The French Jury at a Crossroads

Valerie P. Hans
Cornell Law School, valerie.hans@cornell.edu

Claire M. Germain
University of Florida Levin College of Law, germain@law.ufl.edu

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Recommended Citation
THE FRENCH JURY AT A CROSSROADS

VALERIE P. HANS* AND CLAIRE M. GERMAIN**

The jury "allows the citizen to be a full-fledged judge, and the accused to understand that he is not judged by a far flung and disembodied institution, but by the society that he himself belongs to."—Rapport Deniau, Ministère de la Justice (1996)

INTRODUCTION

Since its inception, the French jury system has generated passionate controversy. The jury originated at the time of the French Revolution as a potent symbol of democratic self-governance. Alternately praised and attacked by successive governments over two centuries, the jury became entrenched in the French justice system and in the French mind. Yet in recent years, the French jury’s future has become the subject of intense political debate. Some recent developments have strengthened the power of lay citizens in France’s justice system. For example, in 2000, a new mixed court of appeals for jury verdicts, the Cour d'assises d'appel, was instituted, enlisting lay citizens in an appellate decision-making role for the first time.

* Valerie P. Hans is Professor of Law, Cornell University Law School, and Fellow, Cornell University Institute for the Social Sciences, 2009-2012, Myron Taylor Hall, Ithaca, NY 14853; vh42@cornell.edu.

** Claire M. Germain is Edward Cornell Law Librarian and Professor of Law, Cornell University Law School, Myron Taylor Hall, Ithaca, NY 14853; cmgl3@cornell.edu (through July 31, 2011); Clarence J. TeSelle Professor of Law & Associate Dean for Legal Information, University of Florida Levin College of Law, Gainesville, FL 32611; germain@law.ufl.edu (as of Aug. 1, 2011). Our work on the French jury system was facilitated by the International Research Collaborative on Lay Participation in Legal Decision Making. We want to thank Kevin Clermont for his insightful comments on earlier versions of our paper, and for many invaluable conversations with us about French jury trial procedure. We also appreciate the suggestions of Guillaume Halard and Amalia Kessler, and the research assistance of Matt Morrison, Research Attorney, Cornell Law Library. Unless otherwise noted, all translations are our own.


3. For a summary review of the arguments with bibliographical notes, see SERGE GUINCHARD & JACQUES BUISSON, PROCÉDURE PENALE 242–49 (6th ed., 2010); see also SERGE GUINCHARD, GABRIEL MONTAGNIER, ANDRÉ VARINARD & THIERRY DEBARD, INSTITUTIONS JURIDICTIONNELLES 600–02 (10th ed., 2009).

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time. However, other changes and proposals threaten to reduce the French jury’s domain. A host of offenses have been reclassified so that they are no longer eligible to be tried by a jury. Furthermore, recent government proposals call for the abolition of trial by jury for serious crimes. Finally, a line of decisions by the European Court of Human Rights raises the possibility that jury systems throughout Europe are at risk because jury verdicts do not fulfill the technical requirements of “reasoned decisions.” That is, general jury verdicts of guilt or innocence do not provide specific legal and evidentiary justifications for the jury’s judgments.

This article describes the contemporary landscape of the French jury. Putting the institution in its historical and political context, it begins with an overview of the rich history of the French jury. We describe the earliest form of community judgment in France, the introduction of a formal jury system following the French Revolution, and the political and legal influences that transformed it from an independent body of lay citizens to a mixed decision-making body of professional and lay judges. We next identify characteristic features of contemporary French jury trial procedure and the respective roles and responsibilities of professional and lay judges, and then summarize the appellate procedure. After reviewing current debates about the merits of lay participation in the French legal system, we close with some reflections about the future of this storied institution.

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5. DONOVAN, supra note 2, at 2, 142-45; JEAN PRADEL, PROCÉDURE PÉNALE 95-99 (15th ed. 2010).


I. HISTORICAL DEVELOPMENT OF THE FRENCH JURY

In older times, it was common for laymen to participate in the decision-making of courts across France. An early form of lay decision-making in the feudal period, with more ancient Frankish roots, consisted of sworn inquests of neighbors called by kings. Some historical accounts identify it as the inspiration for jury systems worldwide. One scholar writing in 1903 asserted that "there is now no question that the modern jury is an outgrowth of the sworn inquests of neighbors held by command of the Norman and Angevin kings." Pollock and Maitland observed that Englishmen of the time undoubtedly faced difficulties in recognizing that their vaunted jury system, the glory of the English law, might have originated in proceedings of Frankish origin.

Whatever the pedigree of the English jury, it was clear that laymen in old France participated in advising and deciding legal cases in the early days. But their role declined after the Fourth Lateran Council's decision in 1215 banning trial by ordeal as a form of dispute resolution. That decision led the French to adopt the Roman-canon law of evidence. As French judges adapted the Roman system, which relied on complicated requirements to establish guilt and to convict criminal defendants, the learned judges came to dominate the increasingly technical proceedings, and the importance of lay judges declined. At the same time, however, across the Channel, the Lateran Council's decision caused the English lay jury to flourish, growing in significance and importance and offering an example of a more democratic fact-finding institution that garnered many admirers on the Continent.

8. DONOVAN, supra note 2, at 23.
9. Id. at 24.
11. C. H. Haskins, The Early Norman Jury, 8 AM. HIST. REV. 613, 613 (1903); see ROBERT VON MOSCHIZISKER, TRIAL BY JURY (1922).
12. POLLOCK & MAITLAND, supra note 10, at 141-42.
13. ANDRÉ TOULEMON, LA QUESTION DU JURY 20-21 (1930).
15. DONOVAN, supra note 2, at 25.
16. THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200-1800 3 & n.1 (1985); WHITMAN, supra note 10, at 125-57 (describing the rise of the jury in England as a result of the disappearance of trial by ordeal).
The French Revolution of 1789 and subsequent political upheavals led to demands for broad change in the inquisitorial approach to criminal procedure. In 1791, the Constituent Assembly passed laws providing for a new penal code; an oral, public, and adversarial trial procedure; and two vehicles for lay participation in felony cases: an eight-person grand jury (jury d'accusation) in each district and a twelve-person trial jury (jury de jugement) in each district.\(^\text{17}\) In each of the districts, elected officials would develop lists of names of appropriate citizens to participate as grand or trial jurors.\(^\text{18}\) Of course, these citizens were not a cross-section of the population. In the early days of the French jury, the jurors were all notables, propertied men of influence, selected by local political figures.\(^\text{19}\) The composition of jury lists and the selection of jurors for trials were hotly contested at many times throughout French history.\(^\text{20}\)

The institution of the jury was attractive to French legislators and the French public for a variety of reasons. Influential Enlightenment philosophers of the day marveled at the jury. Montesquieu’s *De L’Esprit des Lois* advocated a system in which ordinary people would serve for short periods of time to decide legal disputes, as English trial juries did.\(^\text{21}\) The jury was seen as the symbol of democracy and the embodiment of popular sovereignty.\(^\text{22}\) It reflected revolutionary ideals and a mistrust of judges and authority.\(^\text{23}\) It abandoned rigid legal proofs in favor of a more flexible approach of full proof and introduced a new standard, the special French concept of subjective certainty of guilt identified as “intime conviction.”\(^\text{24}\) Indeed, for the revolutionaries, because the jury as the people’s voice was sovereign, its factual conclusions and verdicts were not required to be de-
fended by reasoning.25 Legislators even entertained the possibility of a jury in civil lawsuits as well as in criminal trials, but that option was eventually rejected, in part because of jurors’ perceived lack of experience with civil matters.26

Jury trials were held in the Cour d’assises, the trial court for serious felonies or crimes that were punishable by substantial prison terms (or by capital punishment until that penalty was abolished in France in 1981).27 In the original code, the jury and the court had totally separate roles.28 The group of laypersons who formed the trial jury decided independently of the professional judges.29 However, unlike juries across the Channel, from its inception the French jury did not deliver a general verdict.30 Instead, they voted on a series of questions related to the defendant’s culpability for the crime.31 The jury of lay people served as judges of the facts (juges du fait).32 So, for example, they might be asked whether the act occurred, whether the accused had committed the act, and whether the accused intended to commit the act. In later times, juries also considered whether aggravating or extenuating circumstances existed that might merit a change in punishment. The jury’s judgments about these facts were final and could not generally be appealed, another illustration of the sovereign status of and trust in the jury.33 There was no instruction about the finer points—or indeed any points—of law.34 Instead, the professional judges, as juges du droit, took the jury’s answers to the questions, applied the law, and reached

