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## The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour D'Assises

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**The Intersection of Two Systems:  
An American on Trial for an American Murder in the French Cour d’Assises**

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Summary .....	1
I. Introduction .....	1
II. Overview of the Cour d’Assises .....	11
III. Investigation and Charging .....	13
IV. Courtroom and Personnel .....	20
A. The Courthouse and Courtroom .....	20
B. Judges and Lawyers .....	23
C. The Jury .....	32
V. The Trial .....	36
A. Flexibility of Trial .....	36
1. Explaining American Criminal Procedure: Witnesses Before the Cour d’Assises .....	37
2. The Civil Party .....	39
B. The Personality Phase .....	44
1. The Most Valuable Testimonial Resource: The Defendant .....	47

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<sup>1</sup>Associate Professor of Law, George Washington University Law School; J.D., Yale Law School; M.Litt., Oxford University; A.B., Princeton University. I would like to thank Jean-Yves Garaud and Olivier Saumon, defense counsel for Thierry Gaitaud; Yves Corneloup, president of the Cour d’assises; Chantal Germain, Clerk of the Cour d’assises; Nathaniel Herzberg, reporter for *Le Monde*; Marc Pivois, reporter for *Libération*; Philippe Bilger, *avocat général*; and Mary Ellen Barrett, Assistant District Attorney for San Diego, for sharing their expertise. Raj Bhala, W. Burlette Carter, Richard Cummins, Richard S. Frase, John H. Langbein, Cynthia Lee, Camille Lignières, Sean D. Murphy, William T. Pizzi, Peter Raven-Hansen, David Sharpe, Andrew Spanogle, Gordon H. Van Kessel, Stephen F. Williams, and the members of the George Washington University Law School works-in-progress group provided helpful comments. Many thanks also to Marie-France Garaud, who generously took me into her home during the trial, and to Dean Michael Young of George Washington University Law School for financial support. Except as noted, all translations are the author’s.

2.	The Other Personality Witnesses: Psychiatrists, Psychologists, and Family Members .....	53
C.	The Facts Phase .....	55
1.	Defendant Again at Center Stage .....	55
2.	Lack of Rules of Evidence: Treatment of Hearsay .....	57
3.	The Investigating Judge Testifies: Correcting a Deficient American (and French) Investigation .....	59
4.	Testimony of French Versus American Police .....	62
5.	Differences in Expert Testimony .....	64
6.	Lapses in Dignity .....	68
7.	Physical Evidence in the Inquisitorial System: The Computer .....	69
8.	An Alternative Killer?: An Attempt to “Take the Fifth” .....	70
9.	Reliance on the American Prosecutor: Defense Counsel Timidity .....	73
D.	Closing Arguments: Plaidoiries and Réquisitoire .....	75
E.	Charge, Deliberations, and Verdict .....	80
F.	Postmortem .....	82
VI.	Advice for Americans Working on a Multinational Criminal Case .....	84
A.	The Defense .....	85
B.	The Prosecution .....	86
VII.	Conclusion .....	88

## **Summary**

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

### **I. Introduction**

Monsieur le président, resplendent in a red robe with ermine trim, was running through a chronology from the dossier in a monotone. As he finished he took off his glasses and looked searchingly at the defendant. "Monsieur Gaitaud," he intoned, "you can have any defense you want, but there is a price. If we think you are guilty and you say you are not, we're going to

think you're a liar and not capable of taking responsibility for your actions—that you're dangerous. You're now facing the grandmother of Malinda [one of the victims]. You've also been living with the spirits of the young woman, Susan, who was 24 years old, and the little girl, Malinda, three years old, and also the little baby in Susan's womb, who was only about fifteen days from being born—the baby who would have been your son. I've seen pictures of the foetus, and it was a real baby, with hands and fingers— Monsieur Gaitaud, now is the time for truth.”

“Yes,” said Thierry Gaitaud.

“Did you kill Susan and Malinda?”

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

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

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

Thierry Gaitaud's murder trial before the Cour d'assises in Paris in June was in some respects unusual. Gaitaud is an American citizen. The bodies of Susan and Malinda Belasco, both Americans, were found in Susan's car in his garage in San Diego in June 1992. He had fled immediately, drifted around Europe and Africa for two years, and ultimately was arrested in France under an international arrest warrant. California asked for his extradition, but France responded that Gaitaud was a French citizen—thanks to his parents, both French but long living in the United States. The U.S. extradition treaty with France expressly permits France to refuse to extradite its own citizens, and France exercised that authority in Gaitaud's case. France has also

been reluctant to extradite suspects who may face the death penalty.<sup>2</sup> (The Assistant District Attorney for San Diego stated decisively that the prosecution would have asked for the death penalty in this case had it been tried in California.)

France decided that it had jurisdiction to try Gaitaud in Paris, despite the fact that Gaitaud and the Belascos were American citizens, and the murders were committed in San Diego. France is well-known for having expansive ideas of its civil jurisdiction in international cases under Article 14 of the French Civil Code. Criminal jurisdiction is no exception; Article 689 of the Code of Criminal Procedure gives French courts jurisdiction where a crime is committed *against* a French citizen by anyone anywhere in the world, and also *by* a French citizen against anyone anywhere in the world.<sup>3</sup> In France, as in most legal systems, once a court determines it has criminal jurisdiction, it follows its own procedural and substantive law.

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

<sup>3</sup>The old Article 689 and 689-1 used to make these bases of jurisdiction explicit; the current version of article 689 (effective 1994) refers to Book 1 of the Criminal Code which lays out this jurisdiction. *See* Code Pénale art. 113-6 & 113-7. Jurisdiction over the crimes committed abroad by one's own nationals is more common. This is known as the "nationality principle." *See, e.g.*, Restatement (Third) of the Foreign Relations Law of the United States § 402, Bases of Jurisdiction to Prescribe ("a state has jurisdiction to prescribe law with respect to . . . the activities, interests, status, or relations of nationals outside as well as within its territory"), § 421, Jurisdiction to Adjudicate ("a state's exercise of jurisdiction to adjudicate with respect to a person or thing is reasonable if, at the time jurisdiction is asserted . . . the person . . . is a national of the state"). United States courts only have jurisdiction to try criminal cases if the act in question is a crime under U.S. law (e.g., a U.S. law making it a crime for a U.S. national to violate the narcotics law of a foreign state). *Id.* at § 422(1) & Reporter's Note 3. Jurisdiction over crimes committed against a state's nationals—called "the protective principle"—is more limited. *See id.* at § 402(3). The Omnibus Diplomatic Security Act of 1986, 18 U.S.C. 2331, for example, provides for the domestic prosecution of persons who kill U.S. nationals abroad when the offense was intended to coerce, intimidate, or retaliate against a government or a civilian population.

Gaitaud's trial therefore went forward in Paris in June 1999 under French law, with the San Diego D.A.'s office, police department, and medical examiner's office all well represented. The author was present as a witness, at the request of defense counsel, to testify about American criminal procedure.<sup>4</sup>

Gaitaud's trial is important for several reasons. First, it shows how a case plays out when other countries are willing to assert jurisdiction over a crime committed in the United States. The number of these sorts of cases is likely to rise. Countries are adopting broader bases of criminal jurisdiction, covering crimes committed outside their territory.<sup>5</sup> Dual or even triple nationality is likely to become more common in our age of globalization (*mondialisation* as the French call it).<sup>6</sup> Other countries are increasingly uncomfortable with the death penalty, and so

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<sup>4</sup>One of the defense lawyers in Gaitaud's case contacted me about coming to trial to help clarify some issues about American criminal procedure. He requested I be put on the witness list, and the presiding judge approved. Witnesses in France are not designated as either "defense" or "prosecution" witnesses. I was sent an official summons by the Cour d'assises, and was partly compensated by the French government, although I was working largely pro bono. Officially, both the San Diego Assistant D.A. and I were fact witnesses, not experts. We were, however, accorded certain privileges which other witnesses were not, such as being seated at a table in front of the bar throughout the trial.

<sup>5</sup>*See supra* note 3.

<sup>6</sup>These claims of dual nationality may be based on the nationality of a parent, as in Gaitaud's case, and reflect little previous contact with the country a suspect fled to. Samuel Sheinbein, for example, fled to Israel after a murder and claimed Israeli citizenship based on his father's having been born in British-ruled Palestine in 1944, before the state of Israel was founded. Israeli courts upheld his claim of citizenship, and he pled guilty there. Ethan Bronner, *Israelis Defend Plea Bargain With American*, N.Y. TIMES ABSTRACTS 13 (Aug. 26, 1999). However, because of outrage over the case and U.S. concern, Israel has since amended its laws to allow extradition of nonresidents such as Sheinbein, and even residents as long as they serve their sentences in Israel. Matthew Kalman, *Israel Amends Law, Lets Nonresidents Be Extradited*, U.S.A. TODAY 11A (Apr. 20, 1999). Other laws and treaties prohibiting extradition of nationals, such as the U.S.-French treaty, remain. *See* Jamison S. Borek, *The Importance of Extradition in International Law*, testimony before the Subcomm. on Criminal Justice, Drug Policy, and Human Resources of the House Comm. on Government (May 12, 1999), at 1999 WL

are more likely to refuse extradition to the United States in murder cases and to try such cases themselves.<sup>7</sup> Also, as international crime rings grow, multinational investigations and prosecutions are likely to increase.<sup>8</sup> The Gaitaud case shows how a multinational case

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16947714 (noting that many countries are prohibited by their laws from extraditing their own nationals).

<sup>7</sup>See Borek, *supra* note 5 (State Department official testifying that many countries may decide not to extradite suspects unless they receive assurances that the death penalty will not be imposed). Last April, the U.N. Commission on Human rights approved a resolution calling for a moratorium on executions and urging states that have received requests for extradition on a capital charge to reserve the right to refuse to extradite if they do not receive assurances that capital punishment will not be carried out. *U.N. Panel Seeks Halt to Executions*, A.P. Online (Apr. 28, 1999), at 1999 WL 17061619; Daniel Leblanc, *U.K., Austria Help Broker Accord on Extradition*, GLOBE & MAIL, A15 (Apr. 24, 1999).

<sup>8</sup>See Presidential Decision Directive 42, *International Organized Crime* (Oct. 21, 1995) (ordering federal agencies to increase and integrate their efforts against international crime syndicates and money laundering); *International Crime Control Strategy* V.C.1 &3 (released by the White House May 12, 1998) (noting increase in extradition requests by the U.S. from 1,672 in 1990 to 2,894 in 1996, partly because of the ease of modern travel; explaining goal of promoting cooperation with foreign law enforcement authorities through Mutual Legal Assistance Treaties (MLATs) designed to secure witness statements and testimony, physical evidence, and fruits of crimes from abroad); White House Report submitted in accordance with the Goldwater-Nichols Defense Department Reorganization Act of 1986, *A National Security Strategy for a New Century* (Oct. 1998) 15-19 (recognizing great threat to U.S. security and commerce posed by international organized crime and outlining International Crime Control Strategy including improving bilateral cooperation with foreign governments and law enforcement authorities); William J. Olson, *International Organized Crime: The Silent Threat to Sovereignty*, 21-Fall FLETCHER F. WORLD OFF. 65 (1997) (arguing that the problem of international organized crime is so severe as to threaten the political order of many countries); Bruce Zagaris, *International Criminal Law*, in Symposium: U.S. International Cooperation Against Transnational Organized Crime, 44 WAYNE L. REV. 1401, 1411-1419 (1998) (discussing joint law enforcement efforts through the use of liaison officers and MLATS to help smooth cultural and legal differences); ETHAN NADELMANN, COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT 467-68 (1993) (arguing that cooperation between U.S. and foreign law enforcement agencies has resulted in melting of the two systems of criminal justice); U.S. Dep't of State, Bureau for International Narcotics and Law Enforcement Affairs, *International Narcotics Control Strategy Report* 44 (1997) (describing joint enforcement efforts). There is even a new legal journal entitled "Transnational Organized Crime."

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

Second, and more broadly, the Gaitaud case throws into stark relief differences between our adversarial criminal justice system and the French inquisitorial system.<sup>9</sup> We are fortunately in the midst of a renaissance in comparative criminal procedure;<sup>10</sup> this study draws on the

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<sup>9</sup>There has been an extensive debate in the literature about the use of the terms “adversarial” and “inquisitorial,” with commentators pointing out that most systems use some combination of the two approaches. See, e.g., William T. Pizzi, *The American “Adversary System”?*, 100 W.VA. L. REV. 847 (1998); Craig M. Bradley, *The Convergence of the Continental and the Common Law Model of Criminal Procedure*, Book Review, 7 CRIM. L.F. 471 (1997); Craig M. Bradley, *Overview*, CRIMINAL PROCEDURE: A WORLDWIDE STUDY xix-xxi (Craig M. Bradley ed., 1999). While it is true that no system is purely one or the other, the fact remains that U.S. criminal procedure is far over on the adversarial end of the continuum, and France toward the inquisitorial end. Pizzi himself has acknowledged the extreme partisanship of American advocacy. William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT’L L. 37, 44 (1996). A good definition of the terms “adversarial” and “inquisitorial” can also be found in MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 3-6 (1986).

<sup>10</sup>Interest in comparative criminal procedure waxes and wanes over the years. In the 1970's and early 80's, there was an explosion of interest that then died down, but has recently been revived. In one of the first articles of the “new wave,” Richard Frase compiled an extensive list of citations to the first wave. See Richard S. Frase, *Comparative Criminal Justice As a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 542, 543-544 at nn. 1-5, 7-9 (1990). I will cite to this literature as it is relevant. Frase himself in the California article focused mostly on pretrial procedures and sentencing. He devoted a small section to trial procedure in an appendix at the end. *Id.* at 673-682. Other helpful pieces in the new wave include Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403 (1992); Gordon Van Kessel, *European Perspectives on the Accused as a Source of Testimonial Evidence*, 100 W. VA. L. REV. 799 (1998) (part of a symposium entitled “Is There a European Advantage in Criminal Procedure?”); William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law*

comparative literature as well as French sources. The Gaitaud trial provides concrete examples that help us to understand how the principles of continental procedure work in practice. The one difficulty with the work that has been done in comparative criminal procedure thus far is that it tends to lay down principles divorced from the context of particular trials.<sup>11</sup> This study will address this gap. This contextual approach helps bring the principles to life and highlights differences with our system, differences that were particularly salient in this trial. The very atypicality of this trial brought out the contrasts. There were two criminal investigations of the same case, and often American and French experts testified on the same points. American and French expectations of the trial were poles apart. It is especially important to grasp these different expectations now, when a permanent International Court of Justice is on the horizon and an international system of procedure must be worked out.<sup>12</sup> This will inevitably involve

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*Foundation*, 17 YALE J. INT'L L. 1 (1992); Richard S. Frase & Thomas Weigend, *German Criminal Procedure as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. INT'L & COMP. L. REV. 317 (1995); CRIMINAL PROCEDURE: A WORLDWIDE STUDY (Craig M. Bradley, ed. 1999); Craig M. Bradley, *The Emerging International Consensus as to Criminal Procedure Rules*, 14 MICH. J. INT'L L. 171 (1993). Bradley's comprehensive and detailed book is likely to come into widespread use as interest in offering courses on comparative criminal procedure grows. William Pizzi has recently written a book aimed at a more general audience, criticizing American criminal procedure from a comparative viewpoint. WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH (1999). His proposals for reform, in particular, should spark much-needed debate.

<sup>11</sup>The work of Bron McKillop of the University of Sydney has begun to correct this problem. See Bron McKillop, *Anatomy of a French Murder Case*, 45 AM. J. OF COMP. L. 527 (1997) (describing the proceedings in a standard French murder case); Bron McKillop, *Readings and Hearings in French Criminal Justice: Five Cases in the Tribunal Correctionnel*, 46 AM. J. COMP. L. 757 (1998). The differences between the standard murder case McKillop describes and the Gaitaud case are instructive and will be noted throughout the text.

<sup>12</sup>Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (adopted July 17, 1998 at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court) (published at <http://www.un.org/icc>). See Danesh Sarooshi, *The Statute of the International Criminal Court*, 48 INT'L & COMP. L.Q. 387

compromises between proponents of the two systems.

The proceedings in the Cour d'assises highlighted the consequences of a fundamental difference in the two legal systems: party control of fact investigation and presentation of evidence versus judicial control. The word "inquisitorial" is pejorative to most Americans, but it should be borne in mind that the word simply refers to an official inquiry. In inquisitorial systems the fact-finder inquires into the circumstances of the case, instead of having those circumstances presented to him or her by others. The use of official inquiry implies a greater reliance on government officials, particularly judges. Supporters of adversarial systems are more distrustful of government power, including judicial power, fearing that it breeds corruption, arrogance, and incompetence.<sup>13</sup> They prefer the parties to rely on their own resources to

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(1999); Ruth Wedgwood, *The International Criminal Court: An American View*, 10 EUR. J. INT'L L. 93 (1999); Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR. J. INT'L L. 144 (1999). So far, commentary concerning the ICC has focused on jurisdiction and substantive law, not investigative and trial procedure, although there are important procedural questions to be addressed. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and for Rwanda (ICTR) have had to resolve issues of blending procedural systems. See Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT'L L. 57, 80-81 (1999). A recent U.N. report prepared by an independent commission suggested that procedures in these courts should be revamped and that judges should take "a more interventionist role" to speed up proceedings. The new president of the ICTY, Claude Jorda, a former president of the French Cour d'assises, is said to agree with these conclusions. Jim Wurst, *Rights: Top Judge Seeks to Speed Up Yugoslav War Crimes Trials*, Inter Press Service (Feb. 4, 2000), 2000 WL 4089718. (Jorda's predecessor was former U.S. federal judge Gabrielle Kirk McDonald.) Similar issues will arise for ad hoc courts dealing with particular international incidents. See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L L. 161, 174-179 (1999) (discussing procedural compromises associated with potential trial of Libyan Lockerbie bombing suspects by an ad hoc court in the Netherlands). The ad hoc approach blending procedural systems may be taken in other cases, for example if Afghanistan allows extradition of suspected terrorist Osama bin Laden.

<sup>13</sup>These beliefs, as Tocqueville pointed out, run deep in American thought. See ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 203-205 ("Public Officers Under the Rule of

investigate and present evidence.<sup>14</sup> The French are not blind to the problems that can arise in having judges act as the principal investigators and inquirers at trial, and the French system tries to limit these problems in ways that will be highlighted throughout the piece.

One of the most striking results of judicial control seen in the Gaitaud case was the very different approach to oral testimony compared to that in the U.S. system. The inquiry by the fact-finder has the effect of allowing witnesses—including the defendant—to speak freely, in their natural voices. The French word for trial session—*les débats*—suggests this free speech; it means, among other things, debate or discussion. And indeed trial in the Cour d’assises resembled an ongoing discussion, directed by the president.<sup>15</sup> The presiding judge in the Cour d’assises is explicitly charged with maintaining the dignity and the efficiency of trial.<sup>16</sup> The two are viewed

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American Democracy”) (J.P. Mayer ed., George Lawrence trans. 1969) (1835).

