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The Fourth Amendment Protection Against Unreasonable Searches and Seizures and the French Experience

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TABLE OF CONTENTS

CHAPTER I: THE TENSION BETWEEN THE EFFORT TO DISCOVER THE TRUTH AND INDIVIDUAL PRIVACY

"Democracy means that if the doorbell rings in the early hours, it is likely to be the milkman."[1]

The different cultural and comparative approaches of two important legal systems have repercussions on criminal justice. Under the American approach, freedom of the individual is a paramount ideal. Distrust of any kind of abuse of power is one of the main feature of the American legal system. The French take a contrary approach. Freedom is achieved through the State under French law. As a result of these differences, in the first stage of the criminal process, e.g., the relation between police and suspects, there seems to be better protection of the individuals' rights in the United States than in France.

This paper will examine the protection of individuals' rights, including the rights of privacy[2] and of locomotion during the investigatory stage in American and French criminal procedure. It will do so by focusing on searches and seizures. However, this not a reform oriented work. Even

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[1] Yackle, *the Reagan Administration's Habeas Corpus Proposals*, 68 Iowa L. Rev. 609 (1983) (Quoting Winston Churchill).

[2] By right of privacy, I mean the right to be protected in one's property and one's person against arbitrary intrusions.

though the two systems are different, this paper will not attempt to say that one system is superior. Rather, a major target will be the tracing of the police investigatory powers through searches and seizures, and how that impacts on individuals' rights. A conclusion will be offered that the investigatory function threatens these rights both in the United States and in France.

I. A closer analysis of the American criminal procedure through a comparative study

A. American suspects more protected?

The American law treats a suspect as a criminal defendant when the state has initiated adversary judicial proceedings against him, whereas the French criminal procedure requires a certain quantum of proof to consider the suspect as a defendant. Most of the scholars[3] analyzing the French criminal system consider that the citizens' rights during the police investigation stage are better protected in the United States than in France. According to their view, the French police seem to have greater powers to

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[3] Edward A. Tomlinson, *Justice issues in the United States, West Germany, England, and France: Non adversarial Justice: The French Experience*, 42 Md L. Rev. 131 (1983) [hereinafter Tomlinson, *The French Experience*]; Jack Norton, *Truth and Individual Rights: A Comparison of United States and French Pre-trial Procedure*, 2 Am. Crim. L.Q. 159 (1964); Cynthia Vroom, *La liberté individuelle au stade de l'enquête de police en France et aux Etats Unis*, Revue de Sciences Criminelles et de Droit Comparé [Rev. sc. crim.] 487-507 (1988).

search and to seize evidence of criminal activity or persons than American law enforcers. As a matter of fact, the French criminal procedure ignores different American concepts protecting individuals' rights such as probable cause or the exclusionary rule. In meanwhile, American practice of law enforcement shows that police can exercise most of the French police powers because the safeguards against police intrusions have been redefined more narrowly under the actual U.S. Supreme Court. The result is that in both countries, police have broad investigatory powers.[4]

It is also admitted that American criminal procedure focuses on the protection of the innocent individual, whereas the inquiry regularity is the main preoccupation under the French Law.[5] However, Article Sixty-six of the actual French Constitution of 4 October, 1958, makes the Judiciary, e.g., civil and criminal courts, guardian of individual liberty.[6] Therefore, either an interference into individual liberty is authorized by the Judicial Authority or the latter controls the regularity of such a decision. In other words, an intervention of the Judiciary remains necessary when a proceeding or a statute encroaches on

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[4] Richard S. Frase, *Comparative Criminal Justice,* 78 Cal. L. Rev. 539 (1990).

[5] See Tomlinson, *The French Experience, supra* note 3.

[6] See Fr. Const. art. 66:

> No one may be arbitrarily detained.
> The Judicial Authority, guardian of individual liberty, shall enforce this principle under the conditions stipulated by legislation.

individual liberty. We shall see that a special Court called the Constitutional Council, may invalidate a law encroaching on individuals' rights. The principle of separation of powers, heritage of Montesquieu, does not permit the ordinary courts to pass upon the constitutionality of a statute.[7] On the contrary, this judicial review has been admitted in the United States since 1803 in the landmark case Marbury v. Madison.[8] The French Constitutional Council can check the conformity of a bill with constitutional materials called the "bloc of constitutionality."[9] This movement of "constitutionalization" of criminal law offers new guarantees against government intrusions.[10] Moreover, there are international protections, particularly European safeguards, against states' misconduct that are enforced before European courts.

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[7] It must be emphasized that the French administrative courts (a specific system of courts dominated at the top by the Council of State) can check the Executive activities by annulling or reforming a decision in contrast with the other courts. The latter are not allowed to control Executive activity under the principle of the separation between judicial and administrative authorities.

[8] 5 U.S. (1 Cranch) 137 (1803).

[9] Those constitutional materials encompass the Constitution itself and its Preamble, the Fundamental Principles recognized by the Laws of the Republic, the principles most vital in our time, e.g., right to strike, and the principles of constitutional values.

[10] V. L. Favoreu, *La constitutionnalisation du droit pénal et de la procédure pénale. Vers un droit constitutionnel pénal*, in Melanges Vitu, Cujas (1989).

B. Two "opposite" criminal justice systems

It is traditional to oppose the French inquisitorial procedure to the accusatorial or adversary American one. The French criminal system must not be confused with the barbarian proceedings of the Inquisition period. In the United States as well as in France, each criminal system encompasses a mixture of both proceedings. As concerning to the gathering of evidence, the American judge does not participate in the discovery of the truth. On the contrary, the French investigating judge (*juge d'instruction* who is appointed by a *décret* of the President of the Republic) operating in the framework of an instruction can conduct the investigation himself.[11] He also performs the functions of a judge by issuing orders which can be appealed before the indictment division (*chambre d'accusation*). The *juge d'instruction* is independent from the prosecution, the indictment division and the parties.[12]

1. Decentralization of the American police

In the United States, a wide variety of officials perform the police function such as governmental officers,

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[11] Another difference between both systems concerns the criminal trial itself. In France, the presiding trial judge takes a more active role than his American counterpart.

[12] See Christian Dadomo & Susan Farran, The French Legal System (1993).

authorities of the Federal Bureau of Investigation, state policemen, and county and city police officers. Those forces are created by various levels of government and the staff is locally recruited. There are no general principles for organizing policing structures. The police and prosecutorial functions are separated. Thus, police are independent of the local prosecutor and responsible before the local executive branch. The supervision of police is exercised principally by elected persons.[13]

Two views of criminal procedure have been described, the Crime Control Model and the Due Process Model.[14] The former relies on the repression of criminal conduct. It is grounded on efficiency, administrative and expeditious procedures. Under this approach, police misconduct is deterred through discipline sanctions and civil tort remedies. On the contrary, the Due Process Model is more concerned with equality and fairness in criminal procedure. It appears to be an adversary and judicial model. Thus, evidence illegally searched and seized will be excluded and the prosecution dismisses. Many commentators have referred to these models. However, it has been argued that these two approaches were too general and too simplified.[15]

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[13] See Eric H. Monkkonen, Crime and Justice in American History, Policing and Crime control § 5 (1992).

[14] See Herbert L. Packer, *Two Models of the Criminal Process*, 118 U.Pa. L. Rev. 1-68 (1964).

[15] See Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure*, 121 U.Pa. L. Rev. 506 (1973) (especially pp. 575-76).

Nevertheless, they permit one to better understand the actual trend of the actual U.S. Supreme Court aimed at enforcing law.

2. Integration of the French police with the prosecution function

The National Police depend on the Minister of the Interior whereas the Gendarmes are under the authority of the Minister of the Defense. The police attached to a certain tribunal are under the public prosecutor's supervision, his control and his evaluation.[16] The Criminal Procedure Code compels the police to inform the prosecutor "without delay" when the commission of an offense is known by them and "immediately" for a flagrant offense.[17]

Judicial police and administrative police must be distinguished under French law. The former investigate offenses and apprehend criminals within a repressive mission. The latter protect public, security, health and tranquillity under a preventive mission. This separation of functions is fundamental because the rules applicable change. The administrative law controls the administrative police's missions, whereas the repressive mission relies on

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[16] Code de procedure pénal [C. Pr. Pén.] art. 41 al 2 (Fr.).

[17] C. Pr. Pén. arts. 19, 54 (Fr.). The notion of flagrancy will be studied in chapter II. It is a crime or a misdemeanor which is in the process of being committed, or which has just been committed according to art. 53 of C. Pr. Pén. (Fr.).

criminal law principles such as the principle of legality.[18] The criterion to draw the distinction relies on the purpose of the police's action, e.g., either to prevent offenses or to apprehend offenders. It must be stressed that the same personnel may act under both missions. The broad investigatory powers provided by the Criminal Procedure Code, such as investigatory detentions, are reserved to the judicial police's missions. The police used pretextual stop to control identity of demonstrators and detained them to verify their identity.[19] Their purpose was to prevent public disorder before demonstrations. Neither offense had been committed and nor of the individuals was suspected. Such a detention was similar to an administrative decision of confinement without any legal grounds. The *Cour de cassation*[20] censured the lower court reasoning.[21] However, it held that the police officers had faced a flagrancy

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[18] Moreover, the judicial courts are competent to any issue arising in a repressive mission. On the contrary, a claim of damages for example occurring in an operation of administrative police will be brought before the administrative courts.

[19] Judgment of Jan. 5, 1973 (Friedel case), Cass. crim., 1973 Bulletin Criminel [Bull. Crim.], No.7; 1973 Recueil Dalloz, *Jurisprudence* [D. Jur.] 541 note Roujou de Boubée (Fr.). The French identification proceedings as well as the longer detention up to 24 hours will be examined in chapter III. The police officers are allowed to detain a person up to four hours if she cannot identify herself or refuse to do so. They can also detain a suspect of a criminal offense up to 24 hours.

[20] The *Cour de cassation* is the highest court for civil and criminal law matters. It encompasses five civil division and one criminal division.

[21] The lower court justified its refusal to prosecute the government for arbitrary detention by relying on the administrative police power to temporally detain someone in accordance with common practice.

situation because of the suspicious identity card. This latter could lead the authorities to presume the commission of offenses and therefore, to authorize a detention up to twenty-four hours. The suspicious identity card transformed an administrative mission at its inception to a judicial one. Therefore, it has been argued that suspicious behaviors can provide a sufficient basis for flagrancy inquiries.[22]

There is also a relevant hierarchy among the police officers. Officers of the judicial police are distinguished from agents of the judicial police. The broader investigative powers are reserved to the former. This principle has been reaffirmed by the *Cour de cassation* by reversing a confiscation of radar detector seized by agents, not officers, of the judicial police.[23] In meanwhile, the agents may exercise the same large investigatory powers under the officers' supervision. Nonetheless, operations that are not directly supervised are routinely approved by officers of judicial police.

The judicial police activities are exercised in three different settings, the flagrancy inquiry, the preliminary inquiry and the inquiry under rogatories commissions. The first one occurs when offenses are in progress or have just been committed. Similarly, when the offense is committed

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[22] See Judgment of Nov. 8, 1979, Cass. crim., 1980 Juris-Classeur Périodique, Jurisprudence [J.C.P. II] 19337 note Jean Davia (Fr.).

[23] Judgment of Jun. 17, 1987, Cass. crim., 1987 Bull. Crim., No. 253. (Fr.).

very near in time to the apprehension of a suspect pursued by public clamor or found in possession of evidence of the criminal activity, there is flagrancy.[24] It is a coercive inquiry reserved only to *crimes* and *délits* punished at least by two months of imprisonment.[25] The preliminary inquiry is opened on police officers initiative or on instruction from the prosecutor for any offense (*crime*, *délit* and *contravention*). It is the most widespread and usually opposed to the first one because of its non coercive feature, even though the individuals may be summoned or detained under their consent.[26] Therefore, most of the investigation acts, searches and seizures, can be executed by agents of the judicial police except the detention up to twenty-four hours. Finally, the formal judicial investigatory can be directed by the examining judge (*juge d'instruction)* himself when he has opened an instruction either under the request of the prosecutor (*réquisitoire introductif*) or under the victim's complaint (*plainte avec constitution de partie civile)*. The scope of his investigation depends on the matters set out in the *réquisitoire introductif* but it may be extended by the examining judge. However, he will generally delegate this

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[24] See C. Pr. Pén. art. 53 which defines the flagrancy offenses. Similarly, offenses taking place in a house where the chief requires the authorities to record them are assimilated to flagrancy by the Code.

[25] The French Criminal Code classifies the offenses in three categories: *contraventions* (minor or petty offenses) divided into five classes, *délits* (major offenses) and *crimes* (serious crimes).

[26] See C. Pr. Pén. art. 75 (Fr.).

task to the judicial police officers through rogatories commission (*commissions rogatoires)* because of lack of time and material means. From now on, the police are under the examining magistrate's control once an instruction is opened. Where there are weighty and collaborative evidence (*indices graves et concordants*), the suspect is scrutinized (*mise en examen*). Then, he may fully use his defense rights such as legal assistance.

In both justice systems, French and American, the investigatory function impacts heavily on individual rights and liberties.

II. A difficult balance between discovery of the truth and individuals' rights

A. The American Constitutional guarantees

1. Protection against arbitrary intrusions

The U.S. Constitution is the main source of protection. Most of the provisions of the Bill of Rights that encompasses the first ten Amendments, are procedural and impose safeguards on personal dignity and privacy. The applicability of the Federal Bill of Rights, (approved by Congress in 1789 and ratified by the states in 1791) into the states via the Fourteenth Amendment (ratified in July

21, 1868) was one of the main constitutional issues in the beginning of this century. The text was intended first to apply only to federal criminal defendants. The first step was to incorporate selectively certain provisions of the Bill of rights into the states through the Due Process clause of the Fourteenth Amendment. Then, fundamental fairness was admitted as a general principle in a proceeding against an individual. Thus, even though none specific provisions of the Bill of Rights are violated, the Due Process of Law is violated when the state does not act with fairness against an individual.[27] The Due Process clause is grounded on the Fifth Amendment pertaining the federal government and upon the Fourteenth Amendment of the U.S. Constitution protecting persons from state actions. The procedural feature of the clause guarantees fair procedures. The substantive aspect protects a person's property from unfair governmental interferences or taking.

The Fourth Amendment of the U.S. Constitution deals with searches and seizures and provides:

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[27] The notion of Due Process of Law was explained in Twining v. New Jersey, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97 (1908); Powell v. Alabama, 287 U.S. 45 (1932); Palko v. Connecticut, 302 U.S. 319, 58 S.Ct. 149, 832 L.Ed. 288 (1937). See Black's Law Dictionary 500 (6th ed. 1991). In the Powell case, the Court emphasized the necessity to inquire "whether the defendants were in substance denied the right of counsel, and if so, whether such denial infringes the due process clause of the Fourteenth Amendment." See 287 U.S. 45, 51. The freedom of speech and of the press are also protected by the due process clause of the Fourteenth Amendment. In Hebert v. Louisiana, 272 U.S. 312, 316, (1926), the Court stated that the due process of law encompasses the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This right is recognized by the states and federal constitutions. The interpretation of the Fourth Amendment has raised difficulties because of the absence of an explicit warrant requirement for searches and seizures.[28] For some scholars, the core of this constitutional provision relies on the reasonableness standard. Therefore, the warrant as well as the probable cause requirements are mislead.[29] The intent of the framers has been construed to prohibit only unreasonable searches and seizures.[30] Nonetheless, the U.S. Supreme Court's majority view has stated that searches and seizures require a presumptive warrant as well as a probable cause for warrantless intrusion to be reasonable.[31]

It might be argued that these constitutional guarantees restrict the gathering of evidence against individuals.