26. DONOVAN, supra note 2, at 28. Decades later, the French thinker Alexis de Tocqueville would make a strong case for the many benefits of civil jury service in 1 DEMOCRACY IN AMERICA 258-64 (Harvey C. Mansfield & Delba Winthrop trans., Univ. of Chicago Press, 2000) (1835). But in the late eighteenth century, that view did not carry the day.
27. See generally Michel Redon, Cour d’assises, in RÉPERTOIRE DE DROIT PÉNAL ET DE PROCÉDURE PÉNALE (2010) (discussing conduct of jury trials in the Cour d’assises); see also DONOVAN, supra note 2, at 170 (discussing abolition of the death penalty in France).
28. ROUMIER, supra note 25, at 268-69.
29. Id. at 269.
30. In England, the jury typically did not announce the reasons for its general verdict of guilty or not guilty. LANGBEIN ET AL., supra note 14, at 416. However, in early modern times, the judge might on occasion ask the jury for the reasoning underlying its verdict. Id. at 433–34. If he was dissatisfied, he might re-instruct them, or ask them to redeliberate. Id. Langbein et al. report that in criminal cases, this practice was rare, and was looked upon with disfavor. Id. at 437. Nonetheless, it persisted into the nineteenth century. Id. at 437–38.
31. DONOVAN, supra note 2, at 31.
32. ROUMIER, supra note 25, at 269.
33. DONOVAN, supra note 2, at 34; RAPPORT LÉGER, supra note 25, at 38.
34. DONOVAN, supra note 2, at 31.
a legal judgment consistent with those answers. Typically, this meant that the professional judges applied the mandatory punishment that followed from a conviction. If the jury’s responses showed guilt, the judges applied the sentence. If the jury’s responses indicated that the accused was not guilty of the crime, the judges pronounced acquittal.

James Donovan’s masterly historical account of the jury’s changing role and responsibilities over the course of the nineteenth and twentieth centuries offers an in-depth look at how shifts in the jury reflected and reinforced changes in the evolving French legal system. The jury was introduced with fanfare as a living incarnation of French revolutionary and democratic ideals. The French Constitution asserts that the people exercise the sovereignty of the Nation through its representatives or through referendum. However, unlike the constitutions of a number of other countries, the French Constitution did not specifically mention the jury as the embodiment of sovereignty. Thus there is some debate about whether the jury system can be said to constitute a fundamental principle of the Republic. It might be more accurate to describe the French jury as an element of the democratic process, an important link between the people and justice, and a vehicle for popular control over judges.

The initially warm and enthusiastic reception to the jury system turned chillier as juries began to distinguish themselves from professional judges in their verdict tendencies. Donovan writes:

Already in the 1790s, some judges noted that juries showed what appeared to be pronounced biases in favor of persons accused of certain crimes, such as infanticide, violence against the agents of public authority, murders motivated by passion, and the like, along with a strong bias against persons accused of theft.

Politically motivated crimes, including libel, were especially apt to be viewed more generously by juries than by judges, which caused a great deal of consternation among the politicians of the day.

35. ROUMIER, supra note 25, at 269.
36. DONOVAN, supra note 2, at 46–47.
37. Id. at 34.
38. Id.
39. See generally id., supra note 2.
40. Id. at 28.
41. 1958 CONST. art. 3 (Fr.).
42. RAPPORT DENIAU, supra note 1, at 22.
43. Id. at 19; see ROUMIER, supra note 25, at 46.
44. DONOVAN, supra note 2, at 38.
45. Id. at 83–85 (describing juries’ tendencies to acquit in political and press cases).
Another concern that undoubtedly affected juries was the prospect of a defendant’s punishment. The *Code pénal* specified fixed and often severe punishments following conviction. The decision on punishment, which was considered a legal as opposed to a factual judgment, was exclusively the province of professional judges. Juries reportedly adjusted the factual conclusions in instances in which a guilty verdict would lead judges to impose an overly harsh sentence. In addition to reflecting a soft spot for certain crimes and particular defendants, jury leniency was also attributed to jurors’ confusion over the complexities of evidence presentation and the sometimes substantial numbers of factual questions that juries had to answer. It is interesting that many contemporary complaints about trial by jury in the United States and elsewhere echo strikingly similar claims of jury generosity and jury confusion. And reinforcing the historical pattern of jury leniency in France, many research studies of the American jury system show a tendency for juries to acquit more than judges based on the same evidence.

During the imperial regime of Napoleon, the widespread adoption of the Napoleonic Code brought the jury system to the countries and territories annexed under Napoleon’s rule. Back home, however, Napoleon’s impact on the role of the people as legal decision makers was decidedly mixed. He engaged in admirable efforts to develop a corps of highly professional judges, but he and the magistrates did not appear to be as enthusiastic about the contributions of untrained lay decision-makers. He recognized that the jury itself could not be eradicated: “The jury is the son

46. *Id.* at 38.
47. *Id.* at 30–31, 34.
48. BERNARD BOULOC, PROCÉDURE PÉNALE 479 (22d ed. 2010).
49. See DONOVAN, supra note 2, at 38.
50. For a review of criticisms of trial by jury and a defense of the jury system, see generally NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT (2007).
52. JOHN HENRY MERRYMAN, DAVID S. CLARK & JOHN OWEN HALEY, COMPARATIVE LAW: HISTORICAL DEVELOPMENT OF THE CIVIL LAW TRADITION IN EUROPE, LATIN AMERICA, AND EAST ASIA 473–76 (2010). Merryman et al. describe the “imposition of French laws and institutions on the nations conquered in the Napoleonic campaigns; French imperialism carried French law with it because Frenchmen believed that they were bringing enlightenment and progress to the peoples they conquered.” *Id.* at 475.
54. ROUMIER, supra note 25, at 60.
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55 Nonetheless, its scope could be whittled down. Napoleon introduced military tribunals (cours spéciales) staffed by professional judges to handle political and other cases in which the people’s jury could not be trusted to deliver the right verdicts. The jurisdiction of the special courts was expanded to include cases such as highway robberies or arson, crimes in which juries might acquit based on fear of retaliation following a conviction, or so it was felt. The number of votes needed for agreement on the jury’s factual findings was reduced, presumably to make it easier to convict defendants. During this time, the grand jury (jury d’accusation), which decided on indictments for crimes, was replaced by the Chamber of Indictment. But trial by jury, albeit in modified scope and form, was retained.

During the Bourbon Restoration era, juries gained new authority. Juries were granted the ability to find extenuating circumstances that might warrant reduced criminal penalties, in the hopes that this would eradicate the jury’s acquittal proneness. However, whether or not it was successful in increasing convictions is debatable. But countervailing forces emerged that would eventually lead to the decline in the power of juries. The Bourbon Restoration era marked the beginning of the process of correctionalization, reclassifying cases as less serious crimes so that they could be tried to panels of judges in lower level tribunals rather than to juries in the Cour d’assises. Legislators argued that they had to modify the level of offenses and their associated punishments because the current classification had become too rigid and was obsolete. Whatever the motivation, by the end of the nineteenth century, the French judge, lawyer, and politician Jean Cruppi observed that the correctionalization process had shrunk the domain of the Cour d’assises, and

55. TOULEMON, supra note 13, at 61.
56. DONOVAN, supra note 2, at 39–40.
57. See id. at 38–39.
58. Id. at 39.
59. The law was passed in 1810 and became effective in 1811. Loi 5351 du 20 avril 1810 sur l’Organisation de l’Ordre judiciaire et l’Administration de la Justice [Law 5351 of April 20, 1810 on the Organization of the Judiciary and the Administration of Justice], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE].
60. DONOVAN, supra note 2, at 41.
61. Id. at 49.
62. Id. at 56.
63. See id. at 57–59.
64. Id. at 49, 56–57; see also id. at 58 tbl.2.1 (showing changes over time in acquittal rates).
hence the jury.\textsuperscript{66} Cruppi concluded that rather than characterizing jury trials as having ordinary jurisdiction, it was becoming a jurisdiction of exception because a large segment of cases with facts that would qualify as \textit{crimes} by the \textit{Code} was removed from the jury through the process of correctionalization.\textsuperscript{67}

The French jury system was continually modified through subsequent generations and political regimes. Sometimes, the government reaffirmed the jury’s power by further democratization in jury selection methods or by an expansion of its authority or the number of lay jurors.\textsuperscript{68} Other times, political, legal, and social forces operated to contract the scope of jury trial.\textsuperscript{69}

