination under Rule 5(b) or on a hearing before a Commissioner upon a warrant of removal under Rule 40(b): Hall and Glueck, *Cases on Criminal Law*, 605 (1958). It may be doubted whether the Supreme Court would have decided *Crooker* and *Cicenia* the same way if the cases had arisen under the sixth amendment.

¹⁰⁰ The European Convention provides in art. 6(3)(c) that everyone charged with a criminal offense has the right "to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."

¹⁰¹ Code d'inst. crim., art. 114 (France).

¹⁰² *Id.*, art. 118.

¹⁰³ *Id.*, art. 17.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Id.*, art. 97.

¹⁰⁶ *Id.*, art. 197.

¹⁰⁷ *Id.*, art. 198. Cf. 18 U.S.C. § 1504 (1958): "Whoever attempts to influence the action or decision of any grand or petit juror of any court of the United States upon any issue or matter pending before such juror, or before the jury of which he is a member, or pertaining to his duties, by writing or sending to him any written communication, in relation to such issue or matter, shall be fined not more than \$1000 or imprisoned not more than six months, or both."

"Nothing in this section shall be construed to prohibit the communication of a request to appear before the grand jury."

In felony cases, tried before the *cour d'assises*, the accused is to be requested to select counsel, and if he does not do so, the president of the court is required to appoint counsel for him.¹⁰⁸ The accused is to be free at all times to communicate with his counsel,¹⁰⁹ whose presence at the trial is compulsory.¹¹⁰ In misdemeanor cases, tried before the *tribunal correctionnel*, the accused is likewise entitled to counsel, and the court must appoint counsel for him if he so requests.¹¹¹ The assistance of counsel in misdemeanor cases is compulsory when the court grants the defendant's request that the trial proceed in his absence,¹¹² and also whenever the court determines that the assistance of counsel is necessary for an adequate defense.¹¹³ Communications between the accused and his counsel are privileged and may not be admitted in evidence against the accused.¹¹⁴ In trials for petty offenses before a single magistrate, the accused is entitled to retain counsel, but there seems to be no requirement that counsel be appointed for him by the court.

Under French law, therefore, the accused is entitled to be assisted by counsel of his own choice in all cases, as in American law. At his request, the examining magistrate and the trial court must appoint counsel for the accused, with the apparent exception of the trial of petty offenses. The due process concept which underlies these provisions, based on the philosophy that adequate defense of the accused requires assistance of expert counsel, is evidenced by the requirement that counsel shall be either barristers or solicitors,¹¹⁵ as well as by the provision that counsel shall be appointed, despite waiver by the accused, in all felony cases¹¹⁶ and whenever the absence of counsel would tend to compromise the defense.¹¹⁷

Provisions for representation by counsel under French law are more extensive than generally found in the law of other countries. In Italy, for instance, while counsel will be appointed for an accused if he has not selected counsel,¹¹⁸ the counsel does not have the right to

¹⁰⁸ Code d'instr. crim., art. 274 (France).

¹⁰⁹ *Id.*, art. 278.

¹¹⁰ *Id.*, art. 317.

¹¹¹ *Id.*, art. 411.

¹¹² *Id.*, art. 411.

¹¹³ *Id.*, art. 417.

¹¹⁴ *Id.*, art. 432. The same rule seems to exist in trials for petty offenses before United States Commissioners. See "Rules for Trial of Petty Offenses before United States Commissioners," Rule 2.

¹¹⁵ Code d'instr. crim., art. 114, 275, 417. By way of exception, the accused may be permitted to take a relative or friend as his counsel. *Id.*, art. 275.

¹¹⁶ *Id.*, art. 275.

¹¹⁷ *Id.*, art. 417; *Cf.* art. 411.

¹¹⁸ Codice di procedura penale, art. 304, 366.

actually represent the accused before the judge of instruction.¹¹⁹ The absence of this right has been severely criticized by an outstanding Italian authority.¹²⁰

In Ireland apparently there is no provision for providing counsel for indigents.¹²¹

PRESENCE OF ACCUSED AT TRIAL

In the United States, it has been stated that an accused has the right to be present at his trial whenever his presence bears a reasonable relationship to the opportunity to present a complete and full defense.¹²² This does necessarily include the right to be present at a viewing, by the jury, of the scene of the crime.¹²³ Although the question does not seem to have been the subject of constitutional adjudication, it is a general principle of American jurisprudence that in the case of a felony there can be no trial on the merits in the absence of the defendant.¹²⁴ In some states, trial for misdemeanor may proceed in the voluntary absence of the defendant, provided the court has acquired jurisdiction. Under the Federal Rules of Criminal Procedure,¹²⁵ in non-capital cases the defendant's voluntary absence after the trial has begun in his presence does not preclude the trial from proceeding up to and including the return of the verdict.

The codes of civil law countries quite generally provide for the trial of an accused *in absentia* under certain circumstances. At the same time, they universally allow the accused to be present at his trial if he so wishes, except in unusual circumstances such as unruly conduct.¹²⁶ Where, however, his absence is voluntary, the French code for example, makes provision for trial of the case in his absence and for judgment by default or by contumacy. Before these trials *in absentia*, so alien to the traditions of Anglo-American jurisprudence, can be evaluated from the viewpoint of due process, it will be necessary to consider in some detail the provisions of the French code.

Contumacy. When a person indicted for felony has not been

¹¹⁹ He does have the right to assist in the interrogation of the accused, be present at a reconstruction of the crime, the examination of experts, and at identifications. *Id.*, art. 135, 309-bis. Cf. *Anonymous v. Baker*, 360 U.S. 287 (1960).

¹²⁰ Calamendrei, *Procedure and Democracy*, 93, 94, 102, 103 (1956).

¹²¹ The exact provisions of Irish law are not clear to us. However, Ireland filed a reservation against that part of article 6(c) of the European Convention, *supra* note 100, which provided for the appointment of counsel for indigents on the ground that it was contrary to existing law.