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[28] William D. Anderson, Jr., *Overview of the Fourth Amendment*, 82 Geo. L.J. 597 (1994). The author claims that "[I]nterpreted literally, the Amendment does not require warrants for searches and seizures, nor does it require that searches and seizures be supported by probable cause."

[29] Akil Reed Amar, *Fourth Amendment First Principles,* 107 Harv. L. Rev. 757 (1994).

[30] See Harris v. United States, 331 U.S. 145, 150 (1947) ("[I]t is only unreasonable searches and seizures which come within the constitutional interdiction.").

[31] See Katz v. United States, 389 U.S. 347, 357 (1967); Carroll v. United States, 267 U.S. 132, 155-56 (1925).

However, a democratic and free society needs some barriers to government's action.

2. State interest in effective law enforcement

Every criminal system is faced with the need of an efficient justice to fight crime without being arbitrary. It has been stressed that the Fourth Amendment does not forbid any search and seizure but only unreasonable intrusions in one's privacy. Thus, the Fourth Amendment does not "den[y] law enforcement the support of the usual inferences which reasonable men draw from evidence...[but it] requir[es] that those inferences be drawn by a neutral and detached magistrate."[32]

The Constitutional provision protects individuals only against government action. Private searches such as those conducted by private company guards or neighborhood security patrols are outside the field of the constitutional guarantees. Nevertheless, searches by private persons but considered as public function, e.g., exclusively reserved to the government, must meet the Fourth Amendment requirements.[33] Similarly, a sufficient connection between the private action and the government makes the search "public." Thus, if a statute makes intrusions in one's

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[32] See Johnson v. United States, 333 U.S. 10, 13-14 (1948).

[33] See Flagg Bros v. Brooks, 436 U.S. 149 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

privacy compulsory or encourages them strongly, we face a government action.[34] However, these exceptions are construed narrowly. Furthermore, the Fourth Amendment provisions apply only to the "national community" and not to the nonresident aliens.[35]

B. The French Legislative protections

According to the 1789 Declaration of Human Rights,[36] the State guarantees and protects an individual's fundamental rights. Therefore, one of the police functions, as representatives of the State, is to enforce this protection. A conflict may arise between the means used by law enforcers and their guardian's role of individual rights.[37]

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[34] See Peterson v. City of Greenville, 373 U.S. 244 (1963) (segregation of a private restaurant is government action because it is compelled by state law); Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 615 (1989).

[35] United States v. Verdugo-Urquidez, 494 U.S. 259, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990).

[36] The French Constitution incorporates by reference the individual rights recognized in the Preamble to the 1946 Constitution and in the Declaration of the Rights of Man and of the Citizen. See Fr. Const. (Constitution Act, 1958).

[37] Etienne Picard, *La police et le secret des données d'ordre personnel en droit français*, Rev. sc. crim. 275 (1993) (Arts. 2, 12 of the declaration of 1789) (Fr.).

1. Principle of legality

The state must proceed according to the provisions of the Criminal Procedure Code recently reformed by the Act of August 24, 1993.[38] This general principle of law stated in the Declaration of Human Rights of 1789[39] was a reaction against the arbitrary criminal proceedings during *Ancien Régime* (from the XII century till 1789). With the revolutionaries, the *loi* becomes the only source of criminal law as well as criminal procedure. It means that the citizen cannot be punished for a criminal offense that is not codified by a law ruled by Legislature. This fundamental principle has been re-shaped in the actual Constitution of 1958. Thus, the text distinguishes the areas falling in the legislative field and those belonging to the Executive under its articles Thirty-four and Thirty-seven. The legislative power determines the crimes and misdemeanors (*crimes et délits)*, as well as the penalties imposed.[40] The

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[38] Act of Aug. 24, 1993 modifying the Act of Jan. 4, 1993 reforming the criminal procedure , No. 93-1013, Journal Officiel [J.O.] Aug. 25, 1993; Bernard Bouloc, *Chronique législative,* Rev. sc. crim. 590 (1994) (Fr.).

[39] See arts. 3, 4, 5, 7, 9, 10 and particularly art. 8 providing that "[T]he law may only establish those penalties that are strictly and clearly necessary and no one may be punished except under a law established and promulgated prior to the wrongful act (*délits*)." The phase "*crimes et délits*" was construed before 1958 as encompassing all the offenses.

[40] Fr. Const. art. 34:

> All laws shall be passed by Parliament.
> Laws shall establish the regulations concerning: [part omitted]

construction of Article Thirty-four raised difficulties because the *contraventions*, the third type of offense, does not appear in its content. Therefore, the executive branch may be competent to create and to punish the petty offenses by imprisonment. Such a power is in contradiction with the principle of legality found in the former Article Four of the Penal Code stating that none offense committed prior the *loi* providing penalties, could be punished.[41] This issue divided the Constitutional Council, the Council of State and the *Cour de cassation*.[42] Today, the debate seems over because the new Penal Code prohibits imprisonment penalties for the *contraventions*.[43] In other words, the Executive remains competent to determine and sanction the petty offenses except for the imprisonment penalties.[44]

- determination of crimes and misdemeanors (*crimes et délits*), as well as the penalties imposed therefor; criminal procedure; amnesty; the creation of new juridical systems and the status of magistrates. [part omitted].

[41] The Penal Code has also been reformed by the Act of December 16, 1992 modified by the Act of July 19, 1993. The new Code is applicable since March 1, 1994.

[42] The Council of State refused to encompass the petty offenses in the legislative field. See Judgment of Feb. 12, 1960 (Société Eky), Conseil d'Etat, 1960 J.C.P. II 11169 bis note Vedel (Fr.). The Constitutional Council held that the executive branch cannot impose imprisonment as a *contravention* penalty. See Decision of Nov. 28, 1973, Conseil Constitutionnel [Con. const.] (Fr.). The *Cour de cassation* adopted the same holding as the highest administrative court in the Schiavon case. See Judgment of Feb. 26, 1974. Cass. crim., 1974 Gazette du Palais [G.P.] 1, 235 (Fr.). It accepted the competence of the Executive to rule imprisonment penalties for the petty offenses.

[43] See C. Pén. art. 131-12 (Fr.) stating the penalties available for the *contraventions*: fine and deprivation of certain rights such as the suspension of one's driver's license or the seizure of the instrument of the offense.

[44] Moreover, the French Constitution in its article 11, 16, 38, 92 allows the Legislature to delegate its powers to the Executive in

Surprisingly, body searches as well as vehicles searches are not regulated under the Criminal Procedure Code. The rules applicable to the former are found in an executive act organizing the services of *gendarmerie*.[45] However, body searches, in contrast to vehicles searches, have been assimilated by the French courts to the *perquisitions*[46] which are regulated in the Criminal Procedure Code.[47] Fairness in the gathering of proof prevents the acquisition of evidence in violation of the sanctity of the domicile protected in Article 226-4 of the new Penal Code. However, this article also foresees the intrusion in one's domicile that would be authorized by the law.

The fair treatment general principle of law exists when the "rights of defense" emanating from the Code's frame have not yet attached, e.g., during a police inquiry. Nonetheless, one of the aim of the recent criminal procedure reform was to improve the suspect's protection during this critical stage.[48] The "rights of defense" have not been

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certain circumstances. Through these delegations, the criminal procedure has been reformed.

[45] Act of May 20, 1903 modified by an act of August 22, 1958. The provision of this statute allows *gendarmes* to conduct body search of any individual apprehending in a flagrancy situation (art. 307). Similarly, prior to the detention of a person within the *garde à vue* body searches are lawful. Finally a drunk person found in a public place can be frisked before being retained (art. 308).

[46] It is a search of incriminating evidence conducted in an enclosed place such as one's domicile.

[47] See Judgment of Jan. 22, 1953, Cass. crim., 1953 D. Jur. 533; 1953 J.C.P. II 7456 (Fr.)..

[48] From now on, an individual detained during an investigation, within the frame of the *garde à vue* (police custody), has a right to

defined precisely concerning their source and scope.[49] They imply a contradictory examination, not only of the files gathered in the *dossier* during an instruction, but also of the debates under the jurisprudence of the *Cour de cassation*. Moreover, those rights permit some form of judicial review of an administrative decision taking the form of a sanction against an individual.[50] The secret of conversations between a counsel and his client falls into the "rights of defense." They are not invoked in the Constitution itself. Nevertheless, they have been elevated as constitutional rights by the Constitutional Council.[51]

2. Facultative preliminary check: The constitutional control

Since 1958, the Constitutional Council may confront bills with the Constitution to validate or invalidate them

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counsel arising after a certain period of detention. We will examine closely this important police seizure power in chapter III.

[49] In the Tery case, the Council of State held that the "rights of Defense" encompass the right to timely notice, the right to demand that all members of the tribunal be present at all times and their names be affixed to the judgment, the right to be heard after the presentation of the charges and before the deliberation of the tribunal and finally, the right to require that every judgment contains grounds. See Judgment of June 20, 1913 (Tery case), Conseil d'Etat, in Long Weil, & Braibant, *Les Grands Arrêts de la Jurisprudence Administrative* (Fr.).

[50] Judgment of Feb. 7, 1947, (d'Aillères case) Conseil d'Etat, 1947 Dalloz Périodique, Doctrine [D.P. Doc.] 62 (Fr.).

[51] Decision of Dec. 2, 1976, Con. const., Fr., Dec. 7, 1976 J.O. 7052; Decision of Jan. 19-20, 1981, (decision "Security and Liberty.") Con. const., Fr., Jan. 22, 1981 J.O. 308 (Fr.). In the latter decision, the provision of the law allowing the presiding judge to prevent a lawyer guilty of causing a disturbance access to the court room violated the constitutional principle of the rights of the defense. Jan. 22, 1981 J.O. at 311.

between the times of their enactment and promulgation. However, it is not a mandatory control. Different political officials, the President of the Republic, the Prime Minister, each President of the Houses (Chamber of Deputies and Senate), or sixty deputies or senators since 1974, can refer to the Constitutional Council bills for review.[52] On the contrary, the citizens do not have access to constitutional justice. The Constitution's revision of November 1993 did not expand the right to challenge a bill for review. The Constitutional Council will check the conformity of the bill with the materials encompassed in the "bloc of constitutionality."[53]

In its historical decision of July 16, 1971,[54] the French Constitutional Council, relying on the Preamble of the Constitution, elevated freedom to the status of a constitutional right. For the first time, a statute encroaching on individual freedom (freedom of association) was nullified. The Constitutional Council held that the judiciary authority must guarantee the enforcement of the

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[52] The members' term lasts nine years, and one-third of the members is replaced every three years. The members are appointed in rotation by the President of the Republic, by the Chairman of the National Assembly, and by the President of the Senate.

[53] See *supra* note 9.

[54] Decision of July 16, 1971, Con. const. 1971 Juris-Classeur Périodique, Doctrine [J.C.P. I.] 16832; 1971 Actualité Juridique de Droit Administratif [A.J.D.A.] 537 note Rivero (Fr.). The bill provided that the legal capacity of a registered association would depend on a preliminary check made by the Judicial authority. Before this bill, an association could be created freely. Therefore, the constitutional court seized by the President of Senate struck down the bill because it violated a constitutional liberty.

constitutional rules. This judicial review on civil liberties grounds has often been compared to the leading case Marbury v. Madison.[55] Since 1971, the Council's function is no more limited to that "of preserving the constitutional balance struck in 1958 by assuring that Parliament respects the limits imposed on its legislative competence vis-à-vis the Government."[56] This landmark decision gave constitutional value to the texts incorporated in the Preamble of the Constitution[57] that proclaim individual liberty, composed of personal security and privacy, as the inalienable right of man. From now on, the need to protect the liberty against the law is enforced by the Constitutional Council.[58] The effectiveness of such a control has been recently reaffirmed. The Constitutional Council struck down a bill --related to the need to prevent violence during demonstrations-- giving the high ranking civil servants (*les préfets*) the power to order vehicles' searches to seize any object that might be used as weapons during demonstrations. The Constitutional Council, relying

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[55] See *supra* note 8. However, it has been stressed that constitutional control existed prior to the 1971 decision. See Cynthia Vroom, *Constitutional Protection of Individual Liberties in France: The Conseil constitutionnel since 1971,* 63 Tul. L. Rev. 265, 274 (1988) [hereinafter Vroom, *The Conseil Constitutionnel*]..

[56] Beardsley, *The Constitutional Council and Constitutional Liberties in France,* 20 Am. J. Comp. L 431, 436-37 (1972) (the author refers to the separation of competencies between the Executive and the Legislature as provided by articles 34 and 37 of the Constitution); Haimbaugh, *Was it France' s Marbury v. Madison?*, 35 Ohio St. L.J. 910 (1974).

[57] See *supra* note 36.

[58] See J. Rivero, *Le Conseil Constitutionnel, et Les Libertés,* 131 (1984) (Fr.).

on Article Sixty-six of the Constitution, held that the Judicial Authority must authorize such an intrusion because of its guardian role.[59]

3. Higher supervision of individual's privacy

a. The European Convention

The European Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950, was ratified by the French government in 1974 and in 1981 for its Article Twenty-five providing a judicial remedy for individuals before the European institutions.[60] Article Eight deals with individual privacy and states that

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

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[59] See Decision of January 18, 1995, Con. const., Fr., 1995 Dalloz, *Législation* [D.L.] 92 (Fr.).

[60] [European] Convention for the protection of Human rights and Fundamental Freedoms, Nov. 4, 1950, 213 U. N. T. S. 222, entered into force Sept. 3, 1953; amended by Protocol No. 3, entered into force Sept. 21, 1970, and Protocol No. 5, entered into force Dec. 21, 1971. The French Act No. 73-1227 of Dec. 31, 1973 allowed the ratification. See Jan. 3, 1974 J.O. 67.

Article Five of the Convention interests us as well because it protects individual liberty and security of persons against arbitrary seizures and detentions.[61] The European Court of Human Rights as well as the European Commission interpret broadly the provisions of the Convention, particularly its Article Eight. The jurisprudence of the European Courts has argued the necessity of a flexible construction of the Convention. The agreement is part of French law and therefore, directly applicable before French courts.[62] Furthermore, the individuals may bring a petition before the European institutions.

b. The effectiveness of the Convention

Individuals can bring a petition before the Commission of Human rights which is composed of twenty-eight members sitting in sessions in Strasbourg (art. 25).[63] The remedy is available if the applicants establish to be victims of a breach of the Convention as well as an exhaustion of the

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[61] *Id.*

[62] See Fr. Const. art. 55 making ratified treaties overriding Acts of Parliament.