There were regular changes to the system by which jurors were selected from the community. By the late nineteenth century, jurors were to be chosen from the middle class, because they were deemed to have more at stake in preserving the social pact.\textsuperscript{70} The jurors were drawn from annual lists by commissions, with mostly middle class, urban, male, and older jurors dominating the lists.\textsuperscript{71} Women did not serve on juries until a law of 1944 entitled them to serve, but even after that, they were often excluded from the preparatory lists because of what was perceived to be their sentimentalism and emotionalism.\textsuperscript{72}

The most significant and lasting change in the French jury occurred in 1941, during the tenure of the Vichy government in France.\textsuperscript{73} The law of 1941 stipulated that jurors and judges would sit together and rule on both culpability and punishment.\textsuperscript{74} This collaborative mixed court model combining lay jurors and law-trained judges is referred to as \textit{échevinage}.\textsuperscript{75} Three professional judges along with some number of citizens would decide together both on facts and on law, including the convicted defendant’s punishment.\textsuperscript{76} In the initial law of 1941, the number of lay jurors was set at

\begin{itemize}
  \item \textsuperscript{66} \textsc{Jean Cruppi}, \textit{La Cour d’Assises} 3 (1898), cited in \textsc{Roumier}, \textit{supra} note 25, at 66.
  \item \textit{Id}.
  \item \textsuperscript{68} \textit{See generally} \textsc{Donovan}, \textit{supra} note 2.
  \item \textit{Id}.
  \item \textsc{Roumier}, \textit{supra} note 25, at 133.
  \item \textit{Id}.
  \item \textsuperscript{70} \textsc{Roumier}, \textit{supra} note 25, at 133 n.515.
  \item \textsc{Donovan}, \textit{supra} note 2, at 168, 178; \textsc{Roumier}, \textit{supra} note 25, at 166–68; \textsc{Pradel}, \textit{supra} note 5, at 67–68; \textsc{Redon}, \textit{supra} note 27.
  \item \textsc{Bouloc}, \textit{supra} note 48, at 479–80; \textsc{Donovan}, \textit{supra} note 2, at 166–68; \textsc{Pradel}, \textit{supra} note 5, at 67–68; \textsc{Redon}, \textit{supra} note 27.
  \item \textsc{Bouloc}, \textit{supra} note 48, at 479–80; \textsc{Redon}, \textit{supra} note 27.
  \item \textsuperscript{75} This system had been proposed by Jean Cruppi as early as 1898, Cruppi, \textit{supra} note 66, at 290 et seq., and André Toulemon in 1930, Toulemon, \textit{supra} note 13, at 284–85. It was also recommended by a 1938 commission presided over by Paul Matter (Code d’instruction criminelle projet de la Commission de révision de la législation pénale, présidée par M. Paul Matter, 1938).
  \item \textsc{See Donovan}, \textit{supra} note 2, at 167.
\end{itemize}
Therefore, if the three judges had even a minority of two lay jurors on their side, they could produce a majority verdict. The removal of independent fact-finding by a lay decision-making body, and its replacement with a mixed court, was a significant step in diluting citizens' power.

Of course, similar mixed decision-making courts exist in many other civil law systems, including France’s close neighbors, Germany and Italy. Some scholars argue that France moved to the mixed jury system because “it corrects in a certain way the incompetence of the jury.” The presence of professional judges was said to provide the decisions of the Cour d’assises more coherence and harmony. But one clear motivation was to address what was perceived to be the continuing acquittal-proneness of lay jurors. Here, the move to a mixed court produced what appeared to be immediate success. The proportion of cases in the Cour d’assises that resulted in acquittals dropped from twenty-five percent before 1941 to about eight percent afterwards. One cannot be completely certain that the replacement of the jury system with échevinage was the major cause of the drop in acquittals. Comparisons of judge and jury trials may be complicated by selection effects or by other legal changes that can lead to substantial differences in the cases decided by different fact finders, to say nothing of the social changes in wartime France. Nonetheless, given what we know historically from the French experience and what we know comparatively about the verdict tendencies of professional and lay judges, it seems highly likely that the move to a mixed court generated more guilty verdicts.

The mixed court approach has survived, although later modifications adjusted the numbers of lay jurors and the numbers required for a verdict, so that the lay members of the mixed court had more power. The Ordinance of 1945, for example, reestablished some of the lost power of the lay

77. Id.
79. BOULOC, supra note 48, at 480.
80. Id.
81. See PRADEL, supra note 5, at 68.
82. For a discussion of the factors that must be considered in comparing judge and jury trial outcomes, see Kevin M. Clermont, Litigation Realities Redux, 84 NOTRE DAME L. REV. 1919, 1961-63 (2009); Kevin M. Clermont & Theodore Eisenberg, Litigation Realities, 88 CORNELL L. REV. 119, 145-46 (2002).
83. DONOVAN, supra note 2, at 168-69, discusses and dismisses some potential alternate explanations, including a change in the proportion of criminals brought to trial and changes in peremptory challenges.
84. See id. at 167-68.
fact finders by raising the number of lay jurors to seven, and requiring eight votes for a binding verdict.\textsuperscript{85}

The current Code of Criminal Procedure stipulates that the mixed court must include nine lay jurors.\textsuperscript{86} Still, a minimum of eight votes is necessary for conviction.\textsuperscript{87} Thus, the majority of lay jurors must concur in the conviction. Suppose that the three judges vote in a bloc. To deliver a guilty verdict, they must be joined by a minimum of five lay jurors. If only four of the nine jurors vote together with the three judges, the accused would be acquitted, even though such a vote constellation would represent the majority of the combined lay and professional judges' votes. Thus, the lay jurors have a definitive voice in deciding the guilt of the accused. This reestablishes the place and role of the jury in the spirit that it was created.\textsuperscript{88}

The contemporary French jury is also more democratic than at earlier times in its history. In 1978, a substantial reform of the French jury selection procedure replaced the purposive selection of individuals thought to be better suited for the juror task with random selection from electoral lists.\textsuperscript{89} Today, with some exceptions for those convicted of felonies, those unable to understand French, and similar incapacities, all French citizens who are at least twenty-three can serve; they are excused if they are over seventy years of age.\textsuperscript{90} Each year, in each department, a commission presided over by a judge employs the electoral list to develop a list of qualified prospective jurors.\textsuperscript{91} The departmental commission reviews the names to determine whether they meet legal requirements for jury service as well as whether there are grounds for excuses, and draws up an annual preparatory list of jurors.\textsuperscript{92} From this departmental list is drawn the list for the session, consisting of forty jurors and twelve alternate jurors.\textsuperscript{93} If jurors do not appear for service, they may be liable for a fine.\textsuperscript{94}

\begin{flushleft}
85. \textit{Id.}; \textit{PRADEL, supra} note 5, at 62.
86. \textit{BOULOC, supra} note 48, at 475.
87. \textit{Id.}
88. \textit{ROUMIER, supra} note 25, at 12.
89. \textit{Redon, supra} note 27, at 4; \textit{see ROUMIER, supra} note 25, at 131.
90. \textit{Redon, supra} note 27, at 4. \textit{CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] art. 257 (Fr.)} lists specific government officials, members of the judiciary, and police officers who are also ineligible for jury service.
91. \textit{BOULOC, supra} note 48, at 477. \textit{ROUMIER, supra} note 25, at 138, reports that the mayor draws publicly every year from the electoral list a number of names triple the number of the contingent of the area, following \textit{C. PR. PÉN.} art. 261.
92. \textit{C. PR. PÉN.} art. 262; \textit{ROUMIER, supra} note 25, at 138–39.
93. \textit{See BOULOC, supra} note 48, at 477; \textit{PRADEL, supra} note 5, at 770.
\end{flushleft}
II. FRENCH JURY TRIAL PROCEDURE

The jury hears only criminal cases, not civil cases. As is the case in many other countries, criminal jury trials represent only a small percentage of all criminal case outcomes in France. The classification of offenses (contravention, délits, and crimes, in order of increasing seriousness) determines which court will hear the case. The jury exists primarily within the major trial court, the Cour d'assises. Its jurisdiction includes only the most severe crimes, such as rape and murder. Lay jurors also participate in a special mixed court that hears crimes committed by minors (Cour d'assises pour mineurs). Provisions for non-jury trials exist for cases involving terrorists, drugs, and the military. Crimes committed by ministers while in office are heard solely by professional judges at the Cour de justice de la République.

Just which cases will be heard by French juries is a matter of continuing controversy. The practice of correctionalization, in which key elements of a serious criminal charge are removed, reclassifying the offense as a less serious one, has become if anything more significant in narrowing the ambit of the French jury. The reclassification enables the charge to be decided by judges in a lower court, the Tribunal correctionnel, rather than the Cour d'assises where it would be heard by the French jury. A similar practice that legislators began centuries ago to remove power from the jury is now said to be a necessary action for judges because of the glacial pace

95. See ROUMIER, supra note 25, at 55–56 (retracing the debates during the Revolution that led to the abandonment of the proposal for a civil jury in France).