¹²² *Snyder v. Massachusetts*, 291 U.S. 97 (1934).

¹²³ *Ibid.*

¹²⁴ See 5 Wharton, *Crime, Law and Proc.* § 2007 (12th ed. 1957).

¹²⁵ Rule 43.

¹²⁶ Code d'instr. crim., art. 322 (France).

arrested or does not appear in response to a summons to trial, or when he escapes after such arrest or appearance, the *cour d'assises* issues a new order that he appear for trial within ten days or be declared contumacious,¹²⁷ and this order is to be published in his place of domicile.¹²⁸ Upon his continued failure to appear, the court proceeds to undertake a judgment of contumacy,¹²⁹ at which the accused may not be represented by counsel. His relatives or friends may, however, present excusing causes to the court on his behalf,¹³⁰ and the court, if it finds legitimate excuse for the non-appearance of accused, will order a stay of the contumacy proceedings so long as the excuse continues valid.¹³¹ In the absence of such excuse, the court, sitting without a jury, considers the felony accusation on its merits.¹³² A conviction of the contumacious accused is equivalent to a conviction of the felony charged, he loses his civic rights, and his property is sequestered.¹³³ If, however, the person convicted by proceedings in contumacy surrenders or is arrested before the statute of limitations has run, the conviction is quashed and the case is tried again on the merits and in his presence; and restitution is made of his sequestered property.¹³⁴

Default. An analogous procedure, called judgment by default, is followed in the case of misdemeanors in the *tribunal correctional* and of petty offenses tried before a single magistrate. Before a judgment by default can be rendered against an absent defendant, it must be established either that he was personally served with a summons or that he had actual knowledge of service by publication.¹³⁵ As in the case of contumacy, a judgment by default may be reopened by the defaulter within a specified time after he receives notice of the judgment or, if no such notice is received, then before the statute of limitations has run,¹³⁶ and in such case, the charges against him are tried *de novo* on the merits and in his presence.

Once the statute of limitations has run,¹³⁷ a sentence of fine or

¹²⁷ *Id.*, art. 627.

¹²⁸ *Id.*, art. 628.

¹²⁹ *Id.*, art. 629.

¹³⁰ *Id.*, art. 630.

¹³¹ *Id.*, art. 631.

¹³² *Id.*, art. 632.

¹³³ *Id.*, art. 627.

¹³⁴ *Id.*, art. 639.

¹³⁵ *Id.*, art. 410, 412.

¹³⁶ *Id.*, art. 491-492.

¹³⁷ The statute of limitations is ten years for felonies, three years for misdemeanors, and one year for petty offenses. The statute begins to run on the date of the offense, if there has been no investigation or prosecution in the meantime. Code d'instr. crim., art. 7-9.

imprisonment which has been imposed by judgment of contumacy or default can no longer be executed. On the other hand, if there has been a judgment of contumacy, the property of the contumacious person remains sequestered, and an account thereof is given to the person entitled to receive it, once the conviction has become irrevocable by the lapse of the terms given to him to surrender himself—*i.e.*, once the statute of limitations has run.¹³⁸

Excused Absence. In the case of offenses punishable by fine or by imprisonment for less than two years, the accused may request that the trial be conducted in his absence by the *tribunal correctionnel*, and in such case his counsel appears for the accused.¹³⁹ In the case of petty offenses punishable by fine only, the accused may elect to pay the fine in settlement of the case.¹⁴⁰ Such payment is regarded as an admission of guilt, and there are no further criminal proceedings.¹⁴¹

What is to be said of trials *in absentia* from the viewpoint of due process? Historically, the common law requirement of the defendant's presence at a criminal trial—or at least at the start of the trial, followed by his voluntary absence—traces, as does the requirement of service in civil cases,¹⁴² to the concept of physical power to enforce judgment as the sole basis for jurisdiction. The requirement is, however, so deeply rooted in Anglo-American legal tradition and is such an obvious protection against the abuses of outlawry in the old common law,¹⁴³ that it would doubtless on that basis be held to be demanded by the due process clauses of the fifth and fourteenth amendments, should the question ever arise.¹⁴⁴

It may be queried, however, whether the civil law practice of trials *in absentia* is contrary to a broader concept of due process—whether the practice is inherently and fundamentally unfair.¹⁴⁵ The requirements of actual notice and the admission of excusing causes, as

¹³⁸ Code d'instr. crim., art. 633.

¹³⁹ *Id.*, art. 411.

¹⁴⁰ *Id.*, art. 524.

¹⁴¹ *Id.*, art. 525.

¹⁴² *McDonald v. Mabee*, 243 U.S. 90 (1917).

¹⁴³ For what is apparently the only American case of conviction outlawry and a discussion of the subject, see *Republica v. Doan*, 1 U.S. (1 Dall.) 86 (1784).

¹⁴⁴ *Cf. Blackmer v. United States*, 284 U.S. 421 (1932) sustaining a conviction or contempt as "*sui generis*" and not "a criminal prosecution."

¹⁴⁵ It may be questioned whether there is any substantial difference between permitting a court to enter a judgment for monetary damages against a domiciliary served with process outside of the state (*Milliken v. Meyer*, 311 U.S. 457 (1941)); or against a non-resident automobile driven where process is served on a state official with letter sent to the defendant outside of the state (*Hess v. Pawloski*, 274 U.S. 352 (1927)) and a criminal judgment of a fine imposed upon a defendant who was notified of the charge and refused to appear although given an opportunity to do so.

well as the possibility of a new trial *de novo* and the non-enforceability of judgment after a certain period, all seem to be predicated upon concepts of due process in the more universal sense of the term and at the same time effectively preclude any substantial prejudice to the accused by reason of a trial during his voluntary absence.

