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George W. Pugh

Jean H. Pugh

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# MEASURES FOR MALAISE: RECENT FRENCH "LAW AND ORDER" LEGISLATION

George W. Pugh\* and Jean H. Pugh\*\*

The power and ability efficiently and effectively to investigate crime, prosecute the suspect, and punish the convicted long have characterized the French criminal justice system.<sup>1</sup> Although for the last century or so the French,<sup>2</sup> like so many other western countries, have generally accorded much greater protection to the suspect than previously, and manifested much greater concern for the sensibilities of the convicted, few observers outside of France would characterize the French criminal justice system as "soft" on crime or "short" on police and prosecutorial power. However, the seeming efficacy of France's criminal justice system did not immunize it from the malaise that has given rise in the United States and elsewhere<sup>3</sup> to a "law and order" movement.<sup>4</sup> In early 1981, while the more conservative Valéry Giscard d'Estaing was still Presi-

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\* Professor of Law, Louisiana State University.

\*\* Member, Louisiana Bar.

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1. For general surveys in English of the French criminal justice system, see A. SHEEHAN, *CRIMINAL PROCEDURE IN SCOTLAND AND FRANCE* 24-96 (1975); Pugh, *Administration of Criminal Justice in France: An Introductory Analysis*, 23 *LA. L. REV.* 1 (1962) [hereinafter cited as Pugh, *Criminal Justice in France*]; and authorities there collected.

2. See G. STEFANI, G. LEVASSEUR & B. BOULOC, *PROCÉDURE PÉNALE* no. 77 (11th ed. Dalloz Précis, 1980) [hereinafter cited as *PROCÉDURE PÉNALE*]. See also MUELLER & LEPOOLE-GRIFFITHS, *COMPARATIVE CRIMINAL PROCEDURE* 10ff. (1969).

3. For recent developments in England and Wales, see ROYAL COMMISSION ON CRIMINAL PROCEDURE REPORT, Cmd. 8092, HMSO (January 1981), discussed in Smythe, *The Report of the Royal Commission on Criminal Procedure, Part I. The Investigation of Offences*, [1981] *PUBLIC LAW* 184 and Smythe, *The Report of the Royal Commission on Criminal Procedure Part II. The Prosecution of Offences*, [1981] *PUBLIC LAW* 481. For recent developments in Scotland, see Cooper, *Reports of Committees: The Royal Commission on Criminal Procedure* 44 *MOD. L. REV.* 296 (1981); CRIMINAL JUSTICE (SCOTLAND) ACT 1980, discussed in Finnie, *Police Powers Falling Short of Arrest*, 1981 *SCOTS LAW TIMES* 173.

4. The use of the phrase "law and order" was particularly popularized during the 1968 presidential campaign. The October 4, 1968 issue of *TIME* magazine carried a cover story on "law and order," the first portion of which reads:

The presidential campaign of 1968 is dominated by a pervasive and obsessive issue. Its label is law and order. Its symptoms are fear and frustration and anger.

Everyone is for law and order, or at least for his own version of it. Few Americans can define precisely what they mean by the term, but the belief that law and order is being destroyed represents a trauma unmatched in intensity since the alarms generated by Joe McCarthy in the Korean era.

dent of France,<sup>5</sup> his Minister of Justice, Alain Peyrefitte<sup>6</sup> lead a group which, over vehement opposition, pushed through "emergency" omnibus legislation referred to in appealing terms as the law of "security and liberty."<sup>7</sup> The statute constituted a pervasive attack upon purported weaknesses in the French system's ability to deal effectively with crimes of violence, and carried the full title of a "law reinforcing the security and protecting the liberty of the people." The law amends many provisions of the French criminal justice codes<sup>8</sup> and its changes run the gamut of the criminal justice system from investigation through corrections, giving greater power to the prosecution, increasing sentences for violent crimes, decreasing judicial discretion, and generally adopting measures to speed up the entire process. Reflective of the heated political controversy the legislation generated, on May 10, 1981, at the Place de la Bastille celebration which followed the announcement that Socialist François Mitterand had been elected President of France, a leading spokesman of the Socialist Party, in a public statement, included this legislation among the three enactments that his party would endeavor to change.<sup>9</sup> There are later indications that instead of the entire law being repealed, its provisions would be amended, better to reflect the views of the new government.<sup>10</sup> For reasons hereafter elaborated, the writers feel that whatever happens to the legislation — whether it be retained, repealed, or amended — its adoption in France is worthy of study and analysis in the United States.

Before giving the reader a brief discussion of some of the salient provisions of the controversial new legislation and its background, the writers propose a few personal observations. Although conclusory and conjectural in character, it is hoped that these comments will enhance the relevance of the more concrete discussion which follows.

No legal system is an island and although the legal traditions of France and the United States are vastly different, our fundamental cultures are similar in many ways. We are both very freedom-loving countries, with attitudes grounded in the Greco-Roman, Judaeo-Christian

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5. On May 10, 1981, President Giscard d'Estaing was defeated for reelection by President François Mitterand.

6. For a book authored by Monsieur Peyrefitte, *inter alia* discussing some of his views on criminal justice, see A. PEYREFITTE, *LES CHEVAUX DU LAC LAGODA* (Plon 1981).

7. Law of Feb. 2, 1981, *published in* [1981] *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE DE 3 FEVRIER 1981* [J.O.] 415 (Fr.), *CR. PR. PEN.* [1981 Supp.] Dalloz [D.S.L.] 37 [hereinafter cited as Law of Feb. 2, 1981].

8. Notably, it makes many changes in, *inter alia*, the French Penal Code, Code of Criminal Procedure, and Code of Public Health.

9. *See Le Monde*, May 12, 1981, at 9.

10. *See* the interview of the present Minister of Justice of France, Monsieur Robert Badinter, *Le Monde*, Aug. 28, 1981, at 1, *reprinted in English in The Guardian*, Sept. 13, 1981, at 12.

traditions. As intermittent visitors to France over a period of time, the authors have been struck by the fact that despite institutional differences, both countries are affected very often by the same socio-economic and technological developments and, interacting with each other, respond similarly to like stimuli. Not insignificantly, for example, one of the points often made in support of the French "security and liberty" legislation is that it was inspired in part by what Monsieur Peyrefitte, its principal architect, observed in the United States on a visit in 1979.<sup>11</sup>

In both France and the United States there is and has been a deep-seated fear of crimes of violence and a widespread malaise about administration of criminal justice. France has had a much lower rate of violent crime than the United States,<sup>12</sup> but recently, there has been a sharp increase in violent crime in both countries.<sup>13</sup> In one sense, the circumstance that in France the actual incidence of violent crimes appears

11. See "Quelle justice?" (interview of Peyrefitte), *L'Express* du 4 au 10 Oct. 1980 at 190 ff. For earlier impact of American thought and practice on French penological attitudes, see G. DEBEAUMONT & A. DE TOCQUEVILLE, *ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE* (1964); MUELLER & LEPOOLE-GRIFFITHS, *supra* note 2, at 7 ff; Lyons, *THE EUROPEAN RESPONSE TO EDWARD LIVINGSTON'S SYSTEM OF CRIMINAL LAW*, 24 *LOYOLA L. REV.* 621 (1978). See also J. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* (1980).