96. In the United States, the decline in the proportion of cases that are heard by juries (and by judges) has been much remarked upon. See generally Lawrence M. Friedman, The Day Before Trials Vanished, 1 J. EMPIRICAL LEGAL STUD. 689 (2004) (describing two centuries of decline in U.S. trial rates); Marc Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 1 J. EMPIRICAL LEGAL STUD. 459 (2004) (documenting contemporary declines in U.S. federal judge and jury trials); Herbert M. Kritzer, Disappearing Trials? A Comparative Perspective, 1 J. EMPIRICAL LEGAL STUD. 735 (2004) (offering British data).

97. For a description of the different types of offenses and corresponding courts, see PRADEL, supra note 5, at 51-56. The juge de proximité is a non-professional judge who rules, as does the Police Court, on many of the contraventions and minor offenses. See C. PR. PÉN. art. 521. For moderately serious offenses, called délits, the Criminal Court (Tribunal Correctionnel) will hear the cases. C. PR. PÉN. art. 381.

98. PRADEL, supra note 5, at 57.

99. See C. PR. PÉN. art. 231.

100. Redon, supra note 27.

101. PRADEL, supra note 5, at 624; Redon, supra note 27.

102. BOULOC, supra note 48, at 480.

103. On legislative correctionalization, see Wilfrid Jeandidier, La correctionnalisation législative, I LA SEMAINE JURIDIQUE [JCP], No. 3487, p. 51 (Fr.). On judicial correctionalization, see BOULOC, supra note 48, at 526–29.

104. BOULOC, supra note 48, at 526-29.
of jury trials in the *Cour d'assises*. The French code of criminal procedure allows parties to appeal a reclassification when they think the facts merit a hearing by the *Cour d'assises*. However, there is a natural disincentive for defendants to appeal a downgrading of their charges. It is perhaps not surprising that the impact of correctionalization is to reduce the number of offenses that are considered by French juries.

There is no maximum delay set by law. Sources differ on the typical time to trial for defendants who are held in jail prior to trial and those who are free prior to trial, but a defendant’s wait for a day in court can be considerable. A lengthy time before trial appears to be at odds with principles enunciated by the European Convention on Human Rights, whereby every arrested or imprisoned defendant has a right to be judged without unreasonable delay. At least one court has concluded that sixteen months constituted unreasonable delay.

The procedure for a jury trial begins when the Chamber of Indictment sends an indictment (mise en accusation) to the *Cour d'assises* in the department or geographical location in which the offense occurred. The individual *Cours d'assises* hold court sessions every three months. They can judge all offenses connected to the principal crime. Unlike the United States, where criminal and civil proceedings are entirely separate, French procedure allows for victims to join the criminal proceedings as civil parties in the case. However, the civil verdicts are decided by the professional judges alone; the lay jurors play no part.

The professional members of the court include three judges: the presiding judge and two other judges named *assesseurs*. These members of the court may be drawn from the president or other judicial members of the
court of general jurisdiction or court of appeals. The prosecutor (Ministère public) and a greffier (clerk of the court) complete the professional members of the Cour d'assises.

A characteristic feature of the French jury system is the major role played by the presiding judge. This is in line with French judicial culture. The presiding judge has multiple powers. First, presiding judges have police powers for the hearing (pouvoir de police de l'audience). Second, the presiding judge directs the legal proceedings, including the order of production of the proofs and which debates may be presented and which are to be rejected. Third, the presiding judge has the discretion to take all measures deemed useful to discover the truth. This can involve the hearing of witnesses, the suspect, and the experts; ordering a jury visit to the crime scene; requesting additional documents; reading of the deposition of an absent witness; and so on. The French system's granting of strong powers to the presiding judge is consistent with the practice in many inquisitorial systems, and at odds with adversarial systems that place the development of evidence in the hands of the parties.

Just before each case, in public and in the presence of the accused, the nine jurors who will hear the case as the jury de jugement are chosen. Names of the jurors are read out. The prosecution has up to four peremptory strikes, and the defense has up to five peremptory strikes, which they exercise without offering explanation. Once the proceedings begin, as a

117. Id. at 472–73.
118. Id. at 472.
119. Id. at 859-62.
121. PRADEL, supra note 5, at 737.
122. C. PR. PEN. art. 310.
123. BOULOC, supra note 48, at 859-61.
125. C. PR. PEN. arts. 293–296. In addition, C. PR. PEN. art. 291 requires the court to remove temporarily from the jury list any family members of the accused and the accused’s advocate, as well as those who are directly linked to the present litigation, such as witnesses, investigators, and claimants.
126. C. PR. PEN. arts. 297–298. Article 297 specifies: “As the jurors’ names are drawn from the urn, first the accused or his advocate, and then the public prosecutor challenge them as they see fit, subject to the limit provided. . . . Neither the accused, not [sic] his advocate, not [sic] the public prosecutor are allowed to state their grounds for challenge.” C. PR. PEN. art. 297, translated in JOHN RASON SPENCER, CODE OF CRIMINAL PROCEDURE 93 (2006), available at
sign of respect and equality, the lay jurors sit together with judges, if the location is feasible. Otherwise, they sit in front of the accused. The jurors are asked to be attentive, not to reveal their opinions prematurely, and not to communicate with anyone, except to ask the president for authorization to ask a question of a witness.

However, the dossier itself (dossier d'instruction) is not given to the jurors. The rationale for limiting the dossier to the presiding judge is that the oral nature of the trial is a fundamental principle of French criminal trial procedure. Some commentators have attributed it to the reluctance of professionals in the system to share the dossier information with lay citizens. Whatever the motivation, the presiding judge cannot show the jurors the file before or after the hearing of the witnesses, and the dossier cannot be consulted during deliberations. The parties have limited access to the dossier; a recent government report criticized these limits, and instead proposed that all parties have access to the written file until the close of the trial.

It is an interesting choice to limit the central record of the case found in the dossier to the presiding judge. In its favor, one might use the fact that a good deal of material in the dossier might prejudice the fact finders against the accused, or in favor of a particular party, because dossiers commonly include transcripts or summaries of police interviews and criminal record information. An argument against the limitation is that it pri-
vileges the lead judge over the other fact finders, making it particularly
difficult for lay jurors, who may have little or no prior experience with
courts, to put what they are hearing in context. It reduces the strength of the
lay members of the tribunal to help shape the evidence and the questioning
of witnesses.

After the jurors have given the oath, the presiding judge provides pre-
liminary instructions to the jurors, and reads the text of the accusation
(décision de renvoi). Then the débats formally begin. The débats consist of reviewing and discussing the proofs, the questioning of the accused, including an inquiry into the defendant’s personal background, then the testimony of fact witnesses, followed by experts. The prosecutor and defense lawyers then present their final arguments. Because of the principle of continuity of the trial proceedings (continuité des débats), the trial, deliberation, verdict, and sentencing proceed without interruption, except for necessary rest.

One striking and distinctive characteristic of the French jury trial lies in the emphasis on discussion about the background and personality (personnalité) of the accused. The inquiry into the personnalité of the accused is seen as fundamental to the criminal trial. The accused is interrogated by the presiding judge, and encouraged to speak freely about his or her background, circumstances, and views. The prominence of this inquiry is underscored by the fact that questions about the personal circumstances and thinking of the defendant come at the very start of the trial, before any other witness testifies. This may have to do with the French philosophy of understanding why a crime was committed, and notions of rehabilitation.

In a criminal trial, one judges not only the offense, but

the all-important dossier flies in the fact of the statutorily guaranteed absolute equality of professional and lay judges.”). Id. at 581.

135. Redon, supra note 27, at 55.
136. Id. at 56.
137. Id. at 67.
138. Id. at 67.
139. C. Pr. Pén. art. 307; BOULOC, supra note 48, at 876; PRadel, supra note 5, at 769.
140. See BOULOC, supra note 48, at 771; Mckillop, supra note 114, at 19 n.35, 34-38.
141. See BOULOC, supra note 48, at 621; C. Pr. Pén. art. 81 (requiring that the investigating judge inquire into the personnalité of the accused).
143. See C. Pr. Pén. art. 328.
144. BOULOC, supra note 48, at 3-4, 771. The interest in the personnalité of the accused starts in the investigation phase, where the investigating judge is required to conduct an inquiry into the background and circumstances of the defendant. The results of the investigation become part of the dossier.
also, and even more importantly, the person who has committed it.\textsuperscript{145} The criminal court needs to discover and penetrate the personality of the accused so as to better appreciate his guilt and set the punishment, treatment, or education that is best suited to the person.\textsuperscript{146} This offers a remarkable contrast to the United States and many other countries based on adversarialism. In the United States, discussing the background and personal circumstances of a defendant before proceeding to hear evidence in the case would doubtless be considered an inflammatory and prejudicial practice. The presumption would be that such discussions would bias the factual determinations of the decision makers.\textsuperscript{147} In France, though, considering the background of the accused is seen as an essential part of the jury’s task.

