

# The Saga of Wiretapping in France: What It Tells Us About the French Criminal Justice System

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# The Saga of Wiretapping in France: What It Tells Us About the French Criminal Justice System

Edward A. Tomlinson\*

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## I. INTRODUCTION

On July 10, 1991, the French Parliament enacted a Wiretapping Act which for the first time subjected wiretapping to significant statutory

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limitations.<sup>1</sup> The Act's purpose was to protect "the secrecy of messages transmitted by way of telecommunications."<sup>2</sup> That secrecy could henceforth be intruded upon only by public authorities acting in accordance with the law. The Act itself, however, broadly authorizes wiretapping for both law enforcement and national security purposes. Law enforcement wiretapping is permissible if authorized by an examining magistrate during a formal judicial investigation of designated offenses. National security wiretapping, on the other hand, does not require any judicial authorization, but only the approval of the Prime Minister who must report any wiretaps to an independent three-member commission of two legislators and of a chair named by the courts.

The Wiretapping Act, which had the support of all the major political parties, also received a warm academic response. The leading commentators celebrated the triumph of the principle of legality. The law now controls and legitimizes a necessary protective measure that had previously lacked an adequate textual basis and whose functioning had not

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1. Loi n° 91-646 of July 10, 1991, reprinted in 1991 *Juris-Classeur Périodique* [J.C.P.] Textes 312-15. *Juris-Classeur Périodique*, also known as *La Semaine Juridique*, is one of the three principal reporters in France. The others are *Dalloz-Sirey* [D.S.] and the *Gazette du Palais* [G.P.]. These unofficial reporters appear weekly and publish a collection of statutes, cases (with accompanying critical notes by leading jurists), and short articles (called *chroniques* or *études*).

2. Article 1(1) of the Act. The new Act does not define "télécommunications" (translated telecommunications) but evidently relies on the definition found in Article 32(1) of the Postal Service and Telecommunications Code. That article defines "télécommunications" to cover the "transmission, sending, or reception of signs, signals, writings, pictures, sounds, or information of any kind by wire, optic, radioelectric or other electromagnetic system." That definition, albeit broad, does not cover what Americans call electronic eavesdropping: the planting of a hidden recording device or bug. The Act's protections, therefore, plainly do not apply to electronic eavesdropping. *Cf. Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507 (1967) (bugging of telephone booth subject to Fourth Amendment restrictions). Whether the Act covers hidden bugs which also transmit is more problematic, but that coverage seems unlikely given Article 20's exclusion of broadcasting from the Act's coverage. For an analysis of the Act's coverage, and criticism of the broadcasting exclusion, see Pierre Kayser, *La loi n° 91-646 du 10 juillet 1991 et les écoutes téléphoniques*, 1992 J.C.P. *Etudes* 3559.

The phrase "écoutes téléphoniques," translated as "wiretapping," best defines the Act's coverage, although it is not found in the Act itself. Professor Kayser and other French commentators have used that phrase to identify the Act. It therefore seems appropriate to refer to the new statute as the Wiretapping Act.

Official wiretapping is widespread in France. A leading authority estimates that several hundred judicially ordered wiretaps are in place at any given time and that each year approximately 3000 persons have their conversations intercepted by national security wiretaps. Jean Pradel, *Un exemple de restauration de la légalité criminelle: le régime des interceptions de correspondances émises par la voie des télécommunications* (*Commentaire de la loi n° 91-646 du 10 juillet 1991*), 1992 D.S. *Chroniques* 49.

been subject to adequate safeguards.<sup>3</sup> France's satisfaction is in large part warranted because, as will be seen, the Act does significantly protect privacy by injecting new constitutional and human rights norms into a criminal justice system which has often been hostile to such intruders. But satisfaction also seems a bit excessive, given the Act's incomplete reception of those new norms. Particularly troubling is the Act's failure to impose any meaningful limitations on the examining magistrate's or prime minister's discretion to order wiretaps. Still more troubling, although not the subject of this article, is the Act's conferring on an executive official (the Prime Minister) the authority to intercept private communications for national security purposes.<sup>4</sup>

This article relates the story behind the Wiretapping Act's enactment. Its focus will be on law enforcement wiretapping. Relating that story serves at least two important purposes. First, it gives us a basis for evaluating the operation of the French criminal justice system. That system's response to wiretapping as an investigatory tool tells us something, when compared to our own system's response, about whether the French system is one that Americans should wish to emulate. On the whole, the comparison reflects favorably on America's system. Second, it gives Americans a perspective on the principal catalysts for legal change now operating in France, a country whose legal system belongs to the civil law tradition. Among that tradition's more prominent features are statutory codification and the model of the judge as a civil servant.<sup>5</sup> That combination has by no means prevented statutory innovation or judicial lawmaking, but it has slowed the pace, and perhaps even reduced the incidence of change.

In recent years, French law has evolved remarkably on account of the emergence of new legal institutions external to the traditional legal system. Those institutions have prompted change by introducing new legal norms that the legislature and regular courts<sup>6</sup> must take into account. This phenomenon is readily apparent in the wiretapping saga.

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3. In addition to Pierre Kayser's and Jean Pradel's commentaries, *supra* note 2, see the casenote by Wilfrid Jeandidier in 1992 J.C.P. Jur. No. 21795 (expressing more mitigated enthusiasm for the new law).

4. In this country, wiretapping is a search requiring judicial authorization. The executive branch has no authority to wiretap on its own for national security purposes. See Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-1811 (1988) and *United States v. United States Dist. Court*, 407 U.S. 297, 92 S. Ct. 2125 (1972).

5. On the distinctiveness of the civil law tradition, see John Henry Merryman, *The Civil Law Tradition* (2d ed. 1985). On French judges, see John Bell, *Principles and Methods of Judicial Selection in France*, 61 S. Cal. L. Rev. 1757 (1988).

6. The "regular" or "judicial" courts must be distinguished from the separate system of administrative courts which decide most noncriminal cases involving the government and a private party. The courts, i.e., the regular or judicial courts, decide civil cases between private parties and criminal cases.

The French criminal courts and Parliament acted to restrict wiretapping only because of external pressures from France's new Constitutional Council and from Europe's new Court of Human Rights. That response may end for the time being the wiretapping saga, but there are still many other aspects of French criminal procedure whose conformity to the supposedly superior norms pronounced by those two bodies remain in grave doubt.<sup>7</sup>

#### A. *Emergence of External Legal Norms*

Change occurs slowly in the domain of French private law. In the United States, the two hundred year plus Constitution has contributed greatly to the country's stability. Constitutions in France have not lasted nearly as long. According to the most authoritative count, the present 1958 Constitution establishing the Fifth Republic is the fifteenth since the French Revolution of 1789.<sup>8</sup> Stability in France has come more from the five great Napoleonic Codes enacted between 1804 and 1810: the Civil, Penal, Commercial, Civil Procedure, and Criminal Procedure codes. They have survived from one political regime to another, thus contributing greatly to France's internal stability. Amendments have become more frequent in recent years, as has the adoption of special codes subjecting certain specialized areas, such as leases or employment contracts, to a different body of rules than those found in the general Civil Code. The Parliament also enacted a new Code of Criminal Procedure in 1959, but the basic concepts governing criminal procedure still derive from the Code promulgated by Napoleon.<sup>9</sup>

Codes, both new and old, are of course subject to interpretation, and French jurists have long rejected the myth that judges do not create law in interpreting and applying statutory texts. Case law is important in France, and sometimes the judges' interpretations evolve into fixed formulas which in effect supersede the original statutory texts.<sup>10</sup> But fixed or settled interpretations<sup>11</sup> develop gradually over time and require

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7. The *garde à vue*, for example.

8. Charles Debbasch & Jean-Marie Pontier, *Les Constitutions de la France* (1983).

9. Jean Pradel, *L'instruction préparatoire* n° 24 at 39 (1990). Professor Pradel views the new Code as continuing the "overall design" of the 1808 Code and rejecting more radical reforms proposed after the Second World War. See also Serge Lasvignes and Marcel Lemonde, *Le procès pénal en France*, in Mireille Delmas-Marty, *Procès pénal et droits de l'homme. Vers une conscience européenne* 61-73 (1992).

Parliament also adopted a new Penal Code in early July 1992. See *Le Monde*, July 9, 1992, at 9.

10. For the story of how this occurred with respect to the principal tort sections of the Civil Code, see Edward A. Tomlinson, *Tort Liability in France for the Act of Things: A Study of Judicial Lawmaking*, 48 *La. L. Rev.* 1299 (1988).

11. The French term is *jurisprudence constante*, "constante" meaning settled and "jurisprudence" meaning case law.

a consensus for recognition; rarely are they the product of bold action by an individual judge. Once established, however, the courts' formulaic interpretations of statutory texts have a greater constraining force than do precedents in American law. This conservatism is not surprising given the civil service mode of judging predominant in France. In accordance with that model, most French judges graduate from a special magistrates' school during their twenties and continue their careers on the bench until retirement. Such a system favors consensus and stability over individual achievement and creativity.<sup>12</sup>

In recent years, the pace of legal change within the French legal system has accelerated at an astonishing rate; the leading scholar of the civil law tradition has even used the word "revolution" to describe the situation.<sup>13</sup> The French legal system has been a relatively closed judicial system, based on Codes and interpretative case law supplied by the regular courts. It is now undergoing a process of constitutionalization at the domestic level and federalization at the European level. This process includes the creation of new, controlling norms by institutions external to the regular court system, norms which the regular courts must subsequently ingest in some fashion.<sup>14</sup> The effects of this recent and complex process have only begun to be felt.

#### B. Constitutional Norms

The injection of constitutional norms into the French legal system is a comparatively recent phenomenon. Until 1958, the legislative power of Parliament was absolute and judges had no authority to invalidate laws enacted by the legislature. Constitutional texts, such as the 1789 Declaration of the Rights of Man and of the Citizen, were intended to inspire the people and to guide the legislature but were not considered to be legally enforceable. It was believed that the people's representatives expressed the general will through their enactments and that the judges were only to execute those laws.

This basic tenet of the French Republican tradition suffered a setback in the 1958 Constitution which founded the Fifth Republic after DeGaulle's return to power in May, 1958. Articles 56-63 of that Constitution created

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12. The best book on French judges is Daniel Soulez Larivière, *Les juges dans la balance* (1990). The author, a French lawyer, much prefers the American model of future judges actively pursuing a legal or even a political career before ascending to the bench. He disparagingly labels the French civil service model as the "military" model. See also Bell, *supra* note 5.

13. John Henry Merryman, *How Others Do It: The French and German Judiciaries*, 61 S. Cal. L. Rev. 1865, 1868 (1988).

14. Professor Merryman also considers "decodification"—the French Parliament's enactment of special codes to cover discrete subject matter areas—to be part of the "revolution." *Id.*

a new body called the Constitutional Council and gave it the authority, among other matters,<sup>15</sup> to determine the conformity with the Constitution of a law passed by Parliament but not yet promulgated by the President.

The Council played a relatively modest role during the first thirteen years of its existence. No one had in fact expected it to accomplish very much. The Gaullists who drafted the new Constitution created it primarily to protect from Parliamentary infringement the autonomous lawmaking power which they conferred on the executive. Statutes that unconstitutionally invaded the executive's prerogatives were thus the intended targets of the Council's scrutiny. This limited role came to an abrupt end in 1971, when the Council invoked for the first time a right granted to private persons by the Constitution (in that case the liberty of association) to find unconstitutional a law enacted by the Parliament.<sup>16</sup> This decision inaugurated constitutional review in France; henceforth, the Council has scrutinized newly enacted laws under an ever-expanding "block" of constitutional norms.<sup>17</sup> In doing so, it has functioned more and more like a court with a specialized case load of constitutional cases. Its other responsibilities have diminished in importance,<sup>18</sup> and it has proceeded in a somewhat more adversarial fashion in reviewing statutes for constitutionality.<sup>19</sup> It has even become so bold as to pro-

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15. See *infra* note 18.

16. Judgment of July 16, 1971, Con. const., 1972 D.S. Jur. 685, noted in Louis Favoreu & Loic Philip, *Les grandes décisions du Conseil constitutionnel* 237 (6th ed. 1991). This often cited casebook contains the lead decisions of the Constitutional Council along with extensive accompanying commentary. For the best and most thorough account in English of constitutional review's arrival in France, see James Beardsley, *Constitutional Review in France*, 1975 Sup. Ct. Rev. 189.

17. This "*bloc de constitutionalité*" covers not only the text of the Constitution but also the 1789 Declaration of Rights and the Preamble to the 1946 Constitution (both explicitly reaffirmed in the 1958 Constitution). As if that were not enough, it also includes an amorphous category of "fundamental principles recognized by the laws of the Republic." The Council's 1971 decision included the liberty of association among those fundamental principles, even though the more individualistic Declaration of Rights made no mention of it.

18. Those responsibilities include determining the winner of contested elections and "delegalizing" statutes whose provisions belong in regulations. The latter function, bizarre even to the French, reflects the Council's original role of keeping separate the legislative and executive spheres.

19. The Council's procedures for deciding cases are still strikingly different from those of the United States Supreme Court. There are no briefs or oral arguments. A law's challengers invoke the Council's jurisdiction by letter; all subsequent submissions are in writing. The Council's inquiry into constitutionality seems more inquisitorial than guided by the parties. See Louis Favoreu & Loic Philip, *Le Conseil constitutionnel* 24-26 (3d ed. 1985); Bernard Poullain, *La pratique française de la justice constitutionnelle*, 50-65 (1990).

nounce that "enacted law expresses the general will only when it respects the Constitution."<sup>20</sup>

A 1974 amendment to the Constitution greatly enlarged the opportunities for the Council to exercise its new review function. The original 1958 Constitution only authorized four persons to invoke the Council's jurisdiction: the President of the Republic, the Prime Minister, and the Presidents of the National Assembly and the Senate. If none of the four acted, which could easily occur if all four supported the law or were of the same political persuasion, then no constitutional review would take place. The 1974 amendment, proposed by then President Valéry Giscard d'Estaing, also allowed a group of either sixty Deputies or sixty Senators to invoke the Council's jurisdiction. That amendment thus permits a law's opponents, usually from opposition parties, to challenge the constitutionality of allegedly repressive legislation sponsored by the government. As a result, most major legislation enacted since 1974 has undergone constitutional review. The Council's many determinations of unconstitutionality have been respected; no law has been promulgated by the President until it has been first either cleansed of any unconstitutional provision, or amended to conform to the Constitution.<sup>21</sup>

The Council's review of statutes for constitutionality nevertheless remains subject to a major limitation: it only operates to determine the constitutionality of a law in the abstract before its promulgation. Once promulgated, a statute cannot be challenged before the Council by the individuals to whom it applies. Statutory law thus remains free from challenge except during a narrow window of vulnerability between a law's passage and its promulgation. Laws which have survived that process, and laws which were never subjected to it (e.g., laws promulgated prior to 1974 or 1958), must be applied by the regular courts.

This anomalous situation prompted President François Mitterrand, in July 1989, to propose amending the Constitution to allow private parties in cases before the regular or administrative courts to raise what the French call the "exception of unconstitutionality." If a party's exception satisfied certain minimal criteria, the court would refer it to the Constitutional Council for a determination of whether the challenged

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20. Judgment of August 23, 1985, Con. const., in Favoreu & Philip, *supra* note 16, at 644 (paragraph 27 of the *Second New Caledonia* decision).

21. Perhaps the Council's most controversial decision was its finding unconstitutional the Nationalization Act of 1982. That Act was the centerpiece of the new Socialist government's legislative program. The Socialists, who had just won both the presidential and legislative elections, complied with the decision, albeit somewhat noisily, by enacting a new law providing the additional compensation to property owners required by the Council's interpretation of the Constitution. Judgment of January 16, 1982, Con. const., as reported with notes in Favoreu & Philip, *supra* note 16, at 470.



statute was in conformity with the Constitution. This proposal for constitutional review of legislation in concrete cases prompted a vigorous popular and parliamentary debate. However, the debate died due to political infighting which prevented the National Assembly and the Senate from agreeing on a common text as is required by the amendment process.<sup>22</sup>

The incompleteness of France's system of constitutional review is thus readily apparent. Constitutional norms are superior to legislative norms, but the means for injecting the former into the criminal justice system are limited. No one doubts that the Constitutional Council is the ultimate arbiter of what the Constitution means, and its decisions, according to Article 62(2) of the Constitution, "bind all public powers and all administrative and judicial authorities." But how do those decisions affect judges in criminal cases when they are asked, not to interpret the Constitution, but to apply the law? The answer is not easy because the system of constitutional review and the criminal justice system are separate, water-tight compartments. Constitutional norms may be superior, but there is no system of hierarchical review for imposing them on a system which expects the judge to apply legislative ones.

### C. European Human Rights Norms

The injection of European human rights norms into the French criminal justice system has faced fewer obstacles. The European Convention on Human Rights,<sup>23</sup> which protects a wide range of political and civil rights, went into effect in 1953, but France did not ratify it

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22. For an analysis of what happened, see François Luchaire, *Une réforme constitutionnelle différée: Le contrôle de la saisine du Conseil constitutionnel sur renvoi des juridictions*, 1990 *Revue du Droit Public* [R.D.P.] 1625; Louis Favoreu, *L'élargissement de la saisine du Conseil constitutionnel aux juridictions administratives et judiciaires*, 1990 *Revue Française de Droit Constitutionnel* [R.F.D.C.] 581. Professor Luchaire's article reproduces the text of the Socialist government's proposal which limited the exception of unconstitutionality to challenges based on "fundamental rights" (whatever those might be).

23. The Convention is an outgrowth of the Council of Europe. The Council was founded in 1949 to achieve greater unity among its members through "common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms." Article 1(b) of the Statute of the Council of Europe, signed at London on May 5, 1949. Membership on the Council is open to states who "accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms." Article 3. As of March 1992, the Council had twenty-six members, including three new members from Eastern Europe (Czechoslovakia, Hungary and Poland). See 13 *H.R.L.J.* 131 (1992). Twenty-four members (all but Hungary and Poland) had ratified the Convention. *Id.*

The Council of Europe is thus distinct from the European Community (the Common Market) which now has twelve members.

until 1974. That ratification, however, assured its direct applicability in France with an authority superior to that of statutory law. This occurred as a result of Article 55 of the French Constitution, which provides that "treaties or accords duly ratified or approved have, from the moment of their publication, an authority superior to that of statutes, under the condition, for each accord or treaty, of its application by the other party."<sup>24</sup> Thus, the French Parliament incorporated the Convention into French law by ratifying it in 1974.<sup>25</sup> Parties could thereafter invoke it before the French courts.

The preference given by Article 55 to duly ratified treaties over statutes, and the problem of how to enforce that hierarchy of norms, have generated considerable controversy in France. The Constitutional Council has the authority to determine the conformity of a treaty with the Constitution,<sup>26</sup> but does not have the authority to determine the conformity of a newly passed law with a prior treaty.<sup>27</sup> That control has therefore fallen to the regular (judicial) and administrative courts which have assumed it with considerable reluctance. Their hesitancy is understandable, given the anomaly of denying those courts the authority to review a statute for compliance with the national Constitution but of recognizing their authority to review it for compliance with an in-

24. In France, most treaties require legislative ratification. Ratification is mandatory if the treaty modifies existing statutory law. Article 53 of the French Constitution.