<sup>14</sup>See Bradley, *Overview*, *supra* note \_\_\_\_, at xvi; JOHN H. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* 150-51 (1977); Richard S. Frase, Review Essay, *The Search for the Whole Truth About American and European Criminal Justice*, 3 *BUFF. CRIM. L. REV.* 785, 818-20 (2000). Mirjan Damaška has explored the greater levels of trust in government officials shown by societies which have inquisitorial systems as opposed to those with adversarial systems. Differences in procedure tend to be connected, he argues, with different overall concepts of government. Inquisitorial systems are linked with a desire to have the government find the truth, whereas adversarial systems are linked with a desire to have the government settle disputes among private parties. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY*, *supra* note 8, chaps. 4 & 5.

<sup>15</sup>The heading of a section in the French Code of Criminal Procedure describing trial in the Cour d’assises is entitled, “On the Production and *Discussion* of Evidence.” Code de Procédure Pénale, heading before art. 323 et seq. (emphasis added).

<sup>16</sup>Code de Procédure Pénale art. 309 (“The president has control over the courtroom and the direction of the trial. He shall reject everything that tends to compromise the trial’s dignity or to prolong it without producing greater certainty in the results.”).

as closely linked, with a truth-seeking discussion as the goal.<sup>17</sup> Another important difference which permits witnesses to speak more freely in the French system is the lack of detailed rules limiting admissible evidence. The president's control in the Cour d'assises, combined with a lack of extensive evidence rules, leads to more narrative testimony and flexible debate in contrast to our party-controlled, highly structured direct and cross-examination.

There are advantages and drawbacks to the French system of inquiry of witnesses, and these appeared in the Gaitaud case. Drawbacks include a reluctance to contest official authority—a reluctance which was marked at certain points in the trial. The advantages relate to information-gathering and dignitary values. Much information is known to the fact-finders: there are not so many exclusionary rules of evidence, and witnesses are often more forthcoming with information when they are not tightly controlled by the parties. There is also a dignitary value in allowing witnesses to speak in their natural voices. Most importantly, the defendant speaks and speaks often. In the American adversarial system, the norms of party control of trial and of protecting a zone of privacy around the defendant prevent this inquiry.<sup>18</sup> French views of

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<sup>17</sup>Maintaining dignity, in French jurisprudence, requires that the presiding judge not allow questions to be put to witnesses that distract attention from the issues before the court and impede efficiency. Crim. 26 juill. 1993; *Bull. Crim.* no. 251. Dignity at trial is an important concept in French law generally. Under the Code of Civil Procedure, all people present at trial must behave with dignity and maintain the respect due to the court. Code de Procédure Civile art. 439.

<sup>18</sup>These norms affect other areas of U.S. law beyond criminal procedure. Jerry Mashaw has argued that individual dignity should be taken into account in administrative procedure as an important “process value” or “soft variable” apart from simple accuracy of result. Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Matthews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 48-52 (1976). His version of dignity does include the right to be heard, but he also emphasizes the importance of protecting “zones of privacy” around individuals. Jerry L. Mashaw, *Dignitary Process: A Political Psychology of Liberal Democratic Citizenship*, 39 U. FLA. L. REV. 433,

what is due the defendant are different, and stress not *freedom from* interference but rather *freedom to* be known.<sup>19</sup> This emphasis is particularly evident in the phase of the trial known as the “personality,” where the defendant’s life history and psychology are explored. This exploration helps ensure that the defendant is not a faceless offender to the fact-finders, but rather a unique human being with circumstances and motivations of his own.<sup>20</sup>

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

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439-440 (1987); *see generally* JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* (1985).

<sup>19</sup>These correspond with the categories of “negative liberty”—freedom from—and “positive liberty”—freedom to—that Isaiah Berlin described in his essay *Two Concepts of Liberty*. Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* (1969). The American criminal procedure regime generally adheres to the idea of negative liberty, emphasizing the defendant’s right to privacy and autonomy, his *freedom from* interference by the state. American procedure, for example, has protections designed to ensure that the defendant can remain silent at trial, free from government questioning. The French, in contrast, stress positive liberty: trial participants’ *freedom to* speak without artificial constraints and of the defendant to be known as a complete human being. *See id.* at 155, 160-62 (linking the desire to be known as an individual with positive liberty).

<sup>20</sup>This idea is encapsulated in the French saying, “One judges the man, not his deeds” (*on juge l’homme, pas les faits*). *See* Introduction, *THE FRENCH CODE OF CRIMINAL PROCEDURE* (Gerald L. Kock & Richard S. Frase, trans. 1988), at text accompanying note 151.

of two dissimilar forms of investigation and trial procedure. Enough of the evidence is described to allow the reader to draw his or her own conclusions about the correctness of the verdict.<sup>21</sup>

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

## II. Overview of the Cour d'Assises

The Cour d'assises, or Assize Court, was established shortly after the Revolution and is the only court in France to sit with a jury. But this jury differs from its Anglo-American counterpart. The nine lay jurors sit together with three professional judges, deliberate with them, and vote with them.<sup>22</sup> Each vote has equal weight. A majority of eight is needed to convict, so that even if all three professional judges are convinced of guilt, a majority of the lay jurors must agree.<sup>23</sup> The three professional judges consist of the president (or presiding judge) and two others, called *assesseurs*. The jurisdiction of the Cour d'assises is limited: only offenses for which the minimum punishment is ten years' imprisonment are tried there.<sup>24</sup> Most of the crimes

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<sup>21</sup>[Note to editor: I need to be somewhat careful in drawing conclusions about the accuracy of the verdict because of my role at trial and ongoing proceedings in the Cour de cassation. Suffice to say most people would conclude the verdict was amply justified.]

<sup>22</sup>Code de Procédure Pénale arts. 296, 355, 356.

<sup>23</sup>Code de Procédure Pénale art. 359.

<sup>24</sup>The French call such serious offenses *crimes*, which can loosely be translated as “felonies.” The Cour d'assises has exclusive jurisdiction to try *crimes*. Less serious offenses are called *délits* and petty offenses *contraventions*. For a list of the possible prison sentences for a felony conviction, see Code Pénale art. 131-1 (prison sentences on the following scale: life, no more than 30 years, no more than 20 years, no more than 15 years).

tried in the Cour d'assises are murder, rape, and armed robbery; less common are kidnapping, counterfeiting, torture, crimes against humanity, and terrorism. (Lesser but still serious offenses—those for which the maximum punishment is ten years' imprisonment—are tried by the Tribunal correctionnel, which sits with three professional judges and no lay jurors.<sup>25</sup>)

In keeping with their judge-controlled system, the French do not place burdens of proof on the parties (as the American legal system does in saying the prosecution must prove its case “beyond a reasonable doubt”). Instead, fact-finders in the Cour d'assises are simply asked the question in the charge: *Avez-vous une intime conviction?*<sup>26</sup> This is a very difficult question to translate but might be rendered as “Are you deeply, thoroughly convinced?” Sentencing is done by the entire panel, professional judges and lay jurors alike, voting by secret ballot for one of the possible prison sentences specified by law. A straight majority (seven votes) is needed to impose a sentence; there are rules for arriving at a majority in case one is not achieved on the first ballot.<sup>27</sup> Eight votes are needed to impose the maximum sentence—in this case, life imprisonment.<sup>28</sup>

### III. Investigation and Charging

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<sup>25</sup>In the least serious cases before the Tribunal correctionnel, one judge sits alone. The number of cases tried in the Cours d'assises in 1997, the latest year for which information is available, was 3,161 (of which 138 acquittals and 3,023 guilty verdicts). MINISTÈRE DE LA JUSTICE, ANNUAIRE STATISTIQUE DE LA JUSTICE, séries 1993-1997, at 101 (1999). For comparison, the number of cases tried in the Tribunaux correctionnels in 1997 was 403,885 (of which 21,279 acquittals and 382,606 guilty verdicts). *Id.* While the Tribunal correctionnel tries many more cases, they are of course less serious and that court does not have the same cultural significance for the French as the Cour d'assises.

<sup>26</sup>*See infra* note \_\_\_ and accompanying text.

<sup>27</sup>Code de Procédure Pénale art. 362.

<sup>28</sup>*Id.*

The French have many checks before a case arrives in the Cour d'assises for trial. In contrast with our system, French judges are heavily involved at all pretrial stages—the responsibilities of the prosecutor and defense counsel are much reduced. One of the most surprising things about the French criminal justice system, for an American, is the method of investigation. In serious criminal cases, investigation is done not by the parties but by a judge.<sup>29</sup> This judicial control means that defendants are not so dependent on their counsel for a good defense. An indigent defendant is not placed at such a disadvantage, having to rely on a poorly-funded legal aid system. And a better-off defendant does not have to spend large amounts of money trying to get the best possible counsel. The system of course depends on having competent and conscientious (and more numerous) judicial officers.

Once a crime is committed, it is brought to the attention of the *procureur de la République*, or the equivalent of the district attorney. He or she is the head of the office that represents the government before the trial court of general jurisdiction (the *Tribunal de grande instance*, of which the *Tribunal correctionnel* is the criminal branch) of each *département*, or geographic administrative division in France. If the crime is sufficiently serious, and that includes all crimes that could be tried before the Cour d'assises, the *procureur de la République* requests a judicial investigation (*instruction judiciaire*).<sup>30</sup>

This request goes to a separate body of judges who are responsible for the charging process: the *Chambre de l'instruction* (until very recently known as the *Chambre d'accusation*).<sup>31</sup>

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<sup>29</sup>See *infra* note \_\_\_\_ on the relationship between the investigating judge and the police.

<sup>30</sup>Code de Procédure Pénale arts. 51, 79, 80.

<sup>31</sup>The change in name took effect on January 1, 2001. See loi du 15 juin 2000; circulaire du 11 décembre 2000. These can be found at the French Ministry of Justice's website, at

Each panel of the Chambre de l'instruction is composed of three judges. A panel of the Chambre de l'instruction appoints a special judge to investigate the case (the *juge d'instruction*). The investigating judge investigates the matters laid out in the prosecutor's request; within those bounds, he is required to look for both exculpatory and inculpatory evidence. He is broadly charged with pursuing all inquiries that he deems useful in discovering the truth (*la manifestation de la vérité*).<sup>32</sup> He directs the "judicial police" (*police judiciaire*) in gathering evidence and interviewing witnesses.<sup>33</sup> When witnesses are interviewed, sometimes the entire exchange—all questions and answers—are taken down in a verbatim transcript.<sup>34</sup> Verbatim

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<http://www.justice.gouv.fr>. The change in name is part of a wide-ranging set of reforms to the French criminal justice system enacted by the legislature in 2000. In general, the reforms are aimed at strengthening the rights of the criminal defendant.

<sup>32</sup>Code de Procédure Pénale art. 81.

<sup>33</sup>In France, direct judicial supervision of investigation is rare. Most criminal cases are investigated by the police under the supervision of the prosecutor. See Van Kessel, *Adversary Excesses*, *supra* note \_\_\_\_, at 421-22; Frase, *Comparative Criminal Justice*, *supra* note \_\_\_\_, at 667 n. 640; Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J. 240, 250-51 (1977). Even in serious cases where the investigating judge is in charge, often he or she delegates considerable power to the police. In particular, questioning of suspects is frequently delegated. Lidstone & Early, *Questioning Freedom; Detention for Questioning in France, Scotland, and England*, 31 INT'L & COMP. L.Q. 488, 490 (1982). Other continental systems rely even less on the investigating judge. Germany did away with the office of the investigating judge in 1975. In theory, in Germany the public prosecutor handles investigation; in practice, except in homicide and a few other cases, the police investigate independently. JOHN H. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* 11-12 (1977); Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. INT'L & COMP. L. REV. 317, 323 (1995).

<sup>34</sup>Code de Procédure Pénale art. 102; see also arts. 106, 107 (elaborate procedures for verifying and correcting transcript). Verbatim transcripts, however, are not always taken; sometimes the written record (*procès-verbal*) includes simply the substance of the interrogation. Frase suggests this is generally the case. Richard S. Frase, *France*, in BRADLEY, *CRIMINAL PROCEDURE* 160 & n. 125 (citing G. STEFANI, ET AL., *PROCÉDURE PÉNALE* ¶ 534 (16<sup>th</sup> ed. 1996)). Each page of the written record is signed by the investigating judge, the clerk of the court, and

transcripts were taken in the Gaitaud case. This is quite different from our own witness statements taken by the police, which do not include the questions asked, often do not include exculpatory evidence, and are sometimes written up by the police and signed by the witness months after the interview.<sup>35</sup> (The check in our system is that the defense may attempt to interview witnesses before trial, and of course conduct cross-examination at trial.)

Most astonishing of all are the limitations on partisan evidence gathering. Both the prosecutor and defense counsel are forbidden to interview nonparty witnesses;<sup>36</sup> in fact, defense counsel are disbarred if they do.<sup>37</sup> Therefore witness coaching (or “preparation,” as we call it) is prohibited. The two sides may, however, suggest that the investigating judge interview certain witnesses, ask certain questions, and gather particular physical evidence and run tests on it.<sup>38</sup> If the investigating judge refuses, the prosecutor or defense counsel may appeal to the *Chambre de l’instruction*.<sup>39</sup>

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the witness. The witness is asked to read the record for accuracy.

<sup>35</sup>Gordon Van Kessel, who was a prosecutor in San Francisco, reported that in his experience, many police reports of witness interviews are not even reviewed and checked for accuracy by witnesses. At trial, they often do not correspond to the witnesses’ testimony, “to the delight of defense lawyers and the consternation of prosecutors.” Letter from Gordon H. Van Kessel to Renée B. Lettow (October 31, 2000) (on file with author).

<sup>36</sup>Only the investigating judge (or his or her deputed) are allowed to question witnesses. Code de Procédure Pénale arts. 101, 102.

<sup>37</sup>The prosecutor is not a member of the bar and so cannot be disbarred.

<sup>38</sup>Code de Procédure Pénale art. 82 (prosecutor’s right to request that the investigating judge take actions); art. 82-1 (suspect’s and civil parties’ right to request that the investigating judge take actions); art. 156 (prosecutor’s, suspect’s, and civil parties’ right to request that the investigating judge appoint experts).

<sup>39</sup>*Id.* art. 185 (prosecutor’s right to appeal decisions of the investigating judge); arts. 186 & 186-1 (suspect’s and civil parties’ right to appeal decisions of the investigating judge).

A central feature of this system is the examination of the lead suspect, once one is identified. This is so important that it has its own name, the *mise en examen*.<sup>40</sup> Often, the suspect will be examined several times. Thierry Gaitaud, for example, was questioned twice. As with every witness, there are elaborate procedures for checking the accuracy of the written report of these sessions.<sup>41</sup> At the first session, the investigating judge must tell the defendant the legal and factual basis of the offenses being investigated.<sup>42</sup> Great emphasis is placed on the presence of the defendant's lawyer. If the defendant's lawyer is present, the investigating judge proceeds with questioning. If the defendant does not yet have a lawyer, the investigating judge must advise the defendant of his right to choose a lawyer or to have one provided by the legal assistance service.<sup>43</sup> The defendant is next advised that he cannot be questioned immediately without his consent.<sup>44</sup> Consent to questioning cannot be given except in the presence of defendant's lawyer. However, if the defendant wishes to give a statement at that time (without prompting or being questioned), it will be received by the investigating judge.<sup>45</sup> After this first session, the defendant may only be questioned in the presence of his lawyer, unless he waves this right or the lawyer does not appear. Defendant's counsel is given five days' notice before the

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<sup>40</sup>The recent rash of corruption trials of French politicians has caused some rethinking of the *mise en examen*. Édouard Balladur, a former prime minister, has even proposed that the *mise en examen* be eliminated altogether. Politicians take notice when they feel the effects of a procedure directly.

<sup>41</sup>*See supra* notes \_\_\_ and accompanying text.

<sup>42</sup>Code de Procédure Pénale art. 116.

<sup>43</sup>*Id.*

<sup>44</sup>*Id.*

<sup>45</sup>*Id.*

examination and has the right to consult the dossier beforehand.<sup>46</sup> (After the first appearance before the investigating judge, the defendant need not be informed again of a right not to be questioned without consent; the presence of defendant's lawyer generally means the defendant will be continuously aware of this right.) The nature of the questioner, the careful record-keeping, and the presence of defendant's lawyer limit the questioner's ability to lie about the evidence against the suspect and hold out false hopes of leniency—rather common methods of interrogation in the United States.<sup>47</sup> A defendant cannot be legally compelled to speak during these examinations, or formally punished for refusing.<sup>48</sup> However, there is a strong expectation that defendant will answer questions, and ordinarily counsel urges the defendant to respond to questioning or at least to make a statement.

During Gaitaud's trial, one of the French police who had worked with the San Diego police on this case noted that during an investigation, the French investigating judge tries to get a deep understanding of the personality of the suspect through these extensive interviews. He

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<sup>46</sup>Code de Procédure Pénale art. 114.

<sup>47</sup>See Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 873-874 (1995); DAVID SIMON, *HOMICIDE: A YEAR ON THE KILLING STREETS* 193-223 (1991). For a proposal for interrogation in the United States similar to the French model and consistent with an historical interpretation of the Fifth Amendment, see Amar & Lettow at 898-900. Note that the French proceeding known as the *garde à vue* is different. When a suspect is taken into custody at the time of or just after a crime, there is a period not longer than 48 hours when he may be held and questioned by police. Because of recent statutory changes, there is now some provision for legal advice for the suspect during the *garde à vue*. See Code de Procédure Pénale arts. 63-65. Since Gaitaud was arrested long after the crime was committed, the procedures of the *garde à vue* did not apply to him. The procedures connected with the *garde à vue* have been recently modified to strengthen the right of a detained person to be notified of his rights, particularly his right to counsel. See loi du 15 juin 2000; circulaire du 4 décembre 2000.

<sup>48</sup>Frase, *France*, in BRADLEY, *CRIMINAL PROCEDURE*, at 160-161.

contrasted this with American investigators, who had in his view a much more superficial understanding of the suspect and “see things in black and white.” It certainly is true that, in murder cases at least, the French seemed very concerned with knowing *why* a defendant did something, and not just what he did.