[63] See Tom Wart, *The Admissibility of Human Rights Petitions. The Case Law of the European Commission of Human Rights and the Human Rights Committee*, § 2.2 (1994). The members of the Commission are elected by the Committee of Ministers for a period of six years. Eight sessions a year are usually held. *Id.* at § 2.2.1. The contracting states can also denunciate to the Commission the violations of the Convention by another contracting State or bring an action directly before the European Court of Human Rights. Nevertheless, they rarely do so.

domestic remedies.[64] First, the Commission examines the admissibility of the petition under a contradictory examination. A lawyer of the Secretariat of the Commission prepares the decision on this issue in consultation with the *Rapporteur*, member of the Commission to whom the case has been referred. Once the application is held admissible by the Commission's majority vote, the Commission tries to settle an agreement out of the Court. If it fails, a report discloses the facts and the opinion as regard to the Convention's violation by the State party. This report is sent to the Committee of Ministers and to the State party. The Commission's report does not bind the Court of Human Rights. Then, the Plenary Commission decides to bring the case before submitting it to the Court in a period of three months from the date of the report's transmission to the Committee of Ministers. Full jurisdiction is given to the Court that may redecide the admissibility of the petition. The Court affords just satisfaction to the injured party (art. 50). A recent agreement provides the replacement of the above procedure by the establishment of a permanent and full time European Court of Human rights.[65]

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[64] In practice, the applicants will produce evidence of an exhaustion of local remedies when the State party raises the objection of non-exhaustion. Once the State party has shown existence of effective and sufficient domestic remedies, the applicants may contest the state's claim with contrary evidence.

[65] See Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms and Explanatory Report, Treaties and Reports, Council of Europe, 1994. Some preparatory documents have been published in 14 HRLJ (1993), pp. 31-49.

A state intrusion in one's privacy may be allowed under certain conditions. Thus, the state interference must be grounded on a clear and complete law providing proportionate measures. Recently, the French provisions of the Customs Code dealing with searches and seizures have been deemed illegal.[66] The European Court of Human Rights held that the French customs searches and seizures proceedings did not offer sufficient guarantees against administrative authorities' intrusions. The vagueness of the rules as well as their gaps violated the principle of proportionality between the remedies used to enforce law and the interferences in one's privacy.

4. Relativity of Individuals Rights

In its decision "Security and Liberty,"[67] the Constitutional Council tried to reconcile individuals' liberties and the necessities of justice (apprehending the offenders) as well as the protection of the public order. The bill controlled by the "Court" and partly validated, legalized the identity checks and authorized a twenty-four

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[66] Affaires *Cremieux v. France,* Aff. *Funke v. France;* Aff. *Miaailhe v. France,* Eur. Ct. H.R. (ser. A) at 256 (1993).

[67] See Decision of Jan. 19-20, 1981, (decision "Security and Liberty") Con. const., Fr., Jan 22, 1981 J.O. 308 (Fr.).

extension of *garde à vue* in certain cases upon the judge's approval.[68]

Before to this statute, police custody was limited to twenty-four hours, with a twenty-four extension under the prosecutor's authorization. Therefore, a third period of detention was added by the challenge provision for certain offenses. The "Court" held that constitutional principles such as the protection of the public order encompassing the apprehension of offenders, persons and goods security, may authorize state intrusions in one's privacy under the condition of an intervention of the Judicial Authority, guardian of individual liberty. According to the Constitutional Council, the requirements of Article Sixty-six were met.

This constitutional decision shows the relativity of the role of Judicial Authority as a guardian of individual liberty. The judges are obliged to apply the law. Therefore, a law giving broad investigating police powers must be enforced. The absence of mandatory control by the Constitutional Council and the prohibition of such a check by the French courts permits encroachments on individual

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[68] See Vroom, *The Conseil Constitutionnel, supra* note 55 at 281. (1988). The law dealt with different criminal aspects such as toughening criminal sanction, accelerating criminal procedure, facilitating the entry of victims into criminal cases, reducing delays in various criminal proceedings, giving judges certain powers belonging to prosecutors and increasing the right to court hearing of those in detention.

rights. Furthermore, a state interest such as public order may outweigh privacy and security rights.

CHAPTER II: GATHERING OF EVIDENCE BY SEARCHES AND SEIZURES

I. Judicial control of the police investigation powers

A. The warrant requirement

Before examining the legality of a warrantless search or seizure, a search or a seizure must have occurred under the meaning given to those terms by the American courts.[69] Thus, a governmental invasion of one's reasonable expectation of privacy is a search.[70] The objective expectation of privacy is that recognized by the society. Leaving objects in plain view to be seized does not fit the reasonableness test.[71] The degree of intrusiveness may also determine whether a search has taken place. A sniff test by a dog does not fall within the Fourth Amendment requirements.[72] Similarly, the reasonable test is used to confirm the seizure of a person. The seizure of a thing

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[69] Russell W. Galloway, Jr., *Basic Fourth Amendment Analysis*, 32 Santa Clara L. Rev. 737, 742-48 (1992).

[70] See Katz v. United States, 389 U.S. 347 (1967). However, there is no reasonable expectation of privacy when a conversation is wiretapped with the consent of one of the participant (the undercover agent). See United States v. White, 401 U.S. 745 (1971).

[71] However, the officers must be lawfully present and have probable cause to believe the items are incriminating.

[72] See United States v. Place, 462 U.S. 696, 707 (1983).

occurs when there is a "meaningful interference with an individual's possessory interest in that property."[73]

1. A principle in the United States

The text of the Fourth Amendment does not itself require either warrant or probable cause to search and seize evidence. However, the U.S. Supreme Court has held its preference for a warrant requirement.[74] A warrant must be issued by a neutral and detached magistrate upon probable cause. Thus, an attorney general does not have the character of a neutral and detached magistrate.[75]

There is an immense body of law concerning probable cause, defined as sufficient information to support a reasonable belief that evidence of an offense is present in a particular place or that a person committed an offense. The intrusion in one's privacy must be justified at its inception as well as its scope.[76] The particularity requirement implies a precise suspicion for searching a particular spot or seizing a specific person. General searches and seizures are prohibited. The search of a stolen car in an upstairs bedroom exceeds the scope of the

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[73] United States v. Jacobsen, 466 U.S. 109, 113 (1984).
[74] See *supra* note 31.
[75] Coolidge v. New Hampshire, 403 U.S. 443 (1971).
[76] See Galloway, *supra* note 69, at 768-70.

interference.[77] Scholars point out that the use of expressions such as "fair probability" or "substantial chance"[78] that seizable items will be found or that a person has committed an offense suggests that a lesser quantum of information is needed.[79]

Probable cause is found under the totality of the circumstances.[80] The veracity, the reliability of the source, the means used to get the information and any corroboration permit to meet the probable cause requirement. However, it has been argued that magistrates approve automatically the police officer's request presenting probable cause without making an independent examination.[81] The probable cause standards appear flexible. An anonymous informant's tip,[82] hearsay from a reliable source[83] or the officers' experience may support probable cause.[84]

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[77] *Id.* at 770 citing United States v. Ross, 456 U.S. 798, 824 (1982) ("Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase.").

[78] Illinois v. Gates, 462 U.S. 213, 238, 244 n. 13 (1983).

[79] Russell W. Galloway, Jr., *Eclipse of the Fourth Amendment: Searches and Seizures in the Burger Court*, CACJ Forum p10-15 (Jan.-Feb. 1990) [hereinafter Galloway, *Eclipse*].

[80] See *supra* note 78 at 230, 233, 234, 238, 241.

[81] See William J. Stunz, *Warrant and Fourth Amendment Remedies*, 77 VA.L.REV. 881, 881-83 (1991).

[82] Illinois v. Gates, 462 U.S. 213 (1983) (The "two-pronged" test previously adopted in Aguilar v. Texas, 378 U.S. 108, is replaced by a more flexible approach under the totality of the circumstances. The former test required evidence of informant's credibility and surrounding circumstances showing the basis of the informant's conclusions. In Gates, the Court relied upon corroboration to support probable cause.).

[83] Draper v. United States, 358 U.S. 307, 313 (1957)(The detailed description of the suspect given by the informant and his

A distinction must be drawn between arrest and search. As a general principle, a warrant is required for a search,[85] whereas a warrantless seizure of an individual may be lawful if the probable cause standard is satisfied.[86] Nevertheless, under the Payton rule, a warrantless arrest in the suspect's premises violates the Fourth Amendment provisions.[87]

The warrant must describe with precision the place to be searched or the person or things to be seized.[88] Nevertheless, a warrant failing to meet the particularity standard may be reliable unless this irregularity would have been discovered by a reasonably well-trained officer.[89]

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prior accurate tips make his information in this case reliable even though he did not indicate the basis for his tip.).

[84] In comparison, the French *Cour de cassation* refused to consider that an anonymous telephone call provided sufficient basis to invoke flagrancy and therefore to legalize body and premises searches of the persons suspected of using drugs. It held that an external sign (*indice apparent)* is a prerequisite to characterize flagrancy and therefore, to conduct a search without the consent of the suspect. See Judgment of Feb. 2, 1988, Cass. crim., (Diaz), 1988 Bull. Crim., No. 52, at 142-45 (Fr.). In this case, the *Cour de cassation* maintains its position vis-à-vis the conditions of flagrancy.

[85] See Horton v. California, 496 U.S. 128, 133 (1990) ("The general rule [is] that warrantless searches are presumptively unreasonable.").

[86] See United Sates v. Watson, 423 U.S. 411 (1976).

[87] See Payton v. United States, 445 U.S. 573, 573 (1980) ("The Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.").

[88] U.S. Const. amend. IV providing that "[N]o Warrants shall be issued, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[89] See Massachusetts v. Sheppard, 468 U.S. 981 (1984).

Some scholars relying upon foreign criminal procedures support a warrant requirement limited to searches of buildings' structures or curtilage.[90]

2. An exception in France: The formal judicial investigatory

The French law enforcers conducting searches or seizures are not required to act under a warrant except once a formal judicial investigation is conducted within an instruction.[91] The investigating judge (*juge d'instruction)* may proceed to any act necessary to the manifestation of the truth[92] that are gathered into a *dossier*. He will decide whether there is sufficient cause to remand a defendant to trial.[93] Even though competent to investigate, the examining judge usually delegates his powers to the judicial police officers under a written order called a rogatory commission (*commission rogatoire*). The Criminal Procedure Code admits those delegations of powers when the investigating judge cannot conduct himself the investigation. They are routinely

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[90] See Craig M. Bradley, *The Courts "Two Model" approach to the Fourth Amendment: Carpe Diem!*, 84 J. Crim. L. & Criminology 429, 444 (1993).

[91] See *supra* note 12. We have stressed the existence of the prosecutor's supervision of the police acting in a flagrancy inquiry as well as in a preliminary one. The law officers inform the prosecutor of their investigating researches by sending him reports (*procès verbal)*. The investigating search or seizure does not need to be judicially approved. Thus, the initiative to conduct a search or seizure belongs to the police officers' discretion.

[92] See C. Pr. Pén. art. 81 al 1 (Fr.).

[93] One of the interests of the instruction relies on the examining judge's power to place the suspect under a preventive detention.

given. This substitution of competences does not concern certain acts reserved exclusively to the *juge d'instruction* such as searches in a lawyer's or doctor's office or in a press enterprise.[94] An instruction is mandatory only for felonies (*crimes*). Therefore, the judicial supervision over police officers is rather limited because more than 90% of all the offenses are not preceded by an instruction.[95]

An author has pointed out the lack of legal discussion in France about information necessary to provide a sufficient basis for the magistrate's belief.[96] The warrant provides the nature of the offense investigated that is the object of the prosecution.[97] A rogatory commission may be general and may encompass any investigatory act. There is no need to indicate the name of the suspect and his address.[98] However, such a generality concerning the offenses prosecuted is prohibited. In other words, a warrant

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[94] See C. Pr. Pén. arts. 56-1 al 1,2; 56-2 (Fr.). Similarly, once there is an instruction, suspects can no longer be interrogated by the police, see C. Pr. Pén. art 152 al 2 (Fr.).

[95] Moreover, the practice of "correctionalization" undermines this judicial supervision. In this situation, the suspect is charged with a lesser offense, a *délit,* to avoid a criminal jury trial before the *Cour d'Assises*, only French court composed with a jury. Therefore, this practice permits the defendant to be tried only by professional judges before the *tribunal correctionnel*. In France, the initial jurisdiction of criminal matters belongs to three categories of courts: the *Tribunal de police* (least serious offenses), the *Tribunal correctionnel* (middle-range offenses), the *Cour d'assises* (felonies).

[96] See Tomlinson, *The French Experience, supra* note 3, at 184-85.

[97] See C. Pr. Pén. art. 151, 152 (Fr.).

[98] See C. Pr. Pén. art. 94 (Fr.) (This article holds that searches are permissible in places where seizable objects "may be found" and may be useful to the manifestation of the truth.).

concerning a group of offenses without determining them will be held illegal.[99]

B. Execution of the written order

1. The staleness rule

Federal Rules of Criminal Procedure (Fed. R. Crim. P.41(c)(1)) require the search warrant's execution within ten days, whereas the arrest warrant is not bound by such a rule. Moreover, probable cause must exist until the time of execution. The underlying rationale of this rule is the possibility that probable cause becomes stale. Generally, the warrant search or seizure must be executed only during daytime (from 9 a.m. to 10 p.m.). However, the magistrate may extend its execution under the condition to justify his decision. Furthermore, a daytime search that continues into the night may be held valid.[100]

There is no French equivalent to the staleness rule. However, the French investigating judge sets time limit for the rogatory commissions' transmission to his office. Otherwise, the judicial police officers have a delay of eight days after the execution of warrant to send their

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[99] See Judgment of Mar. 21, 1957, Cass. crim., 1957 Bull. Crim., No. 278 (Fr.).

[100] See United States v. Burgard, 551 F.2d 190 (CA8 Mo. 1977).

reports.[101] Similarly, a daytime search or seizure is required under the French Code for the three inquiries previously mentioned (from 6 a.m. to 9 p.m.)[102] with the exceptions of drugs and pandering offenses.[103]

2. Discretion of the police officers

The American police officers' discretion such as the means used, the degree of coercion required, governs the warrant's execution. Nevertheless, the basic Fourth Amendment reasonableness requirement must be satisfied. This standard has been "stretched" by the U.S Supreme Court in the "drug courier profiles" cases.[104]

Under a search warrant, the police officers can seize incriminating items, contraband, instruments of the offense such as burglary tools and, mere evidence of criminal activity (Fed. R. Crim. P.41(b)).