25. Gerard Cohen-Jonathan, *La Convention européenne des droits de l'homme* 251 (1989); François Terré, *Introduction générale au droit* n° 181 at 160 (2d ed. 1991). The reciprocity limitation in Article 55 does not apply to multilateral conventions containing their own enforcement mechanisms.

26. The Council may determine the constitutionality of a treaty either when it reviews the constitutionality of the law ratifying it or before ratification if the treaty is submitted for its review by the President of the Republic, the Prime Minister, or the President of either the National Assembly or the Senate. For the latter procedure, see Article 54 of the Constitution. President François Mitterrand recently invoked the Article 54 procedure with respect to the Treaty of Maastricht establishing the European Union. The Constitutional Council, as expected, found that ratification could not occur unless the Constitution was first amended in a number of important respects. Judgment of April 9, 1992, Con. const., 1992 J.C.P. Jur. No. 21853 note Nguyen van Tuong. The necessary amendments were duly ratified on June 13, 1992. François Luchaire, *L'Union européenne et la Constitution*, 1992 R.D.P. 933, 980-81 (text of amendments). Among the amendments adopted was one allowing either sixty deputies or sixty senators to invoke the Article 54 procedure. This amendment, although not necessary for ratification, evidently compensated for an oversight ("oubli") suffered at the time of the 1974 amendment. At that time, the Constitution was amended to allow sixty deputies or sixty senators to challenge newly enacted laws only. *Le Monde*, *supra* note 9.

27. Judgment of January 15, 1975, Con. const., 1975 J.C.P. Jur. No. 18030 note Bey; 1975 D.S. Jur. 529 note Léo Hamon; Favoreu & Philip, *supra* note 16, at 286 (abortion decision). In that case, the Constitutional Council refused to determine the conformity of a law legalizing abortion with Article 2 of the European Convention on Human Rights (right to life article).

ternational treaty. It is nevertheless now clear, at least in theory, that both the regular courts<sup>28</sup> and the administrative courts<sup>29</sup> should, in cases of conflict between a treaty and a statute (even a statute promulgated subsequent to the treaty's ratification), apply the treaty and not the statute. The court does not invalidate the statute in such a case, but merely refuses to apply it by "separating" it from the proceeding in which the court applies the treaty.<sup>30</sup>

This controversial enforcement of treaty norms over legislative ones has mainly occurred as part of France's integration into the European Community. While these developments also affect the European Convention of Human Rights, it still seems most far-fetched to imagine a court refusing to apply specific articles of the Code of Criminal Procedure because the Convention provides superior authority in the hierarchy of norms. That phenomenon may occur someday, but until now the infusion of human rights norms has not come from such a blatant assertion of the Convention's superiority. Rather, it has come on account of the Europe-based machinery established by the Convention for articulating and enforcing the human rights norms. It is the effective functioning of that machinery, which includes many compromises built into the system to cushion its impact on the sovereignty of the contracting parties, that has made meaningful the collective guarantee of basic human rights found in the Convention and its protocols and has, in the words of one leading commentator, "severely shaken up" the French criminal justice system.<sup>31</sup> The European human rights experience must be judged a success, but as will be seen, the injection of human rights norms into the previously self-contained French criminal justice system remains both complex and incomplete.

The machinery for enforcing the Convention's collective guarantee of human rights contains three major components: the European Commission on Human Rights, the European Court of Human Rights, and the Committee of Ministers.<sup>32</sup> Both the Court and the Committee may

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28. Judgment of May 24, 1975, Cass. ch. mix., 1975 D.S. Jur. 497 conclusions Touffait; 1975 J.C.P. Jur. No. 18180 bis conclusions Touffait (*Cafés Jacques Vabre* decision).

29. Judgment of October 20, 1989, Conseil d'état, 1989 J.C.P. Jur. No. 21371 conclusions Patrick Frydman; 1990 D.S. Jur. 135 note Paul Sabourin (*Nicolo* decision). The full Council of State recently applied *Nicolo* to "separate" a subsequently enacted statute to make way for a European Community directive. Judgment of February 28, 1992, Conseil d'état ass. plén., 1992 J.C.P. Jur. No. 21859 note Gérard Teboul (*Rothmans* decision).

30. Terré, *supra* note 25, n° 164 at 147 (discussing *Nicolo* decision).

31. Renée Koering-Joulin, *La phase préparatoire du procès pénal: grandes lignes de la jurisprudence européenne*, in Delmas-Marty, *supra* note 9, at 47.

32. The summary which follows derives mainly from P. van Dijk & G.J.H. van

make binding decisions on whether there has been a violation of the Convention. The Court is an independent judicial body which has developed over the years a substantial body of case law interpreting the Convention. Its judges, normally one from each of the states that have ratified the Convention, serve nine-year terms and usually decide cases in panels of seven. The Committee, on the other hand, is a political body whose members (foreign ministers or their delegates) answer to their respective governments. Neither the Court nor the Committee may decide a case until it has undergone screening by the Commission, an independent but nonjudicial body charged with reviewing complaints of human rights violations. The Commission, also composed of one member from each contracting state, first determines whether an application<sup>33</sup> filed with it satisfies certain minimal conditions for admissibility. If it does, the Commission investigates the application's merits, attempts to reach a friendly settlement of the dispute, and, if no solution is possible, submits a report to the Committee of Ministers stating "its opinion as to whether the factors found disclose a breach by the State concerned of its obligations under the Convention."<sup>34</sup> Within three months of the report's transmission to the Committee, the Commission or a contracting state may bring the case to the Court for decision.<sup>35</sup>

The Convention recognizes two categories of applicants: contracting states (interstate cases under Article 24) and individuals who claim to be victims of human rights violations (as defined by the Convention) by contracting states (individual petition cases under Article 25). Both categories of cases broke new ground in the enforcement of international norms, a preserve traditionally left to states acting on behalf of their nationals. Not only did the Convention recognize the right of individual petition, but it also allowed a contracting state to become an applicant even if the interests of its own nationals were not at stake. These innovations naturally aroused concern, as did the Court's authority to render binding judgments. The Convention therefore made the right of individual petition and the compulsory jurisdiction of the Court optional clauses that the contracting states did not automatically accept merely

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Hoof, *Theory and Practice of the European Convention on Human Rights* (2d English ed. 1990); Mark W. Janis & Richard S. Kay, *European Human Rights Law* (1990). For the official text of the convention, see *Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, Eur. T.S. No. 5.

33. Commission practice substitutes the more descriptive word "application" for the word "petition" found in the English version of Article 25. van Dijk & van Hoof, *supra* note 32, at 38.

34. *Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, Eur. T.S. No. 5, art. 31(1) [hereinafter *Convention*].

35. *Id.* at Article 48. A contracting state may act only if it was an applicant or a respondent before the Commission or if one of its nationals was the alleged victim of the violation.

by ratifying the Convention. This compromise, although essential for the Convention's initial adoption, has gradually lost much of its significance as one by one all twenty-four contracting states have accepted the right of individual petition (article 25(1)) and the compulsory jurisdiction of the Court (article 46(1)). France, for example, recognized the compulsory jurisdiction of the Court when it ratified the Convention in 1974, but did not accept the right of individual petition until 1981 and then only for an initial period of five years.<sup>36</sup>

The optional clauses, now accepted by all the contracting states, have in fact played a crucial role in the Convention's enforcement. From the Convention's adoption until the end of 1988, the Commission received a mere seventeen applications from contracting states (involving only six different situations) but more than 10,000 individual applications. The Commission found 590 of these applications admissible, including all the interstate ones.<sup>37</sup> Unless settled, those cases result in a Commission report to the Committee of Ministers. At that point, the individual applicant cannot invoke the Court's jurisdiction,<sup>38</sup> and the respondent state often has little interest in exposing itself to a potentially unfavorable judgment. In recent years, however, the Commission's practice has been to bring before the Court most cases in which the Commission has found a violation.<sup>39</sup> That change, prompted in large part by concerns about the Committee's adequacy as a decisional body,<sup>40</sup> has greatly increased the Court's work load. The Court, which had decided only 147 cases by the end of 1988,<sup>41</sup> decided 235 cases by the end of 1990 and 39 cases (all commenced by individual application) during the first nine months of 1991 alone.<sup>42</sup> In Court proceedings, the Commission functions largely as an *amicus curiae*, presenting its view on the facts

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36. For the list of adhesions to Articles 25(1) and 46(1), see Council of Europe, European Commission on Human Rights, *Stock-taking on the European Convention on Human Rights Supplement 1988* 84 (1989) [hereinafter *Stock-taking*]. Most adhesions are for three or five year periods only. France most recently adhered to both optional clauses on September 25, 1989, for a period of five years.

37. See *Stock-taking*, *supra* note 36, at 93-102.

38. Protocol 9 to the Convention, recently approved by the Council but not yet ratified by the requisite number of states, allows the individual applicant to invoke the Court's jurisdiction, subject to preliminary screening by a three-judge panel. 12 H.R.L.J. 51 (1991).

39. van Dijk & van Hoof, *supra* note 32, at 138-39; Janis & Kay, *supra* note 32, at 44.

40. The Committee has developed no independent interpretive role. All too often it either ratifies what the Commission proposes, or does nothing because stymied by the requirement that two-thirds of its members (sixteen members) must agree to find a violation. van Dijk & van Hoof, *supra* note 32, at 204-06.

41. *Id.* at 157.

42. 12 H.R.L.J. 65, 352 (1991). The Court has not decided an interstate case since 1978.

and the law. Individual applicants, previously allowed to communicate to the Court only through the good graces of the Commission, now may appear before the Court through counsel.<sup>43</sup> This growth of the Court's decisional role has had, as will be seen, an increasingly significant impact on French law.

## II. THE FRENCH CRIMINAL JUSTICE SYSTEM

The French are no more satisfied with their criminal justice system than Americans are with theirs. High on the list of complaints are the slowness and complexity of the process, problems which are no doubt aggravated by the limited (and often decrepit) means at the system's disposal. Another frequent complaint is that the system is too politicized and the judges are not sufficiently independent. These familiar themes reappear in the report recently submitted by the prestigious Delmas-Marty Commission to the Minister of Justice.<sup>44</sup> That report, however, focused on a quite different complaint about the system: the inadequate protection afforded individual liberty. That focus makes the report particularly relevant in the wiretapping saga. But before presenting that saga it is necessary to describe the history and present problems of a criminal justice system which I think you will find quite different than the American system.

### A. *The Investigation of Offenses in France: A Brief History*<sup>45</sup>

To understand the scope and allocation of investigatory powers under French law, it is first necessary to know a bit of history. Modern history in France begins with the Revolution of 1789 and Napoleon, and it was before the latter's Council of State in 1808 that drafters of the original Code of Criminal Procedure (then called the Code of Criminal Investigation or *Code d'instruction criminelle*) adopted the basic principle of

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43. Janis & Kay, *supra* note 32, at 90.

44. The Committee's official name is *La Commission justice pénale et droits de l'homme* (The Commission on Criminal Justice and the Rights of Man). Its chair, from whom it takes its name, is a well-known law professor named Mireille Delmas-Marty. The Minister of Justice Pierre Arpaillange appointed the Committee in 1988, and it submitted its final report in June 1990. Commission justice pénale et droits de l'homme, *La mise en état des affaires pénales 1991* [hereinafter *La Mise en état*]. That report focuses on the pretrial phase (*la mise en état*) of criminal cases. In France, the pretrial phase is considerably more important than it is here. See note 110 *infra* for further details on the lesser importance traditionally afforded the trial stage.

45. The standard treatises on French criminal procedure contain extensive material on the investigation of offenses. The best, and most comprehensive, works are Roger Merle & André Vitu, *Traité de droit criminel. Procédure pénale* (4th ed. 1989) and Gaston Stefani et al., *Procédure pénale* (14th ed. 1990). On judicial investigations conducted by examining magistrates, see the magisterial work by Pradel, *supra* note 9.

separating the prosecution of an offense from its investigation. The new Code thus assigned to the imperial prosecutor the authority to initiate a prosecution—normally by requesting the opening of a judicial investigation, or *instruction préparatoire*, of facts believed to constitute an offense; but it entrusted to a judge (or judges) the actual gathering of proofs and the determination of their sufficiency to put a named defendant on trial. Thus was born the examining magistrate, or *juge d'instruction*, soon dubbed by Balzac the most powerful man in France.<sup>46</sup> The magistrate's investigation, triggered by a prosecutor's petition<sup>47</sup> charging named persons or, more likely, persons unknown, was to be secret, written and nonadversarial—a purely inquisitorial process which did not recognize suspects as having any rights.<sup>48</sup>

Today, the examining magistrate's investigatory authority remains quite broad, but the judicial investigation is no longer purely inquisitorial due to the recognition of certain rights of the defense. The rights of the defense derive primarily from an 1897 statutory reform which drew a distinction between ordinary witnesses and an accused. As presently codified, these provisions require the magistrate to notify formally an accused of his right to counsel and to grant that counsel access to the investigatory file at least forty-eight hours before an interrogation. The interrogation then takes place in counsel's presence.<sup>49</sup> The term "accused" has a functional definition covering all "persons against whom there exist grave and concordant indications of guilt."<sup>50</sup> Once suspicion

46. The exact source of this familiar aphorism remains undiscovered. Balzac did glowingly describe the examining magistrate's power:

Aucune puissance humaine, ni le roi, ni le garde des sceaux, ni le premier ministre ne peuvent empiéter sur le pouvoir d'un juge d'instruction. Rien ne l'arrête. Rien ne le commande. C'est un souverain soumis uniquement à sa conscience et à la loi. Honoré de Balzac, *Splendeur et misères des courtisanes*.

47. Today a crime victim may also trigger a judicial investigation by petitioning an examining magistrate to open one. Proc. Code art. 85. But the 1808 Code did not explicitly authorize any such procedure, and the courts only gradually recognized this right of private prosecution. Pradel, *supra* note 9, n° 214 at 228 n.39. That approach received legislative confirmation in the 1958 Code.

All citations to the 1958 Code of Criminal Procedure, except where otherwise noted, refer to Gerald L. Kock & Richard S. Frase, *The French Code of Criminal Procedure* (1988). Their excellent translation belongs to the American Series of Foreign Penal Codes. For the 1993 amendments to the Code (not taken into account in this article), see *infra* note 220.

48. Pradel, *supra* note 9, n° 13 at 27-28; Merle & Vitu, *supra* note 45, n° 326 at 383-84. For a comprehensive account of the adoption of the 1808 Code of Criminal Investigation, see Adhemar Esmein, *A History of Continental Criminal Procedure* 462-567 (1913 Simpson translation).

49. Proc. Code arts. 114-18.

50. *Id.* art. 105.

of guilt so focuses on an individual,<sup>51</sup> the magistrate must formally accuse that person and may no longer interrogate the person incommunicado without recognizing any right to counsel, as magistrates may do in the case of other witnesses summoned by them to their chambers.

Under the present Code, the magistrate's investigatory authority broadly includes "all acts of investigation he deems useful to the manifestation of the truth."<sup>52</sup> In particular, the Code authorizes the magistrate to search for and seize evidence (articles 92 to 97), to summon and question witnesses (articles 101 to 113), to interrogate and confront with witnesses the accused, subject to the rights of the defense (articles 114 to 121), to detain an accused pending trial (articles 137 to 150), and to designate experts for the resolution of technical questions (articles 156 to 169-1). The magistrate's discretion to designate experts and summon witnesses is total. More surprisingly, the magistrate's authority is similar with respect to searches and seizures because there are no probable cause or particularity requirements limiting the scope of the magistrate's search or what may be seized.<sup>53</sup>

In addition, the magistrate need not perform these investigatory acts personally but, except for interrogating an accused or confronting an accused with witnesses, may delegate them to the police by issuing a rogatory commission (articles 151 to 154). The commission must designate the offenses which the police are to investigate, but may leave to their discretion what investigatory acts to perform, i.e., what places to search or what proofs to seize.<sup>54</sup> Such a general rogatory commission, authorizing the police<sup>55</sup> to investigate in any fashion they wish a designated offense or offenses, gives them the same broad discretionary powers enjoyed by the examining magistrate.<sup>56</sup> However, the rights of the defense apply to protect an "accused," and the term "accused" has the same functional definition to bar the police from interrogating any person (and not just one formally accused) against whom there exist

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51. Article 105's test for identifying an "accused" closely resembles the now abandoned focus test articulated in *Escobedo v. Illinois*, 378 U.S. 478, 490-91, 84 S. Ct. 1758, 1765 (1964).

52. Proc. Code art. 81(1).

53. Even Professor Frase admits that the examining magistrate "has almost complete discretion to select places to be searched and things to be seized." Richard S. Frase, *Introduction, in The French Code of Criminal Procedure* 14 (1988). Special regulations apply to dwelling searches—sometimes referred to in France as the "common law" (*droit commun*) of search and seizure—but these provisions only restrict nighttime searches and mandate the presence during the search of homeowners or other observers. Proc. Code arts. 57, 59, and 95.

54. Merle & Vitu, *supra* note 45, n° 369 at 431-32.

55. Police here means judicial police. *See infra* note 62.

56. Proc. Code art. 152(1). But only the magistrate can confront an accused with witnesses or interrogate an accused.



"grave and concordant indications of guilt."<sup>57</sup> Needless to say, this focus test is often the subject of manipulation by police officers who simply close their eyes to evidence which incriminates the person whom they wish to interrogate.

The justification advanced in 1808 for separating prosecuting from investigating was the fear of executive authority. Those functions had melded considerably during the revolutionary period. There was much sentiment, provoked by recent bad experiences with demagogic prosecutors and with the popular juries introduced by the revolutionaries, for a return to Louis XIV's Ordinance of 1670, which had recognized the predominant role of professional judges.<sup>58</sup> Ironically, the chief spokesperson for this point of view was the Archchancellor Cambacérés, a former member of the Convention who had voted for the death of Louis XVI in 1793 but who was then happily ensconced as Napoleon's right-hand man charged with administering on a daily basis the affairs of the Empire. According to Cambacérés, if the imperial procurator was able to investigate offenses, he "would be a little tyrant who would make the city tremble. . . . All the citizens would shudder if they saw in the same official the power of accusing them and that of bringing together proofs that might justify his accusation."<sup>59</sup> Later, Cambacérés asked rhetorically: "Who would not shudder to see a single official, invested with such inquisitorial power, invade his home?"<sup>60</sup>

This distrust of prosecutors, or at least of prosecutors with too much power, explains the origins of the judicial investigation. This distrust motivated the drafters of the 1808 Code even though French prosecutors were then (and still are) judicial officers of sorts, called *magistrats débout* (standing judges) to distinguish them from the *magistrats du siège* (sitting judges) who do not stand when they speak in court. The judicial label attached to prosecutors may confer a certain dignity on the office, but it does not confer independence because French prosecutors remain hierarchically subordinate to their superiors, up to and including the politically appointed Minister of Justice.<sup>61</sup>

Conferring on examining magistrates a monopoly of investigatory powers proved to be an unworkable idea. The drafters themselves recognized that the urgency of certain situations might justify the gathering of proof by prosecutors or by members of the judicial police acting

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57. Proc. Code art. 104.