12. According to KURIAN, *THE BOOK OF WORLD RANKINGS* 337-41 (Facts on File, Inc. 1979), using figures prepared by Interpol, International Crime Statistics and the United States Department of Justice relative to crime in the middle 1970's, the United States had a forty-one percent higher rate of reported crime per 100,000 of the population than did France, and more than three times as many criminals per 100,000 of the population. The first degree murder rate was more than three times as high, and grand larceny (including robbery and burglary) was more than four times as high.

13. Professor Pradel reports that from 1972 to 1979 there was an eighty-five percent increase in violent crime in France, ten percent of which occurred between 1978 and 1979. Pradel, *La loi du 2 février 1981 dite "Sécurité et Liberté" et ses dispositions de procédure pénale* (D. 1981. 85) *Recueil Dalloz Sirey*, 1981, 14<sup>e</sup> cahier—Chronique 101, 102 (n.8).

Professor Francillon, speaking of violent crime, writes that the increase in the most serious crimes (comprising two to five percent of total crime) was three-fold from 1970 to 1980, but that there was a decrease in the rate of increase during the last three years. Francillon, *La loi n. 81-82 du 2 février 1981 renforçant le sécurité et protégeant la liberté des personnes* *Jurisclassseurs: Droit Penal* n.1 bis de 1981 at 1, 5.

See also "Quelle justice?" *L'Express* du 4 au 10 Oct. 1980, at 190, wherein the then Minister of Justice Peyrefitte is quoted as saying that from 1972 to 1978 "Grande criminalite" (hold-ups, rackets, armed robberies, rapes, murders, etc.) increased 111.49 percent. According to U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1980 290 (Table 3.51), in the United States from 1960 to 1969 violent crime increased 129 percent and from 1969 to 1978, an additional 60 percent—or total of 268 percent from 1960 to 1978. From 1960 to 1969 aggravated assault increased 102 percent and from 1969 to 1978, an additional 79 percent—or a total of 262 percent from 1960 to 1978.

much less than in the United States heightens rather than decreases the relevance for this country of the French experience. The fact that with such a lower crime rate, after careful scientific sampling of public opinion<sup>14</sup> and in anticipation of a general election, such a pervasive attack upon violent crime was presumably deemed by the then parliamentary majority to have popular political appeal, is itself important.

Although American traditions and institutions are very different from those of the French, in the writers' opinion the public appeal for a program to make the American criminal justice system more efficient and effective cannot be more timely. Violence is a consuming concern of the American people. Coincidentally, within the period of about three and one-half months of the adoption of the "security and liberty" law in France, *TIME*, *NEWSWEEK*, and *U.S. NEWS & WORLD REPORT* magazines all had cover stories on violence in the United States,<sup>15</sup> and near-successful attempts were made to assassinate President Reagan<sup>16</sup> and Pope John Paul II.<sup>17</sup> Within the same period, in a call to arms addressed to the American Bar Association Chief Justice Burger outlined his plan for an attack on violent crime.<sup>18</sup> The problems are so much a part of public parlance that the subject matter is almost trite.

What is for these writers a portentous conclusion emerges from their consideration of the French experience in this connection. The public in both countries is and has been most disillusioned with the administration of criminal justice. In the United States, unless a sufficient number of the legal profession and other experts in the area are able to agree upon and take steps to implement needed reforms, the issue may well be used politically for the adoption of measures that, although having popular appeal, may not be consonant with our legal and democratic traditions.

#### SOCIO-POLITICAL CONTEXT

The matrix of laws representing a country's criminal justice system reflects the reconciliation reached between two profound but contradictory interests. On the one hand, there is the interest of the citizen in

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14. See *RESPONSES A LA VIOLENCE—RAPPORT DU COMITÉ D'ETUDES SUR LA VIOLENCE, LA CRIMINALITE ET LA DÉLINQUANCE* (Documentation française et Presses Pocket, 1977) [hereinafter cited as *RÉSPONSES*].

15. See *Plague of Violent Crime*, *NEWSWEEK*, Mar. 23, 1981; *Curse of Violent Crime*, *TIME*, Mar. 23, 1981; *Toll of Violence*, *U.S. NEWS & WORLD REPORT*, Apr. 13, 1981.

16. March 30, 1981.

17. May 14, 1981.

18. Chief Justice Burger, in a speech before the American Bar Association at its winter convention in Houston, February 8, 1981, said: "Crime and the fear of crime have permeated the fabric of American life, damaging the poor and minorities even more than the affluent." *Excerpts from Address*, *N.Y. Times*, Feb. 9, 1981, § D, at 10.

having his government protect him from violent crime, and on the other, there is his interest in preventing governmental invasions of privacy and individual integrity.

Because of their history and experience, the French traditionally have been willing to accord their police and prosecutorial forces far greater authority than we in the United States. As we see it, this is not because the French have greater confidence that their police will respect the privacy of the individual, but rather that they fear violence, anarchy, and social upheaval more than we. Since the French Revolution, there have been periodic manifestations of social and political unrest often resulting in basic governmental change.<sup>19</sup> Since 1800, France has had three kings, been twice an empire, and five times a republic. During this period she has had ten constitutions.<sup>20</sup> The bloody Commune of 1871 is still very much a part of the consciousness of a number of French citizens.<sup>21</sup> Further, the manifestations and near-revolutions of 1958 (movement for Algerian independence) and 1968 (student-worker unrest and strikes) are fresh reminders.

To an American, it appears that French criminal justice institutions have been molded more by fear of violent crime than fear of police and prosecutorial power. In the United States, because of our traditions, the opposite seems generally to have been the case; our fear of abuse of governmental authority is deeply rooted in our political consciousness. By our system of checks and balances, and fragmentation of power, we have sought to protect ourselves from oppressive governmental forces. Further, by our meticulous elaboration of individual civil rights, we have often purposefully chosen protection of privacy over protection from crime—so much so that many say we have gone too far.

Whether the United States has achieved what is for us the most appropriate reconciliation of conflicting interests in privacy and protection, it is clear that the French traditionally have given far greater importance to protection of person and property from violent crime than have we. Despite concerted legislative opposition supported by overwhelming academic, professional, and journalistic support, the French parliamentary majority, under the skillful leadership of Alain Peyrefitte, was willing to expand governmental protective powers. The legislation came

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19. See R. DAVID, *FRENCH LAW—ITS STRUCTURE, SOURCES AND METHODOLOGY* 29 (M. Kindred trans. 1972).