French judicial investigation has its drawbacks. A notable feature of the French criminal justice system is the length of time a suspect can be held while this investigation is taking place. In cases of serious crime, delays are especially long. Gaitaud himself was held in custody for five years before trial, and this is not unusual in a murder case.<sup>49</sup> Periodically during recesses in Gaitaud’s trial, people being held in preventive detention appeared with their lawyers to formally request that they be released. These included, for instance, two men suspected of armed robbery who had been held for two-and-a-half years. The president, sitting with the two professional judges, read the court’s decision. All these requests for release were denied; indeed, they are rarely granted. In the United States, preventive detention before trial can stretch for up to two years in some jurisdictions, but such a long detention is rare.<sup>50</sup> Walking into the office of a

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<sup>49</sup>In 1997, the latest year for which statistics are available, the average length of time between the date of the crime and the date of a decision in the Cour d’assises was 49.7 months, or slightly over four years. ANNUAIRE STATISTIQUE DE LA JUSTICE, séries 1993-1997, at 101 (1999) (showing a steady increase from 39.3 months in 1993). Of course, in some cases a suspect is not held in preventive detention immediately following the crime; he may have been arrested some time into the process of investigation. In contrast, the corresponding 1997 figure for the Tribunal correctionnel was 9.1 months. *Id.* at 103.

<sup>50</sup>This is simply a point about the *length* of pretrial detention, not *rates* of pretrial detention (that is, whether a suspect is likely to be held in pretrial detention at all). Richard Frase has convincingly argued that France has lower rates of pretrial detention than the United States for comparable cases. See Frase, *Comparative Criminal Procedure*, at 599-610; Richard S. Frase, *Sentencing Laws and Practices in France*, 7 FED. SENTENCING REP. 275, 278 (1995). See also Richard S. Frase, *Sentencing in Germany and the United States: Comparing Apples with Apples* (unpublished paper) (finding Germany also has lower rates of pretrial detention than the

French investigating judge, one can see part of the reason why these delays might occur. Every possible surface, including the floor, is piled with paper; investigating judges often handle 100 cases at a time. It should be noted that, since the French lack a system of guilty pleas, some of these defendants may be obviously guilty but still have to wait for formal processing and trial.<sup>51</sup> Recently, as part of a set of significant reforms to the French criminal justice system, the National Assembly enacted reforms providing more procedural protections before a suspect can be held in preventive detention and limiting its duration.<sup>52</sup> The new regime is to be overseen by a new type of judge: the “judge of liberties and of detention” (*juge des libertés et de la détention*).<sup>53</sup> Unfortunately, little provision was made for staffing this position and judges are now under great workload pressure as a result.<sup>54</sup>

The investigating judge compiles all the information he collects in the dossier, a key feature of continental procedure.<sup>55</sup> If the investigating judge feels prosecution for a serious crime is warranted, he transfers the dossier to the office of the *procureur de la République*, who

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United States for comparable crimes).

<sup>51</sup>Another point that should be noted is that guilty defendants may well prefer pretrial over post-conviction confinement, since the former allows them more privileges, less forced work, and more access to their families.

<sup>52</sup>*See* loi du 15 juin 2000; circulaire du 20 décembre 2000.

<sup>53</sup>*Id.*

<sup>54</sup>According to one French judge, the work of the new “judge of liberties and of detention” is often simply not being done, and judicial anger over being forced to take on these new duties contributed to judges in France recently going on strike. Conversation with Judge Camille Lignières, March 30, 2001.

<sup>55</sup>Code de Procédure Pénale art. 81.

in turn gives it to the office of the *procureur général*.<sup>56</sup> Prosecution in the Cour d'assises is handled by the *procureur général*, who represents the government before the Court of Appeals. (His assistants are called *avocats généraux*.) The *procureur général* presents the dossier to the Chambre de l'instruction with a recommendation for action.<sup>57</sup> A panel of the Chambre de l'instruction, composed of three fairly high-ranking judges, decides whether there is sufficient evidence to charge.<sup>58</sup> If they decide there is, they issue the formal charge (*mise en accusation*) and transfer the case to the appropriate trial court.<sup>59</sup> Once the Chambre de l'instruction issues the formal charge, the whole process moves very quickly; trial usually occurs within a few weeks.

The French judicial involvement in investigation prevents a defendant from relying on his own resources or an underfunded public defender system to gather exculpatory evidence.<sup>60</sup> But in a case like Gaitaud's, the very different methods of investigation clash. Gaitaud had no American defense lawyers to gather evidence, and meanwhile the San Diego police were proceeding with a normal American investigation. It was up to the investigating judge to correct this situation, and his effort to do so will be examined in Part IV.C.3 below.

#### **IV. Courtroom and Personnel**

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<sup>56</sup>Code de Procédure Pénale art. 181.

<sup>57</sup>Code de Procédure Pénale art. 194.

<sup>58</sup>Code de Procédure Pénale arts. 191, 211.

<sup>59</sup>Code de Procédure Pénale art. 214.

<sup>60</sup>For the difficulties the defense faces in gathering evidence even in an ordinary American case, see Pizzi, *Trials Without Truth*, *supra* note \_\_\_\_, at 114; Frase, *The Search for the Whole Truth*, *supra* note \_\_\_\_, at 808-13.

### A. The Courthouse and Courtroom

The courthouse and courtroom are imposing. Each department in France has its own Cour d'assises, and naturally the one in Paris is especially impressive. Together with the other courts, it is ensconced in the grand, severe Palais de Justice, a 17<sup>th</sup> century building behind a gilded iron gate on the Ile de la Cité. Its echoing stone hallways, with big black cylindrical heating stoves marching along the length, have names like "Gallerie des Prisonniers." Lawyers in black robes and white cravats sail along with clients. The courtroom itself, up a huge stone flight of stairs, is large and was redesigned in the nineteenth century, with heavy woodwork, green damask walls, and a painting of the coronation of the child Louis XIII.

The design of the Cour d'assises reflects a curious mixture of inquisitorial and adversarial features.<sup>61</sup> An inquisitorial court implies, in physical terms, a direct line of communication between the judge and witness, with that line as the courtroom's main axis. In contrast, an adversarial court implies a public duel between two equal parties—prosecution and defense—fought in a symmetrical courtroom with the judge as a mere referee above the fray.<sup>62</sup> The Cour d'assises incorporates elements of both these models.

As befits an inquisitorial courtroom, there is a direct line of communication between the fact-finders and the witness. The bench is high and wide. It accommodates the president in the center, the assesseurs to either side of him, and the lay jurors arranged on either side of them. All these sit at the same level, making a formidable array. The floor in front of the bench is

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<sup>61</sup>For an account of how the design of the Cour d'assises in Paris reflects the aspirations of the French justice system, see KATHERINE FISCHER TAYLOR, *IN THE THEATER OF CRIMINAL JUSTICE: THE PALAIS DE JUSTICE IN SECOND EMPIRE PARIS* (1993).

<sup>62</sup>*Id.* at 6.

entirely open, except for a microphone where witnesses go to testify, standing in the middle and looking up at the bench. There is no lectern or podium, and the witness feels very exposed to the direct inquiry of the inquisitorial judge. In American courts, in contrast, the witness stand is usually to one side of the judge.

But the courtroom of the Cour d'assises also has adversarial features. Like an Anglo-American courtroom, it is symmetrically divided. There are similar sets of benches along each of the side walls. The defendant sits along the right-hand wall on a bench raised off the floor. (He is screened from the bench by a glass shield and surrounded by two police officers at all times.) On a bench below him, at floor level, sit his counsel. But here the adversarial layout begins to break down. In a fully adversarial court, one would expect that the benches on the left, opposite the defendant and his counsel, would be occupied by the prosecutor. (This would be similar to the way the defense and prosecution have equal tables in front of the bench in an English or American court.) But this is not the case; the prosecutor does not sit directly opposite the defendant. Instead, members of the press sit on these benches facing the defendant. (During the nineteenth century these benches were occupied by the jury. Later the jury was moved up to the judges' bench.) The prosecutor does indeed sit somewhat to the left more or less facing the defendant, but from a skewed vantage point: he actually sits at a small pulpit-like extension of the bench.<sup>63</sup> This is because he is a type of judge, as will be discussed below. The clerk of the court (the *greffier*, or in this case a female *greffière*) balances the prosecutor at the far right end of the bench, as befits her important role in assisting the president. There are a few benches for

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<sup>63</sup>The prosecutor has other privileges as well. Like the presiding judge, he has an office behind the courtroom, and robes in the robing room with the other judges. Defense counsel has no such office and must arrive at court already robed.

witnesses (where the San Diego assistant D.A. and the author were established throughout the trial), and then comes the bar, large and heavy, and rows of benches for the audience beyond that. Further increasing the perception of hierarchy, only the judges and jurors, the prosecutor, and the clerk of the court sit on chairs with backs—everyone else sits on hard benches.

The symmetrical layout of the courtroom thus suggests an adversarial mode which the placement of actors does not fully deliver; the prosecutor is treated more like an inquisitorial judge than an equal party. This disjunction carries into the procedures of the court as well. Some officials (especially the prosecutor) referred to the procedure of the Cour d’assises as “adversarial” or “accusatorial.” And, indeed, the great reliance on oral testimony in the Cour d’assises is similar to our adversarial trials. Still, there was no doubt that the president dominated the proceedings. The power of the inquisitorial president, made visible by his central position with an open floor in front of him, helps him to assert control over the courtroom and keep the lawyers in check. A drawing by Daumier brilliantly captures the unruly alternative, based on a French civil case. Two opposing lawyers are standing at perfectly symmetrical podiums; one is gesturing wildly at his opponent with his mouth open in a roar, the other wears a look of mixed disgust and wounded pride.<sup>64</sup> Despite the oral testimony and informal proceedings in the Cour d’assises, the inquisitorial president maintains the court’s civility.

## **B. Judges and Lawyers**

Heightening the impression of formality and seriousness, a number of figures in the Cour d’assises besides the presiding judge wore robes. As mentioned before, Monsieur le président

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<sup>64</sup>Honoré Daumier, *Une Cause Célèbre*, pen, crayon and watercolor, c. 1858-1862, reproduced in TAYLOR, IN THE THEATER OF JUSTICE, at 7.

was magnificent in his scarlet and ermine, looking like a figure out of the coronation painting. This was no accident—his robe originated as a symbol of royal authority.<sup>65</sup> The prosecutor was the only other figure in the courtroom in red; he wore a red robe with a plain black lining. The *assesseurs*, the clerk of the court, the bailiff (*huissier*) and defense counsel all appeared in black robes with white cravats. Defense counsel in the Cour d’assises wear a special strip of black fabric on their shoulder, tipped with white rabbit fur.

Defense lawyers in France are accorded considerable respect but do not carry the great responsibility American defense lawyers do. (That responsibility falls on the presiding judge instead.) Members of the bar in France are given the title *maître*, literally “master”—a general title of respect that may also be applied, for example, to members of the French Academy. Their training consists of several years of formal study with the law faculty of a university (*cours de faculté*), followed by an apprenticeship-like period with practicing lawyers (*formation d’avocat*).<sup>66</sup>

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<sup>65</sup>By tradition, the king gave each high-ranking judge his red robe as a hand-me-down and these judges wore them at the king’s funeral to symbolize the immortality of sovereignty. TAYLOR, IN THE THEATER OF JUSTICE, at 33. Nevertheless, the president did not seem overcome by pomp and circumstance. The first time I saw him outside the courtroom in street clothes, he said I wouldn’t recognize him when he wasn’t wearing his “animals.”

<sup>66</sup>Entry into the bar requires the degree of *maîtrise en droit*, which is awarded after four years of study in a university. (French students begin their law studies immediately after graduating from secondary school and passing the *baccalauréat*.) Students must then pass an exam and spend a year receiving practical training in a Regional Center for Professional Development (*Centre régional de formation professionnelle* or CRFPA). After passing another exam, they are officially lawyers, but must still do a two-year internship or *stage*. JEAN VINCENT ET AL., LA JUSTICE ET SES INSTITUTIONS §§ 698-701 (4<sup>th</sup> ed. 1996). For details on law degrees, see Frase, *supra* note \_\_\_\_, at 561 n. 90. For a more detailed account of the different types of French lawyers and their training, see RUDOLPH B. SCHLESINGER ET AL., COMPARATIVE LAW 340-353 (6<sup>th</sup> ed. 1998).

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

The prosecutor is treated differently from defense counsel—sitting at the level of the bench in his red robe—because unlike them he is a magistrate.<sup>67</sup> In France, the magistracy includes both sitting judges (*magistrature assise*—also known as *juges du siège*) and prosecutors (“standing magistrates,” or *magistrature debout*—also known as *magistrats du parquet* because they stand on parquet floors to address the court). Because the French place so much

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<sup>67</sup>As William Pizzi has noted, some countries with largely inquisitorial systems—such as Italy—do not even have a word for “prosecutor.” But the French regularly make use of the word *procureur*.

responsibility in the hands of their magistrates, care is taken with their training and career incentives. Like the sitting judges, the prosecutor must finish a special thirty-one month judicial training program.<sup>68</sup> Would-be magistrates enter this program after four years of law studies at a university and a rigorous entrance exam. The program consists of classes at the national school for magistrates in Bordeaux (the *École nationale de la magistrature* or ENM<sup>69</sup>), followed by several internships in different courts. Another exam determines the candidates' class rank, and then candidates (known as *auditeurs de justice*) choose in rank order a post from the list of available openings.<sup>70</sup> At that point, the candidate must decide what branch of the magistracy to go into—representing the government (*ministère public*) or becoming a sitting judge. This system of selection and careful training of judges and prosecutors of course contrasts with the American system of political appointment or election from among the ranks of lawyers, sometimes with input from the local or national organized bar.

The division between ordinary practicing lawyers and magistrates in France is quite

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<sup>68</sup>For a description of this program, see VINCENT ET AL., *supra* note \_\_\_\_, at §§ 483-3-486. When they enter the training program, candidates promise they will spend at least ten years in the judges' corps. *Id.* at § 487. *See also* Frase, *supra* note \_\_\_\_, at 561-62.

<sup>69</sup>The ENM was founded in 1958 in an attempt to boost the prestige of the judiciary by copying the great success of the *École nationale d'administration* or ÉNA, founded 1945. Anne Boigeol, *Les Transformations des modalités d'entrée dans la magistrature: de la nécessité sociale aux vertus professionnelles*, in *Pouvoirs* no. 74 (Les Juges) (1995). For a description of the program at the ENM, see Appelbaum, *Cogestion and Beyond: Change and Continuity in Modern French Legal Education—A Design for U.S. Law Schools*, 10 *NOVA L.J.* 297, 310-14 (1986); M. VOLCANSEK & J. LAFON, *JUDICIAL SELECTION: THE CROSS-EVOLUTION OF FRENCH AND AMERICAN PRACTICES* ch. 6 (1988).

<sup>70</sup>Since a law enacted in 1994, a professional panel recommends to each candidate the positions he or she seems especially suited to. *Loi du 5 février 1994*, art. 21, ord. 1958.

strict; it is very difficult for a member of the bar to become a magistrate.<sup>71</sup> Their training is different, and their exams are different. Training for magistrates at the ENM was consciously designed on a civil service model, rather than a lawyerly one. The two are viewed as different professions, with different goals. As one writer put it when arguing that magistrates should not be trained by a period of apprenticeship at the bar (as had been the case): “Practice at the bar could produce a cast of mind which would be a defect in a judge. The lawyer, whose duty is to win the case for his client, is often led not to favor the emergence of the truth.”<sup>72</sup> Magistrates’ special training in truth-finding at the ENM helps set them apart from the bar and gives them some of the authority needed to hold sway over an inquisitorial courtroom or to represent the government in its truth-seeking function.

Not only is the training of magistrates (including prosecutors) different in France than it is in the United States, their career incentives are also different. The French have designed career incentives to foster good performance. There is greater scope for upward mobility in the French system, and promotions among sitting judges are based largely on the professional evaluations of fellow judges.<sup>73</sup> Judges can move back and forth between being a judge in our

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<sup>71</sup>Over four-fifths of judges (81%) came into the profession straight out of the ENM. Only 12% of judges came from the practicing bar or other professions. The remaining 7% were recruited through special examinations or were already judges before 1958. Boigeol, *Les Transformations*, at 38. For details on entrance examinations and training at the ENM, see ROGER PERROT, INSTITUTIONS JUDICIAIRES 288-290 (8<sup>th</sup> ed. 1998).

<sup>72</sup>Maurice Ribert, *Le Système français actuel de recrutement des juges*, (thesis, Paris 1944) at 38, quoted in Boigeol, *Les Transformations*, at 33.

<sup>73</sup>Judicial promotions strive to be meritocratic and are based on three factors: choice, seniority, and professional evaluations. Judges choose whether they wish to be considered for promotion. There are seniority requirements that vary depending on the position sought. Most importantly, a professional evaluation is conducted by a promotion commission consisting of twenty judges. Sixteen of these judges are elected by their peers, and four are ex officio

sense of the word as a member of a court and a representative of the government.<sup>74</sup> Within the ranks of magistrates, as one authority puts it, “the rule is collegiality,” and reference is made to the “college of judges.”<sup>75</sup> It is entirely possible that one day Philippe Bilger, the prosecutor (*avocat général*) in Gaitaud’s case, would be a president of the Cour d’assises. The same would be very unlikely for defense counsel. In keeping with his training and career incentives as a magistrate, Bilger proved himself to be less adversarial in the course of the trial than a typical American prosecutor.<sup>76</sup>

The “college of judges” is collegial, but also hierarchical. The president, Yves Corneloup, was by far the most important person in the courtroom besides the defendant. As Corneloup’s elaborate robe compared with the plain robes of the assesses graphically demonstrated, he was not first among equals. He was technically a member of the Court of Appeals (Cour d’appel), though he often was designated to sit as a president of the Cour

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members of the commission. VINCENT ET AL., *supra* note \_\_\_, at § 502. Judges are protected, however, from interference with their independence; they may not be given a new position, even a promotion, without their consent. *Id.* at § 497. There seem to be few complaints about the politicization of French judges (at least, concerning the judges who are members of courts), despite the fact that many of them are members of unions. There are several judicial unions, with different political leanings—some left, some right, and some centrist. The prosecutor in Gaitaud’s case, for example, was a member of a leftist union. In general, the method of promotion seems not to depend on political leanings.

<sup>74</sup>Magistrates hop back and forth between the two branches of the magistrature, but it should be noted that each branch is independent of the other and subject to different rules of discipline. See Frase, *Comparative Criminal Justice*, *supra* note \_\_\_, at 559-60 (describing administrative hierarchy checking prosecutors), 564-65 (describing appellate review checking sitting judges).

<sup>75</sup>JEAN LARGUIER, *PROCÉDURE PÉNALE* 8 (17<sup>th</sup> ed. 1999).

