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Chowra Makaremi

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The Right to Punish

Assessing Sentences in Immediate Appearance Trials

Chowra Makaremi

So how many hours of sleep did you get last night since you had to be in court? Want to know if you'll see your kids tonight? That all depends on how many cases you have ... That's what we talk about with colleagues. You have such a huge caseload that you almost become a robot. You make decisions when you're only half-informed about the cases. Numbers are what's most important: you make choices, you take risks for yourself and others. You take a look at the file and think, "So-and-so is clearly guilty," except that anyone who has more time to read the file sees that it is much more complicated than that. But you don't have time to read the case closely and can miss things ... It's really frustrating.

This was how one deputy prosecutor working in a large court district in the banlieues of Paris where we conducted our research¹ described his job. His words illustrate the extent to which the rise in the number of immediate appearance trials has increased the pressures placed not only on the day-to-day activities of his job, but also on the very meaning of what he does and what is at stake. As a result of several newly enacted laws and changes to penal policy guidelines, the number of immediate appearance trials rose by 43 percent between the years 2002 and 2006. This new form of judicial procedure has three major characteristics: it is a way of prosecuting minor offenses quickly, is aimed at offenders with prior convictions, and usually leads to a prison sentence (in 2010, 45 percent of all prison sentences handed down stemmed from immediate appearance trials).²

Immediate appearance trials are held in cases where the individual is accused of having committed an offense punishable by a prison sentence of six months to ten years. The trial occurs within 48 hours of the defendant's arrest, while he or she still remains in police custody. It is a so-called assembly-line type of legal procedure used today in nearly a third of all court hearings.³ This "prosecution in real time," as it is termed, is based on a penal system that operates under constant pressure, involving actors and institutions from various fields: the police officers who arrest the defendant, the prosecutors who decide whether or not to refer the case to trial, the psychologists and social workers who conduct social reports, the

criminal court judges who preside over the trial itself, and finally the sentencing judges who are responsible for adjusting the sentence either immediately after it is handed down, or while the convicted offender is serving it out. The social and political implications of this penal system have been consistently highlighted by sociological studies on the topic for several decades:⁴ it is a harsh and swift form of justice characterized by particularly high rates of conviction following a trial that rarely lasts more than twenty to forty minutes.

Immediate appearance trials exemplify the political uses of the penal system as a key tool in the fight against crime. Two processes are at play here: first, the judiciary is reorganized to ensure the swift prosecution of offenses; second, penal policies are devised to target recidivism. Since the 2000s, the latter process has given rise to new tools in the systematization of convictions, such as the application of mandatory minimum sentences. These two stances are not unique to immediate appearance trials: prosecution in real time prompts a wide range of penal responses, and the prevention of recidivism is a fundamental consideration in the judgment of both felonies and misdemeanors since mandatory minimum sentences are applicable in other judicial procedures as well. Yet immediate appearance trials are “seen as quintessential to swift prosecution,”⁵ and it is during these trials that most mandatory minimum sentences are required and applied. Thus, they offer a privileged vantage point from which to observe the logics at play in the handling of offenses. By examining the judiciary in light of this legal procedure, we will show how the penal response has become a way of governing social problems and how it has evolved since the 1980s within the context of security policies.

The above-described logics portray a judgment molded by constraints. How do these constraints shape the sentence which is at odds with other principles of justice such as the right to a defense, the individualization of the sentence, and the prohibition of administrative detention? And with regard to the actors and their daily practices, how do such constraints frame the judgment and determine, if not override, it, and how do judges reclaim their function within this system?

First, I will analyze the history and functioning of immediate appearance trials in order to understand how the handling of petty crime is conceived of as a social and moral project specific to the state’s governing of populations that are characterized by their precarity. In this context, the actual exercise of justice is organized around a question that is at once moral, legal, and political: that of automatic versus individualized penalties. I will subsequently explore this tension through a qualitative examination of criminal hearings. A courtroom ethnography shows how the work of the actors negotiates between two opposing tendencies: on the one hand, the systematic nature of the sentence, be it an effect of the organization of the large-scale penal machine or a technical tool for repressive public policies, and, on the other hand, the necessity for the individualization of sentences, which is enshrined as a fundamental principle of criminal law. When, why, and how do magistrates decide to rely on the tools of individualization to soften the determinative effects of mandatory sentencing? What room for discretion does the interplay between systematization and personalization offer the actors of the

justice system? Lastly, what is the conception of the offenders underlying this judgment, and which subjects of penal action do these mechanisms produce?

The Penal Handling of Offenses: Between Social Control and Moral Regulation

The quick and widespread judicial procedure known as immediate appearance trial took shape through the sedimentation of two rationales which still lie at the heart of this system today. On the one hand, the penal apparatus is reorganized around the concept of recidivism, and on the other hand, it is oriented towards the management of influxes. A look at the genesis of the French penal system shows how these two notions—recidivism and prosecution in real time—are historically rooted in the social and political will to regulate “floating populations” in the nineteenth century. This targeting of populations identified by their urban and social marginality helps us to understand why and how immediate appearance trials were reformed, expanded, and presented as a political response to the question of “insecurity” associated with youths from immigrant backgrounds beginning in the early 1980s.

The Repeat Offender: A Subject of Judicial Intervention

In light of contemporary laws promoting the repression of recidivism, this “creative obsession”⁶ of the nineteenth century has been the subject of increased attention in recent years. Studies devoted to the concept of recidivism indicate that it is a relatively recent one, emerging at the end of the eighteenth century only to be imposed on judicial practice over the course of the next century.⁷ According to Mario Sbriccoli, the reflection on the causes of “criminality” is driven by the first crime statistics and their dissemination, albeit in embryonic form, through the nascent press in the second half of the eighteenth century. His analysis is thus inscribed in the perspective proposed by Michel Foucault, who showed how statistical tools helped to construct the population as an object of government.⁸

Studies on the notion of recidivism highlight its absence in penal systems prior to the Revolution. The category is only imposed over the course of an important evolution in the social organization that underlies the forms of control: the transition from mutual acquaintanceship to anonymity and the increase in geographic mobility through the urbanization and industrialization of the country. Thus, according to Frédéric Chauvaud, the interest of criminal lawyers in recidivism only took off in the early nineteenth century, when France experienced an initial period of industrialization.⁹ While local societies lost their power to manage conflicts and maintain order, the “national state” found itself “first in line to ensure the safety of people and their property,” contends Philippe Robert.¹⁰

The importance of recidivism and the figure of the recidivist are thus the result of transformations in modes of legal, political, and social regulation. They

echo an evolution not only in the exercise of justice, but also in the philosophy of punishment. They point to a shift in the conception of the offender, the dangers he presents to society, and the ways in which he can be reformed.¹¹ From these discussions emerges the fundamental principle of individualized sentencing.