58. The above account follows Esmein, *supra* note 48. For a somewhat more favorable portrayal of revolutionary justice, see Robert Badinter, *Une autre justice 1789-99* (1989).

59. Quoted in Esmein, *supra* note 48, at 502-03. See Pradel, *supra* note 9, n° 10 at 24, for part of the French text and the identity of the speaker.

60. Esmein, *supra* note 48, at 504.

61. Merle & Vitu, *supra* note 45, n° 186 at 238 (citing an 1810 decree as well as present authority).

under their supervision.<sup>62</sup> According to Cambacérès, there was no "disadvantage" to the imperial procurator gathering the proofs if there were "a capture in the act" of the offender.<sup>63</sup> This criterion of flagrancy, of capturing an offender red-handed, justified in his opinion an immediate reaction, but the 1808 Code explicitly authorized the judicial police to investigate, prior to the opening of a judicial investigation, only for offenses that were infamous ones.<sup>64</sup>

This police authority to investigate flagrant offenses has gradually expanded over time; the 1958 Code explicitly extends it—under the rubric of *enquête de flagrancy*—to cover all but the least serious category of offenses, the equivalent of petty misdemeanors in America. During the investigation of a flagrant offense, an officer of the judicial police may seize any means, instrumentalities, or evidentiary items found at the scene of the offense (article 54), detain persons found there until fully securing the site (article 61), search dwellings and other places for evidence (articles 56-59), seize any papers or other incriminating evidence found (article 56), question any person (article 62), and detain persons for up to twenty-four hours, renewable for an additional twenty-four hours by the prosecutor (article 63—the notorious *garde à vue*). As in the case of the examining magistrate, the judicial police have total discretion as to whom to question, where to search, and what to seize. In particular, the only standard restricting their detention power (the *garde à vue*) is "the exigency of the inquiry."<sup>65</sup> The rights of the defense do not apply, and they may even question as a witness (i.e., incommunicado and without counsel) a person against whom there exists grave and concordant indications of guilt.

The time span during which the judicial police may exercise these coercive powers, supposedly limited by the criterion of urgency, has received a liberal interpretation. The police may open an investigation of a flagrant offense not only if they catch an offender red-handed, but also if they discover an offense within several hours after its commission. More importantly, the investigation may continue indefinitely; termination does not occur with the passage of any particular period

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62. Traditionally, French prosecutors have been more directly involved in the work of the police than have their American counterparts, but the Delmas-Marty Commission found wanting the supervision actually exercised today. La mise en état, *supra* note 44, at 164-66. That supervision primarily affects those police officers formally recognized as having "judicial" or law enforcement responsibilities, i.e., officers of the judicial police (OPJs for those familiar with Georges Simenon's many novels about *le commissaire Maigret*). See Merle & Vitu, *supra* note 45, n° 204 at 260; Edward A. Tomlinson, *Nonadversarial Justice: The French Experience*, 42 Md. L. Rev. 131, 157-58 (1983).

63. Quoted in Esmein, *supra* note 48, at 504.

64. Merle & Vitu, *supra* note 45, n° 268 at 320.

65. Proc. Code art. 63.

of time but only when there has been a "notable break" in the investigatory process<sup>66</sup> or when the prosecutor requests an examining magistrate to investigate.<sup>67</sup> Plainly, urgency is no longer the justifying criterion for this variety of police investigation. What justifies police action is the discovery of external signs of a recent offense. Such an offense is "flagrant" in the sense of "glaringly evident."<sup>68</sup> What the police discover in plain view thus normally authorizes them to initiate their own investigation.<sup>69</sup>

The drafters of the 1808 Code, in addition to recognizing the need for the nonjudicial investigation of flagrant offenses, also recognized that some offenses might not need to be investigated at all, or at least not need to be the subject of a protracted judicial investigation. The Code therefore gave the prosecutor, except for the most serious offenses, the authority to charge defendants directly before the trial courts. The exercise of this power has always caused knotty problems in France. It is uniformly accepted that not all offenses require the formality of a judicial investigation. Often the facts are either clear and not readily disputable, or so simple and straightforward as not to warrant the delay of an intermediate investigatory phase between the prosecutor's initial charging decision and trial. But in those cases, who was to perform whatever limited investigation was necessary and how could the system assure the defendant's presence at trial, since only an examining magistrate had the authority under the Code to order a person's arrest or pretrial detention?

On the latter question, the French have tried a great variety of solutions; the most recent one, found in 1983 amendments to the Code, permits prosecutors to bring defendants charged by them promptly before the trial court (*la comparution immédiate*) and authorizes, for the first time, trial judges to detain defendants pending trial if an immediate trial is not possible and if some form of pretrial detention is appropriate.<sup>70</sup> On the former question, the police responded by informally investigating offenses even though they did not satisfy the criterion of flagrancy. This practice found no explicit support in the 1808 Code,

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66. Gaston Stefani et al., *supra* note 45, n° 302 at 388. See also Merle & Vitu, *supra* note 45, n° 264 at 318 (suggestion of three to four day limit found in third edition deleted); Judgment of Jan. 27, 1987, Cass. crim., 1988 D.S. Jur. 179 note B. Darolle (investigation may continue after arrest of offenders).

67. The opening of a judicial investigation automatically terminates any police investigation and subjects the judicial police to the examining magistrate's control. Proc. Code art. 14(2).

68. This justification for the police investigation of flagrant offenses has been advanced, but found wanting, by the Delmas-Marty Commission. See *La mise en état*, *supra* note 44, at 167-68. For a similar analysis, see Tomlinson, *supra* note 62, at 186-88.

69. For a similar point, see *La mise en état*, *supra* note 44, at 167.

70. Merle & Vitu, *supra* note 45, n° 252 at 305-06.

which had separated the prosecution from the investigation of offenses, but the evident necessity of some mechanism by which prosecutors could inform themselves to determine whether to bring charges before either a trial court or an examining magistrate encouraged its development as an "extralegal" practice, i.e., one neither authorized nor explicitly condemned by the Code.<sup>71</sup> These advantages convinced the French Parliament to legitimize the preliminary police investigation (now called the *enquête préliminaire*) in the 1958 Code of Criminal Procedure. This infringement on the separation principle was justified in part by the absence of coercive powers given the police during a preliminary investigation. But this justification suffered one striking exception: Article 78 of the new Code gave officers of the judicial police conducting a preliminary investigation the same authority to detain persons (the *garde à vue*) previously authorized only for the investigation of flagrant offenses. I will return to this provision, whose validity is most doubtful under the new external norms recently applied to wiretapping.

#### B. The Present Debate Over the Judicial Investigation of Offenses

The above described infringements on the examining magistrate's former near monopoly of investigatory powers have certainly contributed to a decline in that figure's importance.<sup>72</sup> But one should not exaggerate the decline. There remain six hundred examining magistrates in France who conduct approximately 70,000 judicial investigations annually.<sup>73</sup> The latter figure has remained relatively constant over recent decades,<sup>74</sup> but there is little question that the percentage of criminal prosecutions that include a judicial investigation has dropped sharply, perhaps as sharply as from twenty to ten percent of all prosecuted cases, according to the Delmas-Marty Commission.<sup>75</sup> Those statistics, however, only tell part of the story because those offenses which are the subject of a judicial investigation are the most serious ones (homicides, armed robberies, etc.) or the most difficult ones to investigate (white collar offenses and cases of political corruption). The examining magistrate therefore still plays an important role in the French criminal justice system.

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71. Guy Denis, *L'enquête préliminaire* (1974).

72. Tomlinson, *supra* note 62, at 150-55.

73. Pradel, *supra* note 9, at 11.

74. Jean Pradel, *De la réforme de l'instruction préparatoire*, 1989 D.S. Chroniques

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75. La mise en état, *supra* note 44, at 130. In his treatise, Professor Pradel, on the other hand, reports there is a judicial investigation in only one percent of all criminal prosecutions, but his statistics plainly include prosecutions for many petty offenses in which a judicial investigation is unthinkable. Pradel, *supra* note 9, at 11. In the 1830s, by contrast, nearly one-half of all criminal cases were the subject of a judicial investigation. *Id.*

The judicial investigation's survival as an institution is nevertheless today very much at issue in France. The institution's critics have emphasized two interrelated points: the delays caused by the excessive formality and complexity of the procedure and the marginal utility of the magistrate's investigatory role. These criticisms are interrelated because the cumbersomeness of a judicial investigation, attributable in part to the rights afforded the accused in the process, encourages prosecutors to utilize the judicial police as much as possible to investigate and to delay opening a judicial inquiry until the police encounter some obstacle that only an examining magistrate can overcome, e.g., the need to detain a suspect beyond the forty-eight hours authorized for the *garde à vue* or to conduct a wiretap or other search that only a magistrate can authorize. Once the examining magistrate does enter the picture, the judicial investigation itself is often no more than a repeat of what the judicial police have already done.<sup>76</sup> In the debate over their survival, the examining magistrates have not always helped their own cause. In several well-publicized cases, they have stumbled badly by accusing the wrong person or by violating the secrecy of the process, errors generally attributed to the inexperience or excessive zeal of the young magistrates involved.<sup>77</sup>

The proposed responses to these ailments have called into question the traditional principle of separating investigation and prosecution. Even Professor Pradel, a former examining magistrate and the leading authority on judicial investigations, favors abandoning the principle. He argues that prosecutors, who have the judicial police under their supervision, are more qualified to investigate than judges, who should intervene only in politically sensitive cases or when individual liberty is at stake. According to Professor Pradel, the prosecutor's superior qualifications have already warped the present system by causing investigatory power to flow towards the prosecution; assigning full investigatory re-

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76. Pradel, *supra* note 74. The repeat performance may benefit the prosecution because an investigatory file prepared by an examining magistrate is likely to carry more weight at trial than official police reports prepared during a police investigation. As will be seen later, a French criminal trial, while oral and adversarial in theory, still relies quite heavily on the *dossier* compiled during the investigatory stage. Thus the importance of a magistrate's work product, which is likely to command greater respect than mere police reports.

77. The French Parliament in 1985 responded to the problem of magisterial blundering by imposing the principle of collegiality on the judicial investigation, thus trimming the wings of "the most powerful man in France." Henceforth, investigatory chambers (three judges) were to replace the single examining magistrate. This reform proved too costly, and Parliament repealed it before its actual implementation. See Merle & Vitu, *supra* note 45, nn<sup>o</sup> 334-35 at 392-94.

sponsibility to the prosecutor would thus bring the law more into accord with present practice.<sup>78</sup>

The Delmas-Marty Commission took the attack on the separation principle one step further. Not only did the Commission treat the prosecutor as the more qualified investigator, but it also found an incompatibility between the examining magistrate's investigatory and judicial functions. How could the magistrate impartially decide questions of individual liberty when "the very logic of investigating requires him to construct hypotheses on the guilt of some and the innocence of others."<sup>79</sup> In addition, the magistrate's impartiality was impeded by the prosecutor's excessive involvement in the process. The prosecutor, unlike the accused's counsel, enjoys continuous access to the investigatory file (the *dossier*) and may immediately challenge, before the indictment division of the Court of Appeals (the *chambre d'accusation*), the magistrate's refusal to order an investigatory act (e.g., a search) requested by the prosecutor.<sup>80</sup> This prosecutorial power to orient a judicial investigation's course violated what the Commission believed to be a basic principle: the parties to a proceeding should stand on an equal footing.<sup>81</sup>

The Commission's proposed solution was to abolish the present hybrid procedure by assigning to prosecutors full investigatory responsibility and to truly impartial judges (i.e., ones who do no investigating) the control of "all decisions affecting individual liberties (the liberty to come and go, privacy, etc.)."<sup>82</sup> The latter proposal would surely change present practice more than the former; the present system already features much prosecutorial investigation, but it provides very little judicial control over intrusions on individual liberty or privacy. Prior judicial approval is not necessary for particular searches or seizures. Most searches and seizures occur during a police investigation of a flagrant offense or under a general rogatory commission issued by an examining mag-

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78. Pradel, *supra* note 74. Interestingly, Professor Pradel also proposed that the examining magistrate preside over an adversarial procedure at the end of the prosecutor's investigation to determine whether a suspect should stand trial. He envisioned that a sort of "plea bargaining" could become part of the process, thus replacing the formal prohibition in French law on both guilty pleas and plea bargaining.

79. La mise en état, *supra* note 44, at 129.

80. *Id.* at 128.

81. *Id.* at 98, 121. Interestingly, the Commission based this principle, which it originally called, somewhat provocatively, "an equality of arms," on Article 6-1 of the European Convention on Human Rights, which guarantees to a criminal defendant "a fair and public hearing." The European Court of Human Rights has interpreted that language to require an "equality of arms." J.E.S. Fawcett, *The Application of the European Convention on Human Rights* 154 (2d ed. 1986). (The Delmas-Marty Commission never explained how Article 6-1 might apply to the pretrial or investigatory stage of a criminal case.)

82. La mise en état, *supra* note 44, at 115.

istrate. In both cases, it is the judicial police, in the former case operating under the prosecutor's supervision, who decide what places to search and what persons or things to seize. Their discretion is nearly absolute, subject to no significant after-the-fact review by the courts.<sup>83</sup> Of course, the police must observe the statutory formalities applicable to dwelling searches and to the *garde à vue*. Those formalities provide significant safeguards to victims of police intrusions, but limit in no way the police's initial decision to intrude. That decision, according to the Delmas-Marty Commission, properly belongs to a judge who must, according to the Commission, either authorize the intrusion in advance or, if the urgency of the situation precludes that control, approve it after the fact.<sup>84</sup>

### C. *The Special Problem of Wiretapping as an Investigatory Tool*

Wiretapping received no mention in either the 1808 or the 1958 Code and very little judicial attention until a widely known 1953 decision by the Court of Cassation (the *Imbert* decision).<sup>85</sup> Strictly speaking, that decision did not involve wiretapping at all because there was no interception or recording of a telephone conversation. Rather, the judicial police, acting under a rogatory commission to investigate certain designated bribery offenses, recruited one of the victims to telephone the prime suspect (*Imbert*) and to pose him questions drafted in advance by the police. The suspect, against whom there existed grave and concordant proofs of guilt, obligingly incriminated himself while the judicial police listened on an extension telephone (the *écouteur*). This surreptitious interrogation of a person who was without counsel and was entitled to be treated as an accused plainly violated what is now Article 105 of the Code. But the court chose a much broader ground for its decision and overturned *Imbert's* conviction because the police had obtained his confession by a ruse or artifice in violation of the general principle of fairness and of the rights of the defense.<sup>86</sup>

This decision cast a considerable pall over wiretapping, especially wiretapping of an accused during a judicial investigation. Did not the surreptitious interception of telephone conversations also constitute an unfair ruse or artifice that caught the speaker by surprise? If that speaker were an accused, did not the interception constitute an interrogation in violation of the statutory provisions affording the accused various procedural rights, including the right to counsel? The Court of Cassation

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83. Tomlinson, *supra* note 62, at 172.

84. La mise en état, *supra* note 44, at 191-93.

85. Judgment of June 12, 1952, Case. crim., 1952 J.C.P. Jur. No. 7241 note J. Brouhot (the *Imbert* decision). The judgment also appears, with commentary, in 2 Jean Pradel & André Varinard, *Les grands arrêts du droit criminel* 98-102 (2d ed. 1988).

86. See Tomlinson, *supra* note 62, at 176-81.

left those questions unresolved, until in 1980 it finally found legal the wiretapping of an accused's home telephone ordered by an examining magistrate.<sup>87</sup>

A major intervening statutory change made still more difficult the argument for wiretapping's legality. In 1970, the French Parliament recognized for the first time a statutory right of privacy. This Privacy Act<sup>88</sup> added a new Article 9 to the Civil Code which vaguely proclaimed that everyone had the right to the respect of one's private life. More specifically, the Act also added a new Article 368 to the Penal Code which protected private conversations by punishing, among other things, "listening, recording, or transmitting by means of any device whatever words pronounced in a private place by a person without that person's consent" if "done with intent to infringe on the intimacy of another's private life." This criminalization of both wiretapping and electronic eavesdropping contained no explicit exception for law enforcement activities. During the Parliamentary debate, the Minister of Justice had affirmed that the new provisions in no way affected the examining magistrate's authority to wiretap, but this interpretation did not find its way into the text, nor did the Minister identify the source of that authority.

Law enforcement wiretapping thus remained in limbo at best.<sup>89</sup> Perhaps the strongest argument for its legality, or at least for its consistency with the new Privacy Act, was the narrow coverage of Article 368 itself. That article was by no means a general prohibition of tapping and bugging; it only protected conversations in private places and only punished interceptions which intentionally invaded the "intimacy of another's private life." Under that statutory standard, wiretapping and electronic eavesdropping are illegal if used to uncover information about a person's sexual life or personal finances, but are permissible, at least under Article 368, if done for purposes of spying on a person's business or political activity.<sup>90</sup> This limitation on the article's coverage makes less anomalous the recognition of a similar exception for law enforcement wiretapping.

The Court of Cassation's 1980 *Tournet* decision did not address explicitly the applicability of Article 368 of the Penal Code to inves-

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87. Judgment of October 9, 1980, Cass. crim., 1981 J.C.P. Jur. No. 19578 note Gaëtan di Marino and 1981 D.S. Jur. 332 note Jean Pradel (the *Tournet* decision).

88. Loi n° 70-643 of July 17, 1970. For commentary on this act, see Robert Badinter, *La protection de la vie privée contre l'écoute électronique clandestine*, 1971 J.C.P. Doctrine 2435. Then Professor Badinter is now president of the French Constitutional Council.

89. In addition to Professor Badinter's commentary, *supra* note 88, see also Raymond Lindon, *Les dispositions de la loi du 17 juillet 1970*, 1970 J.C.P. Doctrine 2357.

90. For the limited coverage of Article 368, see Pierre Kayser, *La protection de la vie privée* (1984) (analyzing the text and case law interpreting it).



tigatory wiretapping but it did resolve the questions left open by its 1952 *Imbert* decision. In *Tournet*, the examining magistrate had issued a rogatory commission specifically ordering the judicial police to tap Tournet's home telephone. The magistrate had already formally accused Tournet of forgery and had ordered his detention pending trial but had then released him conditionally shortly after issuing the commission. The commission contained no time restrictions; and the judicial police executed it by tapping Tournet's telephone during a period of four days, roughly two weeks after his conditional release. The wiretap recorded Tournet's incriminatory statements which became part of the magistrate's investigatory file. On Tournet's pretrial appeal, the Court of Cassation found no error in the examining magistrate's refusal to exclude that evidence.