The general delegation under the French warrant permits the judicial police officers to decide to search a particular place, to initiate a dwelling search. However, dwelling searches require the person whom the premises are searched to be present. If she is not available, she names someone to represent her. In case of impossibility, the

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[101] See C. Pr. Pén. art. 151 al 4 (Fr.).
[102] See C. Pr. Pén. art. 59 (Fr.).
[103] See C. Pr. Pén. arts. 706-30, 706-37 (Fr.).
[104] See Galloway, *Eclipse, supra* note 79, at 15 citing United States v. Sokolow, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989).

judicial police officer chooses two witnesses except persons' subject to his authority.[105] Moreover, all the investigatory acts are reported in *procès verbaux* signed by the police officer himself as well as the persons witnessing the operations.[106] An issue arises when the police officers, while searching evidence of the offense listed in the warrant, find incriminating items that are not related with this particular offense. The *Cour de cassation* recognizes the police officers' right to inform the investigating judge about this evidence.[107] The body searches may also be conducted under a rogatory commission. Finally, the judicial police in charge of the warrant's execution are the only authorities who can look at the documents before seizing them.[108] The above proceedings limit the French investigation's powers and guarantee individual liberties.

It has been stressed that the examining judge's involvement in the investigation and his authority to delegate powers to the police are foreign proceedings in the American criminal procedure.[109] Thus, a magistrate's participation to a search in an adult bookstore to seize pornographic items not listed in the warrant was held

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[105] See C. Pr. Pén. art. 57 al 1, 2 (Fr.).

[106] See C. Pr. Pén. arts. 57 al 3, 66 (Fr.). It must be emphasized that the above formalities concerning dwelling searches also applied to the preliminary and flagrancy inquiries.

[107] See Judgment of Jan. 14, 1992, Cass. crim., 1992 Bull. Crim., No. 13 (Fr.).

[108] See C. Pr. Pén. art. 97 al 1 (Fr.). The investigating judge has also the right to examine them before undertaking their seizure.

[109] See Frase, *supra* note 4, at 668.

inadmissible. The "neutral and detached magistrate" requirement was not met.[110]

3. The "Knock and Notice" requirement

This rule based on Common Law requires the American law enforcers to state their identity and purpose before entering into a dwelling. Thus, the individual has the opportunity to "peacefully surrender his privacy"[111] and to prevent a violent entry. According to the general view, the rule serves individual's privacy and the police officers' mistaken interferences.[112] The U.S. Supreme Court held that prior notice is "deeply rooted in our heritage."[113] It applies to arrests' warrants and to warrantless searches. The Federal statutory provisions related to the announcement requirement[114] are broadly construed. The phrase "house" encompasses any building within the curtilage, apartments, and motel rooms.[115] Once the law authorities have announced

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[110] See Lo-Ji Sales v. New York, 442 U.S. 319 (1979).

[111] See John Wesley Hall, Jr., Search and Seizure § 44:2. (2nd ed. 1991).

[112] *Id.*

[113] See Miller v. United States, 357 U.S. 301, 313 (1958).

[114] 18 U.S.C. § 3109 states:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

[115] See 18 U.S.C.A § 3109.

their entry, a denial of entry authorizes use of force. For example, surrounding circumstances or silence may show a denial of entry. The notice of authority and purpose rule does not apply when exigent circumstances exist or if the person is aware of the offices' purpose and authority.[116] Moreover, some states have adopted "No knock and Notice" statutes and certain allow "no-knock" warrant in other jurisdictions even though the state legislature has not enacted any exception to the notice and purpose requirement.[117]

The numerous and broad exceptions to the "reasonableness," probable cause and warrant requirements threaten the privacy rights. These exceptions have "swallowed" the principles protecting the individual liberties.

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[116] See Ker v. California, 374 U.S. 23 (1963); United States v. Spinelli, 848 F.2d 26 (2d Cir. 1988).

[117] See Charles Patrick Garcia, *The Knock and Announce Rule: A New Approach to the Destruction-of-Evidence Exception,* 93 Colum. L. Rev. 685, 700 (1993). This article emphasizes that the "war on drugs" has lead the courts to adopt a "blanket rule" authorizing the law enforcers to break down premises' doors in narcotics' cases without any need to state their authority and aim. For a state pattern, see William W. Daniel, Georgia Criminal Trial Practice, § 4-16 (1994). The issuance of a "no-knock" warrant showing the potential danger to the police and destruction of evidence was approved in one Georgia case. See Jones v. state, 127 Ga. App. 137, 193 S. E. 2d 38 (1972).

II. A narrow or limited approach to judicial supervision

The effects of the "Criminal Procedure Counter Revolution" clearly appear in the field of searches and seizures.[118] The Warren Court from 1961 to 1969 has been said to be defendant-oriented. It extended the Due Process Fundamental Fairness principle.[119] On the contrary, the Burger and Rehnquist Courts have "eclipse[d]"[120] the Fourth Amendment safeguards. In France absence of a general judicial warrant requirement facilitates the pre-trial investigatory function to the detriment of citizens' rights.

A. Consent search

1. Necessity of a consent in the French preliminary investigation

Police receive information concerning commission of an offense either through their own observations or from the reports of citizens. Then, they initiate a preliminary inquiry. We have previously stressed the non-coercive aspect

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[118] See Donald E. Wilkes, Jr., *First Things Last: Amendomania and State Bills of Rights*, 54 Miss L.J. 223 (1984). See also Wasserstrom, Silas J., *The Incredible Shrinking of Fourth Amendment*, 21 Am. Crim. L.Rev. 257 (1984).

[119] Thus, even though the states did not violate a specific provision of the Bill of Rights, Due Process concept was violated if the state's proceedings were fundamentally unfair.

[120] See Galloway, *Eclipse, supra* note 79.

of this police investigation.[121] Therefore, in a preliminary inquiry there is no arrest power with the exception of the individual going voluntarily to the police station.

Searches and seizures require the written consent of the person whose domicile is searched.[122] The consent is a mandatory prerequisite to a search conducted, only during legal hours except for terrorism offenses, either by an officer or an agent of judicial police. The consenting person mentions in the report his knowledge of his right to refuse.[123] When one cannot write, the proceedings must show that he was aware of his right to refuse. Nevertheless, the *Cour de cassation* held no consent was required for a surveillance with a pair of binoculars. This surveillance falls outside the domicile's protection. The U.S Supreme Court approved an aerial surveillance in California v. Ciraolo[124] and in Florida v. Riley.[125] According to the Court, surveillance from an aircraft flying at 1000 or 400 feet did

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[121] See *supra* p10 of the thesis.

[122] The legal notion of domicile is defined broadly. Thus, any lived-in place falls within the legal concept. Thus, the *Cour de cassation* invalidated a search conducted in a hotel room without the consent of his occupant by relying on the sanctity of the domicile protected in Article 226-4 of the new Penal Code. See Judgment of May 30, 1980, Cass. crim., 1980 Bull. Crim., No. 165 (Fr.). However, vehicles as well as left-luggage lockers have not been assimilated to domiciles.

[123] See C. Pr. Pén. arts. 75, 76 (Fr.). The latter states:

> Searches, domiciliary visits and seizures of evidence to be used against the defendant may not be effected without the express consent of the person on whose property the operation takes place.(last part omitted).

[124] 476 U.S. 207, 39 Crl 3106 (1986).

[125] 488 U.S. 445, 44 CrL 3079 (1986).

not amount to a search. No reasonable expectation of privacy was found. Those two decisions pointed out the absence of any physical interferences with residents' yard.

Some authors have narrowly interpreted Article Seventy-six of the Criminal Procedure Code, requiring an express consent, to argue that the prerequisite consent to search does not bind vehicles searches during a preliminary inquiry.[126] However, the courts do not follow this approach. Similarly, a body search is limited to the consent of the person unless it is a protective frisk. Therefore, the problem is to draw a line between body search and protective frisk.

2. Evaporation of the probable cause standard as well as the warrant requirement

a. Free consent

The consent must be voluntary.[127] The "voluntariness" standard is appreciated under the totality of circumstances encompassing the competence, the mental condition of the person consenting, her knowledge of her right to refuse, her

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[126] See *supra* note 123; See also Pierre Chambon, *Ouverture du coffre d'un véhicule dans le cadre d'une enquête préliminaire*, 1984 J.C.P II 20213 sous Tribunal correctionnel Toulon, Judgment of Apr. 26, 1983 (Fr.).

[127] See Schneckloth v. Bustamonte, 412 U.S. 218, 227; 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

cooperation or resistance, and police coercive conduct.[128] Similarly, the temporal scope of the consent is examined under the totality of the circumstances.[129] The prosecution sustaining a search as consensual has to prove existence of a consent "by clear and convincing evidence."[130]

b. Consent by a third party

The wife or husband[131] as well as roommates can agree to a search of the areas over which they have common authority.[132] The underlying rationale to the rule relies on the assumption of risk.[133] Furthermore, a reasonable police officer's belief of an apparent authority makes the consent valid.[134] His reasonable mistake of fact in contrast to a legal one does not void the search.[135]

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[128] See Galloway, *supra* note 69, at 760.

[129] See H. Patrick Furman, *The Consent Exception to the Warrant Requirement*, 23 Colo. Law. 2105 (1994).

[130] However, a preponderance of evidence may be sufficient to prove a voluntary consent under state-law. See Hall, *supra* note 109, at § 8:11. Nonetheless, Florida v. Royer, 460 U.S. 1 (1983), states the "clear and convincing evidence" test as the general standard.

[131] See Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

[132] Similarly, a parent may consent to his child's bedroom, an employer may also consent to a search of an employee's work or his storage areas. See Generally Hall, *supra* note 109, at §§ 8: 31-8: 52.

[133] See Ronald L. Carlson, Criminal Justice Procedure, § 2.2 (4th ed. 1991).

[134] See Illinois v. Rodriguez, 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 65 (1983).

[135] See Stoner v. California, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964). The Court refused to extend the third party consent to an officer's mistake as to someone's legal authority.

3. Dilution of the consent

In both countries, police can put pressure on the individuals to obtain a consent. In France, the availability of a detention up to 24 hours (*la garde à vue*) provides the police with an effective threat. In the American procedure, the totality of the circumstances' test permits more easily to find a voluntary consent. The prosecutor is not required to prove that the individual was informed of his right to refuse.[136] The failure to give Fourth Amendment warnings is irrelevant where the defendant "had been arrested and was in custody, but his consent was given while on a public street, not in the confines of the police station."[137] A person who is not aware of her right to refuse to consent to a search will not be protected by the constitutional provision if her consent is found voluntary under other factors. Ones have argued than uneducated people will be more "willing" to consent because they are not aware of their right to refuse.[138]

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[136] See Schneckloth v. Bustamonte, 412 U.S. 218, 232-33 (1973) (consenting person has no right to be advised of his right to refuse).

[137] See United States v. Watson, 423 U.S. 411, 424 (1976).

[138] See Galloway, *Eclipse*, *supra* note 79, at 18.

B. Emergency situations

Exigent circumstances and hot pursuit cases permit American law enforcers to derogate to the warrant requirement protecting privacy in one's home and one's property. Their French counterparts operating in a flagrancy investigation have broader powers to search and seize evidence or person than in a preliminary inquiry.

1. A broad concept

a. Flagrancy

The judicial police officers have sometimes characterized ordinary offenses as flagrant ones to search and seize an individual without his consent. This issue has arisen in drug detention and illegal aliens cases. In those situations, the individual does not present any external proof of his actual criminal activity. These offenses are difficult to detect because of their occult aspect.

The construction of the term "*flagrant*" divides the scholars. For some of them, a flagrancy situation is that which appears to the individual's senses. Other rely more precisely on objective signs[139] whereas other ones assimilate

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[139] See Judgment of Jan. 22, 1953 (Isnard case), Cass. crim., 1953 J.C.P. II 7456 rapport Brouchot (Fr.).

flagrancy offenses with emergency situations. Finally, another view grounded on Article Fifty-three of the Criminal Procedure Code holds that there is flagrancy when the offense is actually committed without any need to see it.[140] The French case-law requires objective signs that an offense has occurred and is still "flagrant"[141] The reports filled by the police must indicate that those signs were present. The jurisprudence of *Cour de Cassation* has held that a flagrancy inquiry must follow a flagrant offense and not the opposite. The problem is to determine what constitutes objectives' signs of flagrancy. Thus, a tip from an anonymous informant is not a sufficient basis to characterize an external sign[142] in contrast to the victim's testimony.[143] Nevertheless, an apparent clue of a flagrant offense makes its seizure by a judicial police agent valid.[144] Moreover, a person's change of walking direction at the sight of the police officers is sufficient to open a flagrancy inquiry.[145] Furthermore, the

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[140] See Merle et Vitu, Traité de Droit Criminel, (4th ed. 1989). See also Judgment of May 30, 1980, Cass. crim., 1980 Bull. Crim. No. 165 at 411, 1981 D.P. Jurisprudence 533 note Wilfrid Jeandidier (Fr.).

[141] See C. Pr. Pén. art. 53 (Fr.): "The felony or delict that is in the process of being committed or which has just been committed is a flagrant felony or flagrant delict." See also Judgment of Jan. 4, 1982, Cass. crim., 1982 Bull. Crim., No. 2 (Fr.).

[142] See Judgment of July 21, 1982, Cass. crim., 1982 D.P. 642 (Fr.).

[143] See Judgment of Oct. 8, 1985, Cass. crim., 1985 Bull. Crim. No. 301 (Fr.).

[144] See Judgment of March 2, 1993, Cass. crim., 1993 Bull. Crim., No. 93 (Fr.) (The judicial police agents seized a weapon from a damaged vehicle involved in a death accident. They noticed it while they were removing the vehicle.).

[145] See Judgment of Jan. 4, 1982, Cass. crim., 1982 Bull. Crim. No.2 (Fr.).

victim's testimony of a future offense (bribe) was held relevant to characterize an appearance of the criminal activity. One author has wondered how the Court could rely on an appearance sign of an offense not yet occurred.[146] In the *Trignol* case, the *Cour de cassation* validated a vehicle search without requiring an external proof and even though the search occurred several days after the commission of the offense (kidnapping).[147] One may wonder whether the "end justifies the means."

b. Exigency situations

The exigent circumstances[148] under American case law constitute a growing area since 1925.[149] They encompass the threat of loss of evidence,[150] physical danger to police officers,[151] to third parties and even to suspects, danger of

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[146] See Judgment of Apr. 22, 1992, Cass. crim., 1995 D. Jur. 59 note Haritimi Matsopoulou (Fr.).

[147] Judgment of Nov. 8, 1979, Cass. crim., 1980 J.C.P. I No. 2983 (Fr.). The critics of this case focused on the Court's interpretation of flagrancy. Article 56 of the criminal procedure Code holds that searches and seizures concern the persons suspected to be engaged in a criminal activity. Here none suspicion existed against Mr. Trignol who was one of numerous citizens searched. Therefore, the French Court relied on an extensive notion of flagrancy.

[148] See Generally Hall, *supra* note 111, at § 7.

[149] See Carroll v. United states, 267 U.S. 132, 150-53. The mobility of the automobile creates an emergency allowing a warrantless search because the driver could flee the locality.

[150] See Wong Sun v. United States, 371 U.S. 471, 9 L.Ed.2d 441, 83 S. Ct. 407 (1963).