<sup>76</sup>See *infra* at text accompanying notes \_\_\_.

d'assises. Compared with Corneloup, the two *assesseurs* were passive.<sup>77</sup> The *assesseurs* in Gaitaud's case—one woman, one man—were investigating judges on special assignment to the Cour d'assises. (Corneloup was himself an investigating judge for fifteen years before being promoted to his current position.) The *assesseurs* almost never asked questions, and rarely took notes. In fact, they were not even given access to the dossier before the trial; during the trial, like the jurors, they could request from Corneloup permission to see parts of the dossier. Apparently this permission is rarely denied. Before trial, the dossier is only given to the president, the prosecutor, the defense, and the civil party if there is one. The *assesseurs* do, however, have potential to check the president when the three judges act as a panel, for example in resolving issues when one of the parties has made an objection.<sup>78</sup>

Corneloup dominated the entire trial from beginning to end, with the sole exception of closing arguments. He controlled the order in which witnesses were presented; he did the lion's share of witness questioning. He was responsible for maintaining both the flexibility and dignity of the court.<sup>79</sup> Although Corneloup had a powerful physical presence and personality, he largely succeeded in putting the spotlight squarely on the defendant, Thierry Gaitaud.

The personnel of the Cour d'assises also includes an important and often overlooked official: the clerk of the court (*greffier* or feminine *greffière*). This position seems not to have been discussed in any detail in the English literature on comparative criminal procedure. Many

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<sup>77</sup>This is typical of a trial in the Cour d'assises. LARGUIER, *supra* note \_\_\_\_, at 193.

<sup>78</sup>Such objections, however, are rare. *Id.*

<sup>79</sup>Code de Procédure Pénale arts. 309, 310. The French literature on the Cour d'assises emphasizes the discretionary power of the president (*pouvoir discrétionnaire*) described in Article 310. See, e.g., VINCENT ET AL., *supra* note \_\_\_\_, at 738; LARGUIER, *supra* note \_\_\_\_, at 193.

people connected with the court remarked that much of the success of a president of the Cour d'assises or of any presiding judge depends on having a good clerk of the court, and this impression is confirmed in the French literature.<sup>80</sup> Often it is the *greffier* who saves the president from being overturned later; she acts as a backstop to the president. There is no close analogy to this position in the American system: she is a sort of American clerk of the court and super law clerk rolled into one. The French clerk of the court is responsible for making sure the president follows correct procedure—from basic ministerial things like reminding him to swear in witnesses to the most arcane points. Madame Germain, the clerk of the court in the Gaitaud case, was universally revered and even beloved. More than once she kept the president from violating procedural rules.<sup>81</sup> In effect, the clerk of the court freed the president from worrying about procedural details and allowed him to focus on the substance of the trial: whether defendant is guilty or innocent.

Two features of the Cour d'assises combine to give the president great discretion over the trial: the spare and formal methods the French use to record cases in that court, and the limited appeal from that court. Throughout the trial, Madame Germain sat at her place at the right end of the bench with a laptop computer; occasionally, but not often, she typed in a notation. There was no court reporter, and no method of oral recording being used. In fact, in the Cour d'assises

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<sup>80</sup>According to a leading French treatise, the *greffier* is an increasingly important figure in French courts, and has been vital to the success of the recent civil procedure reforms. VINCENT ET AL., *supra* note \_\_\_\_, at §§ 557, 564. The *greffier*'s training consists of a stint at the national school for *greffiers* (*École nationale d'application des secrétariats-greffes*) in Dijon, followed by a series of internships. *Id.* at § 560 n. 5.

<sup>81</sup>*See, e.g.*, *infra* at \_\_\_\_.

there is no official transcript made of what was said or even a summary of testimony.<sup>82</sup> As Madame Germain explained, and as many others emphasized, the Cour d'assises uses a procedure that is "entirely oral" (*procès uniquement oral*).<sup>83</sup> All Madame Germain does in the Cour d'assises is to record the bare procedures followed in the trial.

In addition to this bare bones method of recording cases, at the time of Gaitaud's trial there was no appeal from the Cour d'assises in the ordinary French sense. French appeals from most courts are by trial de novo, with no presumption of correctness attaching to the verdict below.<sup>84</sup> But at the time Gaitaud was tried the only way to overturn a verdict of the Cour d'assises was to invoke the equivalent of the French Supreme Court, the Cour de cassation (literally "Court of Breaking" because it breaks judgments). This process is so different that it is not even called an appeal (*un appel*), but has its own special term, the *pourvoi en cassation*. The Cour de cassation, like our own Supreme Court, is quite limited in the questions it hears. It only hears issues concerning errors of law, confined basically to procedural issues. Not having a transcript that lawyers can pore over after a trial limits the claims they can make and gives the trial judge greater discretion. The safeguard in the Cour d'assises that is supposed to compensate

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<sup>82</sup>Code de Procédure Pénale arts. 378, 379.

<sup>83</sup>This is also known as the "principle of orality" (*oralité*). See LARGUIER, *supra* note \_\_\_\_, at 193.

<sup>84</sup>From the Tribunal correctionnel, for example, there is an appeal to the Court of Appeals (Cour d'appel), which takes the form of a trial de novo on the appealed issues before three professional judges. Code de Procédure Pénale arts. 496-520. Either the prosecution or the defense or both may appeal. Code de Procédure Pénale art. 497. After that phase, a dissatisfied party may attempt to invoke the Cour de cassation. While appeal by trial de novo might seem to be a wasteful system, in fact these appeals are relatively quick because cases before the Tribunal correctionnel rely on written material from the dossier much more heavily than the Cour d'assises. At the Tribunal correctionnel, the clerk of the court does take down a brief summary of each witness's testimony.

for this lack of a de novo appeal is the same that is supposed to compensate for the lack of thorough appellate review of facts in our system: the jury.<sup>85</sup> Trust in the sovereign judgment of the *jury populaire* makes such review unnecessary (at least in theory).

Recently, the National Assembly has enacted criminal justice reforms that allow for an appeal from a judgment of the Cour d'assises without disturbing the notion of jury decision-making. But the method chosen is an expensive one: to have a second trial de novo before another Cour d'assises designated by the Cour de cassation.<sup>86</sup> To bolster the impression of legitimacy in this second, appellate Cour d'assises, twelve lay jurors are used instead of nine.<sup>87</sup> Otherwise, the procedures used in the "appellate" Cour d'assises are essentially the same as those used in the first. A verdict of outright acquittal cannot be appealed; the intention of this reform is mainly to give the defendant a second chance.<sup>88</sup> But any other sort of verdict can be appealed by the defendant, the prosecutor, or the civil party.<sup>89</sup> The judgment of the "appellate" Cour d'assises overrides that of the first, whether it is more favorable to the defendant or less; no presumption of correctness attaches to the first decision. The judgement of the "appellate" Cour

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<sup>85</sup>Adversarial systems have also tried to compensate for this lack of thorough appellate review of facts by broadening the definition of legal error to include such things as verdict against the weight of the evidence (rarely granted) and by enforcing elaborate procedural rules (regularly used to reverse a verdict). To some extent, the Cour de cassation has proved willing to go this latter route as well, overturning some decisions of the Cour d'assises based on what would seem to be highly technical grounds. LARGUIER, *supra* note \_\_\_\_, at 191.

<sup>86</sup>See loi du 15 juin 2000; circulaire du 11 décembre 2000; revised art. 380-1 to 380-15 of the Code de Procedure Penale.

<sup>87</sup>See revised art. 296 of the Code de Procedure Penale. The number of votes needed to find the defendant guilty becomes ten in the "appellate" Cour d'assises. See revised art. 359.

<sup>88</sup>Revised art. 380-1.

<sup>89</sup>Revised art. 380-2.

d'assises can then be the subject of review by the Cour de cassation (*pourvoi en cassation*).<sup>90</sup>

Because Gaitaud's trial occurred before this law was enacted, he did not get the benefit of this form of appeal, with its continued emphasis on the *jury populaire*.

### C. The Jury

The jury is of course a very uninquisitorial feature. It swept into French law on a tide of revolutionary fervor and anglomania in 1791; philosophes and anglophiles such as Voltaire championed the jury as an excellent English way to free the criminal justice system from improper pressure.<sup>91</sup> But this institution was such an anomaly in French law that it was quickly absorbed into the inquisitorial system.<sup>92</sup> Professional judges and lay jurors are treated more as colleagues and collaborators than as independent forces.<sup>93</sup>

In keeping with the notion of jurors as temporary judges, they are treated with respect.

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<sup>90</sup>Art. 370.

<sup>91</sup>ROGER PERROT, INSTITUTIONS JUDICIAIRES 283 (8<sup>th</sup> ed. 1998). See also ESMEIN, HISTOIRE DE LA PROCÉDURE CRIMINELLE EN FRANCE 399-480 (1882).

<sup>92</sup>One leading commentator captures the French ambivalence about the jury, even as limited to the Cour d'assises: "Fundamentally, the jury system only makes sense in a civilization that has a mystical character; therefore, it no longer corresponds exactly with our contemporary mind set." PERROT, INSTITUTIONS JUDICIAIRES at 283. The mixed panel of professional and lay judges of course helps to confine the discretion of lay jurors. See John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 1981 AM. B. FOUND. RES. J. 195; PIZZI, TRIALS WITHOUT TRUTH, *supra* note \_\_\_, at 227; Casper & Zeisel, *Lay Judges in the German Criminal Courts*, 1 J. LEGAL STUD. 135 (1972). It also helps to make the process of jury trial more efficient. Bradley, *Overview*, *supra* note \_\_\_, at xxiii.

<sup>93</sup>Perhaps in this way they more nearly attain the true purpose Tocqueville thought the American jury served: to educate lay people about the law and government. It is easier to learn when you are treated with respect and receive good guidance. Tocqueville, who was of course a French aristocrat, expressed doubt about the jury's ability to render good decisions but was sure of its educational value: "I do not know whether the jury is useful to those who have lawsuits, but I am certain it is highly beneficial to those who judge them . . . ." TOCQUEVILLE at 296. Furthermore, he praised strong judges as good educators and models for the jury to follow. *Id.*

The parties are not allowed to pick them over with a fine-tooth comb; voir dire is brief and remarkably unintrusive. The potential jurors appeared, 45 people, and the prosecutor and defense counsel had been given in advance essentially the same information about the venire as they would get in a U.S. federal court: name, age, address, occupation. The crucial difference was that was all the information they ever got, apart from a juror's appearance. There is no questioning of any kind. This is voir dire in its elemental sense; voir—"to see"—the two sides see the jurors, and dire—"to say"—the two sides must say immediately whether the juror stays or goes. The names of jurors are drawn randomly, and the prosecution and defense have the time the juror stands up and walks to his or her seat to decide whether to use a peremptory strike. The defense gets five peremptories and the prosecution four;<sup>94</sup> in Gaitaud's case the defense used four out of five, while the prosecution did not use any. One defense counsel said a friend of his once tried a case in which his best friend was on the jury. It is even possible that someone could be on the jury who was a friend of the defendant.

Lest this approach to jury selection seem oblivious to dangers of bias, it is important to remember two things: first, three professional judges deliberate and vote with the jurors, and second, unanimity is not required. There are, therefore, substantial checks on biased jurors. The French system of voir dire also saves a great deal of time and money. The whole process took well under ten minutes, and a challenge cannot be raised later based on a particular juror's answers to questions and whether he or she should have been struck for cause.<sup>95</sup> No one ever

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<sup>94</sup>Code de Procédure Pénale art. 298.

<sup>95</sup>On the difficulties that rules about juror challenges pose for the American criminal trial, see PIZZI, TRIALS WITHOUT TRUTH, supra note \_\_\_\_, at 81.

uses jury consultants in France—defense counsel was surprised at being asked. The value of such consultants would be limited because of the slight information available about each juror, and French legal culture is not hospitable to such elaborate gamesmanship. Defense counsel said they simply acted on gut instinct, striking for example young people who might not be “mature enough to accept that wild and ugly things may happen in life.” Besides saving time and money, the method of striking and the relatively low number of people struck helps to prevent two opposite problems endemic in our system: first, members of the venire who exaggerate their answers because they want to avoid jury service, and second, those who, struck after questioning, are resentful because they feel rejected and wanted to serve.

In the end, the jurors in the Gaitaud case consisted of five women and four men. They seemed to be, for the most part, intelligent, well-educated, and serious about their responsibilities.<sup>96</sup> The jurors are selected from the session list called for that term of court. Session lists consist of 35 jurors and 10 alternates, drawn by lot from an annual list of prospective jurors for each Cour d’assises, which is based on voter registration lists.<sup>97</sup> Qualifications for being a juror include being at least 23 years old and having the ability to read and write in French.<sup>98</sup> High government officials and police officers are excluded.<sup>99</sup> The French

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<sup>96</sup>The journalists who attended the trial had definite opinions about Parisian as opposed to provincial juries, which may have reflected their own Parisian biases. Some of the journalists had been covering the Cour d’assises in various parts of the country for years, and said that this sort of sophisticated jury—intelligent and at a high social level—is common in Paris. But the story can be different *en province*. In the provinces, they said, sometimes it is obvious from juror expressions and questions that they don’t understand anything.

<sup>97</sup>Code de Procédure Pénale arts. 259-267.

<sup>98</sup>Code de Procédure Pénale art. 255.

<sup>99</sup>Code de Procédure Pénale art. 257.

criminal justice system often takes seriously the job of educating these jurors to perform their functions. According to one French judge I spoke with, jurors on the session list in her area are taken to visit a prison before they sit on an actual jury in the Cour d'assises, to give them a sense of what a prison sentence means.

The French system treats jurors as if they were responsible human beings with serious duties—in fact with consideration. It is particularly sad that despite all the lip service we Americans pay to the jury system, we often demean jurors in actual practice. Jurors in France are not forced to wait through interminable voir dire sessions and told to answer personal and embarrassing questions about their political and religious beliefs and life experiences. They enter the courtroom by the same door and at the same time as the judges, and as has been noted, they sit at the bench with them. They are not constantly sent out of the room while evidentiary objections are being thrashed out, or screened out of bench conferences by white noise. Indeed, no evidence is kept from them that is not kept from the *assesseurs* also, which comes to very little because the French do not have many rules of evidence beyond relevancy and privileges.<sup>100</sup> It has been argued that the complicated American rules of evidence are largely based on distrust of the jury, the idea that they need to be screened from information they will not be able to handle properly.<sup>101</sup> Juror note-taking is allowed in France; all of the jurors in the Gaitaud case

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<sup>100</sup>Even privileges were not much seen at this trial. Generally, continental legal systems have a much broader notion of privilege than ours. Not only spouses but also children and parents are often allowed to claim a privilege not to testify. Here, Gaitaud's son, mother, father, and sister were expected to testify, but they were not put under oath.

<sup>101</sup>A large part of the problem is that we do not know whether jurors handle certain evidence properly or not in a particular case because jurors do not give reasons for their decision. The default solution has been to exclude evidence that might be problematic. See John H. Langbein, *Historical Foundations of the Law of Evidence: A View From the Ryder Sources*, 96

took notes at one time or another, and some took notes frequently.<sup>102</sup> They were permitted to ask questions, which they all did from time to time, and usually these were quite thoughtful, the sort of question that would be important if one were determining guilt or innocence. The president had power to check a juror question that was irrelevant or biased, but he never had to do so. The jurors therefore posed their questions directly to a witness or the defendant. In nearly every respect, they were treated as the peers of the assessesurs.

## **V. The Trial**

### **A. Flexibility of Trial**

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

The French look at evidence more holistically; they try to address one issue in the case at a time, and to bring to bear all the evidence on that point at once.<sup>103</sup> It is possible to achieve this in part because the president, Corneloup, coordinated the trial and determined the order in which

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COLUM. L. REV. 1168, 1194-95 (1996).

<sup>102</sup>Several states, of which Arizona was one of the earliest, now have in place permanent or experimental reforms that allow jurors to take notes and ask questions through the judge.

<sup>103</sup>*See, e.g., infra* at \_\_\_\_.

witnesses would be called. Moreover, this order was flexible; Corneloup proved willing to change it if evidence came up that suggested someone should be called earlier, and he often instructed witnesses to be available on several different days to answer to points as they came up.

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

A good example of this flexibility appeared at the beginning of the Gaitaud trial. In France, normally the first person to testify in a trial is the defendant himself. But this was not a normal French trial. Because of the San Diego investigation, there were issues of American criminal procedure to be dealt with, and Corneloup decided to address the questions up front. The first day of the trial, Friday, he called the San Diego Assistant District Attorney, Mary Ellen Barrett.<sup>104</sup>

Introduction of each witness was minimal. Corneloup rattled off a list of questions—"name, age, occupation, address"—and then asked each witness: "What do you have to tell us?" There was no direct or cross-examination as we know it. The witness started off testifying in narrative form, usually for several minutes without interruption, assuming the witness was reasonably coherent. When the witness finished his or her story or the testimony got murky, Corneloup began asking questions, directing the witness's attention to key points. He often read the former statements of a witness from the dossier in framing his questions. When he was done, he turned to the assessesurs and the jurors to see if they had any questions,

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<sup>104</sup>There were plenty of translators for the Americans. The translators had a difficult job throughout the trial, and performed admirably.

then to the prosecutor, then to defense counsel. Bilger and defense counsel usually asked between one and three questions each. Their tone was almost never dramatic or hostile but rather matter-of-fact. In answer to these questions, the witness was permitted to give a full explanation and was not limited to the sharp “yes” or “no” of our cross-examination. One result was that the witnesses were relatively relaxed and often more forthcoming with information.

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

I was next called to testify. It was a relief to be able to speak without being hemmed in by questions on direct and cross-examination.<sup>105</sup> I explained that the California prosecutor and police are not quite like the French investigating judge (which Corneloup seemed in danger of believing). While they do have some duty to investigate exculpatory evidence, at least in theory, generally they do so only to satisfy themselves they have the right defendant (or at least a plausible one) and possibly to rebut defense evidence.<sup>106</sup> The main burden to investigate

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<sup>105</sup>The less adversarial nature of the questioning seemed to encourage witnesses to be less defensive and partisan and more objective, to admit that the other side had a point where otherwise one would say nothing about it. Even with the best intentions, it is difficult to remain objective while being badgered and impugned by one side.

<sup>106</sup>I also pointed out that while California prosecutors have a duty to turn over witness statements, those statements do not necessarily record all exculpatory information a witness has

exculpatory evidence, I noted, falls on defense counsel—who usually has a duty to do so according to ineffective assistance of counsel cases decided under the U.S. Constitution.<sup>107</sup>

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

## 2. The Civil Party

The surprise appearance of a civil party in Gaitaud’s case showed how quickly the president could adapt to new circumstances at trial and how his control over trial helped to accommodate interests beyond those of the prosecution and defense. (The incident is taken out of chronological order to introduce this important figure early on.) Several days into the trial, an American, Mrs. Belasco—Susan Belasco’s ex-mother-in-law and Malinda’s grandmother—appeared in the courtroom. She was understandably intimidated by being in a

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given. The police themselves write these statements sometimes months after the interview, in contrast to the French system of recording verbatim all witness interviews, including questions and full answers. This difference was important because sometimes Corneloup sought to rely on statements from the American investigation as if they were the product of a French investigating judge’s work. For more detail on California discovery rules, *see infra* note \_\_\_\_.