The Paradoxes of Sentence Individualization

In his work on the birth of the prison, Michel Foucault traces the genealogy of an early nineteenth-century reform movement that developed a new approach to sentencing, marking a break with the idea of punishment.¹² The sentence was aimed at the rehabilitation of the offender from a humanistic and utilitarian perspective. In this view, the social reintegration of the deviant individual was both a more effective form of protecting society, and a practice of coercive power mindful of the value and dignity of the subject on whom it is exercised. This movement was embodied by the French Penitentiary School, or the Prison Society, founded after the restoration of the monarchy at a time when philanthropic enterprises were taking off.¹³ The thought of individualizing punishment was gradually integrated into the philosophy of criminal law beginning in the nineteenth century, eventually becoming a fundamental principle thereof.¹⁴ The principle of an individualized sentence, built around the offender as a person, around his individual responsibility, and around his potential for moral reform was introduced into the French legal tradition through a seminal text published by the criminal lawyer Raymond Saleilles in 1898. The text enshrined in the law a reversal in the definition of the “right to punish,” which took place over the course of the century: the sentence was not only the retribution of one wrong for another, as established by Christian tradition, but also a right that remedied a wrong. The idea of individualized sentences was imposed as the practical application of this shift. It concerned as much the goals of reform and socialization attributed to the sentence—at once useful to society and desirable for the individual convicted—as it did the perception of the offender on which this enterprise was based: a responsible person who will be the subject of a moral transformation prompted by the evaluation process entailed by individualization. This, argues Saleilles, was in fact motivated by

the now indispensable need to take into account the individual himself and therefore the necessity to proportion the sentence less according to the act he has committed or the external wrong that he has produced, than on a wrong which is inside of him, on a kind of latent and potential criminality which makes him a danger to others, on his degree of morality or, if it can be said, of normalcy, and on the chances of rehabilitation he can offer.¹⁵

In practice, the principle of individualization increased the amount of discretion in sentencing, offering judges more autonomy in the choice of sentence and in

the elements that could be considered during adjudication. The last point has two consequences: first, individual responsibility is assessed by taking into account the intention; second, the personality of the individual (his moral sense, manners, and character) becomes part of the judgment beyond the act committed. As Saleilles points out, “Individualization and specialization of the sentence would have to take into account the whole individual, not the fragment revealed by the crime.”¹⁶ So individualized judgments echo the paradox that lies at the heart of Foucault’s genealogical work on the prison: while the conditions of punishment may have been softened, the humanist and utilitarian approach is also more intrusive in so far as the sentence focuses on the offender as a moral subject.

But the attention paid to recidivism reveals another paradox: the principle of sentence individualization is concomitant with the Law of May 27, 1885 on the banishment of recidivists, which establishes “perpetual internment” in penal colonies for delinquents and criminals who exceed a certain threshold of violations. The promotion of convicts’ capacity for moral reform goes hand-in-hand with the assumption that a fraction of them remain forever incorrigible. Seen as a critical threat to social order, the notion of recidivism born out of this new penal policy thus suggests a perception of both crime and the criminal rooted in the hesitation between two conflicting imperatives: the integration (or objective reentry) of the offender into the social body and the exclusion (or definitive distancing) of individuals deemed incapable of amending their ways.¹⁷ Examining the convict profiles found within “reports of recidivism” kept by the archives of the Paris courts, it becomes apparent that between the restoration of French monarchy in the 1830s and the start of the Third Republic in the 1870s, an itinerant “population” of recidivists came into being, living in poverty on the margins of society, pushed beyond the walls of Haussmann’s Paris.¹⁸ It is precisely with regard to the management of this population living in urban marginality and wage instability that the police and the judiciary develop in the intervening period a method of handling the constant flow of offenses, a method later legalized as “*in flagrante delicto*.”

The Origins of Real-time Prosecution

In flagrante delicto judgments were introduced by a series of penal reforms in the second half of the nineteenth century. René Lévy shows how the Law of 1863 instituting this procedure formalizes and legalizes judicial and police practices gradually introduced during the Second Empire.¹⁹ This procedure appears as a functional necessity, allowing for a response to key transformations in the courts, namely the importance and autonomy acquired by prosecutors as well as in the police, particularly through changes in law enforcement methods, the redeployment of police officers and gendarmes, and the creation of police files. The handling of offenses in real time via a simplified investigation conducted by the police thus appears as a tool to “adapt to the productivity of the judiciary to that of the police.”²⁰

Analysis of the legislative debates accompanying the institution of *in flagrante delicto* highlights a fundamental issue: is it possible to reconcile freedom and security? This question will color subsequent developments in the law even until today. First conceived as a solution to the problem of preventive detention for those who posed a flight risk, *in flagrante delicto* restricted the controversial use of pre-trial detention for “itinerants,” which had become an increasingly widespread practice during the nineteenth century. However, far from correcting the social arbitrariness of imprisonment before trial, the law validated its use because the detention was justified by the risk that the accused would abscond and not by the gravity of the act. The deprivation of liberty was thus made necessary by the social precarity of the individual being judged, even if this deprivation proved groundless after the judgment. As the parliamentary debates on the adoption of the law in 1864 show, the *in flagrante delicto* trial was presented as a concrete system that would reconcile two conflicting concerns: on the one hand, the risk of undermining the respect for the freedom of “honorable citizens” potentially exposed to “persecutory acts,” and on the other, the need to secure urban centers plagued by crime. The cause of this latter concern was attributed to a “floating population”—“people without hearth or home, without livelihoods, at odds with society, recidivists”²¹—which was made the target of criminal proceedings in real time. “Honorable citizens” versus “people without hearth or home”: from its inception, the *in flagrante delicto* trial appears as a tool for the differential penal management of the population.

The Defendants: Young Men Often from Migrant Families

Handling crime in real time through the use of immediate criminal hearings is therefore part of the same structural evolution in the methods of social regulation that placed the notion of recidivism at the center of penal thought in the nineteenth century. Beginning in 1864, the procedure acquired a stable form, which lasted for more than a century until the reforms of the 1980s. In addition to this procedural stability, there also exists a consistency in the social uses of this prosecutorial form, as shown by the homogeneity of the population it affects. When immediate appearance trials were first instituted in the early 1980s, René Lévy observed that the penal clientele affected by this procedure was becoming increasingly younger and beginning to include more and more immigrants. Statistical studies conducted at the time explained that the overrepresentation of defendants with foreign backgrounds could be attributed to the choices of penalization determined by the police and prosecutors: “Even when they are French nationals, the probability [that these defendants] will be tried for *in flagrante delicto* is double that of French persons of metropolitan origin and 50% higher than French persons from overseas territories.”²² Relying on statistical data collected in the field, we can say that this trend has increased significantly, with an even younger public and even more people of foreign origin affected today.²³

The population targeted by this criminal procedure is distinguished not only by social, racial, age, and gender characteristics that remain constant over time, but also by a degree of homogeneity in their backgrounds. In France, nearly four out of five defendants have a low level of education and a criminal record, which, as several studies have already established, is indicative of the formation of a judicial and police “clientele.”²⁴ While the consistency in the profiles of those tried in immediate appearance trials comes as little surprise, the offenses in question have in fact evolved since the 1980s. The share of traffic offenses, charges of insulting a police officer or resisting arrest, and immigration violations has increased sharply. These evolutions are due to changes in legislation and public policies which promote the criminalization of certain offenses such as driving without a license or the lack of a residence permit. Yet they also stem from a managerial interest in resolving observed offenses immediately, in order to satisfy numerical objectives demanded by new methods of evaluating police activity. As for the nature of the sentences, half of them translate into hard jail time. And one cannot help but notice their severity, which has been highlighted by the quantitative analyses produced on the subject since the Second Empire.

