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# Understanding the Sentencing Process in France

## ABSTRACT

French sentencing is characterized by broad judicial discretion and an ethos of individualized justice focused on rehabilitation. The aims are to prevent recidivism, and so protect the interests of society, while reintegrating the offender. By contrast, the political Right, characterized by the recent Sarkozy regime, favors deterrence through harsher penalties, minimum prison sentences, increased incarceration, and preventive detention of offenders considered dangerous. The sentencing process can be understood only within the broader context of inquisitorially rooted criminal procedure. The central part played by the prosecutor (including in case disposition through alternative sanctions) and her role in recommending sentences that the court almost invariably endorses, together with the unitary nature of the judicial profession, means that there is remarkable consistency in penalties imposed. The *contrainte pénale*, based on a reconsideration of the range of available penalties put forward by the Consensus Commission and legislated in 2014, is unlikely to have great impact without investment in the probation service and a change in the judicial culture that still favors simple sentencing options, including imprisonment, compared with alternatives now in place.

As in many other jurisdictions, sentencing law and policy over the last two decades in France have been preoccupied with such issues as addressing the increasingly overcrowded prison population, incorporating the victim's perspective in appropriate ways, preventing and punishing

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recidivism more severely, defining and managing dangerous offenders, and balancing the effectiveness of alternatives to imprisonment with a political rhetoric of being tough on crime. Sentencing is an emotive and political issue—prison overcrowding and recidivism both featured in the French presidential campaign in 2012—and even where there is some consensus as to the nature of the problem, there is little agreement among politicians on how best to tackle it. Sentencing policies have followed the political fortunes of the Left and the Right. Recent legislation, the law of 15 August 2014 (Loi no. 2014-896 of 15 August 2014, Relative à l'individualisation des peines et renforçant l'efficacité des sanctions pénales), is no exception. It began life almost 2 years earlier as an initiative by the incoming socialist President François Hollande to reform the mandatory minimum sentences introduced in 2007 and the *rétenion de sûreté*, a measure that allows the continued detention after completion of the sentence of those considered to be dangerous and at high risk of reoffending because of a serious personality disorder. The *peines planchers*, as these mandatory minimum sentences came to be called, were targeted at recidivists but were extended in 2011 to first-time offenders in the case of some aggravated offenses. Both measures were strongly associated with the politics of former right-wing President Nicolas Sarkozy and were criticized as ineffective in preventing reoffending, while at the same time contributing to the increasing prison population. While Sarkozy was in power, first as minister of the interior then as president, the prison population increased from around 48,000 in 2002 to 64,000 in 2012. The rate of imprisonment rose from 79.2 per 100,000 inhabitants to 99.2 in the same period.

In order to inform this most recent sentencing reform, the minister of justice, Christiane Taubira, established a Consensus Commission to find ways of reducing reoffending and to examine the issue of “dangerousness” in the offending population. The commission, which used an unusual methodology for a law reform inquiry,<sup>1</sup> included a panel of 22 experts who selected a “jury” of 20 (presided over by Françoise Tulkens, a former judge in the European Court of Human Rights) made up in

<sup>1</sup> This method is more common in the medical field. The idea is to identify the essential issues and the points of disagreement. By bringing a range of perspectives, informed by research from France and elsewhere and having a structured debate, the aim is to build a consensus base on which to build. See the account of the methodology at <http://conference-consensus.justice.gouv.fr/note-dinformation-2/methode/>.

equal part of expert practitioners and nonspecialists who, in turn, heard from some 30 experts in a series of public hearings. This approach was advanced as scientifically rigorous, independent and with no link to government, and transparent, as hearings were held in public. It considered research evidence from France and elsewhere in order to have a more scientific basis to inform its recommendations. For example, in an attempt to cut across the usual political debates and media portrayals, the commission looked at the nature of recidivism, competing definitions, and frequencies of reoffending across offense types in order to develop a range of effective penal responses.<sup>2</sup>

The commission produced a bold set of recommendations, which the minister of justice was committed to taking forward, but which the interior minister, Manuel Valls, opposed. This is perhaps predictable given the different perspectives and values typically advanced by these two different offices: the interior minister representing the police and law and order and the justice minister representing the judiciary and the balance of constitutional protections (see, e.g., the account of the reforms in Hodgson [2005, chap. 2]). While both ministers agreed that recidivism was a key problem to be addressed, they differed sharply in the choice of solution. The interior minister favored incarceration, building more prison places, and taking a tough stance on sentencing; the justice minister, following the commission's evidence and recommendations, favored greater use of alternative sanctions, sending fewer people to prison in order to decrease levels of reoffending, and continuing to reduce the prison population. This represented a complete clash of values and of policy, typical of the functional differences between these two ministers and their contrasting perspectives. However, in an unprecedented move that demonstrates just how high the political stakes had become, without informing the justice minister, Valls wrote to President Hollande, voicing his strong opposition to the proposals and urging him to arbitrate on the matter. The letter was published in *Le Monde* in July 2013, amid a storm of controversy surrounding a decision by a *procureur* (public prosecutor) to release from prison three offenders sentenced to short sentences because the prison was full (Johannès 2013).

The legislation made it onto the statute book a year later, and the final text of the law retained important reforms such as the creation of a new probation sentence, the *contrainte pénale*, for middle-ranking offenses

<sup>2</sup> The commission cited Huré (2012) as the only study on media portrayal of recidivism.

(*délits*); the abolition of the *peines planchers*; and the removal of the automatic revocation of suspended sentences on the commission of a further offense. However, the *rétenion de sûreté*, associated so strongly with the Sarkozy regime, was retained and automatic early release on parole was rejected.

This essay addresses some of the key themes in sentencing in France and examines recent trends in policy. The French approach is to adapt the penalty to the offender, striving for a justice that is individualized without being arbitrary. Key to this is the relatively unfettered discretion of the judiciary in determining sentence and the notion of sentencing as a process rather than a single event that takes place at the conclusion of the trial. The judge responsible for the execution of the sentence (the *juge d'application des peines* or JAP) will review the penalty, taking account of the offender's employment and family situation and efforts she has made to make good the harm caused. The sentence served by the offender may be quite different from that handed down at trial: electronic tagging may be substituted for a portion of custody once the sentence has begun; noncustodial alternatives may be permitted if the offender has made good progress toward her own rehabilitation; or prisoners may be permitted to continue or take up employment through day release schemes.

The sentencing discretion of the judge has been diluted, through measures such as the *suivi socio-judiciaire*, controversially mixing treatment and punishment, and the introduction of a measure permitting the detention of dangerous offenders beyond the term of their sentence—the *rétenion de sûreté*. Both of these were products of the Sarkozy regime, along with a system of minimum sentences for some offenses, curtailing the traditional and constitutionally guaranteed discretion of the sentencing judge. Pulling in the opposite direction has been the need to address prison overcrowding. Right-wing administrations have favored harsher sentences and building more prisons, but the government of Hollande has focused on rehabilitation and prevention of recidivism through socially adapted (rather than simply harsher) penalties as a means to reduce the prison population.

Here is how this essay is organized. We begin in Section I with an account of the general principles of sentencing in France and their context within the inquisitorially rooted system of French criminal justice. The centrality of the public prosecutor (the *procureur*) during each phase of the criminal process is underlined, including her role in proposing a

sentence to the court and in administering a variety of alternative penalties. Also significant are the relatively diminished role of the defense lawyer and the professional unity of the judicial body (the *magistrature*), which includes the prosecutor, the investigating judge (*judge d'instruction*), the trial judge, and the JAP. Sentencing patterns over recent decades are examined, noting that, despite the introduction of a range of alternative sanctions, including direct alternatives to custody, imprisonment continues to be the sentence of choice. Sentencing appears to be consistent across the country. This may be explained by the unity of judicial culture and the judicial hierarchy for both prosecutors and trial judges, which helps to ensure the application of national and local policies—in particular that the prosecutor's sentencing request in most instances is followed by the court.

Section II discusses the process and laws of sentencing. The offender's relationship with the state is also part of the overall sentencing story. The idea of individualized justice is ingrained in the trial structure (where the antecedents and biography of the accused are set out before the evidence has even been heard), reflecting the relationship with the state in which the trial and sentence are part of the individual's rehabilitation as a citizen.

The law of 15 August 2014 was significant in placing punishment and rehabilitation on the same footing rather than in opposition. Rehabilitation is seen by the current government as a key part of the task of reducing reoffending, and the legislation introduced a further noncustodial sentencing option aimed at rehabilitation, the *contrainte pénale*, a form of probation order. Research suggests, however, that judges prefer simple prison sentences to the myriad of alternatives available because it is often unclear what is available for different levels of offense. The *contrainte pénale* appears to be even more complex, making it unlikely to appeal to a busy judiciary. Furthermore, there are existing measures that achieve the same objectives of imposing obligations on the offender, backed by the threat of a fixed prison term, but are simpler to apply. The August 15 reform also repealed minimum sentences, following the Consensus Commission's findings that these tended to increase the prison population with no corresponding reduction in reoffending.

The final sections provide practical examples of the work of the JAP in adapting sentences to the needs of the individual. These illustrate the close working relationship between the two *magistrats*, the public prosecutor and the JAP, and the focus on personal rehabilitation. While ac-

cused and convicted persons in adversarial procedures are often almost silent, as it is their lawyers who advance the defense case, in the French process, the judge addresses the accused (or here, the offender) directly. Yet, in admonishing the accused in court or delivering a moralizing lecture to the convicted offender, the *magistrat* is affirming the potential of rehabilitation and the value of the individual as a citizen.

The future of sentencing policy and practice in France will depend on how the traditionally conflicting perspectives of the ministries of justice and of the interior are resolved and on the politics of the government in power. It will also depend on resources: new probation measures will require increases in probation personnel, which have been promised. The prosecutor as sentencer is also an important trend that will continue to define the sentencing landscape: around half of all cases prosecuted are disposed of by the prosecutor through some form of alternative sanction. Many cases are dealt with through abbreviated procedures in which the prosecution case and sentence are effectively rubber-stamped by the court.