The *Tournet* court concluded that Article 81 of the Code of Criminal Procedure gave the magistrate legal authority to wiretap. That article generally authorized the magistrate to accomplish all investigatory acts useful for the discovery of the truth. The courts had consistently interpreted it to authorize the magistrate to order the seizure of private letters and other correspondence from the postal services even though the Code of Criminal Procedure was as silent on the seizure of mail as it was on wiretapping; the articles in the Code authorizing searches and seizures during a judicial investigation only covered the searches of private places to seize documents and other tangible things.<sup>91</sup> If magistrates could seize private letters despite those limitations, then surely they also had the authority to intercept oral communications.<sup>92</sup> In addition, the court found that in the present case the interceptions had occurred without employing any ruse or artifice and without interrogating the accused in violation of his statutory right to counsel. In so concluding, the court accepted the reasoning of the academic writers who had argued that a ruse or artifice required some positive act by the police, such as disguising their identity to obtain a statement or interposing a false friend to break down the accused's reticence, and that an interrogation required a give and take of questions and answers between the magistrate, or someone acting on his behalf, and the accused.<sup>93</sup> Merely intercepting an accused's statement to a third party was neither an unfair stratagem nor an interrogation.

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91. See especially Proc. Code arts. 95 and 96.<sup>1</sup>

92. This reasoning by analogy did not appear in the *Tournet* court's spartan judgment which contained, as is customary, no reasons at all to support its conclusions. The analogy had been fully developed by doctrinal writers whose reasoning the court plainly accepted. For the development of the analogy, see especially Paul-Julien Doll, *De la légalité de l'interception des communications téléphoniques au cours d'une information judiciaire*, 1965 D.S. Chroniques 125.

93. For a comprehensive review of the academic writing, see di Marino's lengthy

The *Tournet* decision pretty well settled the legality under French domestic law of wiretapping ordered by an examining magistrate. It left unexplained the inapplicability of the new Privacy Act<sup>94</sup> and left unstated what restrictions, if any, limited the magistrate's discretion in wiretapping. But everyone assumed what the *Tournet* court surely assumed: the Privacy Act did not apply to wiretapping authorized by law and the magistrate could tap any telephone he chose, for as long a period of time as he chose, so long as he did not use any ruse or artifice or violate the rights of the defense. Better still, the magistrate could delegate those choices to the judicial police by issuing a general rogatory commission under Article 151 of the Code of Criminal Procedure. That delegation had not occurred in *Tournet* (the magistrate had specifically ordered the tapping of Tournet's telephone); but it was conceded by all that the magistrate could lawfully delegate to the judicial police the choice of which dwellings to search. That rule appeared readily extendable to permit the police to choose what telephone lines to tap. The only meaningful restrictions on that choice were the rights of the defense. That general principle of law appeared to preclude the interception of conversations between an accused and his counsel<sup>95</sup> and to impose special rules on searches (including wiretaps) of lawyers' offices.<sup>96</sup>

### III. THE WIRETAPPING SAGA

The *Tournet* decision did not culminate as expected the wiretapping saga but opened a decade of feverish activity caused primarily by the introduction of external norms into a previously closed system. These

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note on the *Tournet* decision cited at *supra* note 87. Professor di Marino, however, was generally critical of the court's conclusions. Professor Pradel, on the other hand, was quite favorable.

94. The Paris Court of Appeals addressed that issue several years later and concluded that Article 368 of the Penal Code did not apply to wiretapping authorized by an examining magistrate. The court, in a rather unusual step, actually quoted in its judgment large portions of the legislative history of the 1970 law. Judgment of June 27, 1984, Paris Court of Appeals, 1985 D.S. Jur. 93 note Jean Pradel. The courts had found a similar exception in Article 187 of the Penal Code which explicitly punishes public officials who destroy or open mail. Kayser, *supra* note 90, n° 235 at 272.

95. Commentators on *Tournet* all agreed that intercepting telephone communications between an accused and counsel raised special concerns. The Court of Cassation has consistently condemned a magistrate's seizure of correspondence between an accused and counsel, and just recently forcefully extended that ban to the interception of oral communications by wiretapping. Judgment of April 15, 1991, Cass. crim., 1992 J.C.P. Jur. No. 21795 note Wilfrid Jeandier.

96. Article 56-1 of the Code of Criminal Procedure bans physical searches of lawyers' offices unless performed personally by an examining magistrate in the presence of a bar official. Courts would surely, by analogy, apply a similar rule to the tapping of a lawyer's telephone. The Wiretapping Act does so by adding a new Article 100-7 to the Code of Criminal Procedure.

new norms contributed to the Court of Cassation's 1989 condemnation of wiretapping during police (as opposed to judicial) investigations (the *Baribeau* decision) and forced both the Court of Cassation and the French Parliament to impose additional restrictions on wiretapping by examining magistrates. In both instances, the principle source of new norms was the European Human Rights Convention, but norms derived from the French Constitution also played a significant role. In the first instance, a criminal defendant (*Baribeau*) successfully invoked both human rights and constitutional norms before the regular French courts, while in the second instance a victim of judicially ordered wiretapping (*Kruslin*) obtained France's condemnation by the European Court of Human Rights. That condemnation pressured the French courts and Parliament to further restrict wiretapping ordered by examining magistrates. These developments no doubt redress somewhat the French criminal justice system's imbalance in favor of law enforcement authority over individual rights. But that rectification is so far rather limited; and what has occurred primarily demonstrates the difficulty of the criminal justice system's integrating new norms when the institutions charged with announcing them have no direct authority to impose them on criminal courts which remain bound by statutory law.

A. *The Court of Cassation Condemns Police Wiretapping: The Baribeau Decision*

The first half of the saga—the Court of Cassation's condemnation of police wiretapping in *Baribeau*<sup>97</sup>—does demonstrate a greater willingness by that court to apply European human rights and constitutional norms. That case's facts bear a striking resemblance to the *Imbert* facts. In *Baribeau*, the judicial police recruited the client of a suspected drug dealer (*Baribeau*) to telephone the suspect from the police station to arrange a drug purchase. The judicial police overheard and recorded the statements made by both parties to the conversation, a fact known to the caller but not to *Baribeau*. No recording had occurred in *Imbert*, but the more significant distinction between the two cases was the stage

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97. Judgment of November 24, 1989, Cass. ass. plén., 1990 J.C.P. Jur. No. 21418 conclusions Emile Robert. The *Baribeau* facts do not appear in the court's barebones judgment but may be found in the recommended conclusions presented to the court by Advocate General Emile Robert. His conclusions, as often occurs in major cases, appear in the unofficial reporter (*Juris-Classeur Périodique*) immediately preceding the text of the court's judgment. For scholarly comment on the decision, all quite favorable, see Jean Pradel, *Écoutes téléphoniques et Convention européenne des droits de l'homme (à propos de Cass. Ass. plén., 24 nov. 1989, affaire Baribeau)*, 1990 D.S. Chroniques 15, and Pierre Kayser & Thierry Renoux, *La Cour de cassation et l'article 66 de la Constitution: à propos de l'arrêt de l'Assemblée plénière du 24 Novembre 1989 sur les écoutes téléphoniques*, 1990 R.F.D.C. 139.

of the proceeding during which the wiretapping occurred. In *Imbert*, the prosecutor had requested an examining magistrate to open a judicial investigation, and the judicial police were operating under a rogatory commission from the magistrate. In *Baribeau*, on the other hand, no judicial investigation of Baribeau's offenses was in progress and the police had no commission authorizing them to investigate. Rather, they were conducting a preliminary, noncoercive police investigation,<sup>98</sup> evidently to confirm whether their suspicions about Baribeau's drug dealings were correct. Baribeau's invitation to the caller to come to his place to get drugs did confirm those suspicions and prompted an immediate police search of Baribeau's dwelling. The search uncovered cocaine. That search occurred, according to the official reports prepared by the police, during a police investigation of a *flagrant* offense. That categorization made the search legal because the judicial police, during such an investigation, may forcibly search for seizable objects wherever they believe they might find them.<sup>99</sup> Of course, the categorization was valid only if Baribeau's incriminating statement that he had drugs for sale provided the external sign required for a flagrant offense.

The process that brought the *Baribeau* case to the full (en banc) Court of Cassation was a protracted one. Subsequent to the drug seizure, the police officers filed their official reports with the prosecutor, who then petitioned an examining magistrate to investigate Baribeau's alleged drug offenses; the prosecution attached the police reports to the petition as required by case law.<sup>100</sup> The examining magistrate next asked the indictment division of the Court of Appeals to exclude the police reports from the investigatory file on the grounds that the police acted illegally in overhearing and recording the telephone conversation.<sup>101</sup> The prose-

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98. This distinction provided the basis for at least two arguments in favor of the wiretapping's legality. First, during a police investigation there is no accused who enjoys the rights of the defense. See *supra* text at note 65. Second, courts have interpreted the fairness principle less stringently in the context of police investigations. Police may use decoys or disguise themselves to investigate incognito, ruses clearly forbidden judges. See Tomlinson, *supra* note 62, at 179. Neither of these arguments ultimately proved persuasive.

99. Proc. Code art. 56(1). Their judgment on where to search and what to seize is not subject to any probable cause requirement. See Tomlinson, *supra* note 62, at 185-88; Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 Cal. L. Rev. 539, 575 n.167 (1990).

100. Pradel, *supra* note 9, n° 207 at 223.

101. Proc. Code art. 171(1). Examining magistrates may not themselves exclude evidence but may ask the indictment division to do so on their own initiative or at the request of a party. The prosecutor (but not the accused) may appeal to the indictment division the magistrate's denial of such a request. If neither the magistrate nor the prosecutor will act, the accused must normally wait until trial to challenge any irregularity in the investigatory file. However, in prosecutions for the most serious offenses (*crimes*), the

cuting attorney assigned to the Court of Appeals supported that request, but the indictment division found no illegality on account of the consent by Baribeau's client to the recording.<sup>102</sup> The prosecuting attorney, now supported by Baribeau, then obtained review in the Court of Cassation, which ultimately heard the case en banc. The full court accepted the recommendation of another prosecuting attorney, the Advocate General Emile Robert, that the indictment division had erred in refusing to exclude the police reports. Robert argued that the police recording of the telephone conversation violated Baribeau's rights under the Convention and that the client's consent was irrelevant—a ruse perpetrated by the police on the unsuspecting Baribeau.

This protracted pretrial maneuvering, not unusual in France, reflects concerns not normally found in the American system: the examining magistrate's concern to cleanse the investigatory file of any irregularities before trial and the prosecuting attorney's concern to serve the law rather than to be the winning party.<sup>103</sup> Prosecutors in America tend to be more adversarial and judges less inclined to act on their own initiative. Defendants also tend to be less self-effacing than the defendant in *Baribeau*. These features make the review process in France very abstract, i.e., more oriented towards formulating correct legal principles than deciding concrete cases. This abstract quality appears in the Court of Cassation's decision in *Baribeau*. The court found the police recording of Baribeau's conversation to be illegal but never addressed why the other party's consent to the recording was irrelevant.

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indictment division (and not the examining magistrate) remands the accused for trial, and the accused may challenge any irregularity in the file only during that body's review of it. The indictment division's decisions on exclusion issues are normally reviewable for legal error prior to trial in the Court of Cassation.

102. The client's consent would make what the police did in *Baribeau* legal under federal law. See *United States v. White*, 401 U.S. 745, 91 S. Ct. 1122 (1971) (no search if a party to a conversation consents to its interception); 18 U.S.C. § 2511(2)(c) (1988) (participant monitoring exception to statutory restrictions on wiretapping and electronic eavesdropping).

103. Prosecutors in France are career civil servants who belong to a professional corps called the *Ministère public* (literally, the Public Ministry). The Ministry's mission is to insure "respect of public order, the protection of the public interest, and the sound application of the law." Roger Perrot, *Institutions judiciaires* n° 301 at 263 (4th ed. 1992). In civil cases, the Ministry's role is normally advisory only; the government retains a private lawyer (*avocat*) if its own property or other interests are at stake. In criminal cases, the Ministry is a party to the proceeding but its function is still to seek the sound application of the law. *Id.* n° 308 at 271. Prosecutors therefore often conclude in favor of granting a defendant relief from a misapplication of the law.

The chief prosecutor attached to each Court of Appeal and to the Court of Cassation is the *procureur général*. Their principal assistants are the *avocats généraux* (advocates general). These positions carry considerable prestige even though their holders remain hierarchically subordinate to the Minister of Justice.

The *Baribeau* court cited four texts to support the exclusion of the wiretap evidence: Article 8 of the European Human Rights Convention, Articles 81 and 151 of the Code of Criminal Procedure, and Article 66 of the French Constitution of 1958. The principal support no doubt comes from Article 8. That text<sup>104</sup> recognizes the right to respect for one's private and family life, home and correspondence. The right is not absolute but, like many of the rights recognized by the Convention, any "interference" with it must be "in accordance with law" and must be "necessary in a democratic society" for the protection of some legitimate interest. Thus, the Convention's text not only defines the right but identifies what limitations ("interferences") contracting states may impose on its exercise. At the time of the *Baribeau* decision, the case law of the European Court of Human Rights treated wiretapping as an interference with Article 8 rights, even though the Court did not specify whether the intrusion affected a person's "private life" or "correspondence."<sup>105</sup> Wiretapping thus violated Article 8 unless authorized by a law necessary to protect legitimate interests in a democratic society. Those interests, as specified in Article 8 itself, include "the interests of national security" and "the prevention of disorder or crime." The Court had previously found that those interests justified a German law authorizing, under tightly controlled conditions, national security wiretapping.<sup>106</sup>

The Court of Cassation in *Baribeau* found that police wiretapping in France did not satisfy the threshold requirement that any interference must be in "accordance with law." After quoting that requirement, the court invoked Articles 81 and 151 of the Code of Criminal Procedure, which it interpreted to permit only an examining magistrate to order, under certain conditions, the overhearing and recording of telephone conversations. That interpretation, with the exception of the word "only," plainly derived from the court's earlier *Tournet* decision which had found in Article 81 the basis for wiretapping ordered by an examining magistrate, including wiretapping done by the judicial police under a rogatory commission issued by the magistrate under Article 151. That

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104. The full text of Article 8 of the Convention, *supra* note 34, reads as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

105. *Klass v. Germany*, 28 Eur. Ct. H.R. (ser. A) (1978); *Malone v. United Kingdom*, 82 Eur. Ct. H.R. (ser. A) (1984); Fawcett, *supra* note 81, at 228-35.

106. *Klass*, 28 Eur. Ct. H.R.

legal authority to wiretap did not help the judicial police in *Baribeau* because they had wiretapped "without having received a rogatory commission for that purpose." The wiretapping therefore was not "in accordance" with law and violated Article 8 of the European Convention on Human Rights.

### B. *The Baribeau Decision's Injection of External Norms*

The full Court of Cassation's invoking the Convention to condemn as a violation of human rights a fairly widespread police practice attracted much favorable scholarly attention.<sup>107</sup> Prior to its *Baribeau* decision, the court had reacted cautiously to claims of Convention violations raised by criminal defendants. No doubt the court, as suggested by a leading treatise on criminal procedure, "drew inspiration from the Convention as interpreted by the European Court of Human Rights,"<sup>108</sup> but it usually found French law or practice to conform with European human rights requirements.<sup>109</sup> The Convention's direct applicability as part of French law thus did not much affect the criminal justice system. This cautious application of the Convention is unlikely to continue now that the full Court of Cassation has so dramatically affirmed the independent, controlling force of norms drawn from it.<sup>110</sup>

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107. See the authorities cited in *supra* note 97.

108. Gaston Stefani et al., *supra* note 45, n° 96 at 103.

109. *Id.* at 104 n.2 (citing criminal cases). For a rare finding of violation, see Judgment of December 5, 1978, Cass. crim., 1979 D.S. Jur. 50 note Stanislas Kehrig.

110. The *Delta* case provides another recent example of how the right of individual petition before the European human rights authorities encourages the Court of Cassation to recognize new human rights norms. *Delta v. France*, 191 Eur. Ct. H.R. (ser. A) (1990). *Delta*, convicted in the Paris correctional court for a purse-snatching in the Metro, challenged the court's refusal to call as witnesses the crime victim and her companion. The Court of Human Rights found a violation of Article 6(1) (fair hearing) and of Article 6(3)(d) (examination of witnesses). Anticipating this condemnation, the Court of Cassation had, shortly before the European Court's judgment, invoked Article 6 of the Convention to reverse a lower court for failing to call witnesses requested by the defendant. Judgment of January 12, 1989, Cass. crim., 1989 Revue Science Criminelle [R.S.C.] 348, 350-51 by Braunschweig (*Randhawa* decision). This new norm is likely to have a significant impact in France where the major event is not so much the trial itself as the preparation of the investigatory file. As blithely described by a practitioner: "[t]he most common practice in correctional court is not to hear publicly the testimony of the witnesses but to rely on their previous statements." Henri Leclerc, *Les limites de la liberté de la preuve. Aspects actuels en France*, 1992 R.S.C. 15, 19. Even for the trial of the most serious offenses in a Court of Assizes, the president often exercises his discretionary power to read aloud, before the mixed panel trying the case, prior statements of uncited witnesses. *Id.* Prior to *Randhawa*, the Court of Cassation found no error in these traditional practices. It now appears they must be changed, at least if the defendant requests the witnesses to be present. See *Cardot v. France*, 200 Eur. Ct. H.R. (ser. A) (1991) (no exhaustion of domestic remedies if defendant did not ask court to call witnesses).

What explains the Court of Cassation's turnabout on the injection of European norms into the French criminal justice system? The most important factor appears to be France's acceptance in 1981 of the right to individual petition. This acceptance allows defendants who have exhausted their domestic remedies to seek relief for Convention violations under the European human rights machinery. At the time of the *Baribeau* decision, a challenge to wiretapping during a judicial investigation brought by an individual applicant named Kruslin was pending before the European Court of Human Rights. That fact was brought to the Court of Cassation's attention by Advocate General Robert who suggested, in the concluding paragraph of his report, that the court might avoid the unfortunate consequences of the Human Rights Court's condemning what the Court of Cassation authorized in *Tournet* by demonstrating "its responsiveness to the demands of Article 8 of the European Convention and that French judges have the capacity to control all possible abuse in this area."<sup>111</sup> As will be seen, the proposed tactic did not avoid France's condemnation in the *Kruslin* case, but the responsive approach adopted by the Court of Cassation in *Baribeau* and subsequent wiretapping cases has limited its effect.

The *Baribeau* judgment presents at least two other striking features: the unexplained reference to Article 66 of the French Constitution and the exclusion from the investigatory file of the illegally obtained evidence. The significance of Article 66 was readily understood by French jurists, and its invocation attracted considerable commentary. On the other hand, the exclusion of reliable evidence of guilt and the likely freeing of a drug dealer attracted no comment at all. This automatic, unquestioned exclusion, based on traditional principles rather than newly arrived external norms, tells us something good for a change about the French criminal justice system. Article 66 of the French Constitution proclaims "the judicial authority" to be "the guardian of individual liberty."<sup>112</sup> Whether that text applies to wiretapping depends on the interpretation given "individual liberty." That phrase's placement in Article 66 favors a narrow interpretation covering only what the French call "personal security," i.e., the freedom from arbitrary detention.<sup>113</sup> Indeed, the article's drafters intended to create a French equivalent of the common law habeas corpus. Such an intent is evident in the first paragraph of Article 66 which declares that no one should be arbitrarily detained. The second paragraph then leaves to statutory law the details of how

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111. See his conclusions in 1990 J.C.P. Jur. No. 21418 (last column).

