The French Case for Requiring Juries to Give Reasons. Safeguarding Defendants or Guarding the Judges?

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This chapter provides a descriptive and analytical examination of the requirement for lay jurors to give reasons for their decisions. In the 2010 case of Taxquet v. Belgium, the European Court of Human Right announced a new right for criminal defendants “to understand verdicts.” This jurisprudence has prompted a number of Council of Europe countries to overhaul their criminal procedure, including France, which now requires that its mixed courts, in which professional and lay judges deliberate collectively, justify their decisions on guilt or innocence. Descriptively, the chapter presents the Strasbourg court’s position as well as the French response to it, which have both been heralded as moral advances for criminal defendants. Analytically, the paper considers the values and purposes of reason-giving. What is this turn to heightened reason-giving trying to achieve?

I argue that while both the European Court of Human Rights and French lawmakers depict reason-giving as an individual human right belonging to criminal defendants, in practice, reason-giving functions as an accountability device primarily designed to solve systemic issues within the criminal justice system. More specifically, as the French case illustrates, the European interest in reason-giving can be tied to hopes for tighter control over trial judges. The chapter concludes that it is hard, if not impossible, to disentangle two facets of reason-giving, namely, reason-giving as a way to achieve fairness to defendants and reason-giving as a way to provide checks on legal actors who might otherwise enjoy unfettered discretion.

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Introduction
The distinctive feature of adjudication by juries is that jurors usually do not explain their decisions. Common law jury verdicts are impenetrable. Indeed the decision making processes and reasoning behind such jury verdicts are unknown. Juries in the United States and England return general verdicts, mere declarations of whether the defendant is “guilty” or “not guilty.”¹ An informal statement of the reasoning supporting the verdict is not merely not the practice, but positively illegal.² Far from decrying this black box characteristic of jury adjudication, observers (Fisher, 1997, 706) have identified it as a source of systemic legitimacy for the criminal justice system in protecting it from exposing its shortcomings publicly.

In contrast, in Europe, juries and reason-giving are not antinomic. Juries allowed to decide freely based on their inner conviction (the so-called French “intime conviction”) have long coexisted with juries constrained by formal rules of evidence. This contrast partly reflects a split between jurisdictions relying on juries entirely comprised of lay participants and those using mixed courts where professional judges and lay assessors deliberate together. The former have traditionally been prohibited from disclosing their reasons while the latter have at times been required to substantiate their decisions, be it through special interrogatories or statements of reasons drafted by professional judges (Thaman, 2011, 615–17). In 2010, the tension between these distinct jury cultures came to a head with the European Court of Human Right’s (“ECHR”) decision in Taxquet v. Belgium.³ In its Grand Chamber decision, the Strasbourg court held that criminal defendants ought to be able to “understand” jury verdicts. What this new behest means exactly is still disputed, but it has already led a number of European jurisdictions, including France, to overhaul their jury system by imposing a reason-giving requirement on criminal verdicts.⁴

This chapter presents a largely descriptive and analytic argument, claiming that the goals for requiring jury reason-giving are manifold and sometimes conflicting. These goals matter because we cannot assess whether the turn to heightened reason-giving is a positive development unless we, first, know what it is trying to achieve and, second, assess whether it is working.

The ECHR’s interest in reason-giving can be described as a moral project. For the Strasbourg court, reason-giving appears to represent an individual human right, which can be linked to criminal law exceptionalism. Decision-makers ought to be particularly careful in their decision-making and explanations, the argument goes, because the potential deprivation of liberty is greatest in criminal cases. Defendants’ interests in personal autonomy and even life might be at stake. A process compelling defendants to extrapolate the reasons for their conviction or sentence would be deficient. From that perspective, reason-giving is called for, not so much as a check on decision-makers designed to avoid high error costs, but mainly as a participatory and dignitary measure for defendants. Thus the European Court has held that as a matter of fundamental human rights, criminal defendants must be able to understand what they are charged with and, if convicted, why.

Less than a year after Taxquet, France enacted a new statute mandating that its
mixed juries provide reasons for their verdicts. In addition to responding to the ECHR, the reform was purportedly motivated by the objective of expanding defendants’ rights and fixing a broken criminal justice system. The travaux préparatoires show that legislators had two main concerns.