RIGHT OF CONFRONTATION

The sixth amendment to the Constitution guarantees to an accused the right "to be confronted with the witnesses against him."¹⁴⁶ The precise scope of this guarantee, as well as the extent to which it applies to state prosecutions via the due process clause of the fourteenth amendment, is the subject of some doubt.¹⁴⁷

However, the right to confrontation does not mean that in all cases testimony is inadmissible unless given in court in the presence of the defendant. The Supreme Court has recognized that in some circumstances the right of the accused must give way to considerations of public policy and the necessities of the case.¹⁴⁸ State statutes permitting depositions to be admitted where it is impossible or impracticable to produce the witness at trial have been sustained against attacks upon the ground that they violated the due process clause.¹⁴⁹ And it is clear that in a court-martial the right to confrontation is not quite so broad as it generally is in federal civilian courts.¹⁵⁰

Nor does the confrontation requirement, at least under the fourteenth amendment's due process clause, mean the constitutional canonization of all the common law rules on the exclusion of hearsay evidence. In *Stein v. New York*,¹⁵¹ the Supreme Court stated flatly: "The hearsay-evidence rule, with all its subtleties, anomalies and rami-

¹⁴⁶ U.S. Const., amend. VI; *Mattox v. United States*, 156 U.S. 237 (1895); *Motes v. United States*, 178 U.S. 458 (1900).

¹⁴⁷ See *West v. Louisiana*, 194 U.S. 258 (1904).

¹⁴⁸ *Mattox v. United States*, 156 U.S. 237, 242-244 (1895). However, Rule 36 of the Federal Rules of Criminal Procedure provides that in all trials the testimony of a witness shall be taken orally in open court unless otherwise provided by an act of Congress or the court rules. No statute or rule permits the Government to utilize depositions.

¹⁴⁹ *West v. Louisiana*, 194 U.S. 258 (1904); *Haynes v. People*, 128 Colo. 565, 265 P.2d 995 (1954); *People v. Fish*, 125 N.Y. 136, 26 N.E. 319 (1891); *Harrison v. State*, 112 Ohio St. 429, 147 N.E. 650 (1925), *aff'd*, 270 U.S. 632 (1926); *State ex rel. Drew v. Shaughnessy*, 212 Wis. 322, 249 N.W. 522 (1933).

¹⁵⁰ Under *United States v. Jacoby*, 11 USCMA 428, 29 CMR 244 (1960), a deposition may be admissible if the accused was afforded the right to be present and to be represented by qualified counsel at its taking. Prior to this decision a deposition was admissible even though the accused was not afforded the right to be present. *United States v. Sutton*, 3 USCMA 220, 11 CM 220 (1953); *United States v. Parrish*, 7 USCMA 337, 22 CMR 127 (1956).

¹⁵¹ *Stein v. People of State of New York*, 346 U.S. 156 (1953).

fications, will not be read into the Fourteenth Amendment." The same principle is doubtless, to some extent at least, applicable to the right of confrontation under the sixth amendment.¹⁵²

It seems clear that "confrontation" in the American constitutional sense means something more than the physical co-presence of defendant and witness at the time the latter's testimony is taken. The main objective embodied within the right of confrontation in the constitutional sense is to secure to the accused the right of cross-examination, and the secondary or subordinate objective is to permit the triers of fact to observe the demeanor and assess the credibility of a witness.¹⁵³ Dean Wigmore has pointed out:¹⁵⁴

There never was at common law any recognized right to an indispensable thing called Confrontation *as distinguished from Cross-Examination*. There *was* a right to cross-examination as indispensable, and that right was involved in and secured by confrontation, it was the same right under different names It follows that, if the accused has had the benefit of cross-examination, he has had the very privilege secured to him by the Constitution.

Dean Wigmore also points out¹⁵⁵ that this is not a right without exceptions, for the simple reason that the hearsay rule has always admitted of exceptions and that further exceptions may be created in the future.

It should also be noted that, in the United States, the right of confrontation or cross-examination has never been extended to the testimony of witnesses before a grand jury,¹⁵⁶ nor to the preliminary interrogation of prospective witnesses by a prosecuting attorney. The furthest step in this direction seems to be the right granted to an accused person to interrogate witnesses at the preliminary examination which precedes the referral of charges for trial by court-martial.¹⁵⁷

In the civil law systems generally, the preliminary testimony of witnesses is taken by the examining magistrate outside the presence of the accused or his counsel.¹⁵⁸ They are afterwards required to repeat their testimony in his presence. This is the process which is

¹⁵² However, the Supreme Court has pointed out recently that it regards confrontation as "fundamental" and that it has been "zealous" to protect it not only in criminal cases but in all types of cases where administrative or regulatory action has been under scrutiny. *Greene v. McElroy*, 360 U.S. 474 (1959).

¹⁵³ *Mattox v. United States*, 156 U.S. 237 (1895).

¹⁵⁴ 5 Wigmore, *Evidence* § 1397 (3d ed. 1940).

¹⁵⁵ *Ibid.*

¹⁵⁶ Indeed, hearsay may be the basis for an indictment. See *Costello v. United States*, 350 U.S. 359 (1956).

¹⁵⁷ UCMJ, art. 32, 10 U.S.C. § 832 (1958 ed.).

¹⁵⁸ See Code d'instr. crim., art. 102 (France).

called confrontation, at which counsel for the accused may be present but has no right of cross-examinations. The failure to provide the opportunity for cross-examination at this preliminary investigation parallels the lack of opportunity for cross-examination before the common law grand jury—with one important difference. The file which is compiled as a result of this preliminary investigation is available to the court prior to the subsequent trial; and, in the case of petty offenses tried by a single magistrate, this file may form the sole basis for judgment, unless the accused himself wishes witnesses either for or against him to be recalled to testify at the trial. At the trial of felonies and misdemeanors, however, the court is to base its decision only on proof brought to him during the trial and discussed before him in the presence of both parties,¹⁵⁹ and, except as otherwise provided by law, the *procès-verbal* and the reports establishing offenses have the value only of mere information.¹⁶⁰

In the civil law procedure, however, there is not the right of cross-examination which the common law deems so essential. In the trial of a felony before the *cour d'assises*, the prosecutor may question the witnesses directly, but counsel for the accused must propose his questions to the president to be asked of the witness,¹⁶¹ and the same is true in the trial of misdemeanor cases before the *tribunal correctionnel*.¹⁶² The president of the court may refuse to ask the requested questions, but an objection may be made to his refusal, and this may serve as the basis for an appeal.