The prosecution, the accused, the lawyers, the jurors, and the civil party (partie civile), if any, may ask directly or through the presiding judge questions of the accused and the witnesses.\textsuperscript{148} The alternate jurors do not participate in the deliberations, but have the same status and are allowed to ask the presiding judge if they can question the witnesses.\textsuperscript{149} It is notable that lay jurors can ask questions of the witnesses directly, albeit after asking permission from the presiding judge.\textsuperscript{150} The asking of questions by jurors even within adversary systems has increasingly been advocated. For example, the American Bar Association’s Principles for Juries and Jury Trials recommends juror questions in civil jury trials and suggests that judges consider allowing juror questions in criminal trials.\textsuperscript{151} Although

\textsuperscript{145} Id.

\textsuperscript{146} Id. at 4.

\textsuperscript{147} Extra-legal bias is considered a serious problem in U.S. jury trials. Personal information about the defendant is strictly limited during the trial by a host of evidentiary rules. Furthermore, during jury selection, prospective jurors are quizzed to assess whether they have any knowledge or existing prejudices about the defendant that might undermine their fact-finding. See \textit{Vidmar \& Hans, supra} note 50, at 107–23 (discussing the procedures used in the United States to cope with potential jury bias from pretrial publicity and generic prejudice against defendants or types of crimes).

\textsuperscript{148} C. PR. PËN. arts. 311, 312, 332. Questions by the parties to the accused are governed by art. 312; party questions for other witnesses are governed by art. 332. Article 311, \textit{translated in Rason Spencer, supra } note 126, at 95, governs questions by the jurors: “The assessors and the jurors may put questions to the accused and to the witnesses after asking the president for leave to speak. They have a duty not to show their opinion.”

\textsuperscript{149} Redon, \textit{supra } note 27, at 32.


\textsuperscript{151} “In civil cases, jurors should, ordinarily, be permitted to submit written questions for witnesses. In deciding whether to permit jurors to subject written questions in criminal cases, the court should take into consideration the historic reasons why courts in a number of jurisdictions have discouraged juror questions and the experience in those jurisdictions that have allowed it.” \textit{Principles for Juries and Jury Trials }91 (American Bar Ass’n 2005). For discussion of juror questions within the adversary system, see generally Hans, \textit{Empowering the Active Jury, supra }note 150; Valerie P. Hans, \textit{U.S. Jury Reform: The Active Jury and the Adversarial Ideal}, 21 \textit{St. Louis U. Pub. L. Rev. }85, 90–93 (2002).
more judges permit juror questions today, many American judges remain resistant to the practice, particularly for criminal trials, and many lawyers express concern that juror questions infringe on the parties’ prerogative to develop the evidence in the adversary system.\textsuperscript{152}

It would be interesting to count how frequently the lay jurors in the French system pose questions to the accused and to the witnesses. In some other studies of lay judge inquisitorial trial systems, professionally trained judges dominate the questioning, and lay judges ask questions only infrequently.\textsuperscript{153} The extent to which lay judges ask questions in these other systems appears to be determined in large part by whether or not the professional judges have created a supportive environment for doing so.\textsuperscript{154} Thus it would be valuable to assess the climate for juror questions in the Cour d’assises.

Before the court retires to deliberate, the presiding judge instructs the jury in the standard they must use to decide the case: they must possess an intime conviction, a subjective sense of certainty about the guilt of the accused.\textsuperscript{155} The instruction is also posted prominently in the deliberation chamber:

The law does not ask the judges to account for the means by which they convinced themselves; it does not charge them with any rule from which they shall specifically derive the fullness and adequacy of evidence. It requires them to question themselves in silence and reflection and to seek in the sincerity of their conscience what impression has been made on their reason by the evidence brought against the accused and the arguments of his defence. The law asks them but this single question, which encloses the full scope of their duties: are you inwardly convinced?\textsuperscript{156}

The principle of the juror’s intime conviction was originally instituted during the Revolution as a reaction to the blind, highly technical, and rigid system of legal proofs.\textsuperscript{157} The standard of proof of intime conviction has been the subject of rich debate, because it reflects a deep divide between

\begin{itemize}
    \item \textsuperscript{152} Hans, \textit{U.S. Jury Reform}, supra note 151, at 92–93.
    \item \textsuperscript{154} SANJA KUTNJAK IVKOVIĆ, \textit{LAY PARTICIPATION IN CRIMINAL TRIALS: THE CASE OF CROATIA} 416–17 (1999) (finding that in Croatia, when lay judges perceived that their comments would be evaluated by a professional judge as significant or important, they reported that they made more comments during the trial).
    \item \textsuperscript{155} ROUMIER, \textit{supra} note 25, at 230–32.
    \item \textsuperscript{157} ROUMIER, \textit{supra} note 25, at 230.
\end{itemize}
civil law and common law systems over standards of proof and attitudes toward the search for the truth. Several commentators conclude that American and French law conceptualize proof differently; and in addition, the two systems pursued different goals when they formulated their standards of proof. In particular, American law emphasizes objectivity, while the French value the apparent quest for truth. These differences reflect distinctive conceptions of the search for truth that are rooted in each country’s singular history.

An intime conviction seems to suggest an emotional response and might raise fears that jury decisions are based on emotion rather than reason. However, the French jury scholar Roumier analyzed the history of the standard and concluded that it was developed to convey to jurors in a way that they would understand that the rigid system of legal proofs was no longer in use, and that they were to decide based on reason, not on the feelings in their hearts. Thus, the decision based on intime conviction is not best viewed as the expression of a feeling, but rather as a considered opinion based on the charges, evidence, and defenses presented by the parties.

At the conclusion of the débats, the presiding judge establishes the list of questions that the judges and the jury will consider. Before deliberation commences, the presiding judge reads the list of questions or issues to resolve, based on the indictment, and reviewed and revised after the presentation of the evidence, if necessary. The questions posed to the jury are generally straightforward, factually oriented, and may be answered by yes or no responses. The questions do not employ legal technical terms.
For example, jurors are not asked to determine whether the act conforms to the legal requirements of theft. Instead, the question might be whether the accused is guilty of having taken an object.168

Judges and jurors retire to deliberate in secret.169 Although these proceedings are secret, the procedure for voting is set out very explicitly in the Code of Criminal Procedure.170 Votes on each question are taken using anonymous ballots, which are deposited into an urn.171 The members of the court handwrite their “yes” or “no” answers to each question using the following language: “On my honor and conscience, my answer is . . . .”172 The presiding judge is required to count the ballots in the presence of the other members of the mixed tribunal.173 Any member may scrutinize the ballots.174 If a ballot is blank, or if one is declared void by the majority of the tribunal, a vote is entered in favor of the defendant.175 After the presiding judge counts and records the results, the secret ballots are burned.176 The precisely specified legal requirements of this voting procedure are clearly intended to maximize the regularity of voting as well as the anonymity of the balloting. This stands in contrast to jury voting in most countries, which is not regulated to the same degree.177 Indeed, interviews and research studies find that American jurors are frequently unsure about how to take a vote, and juries engage in different practices, ranging from secret ballots written on paper, to a show of hands, to going around the table to provide verbal justifications for current verdict preferences.178 Research suggests that the approach taken at the start of deliberation, in particular whether formal votes are taken at the beginning, is related to the eventual outcome.179

168. PRADEL, supra note 5, at 778.

169. Case law as well as legal scholars underscore the absolute secrecy of the voting of judges and jurors; and no justification need be provided for their votes: “la loi ne leur demande pas comptes . . . des moyens par lesquels ils se sont convaincus” [“the law does not ask them to account for the reasons that they convinced themselves”]. Redon, supra note 27, at 74.