<sup>107</sup>*See, e.g.,* Strickland v. Washington, 466 U.S. 668 (1984).

foreign court not knowing the language or procedure and without a lawyer, but nonetheless determined. She wore a large orange button showing a picture of Malinda. (This is a common practice among relatives of victims in the United States, but one not seen in France. Because French victims' relatives are formally represented in court, they have less need to resort to such devices to make their viewpoint known.) Mrs. Belasco asked to "represent" her son and family before the court, got out a type-written piece of paper, and tried to read a statement in English. Corneloup was surprised but took it in stride. He gently explained that she could not read the statement because the Cour d'assises uses an entirely oral procedure (once again, the phrase *procès uniquement oral*). Through a translator, he asked her if she wanted to be a civil party in the case (*partie civile*).

The French allow the criminal and civil proceedings against the defendant to be combined, with the latter known as the *action civile*, brought by the "civil party."<sup>108</sup> This is done for two reasons. First, it is cheaper for the civil party (and more efficient for the justice system as a whole) to combine the civil and criminal proceedings rather than having two separate cases.

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<sup>108</sup>Ordinarily, the civil party is the victim or a relative of the victim. But it is possible for a non-profit organization to be a civil party. This might occur, for instance, in a child abuse case where the court could allow an abused children's protection society to be a civil party. Code de Procédure Pénale art. 2-3. Other included organizations are those fighting against racism, sexual violence, crimes against humanity, and "discrimination based on sex or morals." Code de Procédure Pénale 2-1, 2-2, 2-4, 2-6. The main restriction is that these organizations must have officially existed at least five years before the facts occurred that gave rise to the case. The German legal system borrowed the concept of the civil party from the French, but the institution has not been as popular there as in France. German judges have vigorously exercised their powers to decline to hear civil cases combined with criminal ones, partly because German courts are highly specialized, with criminal court judges having little experience in civil matters, and partly because hearing civil claims at the same time slows down criminal cases. LANGBEIN, *supra* note \_\_\_\_, at 111-15. Pizzi, however, reports that German victims are much more likely to exercise their rights to be civil parties in sexual assault cases. Pizzi, *supra* note \_\_\_\_, at 55.

The civil party can “free ride” on the evidence at the criminal trial, and so be compensated at less expense.<sup>109</sup> Second, the civil party serves to push the investigating judge (or prosecution if there is no investigating judge) into vigorous investigation and presentation of the case. The French literature emphasizes this second point; French legal writers often use the phrase “conquering the inertia of the prosecutor” to describe the civil party’s role.<sup>110</sup> Even if the civil party is not able to recover damages, he or she is allowed to participate in pretrial and trial, for exactly this reason. Normally, the civil party is involved from the beginning of the investigation, and may even bring a formal complaint that initiates investigation.<sup>111</sup> (For form’s sake, this is routed through the prosecutor’s office, but the prosecutor does not have discretion to quash it.<sup>112</sup>) Like the defense, the civil party may suggest leads the investigating judge should follow.<sup>113</sup> The theory is that the

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<sup>109</sup>VINCENT ET AL., *supra* note \_\_\_\_, at § 820.

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

<sup>111</sup>Code de Procédure Pénale arts. 85, 86.

<sup>112</sup>LARGUIER, PROCÉDURE PÉNALE 123. The French are alive to the possibility that the civil party’s ability to initiate prosecution may be abused to the detriment of justice. This is a growing concern now that standing to be a civil party has grown much broader and includes organizations as well as individuals. Larguier, one of the most vigorous French critics of the civil party, has identified several problems. The civil party may initiate a charge against someone maliciously, to harass or pressure him or her. Also, charges initiated by civil parties tend to burden criminal investigating regimes and, as a result, judges delegate more of their responsibilities to experts. LARGUIER, *supra* note \_\_\_\_, at 110. Remedies for these problems include the prosecutor being able to request under Article 86 of the Code of Criminal Procedure that the investigating judge hold a hearing to determine whether the civil party’s complaint justifies further investigation; the defendant and the prosecutor being able to contest the existence of a civil party in the case; the supposed victim being subject to civil and criminal liability if charges are malicious; and the defendant having certain rights to clear his name in the press if charges are groundless. LARGUIER at 110-112.

<sup>113</sup>Code de Procédure Pénale art. 82-1.

investigating judge will be encouraged to do his duty in uncovering incriminating evidence by the civil party on the one hand, and exculpatory evidence by the defense on the other.

The civil party actively participates not just in the pretrial investigation but during trial as well. She either pays for a lawyer or has one assigned to her if she is too poor to pay. At trial, the civil party's lawyer may ask witnesses questions relevant to her interests—after the assessesurs and jurors, and before the prosecutor—and also participates in closing arguments.<sup>114</sup> The civil party may ask for a money judgment if defendant is convicted. The three professional judges, without the jurors, determine the amount.<sup>115</sup> If defendant is judgment-proof, there is a public fund of money available to satisfy judgments (*Fonds de garantie*).<sup>116</sup> This fund can be drawn upon to varying degrees depending on the seriousness of the crime and its effects; for lesser crimes, the financial situation of the victim is taken into account and the amount of reparations is capped. For crimes resulting in death there are no such restrictions. However, there is one important limitation, relevant to the Gaitaud case: to receive reparations from the public fund, the civil parties must be French, even if the crime was committed abroad.<sup>117</sup>

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<sup>114</sup>Code de Procédure Pénale arts. 312, 346.

<sup>115</sup>Code de Procédure Pénale art. 371.

<sup>116</sup>See LARGUIER, *supra* note \_\_\_\_, at 86-87. In the United States, the Victims of Crime Act of 1984 established a Crime Victims Fund that distributes money gained from fines, penalties, and bond forfeitures to state victim compensation funds and to victim assistance projects. Pub. L. 98-473, 98 Stat. 2170 (1984). For a comparison of victim compensation in France and the United States before the Act, see Campbell, *A Comparative Study of Victim Compensation Procedures in France and the United States: A Modest Proposal*, 3 HASTINGS INT'L & COMP. L. REV. 321 (1980).

<sup>117</sup>LARGUIER, *supra* note \_\_\_\_, at 87. There is an exception to this rule: if the crime was committed in France, a citizen of a European Union country or a person who regularly stays in France may receive reparations from the public fund. *Id.*

Victims' rights, of course, have become a salient issue in U.S. criminal procedure. Recently, the Senate Judiciary Committee approved, with bipartisan support, a proposed amendment to the U.S. Constitution guaranteeing certain rights to victims.<sup>118</sup> These rights would include the right to be notified of public proceedings relating to the crime, to attend all public proceedings, to be heard at "crucial stages" in the process, and to get an order of restitution. A full comparison of the victims' rights proposals and the French civil party is impossible here, but a word of caution is in order. The French institution of the civil party and the civil party's active participation at trial is made much easier because French trials are controlled by an inquiring president, not by the two parties. The structure of U.S. trials as an adversarial contest between prosecution and defense makes it very difficult to accommodate the interests of a third party. The defense would resent the presence of another party with adverse interests, and even the prosecution might resent interference with the presentation of its case. But the inquiring judge in continental countries can easily fit in the civil party, allowing his or her voice to be heard while controlling a spirit of vindictiveness and keeping the trial moving smoothly. Corneloup effectively managed these tasks in the Gaitaud case.<sup>119</sup>

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<sup>118</sup>S.J. Res. 3, approved by the Senate Judiciary Committee Sept. 30, 1999. The proposed amendment was first introduced three years ago by Senators Jon Kyl (R-Ariz.) and Dianne Feinstein (D-Calif.). See also *Symposium: Crime Victims' Rights in the Twenty-First Century*, 1999 UTAH L. REV. 285-552. The House Committee on the Judiciary is considering a similar but not identical measure, and the Justice Department has recommended changing the language to protect the rights of the criminal defendant and also the interests of law enforcement. *DOJ Representative Voices Objections to Proposed Victims' Rights Amendment*, 68 U.S.L.W. 2502-03 (Feb. 29, 2000).

<sup>119</sup>William Pizzi has suggested important points for the U.S. victims' rights movement to consider based on German procedure; most of the points he makes could be drawn from French procedure as well. William T. Pizzi, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37 (1996).

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

## **B. The Personality Phase**

The first phase of a trial in the Cour d'assises reflects the French interest in the psychology and personal circumstances of the defendant, and is called the "personality" (*personnalité*).<sup>120</sup> The defendant's life history and personality are explored over the course of a day or two. (In the Tribunal correctionnel, this phase comes at the end and lasts a much shorter

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<sup>120</sup>A similar concern with the "personal and economic circumstances" of the defendant appears in German criminal procedure, which requires the judge to begin the trial by examining the defendant on these matters. Strafprozessordnung § 243. If the defendant refuses to answer questions about his personal circumstances, the court may establish these matters by referring to the pretrial dossier. See JOHN H. LANGBEIN, COMPARATIVE CRIMINAL PROCEDURE: GERMANY 71 (1977).

period of time, perhaps an hour or so.<sup>121)</sup> The French do not share American concerns about character evidence and poisoning the well, reflected in elaborate rules of evidence.<sup>122</sup> Rather, they want to get as full an understanding as possible of the person on trial. In part, the French may be less concerned about poisoning the well because the information is not entrusted to a lay jury alone, but to a mixed panel with professional judges who can warn lay jurors about the danger. This information is relevant to the fact-finders at sentencing; in France there is no separate sentencing hearing as in a typical American court. Jean Pradel, a leading French writer about the personality phase, notes that the information it gives “is very useful at the moment of fixing the sentence.”<sup>123</sup>

The vision of sentencing to which the personality corresponds is far broader than that of most American courts. American courts at the sentencing phase often use a somewhat inquisitorial procedure, as in the federal courts where a government official prepares a

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<sup>121</sup>In the Tribunal correctionnel, the judge or three-judge panel begins by reviewing the dossier, then moves to the facts (*les faits*), and briefly covers the personality at the end of the trial. The personality phase before the Tribunal correctionnel does not necessarily include a psychiatrist’s testimony; it might just be a few questions to the defendant about his life. There have been various debates about putting the personality at the end of the trial in the Cour d’assises rather than at the beginning. McKillop notes that the socialist government, prior to losing power in May 1993, sought in their criminal justice reforms to put the personality at the end of trial, but conservatives countermanded this on gaining power. McKillop, *supra* note \_\_\_\_, at 580. The socialist government of Lionel Jospin has not put the personality at the end.

<sup>122</sup>See F.R.E. 404(a) (evidence of a person’s character not admissible to prove action in conformity therewith, subject to narrow exceptions such as defendant opening the door by introducing evidence of his character); 404(b) (evidence of other crimes, wrongs, or acts not admissible to show action in conformity therewith, but may be admissible for other purposes); 608, 609 (ability to impeach a witness based on character evidence or prior conviction is limited). An exception to these general rules is sex offense cases; the Federal Rules of Evidence have recently been changed to allow in more evidence of similar crimes. F.R.E. 413, 414.

<sup>123</sup>JEAN PRADEL, LE JUGE D’INSTRUCTION 31 (1996).

presentencing report that is something like the investigating judge's dossier. American judges also tend to take a more active role at sentencing. However, in the federal courts much of the information contained in the French personality would not be considered relevant.<sup>124</sup> The personality as it exists today in the French courts was born of a movement called *défense sociale* (literally "social defense"), which is virtually unknown in the United States but has been powerful abroad. The movement succeeded in making a personality investigation mandatory under the French Code of Criminal Procedure in 1958.<sup>125</sup> Marc Ancel, one of the leaders of the social defense movement, has described its goals as "first, a concern to ensure the protection of society, over and above the infliction of merely expiatory punishment"; "second, the desire to bring about the improvement, if not the re-education, of the offender," and "finally, the insistence that penal justice . . . should promote and preserve the concept of the human person, as one to which only truly humane treatment may be applied."<sup>126</sup> The French thus have, at least in

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<sup>124</sup>The U.S. Sentencing Guidelines forbid federal judges to consider the following factors in determining whether a downward departure from the guidelines is warranted: race, sex, national origin, creed, religion, and socio-economic status (§ 5H1.10); lack of guidance as a youth and similar circumstances (§ 5H1.12); physical condition, including drug dependence and alcohol abuse (§ 5H1.4); and to some extent coercion and duress (§ 5K2.12). The closest parallel in U.S. criminal procedure to the amount of information about the defendant collected in the French personality phase is the sentencing phase of a capital case. But the collection and presentation of evidence in such proceedings is typically adversarial.

<sup>125</sup>In 1958 the Code of Criminal Procedure was amended to require the investigating judge to inquire into the defendant's personality together with his "financial, family, and social situation." Code de Procédure Pénale art. 81. On the role of the social defense movement in obtaining this reform, see PRADEL at 30; MARC ANCEL, SOCIAL DEFENSE: THE FUTURE OF PENAL REFORM 169-170 (Thorsten Sellin trans. 1987) (LA DÉFENSE SOCIALE NOUVELLE, 3d ed. 1981). The social defense movement, together with the writings of sympathetic authors such as Camus (*Reflections on the Guillotine, The Stranger*), helped eventually to end the death penalty in France.

<sup>126</sup>ANCEL at 7-8.

theory, strong rehabilitation and dignitary goals.<sup>127</sup> To achieve these ambitious ends of individualized justice, the French justice system seeks as much information as possible about the defendant; this relates to the “truth-seeking discussion” model of a French trial. Pradel says that the personality “is a question of obtaining a sort of portrait of the person on trial,” of “understanding the behavior of the person” and “the motive powers that caused him to act.”<sup>128</sup> The personality is, therefore, an affirmation that the person before the court, though accused of a grave crime, is a human being with a unique life story that deserves to be told and understood, not a faceless monster. In keeping with this notion, Corneloup at several points in his inquiry expressed sympathy for (or at least empathy with) Gaitaud.

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

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

Among American criminal defense lawyers, the received wisdom in most situations is not

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<sup>127</sup>There is some question about how important the French justice system considers the personality to be in practice. The criminal chamber of the Cour de cassation has made clear multiple times that the inquiry into the personality mandated in Article 81 “does not detract from the fundamental rule that judicial investigators have the right and the obligation to close the investigation once they consider it to be complete.” To Pradel, this indicates ambivalence about the role of the personality. However, he does note that in felony cases (*crimes*), the investigation of the personality is systematic. PRADEL at 31.

<sup>128</sup>PRADEL at 30-31.

to put a defendant who is probably guilty on the stand.<sup>129</sup> Supreme Court interpretations of our Fifth Amendment help to shield a defendant from the normal consequences of not testifying; *Griffin v. California*<sup>130</sup> held that the jury is not to draw inferences of guilt from defendant's failure to testify, and prevented the prosecution's comment on it. Defendants need not even assert the Fifth Amendment in the jury's presence, to avoid drawing attention to it. The result is, as John Langbein puts it, to deprive the fact finder of a valuable testimonial resource; in fact, often the most valuable.<sup>131</sup> The defendant always knows information important to the fact-finder—if nothing else, where he was at the time the crime was committed. In everyday life, our methods of finding out the truth normally include talking with a suspected person to hear his or her side of the story.

The French have arranged their system to provide incentives for the defendant to testify, to engage in discussion at trial. They thus gather information from this valuable testimonial resource. To be sure, they do not require a defendant to testify; he will not be tortured or thrown in jail if he does not. But a defendant is not informed at trial that he has the right to remain silent (although in fact he may refuse to answer particular questions).<sup>132</sup> Indeed, the tone of the president's questions to him indicates that a reply is expected, and that adverse inferences will be drawn if he does not answer. This tone was evident, for example, in Corneloup's remarks to

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<sup>129</sup>One frequent exception is murder cases. According to American defense counsel lore, juries are ordinarily not too inclined to draw inferences of guilt from a failure to testify except when there is a dead body to be explained.

<sup>130</sup>380 U.S. 609 (1965).

<sup>131</sup>John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047 (1994).

<sup>132</sup>Frase, *France*, in BRADLEY, CRIMINAL PROCEDURE, at 176.

Gaitaud described at the beginning of this Article.<sup>133</sup> There is no doubt that, in practice, a refusal to testify would be devastating. In the French legal culture, defendants are expected to speak. Defense counsel in France encourage their clients to speak—in sharp contrast with our system where defense counsel are constantly hushing their clients and speaking for them. Speaking appears to help a French defendant in several ways. For one thing, if he confesses guilt, the panel is likely to be more lenient in sentencing. Corneloup basically told Gaitaud this would be the case in his remarks quoted at the beginning of this Article. (This could be viewed as a form of plea-bargaining, although it differs from the American approach because a trial, albeit in abbreviated form, would still be held and votes cast to determine guilt.) But even if the defendant does not outright confess, describing his thoughts or actions might in some cases make him appear more sympathetic or at least understandable to the panel. The French, both in legal and social spheres, seem to prefer those who are forthcoming in conversation. The stoic, silent type is not their ideal.<sup>134</sup>

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<sup>133</sup>Some commentators have argued that French jurisprudence, in theory, prohibits an adverse inference being drawn from the defendant's silence. JOHN HATCHARD ET AL., *COMPARATIVE CRIMINAL PROCEDURE*, B.I.I.C.L. 32 (1996) ("French jurisprudence maintains that silence cannot be regarded as evidence of culpability."), cited in Gordon Van Kessel, *European Perspectives on the Accused as a Source of Testimonial Evidence*, 100 W.VA. L. REV. 799, 823 n. 99 (1998). But there is little evidence of such a prohibition in theory, and none in practice. As Van Kessel notes, in practice the expectation at trial clearly is that defendant will speak, and speak often, and that adverse inferences will be drawn if he does not. The fact that the defendant is the first person called to testify suggests the importance of his speaking at trial. McKillop found a similar expectation that defendant will speak in the trial he saw. McKillop, *supra* note \_\_\_\_, at 577. Where the legal culture creates an expectation that defendant will speak, it is quite likely that an adverse inference will be drawn from silence. *See also* Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 527 (1973).

<sup>134</sup>The French are known for highly prizing good conversation, and they themselves mention this very often as one of their defining cultural characteristics. Trial in the Cour

Besides allowing inferences to be drawn from a failure to testify, the French add a number of other incentives to allow or encourage a defendant to speak freely.<sup>135</sup> For one thing there is no concern about a defendant's criminal record coming in as a result of testifying. It comes in anyway. Defendant's criminal record is automatically part of the dossier and past convictions and indeed character in general are discussed in the personality phase.<sup>136</sup> In Gaitaud's case, Corneloup questioned Gaitaud about information from the dossier, not directly related to the murder, that he had earlier stolen a gun and a small amount of money from a neighbor. Gaitaud admitted this prior crime to Corneloup, but said he did so to protect himself from agents of the U.S. government who were persecuting him.