From the foregoing it is clear that "confrontation" has quite a different meaning in a civil law system from its signification in American constitutional law.¹⁶³ And if, *within a civil law system*, the denial of the right of cross-examination has the same effect as it would have in our common law procedure, then it is clear that a substantial right of an accused would be lacking.

Such would not seem, however, on closer analysis to be the case. In comparing the requirements of "confrontation" in the common law system and in the civil law, it is important to remember that in both systems of jurisprudence the sole purpose of a trial is to arrive at the truth, to protect society while safeguarding the rights of the accused.

¹⁵⁹ *Id.*, art. 427.

¹⁶⁰ *Id.*, art. 430.

¹⁶¹ *Id.*, art. 332.

¹⁶² *Id.*, art. 454.

¹⁶³ It is perhaps significant that the word "confrontation" is not used in the European Convention. That Convention does however grant to an accused the right "to examine or have examined witnesses against him" article 6(3)(d). The term "confrontation" is used in article VII of the NATO Status of Forces Agreement, 4 UST 1792, TIAS 2846, 199 UNTS 67 (1951).

They part company only where there is question of the best means of attaining that purpose. In the common law concept, the judge acts as the arbiter between two opponents, each represented by his legal champion. The law assumes that each opponent is adequately represented by counsel and leaves it to each of them to adduce the testimony most favorable to his side and to impugn adverse testimony.¹⁶⁴ The judge sits to see that the rules of the contest are observed by both sides; and in this adversary proceeding, the right of cross-examination is naturally the primary constituent of the right of confrontation. In the civil law system, however, the proceeding is not deemed to be primarily adversary in nature. The judge plays a more active role, and it is not left to the prosecution and to the defense to adduce evidence which is favorable to their respective sides and to impugn adverse evidence. Indeed, the prosecutor himself has the obligation to bring out evidence favorable to the accused. Here, as a result, confrontation is not regarded as essentially including the right to cross-examination. With this difference in mind, it is difficult to assert categorically that the lack of cross-examination in the civil law substantially prejudices the accused or, in context, runs counter to concepts of due process of law and fundamental fairness.

COMPULSORY PROCESS

The sixth amendment to the Constitution provides that an accused is entitled to "have compulsory process for obtaining witnesses in his favor." The question of compulsory process seems not to have been the subject of constitutional adjudication, either under the sixth or fourteenth amendment, at least not in the federal courts. It is clear that the constitutional right refers only to witnesses who are in some way subject to the jurisdiction of the sovereign prosecuting the case.¹⁶⁵ Compulsory process is universally available in the state courts, and the provisions of the "Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings,"¹⁶⁶ have expanded the powers of the states in this regard.

In France, as in the civil law systems generally, the decision to summon and hear witnesses during the preliminary examination is primarily the function of the examining magistrate.¹⁶⁷ Both the

¹⁶⁴ In *Watts v. Indiana*, 338 U.S. 49, 54 (1949), Justice Frankfurter pointed out that "ours is the accusatorial as opposed to the inquisitorial system."

¹⁶⁵ *Baker v. People*, 72 Colo. 68, 209 Pac. 791 (1922). An interesting facet of this problem occurs in the case of an American court-martial sitting outside the United States, where there is a need for foreign witnesses. See *United States v. De Angelis*, 3 USCMA 298, 12 CMR 54 (1953).

¹⁶⁶ 9 Uniform Laws Annotated 41.

¹⁶⁷ Code d'instr. crim., art. 101.

prosecution and the accused may request that certain witnesses be called, and the examining magistrate has compulsory process for that purpose,¹⁶⁸ but the final decision in this matter rests with the magistrate. This is analogous to the procedure before an American grand jury, except that in the United States it is usually the prosecution which determines what witnesses shall be summoned before the grand jury, no similar right being accorded to the accused. In this regard, the American practice gives to the prosecution an advantage which it does not have in the civil law.

At trial, both prosecution and defense have an equal right to summon witnesses,¹⁶⁹ for whose attendance compulsory process will issue from the court.¹⁷⁰ Normally, the expense of summoning defense witnesses is borne by the accused, except that the public prosecutor may cause defense witnesses to be summoned at public expense, if he deems their statements necessary to establish the truth.¹⁷¹

Compulsory process to obtain defense witnesses is so essential to the concept of due process that the question seems not to have been ever raised in American courts.¹⁷² It would seem that the statutory provisions in the French code adequately meet the test and are based on the concept of due process.

BURDEN OF PROOF—PRESUMPTION OF INNOCENCE

In Anglo-American jurisprudence, the burden of proof is on the government in all criminal cases. The defendant is not required positively to prove his innocence. In the United States, as another statement—or perhaps a corollary—of the same principle, frequent reference is made to the “presumption of innocence” which clothes the accused in a criminal case. While this is not a true presumption or a rule of evidence,¹⁷³ it is a well-established maxim of American jurisprudence. It means in essence that the prosecution has the burden of proving guilt beyond a reasonable doubt. The requirement of reasonable doubt has received perhaps its best definition by Chief Justice Shaw in *Commonwealth v. Webster*.¹⁷⁴

¹⁶⁸ *Id.*, art. 109.

¹⁶⁹ *Id.*, art. 281.

¹⁷⁰ *Id.*, art. 324, 326.