20. See R. DAVID & H. DEVRIES, *THE FRENCH LEGAL SYSTEM* 146 (1958); R. DAVID, *supra* note 19.

21. According to the *Encyclopaedia Britannica*, during the "bloody week" of May 21-28, 1871, "[a]bout 20,000 insurrectionists were killed, along with about 750 government troops. . . [T]he Commune of 1871 had continuing significance as a symbol for both the right and left: for the right, as a symbol of the social revolution that it feared; for the left, a symbol of the rise of the working class that it envisioned." III *ENCYCLOPAEDIA BRITANNICA MICROPAEDIA. READY REFERENCE AND INDEX* 44.

on the heels of a report prepared by a governmental commission after several years of study and inquiry,<sup>22</sup> and took a turn departing greatly from the tenor of that report. Rather than reflecting a general continuation of past policies, the new legislation embodied a "tightening up" of the system all along the line. Four areas dealt with by the new legislation are of major importance to current American thinking and will now be briefly considered.

### *Investigation of Crime*

One of the most controversial aspects of investigation of crime in both France and the United States involves whether, and if so, under what circumstances, police may stop and detain citizens and require them to identify themselves. Further, should the police be permitted to question suspects relative to criminal activity, and if so, under what circumstances?

Prior to passage of the "security and liberty" law, no French legislative text gave general authority to the police to stop and detain persons for identification,<sup>23</sup> although police practice in this regard appears to have been very lax.<sup>24</sup> In one of its most debated sections, the new law authorizes designated members of the criminal investigatory police,<sup>25</sup> during the course of criminal investigations or to prevent a disturbance of public order (especially one involving threat of injury to persons or property), to call upon *any person* to establish his identity.<sup>26</sup> Notably, although there are strenuous restrictions upon the procedure thereafter to be followed, and detailed regulations as to required records, etc., the law is very open-ended as to the circumstances under which a person may be detained to establish his identity. The law stipulates that *no one may refuse to comply with such a request*. It goes on to say that identity may be established "by any means", thus making it clear that official identity cards are not required. When a person thus stopped

22. See *RÉPONSES*, *supra* note 14.

23. There was, however, particularized authority under certain circumstances. See Pradel, *supra* note 13, at 111.

24. See *Arret Freidel*, Cass. Crim. 5 jan. 1973, Dalloz-Sirey, *Jurisprudence*, at 541; Pradel, *supra* note 13, at 111.

25. The French police are divided generally into two categories: *police administrative* (general constabulary) and *police judiciaires* (police charged with investigation of criminal offenses, which, for purposes of this article, will be called "investigatory police".) For a discussion of the two branches of the police, see *PROCÉDURE PÉNALE*, *supra* note 2, at no. 230.

26. Law of Feb. 2, 1981, *supra* note 7, art. 76, at 423. For an official interpretation of this and subsequent provisions of the "security and liberty" law, see *Circulaire du 7 février 1981* (*Journal Officiel de la République Française* [J.O.] 1547 (Fr.)), *CODE DE PROCÉDURE PÉNALE* at 90, Dalloz, 1977-1978 (Supp. 1981) (N.C. du 14 février 1981) [hereinafter cited as *Circular of Feb. 7, 1981*].

is not at that time able to establish his identity, the police, if it be necessary, may conduct him to the local police station to permit him to take further steps to identify himself. On arrival at the police station, the individual, without delay, is to be taken before an officer of the investigatory police, and be given every right to contact members of his family and friends to assist in the identification process. The law stipulates that all the above identification procedures shall be carried out "with courtesy."

If a person thus detained does not wish to, or is unable to, identify himself, the officer before whom he has been taken may take necessary steps to identify him, but he shall be detained only so long as it takes to establish his identity, and in any event, no longer than six hours from the time he was first stopped. The person thus detained has the right to request that the public prosecutor be notified, who in turn has the authority to terminate the proceedings. The detainee must be told of his right to notify the prosecutor. Elaborate provisions are made as to the special record that is to be kept of the identification proceedings to prevent abuse of authority, the right of the public prosecutor to inspect the records and regulate the proceedings, and the fact that under no circumstances are the detainee's fingerprints or photograph to be taken or any police record to be kept other than that specifically required.<sup>27</sup>

Although the new law does not state expressly that under the conditions mentioned, the investigatory police have the authority to make a forcible stop of the individual to be identified, this seems clearly to be implied.<sup>28</sup> Anyone refusing to participate in the identification process commits a penal offense, and is subject to punishment by jail sentence of ten days to three months and a fine of about \$240 to \$400.<sup>29</sup> Further, anyone who hinders the authorities from accomplishing their mission is subject to yet more serious punishment—ten days to six months imprisonment and a fine of approximately \$240 to \$800.<sup>30</sup>

These provisions were attacked in the constitutional tribunal<sup>31</sup> as, *inter alia*, an unconstitutional violation of the liberties of the individual. After detailed consideration, the tribunal held that in light of the procedural regulations stipulated in the statute, this portion of the legisla-

27. Law of Feb. 2, 1981, *supra* note 7, art. 77, at 424.

28. *Id.* arts. 76-78, at 423-24.

29. *Id.* art. 78, at 424.

30. *Id.*

31. The Conseil Constitutionnel is a constitutional tribunal provided for by articles 56-63 of the Constitution of 1958. *Inter alia*, it may be called upon to determine the constitutionality of enactments prior to their taking effect. For a discussion of the institution, see R. DAVID, *supra* note 19, at 28-30; Beardsley, *Constitutional Review in France*, the 1975 SUPREME COURT REVIEW 189; Tunc, *The Fifth Republic, the Legislative Power, and Constitutional Review*, 9 AM. J. COMP. LAW 335 (1960).



tion constituted a permissible reconciliation of the rights of the individual and the interest of the public in police protection.

Aside from the right of the police to identify persons they encounter, there is the highly sensitive area of the authority of the police to detain and question persons whom they suspect have knowledge of facts pertinent to a criminal offense, or whom they believe may be implicated in a crime under investigation. Here the French police have traditionally exercised wide powers. Prior to the 1958 French Code of Criminal Procedure,<sup>32</sup> the practice was generally without textual authority but widespread.<sup>33</sup> Rather than attempt to suppress police detention for questioning, as we in the United States endeavored to do, the French in 1958 authorized the practice under certain circumstances and provided protective regulations.<sup>34</sup> In general terms, the 1958 legislation provided that, during the course of an investigation, an *officier* of the investigatory police had the authority to oblige a person believed to have pertinent information relative to a crime under investigation, to appear and answer questions concerning it. This detention for questioning is known as *garde à vue*. The Code stipulated that if the individual thus summoned failed to comply, and the crime was of a relatively serious character and had been recently committed, the public prosecutor, upon request of the police, could authorize that the witness be forcibly detained for questioning. A person could thus be detained legally by the police for a total of 24 hours, but upon request of the police, the public prosecutor could authorize detention for an additional 24 hours.<sup>35</sup> Subsequent legislation provided longer periods of such detention in certain drug cases<sup>36</sup> and for

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32. Revised in 1957 and 1958, the Code of Criminal Procedure had been originally adopted under Napoleon in 1808.