### I. Sentencing and Sanctions

Overall, crime rates have fallen regularly in France since 1996. However, this hides important disparities between different types of offenses. Offenses against property have been falling from a peak in 2001, but the number of offenses against the person more than doubled between 1996 and 2011 (table 1).

Before examining patterns in sentencing and policy trends, we first outline the roles of key legal actors and the path followed by a typical case.

#### A. *The French Criminal Justice System*

Founded on the inquisitorial principle, the French system of criminal procedure is now best described as mixed. At the investigation stage, the police or the *gendarmerie* carry out the investigation under the supervision of a judicial officer. In 98 percent of cases, this will be the public prosecutor (*procureur*); less than 2 percent of cases, the most serious and complex, are handled by the investigating judge (*juge d'instruction*; Ministère de la Justice 2014, p. 14). The evidence collected during the investigation is compiled in the case file, which will then constitute

TABLE 1  
Recorded Crime: 1996–2011

	Offenses against Property	Offenses against the Person	Frauds and Economic and Financial Offenses
1996	2,765,191	228,030	310,910
1997	2,685,053	244,880	295,511
1998	2,753,458	257,233	287,415
1999	2,716,865	282,963	295,734
2000	2,820,509	316,404	352,164
2001	3,063,922	362,175	366,208
2002	3,059,062	381,053	355,342
2003	2,881,838	389,172	349,473
2004	2,708,934	391,857	329,955
2005	2,633,571	411,350	318,680
2006	2,534,097	434,183	334,064
2007	2,363,519	433,284	345,416
2008	2,243,498	443,671	381,032
2009	2,227,649	455,911	370,728
2010	2,184,460	467,348	354,656
2011	2,146,479	468,012	350,040

SOURCE.—Observatoire Nationale de la Délinquance et des Réponses Pénales (ONDRP), Bulletin Annuel 2011 (2012), p. 17 (<http://www.inhesj.fr/fr/ondrp/les-publications/bulletins-annuels/15>).

NOTE.—The ONDRP created three indicators relating to crime recorded by the police and the *gendarmerie*. Offenses against property encompass various offenses of theft and criminal damage. Offenses against the person encompass acts or threats of violence and sexual offenses. Frauds and economic and financial offenses encompass frauds and various other offenses such as counterfeiting, money laundering, etc. Some offenses appear in several indicators (e.g., robberies appear in both offenses against property and offenses against the person) and others appear in none (e.g., drug-related offenses). Aggregated data for police and *gendarmerie* are available only until 2011 as the *gendarmerie* changed its recording software in 2012 and the ONDRP considers that data generated by the new software cannot be compared with data for previous years and cannot be aggregated with police data.

the basis of the trial if the case is prosecuted. Offenses are divided into three categories, from the more minor *contraventions*, through middle-ranking *délits*, to the most serious *crimes*. Many *contraventions*, such as traffic offenses, are dealt with in a quasi-administrative way, but the remainder are tried by a single judge in a *tribunal de police*. *Délits* are tried in a *tribunal correctionnel*, which is traditionally formed of three professional judges, although cases can also be tried by a single judge. Lay



jurors are used only for *crimes*, which are tried by a *cour d'assises*, where three professional judges sit alongside six jurors (nine on appeal). Jurors and judges decide together on guilt and sentence.

French public prosecutors have great influence over the punishment handed down by the courts. Not only do they decide whether to prosecute or not and on what charge, but they also recommend a sentence at trial. Furthermore, they have extensive disposal powers. Only a small percentage of cases received by public prosecutors result in fully fledged trials. In 2012, 5 million cases were brought to the attention of the prosecution service (table 2). Of these, prosecution was legally possible in only 1.3 million cases (such as identified suspect, sufficient evidence, statute of limitations). Prosecutors dismissed 141,000 cases (11 percent) for legal policy reasons: withdrawal of complaint, mentally impaired suspect, low-level harm, and so forth. Almost half of the cases (45 percent) were settled by public prosecutors through alternatives to prosecution. The remaining cases were tried by a criminal court, of which 140,561 went through a speedy “on-file” procedure called *ordonnance pénale* (discussed below) and 63,886 went through the French guilty plea procedure (also discussed below).

TABLE 2  
Case Disposal by Public Prosecutors: 2004–13

	Recorded Crime	Prosecutable	Dismissed	Settled by Prosecution	Tried by Criminal Court
2004	5,399,181	1,455,657	366,414	414,721	674,522
2005	5,143,257	1,461,904	323,594	461,203	677,107
2006	5,311,024	1,526,396	299,459	519,110	707,827
2007	5,273,909	1,476,535	241,597	550,204	684,734
2008	5,101,119	1,500,411	219,520	611,945	668,946
2009	5,030,578	1,487,675	182,552	631,439	673,684
2010	4,966,994	1,260,428	139,856	529,728	590,814
2011	5,771,017	1,250,966	136,971	556,308	557,687
2012	4,982,173	1,293,189	141,252	583,369	568,568
2013	4,899,894	1,306,758	137,317	566,821	602,620

SOURCE.—Ministère de la Justice, Statistiques: Activité des parquets des TGI (<http://www.justice.gouv.fr/statistiques.html>, accessed June 4, 2015).

NOTE.—The following terms are translated from the original source. Recorded crime: *plaintes et PV reçus*; prosecutable: *affaires poursuivables*; dismissed: *procédures classées sans suite*; settled by prosecution: *procédures alternatives réussies and compositions pénales réussies*; tried by Criminal Court: *poursuites*.

Recent years have seen the development of prosecutorial powers to divert cases from court (Saas 2004; Hodgson 2012). Born from local initiatives, alternatives to prosecution have become a criminal justice pathway in their own right: they represented only 10 percent of prosecutorial decisions in cases cleared up in 1994 but one-third in 2000 (Aubert 2008) and almost half in 2012. Prosecutors can decide not to prosecute a case but to engage alternatives to prosecution, such as warnings (*rappels à la loi*), mediations, voluntary regularization or reparation, and rehabilitation schemes, but also *compositions pénales*, which allow the prosecutor to impose a financial penalty or community work if the suspect admits the offense (arts. 41-2 and 41-3 of the Code of Criminal Procedure, CPP). The execution of a *composition pénale* does not formally count as a conviction. However, it prevents prosecution for the same facts (*ne bis in idem*), and it forms part of the person's criminal record (art. 768 CPP). Even when prosecutors decide to prosecute the suspect, they have a choice of procedures from which to select. Introduced in 1972 for *contraventions*, the *ordonnance pénale* is a summary procedure in which no public hearing or debate takes place. The judge makes her decision solely on the papers provided by the prosecutor. This procedure was extended to certain *délits* in 2002 and is particularly used in road traffic cases. In 2012, it represented over 30 percent of prosecutions for *délits* (table 3). Inspired by common law guilty pleas, the CRPC procedure (*comparution sur reconnaissance préalable de culpabilité*) was introduced in 2004 and progressively extended to almost all *délits* (except for certain exclusions, such as serious and sexual assaults). It allows the prosecutor to offer a sentence of up to 1 year in prison or half of the maximum penalty if the defendant admits the offense. In 2012, it represented over 13 percent of prosecutions for *délits*.

This sentencing power given to the *procureur* in the *composition pénale* and the CRPC procedures have been the objects of debate. In 1995, the Conseil Constitutionnel struck down the *injonction pénale*, a predecessor of the *composition pénale*, considering that a criminal sentence could not be pronounced by a public prosecutor but required the intervention of a judge (decision no. 95-360 DC 2 February 1995). A *composition pénale* or a CRPC must therefore be validated by a judge, but this check by a judge has been described as “quick,” “succinct,” or even “artificial,” underlining that the judge can only accept or reject the sentence proposed by the prosecutor and that a deeper check would go against the ob-

TABLE 3  
 Alternatives to Prosecution, *Ordonnances Pénales*, and CRPC: 2004–12

	Prosecutions		Alternatives to Prosecution	
	<i>Ordonnances Pénales</i>	CRPC	<i>Compositions Pénales</i>	Other Alternatives
2004	58,822	2,187	25,777	388,944
2005	105,765	27,200	40,034	421,169
2006	129,577	50,250	51,065	468,045
2007	129,914	49,712	59,770	490,434
2008	136,124	56,326	67,230	544,715
2009	144,711	77,530	73,392	558,047
2010	126,997	69,232	65,460	464,268
2011	136,103	63,452	65,221	491,087
2012	140,561	63,886	73,241	510,128
2013	145,066	65,100	73,732	493,089

SOURCE.—Ministère de la Justice, Statistiques: Activité des parquets des TGI (<http://www.justice.gouv.fr/statistiques.html>, accessed June 4, 2015).

NOTE.—Other alternatives include *rappels à la loi* (warnings), regularization/repairation, and mediation.

jectives of rapidity for which the measures were first introduced (Saas 2004; Hodgson 2012).

While *procureurs* belong to the same professional body as judges, the defense lawyer has been described as a “professional outsider” and traditionally has a limited role in an inquisitorially based system (Hodgson 2005, p. 112). However, recent decades have seen a growing role of the defense lawyer in France, first at trial and, more recently, during the pre-trial phase, influenced by decisions of the European Court of Human Rights (ECtHR 14 October 2010, *Brusco v France*, no. 1466/07). That said, lawyers’ role remains marginalized as, although they can now attend, they must not intervene during police interrogation and are permitted to put questions to the suspect only at the end of the interview and to make observations that would then be attached to the case file. Nonetheless, this can allow them to introduce mitigating elements in favor of the suspect, such as pointing out that she has a stable lifestyle with a job and family, which could influence the decision of the public prosecutor. At trial, a fuller mitigation argument will be made by the defense lawyer with regard to remorse, difficult personal history, addiction, and so forth. The court will also be informed by a probation report and the defendant’s criminal record. The presence of defense lawyers

is mandatory for the CRPC hearing, and their role is crucial in negotiating the sentence with the *procureur* and in advising their client whether to accept the sentence being offered.