¹⁷¹ *Id.*, art. 281.

¹⁷² *Cf.* State *ex rel.* Gladden v. Lonergan, 201 Ore. 163, 269 P.2d 491 (1954), in which the court required the state to produce a witness for the defense over the state's objection that the deposition of the witness would be an adequate substitute.

¹⁷³ 9 Wigmore, Evidence, § 2511 (3d ed. 1940). See Carr v. State, 192 Miss. 152, 4 So. 2d 887 (1941). See also the lucid discussion of this question in McCormick, Evidence, 647-649 (1954).

¹⁷⁴ 5 Cush. 295, 320 (Mass. 1850). See also the discussion in 9 Wigmore, Evidence, § 2497 (3d ed. 1940) and the cases there cited.

[Reasonable doubt] is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say that they feel an abiding conviction, to a moral certainty, of the truth of the fact to a reasonable and moral certainty,—a certainty that convinces and directs the understanding, and satisfies the reason and judgment. . . . This we take to be proof beyond a reasonable doubt.

The requirement places on the prosecution the burden of submitting to the jury such evidence which, if believed by the jury, establishes each element of the crime and the fact that it was committed by the accused—and this beyond a reasonable doubt. There are, therefore, two requirements: (1) the prosecution must prove to the jury each element of the offense¹⁷⁵ and the fact of its commission by the defendant; and (2) the jury must have moral certitude, since only such certitude excludes all *reasonable* doubt.

Since the civil law codes and authors do not generally speak in terms of presumption of innocence,¹⁷⁶ burden of proof or reasonable doubt, we must in this context have recourse to the general principles of the civil law jurisprudence, particularly as exemplified in French law.

Despite a wide-spread belief to the contrary, the maxim that “the accused is presumed guilty until proved innocent” is completely unknown to the civil law. Beyond a doubt, there is no presumption of guilt, and the burden of proof does not lie upon the accused. The authors know of no such principle in the jurisprudence of any civilized nation.

On the other hand, the phrase “presumption of innocence” is not in general use in French jurisprudence. As has been pointed out above, it is not a true presumption in the technical sense. The absence of the term from French jurisprudence is also to be explained as a reaction against the ancient system of “legal proofs” whose probative value was fixed by law or custom and had to be mechanically applied by the judges.¹⁷⁷ French authors do, however, use the term. Thus one commentator says of the burden of proof in criminal cases:¹⁷⁸

It is a general principle that in a case it is up to the moving party to seek out and put forth his proofs; consequently, the bur-

¹⁷⁵ An interesting variation from this principle is the rule in almost one half of our states that the burden of proving insanity as a defense rests on the accused. Amer. Law Inst., “Model Penal Code” (Tentative Draft No. 4), App. C, § 4.03.

¹⁷⁶ Cf., however, article 6(2) of the European Convention which provides that “Everyone charged with a criminal offense shall be presumed innocent until proved guilty according to law.”

¹⁷⁷ See Bouzat, *Traité de droit pénal* § 1066 (1951).

¹⁷⁸ *Id.*, § 1063 (the translation is ours).

den of proof in a criminal proceeding lies upon the accuser, *i.e.*, upon the public ministry and the civil party.

The situation of the moving party in a civil case and of the accuser in a penal proceeding is not, however, identical. In fact, in penal matters, the accused is clothed with a presumption of innocence which constitutes a guarantee of individual liberty. This presumption (which is available to recidivists as well as to first offenders) has as its consequence that, in case of any doubt, it is necessary to decide in favor of the accused (*in dubio pro reo*). This means that it makes the task of the penal accuser a heavier one.

This presumption of innocence has still other consequences: in case of an attempt, if the beginning of the overt act can be applied to several infractions of varying gravity, it must be presumed, in the absence of other proof, that the actor had the intention of committing the less grave offense; on a vote in the *cour d'assises*, ballots which are blank or declared void are counted in favor of the accused, and a tie brings about a definitive acquittal; after a conviction in the court of first instance which has not become final, since the presumption of innocence is not destroyed, the provisional liberty of the convicted person is continued during the appeal and the review in cassation, as a result of their suspensive effect.

Besides, while the accused in a penal proceeding has an incontestable interest in assisting as best he can to establish causes of irresponsibility or excusing causes invoked by him, it is no less certain that it is up to the public ministry to adduce proof himself of all the circumstances of the infraction. When, therefore, an accused invokes, with some appearance of truth, a cause of irresponsibility or excusing cause, it is up to the public ministry, if it wishes to avoid an acquittal, to establish the non-existence of this cause.

It would be difficult to find a clearer expression of the principle that in a criminal case the burden of proof rests with the prosecution. It will be noted that, in French as well as in the majority of American states, once the accused puts in issue some cause of irresponsibility (such as insanity), the burden of proving its non-existence (proof of sanity) rests likewise on the prosecution.¹⁷⁹

Nor does French jurisprudence sanction a finding of guilty in a criminal case by the mere preponderance of the evidence, as is the case in civil actions. French jurists do not, however, speak of a "presumption of innocence" or of "proof beyond a reasonable doubt." Instead, it is required that the judgment of the court be arrived at by an inner conviction. Thus, the French code prescribes that, before the *cour d'assises* retires to consider its verdict, the president shall read to them the following instruction:¹⁸⁰

¹⁷⁹ See note 175, *supra*.

¹⁸⁰ Code d'instr. crim., art. 353 (France) (our translation). See also art. 427, which

The law does not ask the judges for an account of the means by which they have become convinced; it does not prescribe rules on which they shall make the fullness and sufficiency of proof depend; it prescribes that they shall question themselves in silence and meditation and seek in the sincerity of their conscience to know what impression the proofs brought against the accused and for his defense have made upon their reasoning. The law asks them this question only, which encompasses the full measure of their duty: "Have you an inner conviction?"