170. See C. PR. PÉN. art. 358.

171. Redon, supra note 27, at 75.

172. C. PR. PÉN. art. 357.

173. C. PR. PÉN. art. 358.

174. Id.

175. Id.

176. Id.

177. See VIDMAR & HANS, supra note 50, at 143.

178. Id.

179. REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, INSIDE THE JURY 163-65 (1983) (finding differences between juries that begin with voting (verdict-driven juries) as opposed to general discussions of the evidence (evidence-driven juries)); Hans et al., supra note 51 (showing hung juries are more common when first-ballot votes occur early in the deliberation).
The jurors and professional judges together make a series of decisions on both the guilt and the sentence, ruling successively on the principal act, on aggravating circumstances, on any subsidiary questions, and on legal circumstances constituting an exemption or diminution of the sentence.\textsuperscript{180} As noted above, any decision of guilt requires a majority of eight voices out of twelve.\textsuperscript{181} If the accused is declared guilty, the judges' and the jurors' decision on the sentence requires only a simple majority, unless they decide on the maximum imprisonment penalty, in which case the higher number is required.\textsuperscript{182}

Once there is a decision and sentence, the judges and jurors go back to the courtroom, where the announcement of the verdict is generally open to the public.\textsuperscript{183} The presiding judge gives a reading of the answers, stating only whether they are positive or negative.\textsuperscript{184} Then he or she pronounces the court's decision.\textsuperscript{185}

After this, the role of the trial jury ends.\textsuperscript{186} But if the victim has joined the case as a partie civile, the three professional judges continue their work independently.\textsuperscript{187} After the Cour d'assises decides on the criminal verdict, the professional judges, without the jurors, rule on the request for damages requested by the partie civile against the accused, or by the defendant against the partie civile.\textsuperscript{188}

\section*{III. Appeals of Jury Verdicts}

\textit{Cour d'assises d'appel.} In comparison to legal systems worldwide, the French jury system is distinctive in terms of including lay persons in the appeals stage.\textsuperscript{189} From its inception following the French Revolution, the French jury's decision was considered an expression of definitive truth (\textit{vox populi, vox dei}).\textsuperscript{190} As noted earlier, there was hostility to the idea that parties might appeal the correctness of the jury decision. As a result, there were only very limited grounds of legal (as opposed to factual) error on

\begin{footnotes}
\footnote{\textsuperscript{180} Redon, \textit{supra} note 27, at 74-75.}
\footnote{\textsuperscript{181} See \textit{id.} at 75.}
\footnote{\textsuperscript{182} C. PR. PÉN. art. 362.}
\footnote{\textsuperscript{183} Under a few circumstances, the courtroom may be closed to the public. C. PR. PÉN. art. 306.}
\footnote{\textsuperscript{184} C. PR. PÉN. art. 366.}
\footnote{\textsuperscript{185} See \textsuperscript{PRADEL, supra} note 5, at 782-83.}
\footnote{\textsuperscript{186} See MCKILLOP, \textit{supra} note 114, at 46.}
\footnote{\textsuperscript{187} Redon, \textit{supra} note 27, at 82.}
\footnote{\textsuperscript{188} \textit{Id.}}
\footnote{\textsuperscript{189} See McKillop, \textit{Review of Convictions After Jury Trials, supra} note 4, at 343-44.}
\footnote{\textsuperscript{190} ROUMIER, \textit{supra} note 25, at 16.}
\end{footnotes}
which to attempt to appeal the decision of a jury to the highest appellate court in France, the Cour de cassation.191

But the near unassailability of jury verdicts in the Cour d'assises led to the strange result that a small-time thief convicted by judges in a lower court for stealing a watch had a broader right to appeal the decision than a defendant condemned by a jury to life in prison for murder.192 Without the ability to appeal the substance of jury verdicts, France also appeared to be at odds with the European Court of Human Rights' Protocol number 7, adopted in 1984, which affirms the general importance of the right to appeal.193

Over the last several decades, new developments have expanded the opportunity to appeal jury verdicts rendered in the Cour d'assises. The efforts began in 1995 with a government proposal to permit appeals for decisions of the Cour d'assises, but a change in the political majority buried that initial effort two years later.194 In 2000, the Senate succeeded in the endeavor with an amendment that permitted defendants to appeal their convictions.195 In 2002, the right to appeal was expanded to the prosecution, which was now entitled to appeal the acquittal of the accused.196 The appeal must be made within ten days after the decision.197 Thus, France joins a number of other countries that permit not just the defendant but also the prosecution to appeal jury decisions.198

However, the makeup of the French appeals court is quite unusual compared to appellate bodies in other countries in that it is a jury court of appeal.199 If a defendant or prosecutor appeals a French jury decision in the Cour d'assises, the initial appeal is not heard by a higher court composed of professional judges, as is the case in other countries. Instead, that appeal

191. See infra text accompanying notes 224–29.
192. See BOULOC, supra note 48, at 471.
196. Redon, supra note 27, at 87.
197. BOULOC, supra note 48, at 937.
199. McKillop, Review of Convictions After Jury Trials, supra note 4, at 343; see also generally McKillop, The New French Jury Court of Appeal Revisited, supra note 4.
is heard by another, larger jury in a different Cour d’assises. The appellate tribunal includes twelve jurors instead of the nine jurors who participated in the original trial in the Cour d’assises. These twelve lay jurors decide collaboratively with three professional judges, as they do in the Cour d’assises. Reducing the influence of judges and increasing the influence of jurors, the French procedural code retains a two-thirds rule, requiring a majority of at least ten votes of the fifteen members of the Cour d’assises d’appel. If a majority cannot marshal ten votes for conviction, an appealing accused is acquitted or enjoys a reduction in sentencing (the minorité de faveur), or the prosecutor’s appeal fails.

Although the procedure is quite similar to the procedure in the original trial, there are a few adaptations and some differences. Appellate proceedings at the Cour d’assises d’appel begin with the presiding judge reading the decision of renvoi, the jury’s responses to the questions in the first trial, and the decision below. Then the débats (presentation of the evidence and testimony of the witnesses) commence. The appeal is limited to the principal issue in the case, and other disputed subsidiary issues are not considered. Should parties wish to appeal from the Cour d’assises d’appel, that decision can only be referred to the Cour de cassation, the highest appellate court in the French system.

Some observers have expressed concern about whether a second level of jury appeal court is necessary or worthwhile. In the first few years of its existence, relatively few parties appealed their verdicts to the Cour d’assises d’appel. And the appeals court has modified less than one out of every ten cases it has heard. Thus, the vast majority of the verdicts on

201. Id.
202. Id. at 351. For data on the number of cases in the Cour d’assises and Cour d’assises d’appel, see Annuaire Statistique de la Justice, Ministère de la Justice et des Libertés, http://www.justice.gouv.fr/budget-et-statistiques-10054/annuaires-statistiques-de-la-justice-10304/annuaire-statistique-de-la-justice-21359.html (last visited Dec. 9, 2010).
203. Id. at 351. For data on the number of cases in the Cour d’assises and Cour d’assises d’appel, see Annuaire Statistique de la Justice, Ministère de la Justice et des Libertés, http://www.justice.gouv.fr/budget-et-statistiques-10054/annuaires-statistiques-de-la-justice-10304/annuaire-statistique-de-la-justice-21359.html (last visited Dec. 9, 2010).
204. Id. at 351. For data on the number of cases in the Cour d’assises and Cour d’assises d’appel, see Annuaire Statistique de la Justice, Ministère de la Justice et des Libertés, http://www.justice.gouv.fr/budget-et-statistiques-10054/annuaires-statistiques-de-la-justice-10304/annuaire-statistique-de-la-justice-21359.html (last visited Dec. 9, 2010).
205. Id. at 351. For data on the number of cases in the Cour d’assises and Cour d’assises d’appel, see Annuaire Statistique de la Justice, Ministère de la Justice et des Libertés, http://www.justice.gouv.fr/budget-et-statistiques-10054/annuaires-statistiques-de-la-justice-10304/annuaire-statistique-de-la-justice-21359.html (last visited Dec. 9, 2010).
206. Id. at 351. For data on the number of cases in the Cour d’assises and Cour d’assises d’appel, see Annuaire Statistique de la Justice, Ministère de la Justice et des Libertés, http://www.justice.gouv.fr/budget-et-statistiques-10054/annuaires-statistiques-de-la-justice-10304/annuaire-statistique-de-la-justice-21359.html (last visited Dec. 9, 2010).
207. Id. at 351. For data on the number of cases in the Cour d’assises and Cour d’assises d’appel, see Annuaire Statistique de la Justice, Ministère de la Justice et des Libertés, http://www.justice.gouv.fr/budget-et-statistiques-10054/annuaires-statistiques-de-la-justice-10304/annuaire-statistique-de-la-justice-21359.html (last visited Dec. 9, 2010).
208. Id. at 351. For data on the number of cases in the Cour d’assises and Cour d’assises d’appel, see Annuaire Statistique de la Justice, Ministère de la Justice et des Libertés, http://www.justice.gouv.fr/budget-et-statistiques-10054/annuaires-statistiques-de-la-justice-10304/annuaire-statistique-de-la-justice-21359.html (last visited Dec. 9, 2010).
209. Id. at 351. For data on the number of cases in the Cour d’assises and Cour d’assises d’appel, see Annuaire Statistique de la Justice, Ministère de la Justice et des Libertés, http://www.justice.gouv.fr/budget-et-statistiques-10054/annuaires-statistiques-de-la-justice-10304/annuaire-statistique-de-la-justice-21359.html (last visited Dec. 9, 2010).
210. Id. at 351. For data on the number of cases in the Cour d’assises and Cour d’assises d’appel, see Annuaire Statistique de la Justice, Ministère de la Justice et des Libertés, http://www.justice.gouv.fr/budget-et-statistiques-10054/annuaires-statistiques-de-la-justice-10304/annuaire-statistique-de-la-justice-21359.html (last visited Dec. 9, 2010).
appeal confirm the verdict of the jury in the first instance. For example, in one analysis of 1,338 cases heard by the appeals court during a two-year period, just 107 cases (eight percent) resulted in a modification of the decision reached by the original Cour d'assises. In the words of one prosecutor, they are a “verrou de sécurité” (security lock) rather than a second chance for the accused or for the prosecution. Around ninety-five percent of the time, the appeals court concludes that the defendant is guilty, similar to the original court. However, the appeal rate has increased substantially in recent years. It appears that a rising number of defendants are taking the opportunity to have another jury hear their cases. In addition, prosecutors have taken advantage of their new ability to appeal acquittals, and in a substantial proportion of these appeals, they have been successful—more successful than defendants who appeal their convictions. For example, the French newspaper Le Figaro reported their analysis of appeals court verdicts over a two-year period. Of the 1,262 defendants who appealed their guilty verdicts, just five percent (64 defendants) were successful in achieving an acquittal at the appeals court. In contrast, of the 76 acquittals that prosecutors appealed to the Cour d'assises d'appel, fifty-seven percent, or 43, of the defendants who had been originally acquitted were convicted by the appeals court. Thus, prosecutors appear to benefit more from the “second chance” offered by the Cour d'assises d'appel.