[151] See Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889, 88 S. Ct. 1868 (1968) (A reasonable suspicion the suspect is armed during a street encounter creates exigent circumstances justifying a frisk on less than probable cause).

escape, hot pursuit,[152] and the automobile exception. The courts also focus on the amount of time necessary to obtain a warrant and on the gravity of the underlying offense.[153]

Most of the American exigent situations are flagrant. Nevertheless, this exception to the warrant requirement also applies to offenses that are no longer "flagrant" such as an entry based on a recent tip in an old case.[154]

2. Broad investigative police powers

a. Body search

The French law enforcers acting in a flagrancy situation do not need a prior judicial authorization to an individual's search assimilated to a *perquisition*.[155] Moreover, no daytime rule applies but the body search must be conducted by a police officer with the same sex of the person frisked.[156]

Originally, under the American case Terry v. Ohio, the law enforcers could search a suspect and seize dangerous items such as weapons to protect them. This protective frisk

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[152] See Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967).

[153] See Welsh v. Wisconsin, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984) (The Court held the entry in defendant's home to arrest him for a traffic-violation illegal).

[154] See Frase, *supra* note 4, at 579.

[155] See *supra* note 46.

[156] See Picard, *supra* note 37.

was limited to the outer of the clothes. The search may not go beyond what is necessary to determine if the suspect is armed.[157] However, the U.S. Supreme Court has expanded the scope of the frisk to places[158] and drug detention. Thus, a pat down and a strip search of a person suspected of hiding drugs in her alimentary canal was held valid.[159]

b. Premises or buildings search

The inviolability of a private area such as the suspect's home is set aside when exigent circumstances exist under American case-law. Thus, a warrantless entry in one's home[160] or a warrantless entry of a third person's premises[161] does not violate the Fourth Amendment. The "Knock and Announcement" requirement does not apply. In Segura v. United States,[162] the Court held that the police did not violate the Fourth Amendment when after a warrantless entry in the suspect's home, they remained inside for several

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[157] See Minnesota v. Dickerson, 113 S.Ct. 2130 (1993) (An officer while patting down a suspect prolonged his frisk to identify an object even though he knew it was not weapon.).

[158] See Michigan v. Long, 463 U.S. 1032 (1983) (The passenger compartment of the individual stopped may be searched even though the suspect has stepped out of his vehicle.).

[159] See United States v. Montoya de Hernandez, 473 U.S. 531 (1985) (The defendant was detained 16 hours without any judicial authorization. However, this detention was not deemed unreasonable.).

[160] See Payton v. New York, 445 U.S. 73, 100 S.Ct. 1471, 63 L.Ed.2d 639 (1980).

[161] See Steagald v. United States, 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981).

[162] See Segura v. United States, 468 U.S. 796, 104 S.Ct. 380, 82 L.Ed.2d 599 (1984).

hours, while the suspect was in custody. The seizures were not deemed unreasonable despite the absence of a threat of destruction.

The French police, searching in a domicile, must respect the proceedings previously described.[163] The Criminal Procedure Code authorizes domicile search of all persons having participated in the offense or having incriminating evidence.[164] The police officers only seize the documents necessary to their investigation. They can undertake searches and seizures at any time within "places frequented by the public when it has been established that persons engaged in prostitution are habitually received here."[165] Similarly, searches of places where drugs are used in community, fabricated or stocked are no bound by the daytime rule.[166]

In both countries, the law enforcers may search the scene of a *flagrant* crime[167] or the homicide scene without a warrant[168] and seize incriminating evidence.

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[163] See *supra* notes 105, 106.

[164] See C. Pr. Pén. art. 56 (Fr.).

[165] See C. Pr. Pén. art. 706-35 (Fr.).

[166] See C. Pr. Pén. art. 706-28 (Fr.).

[167] See C. Pr. Pén. art. 54 (Fr.). Moreover, the French law officers acting in a flagrancy inquiry can designate experts to conduct scientific examination (C. Pr. Pén. art. 60), can detain persons on the scene (C. Pr. Pén. art. 61), can summon and interrogate any person holding information about the case (C. Pr. Pén. art 62) and can place witnesses and suspects in investigatory detention (C. Pr. Pén. art. 63) (Fr.).

[168] See Mincey v. Arizona, 437 U.S. 385 (1978).

C. Vehicle motor searches: A lesser expectation of privacy

1. "Erosion" of the Fourth Amendment Guarantees

In this area, the traditional holding that "searches conducted without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment subject only to a few specifically established and well-delineated exceptions" seems meaningless.[169]

a. Emergency justification for a search

First, the U.S. Supreme Court in Carroll v. United states,[170] held that the mobility of the vehicle created exigent circumstances, e.g., threat of destruction of evidence, authorizing a warrantless search.[171] However, probable cause to believe that there was incriminating evidence had to be demonstrated. The holding was limited to immediate search.[172]

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[169] This holding is found in Katz v. United States, 389 U.S. 341, 357 (1967); see also United States v. Ross, 456 U.S. 798, 825 (1982); see also California v. Acevedo, 111 S.Ct. 1982, 1991 (1991). See Lisa K. Coleman, California v. Acevedo: *The Erosion of the Fourth Amendment Right to be Free from Unreasonable Searches,* 22 Men. St. U. L. Rev. 831 (1992) (The author stresses the "great departure from the warrant requirement" in Acevedo.) [hereinafter Coleman, *Erosion of the Fourth Amendment].*

[170] 267 U.S. 132 (1925).

[171] *id.* at 149, 153.

[172] *Id.* at 134, 36.

Then, the automobile exception was extended in Chambers v. Maroney[173] to warrantless searches conducted once there was no more emergency. The occupants of the car had been taken to the police station. Nevertheless, exigent circumstances had to be present at the time of the seizure.

b. Privacy expectation in containers within the vehicle

Primarily, the Court in United States v. Chadwick, refused to apply the vehicle's exception to a search of a footlocker within the automobile.[174] Probable cause to the containers alone was deemed insufficient.[175] Therefore, such a warrantless search of property was unreasonable because of no fear of loss of evidence. The second step was to allow a warrantless search of containers when there was probable cause to the entire vehicle. In United States v. Ross,[176] the Court made a complex distinction between probable cause to search an automobile and probable cause to search a container only. In the first situation, the privacy expectation in any containers "yield[ed] to the authority of [an automobile] search."[177] On the contrary, a warrant was required in the second hypothetical. It was pointed out that

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[173] 399 U.S. 42 (1970).
[174] 433 U.S. 1 (1977).
[175] *Id.* at 13.
[176] 456 U.S. 798 (1982).
[177] *Id.* at 823.

police officers could rely on false probable cause to the whole vehicle to search it.[178]

Finally, the trend toward the weakening of the Fourth Amendment appeared clearly in California v. Acevedo.[179] The Court abolished the ambiguous distinction made in Ross between probable cause to search an automobile and probable cause to search a container only. A warrantless search of the containers based only on probable cause to those containers is lawful.[180] The Court's reasoning is grounded on the inefficiency of the Chadwick rule. This later "provided only minimal protection for privacy" and had "impeded effective law enforcement."[181] One can doubt of the greater privacy protection provided under the new holding because of the creation of one more exception to the warrant requirement.[182] The doctrine stressed the absence of identification of any factors making the search reasonable such as the mobility of the vehicle or a threat of loss of evidence. Even though those justifications were not present, the reasonableness standard was satisfied. In the area of vehicles' searches, the interests of law enforcement undermine the individual's privacy.

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[178] Wayne R. Lafave, Criminal Procedure § 3.7 (c) (1987)

[179] See Coleman, *Erosion of the Fourth Amendment, supra* note 169.

[180] *Id* at 1991.

[181] *Id* at 1988-91.

[182] See Coleman, *Erosion of the Fourth Amendment, supra* note 169.

2. French courts' refusal to extend the domicile's protection to vehicles

The *Cour de cassation as well as* the *Conseil constitutionnel* refuse to include vehicles in the legal notion of domicile except for the vehicles used as premises (mobile home).[183] Therefore, the protection afforded to private places does not apply to vehicles. One may wonder why a lesser expectation of privacy governs vehicles search. The law enforcers acting within an administrative mission are not allowed to search vehicles except specialized agents such as customs personnel. On the contrary, such searches during flagrancy inquiries are lawful if the conditions of flagrancy are met.[184]

The French Constitutional Council in its decision of January 12, 1977, invalidated a law expanding the power of police to search automobiles.[185] The challenged bill required neither the commission of an offense nor a threat to public safety to conduct vehicle searches. The vehicle had only to be on a road open to traffic and the driver had to be present during the search. The general search investigatory powers provided in the bill were deemed unconstitutional.

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[183] See Judgment of Sept. 11, 1933, Cass. crim., 1933 Bull. Crim. No. 267; Judgment of Nov. 8, 1979 (Trignol case), Cass. crim., 1979 J.C.P. II 19337 (Fr.).

[184] The jurisprudence of the *Cour de cassation* stresses that a speed limit violation punished by a *contravention* even though *flagrante* does not authorize a vehicle search.

[185] Decision of Jan. 12, 1977, Con. const., J.O. Jan. 13, 1977 (Fr.).

However, the Constitutional Council did not declare all searches of automobiles unconstitutional. Therefore, individual liberty may be set aside when an offense or a threat to public order is characterized. This decision has extended the notion of individual liberty.[186]

In the Trignol case, an individual refused to open his trunk. He was prosecuted under Article L4 of the Highway Code.[187] Mr. Trignol relied on the Constitutional Council's decision to argue the unconstitutionality of the search. Despite the decision of the Constitutional Council, the *Cour de cassation* held the search valid by relying on a different statute (art. L4). The Court grounded the legality of the search by "stretching" the concept of flagrancy.[188] Moreover, Article L4 was broadly construed to encompass not only highway safety verifications but also judicial investigation searches.[189]

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[186] The notions of surety (the searches would have taken place on a public way) and inviolability of domicile (the vehicle is not a domicile) were not concerned.

[187] This article requires a motorist to submit to all police verifications concerning the condition of his vehicle.

[188] See *supra* note 147.

[189] See Vroom, *The Conseil Constitutionnel, supra* note 55, at 186-89.

CHAPTER III: INVESTIGATORY RESTRAINTS ON THE RIGHT OF LOCOMOTION

I. Investigatory stops

A. Requirement of a reasonable suspicion

1. Abandonment of the probable cause requirement

In the leading case Terry v. Ohio,[190] a stop and frisk by a police officer was held constitutionally permissible on reasonable suspicion grounds. It was a great change in the Court position toward warrantless arrests not based upon probable cause. Several men attracted the attention of a police officer. This later approached them for questioning, and frisked them. The detective patted Terry's breast pocket and felt a weapon which was then seized. The U.S Supreme Court held that "specific and articulate facts which taken together with rational inferences from those facts, reasonably warrant" the intrusion.[191] However, the intrusion was limited in scope and purpose. Thus, the frisk of the outer clothing was allowed only to locate weapons to protect

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[190] 392 U.S. 1 (1968).
[191] *Id.* at 21.

police officers. Moreover, the police officers' experience must have lead them to conclude that a criminal activity may be afoot.[192] Suspicion alone such as association with known criminals cannot justify an investigatory stop.[193]

It has been point out that the post Terry cases require less and less evidence to stop and frisk someone.[194] The problem is that more and more investigatory stops look like arrests. From now on, an individual may be accosted by a law enforcer, stopped on reasonable suspicion or arrested on probable cause.

2. Controversial identity checks in France

a. Political issue

The French legislator collections the statutes in this area. Each time a new legislative majority is elected, it will enact a new law about identity checks. In 1981 the law "Security and Liberty" regulated the identity checks by the judicial police acting within an administrative mission. Thus, a prevention of a breach of the public order authorizes such identity checks. Even though these administrative identity checks conducted the judicial police

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[192] *Id.* at 27.

[193] See Sibron v. New York, 392 U.S. 40 (1968).

[194] David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked,* 69 Ind. L.J. 659 (1994).

by were not allowed before 1981, they were routinely conducted.[195] The statute's provisions on identity checks were challenged before the Constitutional Council on two grounds: violation of individual liberty and separation of powers inherent in giving to the judicial police functions normally within the field of the administrative police. The Constitutional Council did not really take position on the constitutionality of an identity control outside any offense. The restrictions on the individuals' rights were outweigh by superior interests. Moreover, the guarantees providing by the law were deemed sufficiently protective of the individuals' rights. The Constitutional Council held "[i]t is up to the judicial and administrative authorities to see to the respect of those rules and guarantees provided for by the legislator, as well as to the competent courts to censure and reprimand, should the situation arise, any illegalities committed."[196]

In 1983, a new statute stated that preventive identity checks could be conducted in determined places where the

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[195] The identity checks were theoretically allowed only in three cases: "flagrant" delict, traffic's violations and during an administrative mission conducted by the *gendarmes*. However, the *Cour de cassation* held that a preventive (administrative) identity check by the judicial police was lawful. See Judgment of Jan. 5, 1973 (Friedel case), Cass. crim., 1973 Bull. Crim., No.7, 1973 D. Jur 541 note Roujou de Boubée (Fr.). See *supra* note 19. Several complaints relying on the illegality of a preventive identity check by the judicial officers were filled in 1980. Then, the police decided to conduct only repressive identity checks to oblige the Legislature to take position.

[196] See Decision of Aug. 27, 1986, Con. const., Fr., 1986 J.O. 10439 (Fr.) citing decision "Security and Liberty" of Jan. 19-20, 1981, Con. const., Fr., Jan 22, 1981 J.O. 308 (Fr.).

security of persons and property was "immediately" threatened. The *Cour de cassation* considered that an appellate court's motivation based only on general frequency of crime in the subway to justify identity control was insufficient.[197] It was necessary to specify in what way the security of persons and goods were "immediately" threatened. The 1983 statute was modified in 1986 to come back to the previous rules of 1981. It was referred to the Constitutional Council which found the suppression of the term "immediate" to be consistent with the Constitution. Finally, the recent criminal procedure reform of 1993 has once again modified the prior rules in a more restrictive way as regard to individuals' rights.

b. Situations of restraint of the right of locomotion

Under the actual Criminal Procedure Code, a person may be asked to justify her identity when the police act within a judicial (repressive) mission either during a preliminary inquiry or during a flagrant investigation.[198] Even though

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[197] See Judgment of Oct. 4, 1984 (Kande case), Cass. crim., 1984 Bull. Crim., No.287, 1985 J.C.P. II 2039 note J. Buisson (Fr.).

[198] See C. Pr. Pén. art. 78-2 al 1 (Fr.):

> The Officers of the judicial police [part omitted] may invite to justify his identity by any means, any person in regard to whom there exists an indication causing it to be presumed:
> that he has committed or attempted to commit an offense;
> or that he is preparing to commit a felony or a delict;
> or that he is likely to furnish information useful to an inquiry in the case of a felony or a delict;

the identity card is not mandatory in France, the document showed by the person must be sufficiently reliable. Therefore, this judicial identity control which has not been reformed in 1993 is based on an individualized suspicion.

The police officers conducting an administrative identity controls, e.g., to prevent a breach of the public order,[199] have been required by the *Cour de cassation* to indicate why the security of persons and property were threatened.[200] The Cour went further, and held that the prevention of a breach of the public order must be directly related to the person's behavior whose identity is controlled.[201] Thus, in this 1992 case, the 1986 version of the identity checks provisions had been read in conformity with both, the respect of the individuals' rights, and the Court's jurisprudence.[202] However, the Court's requirement went beyond the terms of the Code. The Court's holding made the distinction between judicial police mission and administrative police mission more difficult to draw.