The French law, therefore, requires that the judge or jury must arrive at a firm interior conviction that the accused is guilty, on the basis of the evidence presented in the case, before a finding of guilty can be made.¹⁸¹ We think that this is precisely the "moral certainty" required by Chief Justice Shaw in *Commonwealth v. Webster*.¹⁸² Such certainty by definition excludes all reasonable doubt. If a reasonable doubt exists in the mind of judge or juror the maxim, "*in dubio pro reo*," is to be applied, and the judge or juror is obliged to vote for acquittal.

We do not imply that the position of an accused is the same before a civil law court as before an American court. In American criminal procedure there is a close relationship between the presumption of innocence and the privilege against self-incrimination. The accused may choose to remain silent as a practical matter because he is presumed to be innocent and the jury will be instructed to that effect. The defense counsel will argue that he is "clothed with the presumption of innocence" and the jury often is given the impression that if this "presumption" does not have probative effect, it still constitutes some type of mystical barricade which must be obliterated before the Government can triumph.¹⁸³

When the accused experiences his day in court in France, however, the atmosphere is different. The President of the court will have read the *dossier* and will be familiar with prior statements of the accused, the witnesses, and the opinions of the *juge d'instruction* and

requires a judge of the *tribunal correctionnel* to decide on the basis of his own inner conviction, and to "base his decision only on proof brought to him during the trial and discussed before him in the presence of both parties.

¹⁸¹ The concept of "*in dubio pro reo*" is an essential part of Japanese law: Abe, "Criminal Procedure in Japan," 48 J. Crim. L. 359, 363 (1957). The same concept is found in German law: Meyer, "German Criminal Procedure, The Position of the Defendant in Court," A.B.A. J. 592, 593-594 (1955). Chinese law requires a "free conscientious judgment": Wang, "Chinese and American Criminal Law," 46 J. Crim. L. 796, 799 (1956).

¹⁸² 5 Cush. 25 (Mass. 1850).

¹⁸³ Professor McCormick effectively criticizes the misuse of the doctrine. McCormick, Evidence, 647-649 (1954).

the police.¹⁸⁴ The accused will be expected (although not required) to present his story at the beginning of the proceeding. If the accused remains silent, his silence may be made the subject of comment. In some circumstances, the official reports, *procès-verbaux*, carry with them a presumption of authenticity. The criminal trial may be joined with a civil suit for damages. Under these circumstances the doctrine of the presumption of innocence possibly does not assume the importance to a French accused that it does to his American counterpart. This is not to say, however, that he will not be acquitted unless the triers of fact are convinced from the testimony adduced before them that he is guilty of the offense charged.

FAIR AND IMPARTIAL TRIBUNAL

The right to an "impartial jury" is expressed in the sixth amendment to the Constitution. A fair and impartial court is part and parcel of the due process of law guaranteed by the fifth and fourteenth amendments; indeed, it is probably the most fundamental of all the rights embraced within that concept. This right precludes trial before a judge who has a pecuniary interest in the outcome of the case.¹⁸⁵ The required impartiality has been held to be lacking whenever judge or jury are dominated by a mob.¹⁸⁶ The universal common law practice of allowing challenges for cause and of providing for change of venue are predicated upon a recognition of the requirement of a fair and impartial tribunal as essential to due process of law.

Similar provisions for safeguarding the impartiality of the tribunal in criminal cases are found in the civil law systems and are based implicitly upon the same concept of due process. Thus, the French code provides that an examining magistrate cannot participate in the subsequent trial of the same case, under pain of nullity,¹⁸⁷ and provision is made for transfer of the case from one examining magistrate to another, for good cause.¹⁸⁸ No person may sit as a judge of the *cour d'assises* if he has in the same case previously conducted the prosecution or investigation, or participated in the decision to indict

¹⁸⁴ These factors are discussed in different context in Hauser, "The Criminal Law in France," 45 A.B.A. J. 807, (1959); Vouin, "The Protection of the Accused in French Criminal Procedure," 5 Int. & Comp. L.Q. 1, 157, (1956); and Howard, "Compensation in French Criminal Procedure," 21 Mod. L.J. 387 (1958).

¹⁸⁵ *Tumey v. Ohio*, 273 U.S. 510 (1927). Despite the *Tumey* case, four States still permit this practice. See Lee, "The Emergence and Evolution of a Constitutional Right to a Fair Trial Before a Justice of the Peace," 20 Fed. B.J. 111 (1960). See also *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912).

¹⁸⁶ *Frank v. Mangum*, 237 U.S. 309 (1915); *Moore v. Dempsey*, 261 U.S. 86 (1923).

¹⁸⁷ Code d'instr., art. 49 (France).

¹⁸⁸ *Id.*, art. 84.

or in a decision on the merits regarding the guilt of the accused.¹⁸⁹ Enumerated government officials, and particularly employees of the police and certain other law enforcement departments are disqualified from sitting as jurors, as are also anyone who has in the same case been a criminal investigator or in which he is a witness, interpreter, informer, expert, complainant, or civil party.¹⁹⁰ The accused is granted five challenges to the jury.¹⁹¹ Provisions are made for a change of venue if there is reason to suspect the impartiality of the ordinary venue.¹⁹²

INVOLUNTARY CONFESSIONS—RIGHT OF SILENCE

Aside from any question of the privilege against self-incrimination,¹⁹³ it is clear that the due process clause of the fourteenth amendment forbids evidentiary use of confessions or admissions made involuntarily or under coercion.¹⁹⁴ The same principle applies *a fortiori* to the due process clause of the fifth amendment in federal prosecutions. American law, however, generally places police officers or other criminal investigators under no obligation to warn a suspect that he has the right to remain silent,¹⁹⁵ or to permit him to consult counsel during the police investigation before indictment.¹⁹⁶ When the accused is brought before a committing magistrate following arrest, the federal practice requires that he be informed of his right to remain silent,¹⁹⁷ but this requirement is presumably not demanded by the due process clause.¹⁹⁸

In addition, the fifth amendment to the federal constitution and the constitutional provisions of all the states have provisions expressly protecting the accused from self-incrimination.¹⁹⁹ On the other hand,

¹⁸⁹ *Id.*, art. 253.