If the court finds the accused guilty, the trial judge will hand down the sentence, having heard any mitigation from the defendant or her lawyer. However, in some cases there will be a second stage to the sentencing process, in which the JAP, responsible for the execution of the penalty, will adapt the sentence to the needs of the individual offender in order to make it more effective and to prevent reoffending. The JAP determines the terms and conditions under which the sentence will be served. Article 707 of the CCP provides that the sentence should be kept under review and adapted depending on the evolution of the personality of the convicted person and her financial, familial, and social situation, which must be evaluated regularly. This adaptation may consist of awarding or removing sentence reductions to reflect good or bad behavior and efforts made by the prisoner to reintegrate by, for example, passing exams or improving her literacy skills. The JAP is also empowered to commute short prison sentences to noncustodial alternatives before the sentence has been served or to release the prisoner on probation or under certain conditions toward the end of her sentence in order to prepare for her permanent release.

### *B. Sentencing Patterns*

Imprisonment and fines remain the principal punishment imposed by French courts. Despite legislative creativity in establishing a range of noncustodial sentences, they are used relatively rarely by French courts, representing only about 10 percent of the sentences imposed in 2012 (table 4). They mainly comprise suspension of driving licenses, fine days, and community service (*travail d'intérêt général*, or TIG). They also include citizenship courses and the “reparation-sanction,” which forces the offender to repair the damage caused to the victim, either through financial compensation or through reparation in kind or material reparation. In 2012, over 66,000 noncustodial sentences were imposed, including about 17,000 suspensions of driving licenses (25 percent), 24,271 fine days (36 percent), and 16,588 community service sentences (24 percent).

Between 2000 and 2014, the total number of prisoners rose from 51,441 (85 per 100,000 population) to 67,075 (101.6 per 100,000). This

TABLE 4  
Main Penalties Imposed by Courts

	2004	2005	2006	2007	2008	2009	2010	2011	2012
Total	596,304	618,010	632,531	642,803	639,853	633,736	609,992	593,143	610,502
Imprisonment:	311,872	319,126	318,171	322,034	323,772	309,558	301,586	292,786	301,833
Partially suspended	28,337	27,293	26,031	28,495	33,498	33,553	33,684	32,468	31,143
Fully suspended	198,582	198,825	197,026	195,665	197,374	188,744	178,337	169,064	173,125
Fine	204,880	204,782	214,051	223,093	218,677	223,882	212,524	206,049	213,139
Noncustodial	49,672	58,281	62,669	61,358	60,832	64,118	61,481	62,159	64,479
Educative measure	22,716	28,033	29,664	28,417	28,550	28,111	27,257	25,510	24,705
Discharge	7,164	7,788	7,976	7,901	8,022	8,067	7,144	6,639	6,347

SOURCE.—Ministère de la Justice, Statistiques: Les condamnations (<http://www.justice.gouv.fr/budget-et-statistiques-10054/donnees-statistiques-10302/les-condamnations-27130.html>, accessed June 4, 2015).

NOTE.—Noncustodial sentences mainly comprise suspension of driving license, fine days, and community service. An educative measure can be imposed on juvenile offenders (return to parents or guardian, placement in a medical or educative institution, return to children services, reparation, etc.).

increase is due to the explosion of the number of prisoners serving short sentences (see table 5). Whereas in 2000, inmates sentenced to over 5 years in prison represented 41.8 percent of the total with 13,856 prisoners, this proportion dropped to just 22.7 percent in 2014 with 13,902 prisoners. Meanwhile, the number of inmates sentenced to less than a year in prison has gone up from 8,365 in 2000 (25.3 percent) to 22,213 in 2014 (36.3 percent). Additionally, the number of prisoners sentenced to between 1 and 3 years' imprisonment jumped from 6,766 in 2000 to 18,288 in 2014. This trend could be explained by several factors including a change in the structure of reported crime, the introduction of increased sentences for road traffic offenses, the introduction of mandatory minimum sentences for repeat offenders in 2007, and the abolition of the practice of mass pardons by former President Sarkozy from 2007. Mass pardons traditionally took place every year on Bastille Day, but the

TABLE 5  
Prison Sentences Quantum for *Délits*: 2000–2014

	<1 Year		1–3 Years		3–5 Years		>5 Years		Total
	Number	%	Number	%	Number	%	Number	%	
2000	8,365	25.3	6,766	20.4	4,139	12.5	13,856	41.8	33,126
2001	7,739	24.5	6,128	19.4	3,562	11.3	14,202	44.9	31,631
2002	9,301	28.7	6,599	20.3	3,300	10.2	13,244	40.8	32,444
2003	9,875	28.6	7,936	23.0	3,468	10.0	13,250	38.4	34,529
2004	10,954	29.2	8,835	23.6	4,357	11.6	13,333	35.6	37,479
2005	11,504	29.5	8,929	22.9	4,569	11.7	14,039	36.0	39,041
2006	12,146	30.5	8,810	22.1	4,486	11.3	14,342	36.0	39,784
2007	15,141	36.1	8,445	20.1	4,295	10.2	14,035	33.5	41,916
2008	17,371	36.8	11,025	23.4	4,644	9.8	14,161	30.0	47,201
2009	17,422	34.7	13,716	27.3	5,103	10.2	14,002	27.9	50,243
2010	17,445	34.4	14,174	28.0	5,628	11.1	13,442	26.5	50,689
2011	17,535	34.2	14,780	28.8	5,709	11.1	13,248	25.8	51,272
2012	20,641	35.9	17,226	30.0	6,202	10.8	13,428	23.4	57,497
2013	21,961	36.4	18,169	30.1	6,647	11.0	13,563	22.5	60,340
2014	22,213	36.3	18,288	29.9	6,858	11.2	13,902	22.7	61,261

SOURCE.—Ministère de la Justice, *Séries statistiques des personnes placées sous main de justice 1980–2014*, p. 35 (<http://www.justice.gouv.fr/prison-et-reinsertion-10036/les-chiffres-clefs-10041/series-statistiques-des-personnes-placees-sous-main-de-justice-26147.html>, accessed September 8, 2014).

NOTE.—The total represents the stock of inmates on January 1 of each year who were convicted for a *délit* (middle-ranking offense).

constitutional reform of July 23, 2008, restricted the right of the president to grant a pardon to individual cases only. Kensey and Ouss (2011) found that, on average, prisoners released between May 1996 and April 1997 were relieved of an average of 8 percent of their sentences as a result of mass pardons. Forty-three percent benefited from at least one pardon during their sentence. Since 2007, such reductions in sentence do not occur.

Since the Second World War when the files were kept by the French police recording the names and addresses of Jewish people from 1940 (in the occupied zone) and 1941 (in the nonoccupied zone) (on the discovery of these files in 1991–92, see Combe [1994]), French official statistics contain no references to race, religion, or ethnicity; only nationality is recorded. Whereas nonnationals constitute around 6 percent of the general population in France, they represented 19 percent of prisoners (including people under electronic tagging and external placements) in France on January 1, 2015 (Ministère de la Justice 2015, p. 6). Yet, this proportion has decreased significantly as nonnationals represented over 30 percent of inmates in January 1994. By contrast, non-French people represented 5.6 percent of offenders serving a noncustodial sentence on January 1, 2015 (p. 8). The vast majority of foreigners in French prisons come from Africa (49.1 percent, particularly former French colonies in Algeria, Morocco, and Tunisia) and the European Union (38 percent). There is very little research on the impact of nationality, ethnicity, or immigration status on the treatment of defendants in the French criminal justice system. Body-Gendrot (2014) compiled existing research on the subject and concluded that the overrepresentation of non-French in the criminal justice process may result from wrongful bias; but disparities could also be explained by socioeconomic disadvantages or differences in records of past criminality. Roché, Gordon, and Depuiset (2014) conducted a study on the impact of ethnicity on sentencing in two juvenile courts between 1984 and 2005. Although they found some evidence of sentencing bias, they did not discover massive and systematic discrimination based on ethnicity.

### *C. Sentencing Policy Trends (1994–2014)*

The relevant provisions of the *Code Pénal* (CP, Criminal Code) and the course of their recent development are discussed in detail throughout this essay. It may be useful, however, to provide a brief overview of

some of the most significant legislative and statistical trends and the legal and political forces that have shaped them. The CP is the core text governing French sentencing; but as governments change, sentencing reform is characterized by swings between putting in place either more rehabilitative or more repressive measures, depending on the political hue of each administration. The first codification of criminal law since 1810 (a variety of amendments were made, but the same code remained in place), the new CP introduced in 1994 merely brought the finishing touches to the sentencing developments of the nineteenth and twentieth centuries. It ratified the wide discretionary sentencing powers progressively given to judges throughout the years. Judges are virtually unfettered in their choice of the nature and quantum of the sentence, and they do not have to give reasons for their sentencing decisions (art. 132-17 CP). The Cour de Cassation, France's highest criminal court, repeatedly asserted that, with regard to sentencing decisions and as long as they remain within the boundaries of the law, judges have an absolute discretion for which they cannot be made accountable (Cass. Crim., 28 January 1991, no. 89-84987). In order to fight the proliferation of short prison sentences, the CP introduced a limited obligation to give reasons for the imposition of a nonsuspended prison sentence for *délits* (art. 132-19 CP). Chassaing (1993) also criticized the CP for not revising the sentence maximums, leaving them in many instances very high, on the grounds that they were merely symbolic and were never imposed in practice. The new CP also reaffirmed the principle of the individualization of sentences to the circumstances and to the character of the offender, dedicating a whole section of the code to this. It retained the alternatives to imprisonment introduced in 1975 (Loi no. 75-624 of 11 July 1975 introduced sentences involving the forfeiture or restriction of rights, such as suspension of driving license, confiscation of vehicle) and 1983 (Loi no. 83-466 of 10 June 1983 created the TIG [unpaid work in the community] and the fine day) but failed to include them within offense definitions, which continued to refer only to imprisonment and fines. The new CP also neglected to define sentencing rationales. It fell to the Constitutional Court to confirm that prison sentences aim both to reform and to reintegrate the offender (decision no. 93-334 DC of 20 January 1994).