In sum, the historical approach highlights two dimensions. First, the judgment procedure, which is both swift and severe, targets a homogeneous population that is socially excluded and portrayed as a threat. Second, it is closely linked to the constraints imposed on police activity. The function of social control assigned to this form of prosecution explains why it was used in the last decades and privileged over any other type of public action in the service of the fight against crime as it became a major political issue. With *in flagrante delicto*, the state management of social problems related to the modern condition (mobility, insecurity, urban marginality) acquired a penal dimension. This trend continues under the form of immediate appearance trials, even though the realities to which the social exclusion refers have since changed. The precarious margins of the nineteenth-century working class have been replaced by disadvantaged youth of immigrant origin: the racial question has been superimposed on the social question.²⁵

The Penal Instrument of Security Policies

Public representations and actual categorizations at play in immediate appearance trials, as well as the function of social control assigned to them, inscribe this penal treatment within a broader project of “moral regulation.”²⁶ Within this project, social relations are renegotiated over the course of major evolutions, like those experienced in France with post-colonial immigration and the settlement of migrant populations through multiple processes of exclusion.²⁷ Practices of moral regulation do not mask other forms of political and social control, but coexist alongside them, says Allan Hunt. They refer, according to the definition given by Philip Corrigan and Derek Sayer, to a “project of normalizing, rendering neutral, taken for granted, in a word ‘obvious,’ what are in fact ontological and epistemological premises of a particular and historical form of social order.”²⁸

In recent times, two moments have come to illustrate the reconfiguration of the moral issues underlying the political uses of the justice system: on the one hand, the expansion and increasing usage of immediate appearance trials beginning in the early 1980s, and on the other hand, the repressive evolution of the legislative and judicial system since the 2000s.

Unreformed for over a century, *in flagrante delicto* judgments were significantly reworked by the Law of February 2, 1981, only to be subsequently revisited by the Law of June 10, 1983 which established “immediate appearance trials.” These penal reforms came at a time when the fight against crime had become a major priority in public debates and policies, while the issue of insecurity established itself as a social problem and a matter of “common sense” spanning the left–right divide.²⁹ This was accompanied by the emergence of institutional and media discourses surrounding the question of “urban violence.” According to Laurent Bonelli, the report presented by Minister of Justice Alain Peyrefitte in 1977 was a milestone in the gray literature produced on this subject. It marked the beginning of a global approach toward the “new general feeling of insecurity,” which would prevail in the ensuing decades. The ministerial report’s initial assessment was that “violence has taken hold in the heart of the city,” especially “ordinary violence, as if life itself had become violent.” Based on various institutional statistics and opinion polls, this approach was based on the assumption that affects and collective emotions were in a state of crisis or, as the report termed it, a “feeling of insecurity” that could be defined through four assertions: “The risk of being a victim breeds fear. The spectacle of violence provokes emotion. The tensions of collective life cause exasperation. Anxiety stems from the feeling that the situation is difficult to define.”³⁰

This line of reasoning was adopted by Alain Peyrefitte in order to justify his Liberty and Security Act of 1981, which reformed the *in flagrante delicto* trial (giving the procedure its present form), while at the same time amended the Penal Code to include repressive measures like increased penalties for repeat offenders, constraints on suspended sentences, and limits placed on parole. Partial revisions to this law would be made by the new Socialist government when it later passed the Law of June 10, 1983, but the procedure of “direct referral to the criminal court” was nevertheless retained. The minister of justice justified the procedure’s retention, arguing that it made “justice swifter.” But the very name of the law and the introductory speech before the National Assembly presented these penal reforms as a response to the perception of political and social issues expressed as a “feeling of insecurity,” the recurring theme of which had grown increasingly evident in the public and media debate.³¹

This discourse on insecurity reverberated throughout various public forums: expert reports, law commissions, the judiciary, the media.³² The conversations that took place would determine the values and reference points from which security concerns would unfold in the ensuing decades. Following the legislative push of 1981, further adjustments were made to penal policies, including the Internal Security Act of 1994, which toughened penalties for certain traffic and

immigration offenses (among others) by reclassifying them as misdemeanors. Between these two dates, securitarian common sense was compounded by a resurgence of xenophobic discourse in the public sphere directed against undocumented immigrants and French youth of immigrant origin living in low-income neighborhoods.³³

The handling of crime has undergone several significant reforms since the establishment of immediate appearance trials, especially in the last decade: more than fifty criminal laws have been enacted between 2000 and 2012. These laws follow a general trend marked by two characteristics: on the one hand, the expansion of police powers over deferment to the courts, and on the other, the diversification and strengthening of legal tools for the punishment of recidivism. The latter responds to a desire to enhance the deterrence effect of the sentence by relying on theories of crime and society like the “broken windows” theory. Imported from the United States, this theory views disorder—be it qualified legally or not, as in the case of “antisocial behavior”—as an invitation for crime. As a result, acts presenting a potential for social disorder, beyond the threat that each of them poses individually, collectively become the object of public action for the prevention of crime. This prevention is in turn based on an exponential increase in the cost of the offense for the offender, who is perceived as a rational actor.³⁴ The Law of December 12, 2005 on “the prosecution of repeat criminal offenses” increased the prison time as well as the probation time when the offender was in a state of legal recidivism. The Law of August 10, 2007 “strengthening the fight against recidivism in adults and minors” introduced a major reform in the French legal system by including mandatory minimum sentences for repeat offenders. One effect of this reform was the systematization of convictions, as sentences were to be determined from then on by a minimum based on the existence of prior convictions. While mandatory minimum sentencing was applicable in other penal procedures, its impact on the immediate appearance trial was particularly important, since the latter targets a population of young offenders who have already been in trouble with the law. According to the quantitative data collected in the field, 65 percent of people judged in immediate appearance trials were in a state of legal recidivism (meaning the second act was of the same legal category as the previous one), while 85 percent of them had prior convictions (meaning the second act was not specific).

An initial assessment of the application of the 2007 Act underscores its impact on the increase in the country’s prison population: the number of people in custody in France grew from 63,000 in 2006 to 68,000 in late 2007, and the average overall length of prison sentences went from 7 to 16 months over the same period.³⁵ However, magistrates can waive minimum sentences if they provide a justified decision. Judges do use this practice, which allows them to preserve the French ethic of “individualized sentences” within a new rationale of automaticity. There is indeed a tension between the principle of individualization enshrined in French penal law and the introduction of mandatory minimum sentences as part of a technical arsenal standardizing penal responses in cases of recidivism. This

tension produced much controversy and resistance. First proposed in 2005 by the Conservative Party which was in power at the time (at the initiative of Minister of the Interior Sarkozy to the dismay of Minister of Justice Perben), the draft law on minimum mandatory sentences was initially rejected on the grounds that it opposed the French tradition of sentence individualization.

Personalizing the Investigation

The principle of individualization was first imposed through the discretion granted to judges in assessing a sentence depending on the character and previous history of the defendant. Since its inception in the late nineteenth century, this principle has been subjected to different changes. The most notable ones were inspired by the post-World War II criminal lawyer Marc Ancel, who would have considerable influence on Minister of Justice Robert Badinter, and the reforms of criminal procedure in the 1980s and 1990s. Championing a rehabilitative and humanist approach to criminology or, as he called it, the “new social defense (*défense sociale nouvelle*),” Ancel revisited individualization, favoring instead the concept of the “personalization” of the sentence, which was introduced under his influence in the new Penal Code of 1994:

Within the limits set by law, the court hands down sentences and determines how they will be carried out according to the circumstances of the offense and the character of its author ... The nature, length, and way in which the sentence is carried out are determined so as to reconcile the effective protection of society, the punishment of the convicted, and the interests of the victim with the need to promote the integration or reintegration of the convicted and prevent the commission of further offenses.³⁶

Reference to the “person” rather than the “individual” is indicative of a moral approach to the reform of offenders,³⁷ explicitly demanded by Christian concepts of “charity” and “redemption” introduced in the philosophy of sentencing. The emphasis on “moral rehabilitation”³⁸ turns the sentence into a process by which the accused is held “accountable for his actions” by the judicial institution. In practice, the evaluation of the person responsible for the criminal act requires systematic assessment methods that go beyond the subjective interpretation developed by the judges during trials. To do this, psychological and sociological thought was introduced into the judicial analysis, making room for social backgrounds and formations of character. Introduced in France in the early 1980s, the “brief social report” provided this method and became the specific tool in the implementation of sentence personalization in adjudication.