33. See G. STEFANI & G. LEVASSEUR, *PROCÉDURE PÉNALE* No. 546 (2d ed. Dalloz Précis, 1962).

Once the *juge d'instruction*, or investigating magistrate, was seized with the investigation, he had wide express authority to question witnesses directly, or through the police via delegated authority. *CODE DE PROCÉDURE PÉNALE* art. 101 (Dalloz 1977-1978) [hereinafter cited as *FRENCH CODE CRIM. P.*]; A. SHEEHAN, *supra* note 1, at 49; Pugh, *Criminal Justice in France*, *supra* note 1, at 15. However, the Code provides that the police may not question a person as to whom there is strong and convincing evidence of guilt if an investigating magistrate has been seized of the case. *FRENCH CODE CRIM. P.* art. 105.

34. See A. SHEEHAN, *supra* note 1, at 36-37; Pugh, *Criminal Justice in France*, *supra* note 1, at 15. See also *FRENCH CODE CRIM. P.* art. 63 and *PROCÉDURE PÉNALE*, *supra* note 2, at no. 265 (*enquête flagrante*); *FRENCH CODE CRIM. P.* arts 77 *et seq.* and *PROCÉDURE PÉNALE*, *supra* note 2, at no. 276 (*enquête préliminaire*).

35. It was stipulated that this authorization was to be in writing, and that the extension was to be granted only if there was strong and convincing evidence of guilt. *FRENCH CODE CRIM. P.* art. 63; *PROCÉDURE PÉNALE*, *supra* note 2, at no. 265.

36. A maximum of four days, L.31 dec. 1970 (art. 627.1 C. Santé publique).

crimes against the safety of the state.<sup>37</sup> Although detailed regulations were provided for the protection of the detainee, such as elaborate record keeping, medical examination, etc.,<sup>38</sup> the law did not stipulate that violation of the rules would strike the proceedings with nullity, and France's highest court has been unwilling to so hold.<sup>39</sup> Significantly, a person thus questioned is not entitled to be represented by a lawyer.<sup>40</sup>

Not surprisingly, *garde à vue* is a fabulously effective investigative tool, highly valued by the police — so much so that it was frequently urged that it be extended.<sup>41</sup> Under the new "security and liberty" law, the period of *garde à vue* may, as to a limited number of particularly serious crimes,<sup>42</sup> be extended for an additional 24 hours by the investigating magistrate, or upon the request of the public prosecutor, by the president of the trial court, or a judge delegated by him. Before authorizing such an extension, the magistrate must himself go to the place of detention to see the detainee. Failure to comply with this provision subjects the procedure to nullification.<sup>43</sup> As a safeguard, the new law provides that an individual under *garde à vue* detention shall, at the end of the initial 24 hour period, be advised of his right to a medical examination, and the fact of such notification is to be made in the official record and acknowledged by the detainee in writing.<sup>44</sup> If the detention is extended beyond 48 hours, a medical examination of the detainee must be conducted and a medical report put in a dossier.

In the opinion of the writers, the *garde à vue* procedure exemplifies the determination of the French criminal justice system to elucidate the facts, and its willingness to rely upon institutional safeguards, such as elaborate record keeping, medical examination, internal police disciplinary procedures, etc., to protect an individual from physical abuse and other disapproved practices.<sup>45</sup>

### *Speedy Trial*

A major aim of the "security and liberty" law was to speed up French

37. A maximum of six days under normal circumstances, and a maximum of twelve days in a "state of urgency". L.15 jan. 1963, art. 16 et 48, modifies L. 17 juillet 1970.

38. FRENCH CODE CRIM. P. arts. 62 *et seq.*, 77 *et seq.*; A. SHEEHAN, *supra* note 1, at 37.

39. For criticism of the decisions of the *Cour de Cassation* in this regard, see PROCEDURE PÉNALE, *supra* note 2, at no. 277.

40. See A. SHEEHAN, *supra* note 1, at 37. Since the person detained under *garde à vue* is generally not under oath, he is not subject to perjury prosecution for statements then made to the police. See PROCEDURE PÉNALE, *supra* note 2, at no. 274.

41. See Pradel, *supra* note 13, at 110.

42. For example, armed robbery committed by two or more persons. See Law of Feb. 2, 1981, *supra* note 7, art. 39 I.

43. As to the effect of this provision, see Pradel, *supra* note 13, at 110.

44. Law of Feb. 2, 1981, *supra* note 7, art. 39 II.

45. See PROCEDURE PÉNALE, *supra* note 2, at 30B, p. 33 which notes, *inter alia*, that French "doctrine" unanimously prescribes the use of "truth serums."

criminal procedure. Without going into procedural detail,<sup>46</sup> it should be noted that, prior to the new law, if the authorities decided that a suspect should be formally placed under arrest and physically detained for trial,<sup>47</sup> the following procedural dichotomy prevailed as to non-petty crimes. There was one procedure for offenses investigated by the investigating magistrate (*informations*) which was and continues to be required for the most serious category of criminal offenses (*crimes*)<sup>48</sup> and is available, generally as a matter of discretion, for intermediate offenses (*délits*). There was another procedure for offenses (excluding petty offenses<sup>49</sup> and *crimes*) generally<sup>50</sup> available where the defendant was caught in the act of committing an offense or in close proximity, or under circumstances which were deemed analogous. Because it was thought that proof of guilt would often be relatively clear in such cases, an exceptionally expeditious procedure was provided (*procédure flagrant délit*), investigation by the police only was required. If, under the circumstances, the expeditious *flagrant délit* procedure were unavailable, the much longer investigating magistrate procedure was required, unless the public prosecutor concluded that there was a reasonable likelihood that the defendant would appear for trial in response to a mere summons.<sup>51</sup> Thus, for cases not qualifying for the extremely expeditious *flagrant délit* procedure, the very time-consuming, painstaking investigation of the facts by an inves-

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46. For more detailed discussion, see Pradel, *supra* note 13, at 102; Francillon, *supra* note 13, at 27; Circular of Feb. 7, 1981, *supra* note 26, at 16.

47. See note 51, *infra*, and accompanying text as to cases in which the prosecutor reasonably anticipates that the person would respond to a summons and thus that physical detention was unnecessary.

48. *Crimes* is the denomination given the most serious offenses, those triable in the *Cour d'Assizes* before three judges and nine jurors. A special, rather lengthy procedure prevails for such proceedings. Before being tried in the *Cour d'Assizes*, a decision by the investigating magistrate to charge the defendant must be confirmed by the *Chambre d'Accusation* of the *Cour d'Appel*. Approximately 2,000 cases were decided in the *Cours d'Assizes* in France in 1980. For a discussion of this procedure see A. SHEEHAN, *supra* note 1, at 43, 66, 81; PROCÉDURE PÉNALE, *supra* note 2, at nos. 298, 305, 320, 430, 453 & 534. For a discussion of the impact of the new law, see note 63, *infra*, and accompanying text.

49. This procedure was not available for the lowest criminal infraction (*contraventions*) and those of the intermediate offenses (*délits*) not carrying a prison sentence. For provisions regulating *contraventions*, see FRENCH CODE CRIM. P. arts. 521-549.

50. The procedure was not available for proceedings against minors, and certain crimes relative to the press, political crimes and other laws. FRENCH CODE CRIM. P. arts. 71-73.