Since the acceptance of the new CP, particularly from 2002, crime control political rhetoric has progressively dominated the French public debate on criminal justice reform with some impact on sentencing policy



(Salas 2005; Garapon and Salas 2007). However, more rehabilitative inspirations have had a role in the separate phase of sentence execution, which has remained more sheltered from the influence of penal populism.

1. *The Dominance of Crime Control Ideas.* The 2002 French presidential campaign focused on insecurity and zero tolerance. The Front National, the extreme Right party, made it to the second round of the election. Nicolas Sarkozy, first as minister of the interior (2002–7) and then as president of the Republic (2007–12), clearly positioned himself as the defender of victims. Defending his vision of crime policy in a 2012 speech to judges and public prosecutors, he declared, “the judicial institution, is first and foremost the institution of victims. And you, as *magistrats*, you work for them first and foremost” (Robert-Diard 2012). As a result, his crime policy has been criticized for too closely reflecting high-profile crime stories (Salas 2005; Garapon and Salas 2007; Mucchielli 2008; Wyvekens 2010). Referring to crime policy reform between 2002 and 2007, Mucchielli (2008) describes a “security frenzy.” During this period, 30 legislative acts amended the CP and 40 amended the CPP. Numerous new offenses were created (see Danet [2008, pp. 21–22] for an overview). Maximum sentences were also increased, either directly—the law of 18 March 2003 increased sentences applicable to many road traffic offenses—or through the introduction of new aggravating circumstances. The fight against repeat offending also shaped the adoption of several successive acts. The Act of 12 December 2005 widened the scope of equivalent offenses taken into account for the aggravating circumstance of repeat offending to apply and reduced the sentence discount automatically available—barring bad behavior—for recidivists. The reluctance of the ministry of justice to constrain judicial discretion meant that Sarkozy failed to impose minimum sentences for recidivists as minister of the interior. Once he was elected president, however, the law of 10 August 2007 introducing these mandatory minimums was one of the first legislative acts pushed through by his government. Although controversial, these *peines planchers* were later extended to offenses of serious violence by the law of 14 March 2011.

An important development was a new philosophy mixing repression and treatment within a single measure as a new means of reducing recidivism. The law of 17 June 1998 introduced the *suivi socio-judiciaire*, which allows for judicial—and even medical—control of sexual offenders after their release from prison. It involves several obligations, in particular,

bans from certain locations and from carrying out activities in contact with children and an obligation to seek psychiatric treatment. Failure to respect those obligations is sanctioned by imprisonment. The 1998 law met with cross-party approval: it was voted by a left-wing majority in Parliament but found its origins in a bill proposed by the outgoing right-wing government just months before. This particular focus on dangerous offenders, mixing repression and treatment in a single measure, has continued through several subsequent laws. The Act of 12 December 2005 introduced judicial surveillance of dangerous offenders; the person is placed under the control of a judge, who can require the offender to report any change of address to probation, to seek medical treatment, to wear an electronic tag, or to be under house arrest (for people sentenced to over 15 years in prison). In addition, a psychiatric report is necessary to establish dangerousness and to check whether medical treatment is appropriate. The law of 25 February 2008 introduced the *rétenion de sûreté*, which allows the continued detention after sentencing of those considered to be dangerous and at a high risk of reoffending because of a serious personality disorder. The Act of 10 March 2010 required sexual offenders to undertake a hormonal treatment called “chemical castration.” These laws have been denounced as “confusing mental illness and criminality, dangerousness and recidivism” (Herzog-Evans 2011, p. 100). When these two conflicting notions of responsibility are mixed together—criminal culpability and mental illness—the responses of treatment and of punishment also risk being confused: offenders are treated and the mentally ill are punished (Wyvekens 2010). The effects of these new legal provisions and the number of people affected are not yet known, as they apply to offenders sentenced to long periods of imprisonment (e.g., over 15 years for the *retention de sûreté*) toward the end of their sentence.

2. *Rehabilitative Inspirations.* Until 1958, the role of the judge was limited to the imposition of the sentence at the close of the trial; after that, the administration of sentences was left to prisons. In 1958, the CPP established the JAP to oversee the execution of prison sentences. Since then, their role has grown. This redefinition of sentence execution as a judicial function contrasts with the administrative control of sentence execution in common law countries. For example, in England and Wales, the parole board, the body that carries out risk assessment of prisoners to determine who may safely be released into the community, is an independent administrative authority.

The JAP's role in sentence execution has seen a significant increase since 2000 because of contextual but also structural causes. The incarceration of politicians, businessmen, and various celebrities from the mid-1990s, together with the publication in 2000 of a book written by a doctor working in a famous Paris prison (Vasseur 2000), placed the conditions of detention in French prisons firmly under the spotlight. A new interest was taken in violations of human dignity in prisons, in particular because of the state of overcrowding. Parliamentary commissions were tasked to report on the conditions of detention in French prisons (Commission d'Enquête de l'Assemblée Nationale 2000; Commission d'Enquête du Sénat 2000). The return to a crime control ideology from 2002 mainly affected the substantive criminal law and criminal procedure, and the less visible terrain of sentence execution was largely untouched as the focus was of necessity on dealing with the persistent problem of overcrowding. Furthermore, parole and other sentence adjustments were no longer perceived as privileges for offenders anymore, but as tools to prevent recidivism (Warsmann 2003). Further structural causes linked to the legal context can also be identified. Thus, the inclusion by the European Court of Human Rights of sentence reductions within the scope of article 6, paragraph 1 ECHR in its *Campbell and Fell* decision (1984) and the decision in 1995 by the Conseil d'État to open disciplinary sanctions in prison to judicial review (CE, 17 February 1995, *Marie*) seem also to have played an important role in cementing the role of the JAP.

Studying people released between May 1996 and April 1997, Tournier and Kensey (2001) showed that, on average, prisoners served 69 percent of their imposed sentence, with 27 percent of the discount due to discretionary sentence discounts and 4 percent to parole decisions. To the best of our knowledge, this is the only study on sentences actually served. Since 2004, each offender sentenced to imprisonment is given automatic sentence reduction credits. The credits are calculated on the basis of the nonsuspended sentence as 3 months for the first year and 2 months for the remaining years or 7 days per month for shorter sentences. The JAP can withdraw sentence reduction credits for bad behavior up to a maximum of 3 months per year or 7 days per month. Prisoners can receive further sentence reductions for "serious efforts of social readaptation" (art. 721-1 CPP), such as passing an exam or learning to read and write. In addition, the Acts of 15 June 2000 and 9 March 2004 greatly increased the JAP's powers, allowing them to adjust sentences

to take into account the evolution of the offender's situation and personality (art. 707 CPP). They are also permitted to commute short prison sentences to noncustodial sentences before they have been served (art. 723-15 CPP). Article 707 CPP specifies that "sentence execution favors, within the respect of society's interests and the rights of the victim, the integration or the reintegration of convicted persons, as well as the prevention of recidivism." By contrast to the more crime control-oriented policies described above, the Act of 24 November 2009 accentuated this rehabilitative objective by allowing sentences up to 2 years long to be adjusted prior to being served.

## II. The Law of 15 August 2014

This context of a growing prison population and tensions between repressive and rehabilitative objectives, as well as the access to power of a new governing party in 2012, called for a new reform of French sentencing. The new sentencing law of 15 August 2014 is not revolutionary; it is in line with established historical principles of French sentencing, principles that many have argued were called into question by the reforms of the previous administration. The new law establishes a solid foundation by articulating the sentencing rationales of the criminal justice system. Prior to this, article 132-24 of the Code Pénal attempted to reconcile several sentencing aims and functions by providing that "the nature, quantum and regime of imposed sentences are set so as to reconcile the effective protection of society, the punishment of the offender and the interests of the victim with the necessity to promote the integration or reintegration of the convicted person and to prevent the commission of new offenses."

The article was buried in the depths of the Code Pénal's sentencing provisions. The law of 15 August 2014 creates a new article 130-1 CP, placed at the start of the code's section on sentencing. It stipulates that "in order to ensure the protection of society, to prevent the commission of new offenses and to restore the social balance, while respecting the interests of the victim, the sentence has the following functions: '1. To punish the offender; and 2. To promote his reform, his integration or his reintegration.'"

The new article 130-1 articulates an ideology in which punitive and rehabilitative objectives are not opposed, as the drafting of article 132-24 had suggested, but are complementary. There is no political consen-

sus on sentencing aims in France, and the wording of the new article was criticized during its parliamentary debate as evidence of a permissive ideology underpinning the law, which puts on an equal footing the two objectives of punishment and reintegration of the convicted person. The opposition contended that sentences must first and foremost remind offenders of the consequences of infringing the law. The Consensus Commission, whose recommendations formed the basis of the bill, and the government disagreed. The new law gives expression to the view that the punishment of the offender cannot be the sole aim of sentencing; the objective of rehabilitation is an essential part of the battle against recidivism. In this section, we examine two themes that have shaped the French sentencing debate of recent years and make a further appearance in the new law: the individualization of sentences and place of imprisonment within French sentencing.

#### *A. Individualization, Judicial Discretion, and Minimum Sentencing*

The new act reaffirms what has become the central principle in French sentencing: the principle of individualization, which gives wide discretionary powers to the sentencing judge by requiring her to tailor the sentence to the offender. The centrality of this principle is the result of historical developments over two centuries. In reaction to the arbitrariness of the prerevolutionary ancien régime, the 1789 Déclaration des Droits de l'Homme et du Citoyen (DDHC—Declaration of the Rights of Man and of Citizens) expressed the principles of proportionality and of legality in its article 8: “The Law must prescribe only the punishments that are strictly and evidently necessary; and no one may be punished except by virtue of a Law drawn up and promulgated before the offense is committed, and legally applied.”