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or that he is the object of a search ordered by a judicial authority.

[199] See C. Pr. Pén. art. 78-2 al 3 (Fr.).

[200] See Judgment of May 27,1992, Paris Chambre d'accusation, 1992 Droit Pénal [Dr. pénal] No. 216 (Fr.).

[201] See Judgment of Nov. 10, 1992, Cass. crim., 1993 Dr. pénal, No. 23 (Fr.). The Court stressed that the law enforcers cannot simply ground the identity control on the facts that two persons were speaking in a foreign language in an area of high incidence of larcenies.

[202] See Judgment of Oct. 4, 1984 (Kande case), Cass. crim., 1984 Bull. Crim., No. 287 (Fr.). See *supra* note 197.

Nevertheless, the 1993 legislation has reduced the scope of this case law by creating a new situation of identity check: the requested control.[203] This identity check is executed under the prosecutor's requisition to investigate in specific places some offenses during a limited period of time. The prosecutor must identify these breaches of law. This control, without any particularity requirement, is only based on the frequency of certain offenses in a determinate area. The liberty of movement of any individual is directly threatened.

The foreigners may be asked to prove their identity under the above rules. Moreover, their conditions of stay in France can be controlled. The jurisprudence held that such a check must not be grounded on proper characteristics of the person whose identity is controlled such as her skin's color. Objective sign of alien status resulting from "exterior circumstances" to the foreigner are required.[204] The phrase "*circonstances extérieures*" may encompass either

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[203] See C. Pr. Pén. art. 78-2 al 2 (Fr.).

[204] see Judgment of Apr. 25, 1985 (Vuckovic and Bogdan cases), Cass. crim., 1985 Bull. Crim., No. 159 (Fr.). The issue in those cases was to know whether a statute relating to foreigners' police (*décret* March 18, 1946) had been abolished by the 1983 provisions of the Criminal Procedure Code. This statute makes applicable the *Ordonnance* of Nov. 2, 1945 requiring the foreigners to be able to present their immigration papers at any time. The Court held that when there were external signs of alien status, such as a foreign driver's license, the control could be based on the *décret*. On the contrary when those circumstances were not present, the identity control was bound by the Code's provisions.

a physical feature or a physical sign and other characteristics such as clothes.[205]

B. Enlargement of police powers

1. Expansion of investigatory stop and frisk

a. Weakness of the reasonable suspicion standard

The only fact that an individual was observed in an area of "high incidence of drug traffic" was held insufficient to justify a stop.[206] However, the trend has changed, and the liberty of movement has been restricted. From now on, an individual walking in a high crime area with an "evasive" conduct may be stopped and frisked.[207] The targets of those stops will be the disadvantaged American minorities.

The totality of the circumstances test permits the courts to appreciate the legality of a stop. The police officers experience or common sense is a determinative parameter.[208] A comparison of the suspect with a "criminal

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[205] See Jeandidier, 1985 J.C.P. II 20465 (Fr.).

[206] See Brown v. Texas, 443 U.S. 47-49 (1979). In this case, the individual was stopped in an alley associated with drug trafficking, and he refused to identify himself before being frisked. A Texas statute criminalized the refusal to identify oneself.

[207] See Harris, *supra* note 194.

[208] See United States v. Cortez, 449 U.S. 411 (1981). See also United States v. Hensley, 469 U.S. 221, 282 (1985).

profile" outside of the context of any particular case may satisfy the reasonable suspicion standard.[209] An individual turning and walking in other direction after having left a house known for cocaine traffic may be stopped. The reasonable suspicion requirement of Terry is met.[210] Similarly, an anonymous tip but corroborated justifies a stop.[211] Finally, a Terry stop of persons suspected of past crimes when police have reasonable suspicion that the individuals they encounter were involved in or were wanted for a completed felony is constitutional.[212]

The individualized suspicion requirement is set aside when "highway sobriety checkpoints" are conducted by police who stop every car and question the driver.[213]

b. Stop or arrest?

An individual is seized when he cannot reasonably believe that he is free to leave.[214] The Court stressed that an individual can walk away when questioned by the police.[215] Approaching an individual in the street and asking him

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[209] See Harris, *supra* note 194.

[210] See State v. Dickerson, 481 NW2d 840, 51 CrL 1021 (Minn. Sup. Ct. 1992).

[211] See Alabama v. White, 496 U.S. 325 (1990); See also Adams v. Williams, 407 U.S. 143 (1972). The tip must give indication of the informant's basis of knowledge.

[212] See United States v. Hensley, 469 U.S. 221 (1985).

[213] See Michigan Dep't of State Police v. Sitz, 110 S.Ct. 2481 (1990).

[214] See United States v. Mendenhall, 446 U.S. 544 (1980).

[215] *Id.* at 544.

questions does not implicate the Fourth Amendment provisions.[216] Thus, questioning factory's employees about their citizenship while other agents stationed near exits does not constitute a seizure.[217] Nonetheless, the U.S. Supreme Court, relying on the Due Process Clause of the Fourteenth Amendment, invalidated a California Statute requiring persons who loiter or wander to provide a "credible and reliable" identification and to account of their presence.[218] In a concurring opinion, Justice Brennan argued that under the Fourth Amendment, the police officers acting within a Terry stop may ask investigative questions "[b]ut they may not compel an answer, and they must allow the person to leave after a reasonably brief period of time" unless they have acquired probable cause to arrest him.[219]

The degree of force use to interfere in one's right of locomotion may determine if one is facing a stop or an arrest. In Michigan v. Chesternut,[220] the Court held that the police chase of a suspect, who was discarding packets of contraband while he was fleeing, was not a seizure. The Court pointed out that no siren, no flash lights or weapons were displayed. The degree of force used to characterize an

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[216] See Florida v. Royer, 460 U.S. 491. 497 (1983).

[217] See INS v. Delgado, 466 U.S. 210, 217 (1984).

[218] See Kolender v. Lawson, 461 U.S. 352, (1983). The failure to clarify what was contemplated by the "credible and reliable" identification requirement violated Due Process Clause.

[219] *id.* at 366.

[220] 486 U.S. 567 (1988). In this case, the flight from the police alone was deemed sufficient to meet the suspicious grounds test.

arrest seems to be particularly high. Thus, the stop is not converted into an arrest when a gun point or a weapon is displayed, when one is frisked while facing a wall or lying down and handcuffed.[221] Similarly, a "hard take down" of suspects do not turn stop into arrest.[222] In those situations, the suspect can hardly believe to be free to walk away. Moreover, the reasonableness requirement under the Terry doctrine seems far away. The "permissible reasons for a stop and search and the permissible scope of the intrusion have expanded beyond their original contours."[223] The use or display of force in making a stop is generally justifies by the threatening surrounding circumstances. Furthermore, the police are not obliged to use less intrusive means yet available to ensure their safety. The underlying rationale of this rule is the necessity for the law enforcers to decide quickly which means are the more appropriate to protect themselves.

c. Extensive search and seizure and narrow rights

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[221] See United States v. Lane, 909 F. 2d 895 (6th Cir. 1990); United States v. Harrington, 923 F. 2d 1371 (9th Cir. 1991);United States v. Saffeels, 981 F. 2d 1560 (10th Cir. 1992).

[222] See Lee v. State, 311 Md. 642, 537 A.2d 235 (1988).

[223] See United States v. Chaidez, 919 F.2d 1193 at 1198 (1990).

A search warrant for contraband implicitly carries with it the limited authority to detain the occupants of the premise. Therefore, the Fourth amendment is not violated.[224]

The scope of the frisk have been expanded to the passenger compartment of a vehicle where a weapon might be hidden although the suspect was handcuffed.[225] The area of control doctrine of Chimel v. California[226] is determined by the potentiality of harm not by actual, physical control by the suspect.[227] Similarly, airport search cases have extended Terry to allow investigative detention of things.[228]

The period of time of a seizure is also an essential issue. The surrounding circumstances of cases will determine whether the duration of the investigative detention was reasonable.[229] The courts rely on the diligence of the police officer to resolve the matter.

Finally, persons subjected to an ordinary traffic stop are not entitled to Miranda rights[230] because those stops are not deemed excessively intrusive.

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[224] See Michigan v. Summers, 452 U.S. 411 (1981).

[225] See Michigan v. Long, 463 U.S. 1032 (1983).

[226] 395 U.S. 752 (1969).

[227] *Id.*

[228] See Florida v. Royer, 460 U.S. 491 (1983); United States v. Place, 462 U.S. 696 (1983). Terry doctrine also applies for mailed packages.

[229] See United States v. Sharpe, 470 U.S. 675 (1985) (holding the constitutionality of 20 minutes stop as well as 30 minutes detention.) See also United States v. Place, 462 U.S. 696 (1983). In this case, the Court invalidated the detention of a traveler's luggage for 90 minutes and recommending a maximum of 20 minutes.

[230] See Berkermer v. McCarty, 468 U.S. 420 (1984).

The "war on drugs" and the high rates of crimes lead the judicial authorities to broaden the scope of investigatory stops and to narrow the constitutional guarantees.[231] Some commentators point out that the cases reported focus only on individuals charged with an offense.[232] There is no statistics on the number of investigatory stops producing no incriminating evidence.[233]

2. Temporary seizure for an identification under French law

The French identification procedure is far more intrusive than a Terry stop. If the person is unable to prove her identity or refuse, she can be seized and conducted to the police station house for a detention up to four hours to verify her identity.[234] She is only retained for the time strictly required to establish her identity.

The person is immediately presented to a judicial police officer who must give her all the means available to prove her identity. The individual seized has a right to inform the prosecutor of his situation. He can also notice any person of his choice. The prosecutor may decide to end

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[231] It has been said that the "Bill of rights in general and the Fourth Amendment in particular are profoundly anti-government documents." See Anthony G. Amesterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 353 (1974).

[232] See *supra* note 16, at 679.

[233] See Donald E. Wilkes, Jr., The Crime Statistics That We Would Like to See, Zeitgeist p12 (Spring 1992).

[234] See C. Pr. Pén. art. 78-3 (Fr.).

the detention, to order a medical exam, and to verify the legality of the official reports.

Inaccurate information providing by the individual, or a refusal to cooperate permit the police, with the prosecutor's authorization, to take his fingerprints or photographs.[235] This police power is also available when no other means would establish one's identity, and is sanctioned by imprisonment and fine.[236]

The police officer is required to mention in the *procès verbaux* the reasons of the control as well as the conditions under which the person has been presented before him and that the individual was informed of his rights. The duration of the detention is also indicated in the official reports presented for the signature of the person seized.

The above procedural requirements offer certain guarantees to the individuals' rights. Moreover, the Constitutional Council relying on Article Sixty-six of the Constitution has held that the judiciary and administrative authorities are competent to prevent abuses of the rules previously described. This holding implies that an action grounded on an unlawful identity check must be brought before the courts. Furthermore, the provisions of Article

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[235] *Id.* In comparison, the U.S. Supreme Court has held that the Fourth Amendment of the Constitution does not prevent a brief detention of an individual on less than probable cause to get his fingerprints where the detention was authorized by a judge. See Hayes v. Florida, 470 U.S. 811 (1985).

[236] See C. Pr. Pén. art. 78-4 (Fr.).

78-3 of the Code are imposed upon pain of nullity. However, this sanction will be effective if all the subsequent procedure is nullified and not only the official reports. Nonetheless, some commentators wonder about the conformity of this temporary seizure with the European Convention for the Protection of Human Rights in its Article Five dealing with arbitrary detentions.[237]

II. Longer restraint on personal liberty

We will discuss the "arrest power" under American case-law without getting into details. Then, we will focus on the seizure of an individual up to twenty-four hours by the French police.

A. "Arrest power"

1. General power to arrest

American police have a general power to arrest on probable cause (usually without a warrant) but no express power to detain unarrestable person for interrogation. A prolonged Terry stop becomes an arrest. Thus, probable cause alone that a felony was committed by the person subject to

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[237] See Picard, *supra* note 37.

the arrest is sufficient to arrest the person.[238] On the contrary, an arrest for a misdemeanor occurring out of the officer's presence must be grounded on a warrant.[239] A warrantless arrest implies that probable cause exists or is determined promptly. Moreover, an extension of pretrial detention requires judicial review of probable cause.[240]

Arrest in dwellings require a warrant.[241] However, statements of the arrestee made outside the premises are admissible at trial when there is probable cause to arrest him.[242]

The police officer informs the person under arrest of his intention as well as the cause of the arrest. Once a suspect has been arrested, he must be taken "without unnecessary delay before the nearest available federal magistrate."[243] However, circumstances can allow a brief delay between arrest and arraignment. A confession resulting of an undue delay must be excluded under the McNabb-Mallory rule. Those protections enforce the federal statutory prompt

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[238] See Watson v. United States, 423 U.S. 411 (1976).

[239] An arrest warrant is a legal instrument authorizing the seizure of a person. It is indefinitely valid. The officer does not need to have the warrant in his possession if he knows about it. See Fed.R.Crim.P. 4.

[240] See Gerstein v. Pugh, 420 U.S. 103, 114 (1975).

[241] See Minnesota v. Olson, 110 S.Ct. 1684 (1990) (It held that a warrant is necessary to arrest someone in his home even if there is probable cause to arrest him.).

[242] See Harris v. New York, 110 S.Ct. 1640 (1990).

[243] See Mallory v. United States, 354 U.S. 449 (1957). The prompt presentation requirement was codified in Fed.R.Crim.P 5(a). Under the case-law, voluntary confession obtained between six and 24 hours of the beginning of federal custody are admissible if Miranda warnings were given. See also 18 U.S.C. 3501 (c) (The "Safe Harbor Provision")

presentation requirement. They do not apply to state criminal trials. However, many states have adopted similar provisions.

Finally, under the Ker-Frisbie rule,[244] an unlawful arrest is not a basis of dismissal of criminal charges.

2. Search incident to arrest

The Court has held that a body search following a permissible arrest is lawful, even though the arrestee was not suspected to have incriminating evidence.[245] An search is an incident to arrest[246] if "the formal arrest follow[s] quickly on the heels" of the search and is sufficiently justified by facts different from those uncovered by the search.[247] The arrest with or without a warrant must be valid and the search has to be on the spot of the arrest. In meanwhile, courts have upheld delayed searches by relying either on a police continuing right of search or on the necessity to inventory the property found on the person before ceiling her.[248] Nonetheless, an unreasonable intrusion

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[244] Ker v. Illinois, 119 U.S. 436 (1886) (A U.S. citizen forcibly removed from a foreign country for trial in Illinois state court could not challenge his conviction on the ground he was illegally brought there.); Frisbie v. Collins, 342 U.S. 519 (1952) (no violation of due process when a state prisoner was kidnapped and returned for trial).

[245] See United States v. Robinson, 414 U.S. 218 (1973).

[246] See Ronald L. Carlson, Criminal Procedure Justice § 2.2.1 (4th ed. 1991).

[247] See United states v. Edwards, 415 U.S. 800 (1974).