Brief social reports were established as part of an initiative of the Ministry of Justice with the aim of testing in France a method that had been previously experimented with in the United States.³⁹ In 1960, the Vera Institute of Justice, a private entity located in New York City, established a survey method for assessing

the social integration of defendants who did not have sufficient assets to post bail pending their trials and were therefore remanded into custody, even if the severity of the offense of which they were accused did not justify such a deprivation of liberty. The United States has no legal equivalent to immediate appearance trials, which were of course conceived as a response to the issue of provisional detention. The studies conducted by the Vera Institute presented information on the financial situation, living arrangements, career paths, and family situations of the accused, which allowed judges to assess whether those who were too poor to afford bail were nonetheless integrated into a social network and would therefore be likely to appear in court.⁴⁰ The experiment was exported to France in 1980 by a team of investigators trained by the New York experts to assist judges in their decision whether or not to grant bail to persons held in custody. This method was quickly extended to *in flagrante delicto* trials, proving useful to the magistrates, while its application to provisional detention was abandoned.⁴¹ Since then, the brief social report form has become a full-fledged tool for judging in real time. And while the apparatus has not been incorporated into service of the state as originally planned, the association created to consider the arrangements and adaptation of this practice to a French context still continues its activities with several courts in the Paris region. Elsewhere, reports are delegated by each court to socio-legal non-governmental organizations grouped together at the national level by the federation “Citizens and Justice.”

The way in which each organization in charge of these reports operates depends on local habitats and the size of the jurisdiction. In the court I observed, the brief social report was based on a fifty-minute meeting that took place between the investigator, usually a psychologist by training, and the accused, when the latter had been transferred from the police station to detention facilities pending trial. The interview consisted of questions about the professional, legal, and family situation of the accused. The investigator then contacted employers or family members to verify this information, which he or she would summarize in a two-page memo sent to the prosecution and placed in the case file submitted to the judges. As will later be seen, this information was read and sometimes discussed at trial.

Initially conceived for trials of young adults (18–21 years) by the Act of July 6, 1989, which amended the Code of Criminal Procedure, the brief social report was made a requirement for all defendants under the Law of March 9, 2004. The repressive trend of which the latter is part is thus accompanied by a systematization of the instruments for the individualization of sentences. Within the context of a penal policy focused on recidivism, the systematic use of brief social reports has paradoxically perpetuated and strengthened the development of a personal and rehabilitative vision of sentencing.

This movement illustrates the tensions between swift prosecution, mandatory sentencing, and individualization at the heart of adjudication. What tangible system emerges from these different rules and practices underpinned by conflicting visions? How is this double imperative experienced by magistrates in their day-to-day work and what professional ethics are negotiated? I will now address these questions.

The Right Sentence

As stated in the assessment made by the government in June 2010, criminal court judges waived minimum sentences in half of the cases where they were applicable. Nevertheless, the study does show that this tendency declined from one year to the next as the new practice became normalized in the courts. Despite widespread opposition from various magistrate unions, this standardization made notable inroads in terms of legal precedents, since prosecutors were instructed by the Ministry of Justice to appeal decisions where the minimum sentence was not applied. In the court where I conducted my study, the prosecution made substantial efforts to normalize automatic sentencing, appealing decisions in which the law was disregarded 22 percent of the time, i.e., two-and-a-half times more often than the national average.⁴² While mandatory sentencing is still being debated by judges, it has become a full-fledged tool in the day-to-day work of prosecutors, who are considered by the judicial hierarchy as the guarantors of its enforcement. To see how mandatory sentencing is actually applied or circumvented, let us take a look at a routine hearing in an immediate appearance court.

Mandatory Sentences and Their Circumvention

The defendant was a young, 22-year-old black man of French nationality, Elijah Traoré. The courtroom was half filled with the relatives of the 14 individuals on trial that day in a court session that would start at 1:30 p.m. and last until 9:00 p.m. The defendants were brought in groups of three or four from holding cells in the basement of the courthouse into a Plexiglas dock. Their cases were heard one after another, then the tribunal composed of three judges recessed to deliberate, after which it announced the verdicts in quick succession. Elijah was accused of having received stolen goods, “in the form of buying a packet of stolen lunch vouchers,” and of insulting a police officer and resisting arrest. The trial began by returning to the circumstances of his arrest. The police had been on patrol in front of a building entrance when they saw Elijah Traoré enter. They recognized the youth as having been at the police station previously. They found his behavior suspicious since he had “put his hood up” and had looked around before entering the building.⁴³ The police decided to check his identity. The young man “removed his hood and got annoyed,” after which the police decided to search him. This was when they found a packet of lunch vouchers not in the name of the accused. They arrested the man and took him to the police station.

We should now briefly reconstruct what came next. The suspect was placed in custody, that is to say, held in a police cell where his statement was taken by a judicial police officer. The latter then passed along his report to the jurisdiction’s prosecutor. The case of Mr. Traoré (the charges against him, his statements, his behavior, his criminal record) and the cases of all those held in custody that night were outlined over the phone to the deputy prosecutor who determined the nature of the offenses and what legal action to take each time: release with a summons

to appear before a criminal court or a plea bargaining commission (the defendant then agrees to “plead guilty” in the context of a simplified procedure without an adversarial trial); remand to custody and the ordering of an investigation; immediate appearance trial within 48 hours after arrest, etc. The suspect was subjected to this last procedure: he was charged with possession of stolen goods as well as for “insulting a police officer and resisting arrest” while in custody. The day after his arrest, he was transferred in the morning to the holding cells located in the basement of the courthouse. He met a deputy prosecutor for a face-to-face interview in the holding cell. Generally, the prosecutors read for the defendants the charges against them and ask them a few questions to complete the police records and prepare the indictment. Then, for nearly an hour in his cell, Mr. Traoré met with a psychologist responsible for drafting his brief social report.

In the early afternoon, Mr. Traoré was brought handcuffed into the courtroom, where his case was heard after several others. First, the judge looked at the two alleged offenses: buying stolen lunch vouchers, which the defendant admitted to, and assaulting a police officer while in custody, which he denied:

I was the one hit. The police officer I had the altercation with left to execute a search warrant. I had to wait for him to return to confront him, and since I wanted to get out of there as quickly as I could, I confessed to the alleged assault. It’s been three years since I’ve last been arrested and it was very hard for me to find myself back there. I’m trying to do the right thing, I’ve been trying for the past three years. I’m sorry, I’m ready to apologize to set everything straight.

The judge replied: “You are no longer in middle school.” “I know,” said Mr. Traoré, “but apologizing is something. Ever since my incarceration, I’ve only wanted to do the right thing and not end up in one of those cages again.”