112. The full text of Article 66 of the French Constitution reads as follows:

No one may be arbitrarily detained.

The judicial authority, guardian of individual liberty, will assure the respect of this principle within the conditions provided by law.

113. Claude-Albert Colliard, *Libertés publiques* 235 (7th ed. 1989).



the judiciary, as "guardian of individual liberty," shall assure respect for that principle. This textual argument has not convinced the Constitutional Council, which interprets individual liberty much more broadly to cover not only personal security but, as summarized by the leading authority on the Council's case law, "the inviolability of the domicile as well as certain components of the right to the respect of one's private life."<sup>114</sup> This extension of individual liberty to cover dwellings, as well as other private places, occurred in a series of widely publicized lead cases,<sup>115</sup> but the Council has not yet had the opportunity to decide what other "components" of privacy will receive similar protection. This silence has not discouraged commentators, who favor treating private correspondence, by mail or telephone, as part of individual liberty.<sup>116</sup> Proponents of that approach received considerable encouragement from the *Baribeau* court's invoking Article 66 as authority in the wiretapping context. The court must have believed that the protection that article gave to individual liberty did apply to private telephone conversations.

The Constitutional Council has also given a broad interpretation to the judiciary's role as the "guardian" of individual liberty. That role requires not only judicial authorization for intrusions on individual liberty but effective judicial control over those intrusions. Thus, in a leading 1983 case (the *Fiscal Searches* decision),<sup>117</sup> the Council declared unconstitutional a statutory provision authorizing fiscal officers to search private places for evidence of tax fraud upon securing an order from the chief judge of the departmental court of general jurisdiction. This holding's innovativeness was not in requiring judicial authorization for the intrusion—the statute already required that, at least for searches of dwellings—but in requiring effective judicial control over searches. The statute was unconstitutional because "it was silent on the possibilities of judicial intervention and control"<sup>118</sup> and "thus left the searches it authorized to the discretion of executive officials who may search even if there is no evidence of any infraction."<sup>119</sup> This failure to subject fiscal searches to any standard turned the judges into rubber stamps unable

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114. Bruno Genevois, *La jurisprudence du Conseil constitutionnel* n° 348 at 209 (1988).

115. *See, e.g.*, Judgment of December 29, 1983, *Con. const.*, 1984 J.C.P. Jur. No. 20160 note Roland Drago & André Decocq (*Fiscal Searches* decision); Judgment of January 12, 1977, *Con. const.*, 1978 D.S. Jur. 173 note Léo Hamon & Jacques Léauté (*Automobile Search* decision).

116. Favoreu & Philip, *supra* note 16, at 359-60 (note to *Automobile Search* decision); Pierre Kayser, *Le Conseil constitutionnel protecteur du secret de la vie privée à l'égard des lois*, in *Mélanges Offerts à Pierre Reynaud* 342-44 (1985). Bruno Genevois adopts a more wait and see attitude. Genevois, *supra* note 114, n° 352 at 214 (1988).

117. For the text of the decision, see Favoreu & Philip, *supra* note 16, at 556-64. Those authors have added the paragraph numbers cited below.

118. *Id.* at 562 (para. 29 of judgment).

119. *Id.* (para. 27 of judgment).

“to verify, in a concrete way, the well-foundedness of the demand submitted to them.”<sup>120</sup> Finally, the statute was deficient because it required judicial approval of the particular place to be searched only for dwelling searches. This limitation suggested that a judge could generally authorize executive officials to search other private places, an interpretation which evidently raised constitutional difficulties in the Council’s opinion.

The *Fiscal Searches* decision’s interpretation of Article 66 put in doubt, as will be seen, the constitutionality of many statutory provisions not before the Constitutional Council. The Delmas-Marty Commission interpreted it to require judicial authorization, or at least after the fact judicial control in cases of true urgency, for all searches and seizures conducted by the judicial police.<sup>121</sup> The Commission exempted from this requirement only the detention of persons for twenty-four hours under a police-initiated *garde à vue*.<sup>122</sup> Implementing its recommendation would, as the Commission acknowledged, require radical changes in French law because no notion of urgency can justify the uncontrolled (at least by judges) coercive power to search and seize exercised by the judicial police during the investigation of flagrant offenses.<sup>123</sup>

The *Baribeau* court’s citation of Article 66 recognized that article’s relevance but left unexplained how it applied. At a minimum, it did support the court’s conclusion that judicially authorized wiretapping was legal but that police wiretapping was illegal. The *Baribeau* court did not address the issue of what authority the police might have to wiretap and how Article 66, as interpreted by the Constitutional Council, might affect that authority. A number of leading commentators believed that the police did have authority to wiretap during the investigation of a flagrant offense even if they did not have such authority (as most everyone agreed) during a preliminary investigation.<sup>124</sup> The basis for that distinction was that the police needed express consent for a search during a preliminary investigation<sup>125</sup> but could search forcibly and without consent during the investigation of a flagrant offense.<sup>126</sup> Overhearing or recording a person’s private conversations without that person’s consent

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120. *Id.* (para. 29 of judgment).

121. La mise en état, *supra* note 44, at 75, 191-93.

122. *Id.* at 206-11.

123. *Id.* at 167-68.

124. Jean Pradel, Procédure pénale n° 295 at 377 (2d ed. 1987); 2 Jean Pradel & André Varinard, Les grands arrêts du droit criminel 103-05, 106 (2d ed. 1988) (note to *Tournet* decision). On the unanimity in condemning wiretapping during a preliminary investigation, see Pradel, *supra* note 97. In the last cited article, Professor Pradel did interpret *Baribeau* to bar police wiretapping during the investigation of a flagrant offense.

125. Proc. Code art. 76.

126. Proc. Code art. 56.

is therefore not permissible in a preliminary investigation but is permissible in the investigation of a flagrant offense if such an interception is sufficiently analogous to the physical searches and seizures for tangible objects authorized by Article 56 of the Code of Criminal Procedure.<sup>127</sup> Such an expansive interpretation of a statutory text to apply to analogous situations is not uncommon in France,<sup>128</sup> but the *Baribeau* court did not adopt that approach. The court plainly condemned police wiretapping during the investigation of a flagrant offense, although no such wiretapping had occurred in the case before it, when it gave as its reason for excluding the evidence that the police had wiretapped "without having received from a judge a rogatory commission for that purpose." The judge, as the guardian of individual liberty under Article 66 of the Constitution, must authorize and control any such intrusion.

The Court of Cassation's citing as authority Article 66 in *Baribeau* and other recent cases<sup>129</sup> does show the court's new found respect for constitutional norms. During the 1970s, the Court thumbed its nose at the Council on three celebrated occasions.<sup>130</sup> The occasion most relevant for our purpose was the *Trignol* decision,<sup>131</sup> in which the Court interpreted the criterion of flagrancy broadly enough to permit the judicial police investigating a kidnapping to search any automobile trunk they wished as long as it was in their territorial jurisdiction. The Constitutional Council had, just two years earlier, held that a statute authorizing the police to search any vehicle they wished violated the individual liberty entrusted by Article 66 to the judiciary's protection. Those days of conflict between the two tribunals now seem ended, but there is still very little the Court of Cassation can do to impose the constitutional norms it is now willing to recognize. Its function, as head of the regular (judicial) court system, is to apply the law. It cannot review a statute for constitutionality, nor refer a case (or a statute) to the Constitutional Council, either at its own initiation or in response to an exception of unconstitutionality raised by a party. At most, the court can do what it did in *Baribeau*: interpret statutes so they conform to the Constitution as interpreted by the Constitutional Council. The court's citation of

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127. Prior to *Baribeau*, case law permitted the judicial police investigating a flagrant offense to intercept mail by ordering postal officials to transmit it to them. See the conclusions of Advocate General Emile Robert in 1990 J.C.P. Jur. No. 21418 (col. 7).

128. See Tomlinson, *supra* note 10, at 1305-10; Robert S. Summers & Michele Taruffo, *Interpretation and Comparative Analysis*, in D. Neil McCormick & Robert S. Summers, *Interpreting Statutes: A Comparative Study* 471-72 (1991).

129. The Court of Cassation cited Article 66 thirty-six times from the mid 1970s to 1989. Kayser & Renoux, *supra* note 97, at 141-42.

130. Louis Favoreu, *La Cour de cassation, le Conseil constitutionnel et l'article 66 de la Constitution*, 1986 D.S. Chroniques 169, 170-71 (describing these three incidents).

131. Judgment of November 8, 1979, Cass. crim., 1980 J.C.P. Jur. No. 19337 note Jean Davia. For discussion of that case, see Tomlinson, *supra* note 62, at 186-94.

Article 66 in *Baribeau* thus signaled its unwillingness to interpret Articles 56 or 77 of the Code of Criminal Procedure to authorize police wiretapping.<sup>132</sup> A more radical infusion of constitutional norms will occur only when the French amend their Constitution to permit the regular courts to certify the question of a statute's constitutionality to the Constitutional Council for determination. President Mitterrand has proposed allowing parties to raise this exception of unconstitutionality, and President Badinter of the Constitutional Council recently endorsed the proposal, but so far nothing concrete has come of it.<sup>133</sup>

### C. *The Baribeau Court's Exclusion of Wiretap Evidence*

The Court of Cassation's exclusion of incriminating evidence of Baribeau's guilt is more difficult to understand than its invocation of Article 66. This difficulty is primarily attributable to the scant attention given the issue. The Court of Cassation adequately explained why the wiretapping was illegal but did not address at all why that illegality required the exclusion both of Baribeau's recorded statement and of the cocaine seized during the search of his dwelling. Advocate General Robert was only slightly more helpful when he concluded that the forcible dwelling search by the police was legal only if the wiretapping provided the necessary evidence of flagrancy. But he did not explain why the wiretapping's illegality tainted any determination of flagrancy and why the illegality of the dwelling's entry required the exclusion of the cocaine. The lack of interest in these remedial questions may be attributable to the old-hat phenomenon, i.e., these results attracted little attention because they flowed from the application of traditional principles rather than from the injection of any new norms. But the lack of controversy over the exclusionary remedy is still surprising.

Prior to the recent arrival of constitutional and human rights norms, the legal protection enjoyed in France against official intrusions on property or privacy was basically statutory. One of the most important statutes is Article 184 of the Penal Code, which punishes for abuse of authority any public official who enters a citizen's dwelling against the latter's wishes.<sup>134</sup> That article explicitly excepts from its coverage unconsented entries "provided for by law." That exception to the inviolability of the domicile recognizes the authority to search without consent

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132. Judgment of January 12, 1977, Con. const., 1978 D.S. Jur. 173 note Léo Hamon and Jacques Léauté.

133. Robert Badinter, *L'exception d'inconstitutionnalité, garantie nécessaire du citoyen*, 1992 J.C.P. Entretien 3584.

134. This prohibition derives from the Penal Code of 1810. It may also be found in the various constitutions of the revolutionary period. Colliard, *supra* note 113, n° 305 at 380.

which the Code of Criminal Procedure gives to the judicial police (for the investigation of flagrant offenses) and to examining magistrates (for judicial investigations). Forcible dwelling searches not in accordance with those procedures are thus criminal under French law. Criminal prosecutions of offending officers are a rarity, but the inadmissibility of any proof obtained through a criminal entry is standard. This exclusionary rule has provoked little controversy in France; the leading treatises on criminal procedure do not clearly state, much less analyze, the basis for it.<sup>135</sup> French jurists simply assume that evidence obtained through a breach of the domicile's inviolability does not belong in an investigatory file.

A recent lead case so ruling (*Gomez-Garzon* decision)<sup>136</sup> involved the search of a hotel room by the judicial police who had learned from a confidential source that the occupant was distributing cocaine. The Court of Cassation suppressed the evidence seized (cocaine and stolen watches) because they found the offense was not a flagrant one which authorized the police to search without consent.<sup>137</sup> On the question of remedy, the court only quoted the accused's conclusion that the police, in the absence of a flagrant offense, "had proceeded illegally with searches and seizures whose nullification is certain." Similarly, the well known law professor (Wilfrid Jeandidier) whose note accompanied the publication of the decision in the unofficial report, said nothing at all about the remedy. His note merely analyzed the various possible criteria for flagrancy and approved the court's test, which required that the officers observe some external sign of the offense. The fact that the offender went free received no attention at all.<sup>138</sup>

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135. Professors Merle and Vitu, for example, say nothing more specific than that "the gathering of proof must be conducted according to correct procedures in harmony with the moral values presently recognized by our civilization." Merle & Vitu, *supra* note 45, n° 130 at 163. Advocate General Michel Jeol stated the exclusionary rule more clearly when he acknowledged that proofs obtained by "dubious" (i.e., criminal) means cannot be used to prove guilt. See his conclusions to Judgment of May 28, 1991, Cass. comm., 1992 D.S. Jur. 122 note René Texidor. In that case Jeol unsuccessfully sought to avoid the rule's application to proofs used to obtain a warrant for a fiscal search.

136. Judgment of May 30, 1980, Cass. crim., 1981 D.S. Jur. 533 note Wilfrid Jeandidier.

137. The police lacked that authority because they had observed no external sign of the offense. A flagrant offense is one that manifests itself to the police; hearsay reports generally do not suffice to establish flagrancy. Tomlinson, *supra* note 62, at 181-83.

138. A partial explanation for this silence may be that *Gomez-Garzon* was not yet a convicted offender when he successfully appealed to the Court of Cassation. The French system largely settles suppression issues prior to trial. Prosecutors favor cleaning the *dossier* of any irregularities before trial and those formally charged often have the opportunity for a pretrial appeal. Thus, the Court of Cassation's decision did not set *Gomez-Garzon* free. He could still be brought to trial on theft and drug charges, but it is unclear how the prosecutor could prove them.

Automatic suppression is not available as a remedy for most illegalities. It occurred in *Gomez-Garzon* because there the police lacked any authority to search. The judicial police had no authority to investigate a flagrant offense and therefore could only search with written consent, which they plainly did not seek. Different rules apply to illegalities which occur during authorized investigations, i.e., judicial investigations or a properly opened police investigation of a flagrant offense. That formality changes the analysis because the judge or the police now have legal authority to investigate. Their investigatory acts are subject to certain restrictions, found in the Code of Criminal Procedure, on the time of the search, the presence of witnesses, the preservation of evidence, the preparation of official reports, etc. Violations of those formalities do not produce automatic exclusion. Rather, they are generally subject to Article 802 of the Code of Criminal Procedure which requires that the party seeking to nullify an investigatory act first establish some prejudice.<sup>139</sup> Courts are reluctant to find sufficient prejudice to nullify an investigatory act by an examining magistrate or the judicial police. That hesitancy disappears when the courts are confronted with a potentially criminal act not part of any lawful investigation.

The facts of *Gomez-Garzon* demonstrate the potential breadth of the automatic suppression rule. There the police search was of a hotel room, but the Court of Cassation afforded the hotel room the same protection that the court would have afforded a dwelling. Indeed, French jurists tend to treat the inviolability of the domicile as part of a still more general principle protecting basic liberty interests.<sup>140</sup> Article 184 of the Penal Code is only one of the more important manifestations of that principle. An analogous statute of similar vintage (article 187 of the Penal Code) punishes public officials who destroy or open private letters, thus recognizing the inviolability of private correspondence. More recently, the French Parliament in 1970 granted similar protection to private conversations. The Privacy Act of that year enacted a new Article 368 of the Penal Code which punishes anyone who "listens, records, or transmits, by means of any device whatever, words pronounced in a private place without the speaker's consent."<sup>141</sup>

Treating the inviolability of the domicile as a basic principle allows courts to reason from it by analogy. Rather than interpret domicile

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139. On the horrendously complex law on the nullification of investigatory acts, see Merle & Vitu, *supra* note 45, nn<sup>o</sup> 476-87 at 549-64. The application of Article 802 has generated much controversy, but it fairly clearly applies to violations of the "common law" of search and seizure described in the text. Those violations rarely prejudice the rights of the defense.

140. Jean Morange, *Libertés publiques* 149-53 (1985); Colliard, *supra* note 113, at 378-79.

141. See note 88 *supra*.

strictly to cover only dwellings, they have afforded similar protection to hotel rooms and even to a suspect's person.<sup>142</sup> As a result, official intrusions on these liberty interests are legal only if authorized by law. Perhaps the most striking example of this approach is the Court of Cassation's 1953 *Isnard* decision.<sup>143</sup> In that case, the court suppressed gambling paraphernalia seized by the judicial police in an unauthorized search of the defendant's person—unauthorized because the judicial police did not observe any external sign to justify opening an investigation of a flagrant offense. Since the police had no authority, absent a flagrant offense, to intrude forcibly on such a basic liberty interest, the court suppressed the evidence seized from the defendant's person and his subsequent confession of guilt prompted by that illegal seizure.

Wiretapping for law enforcement purposes requires a similar analysis. Surely the overhearing and recording of telephone conversations may intrude on a basic liberty interest just as much as a search of the person. In addition, at least since 1970, Article 368 of the Penal Code protects that interest by criminalizing the overhearing, recording or transmitting of private conversations. That article does not address the admissibility of wiretap evidence, nor does it contain any explicit exclusion for wiretapping otherwise authorized by law. But the application of the above basic principles is fairly straightforward. Wiretapping for law enforcement purposes is an illegal intrusion on private life, and wiretap evidence is subject to automatic exclusion, unless the wiretapping—by definition a coercive search—is part of a judicial investigation or police investigation for a flagrant offense. In *Baribeau*, the police had no basis for opening an investigation into a flagrant offense when they recorded Baribeau's conversation. The wiretapping, therefore, was not an investigatory act but a potentially criminal one. Police reports of the crime did not belong in the investigatory file, nor could the prosecutor use them, as he had in the actual case, as the basis for requesting a judicial investigation.

#### D. *The Human Rights Challenge to Judicial Wiretapping: The Kruslin Case*

The second part of France's wiretapping saga focuses on judicially ordered wiretapping and once again demonstrates both the profound effect of new norms on the previously closed system of French criminal justice and the difficulties encountered by the system in absorbing those norms. The saga's unlikely chief protagonist was Jean Kruslin, an unemployed male without fixed abode who evidently supported himself

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142. See *infra* the *Isnard* decision cited in note 143.

143. Judgment of January 22, 1953, Cass. crim., 1953 D. Jur. 533 note Charles Lapp; Judgment of January 22, 1953, Cass. crim., 1953 J.C.P. Jur. No. 7456 report Brouhot (*Isnard* decision).

through armed robberies.<sup>144</sup> Kruslin's persistent pursuit of his human rights claim resulted in France's condemnation by the European Court of Human Rights. That condemnation won Kruslin only 20,000 francs (\$5,000) and not his release from prison, but it did prompt the French Parliament to promulgate a new Wiretapping Act in 1991. However, that Act's conformity with both European human rights norms and French constitutional norms is questionable in several important respects. Those questions are unlikely to be resolved soon because of the limited mechanisms available for raising them.