51. In a great many cases, defendants simply are summoned to appear for trial (*citation directe*), (see PROCÉDURE PÉNALE, *supra* note 2, at no. 442) or appear voluntarily (*comparution volontaire*) (see *id.* at no. 577). Professor Pradel reports that in 1979 in France there were 20,800 *flagrants délits*, 63,000 *informations* and 487,900 *citations directes*. See Pradel, *supra* note 13, at 103 n.24.

tigating magistrate<sup>52</sup> was required, for in such cases, safeguards and protective procedures expected from a non-partisan career magistrate were deemed to be needed because of the presumed greater difficulties in the investigation than those expected in the *flagrant délit* context. As further security, measures taken during the course of the investigation by the investigating magistrate were subject to interlocutory appeal to a chamber of the Court of Appeal.<sup>53</sup>

In 1979, there were some 63,000 *informations*, compared to 20,800 *flagrant délits* investigations.<sup>54</sup> Great concern existed about the delay often involved in the *information* procedure, and about the fact that the delay had increased from the average of slightly under six months in 1968 to slightly over 8½ months in 1977.<sup>55</sup> Often during the period of this investigation the suspect was detained in jail. In 1967, of those in jail, 1,107 had been detained longer than 8 months and by 1979 the comparable figure had increased to 2,305.<sup>56</sup> There was also much concern that a high percentage of those in prison were persons not yet found guilty. It was brought out in parliamentary debate on the "security and liberty" law that, of the approximately 39,000 persons then in French prisons, some 18,000 had not yet been found guilty and were in "provisional detention" by order of the investigating magistrate.

The cause of the delay under the *information* procedure was attributable to a number of factors, including an insufficient number of investigating magistrates, the fact that experts appointed by the investigating magistrate often took a long time to submit their reports, and the circumstance that the police often took considerable time to comply with investigative responsibilities delegated to them by the investigating magistrate. In its argument in support of the new law, the government contended that in many of the cases handled by the investigating magistrate the facts were sufficiently clear that investigation by an investigating magistrate was unnecessary, and that such cases could be better handled by a new procedure analogous to the one then provided for *flagrant délits*.<sup>57</sup>

The *flagrant délit* procedure was often incredibly speedy. A suspect

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52. For a description of this investigation (*information*), see A. SHEEHAN, *supra* note 1, at 43; Pugh, *Criminal Justice in France*, *supra* note 1, at 14.

53. In the event that the investigating magistrte concluded that the crime was so serious that the defendant should be tried in the *Cour d'Assizes* (France's highest trial court), the concurrence of the *Chambre d'Accusation* of the Court of Appeal was required. See note 48, *supra*, and accompanying text.

54. Pradel, *supra* note 13, at 103 n.24.

55. *Id.* at 103.

56. *Id.*

57. *Id.* at 102 n.17.

detained by the police under circumstances authorized for *flagrant délits*<sup>58</sup> was taken by the police to the public prosecutor.<sup>59</sup> If, after questioning the suspect, the prosecutor decided that he should be placed on trial, either of two procedural routes was available. On one hand, the prosecutor could request the detainee to appear for trial to be held not sooner than three days later, but within a month. Alternatively, the defendant was to be taken that very day, or at the latest, the next day, before the court for trial. The new law substitutes for this *flagrant délit* procedure for bringing a person to trial,<sup>60</sup> a new procedure (*saisine directe*).<sup>61</sup> It is generally available as to most *délits*<sup>62</sup> and is a new optional procedural route.<sup>63</sup> The *saisine directe* procedure draws upon the old *flagrant délit* procedure and some of the regulations governing the *information*. It is to be used at the discretion of the prosecutor where in his opinion and in light of the circumstances and the investigation conducted by the police, it would serve no useful purpose to invoke the jurisdiction of the investigating magistrate under the much slower *information* procedure.<sup>64</sup>

When, under the new *saisine directe* procedure, a person suspected of a *délit* has been taken by the police before the public prosecutor, the prosecutor is to satisfy himself as to the suspect's identity, notify him of the offense he is accused of having committed and receive any statements that the defendant has chosen to make.<sup>65</sup> Under this procedure, three options are then available to the public prosecutor.

Instead of being forcibly detained for trial, the suspect can simply be summoned to appear (*convocation par procès-verbal*)<sup>66</sup> at a trial to be held not sooner than ten days, nor later than two months thereafter.<sup>67</sup>

58. See FRENCH CODE CRIM. P. arts. 53 *et seq.* See discussion of *garde à vue* at note 34, *supra*, and accompanying text.

59. Before questioning by the prosecutor, the suspect was to be advised that he had the right to counsel. FRENCH CODE CRIM. P. art. 71.

60. Procedure for investigating *flagrants délits* (FRENCH CODE CRIM. P. arts. 53 *et seq.*), however, was retained. See note 34, *supra*, and accompanying text.

61. The Law of Feb. 2, 1981, *supra* note 7, art. 51, replaces FRENCH CODE CRIM. P. arts. 393-397 (*flagrant délit* procedure) with FRENCH CODE CRIM. P. arts. 393 to 397-7.

62. The procedure could not, however, be utilized for proceedings against minors, certain crimes relative to the press and political crimes, and in situations covered by special laws. Law of Feb. 2, 1981, *supra* note 7, art. 51. It is also generally not available where the maximum imprisonment for the crime exceeds five years. *Id.* art. 51.

63. *Information* is still available as are the summons (*citation directe*) and voluntary appearance (*comparution volontaire*). See note 51, *supra*, and accompanying text.

64. Law of Feb. 2, 1981, *supra* note 7, art. 51.

65. *Id.* The defendant is not entitled to a lawyer at this time. *Id.*; Pradel, *supra* note 13, at 104. Compare the repealed procedure as to *flagrant délit*, note 58, *supra*, and accompanying text.

66. In this case he is to be informed by the prosecutor of his right to counsel. Law of Feb. 2, 1981, *supra* note 7, art. 51.

67. This compares with a delay of three days and one month, respectively, in the replaced *flagrant délit* procedure.

If the prosecutor feels that the facts developed by the police in their investigation are sufficient and if the punishment stipulated for the crime does not exceed five years,<sup>68</sup> he may immediately invoke the court's jurisdiction (*saisine immédiate*).<sup>69</sup> In such event, the defendant is to be retained in custody and is to be taken under escort the same day before the court. The President of the court is then to advise the defendant of his right to a delay to prepare his defense (not less than five days unless the defendant requests a shorter time).<sup>70</sup> If either the prosecutor or defense feels that additional factual development is necessary, or that further investigation by experts or otherwise should be made as to the background, character, mental or physical condition of the defendant (*personnalité*), the President of the court shall order such further development and set the case for an early hearing.<sup>71</sup> If the defendant, after trial, is convicted and the court sentences him to be imprisoned, he shall begin to serve his sentence, and importantly, the law stipulates that notwithstanding an appeal, defendants under these circumstances shall remain in custody unless the Court of Appeal decides otherwise.<sup>72</sup>

Where it is impossible to take the detainee before the court the same day, but the public prosecutor feels that detention or some other restraints on the suspect's freedom are required, he may preliminarily invoke the jurisdiction of the court (*saisine préalable*) by having the detainee taken before the President of the court or a judge designated by him.<sup>73</sup> Under this option, the public prosecutor shall advise the defendant of his right to have counsel at his appearance before the judge. The judge, after having taken a statement from the defendant in the presence of his lawyer (if he has exercised his right to same), shall decide whether it is necessary to keep the defendant in provisional detention or to restrict his liberty otherwise. If the defendant is placed in provisional detention, he shall be brought before the court at its next hearing and at the latest within four days.<sup>74</sup> The procedure then provided is generally similar to that for *saisine immédiate*.<sup>75</sup>

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68. Under certain circumstances, it appears that recidivists may actually be sentenced to more than five years as a result of the *saisine directe* procedure. See Pradel, *supra* note 13, at 104 n.30.