The first criminal code of 1791 promulgated fixed sentences, denying any discretionary power to the judge. This was in line with the revolutionary impetus for curbing the power of judges who were considered as nothing more than “the mouth of the law,” as Montesquieu put it in *The Spirit of the Laws* (1748, bk. XI, chap. 6). The 1810 criminal code abandoned fixed sentences, instead providing minimums and maximums: for instance, assaults were punished by imprisonment between 15 days and a year and a fine between 500 and 20,000 francs (art. 320). Promoted by liberal lawyers and reformers, the law of 28 April 1832 introduced the mechanism of extenuating circumstances, which allowed the court

to depart from minimum sentences imposed by the Code Pénal, taking into account the personality of the accused or the circumstances of the offense. The principle of individualization was theorized at the end of the nineteenth century by Raymond Saleilles, who argued that it was not possible to set sentences rigidly in advance, since they should be adapted to individual circumstances rather than defined in a purely abstract law, ignoring the diversity of cases and individuals (Ottenhof 2001). The principle was strengthened throughout the twentieth century, in particular, with the consideration of the age of the offender and the creation of a separate regime for juveniles, culminating with the new Code Pénal, which came into force in 1994. Minimum sentences were removed entirely, and a whole new section was dedicated to “the personalization of sentences.” The Conseil Constitutionnel (French Constitutional Court) granted constitutional status to the principle of individualization, inferring this from the principles of proportionality and necessity found in article 8 DDHC, which has been part of the French Constitution since 1958 (decision no. 2005-520 DC of 22 July 2005, para. 3).

The introduction of the *peines planchers* (minimum sentences) in 2007 was seen as a challenge to this principle of individualization, as it limited the power of judges to adapt the sentence to the personal circumstances of repeat offenders. Judges were permitted to depart from these minimums only if they could demonstrate special circumstances, such as “exceptional guarantees of reintegration” (former art. 132-18-1 CP). However, when called on to rule on the constitutionality of this reform, the Conseil Constitutionnel considered that the principle of individualization was not an obstacle to the legislator fixing rules ensuring the effective repression of offenses, and it did not imply that the sentence had to be determined entirely according to the individual’s characteristics (decision no. 2007-554 DC of 9 August 2007, para. 13).

Some commentators welcomed this constraint on the principle of individualization, which they believed could lead to great inequalities between offenders. Pradel (2007), for example, has argued in favor of the introduction of “Anglo-Saxon sentencing guidelines” to promote harmonization between courts. He claimed that the *peines planchers* moved toward greater certainty of sentences, a powerful deterrent against repeat offending. Others, such as Herzog-Evans (2007), argued that the new mechanism did not make sentencing more certain, but simply more severe. Furthermore, experiments in other jurisdictions suggest that, as

a sentencing policy, minimum sentences are destined to fail: the US experience has been an explosion in the prison population, with no effect on reducing criminality or repeat offending.

The Consensus Commission conducted a close examination of the *peines planchers*. They heard evidence from a range of experts—including legal academics, criminologists, and sociologists, and also practitioners such as *magistrats*, probation officers, and psychiatrists—and examined the findings of earlier research studies. They concluded that there was no scientific evidence to suggest that the *peines planchers* were effective in preventing recidivism and furthermore that they had noticeably contributed to prison overcrowding. The commission asserted that it was right to give judges broad discretion in sentencing, emphasizing that “their decision should not be constrained in any way by a minimum sentence which does not take into account the whole background of the individual concerned, the nature of offenses and the necessary individualization of the sentence” (Conférence de Consensus 2013, p. 11). The Act of 15 August 2014 reaffirms this principle in article 132-1 CP, which states that “any sentence imposed by the court must be individualized. Within the limits set by law, the court sets the nature, quantum and regime of pronounced sentences according to the circumstances of the offense and the personality of the offender, as well as her material, familial and social situation.” It repeals all minimum sentences. It also abolishes the automatic revocation of suspended sentences in case of a new conviction, giving judges the discretion “to avoid inappropriate blind revocations.” The clear policy that emerges is a strict application of the individualization principle, reaffirming the total discretion of the judge. This wide judicial discretion is at odds with the international trend toward greater regulation of sentencing through mandatory standards or guidelines. The desire for consistency and predictability of sentences is felt elsewhere, so why not in France?

One explanation might be the absence of wide variations in sentencing, in contrast with other countries. Several factors could be perceived as favoring sentencing uniformity in France. The most obvious factor is provided by the control of individual discretion through the broad right of both defense and prosecution to appeal against the sentence imposed in first instance (unfortunately, no data are available showing the proportion of appealed decisions or the success rate). Furthermore, the exercise of judicial discretion is less solitary in France, where three judges often sit together, compared with, for example, England and Wales. Al-

though there has been a great increase in the number of offenses that can be tried by a single judge, those judges are accustomed to making sentencing decisions collectively. Another guarantee against variations is that, in contrast to England and Wales, public prosecutors recommend a sentence in court and are part of the *magistrature* (French career judiciary), the same professional body as judges.

In an extensive 2013 study of sentencing decisions in five different court centers, Saas, Lorvellec, and Gautron (2013) demonstrated the symmetry that exists between sentences called for by public prosecutors and the sentences actually imposed by the court; for example, the court imposed a fine when it had been requested by the prosecutor in 91.6 percent of cases (p. 171). Faget (2008, p. 23) has also commented on the common “invisible judicial culture” in which those legal actors work. The common training and membership of the same professional body create strong bonds and a common outlook among *magistrats*, who are already characterized by a strong social resemblance (Hodgson 2005, pp. 69–70). Faget also noted that the appraisal of all judges by a hierarchical superior in order to determine career progression contributes to a “culture of obedience” that encouraged conformity of behaviors and decisions (2008, p. 11).

Saas, Lorvellec, and Gautron do not provide detailed tables for each court center in their 2013 study because of a lack of space but provide some further support for their conclusions in the comments of a public prosecutor who worked in several courts and found a remarkable degree of consistency in sentencing practices. By contrast, a journalist evoked “a national lottery” when referring to variations in judicial decisions (Simmonot 2003). Mucchielli and Raquet (2014) also found some variations in sentencing in their study of *comparutions immédiates* in Nice, by comparison with similar studies in Lyon and Toulouse. Similarly, Roché, Gordon, and Depuiset’s (2014) study of serious crime cases in juvenile courts showed important variations between courts and significant differences across sentenced individuals.

A better explanation for the broad acceptance of the principle of individualization is provided by French legal culture. In contrasting the pervasiveness and visibility of character evidence in French trials, with the separation of character from the case facts in England and Wales, Field (2006, pp. 544–45) points to the vision of relations between state and citizen very different from that of Anglo-Saxon liberalism: “Character evidence in England and Wales is marginalized to emphasize that punish-



ment and censure relates to the particular crime charged and not to a more broad-ranging judgment of the standing of the accused in the community. . . . In France, the trial is presented as part of a process of rehabilitating the accused as a citizen of the state. The legitimacy of that notion of criminal trial is related to the legitimacy of a positive concept of the citizen against which it is appropriate to judge the character and life of the accused.” Different concepts of the relationship of the individual to society help explain why the individualization of the sentence has become such a fundamental starting point in France in a way that it has not in common law jurisdictions such as England and Wales.

One of the most striking features of the French criminal justice process for common law researchers is the unitary structure of the trial. In common law jurisdictions, the finding of guilt is often separated from sentencing: in England and Wales, for example, in the more serious contested cases, it is a function of different actors in the Crown Court—the jury decides on guilt, while the judge decides on the sentence. This separation does not exist in magistrates’ court cases, however, where the magistrates or district judge determines both sentence and verdict. The Crown Prosecutor makes no recommendation as to sentence beyond sentence type; she may argue for a custodial sentence, for example, but not for a specific term.

In France, however, guilt and sentence are discussed at the same time, and the *procureur* makes arguments as to both, with a precise sentence recommendation. This has important consequences for the criminal justice system. For instance, an English or American researcher would struggle to recognize the common law guilty plea procedure in the French version of the CRPC. This is partly due to the negotiation that takes place between the public prosecutor and the defendant, not so much on guilt—an admission at the police station is usually necessary to go down this procedural pathway—but on sentence. Interestingly, the 2014 act introduced the formal separation of finding of guilt and sentencing at the trial stage. In order to encourage judges to tailor sentences to offenders, the new law introduces the possibility for judges to adjourn the sentencing decision after the finding of guilt (art. 132-70-1 CP). The court can ask the probation service for further information about the personality of the offender or her material, familial, or social situation. This innovation could prove the most revolutionary aspect of the 2014 law, depending on the use judges make of this new possibility.

*B. Centrality or Subsidiarity of Imprisonment in French Sentencing?*

In a bid to convince judges to impose noncustodial sentences, the Act of 15 August 2014 reiterates the idea that imprisonment should be a sentence of last resort. A new paragraph of article 132-19 CP now affirms that “a nonsuspended sentence of imprisonment can only be pronounced in last resort if the seriousness of the offense and the character of the offender make this sentence necessary and if any other sanction is clearly unsuitable.” It makes it mandatory for judges to justify their decision to sentence a defendant to imprisonment taking into account “the circumstances of the offense and the character of the offender, as well as his material, familial and social situation.” However, the law is far from innovative, as this wording is an exact replica of the third paragraph of article 132-24 CP introduced by Sarkozy’s government in 2009 (Loi no. 2009-1436 of 24 November 2009 *pénitentiaire*). The new law merely abolishes the exception created by the December 2005 law that allowed courts not to provide any justifications for imposing prison sentences in cases of repeat offending.

Since the 1970s, keen to promote alternatives to custody to resolve prison overcrowding, successive governments have introduced a plethora of new sentences. Over the years, noncustodial sentences have slowly piled up: fine days, community service (TIG), electronic tagging, and so on, but also a myriad of punishments that involve the forfeiture or restriction of rights (suspension or invalidation of driving license, prohibition to exercise a commercial or industrial profession, exclusion from certain places [e.g., licensed premises], prohibition from contacting certain people [e.g., victim or coaccused], bans from carrying arms, bans from using checks or payment cards, impounding or confiscation of a thing). Suspended sentences also come in various forms: *sursis simple* (a simple suspension, with only the condition that the offender should not reoffend), *sursis mise à l’épreuve* (SME—with numerous possible conditions, such as keeping in touch with a probation officer, medical treatment, etc.), and *sursis-TIG* (with the condition to do community work). More recently, the Act of 9 March 2004 introduced citizenship courses and the Act of 5 March 2007 created the *sanction-réparation* that forces the offender to pay compensation to the victim.