¹⁹⁰ *Id.*, art. 257.

¹⁹¹ *Id.*, art. 297-298.

¹⁹² *Id.*, art. 662. Indeed, the provision for a change of venue appears to be broader than under federal practice. See Rule 21(b), Federal Rules of Criminal Procedure.

¹⁹³ U.S. Const. amend. V.

¹⁹⁴ *Brown v. Mississippi*, 297 U.S. 278 (1936); *Chambers v. Florida*, 309 U.S. 227 (1940). See also *Lisenba v. California*, 314 U.S. 219, 237 (1941).

¹⁹⁵ A notable exception is the warning requirement in American military law, which makes inadmissible as evidence any confessions or admissions obtained without prior warning. UCMJ, art. 31, 10 U.S.C. § 831 (1958).

¹⁹⁶ See cases cited at notes 97 and 98, *supra*.

¹⁹⁷ Rule 5(b), Federal Rules of Criminal Procedure.

¹⁹⁸ The Court has consistently pointed out that the due process clause does not require that an accused be brought before a committing magistrate promptly after his arrest. See concurring opinion of Mr. Justice Frankfurter in *Fikes v. Alabama*, 352 U.S. 191, 198 (1957).

¹⁹⁹ *McCormick*, Evidence 256 (1954).

it has been held constitutional for a state court to present the accused with the choice of taking the stand and thus having his past convictions brought before the jury, or else of refusing to testify and having his silence commented on by the prosecution and considered by the jury.²⁰⁰

While the civil law countries generally do not have constitutional provisions regarding the right against self-incrimination or the admissibility of involuntary confessions, the criminal codes often contain detailed provisions on these matters, indicating that they are a concern of the civil as well as of the common law.

Thus, under the French code of criminal procedure, the examining magistrate must, at the start of the very first hearing, warn the accused of his right to remain silent, and the fact of such warning must be noted in the record.²⁰¹ The accused may be interrogated at the trial by the presiding judge or the prosecutor,²⁰² but his right to refuse to answer some or all questions is such accepted practice that it is not even mentioned in the code. It should be noted that, in one way, the right to silence is somewhat wider than in an American court, where the accused has only two alternatives—to take the stand and answer all questions, or to refuse to take the stand and thus be deprived of the chance to say anything in his own behalf. There is no doubt that the prosecutor may comment upon, and the court may consider, the failure of the accused to testify or to answer questions.

The problem of involuntary confessions or admissions does not, therefore, arise at trial or during the *enquête officielle*—the official preliminary examination regulated by the code of criminal procedure. It may, however, arise as an aspect of the *enquête officieuse*—the interrogation by the police or other law enforcement officers in extra-judicial proceedings. Although this form of interrogation often precedes the preliminary investigation by the examining magistrate,²⁰³ information thus obtained may be subsequently admitted in evidence against the accused.²⁰⁴ There is no provision under French law for excluding, on the grounds that it was involuntary or under coercion,

²⁰⁰ *Adamson v. California*, 332 U.S. 46 (1947). The 1878 federal statute making the accused competent to testify, 18 U.S.C. § 3481 (1958), declares that his failure to do so shall not create a presumption against him; and this statute has been interpreted to protect the defendant against comment on his claim of privilege. *Johnson v. United States*, 318 U.S. 189, 199 (1943); *Wilson v. United States*, 149 U.S. 60, 66 (1893). Comment is forbidden in most American jurisdictions. See 8 Wigmore, *Evidence* § 412 (3d ed. 1940).

²⁰¹ Code d'instr. crim., art. 114.

²⁰² *Id.*, art. 312, 328, 442.

²⁰³ Once the examining magistrate begins his judicial investigation, all interrogatories are subject to his direction. Code d'instr. crim., art. 72.

²⁰⁴ See Bouzat, *op. cit.*, § 1117.

any confession or admission obtained by the law enforcement officers during the pre-judicial interrogation of the accused. The code expressly states that "the confession, like all elements of proof, shall be left to the appraisal of the judges."²⁰⁵ It should be noted, however, that the reports containing any such confession or admission are available to the accused and his counsel.²⁰⁶ In addition, the official report containing statements by the accused, must expressly record the length of the interrogation to which he was subjected, the period of rest allowed between interrogations, the exact time of arrest as well as the exact time when the accused was released or brought before the magistrate; and this entry is to be initialed in the margin by the persons concerned, including the accused,²⁰⁷ who must moreover be advised of his rights in this regard.²⁰⁸ It is suggested that the rights of the accused are adequately protected if he thus has the opportunity of discussing and challenging this evidence, both at the preliminary investigation of the examining magistrate and at the trial, on the ground that it was given involuntarily.²⁰⁹ It seems certain that a French court would allow an accused to assert the involuntary nature of the confession, and would consider such a confession as of little or no probative value. Express provisions for the inadmissibility of an involuntary confession would, however, afford a greater safeguard for the rights of the accused and the concept of due process of law.

APPELLATE PROCEDURES AND DOUBLE JEOPARDY

French criminal procedure, like most of the civil law systems, in many cases allows the prosecution to appeal from the judgment of the court of first instance, either because the accused has been acquitted or because the prosecution thinks he should have received a more severe sentence. Since this procedure is generally alien to common law concepts, there may be a tendency to regard it with suspicion and to ask whether it is not counter to the constitutional right against double jeopardy or to due process of law.

The fifth amendment protects an accused in a federal prosecution from being twice placed in jeopardy for the same offense.²¹⁰ Similar provisions are generally found in the state constitutions. The due process clause has not, however, been interpreted to bar all multiple prosecutions. An accused can be tried successively for different of-

²⁰⁵ Code d'instr. crim., art. 428.