The *Kruslin* case began in 1982 when an examining magistrate investigating the murder of a banker authorized the judicial police, by rogatory commission, to tap the home telephone of one Terrieux, the prime suspect. The police executed the commission by overhearing and recording seventeen telephone calls over a three day period from June 16 to June 18, 1982. Kruslin was visiting Terrieux at the time and, according to the prosecutor, was a party to several of those telephone conversations. In one of them, the speaker incriminated himself with respect to the robbery and murder of a jeweler presently under investigation by another magistrate. The judicial police submitted their official report of the wiretapping to that magistrate, attaching a transcription of the conversation and the sealed tape itself. The magistrate, after formally accusing Kruslin of the robbery and murder, unsealed and played the tape at a hearing on October 25, 1982, attended both by Kruslin and his counsel. At Kruslin's request, the magistrate then appointed three experts to identify the voice on the tape, which Kruslin denied was his. In their report dated June 8, 1983, the experts could only state with eighty percent certainty that the voice was in fact Kruslin's.

Because of the nature of the charges (murder and armed robbery), only the indictment division of the Court of Appeals could remand Kruslin for trial. The magistrate therefore dispatched the investigatory file for that body's review. On April 16, 1985, it remanded Kruslin for trial, rejecting his request that it rule inadmissible and strike from the investigatory file the recording of the disputed conversation. Kruslin challenged the remand order by appealing to the Court of Cassation, which denied his petition on July 29, 1985. Sixteen months later, on November 28, 1986, a Court of Assize acquitted him of murder but condemned him to fifteen years imprisonment for armed robbery. The Court of Cassation upheld that conviction on October 28, 1987. At no

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144. The facts of Kruslin's judicial odyssey appear fully in the Court of Human Rights decision. *Kruslin v. France*, 176-A Eur. Ct. H.R. (ser. A) (1990). At the same time the Court decided the companion case of *Huvig v. France*, 176-B Eur. Ct. of H.R. (ser. A) (1990).



time during this lengthy process did Kruslin obtain any form of release from confinement.

The Court of Cassation addressed the admissibility of the wiretap evidence on Kruslin's pretrial appeal. Kruslin, confronted with the recent *Tournet* decision upholding the legality under French law of judicially ordered wiretapping, based his challenge to the admissibility of the recording on Article 8 of the European Convention of Human Rights, a ground not invoked by the defendant in *Tournet*. Article 8, as will be recalled,<sup>145</sup> requires that any interference" with "private life" or "correspondence" must be both "in accordance with the law" and "necessary in a democratic society." According to Kruslin, the examining magistrate's interference with the privacy of his telephone conversation was not in "accordance with the law."

Kruslin's human rights challenge posed two major difficulties to the prosecutor, who relied on *Tournet* as authorizing the wiretapping. First, did the term "law" cover not only statutes but also case law? In this instance, the statute (article 81 of the Code of Criminal Procedure) was silent on wiretapping; only the case law (i.e., *Tournet*) authorized it. In cases arising in the United Kingdom, the European Court of Human Rights had interpreted "law" to include "unwritten" or common law,<sup>146</sup> but that accommodation to the common law tradition appeared inapplicable to civil law systems which did not recognize case law as a primary source of law. Second, did French "law," however defined, satisfy the "quality" test imposed by the European Court of Human Rights? That Court, before determining whether an interference with a right protected under Article 8 (or similar article) is "necessary in a democratic society" for the protection of some legitimate interest, reviews the "quality" of the law authorizing the interference.<sup>147</sup> The law must be both "accessible" and "foreseeable." The latter requirement, as interpreted in a wiretapping case from the United Kingdom, "implies . . . there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph 1 [of Article 8]."<sup>148</sup> To prevent abuses, any discretion to interfere with those rights, whether granted to an executive official or to a judge, "cannot be in terms of an unfettered power."<sup>149</sup> Consequently, the law must indicate "the scope of any such discretion conferred on the competent authorities and the manner of its exercise with

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145. See *supra* text in note 104.

146. *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A), at 30 (1979).

147. *Malone v. United Kingdom*, 82 Eur. Ct. H.R. (ser. A) (1984).

148. *Id.* § 67 at 32.

149. *Id.*

sufficient clarity . . . to give the individual adequate protection against arbitrary interferences."<sup>150</sup>

This quality test for law has become an important part of the Court's review of interferences with protected rights; the Court had applied it in 1984 to condemn the United Kingdom's law on wiretapping. Plainly, the Court is more comfortable in determining what legal safeguards must accompany an intrusion than it is in reviewing the necessity for the intrusion itself. That latter question is largely one of opportunity, and the Court's case law leaves each contracting state a certain margin of appreciation in determining its need to interfere with protected rights.<sup>151</sup>

Kruslin's two "in accordance with the law" arguments did not convince the Court of Cassation. In its 1985 judgment,<sup>152</sup> the court cited Article 8 and then faithfully paraphrased the quality test for "law" enunciated by the Human Rights Court. There followed a recitation of the facts of the case and a statement of the applicable law. The latter was no more than a reiteration of what the Court had held in *Tournet*: that Article 81 of the Code of Criminal Procedure authorizes an examining magistrate to wiretap in the course of a judicial investigation for a specified offense, that the judicial police may wiretap under a rogatory commission from a magistrate conducting such an investigation, and that both the magistrate and the police must avoid any ruse or artifice and any intrusion on the rights of the defense. The court thereupon peremptorily concluded that French law complied with the Article 8 norms. That conclusion has a certain magical element to it; the court was saying in effect that this is so because the court said so. The court did not explain how the *Tournet* case's interpretation of Article 81 constitutes "law," nor how the examining magistrate's authority to wiretap is other than "an unfettered power." This magic wand approach did not convince the *Kruslin* decision's principal commentator, who angrily accused the Court of Cassation of "deliberately separating itself from the interpretation given article 8 of the Convention by the European Court of Human Rights."<sup>153</sup>

#### E. *The European Court of Human Rights Intervenes in Kruslin*

The Court of Cassation's decision settled the admissibility of the recordings under French law. Having exhausted all domestic remedies,

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150. *Id.*

151. Thus, the Court of Human Rights upheld as necessary a German law authorizing national security wiretapping by executive officials. *Klass v. Germany*, 28 Eur. Ct. H.R. (ser. A) (1978). On the margin of appreciation, see Mark W. Janis & Richard S. Kay, *European Human Rights Law* 244-58 (1990).

152. Judgment of July 23, 1985, Cass. crim., 1986 D.S. Jur. 61 note Pierre Chambon.

153. See *supra* note 152, citing note by Pierre Chambon. Professor Pradel is equally critical. See his note to the Court of Human Rights *Kruslin* decision in 1990 D.S. Jur. 353, 357.

Kruslin filed an individual petition with the Human Rights Commission on October 16, 1985, well within the applicable six months time limit.<sup>154</sup> In his petition, Kruslin claimed a violation of Article 8 and sought, as an injured party, one million francs as "just satisfaction" under Article 50. That figure treated the fifteen year prison term as the principal injury suffered. The Commission's efforts at investigation and conciliation consumed another three years; its report dated December 14, 1988, found, by a vote of ten to two, a violation of Article 8. Finally, on April 26, 1990, a seven member Court unanimously condemned France for violating Kruslin's Article 8 rights. On the matter of remedy, the Court held that its finding of breach "was sufficient satisfaction for the alleged damage." Although the Commission thus found it unnecessary to award any pecuniary compensation, it did reimburse Kruslin for his lawyer's fees and expenses. That reimbursement only covered legal fees incurred in the French courts (20,000 francs or roughly \$5,000 U.S.), because both the Commission and the Court of Human Rights had afforded Kruslin free counsel.

The *Kruslin* court first held that the interception of telephone conversations was "a serious interference with private life and correspondence" and must accordingly be based on a "law" that is "particularly precise." Although the Court found a legal basis for wiretapping in French law, it held that the French law authorizing wiretapping flunked the Court's "quality" test. On the first point, the Court refused to define "law" in "formal" terms to cover statutes only. "Law" also included "settled case law." Thus, the *Tournet* interpretation of Article 81 of the Code of Criminal Procedure, consistently applied in subsequent cases, provided the legal basis for wiretapping during a judicial investigation. According to the Human Rights Court, this "substantive" approach to what is law applied not only to common law countries for which the Court had already recognized that "law" covered not only statutes but also "unwritten law."<sup>155</sup> It applied generally because it "would be wrong to exaggerate the distinction between common law countries and continental countries." According to the Court, case law has traditionally played a major role in the latter countries, "to such an extent that whole branches of positive law are largely the outcome of decisions by the courts." But after so equating case law in common law and civil law systems, the Court concluded with a peculiar reference to spheres "covered by the written law" in which the "law" for purposes of Article 8 "is the enactment in force as the competent courts have interpreted it in the light, if necessary, of any new practical developments." In these "spheres" covered by written law, which would appear to encompass all French law, since the French courts almost always

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154. See Convention, *supra* note 34, Article 26.

155. See *supra* note 146, § 47 at 30 (*Sunday Times* judgment).

believe it necessary to find some statutory basis for the rule they announce, case law is merely interpretation and not, as in common law countries, "unwritten law." Nevertheless, the Court concluded that wiretapping by an examining magistrate was "in accordance with the law" because the Court of Cassation had interpreted Article 81 to authorize it.

The interference with Kruslin's telephone conversation therefore had a legal basis, but the Court found that legal basis was deficient under the "quality" test. Although the law was "accessible," it was not "foreseeable" because it did not "for the time being afford adequate safeguards against various possible abuses." The Court then identified six specific deficiencies by way of example:

- 1) The law does not define "the categories of persons liable to have their telephone tapped by judicial order."
- 2) It does not define "the nature of the offenses which may give rise to such an order."
- 3) It does not "oblige the judge to set a limit on the duration of telephone tapping."
- 4) It does not specify the procedures for drawing up the summary report on intercepted conversations.
- 5) It does not provide for "verifying" the accuracy of any tapes including "their inspection by the judge and the defense."
- 6) It does not identify "the circumstances in which recordings may or must be erased or the tapes be destroyed, particularly where an accused has been discharged by an examining judge or acquitted by a court."

On account of these deficiencies, French law, according to the Court, "does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities." In closing, the Court acknowledged that this conclusion was less true at the time of judgment (1990) than at the time of the challenged interference (1982). In doing so, it gave France some credit for the many safeguards which its government had proffered as applicable to wiretapping in France, including the Court of Cassation's recent *Baribeau* decision. But those safeguards, according to the Court, could not avoid a condemnation because most of them postdated the wiretapping of Kruslin and others were at most matters of practice "lacking the necessary regulatory control in the absence of legislation or case-law."

The Court of Human Rights' decision in *Kruslin*, like the Constitutional Council's *Fiscal Searches* decision,<sup>156</sup> is a friendly condemnation.

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156. See *supra* note 115.

In both instances, the tribunal not only condemns but also encourages by telling French lawmakers what additional steps they must take to satisfy the applicable norm. With respect to fiscal searches, the French Parliament took the hint, and adopted the following year a statutory provision on fiscal searches which passed constitutional muster.<sup>157</sup> The situation was more complex with respect to wiretapping, because much wiretapping was in progress (or soon to be) under laws found deficient by the European Court of Human Rights. That court's judgment, surrounded by "the mystique of the forms of law,"<sup>158</sup> carried a much greater force than the paucity of enforcement mechanisms would indicate. Defiance was not therefore a viable possibility. But what the French authorities should do, especially in the interim before Parliament could act, was a difficult question.

The Convention itself contains little enforcement machinery. The Court's jurisdiction is declaratory only, i.e., to determine the compatibility or incompatibility with the Convention of an official measure taken by a contracting state.<sup>159</sup> The Court has no authority to overturn judgments of domestic courts upholding the contested measure, much less to invalidate the constitutional, statutory or regulatory basis for the measure taken.<sup>160</sup> All the Court may do is to declare a contracting state in breach and to order it under Article 50 to pay "just satisfaction" to the injured party for the consequences of the breach if full reparation has not occurred under domestic law.<sup>161</sup> Just satisfaction more often than not takes the form of pecuniary compensation, but a monetary award made by the Court is not a judgment enforceable in the courts

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157. Judgment of December 29, 1984, Cons. const., 1985 D.S. Sommaire 220, analyzed in Genevois, *supra* note 114, n° 351, at 212-13.

158. Janis & Kay, *supra* note 151, at xliii. The authors believe this mystique helps explain the "startling" willingness of contracting states to accept highly controversial judgments of the European Court of Human Rights. "We cannot know for sure, but it is at least doubtful, that a national state would abandon its sodomy laws or reform its welfare procedures merely on the directive of some nonjudicial board composed almost completely of foreigners." *Id.* at xliii-xliv.

159. Convention, *supra* note 34, Article 50.

160. Jacques Velu, *Report on Responsibilities for State Parties to the European Convention*, in Council of Europe, Proceedings of the Sixth International Colloquy about the European Convention on Human Rights 533-705 (1988); Georg Ress, *The European Convention on Human Rights and States Parties: The Legal Effect of the Judgments of the European Court of Human Rights on the Internal Law and Before Domestic Courts of the Contracting States*, reprinted in Protection of Human Rights in Europe: Limits and Effects 209-69 (Irene Maier ed. 1982) (English edition of Proceedings of Fifth International Colloquy).

161. The Court's jurisdiction is somewhat broader if the petitioner is another contracting state rather than an individual. See Article 24 of the convention as analyzed by Velu, *supra* note 160, at 568, 570.

of the offending state.<sup>162</sup> That state, however, must under Article 53 "abide by the decision of the Court," an obligation which Article 54 subjects to the supervision of the Committee of Ministers, the Council of Europe's political organ.

A state's obligation to abide by a decision finding it in breach is primarily one to correct the effects of the breach on the injured party.<sup>163</sup> The state must therefore take whatever individual measures are necessary under domestic law to give the injured party just satisfaction. Whether the state's obligation under Article 53 extends to the taking of more general measures, such as the enactment of new legislation to prevent recurrences of the breach, is a more complex question.<sup>164</sup> Sometimes legislative change is necessary to afford individual relief, as when the Court of Human Rights found that a United Kingdom sodomy statute breached an individual petitioner's Article 8 right to engage in homosexual sex with other consenting adults.<sup>165</sup> But if the offending state can afford an individual petitioner "full satisfaction" without changing its domestic law, as France could in *Kruslin*, that state can argue that it has satisfied its Article 53 obligation to "abide by the decision." That obligation thus covers only the *res judicata* effect of the decision.<sup>166</sup> In any case, the Court has no authority in its judgment to order a state found in breach to take specific measures to prevent additional breaches from occurring, regardless of whether those breaches would affect only the petitioner before the Court or other persons as well.

Of course contracting states have a general obligation to bring their legal systems into conformity with the Convention, but each state retains the liberty of choice as to how to accomplish that goal.<sup>167</sup> States have

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162. Ress, *supra* note 160, at 223-25.

163. *Id.* at 234-35.

164. Marc-André Eissen, *La Cour européenne des droits de l'homme*, 1986 R.D.P. 1539, 1574.

Member states of the European Community plainly have such an obligation. If the Court of Justice of the European Communities determines that a member state has failed to fulfill its obligations under the Treaty of Rome, that state has an obligation to conform its legal system to community law. Article 171 of the Treaty of Rome as interpreted by *Waterkeyn v. France*, *aff.* 38-82, Court of Justice of the European Communities [December 14, 1982].

165. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) 1981. The statute only applied in Northern Ireland.

166. This conclusion is perhaps a bit overstated. Professor Velu suggests rather tentatively that a state may have a general obligation to clarify an "ambiguous situation" which places persons "in a state of uncertainty." Velu, *supra* note 160, at 582. Marc-André Eissen, the Court's Registrar, believes the question to be unsettled. See Eissen, *supra* note 164, at 1574.

167. Ress, *supra* note 160, at 216. This obligation is implied from Article 1 in which the contracting states agree to "secure to everyone in their jurisdiction the rights and freedoms" found in the Convention.

a good deal of leeway in doing so, given the relatively vague or "fuzzy" norms found in the Convention.<sup>168</sup> Those norms may be made more concrete by a judgment of the Court, but the Court's interpretation of the Convention does not legally bind domestic judges in cases involving different parties.<sup>169</sup> Giving the Court's judgments the effect of precedent would be especially startling in civil law countries such as France where lower court judges are not legally bound even by the decisions of their own Supreme Courts, especially on matters of first impression.<sup>170</sup>

Thus, the *Kruslin* Court's interpretation of Article 8, like the *Kruslin* judgment itself, had no immediate impact in France. But the long-term practical consequences were certain to be significant. If France did nothing, it would soon need to respond to embarrassing questions from the Committee of Ministers under Article 54<sup>171</sup> and, more significantly, to a flood of individual petitions filed with the Commission on Human Rights seeking just satisfaction for breaches of Article 8. The threat of subsequent condemnations from the Court, although perhaps slow in coming because of processing delays before the Commission, also increases the moral (and fiscal) pressure on the lawbreaker state to mend its ways. These pressures help explain the prevailing practice of compliance with the Court's decisions, but that compliance has sometimes come slowly if a controversial decision required significant changes in an offending state's legal system.<sup>172</sup>

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168. On the "fuzziness" of the European human rights norms, see *infra* text at note 200.

169. Velu, *supra* note 160, at 594; Ress, *supra* note 160, at 238. Professors Velu and Ress both distinguish between the binding *res judicata* effect of the Court's decisions under Article 53 and their highly persuasive but nonbinding effect as judicial interpretations.

170. Case law plainly plays a significant role in France despite the absence of any rule of precedent. See Tomlinson, *supra* note 10, at 1313-22. But case law rules develop gradually over time and become settled only when accepted by a large number of judges. Even then, lower court judges retain the liberty to apply a different rule than the rule formulated by the Court of Cassation. Philippe Jestaz, *La jurisprudence: réflexions sur un malentendu*, 1987 D.S. Chroniques 11.

In a recent well-publicized case, the Council of State did adopt the European Court of Human Rights interpretation of Article 8 in determining when the expulsion of an alien whose family lived in France interfered with "family life." Judgment of April 19, 1991, Conseil d'état, ass. plén., 1991 J.C.P. Jur. No. 21757 note Nguyen van Tuong and 1991 D.S. Jur. 399 note Xavier Prétot (*Balgacem* and *Babas* decisions). But the Council acted voluntarily and not under constraint.

171. The practice has developed for states found in breach by the court to report to the Committee of Ministers under Article 54 any general measures taken to bring their legal systems into conformity. Velu, *supra* note 160, at 626. Recently, the Committee of Ministers has taken a more active supervisory role, inquiring about measures taken. Frédéric Sudre, *La Convention européenne des droits de l'homme* 76 (1990).

172. Belgium, for example, waited eight years before enacting legislation curing the discrimination against illegitimate children condemned in the Court's controversial *Marckx*

### F. The French Courts Respond to *Kruslin*

Fifteen months elapsed between the *Kruslin* Court's condemnation of France and the enactment of the 1991 Wiretapping Act. That delay reflected in part the French Parliament's long-standing reticence to legislate in this controversial area.<sup>173</sup> Parliament's inertia received further encouragement from the *Kruslin* decision's interpretation of "law," which seemingly permitted France the luxury of dispensing with a wiretapping statute. Some commentators actually feared that the Parliament would once again avoid the issue by allowing the Court of Cassation to bring France into conformity with Article 8 through case law.<sup>174</sup> But the problems encountered by that court quickly demonstrated that Parliament was the appropriate body to act and that the Court of Human Rights was perhaps unwise to treat French case law the same as it did statutory law.