Yet, despite all these legislative efforts, imprisonment remains the sentence of choice, although those sentences are typically not served in full because of the automatic sentence reductions detailed above. When *ordonnances pénales* that do not allow for imprisonment sentences are

excluded, imprisonment sentences represent 63 percent of convictions (37 percent—totally suspended sentence; 26 percent—not suspended or partially suspended; “Étude d’impact du projet de loi relatif à la prévention de la récidive et à l’individualisation des peines” [2013, p. 18]). Although this is difficult to measure, some authors have suggested that the multiplication of noncustodial sentences has had a net-widening effect, as the new sentences apply to cases in which another noncustodial sentence would have been imposed without reducing the imprisonment rate (Herzog-Evans 2013). The gradual stacking up of noncustodial sentences has created a tangled undergrowth in which even professionals get lost. Definitions of offenses indicate only the maximum term of imprisonment and the maximum fine that can be imposed for each offense, but the legislator has also authorized judges to impose alternative noncustodial sentences instead. Judges have to refer to separate provisions to make sure that the alternative sentence they are considering is indeed applicable to the specific offense they are dealing with. Some critics argue that, as a result of this, judges and prosecutors tend to stick with the familiarity of imprisonment and fines to avoid venturing into the maze of alternative sentences (Saas 2010).

The new Act of 15 August 2014 creates a new probation sentence: the *contrainte pénale*. The new sentence will apply only to adult offenders, not to juveniles, and is aimed at offenders who need “personalized and sustained socioeducative support” (new art. 131-4-1 CP). Under this sentence, the convicted person is the subject of measures of control and assistance for a period between 6 months and 5 years. The probation service will have to draw up its proposed measures for the offender and submit them to the sentencing judge (the JAP; see below for a detailed account of the process). The new law provides for regular reevaluation of the measures in place, taking into account the evolution of the situation, which could even result in the sentence being ended earlier than originally planned.

The creation of this new sentence gives effect to recommendations of the Council of Europe. The Council of Europe’s Recommendation on Probation Rules was adopted on January 20, 2010, and defines probation as “the implementation in the community of sanctions and measures, defined by law and imposed on an offender. It includes a range of activities and interventions, which involve supervision, guidance and assistance aiming at the social inclusion of an offender, as well as at contributing to community safety” (Recommendation CM/Rec [2010] 1). Yet

there already exist several sanctions in the French sentencing system that fit within this description, in particular, TIG and SME, but more broadly any sentence that imposes obligations on the offender. It has been argued that the SME was a better solution, as it is more flexible and easier to use, in particular, in cases in which the offender does not respect the obligations imposed on her by the probation service (Herzog-Evans 2013). Under the SME, the failure to respect obligations can lead to the revocation by the JAP of the suspended prison sentence originally imposed by the court. The new law provides for a complicated process in cases of failure to respect the obligations imposed under a *contrainte pénale*: the court that imposes the *contrainte pénale* must provide the maximum prison sentence that can be imposed for failure to respect the obligations (art. 131-4-1 CP); if the offender fails to respect her obligations, the JAP can remind her of these obligations or modify them (art. 713-47 CPP); if that is insufficient, the JAP can apply to another judge to decide the length of the prison sentence that the offender will have to serve, within the maximum provided by the original sentencing court (art. 713-47 CPP).

By creating a new noncustodial sentence on top of those already in existence, the new law can be criticized for adding a layer of complexity and for failing to respond to the criticisms expressed against existing alternative sentences detailed above, in particular, that introducing new sentences has not had much effect on the ground. This has been recognized by the government itself, which states in the impact study of its bill that noncustodial sentences represent about 15 percent of imposed sentences, 66 percent of which are fine days (“Étude d’impact du projet de loi relatif à la prévention de la récidive et à l’individualisation des peines” [2013]). The Consensus Commission recommended the inclusion of all the existing sentences imposing obligations on the offender under a new probation sentence. This would have had the advantage of simplification, but it was considered too onerous in terms of resources. The government decided to reserve the *contrainte pénale* for offenders in need of intense support, keeping other alternative sentences for those for whom a lighter touch is sufficient. It remains to be seen whether this added layer of complexity will deter judges further from imposing non-custodial sentences. The government considered going further and replacing references to imprisonment with the *contrainte pénale* in the definition of specific offenses, thus forcing judges to impose it instead of prison. It decided against this, as it would have meant reducing the scope

of the new sentence to a limited number of offenses instead of targeting offenders who need special support. However, the door has not been completely closed to this proposition, as article 20 of the law provides that the government should report to Parliament within 2 years of the law coming into effect, to examine the possibility of replacing imprisonment with the *contrainte pénale* for certain offenses.

### III. The Sentence as Process

To the English observer, the French approach to sentencing has a number of striking features that mark it out as very different from that in England and Wales, where responsibility for passing sentence rests squarely with the trial judge. The court in England and Wales sentences the accused after hearing the prosecution case, any mitigation from the defense, the accused's previous criminal convictions, and information on the person's work and social circumstances. Typically, where there has been a "not guilty" plea, the court will adjourn after the decision to convict in order to gather more information to inform its sentencing decision. The sentence is announced in open court along with reasons for the choice and severity of the penalty. Apart from rules allowing for early release from prison, the sentence pronounced in court is the sentence served. The French system also differs strikingly from American practices in which, in theory, sentencing decisions are for the judge to make, but in practice, all but 3–5 percent of convictions result from guilty pleas in which the sentence is effectively negotiated between the prosecutor and the defense counsel, with the prosecutor's voice almost always being determinative (e.g., Lynch 2003).

In France, the position is rather different: the sentence imposed by the trial judge may simply be the starting point in determining the sentence that will be carried out. Sentencing is not a single event but an ongoing process, through which penalties can be adapted weeks or months after conviction, in a closed hearing with a *procureur* and a sentencing judge, the JAP. This might include substituting a noncustodial measure in place of a short prison term or altering the way in which imprisonment is served—allowing the convicted person to continue in employment, for example. The rationale is to ensure that the sentence is appropriate to the individual and so is effective in preventing reoffending and assisting in the individual's reinsertion into society. For less serious sentences, this process will begin immediately after the trial and court sen-

tence. For those serving more than 2 years in prison (art. 723-15 CPP), it will take place toward the end of their sentence. In short, the sentence pronounced in court may be very different from the sentence that will be served in practice.

Before we tease out some of the underlying assumptions and practices revealed through this approach, a few examples from recent research provide a sense of these hearings and the scope of this sentence adaptation and adjustment (see also Padfield [2011*a*, 2011*b*, 2011*c*, 2011*d*] for further brief examples).<sup>3</sup> Present at all of the hearings were the JAP, the *procureur*, and a court clerk. The first three cases took place in the chambers of the JAP.

Case one concerned a man sentenced to 18 months in prison for the sexual assault of his daughter. He applied to serve his sentence by being electronically tagged, and the probation service recommended the route of *semi-liberté*, which requires the person to spend each night in prison but allows her to go to work during the day as part of a strict schedule of her movements. The JAP checked the employment schedule and that the person had been attending his medical treatment appointments as required. The JAP asked the man how the treatment was going and how things were with his children. The *procureur* suggested that he begin executing the sentence when he returned from holiday with his family.

*Procureur*: There is something else I would like to speak to you about. I know you have problems with alcohol and you would like to benefit from the *semi-liberté* system but I need you to realize that you cannot come back to prison in the evening completely drunk. You need to be very careful.

*JAP*: Do you understand what the *procureur* is saying? It is important.

[Convicted person explains that he is trying to get a place in a rehabilitation program.]

*JAP*: I think we could delay the sentence execution to allow you to do this. What do you think?

<sup>3</sup> These are the observations of Laurène Soubise in the course of her current PhD field-work examining the independence and accountability of prosecutors in France and in England and Wales.

*Convicted person:* I think it would help me.

*Procureur:* I'm not opposed to it. Obligation to get medical treatment is essential.

*JAP:* Is there anything else you would like to add?

*Convicted person:* I've already paid 50 euros towards compensation. I'm going to leave my flat when I go to prison so I will be able to pay more.

*Procureur:* You're going to leave your flat? Are you sure it's a good idea? Where will you go when you have permission to be on leave? We need to have a stable address if we let you come out of prison occasionally!

[He explains that he will stay with a family member.]

Case two concerned a man sentenced to 5 months in prison for theft and assaulting a police officer. The probation service reported that the man's behavior had been problematic and he had been complaining that justice is too slow. Both the *procureur* and the JAP lectured the man about his behavior: he was not the victim here; he chose to commit the offenses. The man went on to say that he had no income and so could not pay compensation to the victims.

*JAP:* I won't adjust your sentence without compensation to victims. I don't take into account just your interests when deciding whether or not to adjust your sentence, but also society's interests and the interests of the victims.

*Procureur:* You were sentenced to do some community work and you didn't do it. You were sentenced to prison because of that and now we are trying to adjust this prison sentence. You are not showing that you have made any effort; you need to improve your attitude quickly, otherwise you will go to prison.

Case three concerned a man sentenced to 3 months in prison for possession of cannabis, who was asking for this to be commuted to unpaid work. He could not read or write, and he had recently be-

come a father. After asking how he was managing as a father the judge asked:

*JAP*: What about the drugs consumption?

*Convicted person*: I only take cannabis now. I stopped heroin and alcohol. I've reduced my consumption a lot, but I haven't been able to stop completely yet.

The man was still under the treatment of health care professionals. The *procureur* did not object to the sentence adjustment to unpaid work and proposed 105 hours together with an obligation to receive health care treatment, to pay prosecution costs, and with an obligation to work or receive training (especially with reading and writing).

Cases four and five were similar hearings but took place in prison and concerned serving prisoners applying for some form of early release from prison—either on a day release scheme or by being electronically tagged. In addition to the JAP, the *procureur*, and a clerk, a representative from probation and a duty lawyer were also present.