The brief social report, read aloud, specified that Mr. Traoré “was jailed in 2007 for ‘gang assault.’” It went on to indicate that “Mr. Traoré lives with his mother, the family gets along, but he was traumatized by the death of his father. He is monitored by a social worker. He has tried to reintegrate into society since his release from prison and is currently training to become a wood turner.” The floor was given to the counsel for the plaintiff, that is to say, the police officer who had brought suit and was demanding 900 euros in damages for pain and suffering. The prosecutor then gave his closing argument:

No one forced the defendant to receive stolen goods, and no one forced him to threaten the officer. He has a selfish and self-centered outlook on life: he does what he pleases and the world must adapt. [Turning to the defendant] We respect others, especially a police officer, who does honorable work and deserves more respect than anyone else. The defendant has already been convicted twice. He was incarcerated and he says that he took court-ordered civic responsibility classes. How can we be sure that he has learned what it is

to be a good citizen? He faces a minimum prison sentence of one year without possibility of parole and cannot receive a suspended sentence with probation. The defendant loses his temper when he is in jail and should therefore keep a low profile. He is to take court-ordered civic responsibility classes to understand that our society requires that he learn certain values. It is not easy but that is how it is.

The prosecutor requested a twelve-month prison sentence, eight months of which were to be suspended, accompanied by eighteen months of probation with mandatory therapy sessions to manage his violent behavior and help fulfill the requirement that he find a job.

Mr. Traoré's court-appointed lawyer in turn made her case. In response to the prosecutor's arguments, she asserted: "It is not a lack of societal values, but a certain jadedness. This jadedness is understandable given the [social context]." She then mentioned the classes the defendant had started taking before concluding: "This is someone who surrounds himself with the right people. Are we going to ruin his efforts?"

The trial lasted a little less than forty minutes. The judges recessed to deliberate on the series of cases, which Mr. Traoré's had just ended. Half-an-hour later, the four verdicts were announced in the order in which each case had been heard. A 21-year-old adult of Algerian origin, convicted of stealing a handbag and who also had prior convictions, was sentenced to two years' imprisonment, eighteen months of which were to be suspended with probation with the requirement that he be treated for alcoholism and compensate the victim. A 30-year-old Congolese man convicted of driving while intoxicated was given a two-month sentence and a 500-euro fine. A 25-year-old man of Algerian origin convicted of credit card theft was sentenced to five months in prison plus seven months of a previous suspended sentence, accompanied by a fifteen-month suspended sentence with probation with the requirement that he be treated for alcoholism. Mr. Traoré was likewise found guilty of the charges brought against him and sentenced to three months of prison but was released pending execution of the sentence (that is to say, the defendant is not directly escorted by police from the courtroom to the jail). The judge stated that the minimum sentence would not be applied "on the grounds that the defendant shows promise of reintegration." It was, however, legally impossible to circumvent the prison sentence. Nevertheless, the magistrate handed down a sentence without immediate imprisonment, offering the possibility that the sentence would be adapted by the judge—another legacy of the individualized approach.⁴⁴

The details of this trial illustrate three issues surrounding sentencing. First, the remit of the case as determined by the prosecution creates a situation wherein the defendant is held in custody for the mere purchase of stolen lunch vouchers. Then, following an altercation with a police officer while in custody, he is judged in an immediate appearance trial: a trial in which he systematically risks a prison sentence. This mechanism of prosecution is found in other situations like the

theft of a cell phone, the breaking of a car window, the theft of two euros by a homeless man, or the use of a laser pen on a highway sign, all of which led to a public trial after custody. Almost every time judges were faced with sentencing guidelines they could not disregard, even when they gave a reason for their refusal to apply the minimum sentence in their decisions. In cases like these, which form the bulk of the court's docket, the gap between the act committed and the coercive form of judgment, as well as the extreme severity of the sentence incurred, raises a question: is it really the offense that is being judged (the theft of a few euros, the possession of stolen lunch vouchers)? The disproportion between the act and its prosecution raises yet another question: if it is not (only) the act that is being judged, who or what is being punished then? And what does the sentence mean?

Second, what is debated in the courtroom is not so much the defendant's guilt (the defendant is considered guilty *a priori*, unless proven otherwise as interviews with judges make explicit), as it is the assessment of a just sentence. This assessment is made within the many technical constraints, which leads to the severity of the penal response to recidivism—mandatory minimums are only one factor in the matter.

Third, the paradox is that sentencing has been legally redefined since the 2000s in a move towards ever more repressive response, while simultaneously, sometimes in sections of the same statute, the commutation of sentences is encouraged and facilitated. In other words, mandatory sentencing laws have increased the number of sentences handed down as well as their duration, whereas new measures have helped to reduce or commute the actual incarceration. This paradox creates contradictory demands that frame the work of the magistrates on political, ethical, and practical levels.

Evaluating the Offender's Criminal Record

The trial described above reveals the importance of the proceeding's time frame and the form of prosecution decided. The form of prosecution, the qualification of the crime, and the requisitions made by the prosecutor have three characteristics. First, the management of cases in real time systematizes the passage from police procedures to judicial procedures. The path of Mr. Traoré from his identity check to his conviction in criminal court suggests one thing: the delinquency that is being prosecuted seems to be constructed by the very system put in place to manage it. In a justice that is overburdened and perpetually lacking in resources, this issue is especially crucial. Second, in this swift prosecution, a moral discourse is realized through the hearing. What occurs in the courtroom is a small part of the entire process. The values on behalf of which the system works are publicly asserted: the importance of employment, the possibility of integration, and civic responsibility—and, more generally, an application *in situ* of individual responsibility. Within this framework, the adjudication is organized around the notion of recidivism: in a legal and technical way on the one hand, and in the assessment of the individual's background in addition to the acts committed on the other.

There are no specific categories of offenses that are judged at immediate appearance trials, but ones that are remitted to this form of trial by the prosecutor. The elements taken into account in deciding the form of prosecution are threefold. The first is the evidence established by the police report. The second is the legality of the police custody procedure; due process rules must be met or the counsel for the defense can appeal on the grounds of improper procedure, overturning the conviction and thus wasting the court's time and money: the prosecutor quickly anticipates this possibility and ensures that the charges "stick." The third is the length of the sentence faced by the accused, which must exceed two years in prison or six months in prison for *in flagrante delicto* offenses. However, the sentence incurred is itself determined by the state of recidivism, since the existence of a criminal record not only incurs a minimum sentence, but also doubles the length for the offense committed. The rules and practices of prosecution thus produce a judgment process, which prosecutes not so much the offenses as it does the offenders.

However, the problem of recidivism, around which prosecution is organized, exceeds the legal concept in the strict sense (having already been convicted of "similar" acts) to attach itself to a broader assessment of the criminal records of the offenders. One prosecutor stated:

When a decision about the type of trial is made, prior convictions are one of the first things taken into account. "Recidivism" is a technical term: the person has been convicted of similar offenses. While this is certainly taken into account, what is more generally considered is the notion of repetition, even though the person is not a recidivist because he or she has not been tried yet. On the phone [during the conversation with the judicial police officer who gives the arrest report], it is one of the first things I consider. That's why I have the police records and the files that show the current cases.