Another difference that encourages the defendant to testify is the absence of American-style cross-examination. American cross-examination does much to prevent witnesses from speaking freely in a civilized way. It is often deliberately designed to produce in the witness confusion, fear, or rage. In Gaitaud's trial, questioning could be sharp and even exasperated at times, but this was rare and occurred only if Gaitaud was being exceptionally evasive. For the most part, the tenor of the questions put to Gaitaud by Corneloup and Bilger was matter-of-fact, or curious in the personality phase. With the exception of the exchange described at the beginning, the questioners did little striving for drama. (The question "Did you do it?" is a

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d'assises appears to be no exception.

<sup>135</sup>For a discussion of some of the reasons why the rule against drawing adverse inferences from silence be a good idea in our current criminal justice system—reasons the French have addressed—see Amar & Lettow, *Fifth Amendment First Principles*, at 866.

<sup>136</sup>There is another, more Anglo-American solution to the problem of prior convictions coming in when the defendant testifies: to simply exclude them in that situation. Montana has taken this approach, which should help encourage defendants to testify. Montana Rule of Evidence 609 (prior convictions not admissible to attack credibility).

staple of French trials, normally asked at some point.) Gaitaud was allowed to explain himself fully, and was not limited to simply answering “yes” or “no.” There was little possibility that Gaitaud would be tripped up unawares or that a question would make a truthful response appear false. While Wigmore described Anglo-American cross-examination as “the great engine of truth,” it can also prove very dangerous to the truth. Many a skilled trial lawyer has boasted that he is able to make a truthful witness look like a liar or a fool.<sup>137</sup>

In addition, the defendant is not under oath (he is not *sous serment*). He therefore is not subject to prosecution for perjury should he lie.<sup>138</sup> This removes the “cruel trilemma,” where a defendant is faced with a choice of incriminating himself, committing perjury, or being subject to contempt for failure to answer. The cruel trilemma is often cited as a rationale for the Fifth Amendment privilege against self-incrimination,<sup>139</sup> and indeed Professor Alschuler has written that at the time of the Founding this was the main reason for the privilege (fear of eternal damnation of one’s soul being added to the perils of perjury). He has noted that the concerns of the Framers that led them to embrace the privilege would be satisfied if the defendant were permitted to testify not under oath.<sup>140</sup> We know from many sources that this was the practice in

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<sup>137</sup>See FRANCIS L. WELLMAN, *THE ART OF CROSS-EXAMINATION* 44 (4<sup>th</sup> ed. 1936) (Collier Books 1962) (examples of venomous cross-examinations of “a peasant” and “a big *nouveau riche* jeweler”).

<sup>138</sup>There is thus some question whether a French defendant’s giving evidence at trial should even be called “testifying.”

<sup>139</sup>Amar & Lettow, *Fifth Amendment First Principles*, at 890.

<sup>140</sup>Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2648-2653 (1996).

eighteenth-century England and America, so the French practice is close to our roots.<sup>141</sup>

The defendant's not being under oath has interesting implications for the attorney-client relationship in France. It is permissible to advise the defendant to lie, and in fact defense lawyers in France sometimes recommend it on certain points. Of course, these lies may be found out and make things worse for the defendant, so the strategy is very risky.<sup>142</sup> Gaitaud (almost certainly not on the advice of defense counsel) often changed his story during the trial and claimed not to remember things it would be impossible to forget.<sup>143</sup> This in itself was very valuable to the finders of fact. A defendant need not be truthful to reveal a great deal, as all detectives know. A good American detective, working behind closed doors in a police station and often using deceit about the evidence against the suspect or holding out promises of leniency, can get a confession written down that contains telling contradictions. But such statements make much more of an impact in open court, coming directly from the mouth of defendant himself.

Gaitaud, speaking French fluently but with a strong American accent, began describing his life: how his parents divorced and his mother got most of the property, how he spent his six years in the U.S. Marines, how his own marriage ended when Theresa, his wife and mother of

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<sup>141</sup>The practice of having defendant speak, but not under oath, began to disappear in the nineteenth century as states gradually did away with the traditional prohibition on defendant testifying under oath. See George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 662-671 (1997); *Ferguson v. Georgia*, 365 U.S. 570, 577 n.6 (1961).

<sup>142</sup>The pretrial questioning of the suspect limits the effectiveness of defendant lying at trial. When he is questioned pretrial, he has not had plenty of time and access to the dossier to invent false stories. The president will read defendant's pretrial answers from the dossier if they contradict what he says at trial.

<sup>143</sup>See, e.g., *infra* at \_\_\_\_.

his four children, would not end her affair with another man despite Gaitaud's entreaties. After his break with Theresa, Gaitaud described a few brief relationships with other women before he began seeing Susan Belasco seriously. They quickly moved in together, she became pregnant with his child, then he said they had to live separately because his son Nicholas and her daughter Malinda did not get along.

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

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

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

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

“It would be my job,” said Gaitaud.

“But the locks?”

“Lots of locks, that goes with all my jobs.”

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

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

“No. I found them in bed together.”

“What did you do then?”

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

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

After Gaitaud spoke, experts testified about his personality. The personality phase is so important in the Cour d’assises that a psychiatrist routinely examines the defendant before trial.<sup>144</sup> In this case, three mental health professionals testified: a psychiatrist who had examined Gaitaud, a psychologist who had done the same, and a psychologist who evaluated various psychiatric tests administered to Gaitaud. The experts had taken an oath different from that of fact witnesses, and unlike them were permitted to look at their notes during their testimony. Discussion of the experts’ qualifications was perfunctory. After all, these were not witnesses put

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<sup>144</sup>PRADEL, *supra* note \_\_\_\_, at 31.

forward by one party or the other—they had been appointed by the judiciary.<sup>145</sup>

The expert psychiatrist in Gaitaud’s case said privately that there were a number of differences between American and French psychiatry,<sup>146</sup> and these appeared in the course of the experts’ testimony. The French prefer “softer,” more metaphorical and subjective categories. French psychiatrists do not use the DSM-IV,<sup>147</sup> the main reference guide for American psychiatrists, which has done away with the category of neurosis. The psychiatrist who examined Gaitaud testified that he was “borderline psychotic/neurotic with a persecution complex” but that his mental problems were not so grave as to reduce his criminal responsibility. He said that Gaitaud did not have a very firm sense of self and helped bolster it by imagining that he was being pursued. His years in the marines, according to this theory, provided the structure that he so desperately needed to give him an identity. Corneloup harked back to his theory of Gaitaud’s image of women. The psychologist who analyzed Gaitaud’s responses to tests said that his answers in the Rorschach tests, particularly his reaction to the color red, indicated fear of women. Defense counsel made an effort to bring out the vagueness of psychiatric analysis in general by pointing to contradictions among the three experts’ testimony and their inability to say whether he would necessarily be dangerous in the future. But they did not go deeply into testing the bases of the experts’ theories or methods, for example by probing the value of a Rorschach test. It was difficult to determine what impact, if any, the psychiatric

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<sup>145</sup>The role of experts will be discussed in more depth *infra* Part V.C.5.

<sup>146</sup>At the time, he had just returned from an international conference of psychiatrists in Washington, D.C.

<sup>147</sup>American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4<sup>th</sup> ed. 1994).

and psychological testimony had on the outcome of the trial or sentence because the panel in the Cour d'assises does not give reasons for its decisions.

Gaitaud's father was called; like Gaitaud himself, he did not take an oath. Family members and employees cannot be sworn, the idea being that the emotional or financial pressure on them to lie is too great to subject them to the risk of perjury. This rule extends to relatives by marriage and even ex-spouses. These people are thus encouraged to speak freely. The father started off on his narrative, but quickly became bogged down in his distrust of the American government born of his own miserable divorce proceedings and "what they did to Thierry" (apparently he was convinced his son was poisoned in the marines). Corneloup cut him off and questioned him about his family life. It turned out that the father had been reasonably successful in business but had lost his main asset—an apartment building—to his wife during his divorce. Even before the divorce, he feared and resented her as the dominant figure in the household. Corneloup glowed with the vindication of his theory: like father like son.

### **C. The Facts Phase**

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

The personality phase of the trial now over, the "facts" phase began. Certain elements in the beginning of the facts phase were standard procedure, but after that the president determined the order unconstrained by tradition. Corneloup ran through a chronology of facts from the dossier. It was at this point that he posed the dramatic question described in the beginning and asked Gaitaud if he killed Susan and Malinda. After that exchange, Corneloup gave Gaitaud his chance to describe the facts. Corneloup let him go for a while, and Gaitaud gave a confused chronology up to the point when he fled to the Ivory Coast and was injured by a robber there

(Gaitaud said he thought the U.S. government sent the robber after him). Corneloup then stopped him and said,

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

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

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

Disagreements between Gaitaud’s testimony and that of the other witnesses were dealt with immediately after they arose. Often these disagreements produced a dialogue between the witness and Gaitaud. Mary Beniche, Susan’s mother and a civil party, testified that she called Gaitaud at 6:30 in the evening on Tuesday the 16th. (According to the medical evidence, the

killings took place in the evening or night of the 16th or early the morning of the 17th.) Beniche said she asked Gaitaud where Susan was, and Gaitaud told her she was with a friend. Gaitaud said *he* called *Beniche* about that time and asked her where Susan was, that they had arranged to meet but she had not shown up. Corneloup asked to see the phone records. The San Diego police searched for a bit, then declared they couldn't find the records but they might be in their hotel room. (The San Diego police were unprepared for the fast pace and flexibility of the French trial; they were used to a more regimented system.) Corneloup sighed and moved on. A day or two later, the records were found and showed a call from Beniche's house to Gaitaud's number, but not vice versa, about that time.

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

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

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

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

There are virtually no rules of evidence in the American sense in a French trial.<sup>148</sup> All sorts of evidence comes in, including hearsay.<sup>149</sup> This prevents time-consuming conferences between the judge and lawyers about admissibility, from which jurors are excluded; French jurors thus hear all the evidence, and trials move faster. It also prevents objections from interrupting the flow of a witness's testimony.

The American concern about the jury giving too much weight to hearsay evidence is mitigated in several ways in the French system. First, the judges sit with the jurors during deliberations and can remind them of hearsay's unreliability. Second, the reliability of a second- or third-hand statement can be immediately tested by asking other witnesses and checking documents, even if the original declarant is not in court.<sup>150</sup>

A particular incident shows how hearsay is used in a French trial and how this testing works. A statement was read of a witness who was dead, an older man and friend of Susan's

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<sup>148</sup>On the lack of formal rules of evidence in continental systems generally, see Damaška, *supra* note \_\_\_\_, at 514. However, this relaxed approach is starting to change, thanks to recent interpretations of the European Human Rights Convention, by both French courts and the European Court of Human Rights. These have expanded the defendant's rights to require witnesses to appear and to testify in person. See Frase, *France*, in BRADLEY, CRIMINAL PROCEDURE, at 183.

<sup>149</sup>The International Criminal Tribunal for the Former Yugoslavia has stated that it is charting a middle course between the common law and civil law systems with respect to admitting hearsay. Blaškić, Jan. 21, 1998; *see also* Tadić, Aug. 5, 1996. But in practice hearsay is rarely excluded. ICTY Rule 89(c) (The basic rule of evidence is for a trial chamber to "admit any relevant evidence which it deems to have probative value."). These judges seem to be taking a more civil law approach, including ordering witnesses to appear and testify although they were not called by either party. ICTY Rule 98; Kupreškić, Sept. 30, 1998 (witness not called by either party ordered to appear). *See* Murphy, *Progress and Jurisprudence*, *supra* note \_\_\_\_, at 80; Rod Dixon, *Developing International Rules of Evidence for the Yugoslav and Rwandan Tribunals*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 81 (1997).

<sup>150</sup>In other French and continental courts, another check would be the requirement of making detailed findings of fact with reasons given.

who said Susan complained that Gaitaud had beaten her. Corneloup asked Gaitaud about this; Gaitaud said he had never beaten Susan. Corneloup then asked Mary Beniche (Susan's mother) if Susan had ever told her that Gaitaud had beaten her. Mrs. Beniche said no, perhaps, she speculated, because Mrs. Beniche had been beaten herself in a previous marriage and maybe Susan was ashamed to admit that it had happened to her also. Mrs. Belasco (Susan's ex-mother-in-law) said that her son Maurice had said to her that he had seen bruises on Susan and that he had told Susan that if he ever learned that Gaitaud had beaten Susan or Malinda, Gaitaud would have to answer to him.<sup>151</sup> Mrs. Belasco said Maurice said Susan didn't say anything in response, but started crying and left. Defense counsel asked Mrs. Beniche how often she saw Susan and if she had ever seen bruises on her. Mrs. Beniche said she saw Susan sometimes, but not often, and that she had never seen bruises on Susan. The statement of Jennifer, Susan's best friend who saw her frequently, said that Susan never said Gaitaud had beaten her and that Jennifer had never seen bruises on Susan.<sup>152</sup>

### **3. The Investigating Judge Testifies: Correcting a Deficient American**

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<sup>151</sup>Maurice Belasco, oddly, never came to the trial despite being Susan's ex-husband and Malinda's father; there didn't seem to be anything pressing keeping him away. From comments made at trial, he appeared to be a happy-go-lucky type who rarely held down a steady job and spent most of his time surfing.

<sup>152</sup>Shortly thereafter, there was testimony that Maurice, and indeed the whole Belasco family, were very sensitive to the possible dangers posed by Gaitaud and his son. Defense counsel asked Mary Beniche how suspicion arose that Gaitaud's son Nicholas was molesting Malinda. Mrs. Beniche said one day Maurice was undressing Malinda and when he was taking off her underpants she said "owie." Maurice then asked whether anyone had touched her there, and she said "Nicki Nicki Nicki." The Belascos then, according to Mrs. Beniche, set in motion all sorts of investigations into child molestation. It was clear that Mrs. Beniche thought the Belascos had blown the incident out of proportion in order to get custody of Malinda. This testimony cast doubt on Maurice's description and interpretation of events, as reported by his mother.

### **(and French) Investigation**

The defense lawyers said privately that the investigating judge in a serious case is usually quite competent and thorough. In fact, they said, normally when you put a question to a witness in the Cour d'assises you already know what the answer will be because of the very complete witness interviews done by the investigating judge.<sup>153</sup> In this case, however, they often had no idea what a witness would say. Written material from the dossier is normally more important than it was in this case. It was evident this particular investigating judge relied too heavily on the work of the San Diego police. This is one of the difficulties with an inquisitorial system—it depends greatly on the competence and thoroughness of judicial personnel. Fortunately, to some extent a president can act as a backstop and compensate for an incomplete investigation at trial.

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

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<sup>153</sup>McKillop confirms this view of the thoroughness of normal dossiers in the Cour d'assises. McKillop, *supra* note \_\_\_\_, at 565-567.

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

"You didn't ask them any additional questions?"

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

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

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

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

"No."

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

"No."

Defense counsel was indignant—but quietly, by American standards. He strongly suggested that this is not the way a proper French judicial investigation is done and that the witness statements taken by the San Diego police should not be treated the way statements taken

by an investigating judge would be read in court and generally relied on. Corneloup intervened, implying that Humetz properly transformed an American police investigation into a French judicial investigation by interviewing the witnesses himself.

But during the trial, Corneloup's skepticism about the thoroughness of the American (and French) investigation clearly grew. He appointed experts for the defense to investigate physical evidence even during the trial, at one point granting a "rest period" during trial to allow this to happen.<sup>154</sup> After the verdict, he said privately that this was an exceptionally difficult trial because, in effect, he was having to act as an extra investigating judge while the trial was going on. To a certain extent, therefore, a presiding judge can compensate for an incomplete investigation.

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

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

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<sup>154</sup>*See infra* at \_\_\_\_\_. In granting this "rest period," Corneloup was perhaps stretching the rules. He could not formally suspend trial because of the "principle of continuity" of trial in the Cour d'assises. Code de Procédure Pénale art. 307 ("The trial may not be interrupted and must continue until the case is ended by the verdict of the Cour d'assises.")

especially on cross-examination. The different styles and substance split the Gaitaud trial into American and Gallic segments—voluble Frenchmen described Gaitaud’s relationship with his mother, while gruff Americans described what they found at the crime scene. The French police did not hesitate to express themselves, expansively at times, and they were not as guarded in response to questioning from defense counsel.

After Humetz had finished, a French policemen testified. He had been one of the principal policemen working on the case and had gone to California with Humetz. He testified a good deal longer than Humetz, and seemed to view his role almost as that of a psychoanalyst. He launched into a discussion of Gaitaud’s psychology, reviving themes from the personality phase. He said that Gaitaud was a good deal like his father, that both father and son were suspicious of the American government and also suspicious of American women. The judge in Gaitaud’s divorce case was a woman—in Gaitaud’s eyes, yet another American woman who was against him, and a representative of the American government to boot. Nicholas, Gaitaud’s oldest son, shared some of this suspicion and dislike. At one point, when Susan and Gaitaud were living together, Nicholas burned all of Malinda’s toys. The Belasco family accused Nicholas (then 13 years old) of sexually molesting Malinda. (Gaitaud had testified earlier that this was the crisis that led him to live separately from Susan.) The policeman described the very close relationship between Gaitaud and Nicholas.

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

Defense counsel rose. “We’ve been quiet throughout this whole trial while you’ve expounded your psychological thesis, Monsieur le président. But now I’m going to say

something. Monsieur Gaitaud asked for custody of all his children; he didn't treat them differently. He told you he loved all his children.”

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

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

The San Diego police next took the stand. They did not refer to the inner workings of Gaitaud's mind or to his relationship with his children; they had not interviewed available witnesses to find out about Gaitaud's family life. As with all the witnesses, Corneloup started by asking them to tell what they knew. Instead of giving the usual narrative, the American police officers gave a very short, introductory answer and stopped. Further questions elicited the same clipped sort of answers. Corneloup was getting visibly impatient with them. Exasperated, he complained to me in the corridor during the lunch-break, “I seem to terrorize all the American witnesses!” I told him it was not terror, it was just the American style of trial. Police officers are trained to wait for questions from the lawyers before answering, and then to answer only the question and not to volunteer information, especially on cross-examination. Otherwise, they are attacked on cross-examination (“ripped apart,” as the Assistant D.A. later described it).

Corneloup shook his head in wonder.