IV. CONTEMPORARY DEBATES OVER THE JURY IN THE FRENCH LEGAL SYSTEM: AT THE CROSSROADS

The fact that the French have developed a jury court of appeals illustrates the substantial value placed on including lay participation in the French legal system. Two challenges to the French jury have emerged recently, however, and how each of these challenges will ultimately affect the scope and nature of the French jury remains to be seen. One objection comes from outside of France: a challenge from the European Court of Human Rights over the lack of reasoning provided by the general verdicts

212. Id.
213. Id.
214. Id.
216. McKillop, The New French Jury Court of Appeal Revisited, supra note 4, at 143–44.
217. Delahousse, supra note 211.
218. Id.
219. Id.
220. Id.
of juries. Another comes from within, as French political figures, legislators, legal scholars, and judges battle over where best to include lay voices in the French legal system.

V. ABSENCE OF REASONED VERDICTS

The French jury trial is said to lack "reasoned decisions." The decisions of the Cour d'assises are based solely on the verdict, and the verdict itself is in turn based on affirmative or negative answers given to the questions asked. There is no recording of the trial, and no written explanation of the legal and factual basis for the verdict, as would be the case in American judge trials, for example. As described earlier, when the jury was introduced in 1791 to judge criminal cases, the jury was considered to be sovereign and infallible, which justified the absence of reasoned verdicts, and indeed the very limited ability to appeal a jury's verdict. For a long time, the French jury's lack of a reasoned verdict was not subject to serious dispute. As recently as 1999, the Cour de cassation stated that the system of responses to specific questions was the equivalent of a reasoned decision, because the basis for the verdict could be determined by the pattern of responses. However, when the Cour d'assises d'appel was introduced in 2000, allowing appeals of jury verdicts, the absence of reasoning below complicated the task of the Cour d'assises d'appel. Although the Cour d'assises d'appel learns of the prior jury's responses to the questions, it does not have knowledge of the reasoning underlying the verdict of the Cour d'assises.

In 2009, external developments brought attention to the nature of the French jury's verdict. In a Belgian case involving the murder of a minister, the European Court of Human Rights (ECHR) challenged the compatibility of the Belgian jury system that did not include reasoned verdicts with the

222. See infra Section V.
223. See infra Section VI.
226. RAPPORT LÉGER, supra note 25, at 38.
227. Anne-Sophie Chavent-Leclere, Motivation et procès équitable, in JURISCLASSEUR PROCEDURES NO. 4, 5 cmnt. 129 (2010); see also Anne Leprieur et al., Chronique de jurisprudence de la Cour de cassation, Chambre criminelle, 2010 RECUEIL DALLOZ 39.
ECHR requirements of an equitable trial.\textsuperscript{230} The question was whether the reasoned decision requirement of the ECHR was compatible with the jury’s verdict.\textsuperscript{231} The European court said no.\textsuperscript{232} The Belgian government appealed the decision, but the Grand Chamber of the European court recently found in that case that the absence of a reasoned decision violated the Convention.\textsuperscript{233} The Grand Chamber’s opinion was careful to say that the case was not an invalidation of the entire institution of the jury system per se, but rather the procedure and outcome in this particular instance.\textsuperscript{234} If questions to the jury were specific enough to be able to understand the reasoning behind the decision, that might comport with the reasoned decision requirement.\textsuperscript{235}

French courts have taken up the issue of reasoned verdicts. A \textit{Cour d’assises} in Saint-Omer, in the north of France, for instance, tried to produce a more reasoned verdict in a murder trial.\textsuperscript{236} The presiding judge made the decision to attempt to comply with the ECHR decision.\textsuperscript{237} After consulting with the prosecutor, the victims, and the defense, the presiding judge crafted a series of sixteen specific questions aimed at showing the “reasoning” underlying the verdict.\textsuperscript{238} For example, one question asked whether the scratch on Mme. Matis’s arm was “attributable only to a wound of defense.”\textsuperscript{239} When the judges and jurors concluded it was not, it was understood that the defendant would be acquitted of the murder

\textsuperscript{230} Haritini Matsopoulou, \textit{Faudrait-il motiver les arrêts de la Cour d’assises?}, \textit{LA SEMAINE JURIDIQUE [JCP]} (Fr.), Nov. 16, 2009, at 456.


\textsuperscript{235} Michel Huyette, \textit{Quelles réformes pour la Cour d’assises?}, 2009 \textsc{Recueil Dalloz} 2437; see also Hélène Nico, \textit{La Cour de cassation étudie la question prioritaire de constitutionnalité relative à la motivation des arrêts de Cours d’assises}, 2010 \textsc{Recueil Dalloz} 2236, 2236.

\textsuperscript{236} \textit{Id.}

\textsuperscript{237} \textit{Id.}

\textsuperscript{238} \textit{Id.}

\textsuperscript{239} \textit{Id.}
charge.\textsuperscript{240} Thus, in at least one trial, the presiding judge found a way to implement what he considered to be the ECHR directive for reasoned decisions within French criminal jury trial procedure.\textsuperscript{241} Admittedly, the trial appeared to be a fairly simple one. A practical question is whether or not the court would be able to develop the number of detailed questions designed to offer an account of the reasoning underlying jury verdicts when there are many defendants and complex factual issues.

In January, 2011, the criminal chamber of the highest appellate court in France, the Cour de cassation, employed a recently adopted procedure, a priority preliminary ruling on the issue of constitutionality,\textsuperscript{242} to ask the Conseil constitutionnel (Constitutional Council) to assess whether the Criminal Procedure Code provisions for jury verdicts conform to the Constitution.\textsuperscript{243} The Conseil considered three priority preliminary ruling questions on the constitutionality of the absence of reasoned verdicts of the Cour d'assises.\textsuperscript{244} Public hearings were held in March 2011.\textsuperscript{245}

On April 1, 2011, the Conseil constitutionnel concluded that the absence of reasoned verdicts conforms to the Constitution.\textsuperscript{246} It stated that the absence of reasoned verdicts can be justified because other features of French criminal procedure guard against arbitrary decisions.\textsuperscript{247} The decision makers’ intime conviction is based on the elements of proof and the arguments which are openly debated. The careful and extensive formulation of a complete list of questions that the jury must answer is a particularly important protection against arbitrariness, as are the rules of deliberation and the requirement of a majority vote on each question.\textsuperscript{248}

The quasi-official commentary posted on the Conseil constitutionnel website explains that the French criminal jury is not only a procedural choice, but also a political choice; to find that an act constitutes a crime is not just a jurisprudential determination but also a reflection of citizens’

\textsuperscript{240} See id.
\textsuperscript{241} See id.
\textsuperscript{243} Stephane Durand-Souffland, Innovation aux assises: Un questionnaire avant le verdict, LE FIGARO (Fr.), Nov. 26, 2010.
\textsuperscript{244} Id.
\textsuperscript{248} Id.
judgments that “this is a crime.” The commentary observes that the combination of lay and professional judges who decide cases together in the Cour d'assises embodies a political balancing act. Requiring reasoned verdicts would inevitably tip the balance in favor of the professional judges. Hence, the legislature rather than the courts would be a more appropriate body to undertake such a modification of the political role of the French criminal jury.