[248] See Carlson, *supra* note 246.

into the arrestee's body requires a search warrant.[249] Thus, a surgical intrusion in the suspect's body was compelled by the Court "even if likely to produce incriminating evidence."[250] Some state courts have admitted the results of blood sample taken on drivers even unconscious.[251] Moreover, the failure to cooperate in an identification procedure, e.g., refusal to give a blood sample, may be used as evidence at trial against the accused.[252]

Under the Payton rule,[253] an arrest warrant is necessary for felony arrests within private residences except exigent circumstances. Moreover, a warrantless search of a place while the arrestee is in custody is not an incident to arrest. Similarly, a warrant is required to search an automobile which was first impounded and later searched while the driver was under arrest.

3. Pretextual arrest

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[249] See Rochin v. California, 342 U.S. 165 (1952) (The use of stomach pumping to obtain morphine tablets which had been swallowed by the suspect so "shock[ed] the conscience" of a "civilized society" as to violate due process.). Nevertheless, a blood sample taken on an arrestee does not violate the Fourth Amendment. See Schmerber v. California, 384 U.S. 757 (1966)(The defendant while under a lawful arrest was forced to give a blood sample while resisting verbally.); Cupp v. Murphy, 412 U.S. 291 (1985) (A scraping of fingernail producing incriminating evidence is a reasonable search.).

[250] See Winston v. Lee, 470 U.S. 753 (1985). However, a person searched at the border (body invasion) does not have the same rights as U.S. citizens. See United States v. Montoya de Hernandez, 473 U.S. 531 (1985).

[251] See State v. Findlay, 145 N.W.2d 650, 653 Iowa 1966).

[252] See South Dakota v. Neville, 459 U.S. 553 (1983). See also Pennsylvania v. Muniz, 496 U.S. 582 (1990) (admitting the drunk driver's answers showing his drunkenness as evidence.).

[253] Payton v. New York, 445 U.S. 573 (1980).

An individual may be arrested for minor offenses, e.g., traffic violations, to permit the police to search for evidence related to more serious offenses as to which probable cause is lacking. There are two different approaches.

First, the courts could determine whether a reasonable officer "would have arrested the individual absent unrelated suspicions."[254] They could also rely on an objective standard: could the law officers validly have stopped or arrested the suspect in the absence of the invalid purpose?[255] The U.S. Supreme Court has adopted the objective test which does not take into account the underlying motivation of the law enforcers.[256]

B. Detention up to 24 hours: the *garde à vue*

1. Initiative of the seizure

The French police officers have a powerful seizure power called the *Garde à vue*. It emanated from practice before being organized in the Criminal Procedure Code. This police custody is decided by the judicial police officers

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[254] See United States v. Guzman, 864 F.2d 1512, 1517 (CA 10 1988).

[255] *Id.*

[256] See United States v. Scopo 19 F.3d 777 (1994).

only with no need of judiciary authorities' approval. The investigatory detention is available in the preliminary and flagrancy inquiries[257] with noticeable differences. This restriction of one's liberty is aimed to obtain confessions. Therefore, one may fear police abuses (physical exhaustion, threats or violence).

The prosecutor must be informed of the procedure in the "best delays." The last 1993 version of the code did not retain the notice of the prosecutor from the beginning of the police custody. Some commentators have argued that this "best delays" requirement was in conformity with the philosophy of this temporary detention.[258] However, the Constitutional Council specified that this notification must occur as soon as possible to protect the suspect's rights.

The *Cour de cassation* held that police custody did not violate Article 5.3 of the European Convention on Human Rights requiring an immediate presentation of the person seized before the judicial authorities.[259]

2. Length of the investigatory detention

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[257] See C. Pr. Pén. arts. 63, 77 (Fr.).

[258] See 1993 J.C.P. Doctrine 3720 (Fr.). This article explains that an immediate information of the prosecutor would contradict the power of the police to initiate the proceedings. The magistrate's control on police custody is a later one.

[259] See Judgment of March 10, 1992, Cass. crim., 1992 Bull. Crim., No. 105 (Fr.).

In the flagrancy inquiry, a suspect as well as a witness, or a "person capable to furnish information on the facts or evidence seized" may be detained up to twenty-four hours.[260] The time period starts when the individual is taken in for questioning. A twenty-four hours prolongation requested by police can be authorized by a written order of the prosecutor except for witnesses' police custody.[261] However, in practice most prolongation are allowed by telephone. the police custody's extension concerns only the persons against whom there are presumptive grounds that they have committed an offense. Moreover, the presentation of the individuals before the prosecutor which did not exist before 1993 is not mandatory. The urgency rationale of the flagrancy inquiry may explains this rule.

Under a preliminary investigation, witnesses cannot be subject to police custody. A prolongation of the police custody must be based on the "necessities of the inquiry." Then, the suspect must be taken before the prosecutor. Nonetheless, under the new provisions of the Criminal Procedure Code, "exceptional circumstances" (without saying which) may permit a written authorization of prolongation without presenting the suspect before the magistrate. The recent reform did not change the situation of the witnesses

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[260] Police custody is available for flagrant *crimes* and *délits* punished by imprisonment.

[261] The detention of witnesses should not exceed 24 hours and should only last the time necessary to interview them. See C. Pr. Pén. art 63 (Fr.).

heard under rogatories commissions. Thus, they may be detained up to twenty-four hours. However, a twenty-four hours' extension requires the taking of the witnesses before the investigating judge.[262] This detention of an individuals suspected of no crime is obviously excessive and violates the European Convention on Human Rights in its Article Five.

For drug traffic and terrorism offenses, the detention may last four days with the prolongation included (twenty-four hours plus an extension of twenty-fours hours and a new expansion of two days).[263]

2. Guarantees against police's abuses

The law enforcers indicate in the *procès verbaux d'audition* and in a special register the reasons of the police custody, the times of the beginning and end of the detention, and that the notice of the suspect's rights was given. Similarly, the duration of the interrogations as well as the resting periods are also mentioned in those official reports signed by the suspect. His refusal to sign must be indicated.[264]

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[262] Nonetheless, the examining judge may exceptionally authorize an extension of the police custody without seeing the witnesses. See C. Pr. Pén. art 154 (Fr.).

[263] See C. Pr. Pén. arts 706-29, 706-23 (Fr.).

[264] See C. Pr. Pén. arts. 63-1, 64, 65 (Fr.).

The suspect has a right to a medical exam to avoid later motions to suppress coercive confessions.[265] The physician is designated by the judicial police officer or the prosecutor. The person retained has also a right to contact certain persons.[266]

An important debate took place in France as regards to the right to counsel during police custody. The socialist opposition challenged the bill which excluded any legal assistance for drug traffic and terrorism offenses before the Constitutional Council. It held that the right to counsel is a defense right available at the inquiry stage. Nevertheless, this right may be subject to different regimes without violating the principle of equality before law among citizens. The right to counsel attaches only after twenty hours of detention or after thirty-six hours for certain offenses.[267] The distinction drawn by the Constitutional Council between the existence of the right for any offense and its different modalities of exercise depending on the offenses explains why this right does not exist immediately. On one hand we the investigation stage and on the other hand the instruction and trial stages where the defense rights fully applied. Thus, the spirit of the French criminal procedure would command this late legal assistance.[268]

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[265] See C. Pr. Pén. art. 63-3 (Fr.).
[266] See C. Pr. Pén. art. 63-2 (Fr.).
[267] See C. Pr. Pén. art. 63-4 (Fr.).
[268] See *supra* note 258.

The counsel can meet the person in *garde à vue* during only thirty minutes and he has no access to police files. The lawyer is nonetheless informed of the charges under which the person is retained. In fact, his role is limited to control the proceedings.

3. Sanction against arbitrary detentions

In theory, police abuses may be punished by fine and imprisonment penalties.[269] In practice, these sanctions are never used. Disciplinary punishments also exist as well as civil penalties. Thus, in this latter case, the *garde à vue* may be nullified only if the establishment of the truth has been prevented because of an irregularity in the proceedings. The judges will try to determine whether the breach of law has had an important impact on the confession. Thus, the gravity of the violation seems secondary if it did not taint the confession.

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[269] See C. Pr. Pén. arts 432-4, 432-5 (Fr.).

CHAPTER IV: THE JUDICIAL IMPLEMENTATION OF INDIVIDUAL RIGHTS

I. Exclusion of evidence illegally searched and seized

The American exclusionary rule appears unique and does not have a French equivalent. Therefore, the scholars point out that American law provides suspects greater protection than the French criminal procedure. However, the result appears similar in both countries: the courts are reluctant either to exclude improper incriminating evidence in the United States or to nullify the procedure in France.

A. Right not to be tried on inadmissible evidence

1. Deterrent effect of the exclusionary rule

The exclusionary rule stated in Mapp v. Ohio,[270] bars the use of evidence obtained pursuant to an illegal search or seizure. The jury will not hear about the fruits of an unreasonable search. Thus, the U.S. Supreme Court upheld the Fourth Amendment and deterred the police from violating it. Similarly, evidence deriving from incriminating items illegally searched must be excluded under the "fruit of the

[270] 367 U.S. 643 (1961).

poisonous tree" doctrine.[271] The problem raised by this rule is the exclusion of evidence which is often necessary to convict a criminal defendant. Then, it is argued that the "guilty" person will go free.

The Fourth Amendment itself does not provide such a sanction. It is a judicially created remedy. However, it is argued that the exclusionary rule has a constitutional origin and an effective deterrent purpose.[272] Some scholars indicate that the exclusionary rule frees criminal suspects in very few cases.[273] Therefore, this enforcement of the Fourth Amendment does not hinder the efficiency of the American criminal system. In the meantime, the restrictive application of the exclusionary doctrine may explain its limited impact on acquittals or dismissal of cases. There is a much more powerful argument against the claim that the rule frees criminals. The protection against arbitrary intrusions commands that police respect the Constitution.[274]

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[271] In comparison, the *Cour de cassation* quashed a conviction resulting from an illegal seizure. An unfruitful investigation had been closed. However, a police officer seized one of the suspect and conducted a search. The suspect confessed his participation in a criminal activity and was convicted. See Judgment of Jan. 22, 1953 (Isnard case), Cass. crim., 1953 J.C.P. II 7456 rapport Brouchot (Fr.).

[272] See Malcom R. Wilkey & Stephen H. Sachs, Readings in the Philosophy of Law, A debate on the Exclusionary rule, 261 (2nd ed. 1994) [hereinafter Wilkey & Sachs, A debate]. This latter author cites Weeks v. United States, 232 U.S. 383 (1914),to emphasize the "constitutional necessity of effectively enforcing the Fourth Amendment.

[273] *Id.* at 269.

[274] *Id.*

The guarantee of personal liberty may have a price, e.g., to exclude vital evidence, in a free and democratic society.

There are repeated denunciations of the rule on different grounds. The costs of the exclusionary rule have been listed such as police perjury, excessive burden on the courts through the motions to suppress evidence, and performance by the judiciary of the executive branch's job of disciplining law enforcers.[275] Today, there are proposals before Congress revising the new Crime Bill to abolish the exclusionary rule.[276]

2. Nullity of the procedure

There is no so-called exclusionary rule in French law. Evidence illegally obtained may still be included in the case file. However, the finders of fact must have a "deep seated conviction" (*intime conviction*) of guilt before announcing their verdict. In other words, a conviction based on illegal evidence will be annulled if the remaining evidence leaves a real question of doubt on the defendant's guilt.

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[275] *Id.* at 263. Appellate judge Wilkey describes till 12 costs of the exclusionary rule.

[276] H.R. 666, 104th Cong., 1st Sess. (1995); H.R.Res. 61, 104th Cong., 1st Sess. (1995).

The action taken by the authorities can be nullified if the provisions of the law have been violated.[277] The issue of nullification is raised during the pretrial hearing in the indictment division (*chambre d'accusation*) for felonies and during trial for misdemeanors. The striking of the tainted part of a case does not cover the preliminary inquiry before or instead of the judicial investigation.[278] The investigating judge, the prosecutor, and since 1993 the parties can bring an action to declare the searches and seizures null before the *chambre d'accusation*[279] but only during the instruction.[280] The ordinance closing the instruction purges definitively all the irregularities.

A relevant distinction exists between "textual nullities" and "substantial nullities." The former are pronounced when a particular provision of the Code enacts the sanction (nullity) of its violation. In contrast, the annulment of the proceedings is pronounced, even though this sanction is not foreseen in a text, when infringements on the defense rights occur(substantial nullities). Thus, a substantial nullity is pronounced when the party's interest have been seriously violated.

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[277] See judgment of June 24, 1960 (Soc. Frampar Le Monde case) Conseil d'Etat, Long, Weil & Braibant, *Grands Arrêts de la Jurisprudence Administrative* (Fr.).

[278] It is important to remember that suspect's rights fully attach when the person is formally charged, at which time the formal instruction begins.

[279] The indictment division is also competent to pronounce disciplinary sanctions (temporary suspension or decertification) toward police officers' misconduct.

[280] C. Pr. Pén. arts. 170-174 (Fr.).

Under the Criminal Procedure Code,[281] the rules regulating the *perquisitions* and the identity checks are sanctioned through "textual nullities." Under a police custody (*garde à vue*), the notice to the detainee of his rights, the medical exam, and the right to counsel are substantial formalities. Those safeguards are a benefit to the defense rights, and their violation requires the annulment of the proceedings. On the contrary, the mere formalities requirements such as the mentions in the official reports about the detainee's notification of his rights are not substantial. Therefore, the showing of the accomplishment of those administrative formalities is sufficient to prevent the invalidation of the proceedings. Similarly, the provisions dealing with dwelling searches during a flagrancy investigation are sanctioned by a "textual nullity."[282]

B. Focus on police efficiency

1. More flexibility to police

The scope of the exclusionary has been restricted and the exceptions broadened. Thus, incriminating evidence from an unlawful search will not be excluded when a police

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[281] See C. Pr. Pén. arts. 171, 802 (Fr.).
[282] See C. Pr. Pén. art. 59 (Fr.).

officer reasonably believes that his search warrant was proper. This good faith exception to the exclusionary rule was shaped in United States v. Leon.[283] Its justification relies on a cost-benefit analysis: "The marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial cost of exclusion."[284] The rationale of the "reliance exception" is the absence of deterrence. An officer acting in good faith will not be deterred by the threat to exclude illegally obtained evidence.[285] It has been argued that the good faith exception promotes "police ignorance" of law.[286] The House has passed a bill extending the good faith exception to warrantless searches. This concept has been discussed in Senate.[287]

The states are free to interpret their search and seizure provisions. This construction may be broader than the U.S. Supreme Court Fourth Amendment's interpretation.[288] Thus, some of them refuse to adopt a good faith exception to the federal exclusionary rule. They hold that such an

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[283] 468 U.S. 897 (1984).

[284] *Id.*

[285] This exception was extended in Illinois v. Krull, 107 U.S. 1160 (1987), when an officer reasonably relied on a statute later found to violate the Fourth Amendment. Notwithstanding, the Court extended it in Arizona v. Evans, 115 S.Ct. 1185 (1995).