²⁰⁶ *Id.*, art. 118, 197.

²⁰⁷ *Id.*, art. 64.

²⁰⁸ *Id.*, art. 63.

²⁰⁹ Bouzat, *op. cit.* § 1117.

²¹⁰ U.S. Const. amend. V.

fenses forming a part of the same transaction.²¹¹ For identically the same act, he may be tried by the state after a federal prosecution,²¹² or by the federal government after a state prosecution.²¹³ Furthermore, the state may be permitted to appeal from a decision adverse to it in the trial court, even after an acquittal of the accused, at least upon a question of law.²¹⁴ For good cause a mistrial may be declared, after jeopardy has attached, and the accused may be tried again at a later time.²¹⁵

French jurisprudence, as that of the civil law countries generally, is thoroughly committed to the maxim, "*Non bis in idem*"—that there shall never be two completely separate trials for the same offense. In this, they are in agreement with the common law concept of double jeopardy. They differ from American practice however, in that the principle of "*Non bis in idem*" does not become applicable until the trial stage of the case has been definitively completed. Under French practice and theory, the trial of a criminal case may be in two interdependent, though not independent, stages.

In the trial of petty offenses before a single magistrate, or of misdemeanors before a *tribunal correctionnel*, French jurisprudence has the theory of two stages of trial (*jurisdiction de double degré*). Both the accused and the prosecution (as well as, to a limited extent, the civil party) have the right to appeal to the court of appeals from the judgment or sentence of a *tribunal correctionnel*²¹⁶ or of the police tribunal composed of a single magistrate.²¹⁷ The judgment of the court of first instance is not regarded as final until either it has been affirmed or modified by the court of appeals, or the time for appeal has lapsed. On such appeal, the court looks *de novo* into the facts of the case, and may rehear the witnesses or take new testimony. If the court of appeals disagrees with the court of first instance, it may set aside the judgment or sentence, or it may modify either. In any case (except for review of questions of law by a higher court), the court of appeals renders final judgment at the trial level: it does not remand the case for retrial by the court of first instance. If this concept seems strange to us, it may be noted that at least one state, Maryland, has a

²¹¹ *Hoag v. New Jersey*, 356 U.S. 464 (1958); *Ciucci v. Illinois*, 356 U.S. 571 (1958). See *Petite v. United States*, 361 U.S. 529 (1960), in which the United States represented to the Supreme Court that it was the policy of the government to try at the same time all offenses arising out of the same transaction.

²¹² *Bartkus v. Illinois*, 359 U.S. 121 (1959).

²¹³ *Abbate v. United States*, 359 U.S. 187 (1959).

²¹⁴ *Palko v. Connecticut*, 302 U.S. 319 (1937).

²¹⁵ *Brock v. North Carolina*, 344 U.S. 424 (1953).

²¹⁶ Code d'instr. crim., art. 497.

²¹⁷ *Id.*, art. 546.

similar procedure. There, minor offenses are tried by a justice of the peace. On motion of either the accused or the prosecution (even after an acquittal), the case may be appealed to the county court, where it is tried *de novo*.²¹⁸ The Court of Appeals of Maryland has held that giving the State this right to appeal under this procedure does not violate the federal constitution.²¹⁹

In felony cases tried before the *cour d'assises*, however, a different concept is applied. In these cases, the trial has only one stage, and there can be no "appeal" to another court to review the facts of the case or the appropriateness of sentence. The *cour d'assises* is composed of three judges and nine jurors. The rationale of prohibiting an "appeal" here is that there would be no point in submitting the case again to another jury (which would really be a second trial in the American sense), and that it would be improper to submit to professional judges in the court of appeals questions of fact which had already been passed upon by jurors chosen according to democratic processes. Hence there can be no review, at the instance of any party, of facts passed upon by the *cour d'assises* nor any review of the appropriateness of the sentence which it imposed.

An appeal may be taken from any lower court to the *cour de cassation*, but such appeal is limited solely to questions of law.²²⁰ Such appeal may be brought by either the accused or the prosecution or by any party prejudiced by the judgment of the lower court,²²¹ but a judgment of acquittal may be appealed only in the interests of determining the correct law, and without prejudice to the acquitted party.²²² That is, if the court of cassation decides that the accused was acquitted on the basis of an erroneous interpretation of the law by the lower court, the judgment of acquittal stands and the decision of the court of cassation is to be applied only in future cases. In other cases in which the court of cassation reverses, provision is made for remanding the case for a new trial.²²³

CONCLUSION

Space prohibits a discussion of many other factors that go into a system of administration of criminal justice. The right to bail, the right to a speedy and public trial, the right to be free from unreason-

²¹⁸ See Md. Code Annot., art. 52, § 13 (1957).

²¹⁹ *Robb v. State*, 190 Md. 641 (1947). See also *State v. Brunn*, 22 Wash. 2d 120, 154 P.2d 826 (1945).

²²⁰ Code d'instr. crim., art. 567.

²²¹ *Ibid.*

²²² *Id.*, art. 572.

²²³ *Id.*, art. 605-619.

able searches and seizures, and like matters must be ignored at the present. Likewise, an analysis of the intangibles such as the attitude of the police and the professional status of the bar must await subsequent treatment. What we have sought to do is to discuss some of the essential elements of a system of criminal procedure from a comparative viewpoint.

There can be no doubt that both our system of procedure and that of the civil law nations have as their ideal the object of due process in the broad sense, *i.e.*, fundamental fairness. The approach of the two systems is different and, because of this basic difference in approach, the individual rules and doctrines which comprise the systems often differ. Before any given practice or rule can be determined to be unfair, however, we must not only compare it with its foreign counterpart; we must place it in the context of its own system. When this is done, we think that due process is as much an essential fiber of civil law procedure as it is in our own system.