69. Law of Feb. 2, 1981, *supra* note 7, art. 51.

70. *Id.*

71. The law sets forth detailed regulations as to the procedure to be followed in such cases. *Id.*

72. Pending the appeal, the defendant may ask the Court of Appeal to terminate his incarceration. If the Court of Appeal does not act on this request within a month, the defendant is automatically to be set free pending the appeal. *Id.*

73. *Id.*

74. If not taken before the court within four days, the defendant is to be released from custody. *Id.*

75. See note 69, *supra*, and accompanying text.

Regardless of which of the three procedural options is selected by the prosecutor under *saisine directe*, the trial court is to decide the case within two months. If not, the defendant is to be released.<sup>76</sup>

Thus, briefly stated, if a defendant is to be forcibly held for trial, either the somewhat laborious *information* route or the very speedy *saisine directe* procedure is to be followed. Under *saisine immédiate* procedure, he is to be brought before the court immediately, and under *saisine préalable* within four days. Under both *saisine immédiate* and *saisine préalable* the defendant is to be released from custody if trial has not been concluded within two months.

The trial itself remains generally the same as prior to the "security and liberty" law, and is very different from an American trial. In many *délict* trials, the defendant is the only person questioned. The three judges who comprise the court can take into consideration materials properly in the dossier prepared by the police, including statements taken from witnesses, etc. Although entitled to counsel at trial (retained or appointed), with access to the dossier, the role of counsel is relatively passive at the judge-dominated hearing. The trial is very short, especially in Paris—often only 15 to 30 minutes.<sup>77</sup> No guilty pleas are allowable; all defendants go to trial. The maximum authorized imprisonment is usually five years or less;<sup>78</sup> sentences actually imposed, however, are usually very short, and often wholly or partially suspended. Thus, although conviction is often very swift, the sanction is frequently merciful.

In addition to providing great celerity for *saisine directe* procedures, the "security and liberty" law makes a number of detailed changes relative to *informations* designed to speed them up also.<sup>79</sup> The original proposal by the government would have gone much further. A very controversial unadopted proposal relative to most *crimes*,<sup>80</sup> would have authorized the prosecution, where it deemed an investigation by an investigating magistrate to be unnecessary, to go directly to the indicting chamber of the Court of Appeal (*Chambre d'Accusation*).<sup>81</sup>

Another highly controversial article<sup>82</sup> of the "security and liberty"

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76. Law of Feb. 2, 1981, *supra* note 7, art. 51.

77. For an interesting informal description of such trials, see S. BEDFORD, *THE FACES OF JUSTICE* 303 (1961).

78. See, however, note 108, *infra*, and accompanying text.

79. See Pradel, *supra* note 13, at 106; Francillon, *supra* note 13, at 30.

80. Projet of "Security and Liberty" law, art. 36. The proposal excluded cases involving minors.

81. *Id.*

82. Law of Feb. 2, 1981, *supra* note 7, art. 66, as passed by the parliament, was declared unconstitutional by the Conseil Constitutionnel jan. 20, 1981.

law was one of the three articles declared unconstitutional by the constitutional tribunal<sup>83</sup> as an unconstitutional violation of the rights of the defense.<sup>84</sup> Some of the delay in the French system has been attributed to what have been considered improper delaying tactics on the part of defense counsel in the representation of their clients. The hotly debated provision concerned the discipline of attorneys for conduct in court and would have authorized the President of the court, after having heard from the chairman of the local Bar (or his representative) to suspend a lawyer for up to two days<sup>85</sup> when, in the opinion of the President of the court, the "attitude" of the lawyer "compromised the serenity of the proceedings." Understandably, lawyers were incensed, and the constitutional tribunal, in voiding the provision, held that the provision would have, under some circumstances, authorized suspension of an attorney for complying with obligations imposed upon him by his professional oath.

#### *Penalties and Corrections*

From the end of World War II to the adoption of the new law, the prevailing correctional thought in France militated in favor of a high degree of individualization of penalties, and freedom of the court to impose whatever correctional measures it deemed appropriate,<sup>86</sup> up to a stipulated maximum. In time, this view had its impact not only on sentencing, but on service of the sentence as well.<sup>87</sup> Prison terms, rather than being viewed as retributive justice for malefactors, were seen as measures aimed at fitting a person for reintegration into society.<sup>88</sup>

The new law represents a change in emphasis and direction. Both rhetoric and attitude are very different. Proponents of the new law call for the swift and certain punishment of the offender, and refer often to Beccaria<sup>89</sup> and deterrence. The circular published by the Minister of Justice explaining the new law stated that in part it was designed "to restore to the criminal law its credibility by assuring certainty of punishment of the perpetrators of violent crimes."<sup>90</sup> More explicitly it stated, "Certainly justice cannot have as its only preoccupation the punishment

83. For a discussion of this institution, see note 31, *supra*.

84. Decision no. 80-127 D.C. published in *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE* DU 22 jan. 1981 308 (1981).

85. The chairman of the Bar was authorized to name a substitute.

86. See Pradel *supra* note 13, at 101; Francillon *supra* note 13, at 5, para. 9.

87. See Blakesley, *Conditional Liberation (Parole) in France*, 39 *LA. L. REV.* 1 (1978); Chemithe & Strasbourg, *France's 'Sentence Judge'*, 4 *CORRECTIONS MAGAZINE* No. 1 at 39 (March 1978).

88. See Francillon, *supra* note 13, at 5, para. 9. See the important work, M. ANCEL, *LA DÉFENSE SOCIALE NOUVELLE* (2d ed. 1966). Translated into English by Wilson and Ancel under the title, *Social Defense: A Modern Approach to Criminal Problems*.

89. BECCARIA, *ON CRIMES AND PUNISHMENTS* (first published in 1764).

90. See Circular of Feb. 7, 1981, *supra* note 28, at 6.



of the guilty, and neglect their reformation and reintegration into society. But in regard to aggressive and violent criminality, intimidation [of potential criminals] and neutralization [of malefactors] should often take precedence over other considerations."<sup>91</sup>

There are obvious analogies to some current correctional movements in the United States, and it was widely suggested in the French press that many of Peyrefitte's ideas were inspired by his visit here.<sup>92</sup> The "security and liberty" law "tightens up" sentencing and corrections in a number of respects. The most notable from an American standpoint seem to be the following.