[286] See Yale Kamisar, *Defense of the Exclusionary Rule*, Crim. L. Bull. 15 (1979).

[287] H.R. 666, 104th Cong., 1st Sess. (1995); H.R.Res. 61, 104th Cong., 1st Sess. (1995).

[288] See Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982).

exception is incompatible with the guarantees of State Constitution provisions against unreasonable searches and seizures.[289] They rely on the deterrent effect of the judicial remedy to exclude evidence as well as the prohibition for the state to benefit from its error.[290]

Derivative fruits of the violation such as plain view or inevitable discovery can be introduced if they have an independent source.[291] Moreover, the attenuation of the causal link between the illegality and the fruits makes the evidence admissible.[292] It is the so called purged taint limitation rule. Similarly, admissions of guilt obtained outside a dwelling despite an unlawful entry in one's home are usable at trial.[293] Nevertheless, some states case-law reject the U.S. Supreme Court approach. They consider that

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[289] See Gary v. State, 422 S.E.2d 426 (Ga. 1992); State v. Guzman, State v. Evans, 866 P.2d 869 (Ariz SupCt. 1994) (holding that the exclusionary rule is properly made on the basis of an erroneous computer record); 122 IDAHO 981 (1992); State v. Carter, 370 S.E.2d 553 (NC SupCt. 1998).

[290] The Supreme Court of Idaho has held: "As the state is only deprived of what it was not entitled to possess in the first place, to say the Fourth Amendment exacts a cost to the state is like saying that a thief pays for committing a theft when he is required to return what he stole."

[291] United States v. Crews, 445 U.S. 463, 471-74 (1980).

[292] Wong Sun v. United States, 371 U.S. 471,491 (1963). The Supreme Court deemed that the defendant's voluntary confession attenuated the connection between his illegal arrest and the subsequently statement.

[293] See New York v. Harris, 495 U.S. 14 (1990). The Court held "where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of Payton."

the "per se rule in Harris" affords insufficient protection to citizens' privacy rights under states' constitution.[294]

Illegally seized evidence (obtained in violation of Miranda warnings) can be used to impeach the defendant's trial testimony.[295] The U.S. Supreme Court extended the impeachment exception from impeachment of direct testimony[296] to impeachment of cross-examination testimony.[297] However, the Court specified the impeachment exception remains limited to the defendant's own testimony.[298] Finally, illegally obtained evidence may be produced to obtain a Grand Jury indictment.[299] The formal rules of evidence do not apply during the Grand Jury proceedings.

2. Reluctance of the French courts to exclude illegal evidence

In the Trignol case previously cited,[300] the French police officers investigating a kidnapping stopped many vehicles to search them. Mr. Trignol refused to open his

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[294] See State v. Geisler, 25 CONN. 672, 610 A.2d 1225 (1992). The State court held that the Harris rule "does not grant to Connecticut citizens the scope of exclusion that we believe is necessary to deter police from entering a home without a warrant."

[295] See Harris v. New York, 401 U.S. 222 (1971).

[296] See Walder v. United states, 347 U.S. 62 (1954).

[297] See United States v. Havens, 446 U.S. 620 (1980).

[298] See James v. Illinois, 110 S. Ct. 648 (1990). An Illinois statute extending the exception to all defense witnesses was held unconstitutional.

[299] See United states v. Calandra, 414 U.S. 338 (1974).

[300] See Judgment of Nov. 8, 1979, Cass. crim., 1979 J.C.P. II 19337 (Fr.). See *supra* p53-54.

trunk, and was arrested. Before court, he claimed that the search was unconstitutional relying on the decision of January 12, 1977 of the Constitutional Council.[301] However, the *Cour de cassation* refused to admit the binding effect of the Constitutional Council's decision. The *Cour de cassation* implicitly upheld the *Tribunal correctionnel* reasoning. The Constitutional Council only invalidated general and random searches where the police were not investigating a particular offense. According to the Court, the law enforcers were searching vehicles within a flagrancy inquiry.[302] Therefore, the Constitutional Council's decision was held not applicable and Mr. Trignol was convicted of refusing to submit to a vehicle search.

The *Cour de cassation* is reluctant to conclude that the non respect of a particular formality has prejudiced the rights of defense (substantial nullity). Thus, the detention of a suspect during two more days after the legal period of the police custody (*garde à vue*) was not held fundamentally prejudicial to the suspect. A prejudice in a statutory violation when the person's right to defend himself against charges has not yet attached will not be found easily.[303]

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[301] See *supra* note 185.

[302] In this case, the concept of flagrancy was broaden to a non suspicious situation (the vehicles were automatically stopped) and to a search taking place several days after the kidnapping.

[303] See Judgment of Oct. 21, 1980, Cass. crim., 1980 D.Jur. 104 (Fr.).

II. Protections against police abuses

A. Alternative remedies to the exclusionary rule

The exclusionary rule is the subject of an important debate in the United States. It is sometime argued that the absence of such a rule in other civilized countries demonstrates the irrationality of the remedy.

For some scholars, it is not a "constitutional necessity but a method to enforce the Fourth Amendment."[304] Therefore, other remedies may guarantee the individuals' rights as well. Thus, the constitutional protection could be enforced through civil tort action.[305] According to the general view, a victim of an unlawful detention must prove both a confinement against his will and an illegal one to recover for false imprisonment. The citizens victims of illegal searches may also sue the law authorities under the doctrine of respondent superior.[306] The tort remedy should not substitute the exclusionary rule but enhance it through compensation of innocent victims of government misconduct.[307]

Other views suggest the efficiency of disciplinary sanctions, mini-trial of the overzealous officer separate

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[304] See Wilkey & Sachs, A debate *supra* note 272, at 262.

[305] See Carlson, *supra* note 133 at §§ 10.15 (2), 10.18.

[306] See Herman v. state, 357 N.Y.S.2d 811 (1974). A couple recovered damages ($14,000) for an early morning "no-knock" search in the wrong place.

[307] See Wilkey & Sachs, A debate,*supra* note 272, at 272.

from the main criminal trial or decertification of police officers to enforce the Fourth Amendment guarantees.[308]

B. Role of the French Constitutional Council

Since 1971, the movement of "constitutionalization" of criminal law offers better protection against government arbitrary interferences. The Constitutional Council relies on Article Sixty-six of the Constitution to require a prompt control of the judicial authority when encroachments on individual liberties are authorized under a statute. The intervention of the judiciary seems to be a prerequisite to valid a bill under the constitutional check.

In 1983 a bill authorizing agents of the tax administration to search and seize without any judicial supervision was challenged before the Constitutional Council. The Constitutional Council balanced the need to control fiscal fraud against the principle of inviolability of the domicile. It held the bill unconstitutional because the judicial authority did not intervene in the proceedings.[309] Thus, the detection of fraud must comply with

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[308] See Goldman and Puro, Decertification of Police: *An Alternative to Traditional Remedies for Police Misconduct*, 15 Hastings Const. L. Q. 45 (1987).

[309] See Decision of Dec., 29, 1983, Cons. const. (Fr.). The decision referred to different constitutional principles encompassed in the "bloc de constitutionnalité": Article 13 of the Declaration of the Rights of Man providing equal contributions from all the citizens and the right of privacy consecrated by the decision of January 12, 1977.

the principle of individual freedom also protected by the Constitution. The Constitutional Council has maintained its position in its following decisions.[310]

The constitutional norms as construed by the Constitutional Council have been followed by the *Cour de Cassation*, particularly in the Bogdane and Vuckovic cases. the Court overruled its own case-law. The issue concerned the distinction between administrative and judicial police, and the challenge of administrative identity checks before the judicial courts.[311] The *Avocat Général* (Attorney-General who insures a proper application and a uniform interpretation of the law) relied upon the Constitutional Council's holdings to emphasize the duty of the judicial authority to protect individual liberty wherever it is threatened. The Constitutional Council had consacred the jurisdiction of the judicial courts although the traditional administrative tribunals' competence to control the operations of administrative police. Thus, since 1985 it is

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[310] See Decision of Jan. 19, 1988, Con. const., Fr. (The search and seizure powers given to the agents of the "Commissions des Opérations Boursières" without any judicial control were held unconstitutional); Decision of Dec. 27, 1990, Con. const., Fr. (same holding in this decision related to the agents of the communication agency); Decision of Jan. 12, 1977, Con. const., Fr., 1978 D. Jur. 173 (unconstitutionality of a law giving the police unrestricted authority in vehicle searches); Decision of Jan. 18, 1995, Con. const., Fr., *supra* note 59.

[311] Under Article 66 of the Constitution, the judicial authority is guardian of individual liberty. Article 136 of the Criminal Procedure Code states that "in all cases of threats to individual liberty, the conflict [of competencies] can never be raised by the administrative authority, and the judicial courts always have exclusive jurisdiction."

said that the Constitutional Council has become the highest court of the land.

C. European safeguards

The enforcement of the European Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950, provides an efficient protection against government's abuses.[312] It obliges the contracting states to modify their legislation in conformity with this treaty.

Thus, the European Court of Human Rights in 1993 held that the provisions of the French Customs Code (articles 64 and 454)[313] violated Article Eight of the Convention.[314] The Court examined the scope of the interference, the accordance of the proceedings with the law, their legitimate aim, and their proportionality.[315]

In those three cases, a numerous number of documents were seized (till 15,000) among which some were not relevant to the police inquiry. The searches took place in private firms and homes. The Court recognized an interference with

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[312] See *supra* note 60.

[313] Article 454 allowed customs agents to establish offenses against the regulations governing financial dealings with foreign countries through house searches in any place. Article 64 authorized customs officers to carry out house searches if accompanied by a local police officer or a judicial police officer during daytime. There were exceptions to the presence of a police officer while a premises search was conducted. Those articles are not overridden by the Criminal Procedure Code.

[314] Affaires Cremieux v. France,; Aff. Funke v. France; Aff. Miailhe v. France, Eur. Ct. H.R. (ser. A) at 256 (1993).

[315] See Art Eight, *supra* p22.

the applicants' private life and their correspondence. The petitioners claimed the unconstitutionality of the customs code provision because houses searches and seizures were not subject to judicial authorization.[316] However, the Court held that Article Eight of the Convention contained no requirement that dwellings search should be judicially authorized in advance. Moreover, it was unnecessary for the Court to rule on this issue because the interferences were found incompatible with Article Eight.

The Court also admitted the legitimate aim of the interferences with the interest of "the economic well-being of the country and the prevention of crime." The jurisprudence of the Court has always upheld that "the contracting states have a certain margin of appreciation in assessing the need for an interference." Nonetheless, the exceptions provided in Article Eight must be construed narrowly. In these cases, the court recognized the difficulties encountered by the states to prevent flight of capital and tax evasion. Nevertheless, the legislation under examination did not provide "adequate and effective safeguards against abuses." The exclusive competence of the customs authorities to assess the expediency, number, length, and the scale of inspections as well as the absence of any judicial warrant requirement were disproportionate

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[316] The law enacted the Customs Code was not challenged before the Constitutional Council. Therefore, the regular courts cannot pass upon the constitutionality of articles 454 and 64.

with the legitimate purpose of the searches and seizures. The French government was convicted to pay damages, at least in one case. In the two other ones, the Court held that the judgment afforded the parties sufficient compensation for it. The impact of the French government's conviction on the individual rights' protections should not be neglected despite the absence of monetary compensation.

The Customs Code provisions on search and seizure have been modified in 1986 and in 1989 to afford greater guarantees against arbitrary powers. From now on, a domiciliary search must be authorized by the President of the *Tribunal de Grande Instance* except in a flagrancy case. Moreover, the searches are limited to certain offenses. The searches in a home also require the presence of the occupant or a representing person or at least two witnesses. Nonetheless, some scholars have argued that those provisions could be once again challenged before the European institutions, and the French government could be convicted.[317]

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[317] See Dominique Viriot-Barrial, *La Preuve en Droit Douanier et la Convention Européenne des Droits de L'Homme*, Rev. sc. crim. 537 (1994) (Fr.).

III. Conclusion

Striking the proper balance between law enforcement and individual liberties poses a challenge to any society, and seems difficult to find. In American case and statutory law, the issue of probable cause for a search or seizure is the touchstone of the reasonableness standard under the Fourth Amendment. The numerous exceptions including consent searches, exigent circumstances, automobile searches, investigatory stops, and others have reduced constitutional protections on liberties. The exclusionary rule does not apply when the police did not intend to violate the suspect's rights or act under circumstances where their ignorance of law is excusable.

French police, when acting in a flagrancy inquiry, may conduct forcible searches and seizures. They may also hold a person in custody for up to twenty-fours hours when detention is necessary for purposes of the inquiry. The non-coercive preliminary inquiry also gives large powers to the law enforcers. Police custody may be an element of this. In both sorts of inquiries, the search of a dwelling requires the consent of the household. The privacy of one's premises appears more protected than freedom of movement. Finally, in a judicial investigation, e.g., once an instruction has been opened, the rogatories commissions are usually general concerning the investigative powers delegated to the

judicial police officer by the *juge d'instruction*. Nonetheless, the police investigation must comply with the Criminal Procedure Code provisions (such as keeping a complete record of police action). The defendant's rights are more protected during a judicial investigation, and during the trial itself where the rights of defense fully attach. Even though the indictment division may nullify the prior proceeding and may return the case to another investigation, it rarely happens. Then, illegally seized evidence may be produced at trial.

Foreign criminal procedure doctrines are sometimes pointed out to American authorities to argue in favor of legal changes. Comparative study is then used as a tool of law revision. Thus, the absence of exclusionary rule in other nations, and the general warrant requirement in France permit some American scholars to denounce the effects of their own legal rules. We also find the same attitude among certain French authors.

In American criminal procedure, states have recently reacted against narrow construction of federal Constitutional guarantees by the U.S. Supreme Court. This reaction has been called "the New Federalism in Criminal Procedure." Many states go beyond the Supreme Court's analysis of the Fourth Amendment to grant broader rights to their citizens. State courts' judgments resting on adequate and independent state grounds cannot be reviewed. Thus, the

"Federal Constitution gives a minimum level of protection (the floor) and the states provide larger safeguards (the ceiling) against government interference."[318]

French political authorities following the general demand have enlarged law enforcers' powers. The legislature also intervenes to legalize factual police practices such as identity checks. The regular judges can never pass upon the constitutionality of statutes, yet they must apply them. For this reason, the role of the Constitutional Council has evolved and expanded. From a supervision of the separation of powers between the Executive and the Legislature, it has become a guardian of individual liberty. The access of the individuals to constitutional justice remains an ongoing debate.

An ethical Europe has started to exist through the enforcement of the Convention of Human Rights. The power of the contracting states to settle their criminal policy must comply with the European standards. The nation states may be compelled to revise their criminal procedure rules. Thus, France enacted a law in 1991 on wiretapping after having being convicted by the Court of Human Rights in 1990.

Today, in France as well as in the United States, conservative political and judicial authorities aim to

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[318] Lecture, Professor Donald E. Wilkes, Jr., University of Georgia School of Law, Criminal Procedure I, October 3, 1994.

expand the role of law enforcement. Nevertheless, safeguards do exist and are applied through procedural requirements.