## **5. Differences in Expert Testimony**

Differences in testimony between the American and French experts were one of the most fascinating parts of the trial. The differences paralleled the differences in police testimony, but were even more striking because the American and French experts were basing their opinions on

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

Experts appointed by the judiciary have traditionally played a large role in French adjudication and are given considerable deference. Their appointment and duties are so significant that there is a special term for expert inquiry into facts: the *expertise*. In civil cases, often French judges will delegate inquiry into factual issues that are at all complex to experts. These experts in effect hold a mini-trial on the subject and give the judge a detailed report together with conclusions on the application of law to facts.<sup>155</sup> In criminal cases, the investigating judge initiates an *expertise*, and parties can request that he do so.<sup>156</sup> Experts are chosen from either a national list established by the bar of the Cour de cassation, or from lists compiled by the regional Courts of Appeals.<sup>157</sup> They are given great leeway in expressing their

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<sup>155</sup>See James Beardsley, *Proof of Fact in French Civil Procedure*, 34 AM. J. COMP. L. 459, 480-85 (1986).

<sup>156</sup>Code de Procédure Pénale art. 156. If an investigating judge refuses the request of a party for an *expertise*, he must give his reasons in writing and the parties may appeal the decision to the Chambre de l'instruction.

<sup>157</sup>*Id.* art. 157. The experts on these lists take an oath before the Court of Appeal of their domicile that they will use their skills in the service of justice on their honor and their conscience. This oath is taken once and for all, and is not renewed at each appearance at court,

opinions; while the presiding judge is forbidden to express his opinion on defendant's guilt at trial,<sup>158</sup> experts may even say "This man has killed."<sup>159</sup> However, there is a growing tendency for lawyers to call people who are really technical experts as ordinary witnesses to dispute the results of the official expert's report.<sup>160</sup> Defense counsel did not do so in Gaitaud's case.

The police went over the discovery of the bodies in detail. The San Diego medical examiner who performed the autopsies testified, as did French pathologists who had reviewed the results. They showed the photos of the bodies, both as found and during autopsy.<sup>161</sup> Several jurors cringed at the sight. There was evidence of blows to the head of Susan Belasco before death, and of marks on the backs of her hands suggesting she may have tried to protect herself by covering her head. The head wounds would have bled a great deal, but were not deep; the skull was not fractured. Both the San Diego medical examiner and the French pathologists agreed that these could not have caused death. There were no marks at all on Malinda.

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emphasizing the experts' role as a government official. *Id.* art. 160.

<sup>158</sup>*Id.* art. 328.

<sup>159</sup>LARGUIER, *supra* note \_\_\_\_, at 195.

<sup>160</sup>VINCENT ET AL., *supra* note \_\_\_\_, at § 627. The Code provides for the situation in which a witness contradicts the conclusions of an official expert or suggests new considerations from a technical point of view. In that case, the presiding judge must ask for the observations of the official experts, the prosecutor, the defense counsel, and the civil party. He must then issue a written decision with reasons on whether to continue with the trial or to postpone it to a future date. Code de Procédure Pénale art. 169.

<sup>161</sup>Sometimes a French trial can be more adversarial behind the scenes. One evening after the trial session, Corneloup had held a contentious conference with Bilger and the defense lawyers over whether photos of the bodies should be shown. Defense counsel strenuously argued that there would be no point in showing them because the bodies were simply decomposed; it was not the manner of death that caused the photos to be disgusting. Corneloup decided they would be shown anyway, saying, "*La mort c'est la mort*—these things exist, we can't ignore them."

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

Ms. Barrett later said in private that unless a fact is almost absolutely certain and indisputable, medical examiners are often cautious in giving their opinions and hedge, so as not to allow any opening for the other side to attack them on cross-examination. French experts, like the French police compared to American, give their opinions much more freely.<sup>162</sup> They are not subject to hard-hitting, probing American-style cross-examination.<sup>163</sup> (Indeed, Bilger and the defense counsel asked few questions. Corneloup, on the other hand, was in his element and asked many questions; having been an investigating judge for so long, he was familiar with medical evidence.) Because French experts have been appointed by the judiciary, they are not as vulnerable to charges of partisanship. There are dangers inherent in deference being given to

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<sup>162</sup>The reticence of American experts as opposed to the French also appears in an incident concerning a computer. Corneloup asked when a particular document was written, or at least modified for the last time. The FBI agent was extremely reluctant to assign any date to the computer file, and wouldn't even say for sure that it had been written before a certain date. The French computer expert, in contrast, said it must have been saved for the last time before April 30, 1992, for various reasons. The FBI agent didn't take issue with this analysis, and in the end agreed. Once again, it appeared the American expert was extremely reluctant to give an opinion, based on experience with the American system where he would be skewered if there were the slightest chance he was wrong.

<sup>163</sup>*See supra* at \_\_\_\_ and \_\_\_\_ (discussing the effects of American cross-examination on witness testimony).

these official experts; weaknesses in their testimony may not be exposed. On the other hand, this system may prove to be a net benefit to defendants compared to the American method of parties providing experts. Normally, the prosecution in our system has more resources than the defendant, and can pay for expert testimony more easily—testimony that is often decidedly partisan in nature.<sup>164</sup>

The jurors asked several questions. “Could the blows have come from more than one person?” one asked. “Yes,” was the answer. Ms. Barrett was also allowed to ask questions, after the civil party and before the French prosecutor. Once or twice she did. “Is it possible the bodies were moved after death?” she asked. Yes, as long as it was done within three hours of death. Corneloup asked if any fingerprints were found on Susan’s car inside the garage where the bodies were found. The San Diego police said they lost the fingerprint cards, but they assured Corneloup that the only fingerprints found on the car were Susan’s. They threw out a bootie, a child’s shoe presumably belonging to Malinda that was found in the car, as irrelevant to the investigation, once again prompting Corneloup’s amazement.<sup>165</sup>

## 6. Lapses in Dignity

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<sup>164</sup>Arguments for and against adoption of court-appointed experts are found in Howard, *The Neutral Expert: A Plausible Threat to Justice* 1991 CRIM. L. REV. 98; Spencer, *The Neutral Expert: An Implausible Bogey* 1991 CRIM. L. REV. 106.

<sup>165</sup>Corneloup was often astonished at the way the San Diego police treated physical evidence. At some point, a roadside cleaning crew reported they had found two wallets together on the side of a highway not on the path of Gaitaud’s flight—one belonging to Susan Belasco, the other a child’s wallet with the name “Megan” on it. The question was asked when these were found and where the “Megan” wallet was. Corneloup was dismayed that the police had not made an effort to figure out when the cleaning crew found these and that the police had thrown out the “Megan” wallet. One policeman explained he thought these were a diversionary tactic on the part of Gaitaud and so not important. Of course, problems with conserving evidence are not unique to this case.

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

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

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

A particular episode, involving Gaitaud's personal computer, demonstrates how Corneloup attempted to correct for some of the problems caused by combining an American and French investigation. It also shows how more evidence can come into a French court, thanks to a judicial rather than a partisan investigation. Gaitaud's home personal computer was supposed to be sent from San Diego as physical evidence. On Friday a box arrived; the French police unpacked it and found it contained the monitor and the keyboard, but not the central processing unit containing the hard drive. Corneloup naturally asked for the computer to be sent as soon as

possible. The next Monday it came. An FBI agent, brought into the case by the San Diego police because of his technical expertise, had already investigated the contents of the hard drive and found a fictional story about the murder of a woman named Theresa (the name of Gaitaud's ex-wife), whose body was found in the murderer's garage. The FBI agent testified that he was instructed by the San Diego police only to look for the keywords "murder" and "secretive" or "secret."

Defense counsel argued to Corneloup that this was not a sufficient investigation of the computer, and asked to have French experts appointed who would look for additional words, such as "Malinda," "Susan," "Belasco," "NSA," "insurance," etc. Corneloup agreed and said he was exercising his discretion to appoint two French computer experts (an appointment normally made by the investigating judge before trial), who were promptly sworn in. Corneloup granted a "rest period" Monday afternoon to allow the work to be done.<sup>166</sup> The two French experts worked alongside the FBI agent and a translator all through the night.

The additional work turned up several other relevant documents, including letters written by Susan lambasting the Belasco family and one dated February 1992 saying how happy she was and how well she was getting along with Gaitaud's children. Unfortunately for the defense, the work also turned up another story, this one about a man killing his girlfriend for insurance money. In many American trials, this story never would have seen the light of day. The prosecution would have missed it and the defense, if it had found it, never would have revealed

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<sup>166</sup>*See supra* note \_\_\_ on the principle of continuity of trial in the Cour d'assises.

it.<sup>167</sup> As it was, the defense had no choice because the work was done by court-appointed, not party-retained, experts. Damning as it was, the evidence came in.

### **8. An Alternative Killer?: An Attempt to “Take the Fifth”**

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

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

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<sup>167</sup>States with liberal reciprocal criminal discovery rules, such as California, might possibly be an exception. But even there, it could be argued that the prosecution had full access to the piece of physical evidence in question—the computer—and could have found out the same information. The two sides might not have to disclose everything they found out about the piece of evidence in question. In general, California’s reciprocal discovery rules focus on evidence the parties intend to present at trial. *See* CAL. CONST. art. I, § 30(c); Cal. Penal Code § 1054; *Izazaga v. Superior Court*, 285 Cal. Rptr. 231, 815 P.2d 304 (Cal. 1991).

by a thirteen-year-old.

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

"Did you kill Susan and Malinda Belasco?"

"No."

"Were you capable of killing them?"

"Of course. Anyone would have been capable of killing them."

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

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

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

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

Tuesday afternoon the computer experts reported their findings, and stated that the story named "Theresa" was found in the file named "Nick." Again, Nicholas shuffled into court in

cargo pants trailing on the floor, sandals, and a huge T-shirt that showed the massive tattoos covering his slender arms. Corneloup gave him the story about Theresa to read in English.

Nicholas read for a few minutes and looked up.

Corneloup asked, “Did you write this story?”

“I don’t remember.”

“Were you capable of writing this story?”

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

“Did you kill Susan Belasco and Malinda?”

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

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

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

Ms. Barrett and I rose. We told him that the Fifth Amendment to the U.S. Constitution allows a witness to refuse to answer questions that might incriminate him, even if he is being asked to answer in someone else’s criminal trial.<sup>168</sup>

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

“No. I renounce my French citizenship. I’m not coming back again.”

Silence again settled over the courtroom. Corneloup thought for a moment and then took

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<sup>168</sup>Unlike the Fifth Amendment proper, *Miranda* seems to be well-known in France, thanks to American movies. A person who clerked for a French judge said that a French defendant in a criminal case complained that the French police officer who arrested him did not “read him his rights,” and tell him he had the right to remain silent. The argument did not get the defendant very far.

a different tack. He did not return to the direct question of whether Nicholas committed the murders but rather questioned him about where he was on the evening of the 16<sup>th</sup> and morning of the 17<sup>th</sup>. Nicholas ended up admitting he was at his mother's house, thus implicitly denying he committed the murders. His testimony was supported by Gaitaud's answering machine tape, which played several calls from a cheerful thirteen-year-old Nicholas on the evening of the 16<sup>th</sup>, saying he was with his mother and asking where his father was. The testimony of Theresa McCarthy, Gaitaud's ex-wife and Nicholas's mother, confirmed that Nicholas was with her. The Nicholas drama was deflated, but not without a careful inquiry by the president. After the trial, Corneloup said it was painful to have to ask Nicholas those questions, but he felt he had a duty to do so.

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

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

During the discussion of the computer story about killing Theresa, Corneloup debated whether the story was more like something written by an adult or a child. He turned to Ms.

Barrett and asked her the question. Ms. Barrett said it seemed to have been written by an adult because it was complicated. It did not seem all that complicated and it was possible to imagine many older children or teenagers capable of writing it. In any event, it seemed a question he should be asking someone else. Defense counsel showed no signs of acting. I stood up.

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

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

Bilger said, “Madame Lettow doesn’t seem very neutral to me.”

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

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

Afterward, defense counsel said they were glad I had done something. They had been holding their fire for some time about Corneloup’s deference to Ms. Barrett for fear of irritating him. Before that incident, they said, Corneloup had even asked Ms. Barrett if she wanted to do a closing argument. Defense counsel decided not to object to avoid rankling Corneloup. Fortunately for them, Madame Germain the *greffière* pointed out to Corneloup a procedural rule that forbids a witness from giving a closing argument. (This was yet another example of how the *greffier*, or clerk of the court, is invaluable to the president and saves the proceedings from being

overturned.) Corneloup himself said after the trial that I was right to object to his asking Ms. Barrett that question. He had to make a number of unusual decisions in this trial, he said, and was bound to get one wrong occasionally.<sup>169</sup>

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

Testimony was now at an end, and a long-anticipated phase of the trial began. These are the famous *plaidoiries* and the *réquisitoire*—closing arguments.<sup>170</sup> They are a venerable institution in France; this is the only time when the lawyers get a chance to shine rhetorically, to make their case free from judicial interference. Unlike Anglo-American lawyers, who have opening arguments and lengthy cross-examinations throughout the trial, French lawyers are continually under the president's thumb until the closing arguments. During the closing arguments, they may talk for hours without fear of interruption. And often they do. Stories abound of famous *plaidoiries*. Madame Marie-France Garaud, who is the mother of defense counsel Jean-Yves Garaud (and who was recently elected to the European Parliament), told of being spell-bound as a child listening to the *plaidoirie* of the great Michel Garçon in the Cour d'assises. Garçon was a very learned and cultured man, a member of the revered *Académie française*.<sup>171</sup> But his logic and rhetoric was so powerful that it appealed even to a schoolgirl.

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<sup>169</sup>It was true that this error was by no means fundamental to the question of Gaitaud's guilt or innocence. Nonetheless, it was interesting that Corneloup felt so comfortable admitting a mistake. Possibly the method of appellate review had something to do with this. *See supra* at \_\_\_\_\_.

<sup>170</sup>The closing arguments of the civil party's lawyer and defense counsel are called the *plaidoiries*; the closing argument of the prosecutor is called the *réquisition* or *réquisitoire*.

<sup>171</sup>The fact that a lawyer best known for his *plaidoiries* would be elected to the *Académie française*, which is almost sacred in French culture, suggests in what high regard that skill is held.

“When you heard him, you believed everything he said was the way it had actually happened—that his client was innocent.”

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

Jean-Yves Garaud and Olivier Saumon spent countless hours preparing their *plaidoiries* for Gaitaud’s case. This seemed to be exhausting them; they looked pale during the last week of trial. On Sunday before the last week they met with a former professor of Saumon’s, Stéphan Ben-Simon, now a professor of rhetoric at a school for continuing legal education. From mid-afternoon he helped them work out arguments to defend Gaitaud, finally leaving at 2:00 a.m.<sup>172</sup> Garaud and Simon stayed to continue working. On Monday, they fell asleep in the library of the Palais de Justice preparing their *plaidoiries*.

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

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<sup>172</sup>I helped out with pieces of Americana: that it is not so unusual for an American to be in as much debt as Gaitaud was at the time of the murders (a few tens of thousands of dollars, an amount that staggered the French), that there are 12 inches to a foot, not ten.

Maître Lévy initially had planned to ask for one million francs in damages for the civil parties, but she did not mention money at all in her *plaidoirie*. In fact, she could not ask for damages because Susan and Malinda were considered to be financial dependents under French law, not money-earners (Susan had quit her job in anticipation of the baby's birth), and so the civil parties could not receive compensation for their deaths. The French do not consider future earnings the same way Americans usually do in calculating damages. The civil parties did ask for nominal damages of one franc. Even if they had been awarded large damages, they could not have collected them because Gaitaud had no money and the public judgment fund covers only French civil parties.<sup>173</sup>

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

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<sup>173</sup>See *supra* note \_\_\_\_ and accompanying text.

American and French criminal procedure was an admirable way to get to the truth.

Turning to the facts of the case, he gave a chronological description of Gaitaud's life, stressing his close relationship with Nicholas, which he termed "corrupt and rotten." He moved closer to the events surrounding the deaths, noting that there were elements of doubt concerning guilt—for instance, Gaitaud beginning to clean his carpets before the deaths took place. But he emphasized Gaitaud's lies about making a call to Mary Beniche on the 16<sup>th</sup> about where Susan was, when in fact Beniche made a call to him. His voice then dropped very low, almost to a whisper. "You have to understand what it is to asphyxiate a human being. It takes three, sometimes even four minutes." Gaitaud decided he could not leave Malinda alive—she was old enough to tell others what had happened—so he did the same to her. In the same low voice, Bilger invoked Courneloup's fascination, "the baby about to be born—you should see the photos."<sup>174</sup> Returning to a normal voice, he asked, "Why did he commit this crime? His defense about the American agents is absurd, and when pressed for details, he can only say 'I don't remember.'" Bilger said he did not think the motives of this crime were economic. Rather they were psychological, based on "a double image of women" as idealized and yet worthy of disdain. This double image, combined with his desire to make Nicholas the center of his life and his problems with Susan, pulverized his ability to relate to people and brought out the savage in Gaitaud. Bilger thus played to the French fascination with psychological theory, especially Courneloup's interest.

Nearing the end, Bilger tackled the question of premeditation. The closure of Gaitaud's

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<sup>174</sup>Killing the foetus could be charged in California as a third murder; under French law, it could not be considered a separate murder.

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

Bilger's *réquisitoire* had lasted about an hour and a half, rather short by Cour d'assises standards. Garaud and Saumon divided the defense's *plaidoirie* between them. No rebuttal is allowed the prosecutor, unlike the American system, so the defense has the last word. At this point, Garaud and Saumon needed every possible advantage. Defense counsel spoke standing in their places, on the bench beneath Gaitaud, with notes. Garaud came first. His assignment was to be cool, unemotional, and logical, "computer Garaud," as he called it. Calmly he pointed out that there were many problems with using this mixture of American and French procedure. Many things were missing, many things were not tracked down. "I've never seen an investigation in the Cour d'assises done like this." Nicholas was never thoroughly investigated, there was not even an attempt to interview Maurice Belasco, let alone investigate him. This

latter omission was especially troubling, since Susan's letters about her ex-husband were very critical—she said he was violent, lazy, and did drugs. He concluded by questioning whether a man as intelligent as Gataud could have made such stupid mistakes in committing a murder, such as leaving the bodies in his garage.

Saumon spoke next, much more emotionally than Garaud. “This crime is horrible,” he said, “it is very hard on all the families. I can't stand here and tell you he is innocent. But there is a serious doubt about guilt; this investigation was not sufficient, especially to give such a drastic punishment.” He picked up his teacher Ben-Simon's line of argument. “Before 1992, Gataud was more or less normal. Sure, he had had various shocks, but you can reconstruct yourself after your parents' divorce—I did.” He invoked the complicated situation surrounding Thierry and Susan, with pressure coming from all sides. In conclusion, he said, it would be crazy to commit a murder the way Thierry Gataud was said to have done, and so he was either innocent or profoundly mentally unbalanced. Garaud and Saumon together spoke for about an hour and a half, the same length as the prosecutor. They ended at about 3:30 in the afternoon.