However, in the reconstruction of an offender's background, the seriousness of each offense is blurred by a chain of relationships between the noted offense and the previous ones. As the same prosecutor points out:

With prior convictions, it is the nature of the offense that is important. Say that someone has committed ten robberies and that for the first time, he or she is pulled over for drunk driving: I think that is much less serious than someone arrested two or three times for driving under the influence. Because it means that here is someone who is already used to this kind of dangerous and reprehensible conduct and is therefore liable to do it again. Whereas someone who has committed a lot of completely different offenses and who is caught drunk-driving for the first time is probably safer on the road than the one who has been convicted twice before for the same thing. I look at the nature of the offense first: was the same offense committed? When were they committed? Because someone who commits theft in 2000 and then again in 2010 is, for me, less worrying than someone who commits theft in 2009 and

then again 2010. And then there is the importance of the previous sentence. Someone who has received a warning and breaks the law again, that is not the same thing as someone who has been sentenced to prison for three years and breaks the law again because he has received a more serious warning: the severity of the first punishment is something I have to take into account when thinking of how I will respond.

From the different criteria for evaluation that make up the offender's criminal record—the repetition of the same offenses, the time between the offenses, and the nature of previous punishments—the figure of the repeat offender is constructed. This assessment of the accused's past not only takes into account the criminal record and other police files available to the prosecutor, but also the information available through the brief social report. As one vice president of a criminal court emphasizes: “In the two years between his first conviction and his second offense, what has the person done? If he looked for and found a job, if he has built a family, these are factors that lead us to disregard minimum sentencing requirements.”

As we have seen, the prosecutor's job of determining the type of procedure is essentially tantamount to a “pre-judgment” carried out by a single agent from his office. The trial which follows this determination is itself divided into two parts: the examination of culpability according to the “judicial truth,” which stems from the written record and questioning at the hearing, and the assessment of an appropriate punishment. Judges and prosecutors are in unanimous agreement that doubt is the cardinal virtue of their offices. Nonetheless, they take for granted that only cases in which the facts are fairly well established and the rules followed tend to be presented in immediate appearance trials:

When there is doubt, it works the other way: we doubt [the accused's] guilt, not his innocence. The premise is that the prosecutor has information that gives him and the judge reason to believe that the accused has committed the offenses he is charged with; then, we check to see if we are convinced that the defendant committed those offenses.

This initial screening explains why the trial itself mainly focuses not on whether the defendant is guilty of the offense (in 2008, only 4.4 percent of defendants in trial were acquitted⁴⁵), but on the assessment of the penalty incurred.

As explained earlier, the idea of a mandatory minimum sentence is not a break with, but the systematization of, a logic of punishment that existed prior to the law through other technical and legal tools. The novelty comes from the obligation it imposes on judges, where autonomy once prevailed.

However, the actual exercise of judgment once again reverses the pattern desired by the law. The trial undertakes an evaluation of the criminal record and the character of the defendant. This evaluation allows for decisions to be made prior to the application of the mandatory sentence or to its circumvention through the different legal tools available to judges. As one criminal court judge confirmed:

When deliberating, we start by asking: what does it deserve? Then, afterwards, we consider: does it incur the minimum sentence? If so, then we have to disregard it: how do we do that? (We have legal tools for this. If these tools are taken away from us, then we can't do it anymore.) Sometimes it is really difficult, but we prefer to think like that. Normally, this is not how we should think. We should be saying: he incurs the minimum sentence, does he meet the criteria for disregarding it?

As shown, the legal tools available to judges are, on the one hand, the personal circumstances of the accused, which provide a reason to disregard the application of a minimum sentence, and on the other hand, the adjustment of the sentence through the use of suspended sentences in conjunction with probation, but also through direct referral to the sentencing judge before the execution of the sentence.

The Rationalization of Moral Sentiments

Personalizing a sentence thus operates on several levels. With regard to the offense, the determination of responsibility is based on the intention behind the act and the circumstances. With regard to the sentence, the probation and the obligations that accompany the suspended sentence define the accused as the subject of a penal decision. Thus, the judges punish an offense, by handing down a sentence which takes into account the particular situation of the offender. Moreover, their decision aims as much to punish misbehavior as it does to normalize it. The convicted individual does not leave the judicial system with just the judgment of the criminal act, which caused him or her to enter it in the first place. He is also subjected to longer-term pigeonholing of his social life through the material, psychological, and emotional standards defined by the "obligations" that condition the adjustment of the sentence.

"Is it our job to judge social problems? A person who is totally unintegrated?" asked a former prosecutor who had become vice president of the criminal court, before continuing:

Today, we must justify everything we do. Those who are not integrated because they do not have enough family support, for them, probation is the solution, like the follow-up measures stipulated by the sentencing judge. A long probation means that we are concerned and are trying to prevent a repeat. In that case, we will clearly specify the requirements, including treatment requirements if there is a psychiatric problem or an issue with alcohol: we specify it in such a way that we give instructions to the sentencing judge.

However, in reality, the judicial handling proves irregular, uncertain, and often without real implementation due to the lack of human and material resources, which results in an increasingly longer processing time.

But the personalization of the judgment also operates on another level, transversal to the two previously mentioned: that of moral sentiments like compassion, empathy, or indignation. Magistrates, however, tend to deny this, rationalizing their affective reactions through legal reasoning. As one former family court and current criminal court judge explained: “Not giving the person a harsh sentence because the person has a job is not a response to a sense of humanity, it is a question of prosecution: it is a way to avoid desocialization which is the quickest way to provoke a repeat offense.”

An examining magistrate who was once a criminal court judge also touched on this distinction, which he situated between “humanity” and “compassion”:

Humanity is not compassion: compassion is taking out your handkerchief while listening to the criminal record of the person in front of you. Humanity is something else, and it is more difficult: it is the ability to hand down a penal response, which, taking into account all the elements, seems more appropriate. Humanity is not necessarily compassion but the taking into account of the difficulties of the person without showing any sign of weakness in the response that is handed down.

The presiding judge at the trial described above also noted the distinction between the values associated with good judgment and the affective dimension, which is excluded in sentencing:

We do not become attached to the defendants because there are no affects, but we become attached insofar as they manage to turn away from crime. Their behavior does not enter into the decision because there is nothing personal and because we do not know each other.

The prospect of personalized sentencing thus offers a discursive and analytical framework that allows magistrates to dismiss or neutralize the emotional dimension of adjudication, so that it does not appear as such. One reason why this handling of affects through social and legal discourse seems necessary is that it frames and preserves the work of deliberation. Indeed, the decision of the judges assumes a margin of inner or subjective or, to put it more bluntly, arbitrary assessment. The erasing of the affective dimension maintains the conditions of possibility of this personal judgment by removing the specter of subjectivity, which, if made bare, might compromise the legitimacy of the sentencing and on a broader level the functioning of the public trials.

Adjusting and Transforming Sentences

After the verdict, the adjustment and monitoring of the sentence transform its nature. They replace the practice of harsh justice, in which the sentence is enforced at the end of the trial, with a much longer, more spread out, more

dynamic temporality of modulating the punishment.⁴⁶ Criminal court judges who solemnly hand down their sentence at a trial are unaware of what will become of their decision and how it will be implemented; they sometimes have a rather vague idea of how the next phase works. The application of sentences thus benefits from a paradoxical status. It is considered by some magistrates as an act of “stewardship” of justice: an office activity that takes place in courts overloaded with pending cases, far from the decorum and symbols associated with the act of judging. Yet the application of sentences has an essential function in the criminal justice system as it determines what will actually become of the decision and the fate of the convicted offender. How do these practical developments in the enforcement of the sentence take into account the moral implications of the act of judging and how do they modify it?