Case four concerned a young man who had been released under the *semi-liberté* regime but was unable to continue for health reasons. He was fitted with an electronic tag instead. A week later he was returned to prison. The JAP asked him what happened.

*Convicted person*: I thought I was going to have the same schedule as with *semi-liberté*. . . . I had three beers, three joints and some tablets as well. [He explains that he had an argument with his stepmother and she called the police because she was scared, and he has been in prison since the electronic tagging was suspended a week ago.]

*JAP*: The probation report sounds as though you are blaming the JAP for the failure of the electronic tagging.

*Convicted person*: No, I think it's my fault. Wearing a tag is not at all like I thought it would be.

[Probation are asked for their opinion. They think tagging is the best solution, but as it is now the summer vacation, there will be insufficient support available for the prisoner to ensure it works this time. They suggest looking at it again in September. The *procureur* agrees.]



*Convicted person:* I would like to take my exam next week.

*Lawyer:* [speaking for the first time] This is a difficult situation. It is very important that he sits this exam. His father says that he has worked hard for it. He wrote a letter to his stepmother to apologize. He needs to study and the prison have refused to let him have his books in.

[The *procureur* suggests that he can apply for a day release to take his exam.]

*JAP:* Here is my decision: I suspend the electronic tagging. *Semi-liberté* is not possible. If you ask for day release to take this exam I am prepared to allow it. . . . You have got an addiction and you are not dealing with it properly. You will spend the summer in prison and we will reexamine the situation in September.

*Convicted person:* Can I get my books in?

*JAP:* Yes, it seems perfectly legitimate. Probation will speak to the prison about it.

Case five concerned a man with a long list of convictions. He received 100 fine days at €10 per day for theft and 30 fine days at €20 for drug use, both 4 years ago. He has not paid anything and so owes €1,600. He has been in prison for a year on other offenses and could be released in a few months.

*Procureur:* Can you pay now? . . . The judge cannot give you longer than six months to pay. Can someone lend you the money?

[After a long discussion, the prisoner agrees to pay. The *procureur* and the JAP want to be sure that he will be able to pay, and the *procureur* makes clear that the consequences will be serious if he does not.

*Convicted person:* I promise to pay.

*JAP:* OK I will summon you to appear before me three months after your release and you will bring the receipts then. If you don't, you will be sent back to prison.

When looking at sentencing policies and practices through a comparative lens, it is important to understand the legal culture and practices within which they function. These cases are typical and illustrate several important features of the French process, which are discussed below: the range of offenses for which sentences are adjusted; the close and cooperative working relationship between the *procureur* and JAP (as part of the same professional grouping, *magistrats*) and with probation; the minor part played by the defense lawyer; the frank and direct communication between the *magistrats* and the convicted person; the importance of the victim's interests; and the need for convicted persons to demonstrate that they are making efforts toward their own rehabilitation into society.

*A. Adapting the Sentence to the Offender: The Juge d'Application des Peines (JAP)*

Alongside other continental European models of criminal justice, the French legal system is typically portrayed as a top-down hierarchical process, in which discretion is closely circumscribed. This is reflected in the structures of legal authority designed to ensure the promulgation of orders and the *politique pénale* of the executive, through the minister of justice (for a classic account, see Damaška [1986]). In practice, *procureurs* as well as judges enjoy a great deal of discretion (Hodgson 2002, 2005). It is the *procureur* who decides whether to charge the suspect, whether then to pursue a formal prosecution or an alternative such as mediation, what offense to prosecute, whether to involve the *juge d'instruction* in the investigation, how to present the case at trial, and the sentence to recommend to the court. These decisions are governed in part by legal constraints, including targets set centrally (see Vigour 2006; Alt and Le Theule 2011), but they also reflect local priorities and the working practices of individual *procureurs*.

The scope of discretion is most visible in the treatment of individual cases. Running alongside, and arguably in tension with, the rhetoric around uniformity and hierarchical order, the French criminal justice process attaches great weight to the importance of a properly "adapted" criminal response. This approach recognizes that a one-size-fits-all model of justice may appear to promote equality of treatment but in fact produces injustice. As one of Hodgson's *procureur* respondents explained:

“Of course there are problems of standardisation . . . you cannot follow the same *politique pénale* everywhere because the cases are different, the populations are different, the problems are different. . . . In one instance you will prosecute far more offenders than in another, because there is less delinquency. . . . A uniform system of justice, which is delivered in the same way everywhere and so which does not take account of differences, would effectively be a nondemocratic system of justice” (interview respondent [*procureur*] A6, quoted in Hodgson [2005, p. 230]).

The impact particular crimes might have on the local community are important in determining how they should be dealt with:

If you arrest someone with 10g of hashish here [a major city], we will not prosecute. It is of no interest, it is not a threat to public order. But in a town of 15,000 inhabitants, where everybody knows one another, where nothing ever happens, you find 10g of hashish and in fact, you need a different kind of judicial response because everybody is going to panic, because everybody is going to say, “There are drugs, we have never had this before, this is a major event” . . . depending on the scale of the problem, attitudes will be different . . . you can say that one court was less severe and another court was more severe. This is because there is a context, and one can say that actually, justice, from one angle, will not be the same for everyone, but it will be designed to have the same degree of effectiveness. So effectiveness is not necessarily achieved by treating all things in the same way. (Interview respondent [*procureur*] E5, quoted in Hodgson [2005, p. 230])

This notion of adaptation is also strongly present within the sentencing process and was one of the chief sources of opposition to the introduction of *peines planchers*, which were seen by critics to tie the hands of the judiciary and to emphasize punitiveness over effectiveness. In the same way in which prosecution policy is “adapted” to local conditions in order to be effective, so too there is a keen desire to ensure that the sentence fits the offender as well as the crime.

Defendants sentenced to imprisonment for a *délit* at a criminal hearing are not immediately incarcerated, unless the court issues a detention order. They will later be summoned by the JAP if the decision becomes definitive (i.e., no appeal is formed against it within the legal time limit). Sentences up to 2 years’ imprisonment can be adjusted after conviction (i.e., a noncustodial sentence can be substituted or the way the prison sentence is served can be altered). The range of offenses that might be

dealt with in this way is illustrated by the five cases outlined above—sexual assault, drug possession, theft. The convicted person works with probation as well as the JAP to find a sentence that will work for her and is practicable to carry out. For example, electronic tagging requires the consent of the householder to have equipment installed and the support of probation to agree on a schedule of movements; carrying out a prison sentence in *semi-liberté* requires the offender to have a set schedule that can be approved in advance.

For their part, the JAP and the *procureur* speak to offenders about their life, their family, their work, and their sentence so far, and where applicable, why they have been returned to prison, to ensure that they can find a solution that will promote the rehabilitation of the individual, so that she can lead a useful life in society without reoffending. In case one, prison was delayed in order that the offender could attend a drug and alcohol rehabilitation program; in case three, the *procureur* ensured that literacy and numeracy training were undertaken as well as drug treatment. Without the ability to read and write, the offender was unlikely to gain employment. In case four, the JAP ensured that the prisoner could study for and then sit his exam, and a second try at electronic tagging would be considered in a few months. In case five, both the JAP and the *procureur* were prepared to give the offender another chance to pay at least some of the fines owed from 4 years ago, sympathizing with his poverty. In case two, however, the offender had already benefited from a more individualized sentence, but he had failed to do what was required and made no effort to provide any guarantee of compliance. In essence, he had used up his chances.

Armed with information about individuals, their personality, and their current circumstances, the JAP seeks to assess what will be most effective in reforming them—in particular, imposing a sentence that is realistic and can be executed successfully. For their part, offenders are expected to demonstrate that the proposed sentence is realistic and that they will stick to what is agreed. Case five seemed especially generous in this respect. The offender had not been able to pay the fines for 4 years and had gotten into more trouble. Payment to victims is taken more seriously than payment of fines. The production of work schedules, undertaking treatment programs, and beginning to pay compensation to victims are all crucial parts of this process. It is clear that no sentence adjustment is possible without evidence of some, albeit very small, steps being taken to compensate the victim in accordance with the order of

the trial court. As the JAP explained to the offender in case two, “I won’t adjust your sentence without compensation to victims.”

*B. The Relationship between Offender and Magistrat*

In more adversarial systems of criminal justice as in England and Wales and the United States, we are accustomed to judges and prosecutors remaining at a distance from the accused, all contact being mediated through the defense lawyer. The direct relationship between the *magistrat* and the offender in France is very different. Before trial, the accused may be brought before the *procureur* before appearing directly before the court. During the *instruction* investigative phase, the *juge d’instruction* questions the accused directly. At trial, the judge maintains a constant dialogue with the accused; the defense lawyer plays a diminished role, usually consisting of a brief mitigation speech. This direct contact between judge and offender is also a marked feature of the JAP hearings. It is unusual for a lawyer to be present, and the hearing is relatively informal. There is no raised bench, no formal procedures, and no legalistic terminology. Judge, *procureur*, and offender will discuss the matter together. There may be reports from the probation service, but the JAP will also ask the offender directly about home life, the impact of becoming a parent, employment, how drug treatment programs are going, and so on. They will also ask direct questions about offending and in particular how the offender is managing drug or alcohol problems.

This direct engagement of the *magistrat* with the offender is part of a wider culture in which the criminal justice process (representing the state) seeks to reform the individual citizen. The judge will try to get a sense of the offender as an individual and often knows some personal background about her life in the years preceding her offending. This approach is not unique to the JAP hearings: an emphasis on the person, the accused or offender as citizen, is pervasive. Defendants in England and Wales are essentially “processed” through the courts, objects rather than subjects of their own trial (Hodgson 2006); likewise in the United States (Bogira 2006). Although French defendants might also feel that they are processed through the courts as they struggle to understand the process,<sup>4</sup> they are addressed directly, required to account for themselves and to respond to the accusations against them. In contrast to an

<sup>4</sup> See the Ministry of Justice (January 2014) survey at [http://www.justice.gouv.fr/art\\_pix/j21-p-jpj.pdf](http://www.justice.gouv.fr/art_pix/j21-p-jpj.pdf).

adversarial procedure, their character is before the court from the outset (before any finding of guilt) and is seen as an essential part of evaluating the evidence (Field 2006).