Although the French escalate penalties for recidivists,<sup>93</sup> generally a person was deemed a "recidivist" only if he was convicted again of the *same* offense<sup>94</sup> within five years. By listing a number of crimes against person or property as, for this purpose, being considered the same crime, the new law greatly expands the impact of recidivist legislation.<sup>95</sup>

Under the prior law, a person convicted of a crime usually could be given a suspended sentence or probation.<sup>96</sup> The new law provides detailed circumstances under which recidivists may not be given either a suspended sentence or probation,<sup>97</sup> and establishes a mandatory minimum prison term in the most serious cases — two years if the recidivist's most recent crime ordinarily carries a sentence greater than ten years, and one year if the crime ordinarily carries a sentence of less than ten years.<sup>98</sup> Further, the new law escalates penalties (doubles them for certain crimes committed by convicted persons on provisional liberty, etc.).

As indicated earlier, France had developed extensive mechanisms for individualizing correctional measures. It had entrusted to the very important "sentence judge" (*juge de l'application des peines*) wide authority to reduce sentences, and to grant leaves, parole, semi-liberty, etc.<sup>99</sup>

91. See *id.* at 2.

92. See Francillon, *supra* note 13, at 6, para. 10; "Quelle Justice?" L'Express du 4 au 10 Oct. 1980, at 190.

93. Such a recidivist generally was subject to being sentenced to as much as twice the ordinary penalty. See Francillon, *supra* note 13, at 10. FRENCH PENAL CODE art. 56 *et seq.*; Stefani, Levassur et Bouloc, DROIT PÉNAL GÉNÉRAL (11th ed. Dalloz Précis, 1980) no. 579 *et seq.*

94. For relatively few exceptions to the rule, see Circular of Feb. 7, 1981, *supra* note 26, at 6.

95. Law of Feb. 2, 1981, *supra* note 7, art. 2; Circular of Feb. 7, 1981, *supra* note 26, at 6.

96. See French Code Crim. P. art 734-1, 738; Stefani, Levasseur et Bouloc, DROIT PÉNAL GÉNÉRAL (11th ed. Dalloz Précis, 1980) nos. 637 *et seq.*, 648 *et seq.*

97. Law of Feb. 2, 1981, *supra* note 7, art. 9.

98. *Id.* art. 4.

99. For a description in English of the institution, see Blakesley, *supra* note 87, at 31; Chemithe & Strasbourg, *supra* note 87.

Because some convicted persons who had been granted leave by sentence judges had committed heinous crimes, there was public distrust, fanned by the press, of the institution.<sup>100</sup> The new law decreases availability of release measures<sup>101</sup> and in addition diminishes the power of the sentence judge. It makes decisions as to many crimes previously left to the determination of the sentence judge now the prerogative of a commission composed of the public prosecutor, the warden of the prison facility, and the sentence judge. Certain of the commission's decisions are to be by majority rule, and some by unanimous vote, thus effectively emasculating much of the sentence judge's prior power of independent action under certain circumstances.

Other very significant provisions of the "security and liberty" law concern classification of offenses and consequent impact on the system. The manpower and facilities for trying the most serious cases (*crimes*) in the *Cour d'Assizes*, as envisioned by the law, are insufficient to take care of the number of crimes qualifying for such treatment. Approximately 55,000 offenses committed in 1978 were of this type, whereas it was estimated that facilities were available to try only 2,000 of them.<sup>102</sup> The procedure provided for cases to be tried in the *Cour d'Assizes* was more protective of the rights of the defendant and much slower.<sup>103</sup> The fact finding process preceding trial, was, however, more certain of elucidating all pertinent facts surrounding the case. The French had developed a pragmatic solution, that of *correctionnalisation*—charging the defendant with a lesser included *délit* (or intermediate offense) triable in the *tribunal correctionnel* and subject to a more expeditious procedure,<sup>104</sup> rather than the committed aggravated offense (*crime*).<sup>105</sup>

There were obvious theoretical and practical problems with this approach.<sup>106</sup> By reclassifying a large number of crimes as *délits*, the new law achieves a legal *correctionnalisation*. As a result, the reclassified offense can now be given much more expeditious treatment and trial. Further, by decreasing the penalty provided for many offenses, which to a large extent had become anachronistic, the law makes them triable in the more expeditious *tribunal correctionnel*.<sup>107</sup>

Although there had been some prior exceptions to the general rule

100. See Chemithe & Strasbourg, *supra* note 87.

101. See Law of Feb. 2, 1981, *supra* note 7, arts. 35-36.

102. See Francillon, *supra* note 13, at 10.

103. See note 48, *supra*, and accompanying text.

104. Trials in the *tribunal correctionnel*, which is staffed by three judges sitting without a jury, are usually much more expeditious than those in the *Cour d'Assizes* where nine lay persons sit together with three professional judges to decide the case.

105. See note 48, *supra*, and accompanying text.

106. See Francillon, *supra* note 13, at 10.

107. *Id.*

that the maximum first offender punishment for a *délit* was five years, the new law expands these exceptions.<sup>108</sup> In the process, it decreases the protections afforded persons accused of committing heinous offenses carrying prison terms longer than five years.

### *Protection of Victims of Crime*

French criminal procedure traditionally has shown great concern for the interest of the victim of crime. If the victim wishes, he may himself institute a criminal action,<sup>109</sup> although as a practical matter this usually is not done.<sup>110</sup> However, the availability of the right gives the victim a certain protection against arbitrary inaction on the part of the public prosecutor. Aside from this, and his right to bring a separate civil action, a person directly injured by a criminal infraction may intervene in the criminal proceedings brought by the public prosecutor, and through his attorney, play a very active role both in prosecuting the defendant and asserting his own right to civil damages. Because of a number of factors, including what appears to be lack of confidence in civil proceedings, in France most victims of crime prefer to seek civil relief in criminal proceedings rather than institute separate civil actions.<sup>111</sup> Reflective of the importance of the institution of civil party intervention is the fact that approximately 20 percent of criminal actions prosecuted in Paris a few years ago had a civil party intervenor,<sup>112</sup> and that the majority of automobile personal injury litigation is processed in criminal courts.<sup>113</sup> Rules regulating the procedure are understandably complex, and it is beyond the scope of this article to attempt to set them forth here.<sup>114</sup> It is noteworthy that France's interest in protecting the victim of crime, an interest reflected in recent developments in American law,<sup>115</sup> is the subject of 20 of the 100 provisions of the "security and liberty" law, strengthening and enlarging existing protections. Only those provisions that seem particularly interesting from the standpoint of American law will be noted here.