Throughout the course of the interviews, several magistrates raised the dilemma of their “responsibility for people’s freedom,” as one of them termed it. This responsibility lies at the heart of the ethical issues raised by the act of judging in an immediate appearance trial marked by a sense of urgency, a lack of time, and lack of human and material resources—all factors leading to stereotypical judgments. As one examining magistrate, who was once a criminal court judge, pointed out, the work of preparing the verdict “still remains mysterious because there is the question of power behind it, a decision about someone’s freedom: ultimately prison is still at stake. The law is technical, but you are still dealing with human beings.” This responsibility implies a significant emotional burden, according to a magistrate who worked as a prosecutor and then as a criminal court judge:

It means something, when you judge. It is serious, it is burdensome, it weighs on our shoulders. We know all the time that we are doing something serious: like a doctor who knows that what he or she is doing is serious, or like a diamond cutter who might miscut a diamond and slice it in two: what he is doing is serious.

In this context, the procedure known as “723-15,” which systematically includes the sentencing judge in the course of the immediate appearance trial, and the transformation of the sentence into a flexible punishment with multiple possibilities in turn modifies the responsibility of the magistrates in the criminal courts. Their sentence becomes an element in a complex and time-intensive system whose outcomes they remain unaware of. During one hearing, for instance, judges were required by the law to hand down a prison sentence without suspension for the use of a laser pen by a driver, who for fun pointed it at highway signs. The offense was minor, but the offender had been previously sentenced to prison multiple times (once for several years for armed robbery). In these circumstances, the judges imposed a sentence of six months’ imprisonment, but without immediate execution, which in practice referred the convicted individual to the sentencing judge with the expectation that the sentence would be adjusted before implementation. Splitting the penal activity between the official public trial

and the application of the sentence held privately in the judge's chambers thus reevaluates and transforms the concept of "responsibility for people's freedom" involved in adjudication. It seems in fact that it allows for a compromise between this ethical responsibility and the repressive legal constraints.

Ultimately, the intersection between these adjustment practices and the systematic sentences is not necessarily graspable for either the observers or the actors of the justice system themselves. While, on the one hand, a rise in repressive laws since the 2000s increases the number of offenses which can be tried in immediate appearance courts and raises the punishments incurred, on the other hand the adjustment of sentences is extended to prison sentences of less than one year with the Act of November 25, 2009, and the completion date of sentences has been systematically altered since the Law of March 9, 2004. For some magistrates, this contradictory evolution boils down to "increasing the prison population, as a result of the law, and systematically adjusting the sentences, as a result of the law," while neither the prison system nor the application of sentences is provided with sufficient resources to manage both influxes.

One prosecutor did, however, propose an integrated reading of these different rationales. According to him, reintegration, so dear to the tradition of individualization, is reinterpreted through a logic of costs and benefits inherited from new theories of crime, including the "broken window" theory. From this perspective, the subject of penal action that aims to reintegrate is now a moral being who is governed and whose behavior is predicted through an economy of risks and interests. As the magistrate summed it up:

What interests me is not sending people to the slammer for as long as possible; it's that they stay on track because it's in their interest and in the interest of the 64 million people around them to have someone who is not dangerous. There always has to be some punishment to serve as something of a deterrent for the person and for those who might be tempted to do the same. But the main goal is that the person doesn't do it again and to that end, we will look for punishments like suspended sentences with probation, the 723-15. Prevention of recidivism is achieved through the adjustment and individualization of the sentence. Minimum sentencing requirements go against the logic of adjusting the sentence, that's for sure ... A minimum sentence should be given to a person because you think the situation demands it: you play with the effects of deterrence that the sentence has. You're not going to do it again because you know that you're risking a lot. But after that, nothing stops you from: "We give you harsher sentences, but we can also adjust them more, so the stakes are more important for you to shape up after your conviction, because you know that you risk even more and what's more, you know that your sentence can be adjusted if you do shape up." It is a logic that is not necessarily contradictory. I know that I am in the minority with this view: many believe that applying minimum sentences on the one hand and expanding the adjustment of sentences on the other is contradictory.

The function of immediate appearance trials can thus only be understood in relation to their pre-trial stage—that is to say, police arrests and emergency prosecution—and their post-trial stage—the possibilities of monitoring and adjustment after sentencing. These different practices revolve around rationales that in the end point to the following question: how to control the habits, behaviors, and deviant actions of individuals belonging to a relegated population and governable according to the application of rational choice?

Conclusion

The swift and severe prosecution of offenses, such as is practiced in immediate appearance trials, has become a political response to security issues, as illustrated by the orders which the Ministry of the Interior gave during the riots of autumn 2005 to have all the individuals who had been arrested systematically tried in immediate appearance trials. This judicial handling of crime is based on an older justice “in real time” focused on the prevention of recidivism as a method for the social control of marginal and precarious populations. But the practice of *in flagrante delicto* underwent a major reorganization beginning in the 1980s. First, the number of cases handled that way significantly rose and continued to increase until the mid-2000s. Second, numerous legislative measures technically compelled a harsher response in penal decisions with regard to cases involving recidivism.

These developments pose a major problem for the magistrates involved in prosecution and sentencing: that of a judgment made in a situation of constraint, under the pressure of an accelerated time frame, and with limited means, a consequence of the increased number of immediate appearance trials and mandatory sentencing rules. The new norms were resisted by the judiciary as a whole when they were first enacted and have been denounced regularly since then as “contrary to the French tradition of the individualization of sentences,” as judges I met in the field pointed out. Yet despite this opposition, the application of sentences with a mandatory minimum and which cannot be adjusted has been gradually normalized under pressure from the prosecution as was requested by the Ministry of Justice.

Yet this picture becomes more complex if one takes into account the fact that changes in judicial practice over the same period have incorporated elements of sentence individualization. These elements take the form, on the one hand, of brief social reports that allow for the systematic consideration, during the trial, of the character and social integration of the accused: their family background, their employment history, their relationships with their families and friends. On the other hand, they take the form of more systematic and more wide-ranging recourse to sentence adjustment. How can the use of these tools inherited from the tradition of individualization be understood within the context of the repressive penal and security policies of the last twenty years?

My research suggests that the systematized consideration of individual situations and, on a larger scale, the adjustment of sentences in practice provide

the conditions under which judges can redefine their work within situations of constraint. Indeed, the information from the brief social report is enlisted in support of the refusal to apply minimum sentencing requirements. The individualization tool is not contradictory to mandatory sentencing; it is used to develop a differential management of its application. Similarly, the extension of sentence adjustment creates a form and temporality of judgment, which modifies the concept of “responsibility” weighing on the shoulders of the criminal court judge: the judges perceive the sentence as a multi-stage decision that can be immediately or subsequently adjusted. Such a process modifies, divides up, and projects into a new temporality the responsibility for the decision.