Concerns about the *Kruslin* decision's consequences for ongoing investigations prompted the Minister of Justice, the day after the decision, to dispatch to all prosecutors and judges a "note" informing them of the decision and suggesting how they should respond to it.<sup>175</sup> The note explicitly invoked the decision's recognition that case law could supply the safeguards needed to make judicial wiretapping legal under Article 8 of the Convention. The courts should therefore immediately supply the necessary safeguards. In particular, the Minister suggested that examining magistrates order wiretapping only when investigating the most serious offenses and only for short periods of time; in addition, they should include in their rogatory commissions specific instructions to the judicial police on transcribing, sealing, and ultimately destroying any conversations recorded. These "patchwork"<sup>176</sup> suggestions did not appear to qualify as the "settled case law" required by *Kruslin*; but they were sensible interim measures which at least demonstrated a good faith effort to respond to the Court's concerns.<sup>177</sup> The alternative of

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decision. *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) 1979. See *Sudre*, *supra* note 171, at 75. In less controversial cases, states often settle at the Commission level prior to a case's referral to the Court or, if that proves impossible, make conforming changes prior to an expected condemnation by the Court.

173. In 1973, a Senate Committee (the Marcilhacy committee) and in 1982 an executive commission (the Schmelck commission) had proposed wiretapping legislation. Neither report generated a legislative response.

174. See, e.g., Renée Koering-Joulin, *De l'art de faire l'économie d'une loi*, 1990 D.S. Chroniques 187.

175. For the issuance of the note, and substantial quotations therefrom, see *id.*, at 189, and Professor Jeandidier's note on the *Bacha* decision, *infra* note 178.

176. The phrase ("rafistolage") is Professor Jeandidier's.

177. Professor Pradel viewed them as such and envisioned examining magistrates taking such measures on their own initiative. See his note accompanying the Court of Human Rights' *Kruslin* decision in 1990 D.S. Jur. 353, 358-59.



ceasing all wiretapping until safeguards were in place occurred to no one. Perhaps it was totally impractical, comparable to the police surrendering all their weapons.

The Court of Cassation did not wait long before it responded in turn to the need for additional safeguards. The response came from the full Criminal Division, and not just a panel, in the *Bacha* decision of May 15, 1990.<sup>178</sup> Ironically, the wiretapping in *Bacha* involved the very same telephone line (Terrieux's home telephone) and the very same rogatory commission as did the *Kruslin* case. Once again the wiretap recorded the voice of a third person (*Bacha*), but this time the recorded conversation incriminated the speaker for the crime under investigation (the banker's murder). *Bacha* challenged the recording's admissibility under Article 8 of the Convention, but the full Criminal Division denied relief. The court first reiterated the Court of Cassation's standard interpretation that Articles 81 and 151 of the Code of Criminal Procedure supplied a legal basis for wiretapping ordered by an examining magistrate so long as the wiretap was done without any ruse or artifice and without violating the rights of the defense. But the court then added two new limitations which it found satisfied in the present case: the wiretapping must be to obtain proof of "an infraction gravely affecting public order" and the recordings themselves must be subject to adversarial challenge by the parties. These new safeguards, when combined with the prior limitations, satisfied, according to the *Bacha* court, the "demands of article 8 paragraph 2 of the Convention."

At least two aspects of the *Bacha* decision are surprising. First, what is the basis for the new limitations to which the court subjected judicial wiretapping? They have a drawn-out-of-the-hat quality since it is hard to view them as interpretations of Article 81 or 151, the only Code articles cited. Those articles merely authorize examining magistrates to investigate offenses and to issue rogatory commissions to the judicial police. Obviously, the court was seeking to cure two of the six deficiencies which the Court of Human Rights had discovered in French wiretapping law, i.e., the failure to define the offenses for which wiretapping is permissible and the failure to provide for the verification of any recordings. But the new rules lacked a textual basis and were no more than general principles extracted from the Code as a whole.<sup>179</sup> This shaky basis for the new rules did not pose as grave a problem as did the court's rather clumsy effort, repeated in subsequent cases, to render

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178. Judgment of May 15, 1990, Cass. crim., 1990 J.C.P. Jur. No. 21541 note Wilfrid Jeandidier (*Bacha* decision).

179. The Court of Cassation, in the absence of a specific text, occasionally bases a decision on a general principle of law which it extracts from the Civil Code, Code of Criminal Procedure, or other applicable Code taken as a whole. Terré, *supra* note 25, at 199.

what the French call a "general regulation" or an *arrêt de règlement*, i.e., to formulate a rule of law for application in subsequent cases.

This prohibition of general regulations, and the accompanying rejection of any rule of precedent, derives from the peculiarly French experience with the separation of powers. The judicial Parliaments of the Old Regime had arrogated to themselves the power to announce general rules for resolving questions that might arise in future cases.<sup>180</sup> These privileged bodies' abuse of this power provoked an angry response at the time of the Revolution. Both the Constituent Assembly in 1790<sup>181</sup> and Napoleon's Council of State when it promulgated the Civil Code in 1804<sup>182</sup> specifically prohibited what they considered to be "legislating" by the courts. This condemnation remains a basic part of French law and prevents judges from attempting to control how future judges will decide like cases. Future judges must enjoy the liberty to decide as they believe best.<sup>183</sup>

The *Bacha* decision struck the commentators as "almost an *arrêt de règlement*"<sup>184</sup> or "having the appearance of an *arrêt de règlement*."<sup>185</sup> What saved it from being a "true" *arrêt de règlement* was the court's failure to identify what it meant by "grave" offenses, either by naming them or by specifying the level of punishment required.<sup>186</sup> But that additional step was one the Court of Cassation would not take, either in *Bacha* or its progeny.<sup>187</sup> That unwillingness limited the efficacy of the new safeguards because what is a grave offense remained quite uncertain. Nevertheless, the commentators' characterization of *Bacha* seems well founded. The full Criminal Division in that case was attempting to impose on magistrates and courts in future cases a rule prohibiting wiretapping in the investigation of offenses which were not sufficiently "grave." That analysis is compelling because there could be

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180. *Id.*, n° 48 at 41-42.

181. Law of August 16-14, 1790, tit. II, art. 12. For an English translation, see John Dawson, *Oracles of the Law* 376 (1968). For the French text (still in force), see Code adm. at 18 (1985).

182. Code Civil art. 5. The present Article 5 remains unchanged from 1804.

183. Settled case law, often called *jurisprudence constante*, does not deprive them of that liberty; they retain, if nothing else, the liberty to be reversed. But the distinction is often a fine one between a forbidden *arrêt de règlement* and a lead case (an *arrêt de principe*) which resolves, after mature reflexion, a legal issue of particular importance and broad applicability. Terré, *supra* note 25, at 359.

184. Jean Pradel in his note accompanying the Court of Human Rights' *Kruslin* decision in 1990 D.S. Jur. 353, 359.

185. Koering-Joulin, *supra* note 174, at 189.

186. Pradel, *supra* note 184, at 359.

187. On *Bacha's* progeny, see the note by Professor Jeandidier accompanying Judgment of April 15, 1991, *supra* note 95. Professor Jeandidier also cited the court's "fear" of rendering an *arrêt de règlement*.

no other purpose to the enterprise. Why else would the *Bacha* court, just three weeks after the *Kruslin* decision, announce a new rule? Decades of mature reflection by the courts on judicial wiretapping had produced few rules, and certainly no new rules since *Tournet* in 1980. The matter had been left largely to practice, i.e., to the accumulated experience of examining magistrates. That approach was no longer permissible after *Kruslin* had condemned the practice "as lacking the necessary regulatory control" furnished by case law rules, but case law rules could accomplish that goal only if they bound judges in future cases. Any effort to give rules that force necessarily smelled of an *arrêt de règlement*.

The second surprising aspect of the *Bacha* decision was its failure to address the four other deficiencies in French wiretapping law identified by the Court of Human Rights in *Kruslin*. If the full Criminal Division could render what appeared to be an *arrêt de règlement* to cure two deficiencies, why could it not also do so for the remaining four?<sup>188</sup> How could the safeguards enunciated in *Bacha* "satisfy," as the court held, "the demands" of Article 8 of the Convention, when the other missing safeguards remained unmentioned? Plainly, the Criminal Division's work was not complete, and *Bacha* opened a year of "feverish" judicial activity which produced six additional published decisions by Criminal Division panels<sup>189</sup> and a much noted decision by the Indictment Division of the Court of Appeals in Paris, the body responsible for reviewing much of the judicial ordered wiretapping in France.<sup>190</sup> Those bodies encountered the same difficulties the *Bacha* court had in formulating general rules. How could they, for example, order examining magistrates to limit the duration of a wiretap, and what time limits were appropriate? Asking courts to provide those safeguards through case law was really asking them to do something which case law cannot do in France, i.e., to provide generally applicable, binding rules.

The Paris Court of Appeals' response to this difficulty might eventually have solved the problem. That approach, urged on the court by the prosecutor assigned to it,<sup>191</sup> required the court to verify case-by-case whether examining magistrates had provided, in their rogatory commissions or other orders, the safeguards which the Court of Human Rights had found lacking. This control over what magistrates were actually

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188. Professor Koering-Joulin suggests that the *Bacha* court did not address the other deficiencies because doing so might have required the exclusion of the recording in that case. See Koering-Joulin, *supra* note 174, at 189.

189. The cases are analyzed by Professor Jeandier, *supra* note 95.

190. Judgment of October 18, 1990, Paris Court of Appeals, 1990 D.S. Jur. 536 requisitions Stanislas Kehrig. For commentary, see Pierre Kayser & Thierry S. Renoux, *L'autorité judiciaire et la loi: à propos des écoutes téléphoniques (Note sous Paris, 1ère chambre d'accusation, octobre 1990)*, 1991 R.F.D.C. 331.

191. Substitute prosecutor Stanislas Kehrig. See *supra* note 190.

doing might over time have fostered the development of certain minimum standards enforced by the courts. However, the Paris court was rather indulgent in its application of the standards; it found them satisfied even though the wiretapping of one suspect had continued for five months, including three months after the examining magistrate's order had expired. That indulgence is surely attributable to the fact that the wiretapping in question *preceded* the *Kruslin* decision. Now that magistrates know better what safeguards they must provide, they will surely be more careful and should be held to a higher standard.

### G. *Parliament Intervenes: The 1991 Wiretapping Act*

The difficulties encountered by the courts in responding to the Court of Human Rights' condemnation of France in *Kruslin* prompted Parliament to act. On July 10, 1991, it finally enacted a Wiretapping Act which guaranteed the freedom of telecommunications from intrusions by public authorities except as provided by law (article 1). Succeeding articles of the new law authorized examining magistrates to wiretap for law enforcement purposes (article 2) and the Prime Minister to do so for national security purposes (article 3). The Act's lead commentators promptly praised Parliament for restoring the rule of law<sup>192</sup> and for recognizing the primacy of European human rights norms.<sup>193</sup> That praise is a bit overblown because grave questions remain whether the Act adequately incorporates the new constitutional and human rights norms. The Act nevertheless ends the wiretapping saga. Parliament has spoken in favor of wiretapping during a judicial investigation. As long as Parliament retains that venerable institution, there is little more the Constitutional Council or the European Court of Human Rights can do to impose their new norms on an institution basically in conflict with them.

The Act's brief provisions on law enforcement wiretapping, adding Articles 100 to 100-7 to the Code of Criminal Procedure, reflect the concise drafting style popular in France for both statutes and court judgments. New Article 100 makes explicit what the *Tournet* decision had found implicit in Article 81: an examining magistrate has the authority to order the interception, recording and transcription of telecommunications whenever justified by the needs of an ongoing judicial investigation. But the Act does not address at all the first and most glaring deficiency identified in *Kruslin*: French law's failure to define "the categories of persons liable to have their telephones tapped by judicial order." The Act's silence on this point appears to allow mag-

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192. Pradel, *supra* note 2.

193. Kayser, *supra* note 2.

istrates to intercept the wire communications of any person they wish, or at least to tap any telephone line they wish.<sup>194</sup> Their orders need only identify the line to be tapped, the offense justifying the interception, and the duration of the wiretap (article 100-1). In addition, the magistrate's order, although required to be in writing, is not a judicial determination subject to challenge by the accused (article 100(2)). It is therefore a discretionary investigatory act which the magistrate may make either on his own initiative or in response to a prosecutor's petition.<sup>195</sup>

The remaining articles added to the Code of Criminal Procedure address, at least in part, the other five deficiencies in French law identified by the European Court of Human Rights in *Kruslin*. Henceforth magistrates may wiretap only when investigating offenses punishable by two or more years imprisonment (deficiency #2).<sup>196</sup> In addition, magistrates must specify the duration of any wiretap, which cannot exceed four months, but which can be renewed for subsequent four month periods under the same conditions (deficiency #3). Magistrates must also assure, although the new law does not specify how they are to do so, the preparation of official reports on any interceptions (deficiency #4), the sealing and transcription of any recordings (deficiency #5), and the recordings' ultimate destruction (deficiency #6). These provisions' thinness has been rightly criticized,<sup>197</sup> but case law may over

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194. Federal law utilizes the probable cause standard for identifying the persons whose wire communications may be intercepted. The judge must determine, before ordering a wiretap, that there is probable cause for belief that an individual has committed or is about to commit an offense, 18 U.S.C. § 2518(3)(a) (1988), that there is probable cause for belief that particular communications concerning the offense will be obtained through the interception, 18 U.S.C. § 2518(3)(b) (1988), and that there is probable cause for belief that the telephone to be tapped is being used or is about to be used in connection with the commission of the offense or is leased to, listed in the name of, or commonly used by the person believed to have committed or to be about to commit the offense, 18 U.S.C. § 2518(3)(d) (1988).

195. The Code of Criminal Procedure distinguishes between judicial determinations by an examining magistrate, which an aggrieved party may immediately challenge before the Indictment Division of the Court of Appeals, and investigatory acts which a private party may not challenge. The paradigmatic case of a judicial determination is an order affecting an accused's liberty. Most decisions to search and seize are investigatory and thus not reviewable at the behest of the affected private parties. See Pradel, *supra* note 9, nn<sup>o</sup> 194-97 at 210-15. On the prosecutor's right to challenge the magistrate's investigatory acts, see Proc. Code art. 185(1) and text at *supra* note 80.

196. Federal law authorizes wiretapping and electronic eavesdropping for a lengthy list of federal and state offenses and for any unlisted state offense dangerous to life, limb or property, punishable by imprisonment for more than one year, and designated in the state statute authorizing the interception. See 18 U.S.C. § 2516(1) and (2) (1988). The other subjects covered by the French Wiretapping Act receive far more detailed treatment in the federal statute.

197. See note by Professor Jeandidier, *supra* note 95.

time clarify how magistrates are to control the execution of their wiretap orders and the safeguarding of wiretap evidence.<sup>198</sup>

More serious is the absence of any restrictions on the magistrate's decision to initiate a wiretap. The Act allows magistrates to order a wiretap whenever and wherever they wish. The intrusion requires no justification other than the needs of the investigation as perceived by the magistrate. This unrestrained investigatory discretion seems inconsistent both with Article 8 of the European Convention of Human Rights (as interpreted in *Kruslin*) and with Article 66 of the Constitution (as interpreted in the *Fiscal Searches* decision). Does not the Act give magistrates the "unfettered power" to intrude on private life condemned by the European Court of Human Rights in *Kruslin*? How can magistrates play an active role as "guardians of individual liberty," as required by the Constitutional Council's *Fiscal Searches* decision, when there are no standards they must observe for determining the "well-foundedness" of a particular wiretap?

These difficult questions on the Wiretapping Act's conformity to the French Constitution and to the European Convention of Human Rights are likely to remain unanswered. Its conformity to the French Constitution will never be known because the Constitutional Council did not review it for constitutionality. None of the persons (the President of the Republic, the Prime Minister, or the Presidents of the Senate or the National Assembly) or groups (sixty senators or sixty deputies) with authority to invoke the Council's jurisdiction chose to do so. This inaction is attributable to the widespread political support enjoyed by the Act and to a perception that the norms announced in the *Fiscal Searches* decision do not readily apply to judicial investigations. The President therefore promulgated the law without its having undergone constitutional review.<sup>199</sup> Constitutional review will never occur unless France amends its Constitution to permit litigants to raise the exception of unconstitutionality. If that does not occur (as now appears likely), the regular courts must apply statutory law; at most they can take constitutional norms into account in interpreting it.

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198. The Act's silence on an accused's right to challenge any wiretap evidence in the investigatory file is puzzling. Deficiency #5 identified by the *Kruslin* decision suggests that such a denial of defense access might occur in France. Perhaps the right to adversary challenge, proclaimed as a general principle of law in the *Bacha* decision, seemed firmly enough based in the Code of Criminal Procedure to make unnecessary a more explicit statutory reaffirmation. See Procedure Code article 118(3) on defense counsel's access to the investigatory file compiled by the magistrate.

199. Another more controversial law which escaped constitutional review was a recent act punishing a wide variety of hate speech. Loi n° 90-615 of July 13, 1990, reprinted in 1990 J.C.P. Textes 64046. None of the persons or groups qualified to initiate the review process wished to be identified as saboteurs of that politically correct Act.

The situation is almost as clear-cut with respect to the absence of review for compliance with European human rights norms. French courts must apply the Convention, but the Court of Human Rights' interpretation of "law" allows them to supplement the Wiretapping Act with case law. Surely they will seek to fill any statutory gaps with case law rather than to refuse to apply the statute (i.e., "separate" it from a pending case) because it violates the European Convention on Human Rights. The question of the Act's conformity to the Convention may ultimately reach the European Court of Human Rights, but an individual petitioner must first exhaust all domestic remedies and then wait several years while the Commission investigates and seeks a friendly settlement of the dispute. That delay will afford the French courts time to attempt to develop a body of case law interpreting the new Act to bring it into conformity with the Convention.

Another, more basic reason makes unlikely any subsequent condemnation of France for law enforcement wiretapping conducted under the Act. The relationship, at least as perceived in France, between the Court of Human Rights and the domestic courts is not a hierarchical one in which the higher court announces a legal norm that the lower courts must correctly apply. Not only are the norms too fuzzy to permit any mechanical application, but the relationship between the domestic courts and the European Court of Human Rights is not one of subordination but one of dialogue permitting the development of intermediate norms.<sup>200</sup> The *Kruslin* decision initiated that dialogue and the French courts, aided by Parliament, have responded in good faith to the Court's decision. That response affords greater protection to private life and correspondence than did prior law.

No doubt the protection is not as complete as the *Kruslin* decision appears to mandate; French law has not yet managed to integrate fully the new norms into the traditional institution of a judicial investigation. But both Parliament and the courts are addressing the issue, i.e., seeking to find intermediate norms. That context makes a second condemnation of France implausible. France has responded sufficiently to the invitation to dialogue; and the *Kruslin* decision contains no mandate which France must mechanically apply. Perhaps someday Court of Human Rights' decisions interpreting the Convention will have that force, but they do

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200. This notion of dialogue is the central theme of Professor Delmas-Marty's recent book *Raisonner la raison d'état: vers une Europe des droits de l'homme* (1989), especially at 401-05 and 465-69.