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108. *Id.*

109. See A. SHEEHAN, *supra* note 1, at 21.

110. Mr. Sheehan reports that only two cases in 1,000 were commenced in this way in Paris in 1970. *Id.* at 22 n.38.

111. See *id.* at 21; Pugh, *Criminal Justice in France*, *supra* note 1, at 12.

112. See A. SHEEHAN, *supra* note 1, at 34.

113. See *id.* at 21 n.31.

114. For a discussion of this procedure, see Larguier, *The Civil Action for Damages in French Criminal Procedure*, 39 TUL. L. REV. 687 (1965). See also A. SHEEHAN, *supra* note 1, at 20.

115. See Pugh, *Ruminations Re Reform of American Criminal Justice (Especially Our Guilty Plea System): Reflections Derived From a Study of the French System*, 36 LA. L. REV. 947 (1976), and authorities cited therein.

The new law makes it possible, under certain circumstances,<sup>116</sup> for the person who claims to have been injured by criminal conduct of the defendant to intervene as civil party in a pending criminal proceeding by the simple expedient of a registered letter, attaching any pertinent documents which he wishes the court to consider. The article contemplates that generally the court will be able to decide the case in the absence of the civil party claimant. If the court deems it necessary, however, it can order a later hearing as to the civil claim where all parties are to be cited to appear.

The new legislation expands the authority of the judge, where he deems it otherwise inequitable, to charge the defendant with part or all of the expenses otherwise chargeable to the intervening civil party.<sup>117</sup> It is contemplated that under this provision the defendant may be assessed such costs as attorney fees of the intervening civil party.<sup>118</sup>

To encourage a defendant to indemnify his victim, the "security and liberty" law, as originally introduced, provided that if on the day of trial (for all but the most serious offenses), the defendant was able to establish that he had indemnified the victim, the maximum possible punishment would be reduced by one-half.<sup>119</sup> The provision was highly criticized<sup>120</sup> as being contrary to the principle of equality before the law and was not adopted. However, in its stead the parliament did adopt a provision that in such cases the fact that a defendant had made reparation could be considered as an extenuating circumstance.<sup>121</sup>

Further, the new law expands state indemnification (authorized in 1977) of certain persons who because of another's criminal act, for which they are otherwise unable to secure redress, are in substantial need.<sup>122</sup> Notably, however, the 1981 law limits its coverage (and that of the earlier law) to French nationals, and to foreigners having a privileged resident status or citizens of a country which has put in effect reciprocal agreements for such victims.<sup>123</sup>

## CONCLUSION

Each country must decide what is for it the appropriate balance be-

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116. The new procedure is available only when the victim claims restitution or damages and interest not to exceed approximately \$2,000. Law of Feb. 2, 1981, *supra* note 7, art. 87; Francillon, *supra* note 13, at 33.

117. Law of Feb. 2, 1981, *supra* note 7, arts. 83 & 91.

118. See Francillon, *supra* note 13, at 33.

119. See *id.* at 35.

120. *Id.*

121. Law of Feb. 2, 1981, *supra* note 7, art. 90.

122. *Id.* art. 98. The protection is extended to victims of theft, fraud, and abuse of confidence.

123. See Law of Feb. 2, 1981, *supra* note 7, art. 99.

tween conflicting interests in protection and privacy, and the writers do not presume to judge whether the French, via the new law, have attained the balance most propitious for them. The past government apparently thought the public would approve the balance struck in the new law. There is much to indicate, however, that the new government will reach a different conclusion.<sup>124</sup> In any event, it is important for us in the United States to know what others are doing in the area of administration of criminal justice and to try to understand why they are making certain decisions, and whether an adaptation of their procedures or institutions would be appropriate in the United States.

Violence is indeed a very real problem both here and in France and cannot be wished away. The underlying problems addressed by the French in the legislative provisions discussed above are also very much present in the United States, and the four general aspects of criminal justice there considered are of great importance and sensitivity here. Reacting to them: (1) The writers are most unwilling for us in the United States to give as much power to governmental authorities as the French have done and we are not willing to abandon the great protective due process safeguards incorporated in our system in the sixties; (2) Although we in the United States need to develop a much speedier system for determining guilt or innocence, one which would not rely so heavily upon plea bargaining, the authors are unwilling to embrace procedures as speedy as the new French legislation envisions; (3) There is a compelling need in the United States for reform measures relative to sentencing and corrections, and here America may learn much from a study of the French experience before and after the "security and liberty" law; (4) Although not enthusiastic about state indemnification of victims, the writers feel that our society should concern itself much more with the problems of victims of crime.<sup>125</sup>

The American criminal justice system is inefficient and ineffective. The writers are confident,<sup>126</sup> however, that many changes can be effected without significant alteration in the essential balance previously struck between protection and privacy. Although we suspect that the rate of

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124. See interview of the present Minister of Justice of France, Monsieur Robert Badinter, *Le Monde* Aug. 28, 1981, at 1, reprinted in English in *The Guardian*, Sept. 13, 1981, at 12.

125. For a general elaboration of these views, see Pugh, *Ruminations Re Reform of American Criminal Justice (Especially Our Guilty Plea System): Reflections Derived From a Study of the French System*, 36 *LA. L. REV.* 947 (1976); Pugh & Rademaker, *A Plea for Greater Judicial Control Over Sentencing and Abolition of the Present Plea Bargaining System*, 42 *LA. L. REV.* 79 (1981).

126. See authorities cited in note 125, *supra*. See also Rubin, *How We Can Improve Judicial Treatment of Individual Cases Without Sacrificing Individual Rights: The Problems of the Criminal Law*, 70 *F.R.D.* 176 (1976).

violent crime is affected much more by socio-economic factors than by changes in the criminal justice system, clearly our society should be willing to make the changes that can be made without compromising fundamental principles.<sup>127</sup> It is very dangerous indeed to tamper with basic freedoms, and in the writers' opinion, ill-advised if less radical measures would suffice.

The leaders of the Bar — both prosecution and defense-minded — are familiar with the values imbedded in the great traditions of the American criminal justice system. Before embracing radical reforms that alter the basic balance between protection and privacy, we should work together to effect changes within our traditions. If our profession does not, changes may be made that do not comport with the ideals of our system.

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127. As an illustration of the sometime inability of the criminal law to control individual conduct, in 1962, reflecting the society's great concern over the spread of marijuana use among the state's teenagers, an act was passed by the Louisiana legislature which provided, *inter alia*, that anyone over the age of 21 convicted of "selling, giving, administering, or delivering" a "narcotic drug" (which by definition included marijuana) to someone under the age of 21 should, at the discretion of the jury, be sentenced either to death or 30 to 99 years imprisonment "without benefit of parole, probation or suspension of sentence." LA. R.S. 40:981 amended by Act No. 80 of 1962. The following year the statute was amended to provide that a first offender would not be deprived of "the benefits of parole, probation and suspension of sentence." Act, No. 60 of 1963. It is suspected that these harsh penalties did not have great effect on decreasing the prohibited act and in 1972 the law was relaxed. The death penalty was removed and the penalty of life imprisonment was provided for persons over the age of 25 who distributed any narcotic drug (which by definition included marijuana) to anyone under the age of 18. 1981 La. Act No. 634.