Notes

- 1 The empirical data stem from fieldwork conducted between May 2010 and May 2011 in a criminal court in the Paris banlieues, through ethnographic observation of the immediate appearance trials and a systematic collection of data from 230 trials; through an ethnographic observation and study of 80 criminal records at the Sentence Execution Services; and through interviews with 17 professionals in the criminal justice system: social workers, criminal court judges, sentencing judges, and prosecutors.
- 2 It is in this sense that we speak of a “penal clientele,” an expression used by Fabien Jobard and Sophie Névanen (2007) to explain the considerable over-representation of ethnic minorities among those judged.
- 3 The statistics provided in the previous paragraph come from the *Annuaire statistique de la justice* [Annual Statistical Report of the Ministry of Justice], 2006 and 2010, and from a report on immediate appearance trials by the information committee of the Senate’s commission on laws (Zocchetto 2005).
- 4 See, in particular, the studies led by Philippe Robert and Pierre Lascoumes (1974), Denis Salas (2007), Camille Viennot (2012), or Angèle Christin (2008).
- 5 This is what resulted from a study devoted to prosecution in real time by Benoît Bastard, Christian Mouhanna, and Werner Ackermann (2007).
- 6 This phrase, often adopted by others, was what legal historian Bernard Schnapper (1983) used to designate the essential role that the concept of recidivism played in the formation of penal philosophy and the penal system such as we know them today.
- 7 See, for example, the collective works from the conferences “Récidive et récidivistes: de la Renaissance au XXe siècle” [“Recidivism and Recidivists: From the Renaissance to the Twentieth Century”], University of Geneva, June 6–8, 2002; “La récidive: représentations et traitement, XIXe–XXIe siècle” [“Recidivism: Representations and Prosecution from the Nineteenth to the Twenty-first Centuries”], University of Pau, December 9–10, 2009.
- 8 Sbriccoli (2006). The question of the formation of statistics as a government tool in relation to the emergence of the administrative and political concept of “population” is explained in Michel Foucault’s lectures on “Territory, Security, Population” (2003).
- 9 Chauvaud (2006).
- 10 Robert (2009: 11).
- 11 See the reference works by Beccaria (1979 [1764]) and Mouton (1887).
- 12 Foucault (1979 [1975]).
- 13 This history is retraced in Schnapper (1983).
- 14 Though individualization might be qualified as a “fundamental principle” of penal law in judicial doctrine, it is not included in the “Fundamental Principles Recognized by

the Laws of the Republic” by the Constitutional Council, which has argued that it is a “constitutional principle” stemming from Article 8 of the Declaration of the Rights of Man and of the Citizen on the necessity of punishments (Decision DC No 2005-520 on July 22, 2005). It is interesting to point out that this inscription of the principle of individualization in the legal bedrock does not date back to the period immediately following World War II—the moment when the “fundamental principles” were drafted and the humanist values of criminal justice affirmed. Instead, it occurs thanks to a legal battle waged in 2004 against the procedure of plea bargaining as a tool in the systematization of punishments (“pleading guilty” is an import from North American judicial systems, which proposes a sentence negotiated with the prosecutor on the condition that the defendant waive the right to a defense).

- 15 Saleilles (1898: 16, 243). This text was republished in a critical edition accompanied by a series of studies on the contemporary uses of the concept of individualization by Ottenhof (2001).
- 16 Saleilles (1898: 243).
- 17 This point is developed in greater detail by Schnapper (1991).
- 18 This is the conclusion of the statistical study carried out by Jean-Claude Farcy on *in flagrante delicto* trials from the archives of the Paris courts during the Second Empire (Farcy 2006).
- 19 René Lévy studied the birth and evolution of this penal procedure in detail in the dissertation devoted to the topic.
- 20 Lévy (1985: 58).
- 21 Expressions used by the parliamentary rapporteur during the law’s adoption, cited in Lévy (1985: 43).
- 22 Lévy (1985: 481).
- 23 The judicial “clientele” at the court where I carried out my study counted 57 percent who were less than 25 years old (34 percent in René Lévy’s study) and 80 percent of defendants with either foreign last names or foreign citizenship (60 percent for Lévy).
- 24 These analyses were carried out by Bruno Aubusson de Cavarlay (1985) and Fabien Jobard and Sophie Névanen (2007).
- 25 The relationships between social exclusion and ethnic minorities and the way in which this articulation plays out in judicial treatment have been noted by numerous sociological works among which can be cited those of Jean-Claude Chamboredon (1971), Pierre-Victor Tournier and Philippe Robert (1991), Fabien Jobard and Sophie Névanen (2007), Didier Fassin and Éric Fassin (2006).
- 26 The concept of moral regulation, presented by Philip Corrigan and Derek Sayer (1985) is adopted and developed in numerous legal sociological studies among which, the works of Allan Hunt (2003).
- 27 These themes have notably been discussed by Gérard Noiriel (2007), Didier Fassin and Éric Fassin (2006).
- 28 Corrigan and Sayer (1985: 194).
- 29 See the analyses of Laurent Bonelli (2008) on this subject.
- 30 See the report presented by Alain Peyrefitte et al. (1977: 18–19, 37).
- 31 Philippe Robert and Marie-Lys Pottier have notably analyzed the emergence of new forms of security preoccupations beginning in the 1990s (Robert and Pottier 1997, 2004).
- 32 This movement has been analyzed by Laurent Mucchielli (2002).
- 33 This contemporary resurgence of xenophobic discourse has been analyzed for example in the works of Pascal Delwit, Jean-Michel De Waele, and André Rea (1998) and Gérard Noiriel (2007).
- 34 This theory, forged by the practitioners and experts of urban security in the United States is based on the idea that to deal with urban crime it is necessary to reduce and

- control unruly behavior (e.g. “insecurities” in public policies terminology), the cause of social disorder. This “zero tolerance” towards antisocial behavior (Kelling and Coles 1998) imposes a conception of delinquency disconnected from its legal definition (the commission of an “offense” subject to punishment): the subject of repression and control are no longer acts, but more broadly behaviors and cultures referring to specific social affiliations. For a critical discussion of this theory and its spread, see Bernard Harcourt (2001) and Loïc Wacquant (2004).
- 35 Information report submitted by the National Assembly’s commission on laws in December 2008: <http://www.assemblee-nationale.fr/13/rap-info/i310.asp>.
- 36 Penal Code, article 132-24.
- 37 “The new social defense doctrine is intended to take moral values into greater account since one of the essential goals that it attributes to the sentence is to make the individual aware of his human duties towards the collective,” explains Marc Ancel (1954: 73).
- 38 Ancel (1954: 132).
- 39 As the genesis of the Association for Applied Criminal Policy and Social Reintegration, the first group in charge of this experiment in Paris, shows (Bonneau 2007).
- 40 The proven use of social reports is confirmed in a now-famous report by the Vera Institute of Justice (1972).
- 41 Interviews with the group’s director, January 23, 2011.
- 42 These figures are those given by the Ministry of Justice. “Assemblée nationale, Peine plancher: statistiques. Réponse écrite de la garde des sceaux à une question de M. Éric Raoult (UMP)” [“National Assembly, Minimum Sentencing Requirements: Statistics. Written Response from the Attorney General to a Question from Mr. Éric Raoult (UMP)”], *Journal officiel* [Official Journal], Wednesday, June 29, 2010, 7352.
- 43 Unjustified identity checks are considered illegal.
- 44 Article 723-15 of the Code of Criminal Procedure introduced in March 2004 provides that when a person is sentenced to up to one year of jail time without immediate imprisonment, which was the case here, the case is systematically submitted to the sentencing judge by the prosecutor. The guilty party, after meeting with an officer of the Prison and Probation Service, is summoned by the sentencing judge. The purpose of this meeting, which takes place in the judge’s chamber, is to determine the conditions of the sentence’s execution. This may entail redefining the nature thereof and imposing alternatives to imprisonment, as Mr. Traoré’s judges suggested.
- 45 Ministry of Justice, *Annuaire statistiques de la Justice, 2008* [Annual Statistical Report, 2008]. It may seem a little inconsistent to refer to different annual statistical reports (2008, 2009, 2010) throughout this chapter: the reason for doing so is that the different annual statistical reports are based on different data-gathering methods that change each year.
- 46 Mireille Delmas-Marty (1986) analyzed the new judicial temporality introduced by the adjustment of sentences.