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

The height of formality at the trial came during the charge. After the *plaidoiries*, the atmosphere in the courtroom became very solemn. The president asked Gataud if he had anything to add. Gataud stood up and said simply, “I am innocent.” (Defense counsel later said this was a great improvement on what Gataud had originally intended to say. They had discouraged him from arguing that the killer was really someone else altogether, a shadowy figure hardly mentioned at trial.) The president then gave the charge to the panel—including, of course, himself. He slowly read out the formal allegations against Gataud: First, the unlawful

killing of Susan Belasco; second, with premeditation; third, the unlawful killing of Malinda Belasco; fourth, with premeditation. He paused, and intoned the famous words of Article 353 of the French criminal code, the charge to the Cour d'assises:

The law does not ask an accounting from judges of the grounds by which they became convinced; it does not prescribe for them rules on which they must make the fullness and sufficiency of proof particularly depend; it requires of them that they ask themselves, in silence and reflection to seek out, in the sincerity of their conscience, what impression the evidence reported against the accused and the ground of his defense have made on their reason. The law asks them only the single question, which encompasses the full measure of their duties: "Are you thoroughly convinced? [*Avez-vous une intime conviction?*]"<sup>175</sup>

Thus charged with their responsibilities, the panel went to deliberate. There was no elaborate exposition of the law; the professional judges can answer questions as they arise in deliberations. It should be noted that the lack of a requirement to give reasons for a decision is virtually unique to the Cour d'assises; elsewhere in the French system, judges must give reasons for reaching a particular decision (*jugement motivé*).<sup>176</sup> This failure to require reasons from the Cour d'assises is connected with its oral proceedings and the use of lay jurors.

The panel deliberated at an oval table in a comfortable, well-appointed room just behind the courtroom, with a marble bust of an eminent jurist set in a niche along the wall and a copy of Article 353 prominently displayed. The table was solid wood and the chairs large and well-stuffed. The whole atmosphere was far from the dingy or at best utilitarian American jury rooms, and impresses the onlooker with a sense of weighty deliberations taking place there.

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<sup>175</sup>THE FRENCH CODE OF CRIMINAL PROCEDURE (Gerald L. Kock & Richard S. Frase, trans. 1988) 173.

<sup>176</sup>This is true for other continental systems as well. See LANGBEIN, *supra* note \_\_\_\_, at 63.

Once the panel went in to deliberate, they could not leave until they had reached a verdict.

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

Then each member of the panel cast a vote on the first charge, a formal procedure in which a written ballot is put into a wooden box. The ballot is a little sheet of paper stating: “On my honor and my conscience, my verdict is \_\_\_\_.” The ballots are anonymous. (The casting of this ballot is required.<sup>177</sup>) The votes are then counted. This procedure was repeated for each of the charges. This relatively simple procedure works because a super-majority of eight is required to convict, not unanimity. Everyone has an opportunity to speak to each issue, and no one is unduly pressured.

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

Shortly after 8:00, the panel emerged from deliberations and the members took their seats in the courtroom. The president announced that there were at least eight guilty votes for all four charges. Everyone looked at Gaitaud. His face was expressionless. After the panel rose to leave

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<sup>177</sup>Code de Procédure Pénale art. 357.

he turned to Garaud and Saumon. “I’m very angry,” he said calmly, “Let’s keep in touch.” The police officers then escorted him back to prison. Gaitaud’s family was also quite calm. “When is he going to get out?” they asked.

#### **F. Postmortem**

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

Bilger was courteous, and very interested in American adversarial procedure. We discussed the differences between American and French trials. He said (out of earshot of Corneloup) that he hoped France moves to a system of American-style courtroom procedure, with lawyers asking most of the questions. The current procedure in France, he said, depends too heavily on the president. Garaud separately gave the same opinion. Doubtless the American approach is very attractive to lawyers abroad, since lawyers have much more control over the courtroom.

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

Corneloup and the assessesurs all agreed that it was very difficult to do the closing argument for the defense. Corneloup assured Garaud and Saumon that they could not have done better. Garaud and Saumon said they thought the jurors to the female assesseur’s left had already made up their minds early in the trial, based on their questions and reactions. Corneloup

and the assessesurs all shook their heads vigorously, saying nothing could be further from the truth. Corneloup added, “You never can tell with jurors.” Corneloup would not say what the actual votes were on each count; he is in fact prohibited from doing so. As with the American use of lay jurors, the content of deliberations is kept under wraps; it may not be probed.

Garaud and Saumon, a little shaken, told Corneloup and the assessesurs that they thought the sentence was harsh, since Gaitaud is clearly mentally unbalanced. Corneloup said that in fact, the court had not decided on life imprisonment (*perpétuité* or *perpét* for short). There had not been the eight votes necessary to impose that punishment. Instead, Gaitaud was sentenced to no more than 30 years’ imprisonment. Gaitaud, he said, could even get out in fifteen years, minus the five he had spent in pretrial detention, assuming he confessed and behaved well.<sup>178</sup> As Garaud and Saumon agreed later, from Gaitaud’s point of view it was a definite improvement over the California death penalty. Even if he were not sentenced to death in California, most likely he would have received a sentence of life imprisonment without possibility of parole in a California prison if convicted of the multiple murder.<sup>179</sup>

As noted in Part IV.B above, at the time of Gaitaud’s trial there was no regular appeal from a decision of the Cour d’assises. The only hope of overturning Gaitaud’s conviction lay in invoking the Cour de cassation, the equivalent of the Supreme Court of France. This proved to be difficult for Gaitaud, in part because counsel who represented him before the Chambre

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<sup>178</sup>The French Criminal Code specifies that a person sentenced to ten years’ or more imprisonment must serve at least half the sentence; this is known as the “security period.” Code Pénale art. 132-23.

<sup>179</sup>Jim Whitman is currently working on a paper on the great differences between prison sentences in the United States and Europe. He preliminarily attributes the lower sentences in Europe to a greater concern with dignitary values.

d'accusation (as it was then known) may have failed to preserve certain procedural arguments related to the American investigation.

## **VI. Advice for Americans Working on a Multinational Criminal Case**

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

### **A. The Defense**

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

Well before the formal accusation is issued, the *Chambre de l'instruction* or its equivalent should be given a detailed memorandum discussing the differences in methods of American and French investigation. This memorandum should particularly focus on: methods of witness-

questioning and statement-taking by American police (see Part IV.C.3); the American police's lesser duty to investigate exculpatory evidence compared with that of the French investigating judge (see Part II); American rules of discovery in criminal cases that may allow the police and prosecution to withhold arguably exculpatory evidence; and the important role American defense counsel plays in investigating the facts. It is important that this information be conveyed to the investigating judge, particularly the one heading up a rogatory commission to the United States. As always, the investigating judge should be given names of additional witnesses to question and questions to be asked of those witnesses. But, in addition, the investigating judge should be asked to re-interview thoroughly all witnesses interviewed by the American police, as if they were being interviewed for the first time (see Part IV.C.3). Statements taken by the American police should not be treated as if they were part of a European dossier and quoted at trial.

At trial, if at all possible, the American adviser should be present throughout. Questions about American procedure come up during all parts of the trial, and trial flexibility is such that the presiding judge does not hesitate to ask questions of witnesses at any time (see, e.g., Parts IV.A.2 and IV.C.8). The American adviser needs to educate judges and jurors at the trial as well as pretrial. Defense counsel should request that the American adviser be allowed to testify about differences between American and French procedure early in the trial, preferably even before defendant speaks, in order to set the stage for what follows. This is also important because the adviser may not be allowed to be present at trial until he or she has testified. In addition to the points made to the *Chambre de l'instruction*, at trial the adviser needs to emphasize that the role of the American prosecutor is more adversarial than that of the French prosecutor (see Part IV.C.9). It should be noted that the American prosecutor is not a judge. In cases where the

rogatory commission has not adequately done its job, defense counsel should not hesitate to ask for additional investigation of physical evidence during the trial itself (see Part IV.C.7).<sup>180</sup>

## **B. The Prosecution**

For the American prosecutor's office, concerns will focus on the presentation of witnesses (especially experts) and evidence, and to some extent on the civil party. Of course, in the investigation stage, full cooperation with the French investigating judge and turning over all results of the investigation is important for building trust and ensuring thorough collection of evidence. As with the defense adviser, American law-enforcement witnesses and possibly even experts should be prepared to attend trial for several days, since the president may ask these witnesses to comment as new issues arise. The witnesses may even be asked to do new physical investigation, as the FBI computer expert was asked to do in the middle of Gaitaud's trial (see Part IV.C.7). These witnesses should be primed for a very different style of questioning than in a U.S. trial (see Parts IV.C.4 and 5). They need to be told to expect most of the questioning to come from the presiding judge, and to give answers in longer form, really a narrative, and not the choppy responses common in an American trial. The tone should be almost conversational. They should feel free to give their opinion on scientific questions, without fear that they will be criticized in a harsh cross-examination for failing to address remote possibilities.

In terms of physical evidence, American police should be especially careful not to discard any evidence that might remotely be relevant, and to preserve it in good condition (see

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<sup>180</sup>An interesting question arises as to whether an American defense lawyer might do some investigation, even after the French courts had asserted jurisdiction, and hand the results over to the French investigating judge. This might be a risky strategy; if there were questions of coordination between the American and French lawyers, the French lawyers might be disbarred for participating in an unauthorized investigation.

Part IV.C.7). Otherwise, doubt might be cast on the entire investigation. Also, considerable care should be taken to transport all of it to the trial in a timely way.

The prosecution should also inform the victim of the crime (or the relatives of the victim, in case of a homicide) that they may become civil parties in the criminal case. It is important to do this well before trial, to allow the civil party time to find a foreign lawyer or to have one appointed and to review the dossier. This would prevent situations such as the surprise appearance of Mrs. Belasco, see Part V.A.2, which was trying for her and somewhat disruptive for the court. Different continental countries have different rules about the civil party, with France allowing the most active participation. The prosecutor should make an effort to find out what these rules are and to inform the victim or relatives. Attention should be paid to the different rules about compensation (see Part V.D), and in particular to the fact that the French public fund covering judgments against indigent defendants only covers French civil parties, except in certain narrow circumstances.

## **VII. Conclusion**

The Gaitaud trial threw into relief some of the principal differences between inquisitorial, or inquiring, procedure and party-controlled adversarial procedure. While the French consider the procedure of the Cour d'assises to be like Anglo-American adversarial procedure in its emphasis on oral testimony, the rights of the defense, and the use of juries, the differences were more striking than the similarities. The French inquiry into the Gaitaud case was conducted mainly by the investigating judge before trial and the presiding judge during trial. Others also played a role in the inquiry: besides the defense and the prosecutor, both the assessors and the jurors asked questions of witnesses. Especially noteworthy is the French idea of the jurors as

temporary colleagues of the judges; they are treated with respect during jury selection and throughout the trial, where they play an active role. American juries, while given a great deal of power over the result, are picked over by the parties during voir dire and shut out of questioning at trial by party control.

Systems where the parties control the trial have a tendency to eliminate the voices of anyone but the state's lawyers and the defendant's lawyers. Everything else becomes subordinate to the adversarial contest. In contrast, judicial control over trial allows the voices of the jurors to be heard, in the form of inquiry. It also allows the interests of victims to be considered. In an American trial, Mrs. Belasco could not have asked questions of witnesses nor had her lawyer make a closing argument presenting her viewpoint. Although she was not compensated financially for her loss, it appeared to mean a great deal to her to participate in trial. It would be very difficult for the victims' rights movement in the United States to achieve anything like the civil party in France, because of our powerful tradition of party control of trial. A strong judge is needed to accommodate the interests of the civil party in a flexible trial format and yet keep motivations of vengeance in check.

Judicial control both makes possible a flexible order of trial and allows witness testimony to resemble a discussion. Witnesses can directly respond to the statements of other witnesses, in a sort of dialogue. They also are permitted to speak in their natural voices, initially in narrative form. They have not been carefully coached by one party or the other before trial, they are not constrained by the direct and cross-examination of the parties, and their statements are not interrupted by evidentiary objections. As a result, witnesses are more relaxed and often forthcoming with information. Even apart from the pursuit of information, there are dignitary

values inherent in freedom to participate in discussion in one's own voice. These values differ from the Anglo-American interest in preserving a zone of privacy (freedom from inquiry), but sometimes the president worried that his inquiry had been inappropriate, as with Gaitaud's son Nicholas.

The discussion at a French trial notably includes the defendant himself; defendant speaks constantly and the focus remains on him. In an American trial the defendant rarely speaks,<sup>181</sup> and the focus tends to be on his lawyers—their skill (or lack thereof) matters much more. U.S. criminal procedure has the effect of discouraging the defendant from testifying—by not permitting inferences to be drawn from silence, by often excluding his criminal record if he does not testify and does not open the door, by subjecting him to fierce cross-examination, and by requiring him to speak under oath if at all. French procedure has in effect eliminated each of these disincentives, and as a result it takes advantage of this valuable testimonial resource. Gaitaud spoke often, and revealed a great deal as he did so.

The personality phase of trial in the Cour d'assises shows the broad scope of the official inquiry and the interest in the defendant. The personality phase seems extraordinary to Anglo-American lawyers. We have difficulty grasping the significance of this wide-ranging inquiry into the defendant's upbringing, family life, education, job history, financial situation, and psychological makeup. It seems to be a distraction from the facts of the crime. The personality is of course partly connected to sentencing; French trials do not have separate sentencing hearings. Yet the vision of sentencing to which the personality responds is different from that of

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<sup>181</sup>See Van Kessel, *European Perspectives*, at 814 (suggesting that there has been a trend toward fewer defendants taking the stand at trial in the United States).

most U.S. courts; it is much more individualized, taking into account the unique circumstances of the particular person before the court. It also has a strong rehabilitative streak, derived in part from the *défense sociale* movement—a movement which has received almost no recognition in American scholarship. The *défense sociale* movement seems to have as one of its goals the affirmation of the defendant as an individual human being worthy of society's concern, as opposed to treating the defendant as a faceless offender. Beyond sentencing, French public officers showed a strong desire to understand *why* Gaitaud committed this crime, almost for the sake of the knowledge itself. The mental health experts, the police, the president, and the prosecutor all strove to understand why Gaitaud would have done this, and between them seemed to settle on a theory of Gaitaud's flawed image of women derived from his parents' relationship. (Corneloup was well-known for trying to find psychological explanations, but this interest was by no means limited to him—see the policeman's testimony in Part V.C.4.) The personality and its relationship to the *défense sociale* movement, sentencing, and the desire of French officials to arrive at a psychological explanation of a crime all need to be studied in more depth.

The Gaitaud case revealed some of the pitfalls of judicial control. One grave problem is the amount of time suspects spend in preventive detention, waiting for the judicial investigation to be completed. Gaitaud spent five years in preventive detention, a not unusual length of time in a murder case. Reforms recently enacted by the National Assembly limit the duration and provide other safeguards, but the new system requires an amount of judicial supervision that seems to be unworkable at present. It is also possible that the investigating judge might not do a thorough job. In the Gaitaud case, the investigating judge was largely prepared to rely on the

evidence collected by the San Diego police, without doing much of an independent investigation to counteract the effects of partisan evidence gathering. To some extent, the president can compensate for an incomplete investigation at trial, by ordering additional witnesses to be heard and examinations of physical evidence. In effect, Corneloup acted as a second investigating judge in his questions to Nicholas and in ordering further examination of the computer. He thus can act as a backstop for the investigating judge.

There are also problems associated with the control of the president. While his power makes possible the flexibility of trial and the ability of witnesses to speak freely, it also may lead to abuse of discretion. Corneloup was, for example, deferential to the Assistant D.A. at trial. Defense counsel hesitated to object because they did not want to irritate Corneloup. (It appears to be a common complaint among continental lawyers that they hesitate to speak up forcefully for fear of antagonizing the presiding judge.) In such a case, the *greffière* acted as a backstop, pointing out to Corneloup procedural rules that limited the Assistant D.A.'s involvement in the trial. It is also possible that one of the *assesseurs* could remind him of such a rule. More delicate questions arise when there is no procedural rule. Early in the Gaitaud case, for example, it seemed that Corneloup had developed a psychological theory about Gaitaud, which Corneloup believed was confirmed by the reports of the mental health experts. Defense counsel did not push the psychology and psychiatry witnesses hard in questioning, as would likely have been done on cross-examination in an American trial. Deference to experts, who are selected by the judiciary, is another feature of judicial control, and sometimes this deference may come at the cost of careful probing. (There are also distinct advantages to judicial appointment of experts, see V.C.5.) It seems unlikely, however, that either Corneloup's deference to the Assistant D.A.

or his psychological theory affected the outcome of the trial.

The French have tried to develop solutions to the problems associated with judicial control. They have many different types of judicial officials, who are able to act as backstops for each other. And they recognize the importance of having intelligent, fair, and well-trained judges in their system. Their judges, including prosecutors, undergo rigorous selection, training, and promotion processes. In contrast, the American system of party control of cases and independent juries are designed to avoid reliance on judges to the greatest extent possible. But we Americans may be too cynical about the capabilities of judges. With some adjustments, there might be less call for cynicism.<sup>182</sup> We currently do very little to train judicial officers, for example, or to select or promote them in a way that rewards merit more than political allegiance. Indeed, we can hardly conceive of judicial merit as something separate from politics.

Even if it were desirable, it would be difficult for American criminal justice systems to adopt large portions of French trial procedure.<sup>183</sup> We are hemmed in by federal and state constitutional rules and also by our longstanding political traditions and even popular culture. The dominance of a single inquisitorial judge might not be viewed as fair. But we might at least consider the beneficent influence of a strong and fair trial judge, not afraid to enforce basic rules of civility and enabling trial participants to speak without undue hindrance.<sup>184</sup> He or she can do

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<sup>182</sup>Indeed, it may be possible for American judges to help compensate to some extent for inadequate investigation and preparation by defense counsel. See Frase, *The Search for the Whole Truth*, *supra* note \_\_\_, at 831-33.

<sup>183</sup>See Van Kessel, *supra* note \_\_\_, at 487-510; Frase, *supra* note \_\_\_, at 664.

<sup>184</sup>Occasionally, a court in the United States strikes a small blow for dignity and civility. A recent opinion of the Ninth Circuit affirmed a district court's finding a lawyer in contempt for repeatedly violating his orders. The orders sprang from the district court's desire for the criminal trial "to be dignified and not an exercise in combat." *United States v. Galin*, 222 F.3d 1123,

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

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1124 (9<sup>th</sup> Cir. 2000). I am indebted to Gordon Van Kessel for this reference.