The role of the *procureur* in these hearings is also important. As a *magistrat* (along with the JAP, the *juge d'instruction*, and trial judges), the *procureur's* function is defined in different terms from that of an adversarial public prosecutor; in particular, her professional ideology requires her to represent the public interest. *Procureurs* work with other agencies in the development of local crime policies and intervene in noncriminal cases in which actions threaten the public interest. For example, the *procureur* may attend hearings at the commercial court to defend the "economic public order," which may include the protection of jobs in a company takeover. She is also seen to represent the interests of the victim—typically by insisting that some attempt is made at paying compensation to the victim—as well as the wider public interest. However, the way in which the public interest is understood within the neutral terms of the professional ideology of the *magistrat* is not always reflected in the practice of the public prosecutor. Hodgson (2005) has argued that the predominant crime control ideology of *procureurs* is often clothed in the legitimacy of public interest. Acting in the public interest, or seeking the truth in an investigation, is, in practice, often synonymous with obtaining an admission.

However, the *procureur's* role in representing the public interest during the postconviction sentencing process seems to be a little different. In the examples observed, it was not rooted in a crime control ideology as is so often seen in the trial and pretrial role, but seemed to be closer to the more neutral rhetoric of the *magistrat*. Rather than seeking a punitive response, the *procureur* worked in a spirit of cooperation to see what could be agreed to (delaying prison to accommodate a rehabilitation program; substituting prison for electronic tagging or unpaid work; having a day release from prison to sit an exam), while ensuring that the sentence is credible ("you cannot come back to the prison in the evening completely drunk") and the victim's interests in receiving compensation are respected. Interestingly, observations of the CRPC meetings between the *procureur*, the accused, and the defense lawyer were similarly cooperative and nonconflictual.

Offenders appear to be comfortable with this direct relationship, and they are often frank in their conversations with *magistrats* telling them how they feel, what they struggle with and not trying to disguise, for ex-

ample, continued unlawful behavior. Noticeably absent in the sentencing process is the defense lawyer, other than a duty lawyer in prison hearings, for those who want one. Again, this reflects the relatively diminished role of the defense lawyer throughout the criminal process, compared with her institutionalized function within more adversarial procedures. In the French court, typically, several cases are heard together, and then after a short adjournment, the verdicts and sentences are all announced together. The defense lawyer will normally have left the court and so will not be present for the verdict or the sentence (this does not hold true of cases involving serious crimes tried in the *cour d'assises*). Lawyers tend also not to be present during the JAP hearings, as they do not have a formal role in the procedure. There is a higher degree of trust in *magistrats* as representatives of the public interest (rather than punitive, crime control-oriented prosecutors, e.g.), as well as a culture of direct engagement between judge and accused or offender, as noted above. This contrasts sharply with more adversarial procedures, where the defense lawyer would seek to shield the accused from direct questioning that might risk incriminating admissions.

As well as being direct, judges and *procureurs* speak to accused and convicted persons in often quite moralizing tones. At one level, this may be objectionable because it is patronizing, but there is also a potentially positive strand to this approach. In England and Wales and the United States, by contrast, there is almost no contact between the prosecutor or judge and the accused. Defendants are objects to be processed through the system by the criminal justice repeat players—the prosecutors, defense lawyers, magistrates—who speak for, about, and at the accused. There are few moralizing speeches about the need to break out of a cycle of drug use and criminality or the potential that might be realized in a person. Defendants are seen as undeserving of this and unlikely to benefit. In short, their value as useful members of society is implicitly denied. In France, this process of “othering” is much less pronounced. Only in the Youth Court in England and Wales are defendants addressed as they are in France: asking them why they would commit an offense and risk their liberty or what the welfare of their family is; encouraging them to take up offers of training and make something of their life. The discourse of *magistrats* focuses on the reintegration into society of the offender as citizen. In admonishing the accused or the convicted person, in delivering moralizing lectures, the *magistrat* is affirming the potential of rehabilitation and the value of the individual.

### C. *Too Much Discretion, Not Enough Public Accountability?*

Theoretical accounts of the inquisitorial model of procedure have characterized it by its hierarchical structures of authority and the absence of individual discretion. Contemporary French criminal justice, however, is characterized by both hierarchy and discretion; the two are not mutually exclusive. Rather, it is a question of degree. The discretion of the *procureur* is framed by the wider criminal justice policy promulgated from the minister of justice through the prosecution hierarchy, but in practice, this places little constraint on the actions of the *procureur*. Policies are expressed in broad terms, and there is little or no policing of their implementation at the local level. Centrally determined targets around methods of case disposition, together with local interagency cooperation, provide some framing, but *procureurs* enjoy considerable latitude in their interpretation of the public interest in individual cases. Hodgson's (2005) empirical study of *procureurs*, for example, demonstrated the ease with which the repressive crime control practices of the *procureur* were fitted into a more neutral discourse of public interest.

Critics of the JAP process of individualization in sentencing tend not to question *magistrats'* commitment to their professional ideology and values, but object to the existence of broad discretion per se. It is perhaps unrealistic to separate out these two; a judge who exercises discretion in an excessive or arbitrary way is not acting in accordance with the public interest professional ideology. Pradel is one such critic, arguing that with judicial discretion comes the risk of excessive discretion and so arbitrariness and inequality (Pradel 2007). Policies such as minimum sentences avoid this. In contrast to countries such as England and Wales, where the judiciary might be seen as preventing the excesses of the executive by holding its members accountable under the rule of law, in France, the state-centered nature of French political culture is such that judges are mistrusted by government, and it is the democratically elected executive that claims to hold the unelected judiciary to account. One might compare the JAP to the *juge d'instruction*: operating within a legal framework and with the *procureur* participating in the entire process, the JAP exercises a broad discretion according to what she considers to be appropriate in the individual case. And like the *juge d'instruction*, the process takes place behind closed doors and without reasons. This lack of transparency requires a great deal of trust in the *magistrat*. This is characteristic of the entire French criminal justice process: Mouhanna (2001,



p. 82) describes trust as a pragmatic response to the irreconcilable demands of justice. It also risks the JAP replacing the trial judge as sentencer and so moves the truth of sentencing out of court and into the judge's chambers.

The new ability of the court to adjourn sentencing in order to gather up information on the offender represents a different way of doing sentencing. Rather than considering such information in private after trial and sentence have been concluded in court, it allows for relevant information to be brought before the trial judge and taken into account at the time the sentence is passed in court. It might be argued that this is more efficient, as well as bringing the truth of sentencing back into the courtroom. Saas (2010) questions whether this will have an impact on judicial behavior, given judges' reluctance to take advantage of the more recent diversification of sentences that are available to them. The Consensus Commission also noted the continued preference for fines and imprisonment; the diversification of trial procedures has not been matched by a diversification of sanctions. The role of the *procureur* is key here, as the sentence she recommends is invariably followed by the trial court—in type if not in severity. However, in contrast to the JAP, the *procureur* has little information on the person's background, and this may be a barrier to the proposal of alternative sanctions to the court.

#### IV. Looking Ahead

It is difficult to predict what the future holds for sentencing reform in France. The ministry of justice has recently turned its attention to yet another reform of the juvenile justice system. The French juvenile justice system is regulated by the Ordonnance of 2 February 1945, which has been amended no fewer than 36 times. During the 2012 election campaign, President Hollande had promised the abolition of the *tribunaux correctionnels pour mineurs* composed of three professional judges and instituted by the Act of 11 August 2011 to try repeat offenders aged between 16 and 18 years old risking a prison sentence of 3 years or over. Prior to the 2011 reform, these defendants were tried along with other juvenile defendants by a *tribunal pour enfants* (youth court) composed of a professional judge and two lay judges with professional experience of juvenile questions. The 2011 act was criticized by professionals as going against the spirit of the 1945 *ordonnance*, which favors an educative

over a repressive approach. However, *Le Monde* reported in January 2015 that the new courts had tried only 787 young defendants between January 2012 and November 2013 and had not imposed more severe sentences (Johannès 2015). It is therefore unlikely that their abolition will have much more than a symbolic effect. Nevertheless, it has been reported that the government was hesitant to propose the reform because of the proximity of regional elections in 2016, followed by presidential elections in 2017 (Johannès 2015).

The question of radicalization in French prisons has been at the forefront of public debates following the attacks in Paris in January 2015. A recent parliamentary report pointed out that recent terrorist attacks in Paris and Toulouse were all committed by former prisoners. Yet it also admitted that it was established that their radicalization did not take place in prison and that a minority of people traveling to Iraq or Syria to join extremist groups had spent time in prison beforehand. Khosrokhavar (2013) identified the main cause of radicalization in prison as the existence of deep frustrations, in particular, the near impossibility of performing religious duties for Muslim inmates. This combines with overcrowding, understaffing, and high turnover of both staff and prisoners. Keen to be seen to act against radicalization in French prisons, the ministry of justice announced the recruitment of 60 Muslim ministers in January 2015. Furthermore, a provision of the intelligence bill currently being discussed in Parliament gives greater powers and resources to prison administrators to monitor electronic communications and prisoners' interactions. This has been opposed by the minister of justice, who argues that, as the guarantor of individual freedom, the justice system cannot be seen to be the prescriber of phone tapping and microphones' installation in prison cells. It was further claimed that such a move would undermine the necessary trust between guards and inmates (Suc 2015).

The return of Nicolas Sarkozy to the political stage as president of the main opposition party could spell a remake of the 2012 presidential election if François Hollande also seeks a second mandate in 2017. Whether the Left will remain committed to broadly rehabilitative ideals remains to be seen. Some in the Socialist Party, such as Manuel Valls, who was promoted to the position of prime minister in March 2014, would like to see the adoption of a tougher line, in response to the accusations of naïve leniency traditionally levied against left-wing parties. In view of

the rise of the extreme-right party—the Front National—in the polls, a surge in penal populism cannot be ruled out, with both mainstream parties attempting to outbid the other through tough-on-crime manifestos.

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