VI. JURIES AND PUBLIC PARTICIPATION IN THE FRENCH LEGAL SYSTEM TODAY: SUPPRESSION OR EXPANSION?

In addition to questions over the nature of jury verdicts, the scope of lay participation in the French legal system has become a major political issue. The high-profile Rapport Léger, commissioned by French President Nicolas Sarkozy, undertook a major re-examination of the French legal system. Among the most significant problems it identified were lengthy delays for hearings at the Cour d'assises, which result in long periods of detention for defendants awaiting trial. As a remedy, the Rapport Léger proposed that the Cour d'assises be replaced with a new criminal court composed of professional judges and fewer lay jurors, and a more flexible and less formalist procedure than the current one. However, there was a split of opinion about the proposal, and consequently no majority in support of it. Nonetheless, others have taken up the idea. For example, French law professor Yves Jeanclos proposes the creation of a criminal court of the first instance that would substitute for the current Cour d'assises and also take certain cases that are presently heard by a lower court, the Tribunal correctionnel. This new court would consist of three professional judges and two jurors, and would provide reasoned verdicts, in compliance with the ECHR. The decisions could be appealed to a court of appeal with four professional judges and three lay jurors.

250. Id.
251. See Rapport Léger, supra note 25, at 1.
252. Id. at 25.
253. Id. at 37.
254. Id.
256. Id.
257. Id.
In recent months, President Sarkozy and his government ministers have made a host of seemingly contradictory statements on suppressing, or alternatively enlarging, the role of lay jurors in criminal cases in various ways. Some of their motivation may be to create greater efficiencies in the legal system, in line with the concerns expressed in the Rapport Léger. But there appear to be other factors at work. Populist rhetoric and lay participation in legal decision-making are being employed to counter what the government believes are overly lenient tendencies of the professional judiciary. Ironically, the promotion of lay jurors is seen as a method for ensuring a tougher, less forgiving approach to crime and criminals than that currently in place.

In July 2009, the then Minister of Justice, Michelle Alliot-Marie, in the context of overall criminal procedure reform, offered proposals to remove the jury in trials of the first instance while maintaining the jury court of appeal. The rationale was efficiency: to reduce delays between the end of the investigation and the beginning of the trial in the Cour d’assises. The Minister of Justice suggested that new criminal tribunals (Tribunaux criminels, not the same as the already established Tribunaux correctionnels, the courts that hear lower level offenses) be composed of five judges: three professional judges and two juges de proximité, that is, lay judges who serve for a period of time. However, French judges’ unions expressed serious objections to the proposal. They attached importance to the jury as an expression of popular justice. Hence, the judges’ unions recommended instead that the number of Cours d’assises be expanded. A parliamentarian presented a legislative bill to do just that in order to create a more efficient and effective Cour d’assises.

On September 9, 2010, shortly after the tragic murder of a woman jogger by a man who had previously been convicted of rape and released on parole, President Sarkozy seized the opportunity to announce his intention to introduce lay jurors to parole decision-making. Two months later, President Sarkozy confirmed the government’s plan to introduce lay ju-

258. Boutry & Tomasovitch, supra note 6.
259. Id.
260. Id.
261. Id.
262. Id.
263. See Saint Rémy, supra note 6.
264. Stéphane Durand-Souffland, Jurés en correctionnelle: la réforme en questions, LE FIGARO (Fr.), Nov. 18, 2010.
rors in criminal tribunals for the most serious misdemeanors. He reasserted his desire that citizens make parole decisions with professional judges: "I will ask the new Minister of Justice and the Prime Minister to lead a reform of the judiciary to bring justice closer to citizens. There has been much misunderstanding in recent times, especially on parole." Sarkozy went on to say, "In a Cour d'assises, a lay jury pronounces sentences with judges. And when deciding on early releases, it must also be a professional judge surrounded by lay jurors to make that decision." He concluded optimistically, "And so there will no longer be any scandals.

It is interesting to observe Sarkozy's presumption that French citizens will be tougher on crime than French professional judges. That may well be the case. After all, conviction rates are high in the Cour d'assises, and prosecutors appear to be more successful than the defendants in the Cour d'assises d'appel. However, consider the fact that in the United States, public opinion polls show that the citizenry as a whole is tough on crime as an abstract matter. When the abstract becomes concrete, it is a different story. As noted earlier, when jury verdicts are compared to the verdicts judges would have reached had they been deciding the case themselves, American juries are generally found to be more lenient than professional judges.

Currently, a French government working group is examining novel and different options for incorporating lay jurors into the French justice system. One possibility is to add two lay jurors to the three professional judges in the Tribunaux correctionnels—not in the original hearings, which are very numerous, but in appeals cases only. Another suggestion the working group is contemplating is to lower the number of lay jurors in the

266. Id.
267. Id.
269. Id.
270. Id.
274. Id.
mixed courts of the Cour d’assises. 275 The sheer number and diversity of proposals for the use of lay citizens is dizzying. Whether any of these proposals will actually become law is open to question. Whatever the eventual outcome, this ferment over lay participation in French criminal justice tells us something important about the political and other functions that are served—and are seen to be served—by lay participation in legal decision-making.

CONCLUSION

The French jury is a product of a revolutionary time, and was viewed historically as an important method of fighting arbitrary justice. It continues to hold symbolic and practical value as a democratic institution that allows the people a direct voice in the resolution of criminal trials. Today, of course, there are fundamental guarantees for defendants, both at the national and international levels. Judges possess a greater degree of independence from the state. Defendants also have significant options to appeal decisions they believe are incorrect or arbitrary. This state of affairs raises an interesting question about whether the jury continues to enjoy legitimacy in a state that possesses the rule of law, as France does. 276

Political and legal developments suggest that it remains a very significant institution. In some ways, the French have demonstrated more dedication to the idea and the reality of citizen participation than other countries one might think are more committed to the jury system. Australian legal scholar Bron McKillop observes that although British and Australian legal commentators have “sung the praises of the criminal jury,” that has not stopped them from “empowering judges to override jury verdicts on quite broad grounds.” 277 He writes:

It is ironic that the French, having transplanted the British jury into their criminal justice system after the Revolution, a system until that time operated by legal professionals . . . , have opted for a second jury court as the court of appeal for an accused convicted by a first jury court, while the British and Australians for nearly a century now have subjected guilty verdicts by jurors to scrutiny by judges and on very broad grounds . . . . 278

However, the independent fact-finding of common law juries, in contrast to France’s mixed court of lay and professional judges, cuts the other way.

275. Id.
276. See ROUMIER, supra note 25, at 87.
278. Id. at 357.
One cannot help but be impressed by the high rhetoric about the democratic values served by the French citizenry as they grapple with legal decisions. But what is missing from the debates over juries in France is systematic empirical study of the institution itself.\textsuperscript{279} Aside from some wonderful historical analyses, and the annual statistics of the operation of the \textit{Cours d'assises} and the \textit{Cours d'assises d'appel} that are published by the French government, we know very little about how French citizens embrace their work as lay jurors in conjunction with professional judges. The contemporary debates over the scope and nature of the French jury would be well served by empirical research about the current system.

\textsuperscript{279} Only a handful of empirical studies have been conducted dealing with the French jury, and most are historical in nature. We could not locate, in English or French, contemporary empirical projects that studied the work of actual jurors. There is work on related issues. \textit{See, e.g.}, Magali Ginet, Serge Guimond & Catherine Greffeulille, Human Justice or Injustice? The Jury System in France, in \textsc{Understanding World Jury Systems Through Social Psychological Research} 147 (Martin F. Kaplan & Ana M. Martin eds., 2006) (describing the outlines of the French jury and examining the implications of eyewitness testimony research for the oral tradition of the French jury trial); Rémi Finkelstein & Marina Bastounis, The Effect of the Deliberation Process and Jurors' Prior Legal Knowledge on the Sentence: The Role of Psychological Expertise and Crime Scene Photo, 28 \textsc{Behav. Sci. \\& L.} 426 (2010) (describing an experiment with simulated juries of French social science students or future professional magistrates finishing their final year of training).