For a similar conclusion on the importance of the dialogue between domestic courts and the European Court of Human Rights, see Jörg Polakiewicz and Valérie Jacob-Foltzer, *The European Human Rights Convention in Domestic Law: The Impact of Strasbourg Case-Law in States Where Direct Effect is Given the Convention*, 12 H.R.L.J. 65, 66, 141 (1991).

not at present. The success of the European experiment for the collective guarantee of human rights is attributable to the dialogue which the adoption of the Convention has permitted to develop and not to any subordination of domestic courts in applying the norms announced by the European Court of Human Rights. (The above may merely be another way of saying that contracting states are bound only by the judgment of the Court of Human Rights and not by its interpretation of the Convention.)

The French Parliament's implementation of the *Fiscal Searches* decision had been far more receptive to new norms than was its response to the *Kruslin* decision. The explanation for that discrepancy does not lie in any greater receptiveness by Parliament to norms emanating from a domestic court. Rather, it lies in the greater difficulty in implementing the new norms (both European and constitutional) in the context of a judicial investigation.

The *Fiscal Searches* decision found unconstitutional a law which allowed fiscal agents to obtain a warrant from the chief judge of the departmental court of general jurisdiction to search private places for evidence of certain violations of the tax code. The Council found the law unconstitutional because it contained no standards empowering the judges, as guardians of individual liberty under Article 66 of the Constitution, to check searches of private places by executive officials. According to the Constitutional Council, it did not permit the judge to verify the "well-foundedness" of a request to search nor to control the search's execution.<sup>201</sup> This interpretation of Article 66 not only invalidated the law before the Council but raised serious questions about the constitutionality of numerous previously promulgated statutes authorizing searches for evidence of fiscal or economic offenses. Those statutes were no longer subject to challenge before the Council.

Parliament responded to the Council's friendly condemnation by amending the statutes in question. The new statutes<sup>202</sup> provide that the chief judge of the departmental court of general jurisdiction may authorize a search for evidence of an offense only if the judge first "verifies in a concrete fashion that the request for authorization submitted to him is well-founded."<sup>203</sup> The request must include all the information "in the possession of the administration which justifies the search." In

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201. See para. 29 of the *Fiscal Searches* decision.

202. For a list of statutes, see *La mise en état*, *supra* note 44, at 131 n.1. For a discussion of their enactment, see the note by Olivier Dugrip to Judgments of December 15, 1988, Cass. ch. mixte, 1989 J.C.P. Jur. No. 21263.

203. The prototype statute, quoted in the text, was Article 94 of the Budget Act of 1985, now codified as Article 16B of the *Livre des procédures fiscales* (Code of Revenue Procedures). After the Constitutional Council found that law constitutional, Parliament copied its provisions in at least a half-dozen other laws.



addition, the judge may control the execution of a search by instructing the fiscal agents how to accomplish it and by ordering its suspension or termination at any time. The judge, who must be kept informed of the search's execution by the officer of the judicial police accompanying the fiscal agents, is also made responsible for the safeguarding and disposition of any evidence seized. Finally, the victim of a search may obtain review in the Court of Cassation on the legality of the judicial order authorizing it. These statutory provisions assure the judges' role as guardians of individual liberty; and the Constitutional Council has found them to be in conformity with the Constitution.<sup>204</sup>

These new statutes thus afford taxpayers substantial protection against arbitrary intrusions into their private lives. The protection derives from the probable-cause type standard (i.e., the "well-foundedness" of the search) formulated by the Constitutional Council and included by Parliament in the statutes. That standard bars a search unless the fiscal agents present to the judge concrete information establishing the search is likely to uncover evidence of particular infraction; rumors, anonymous tips, or the agents' unverified suspicions do not provide adequate basis for a search.<sup>205</sup> The "well-foundedness" standard thus forces courts to play an active role in checking fiscal searches by executive officials. The lower courts were initially reluctant to fulfill that unfamiliar role, but the full Court of Cassation sharply brought them into line in five well-publicized decisions released on December 15, 1988.<sup>206</sup> In those decisions, the court insisted that the lower court judges specify the factual basis for any search with sufficient particularity to permit the Court of Cassation to review its legality (i.e., its "well-foundedness"). For the first time, French courts are enforcing a probable-cause type requirement for official intrusions.

The application of this new constitutional norm to searches during a judicial investigation raises serious problems. Indeed, one argument advanced for the new probable-cause norm is that it serves as a substitute for the opening of a judicial investigation. This argument assumes that searches not part of a judicial investigation require some special justification.<sup>207</sup> Indeed, concerns about the "well-foundedness" of a search have not surfaced (at least until recently) in the criminal context because the formal opening of a judicial investigation, or of a police investigation for a flagrant offense, has served to legitimate whatever searches follow.

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204. Judgment of December 29, 1984, Cons. const., 1985 D.S. Sommaire 220 (upholding Article 94 of the 1985 Budget Act).

205. Professor Dugrip so described the well-foundedness standard in his comprehensive note to the Judgments of December 15, 1988, Cass. ch. mixte, 1989 J.C.P. Jur. No. 21263.

206. *Id.*

207. *Id.*

The opening of such an investigation does require something akin to probable cause—the factual allegations in the prosecutor's petition for opening a judicial investigation<sup>208</sup> or the external signs of an offense for opening a police investigation of a flagrant offense<sup>209</sup>—but once opened the magistrate or judicial police may investigate unhampered by any probable cause limitation as to the places to be searched or the persons to be seized (the *garde à vue*). They are expected to use their broad investigatory powers to discover the truth. In doing so, they function as freely as does a federal grand jury, whose investigatory demands do not require for their enforcement any showing of cause.<sup>210</sup> A grand jury, however, can only subpoena evidence; it cannot search or detain.

The Delmas-Marty Commission's Final Report of June 1990 recognized that the new constitutional norm derived from Article 66 of the Constitution did not mesh well with the traditional French institution of the judicial investigation. How could one expect a magistrate charged with the responsibility to discover the truth also to serve as a guardian of individual liberty? In the Commission's opinion the two roles were inconsistent. To implement the new constitutional norm, the Commission therefore proposed abolishing the institution of the judicial investigation and substituting in its place the procedures applicable to fiscal searches.<sup>211</sup> Those procedures allowed judges to fulfill their role as guardians of individual liberty by determining whether to approve a prosecutor's request to search or otherwise intrude on individual liberty. Although the Commission did not explicitly say so, such a system should encourage the development of probable-cause type standards applicable to particular intrusions because the judges must review case-by-case the adequacy of the justification advanced by the executive.

The Commission's reasoning helps us understand Parliament's failure in the Wiretapping Act to implement fully the new norms enunciated by the Court of Human Rights in *Kruslin* and by the Constitutional Council in the *Fiscal Searches* decision. The unimplemented norms are basically inconsistent with the institution of a judicial investigation. The hallmark of that institution is the magistrate's responsibility to investigate

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208. The prosecutor's opening petition must state the facts which the prosecutor wants investigated and must cite the Penal Code sections which punish those facts. Pradel, *supra* note 9, nn<sup>o</sup> 201-02 at 220-21. It would be an unusual case if the facts in the petition did not establish probable cause that someone had committed an offense. The prosecutor may ask the magistrate to investigate whether named persons committed the offense, but an opening petition requesting an investigation against X or persons unknown is commonplace.

209. See *supra* text at notes 68-69.

210. *United States v. Dionisio*, 410 U.S. 1, 93 S. Ct. 764 (1973).

211. *La mise en état*, *supra* note 44, at 131.

fully the facts alleged in the prosecutor's petition. Rules that require the more precise identification of the persons whom the magistrate may wiretap (i.e., rules addressing the first deficiency specified in *Kruslin*) or that require the magistrate to determine the "well-foundedness" of a particular wiretap (i.e., rules addressing the *Fiscal Searches* decision's interpretation of Article 66) do not fit within the present system of the judicial investigation of offenses. That system may be changed by Parliament; but, unless Parliament acts to separate investigating from judging, it appears unlikely that French law will be in full conformity with the European Convention on Human Rights or France's own Constitution. Absent such a separation, it is hard to see how the judges are likely to be any more successful than was Parliament in developing meaningful standards to limit magistrates' unfettered power to tap whatever telephone lines they choose.

The Delmas-Marty Commission's proposed separation of investigating from judging proved too radical a reform for France's weakened Socialist government to submit to Parliament. The Commission's principal recommendation—the transfer of all investigatory responsibility to prosecutors—was, in the opinion of the Minister of Justice, "impossible to realize" because there was no easy way to make prosecutors sufficiently independent.<sup>212</sup> This none too convincing excuse assures the examining magistrate's survival, at least for the time being. The government did ultimately propose in early 1992 major changes in the Code provisions governing judicial investigations because, in the Minister's opinion, "the present Code did not sufficiently fulfill its role as a code protective of liberties."<sup>213</sup> The proposed legislation adopts many of the Commission's specific recommendations<sup>214</sup> but its overall approach seems quite different. The Commission sought to protect individual liberty from investigatory intrusions, while the proposed legislation seeks primarily to strengthen the rights of the defense in the investigatory process. Thus, the proposed legislation affords suspects<sup>215</sup> earlier access to the investigatory file and allows them to appeal to the indictment division the magistrate's refusal to order an investigatory act, such as a search. These

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212. *Le Monde*, February 27, 1992 at 12.

213. *Id.*

214. In particular, it adopts the Commission's recommendation on restricting the *garde à vue* described in the following paragraph.

215. The proposed legislation's most spectacular reform is to eliminate the examining magistrate's authority formally to accuse a person against whom there are strong indications of guilt. The concern behind that change was the stigma which accompanies the formal accusation and which cannot be removed if the magistrate subsequently decides not to remand the accused for trial. The government therefore proposed abolishing the magistrate's authority to accuse and extending the rights of the defense basically to anyone who requested them. Needless to say, how all of this would be implemented remains very unclear.

concerns over the "equality of arms" available to the parties, and over the investigator's investigating innocence as well as guilt, also appeared in the Commission's report,<sup>216</sup> but the Commission's recommendations for increased judicial control over investigatory intrusions have disappeared.

The government has submitted to Parliament the Commission's proposed reform of the police *garde à vue*. The pending legislation limits the *garde à vue* to twenty-four hours and requires the judicial police to have "proof permitting one to suspect" the person detained has committed an offense. Once again norms derived from the European Convention on Human Rights appear to be a strong motivating force for change. Article 5(3) requires "reasonable suspicion" as justification "for the arrest or detention of a person effected for the purpose of bringing him before the competent legal authority." Under that article—seemingly the only one that could justify the *garde à vue*'s interference with the Article 5 right to liberty and security of the person—the problem is not the length of the detention (forty-eight hours maximum under present law)<sup>217</sup> but the unfettered power of the judicial police to detain whomever they wish.<sup>218</sup> The police's detention power, like most other investigatory acts by either the judicial police or by an examining magistrate, is not subject to any showing of cause. This failure to limit police discretion to detain is, in the opinion of the Commission and other leading authorities,<sup>219</sup> a plain violation of Article 5(3) as interpreted by the European Court of Human Rights. That interpretation has so far not resulted in a condemnation of France for violating the Convention (most of the cases applying Article 5(3) have involved the United Kingdom).<sup>220</sup>

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216. See *supra* text at notes 80-81. Professor Delmas-Marty had earlier criticized the government for having rejected "true structural reforms." *Le Monde*, November 22, 1991, at 10.

217. The European Court of Human Rights has upheld police detentions lasting up to four days. See van Dijk & van Hoof, *supra* note 32, at 274-83. The United States Supreme Court generally allows the police to detain arrestees for forty-eight hours before bringing them before the courts. *County of Riverside v. McLaughlin*, 111 S. Ct. 1661 (1991).

218. The European Court of Human Rights recently interpreted Article 5(1)(c)'s reasonable suspicion standard to require an objective basis for the detention and not merely good faith on the police's part. *Fox, Campbell & Hartley v. United Kingdom*, 182 Eur. Ct. H.R. (ser. A) (1990).

219. *La mise en état*, *supra* note 44, at 207; Henri Leclerc, *Les limites de la liberté de la preuve*, 1992 R.S.C. 15, 28.

220. In early 1993, Parliament enacted in modified form the government's proposed amendments to the Code of Criminal Procedure. See *Loi n° 93-2* of January 4, 1993, reprinted in 1993 J.C.P. Textes 65891. The new law also contains several highly controversial provisions, added at the legislature's initiative, which introduce lawyers at the *garde*

#### IV. CONCLUSION: WHAT THE WIRETAPPING SAGA TELLS US ABOUT THE FRENCH CRIMINAL JUSTICE SYSTEM

The comparative merits (or demerits) of the French and other continental criminal justice systems were the subject of a lively debate in the late 1970s and early 1980s. A number of prominent scholars believed those systems offered an attractive alternative for curing several troubling aspects of the American criminal justice system.<sup>221</sup> They found particularly appealing on the Continent the investigation of criminal charges by a judge (the examining magistrate in France), the absence of plea bargaining, the banning of guilty pleas, and the streamlined, nonadversarial trial conducted before a panel of judges or a mixed panel of professional judges and lay jurors. Quite naturally, the scholars urged the reform of the American system along continental lines. The continental systems' critics responded that in actual practice the French, German, and Italian systems more closely resembled the American system of prosecutor dominated, bargained justice than the would-be-borrowers acknowledged in their overly formal presentations of how those systems functioned.<sup>222</sup> My own contribution to this debate largely agreed with the critics.<sup>223</sup> In addition, I found the French criminal justice system wanting because the balance it struck between individual rights and law enforcement needs gives too little protection to individual rights. The wiretapping saga, I believe, confirms that analysis.

The critics' response has not caused the admirers to concede defeat, but nothing has so far come of the latter's reform proposals. In the most recent contribution to the debate, an admirer, Professor Richard S. Frase, attributes the stalemate, at least in part, to the "system-wide"

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*à vue*. These new provisions give most detainees a right to consult with a lawyer but not to have the lawyer present during interrogation. Their effect deserves a separate article, assuming they survive the expected rightist victory in this spring's legislative elections.

221. Lloyd L. Weinreb, *Denial of Justice* (1977); John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 Mich. L. Rev. 204 (1979); John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 Yale L.J. 1549 (1978); John H. Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. Chi. L. Rev. 439 (1974); George 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); Rudolf B. Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 Buffalo L. Rev. 361 (1977).

222. Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy and Germany*, 87 Yale L.J. 240 (1977); Abraham S. Goldstein & Martin Marcus, *Comment on Continental Criminal Procedure*, 87 Yale L.J. 1570 (1978). For a Continental scholar's argument that French and German procedures would not work in America, see Thomas Weigend, *Continental Cures for American Ailments: European Criminal Procedure as a Model for Law Reform*, 2 Crime and Justice: An Annual Review of Research 381 (1980).

223. Tomlinson, *supra* note 62, at 132.

focus of the reforms proposed by his predecessors.<sup>224</sup> Total system reforms are, he believes, extremely unlikely to occur, but “smaller transplants” are possible and may produce “hybrid systems” of criminal justice superior to either parent system.<sup>225</sup> In addition, the global transplants offered by the earlier admirers were actually the least feasible.<sup>226</sup> Frase therefore identifies seven features of the French system which he believes either “suggest desirable and feasible American reforms or might be seen as posing insuperable barriers to other aspects of that system.”<sup>227</sup> His seven potential transplants are:

- 1) More careful selection, training and supervision of police, prosecutors and judges.
- 2) Narrower scope of the criminal law.
- 3) Fewer limits on the gathering and use of evidence against the accused.
- 4) Less frequent use of arrest and pretrial detention.
- 5) Limits on prosecutorial charging discretion.
- 6) Absence of explicit plea bargaining, as well as less abusive forms of tacit bargaining.
- 7) Less severe sentencing laws and practice.

These potential transplants do not strike me as “small” or “modest” as Professor Frase suggests; but they do strike me, except for number three, as eminently sensible, or at least defensible, reform proposals. For example, narrowing the criminal law’s scope (number two) and lessening sentencing severity (number seven) would, given my values or perspective as a largely unreconstructed sixties liberal, substantially improve the American criminal justice system. So would the elimination of the death penalty, a possible transplant from abolitionist France<sup>228</sup> barely mentioned by Professor Frase.<sup>229</sup> Now all such reform proposals deserve a full debate on their merits; their successful functioning as part of another country’s criminal justice system certainly should carry some, but in my opinion not very much, weight. The evidentiary support which the French experience brings to proposals for reforming the American system depends on the degree of similarity between the two systems. This basic point receives inadequate attention from Professor Frase,

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224. Frase, *supra* note 99, at 550.

225. *Id.*

226. *Id.* at 662.

227. *Id.* at 550.

228. *Id.*

229. *Id.* at 649 n.571. France abolished the death penalty in 1981. There is little agitation for reinstating it. Protocol No. 6 of the European Convention on Human Rights, ratified by France in 1985, bars its reinstatement.

whose article devotes more space to describing how our system malfunctions than to describing how the French system actually functions. My interest, on the other hand, is to use the wiretapping saga to show in greater depth how the French system works. That story discloses a system which is both profoundly different from America's and undergoing rapid change. Both those factors weaken the support it lends to home-based reform proposals.

Item number three—fewer limits on gathering and use of evidence against the accused—poses more serious problems. First, it appears that Frase treats this item not as a potential transplant but as a potential “barrier to American adoption of *other* continental procedures that depend critically on a broad investigatory power.”<sup>230</sup> Thus, he outlines the formidable array of investigatory powers found in France, but then argues that “American police powers are, in practice and even in theory, almost as broad as those enjoyed by French investigating authorities.”<sup>231</sup> He concludes that, “[t]o a very great extent, the American police, like their French counterparts, can do whatever they want to do.”<sup>232</sup> No borrowing is therefore necessary before adopting other aspects of the French system. Second, I do not agree with Professor Frase that the balance between individual rights and investigatory authority is at all comparable in the two countries. The French system still weights the scales more heavily on the side of the investigators than does America's system, despite the vigorous catchup efforts of the Rehnquist Court in the ten years which have elapsed since I last published in this area.<sup>233</sup> That proposition receives empirical support in the French system's response to wiretapping described in this article. That saga demonstrates that the authority of law enforcement officials to wiretap, and to search and seize generally, remains subject to far fewer constraints in France than in this country. The situation continues despite the ongoing infusion of constitutional and European human rights norms designed to protect the individual. The discrepancy between the American system and the French system is even greater in areas such as incommunicado police interrogation of suspects (the *garde à vue*) not yet subjected to review under the new external norms.

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230. Frase, *supra* note 99, at 573.

231. *Id.* at 576.

232. *Id.* at 577.

233. For two striking recent examples, see *Florida v. Bostick*, 111 S. Ct. 2382 (1991) (police requesting bus passengers for tickets and identification not subject to Fourth Amendment restrictions); *Kuhlmann v. Wilson*, 477 U.S. 436, 106 S. Ct. 2616 (1986) (deliberate overhearing of indicted defendant's statements by “listening post” informant does not violate Sixth Amendment right to counsel).