First, they wanted to remedy the “incoherent” bifurcation of the criminal justice system. In France, mixed juries try felonies punishable by a prison sentence of ten years or more in specialized criminal courts, the “cours d’assises.” Until the 2011 reform, these courts did not give reasons for their verdicts. Contrastingly, three-judge panels of first instance courts called “tribunaux correctionnels” try lesser offenses. Like all other professional French judges, judges of the tribunal correctionnel are statutorily obligated to provide written reasons for their decisions. This split led to the paradoxical result that defendants charged with more serious offenses and risking the longest sentences were not entitled to reasons, while those charged with lesser offenses and liable to milder punishments were statutorily guaranteed access to the reasoning behind the adjudicators’ decisions.

A second legislative concern was to facilitate appeals. For most of their history, French jury verdicts could only be appealed to the cour de cassation, France’s court of last resort for criminal and civil matters. The cour de cassation operates under an extremely deferential standard, strictly limiting its review to compliance with substantive and procedural law based on the records of the proceedings below. In 2000, in order to conform to the European Convention on Human Rights’ principle of the right to appeal, France introduced a new, intermediate appeals procedure. Both defendants and prosecutors can now appeal as a matter of right a cours d’assises verdict before a second cours d’assises, which retries the case under a de novo standard. By requiring the cours d’assises to give reasons for their verdicts, both at first instance and on appeal, French legislators hoped to strengthen this right to appeal.

While these two narratives are accurate to some extent, a closer look at the ECHR’s jurisprudence and at the French case reveals a more complicated story. The ECHR’s call for heightened reason-giving in jury trials is not a purely humanitarian position. As I will argue, it has been spurred in part by pragmatic considerations of administrability and the quest for stronger mechanisms of judicial accountability. Similarly, on the French side, the requirement that mixed juries explain their verdicts can be seen not only as a pro-defendant commitment, but also as a measure of administrative convenience and hierarchical control. Both for the Strasbourg court and the French reformers, the move toward reason-giving may have less to do with real or imagined qualities of the jury and the effect of reasons on the intelligibility of verdicts than with conceptions of the judicial role and the desire to keep judges in check.

The chapter proceeds in three parts. Part I examines the emergence of a right for criminal defendants to understand their conviction and sentence under the ECHR’s lead. Part II offers a case study of how the European shift toward reasoned jury verdicts has been implemented in France. Part III argues that despite a humanitarian rhetoric, neither the European nor the French demand for reasons is devoid of accountability considerations. In both legal orders, the push for reasons may come from similar
motivations. There is an essential similarity between the ways in which different systems perceive reason-giving as a method to achieve fairness to defendants while monitoring legal actors who might otherwise enjoy great discretion. Reason-giving, I conclude, is not so much about ensuring that defendants understand their sentence, but rather about policing judges.

A note on methods: Because the French reform only began to be implemented in January of 2012, there is still very little case law or secondary literature addressing the sufficiency of cours d’assises’ reasons. As a result, my analysis relies in part on informal conversations I had with a few French criminal lawyers and cours d’assises judges, who because of the sensitivity of the topic, have asked me not to quote them by name.

I. Reasons and Human Rights in the Council of Europe

According to the ECHR, reason-giving is a human right. The European public in general and criminal defendants in particular have a fundamental right to understand court decisions that affect them. This approach is rooted in a general principle embodied in the European Convention on Human Rights, which protects individuals from arbitrariness. The Court has inferred the reason-giving doctrine from the right to a fair trial, which is textually protected in Article 6(1) of the Convention.

Originally a Belgian case involving the murder of a politician, Taxquet challenged the compatibility of the Belgian jury, which did not provide reasons for its verdicts, with Article 6(1). That article provides that “[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” Since the 1990s, the Strasbourg Court had interpreted Article 6’s right to a fair trial to require that “judgments of courts and tribunals should adequately state the reasons on which they are based.”¹³ National courts in the Council of Europe must explain their decisions, according to the Court, because reason-giving is a means to achieve access to justice and to show that parties’ arguments have been heard.¹⁴

The ECHR’s doctrinal vocabulary—of fundamental rights, justice, and fairness—provides structure to its case law, which seems to endorse the view that the right to understand court decisions is a basic moral right. Implicit in the Court’s jurisprudence is the liberal-democratic ideal that human beings should not be subjected to actions or institutional norms that cannot be justified to them. The liberal rationale is that it is part of what is owed to one as a citizen that one should be told what one is thought to have done and have an opportunity to respond. According to this view (Nagel, 1987; Macedo, 1990), reason-giving must be an essential activity of democratic states. More specifically, reasoned court decisions are fundamental to the political and moral legitimacy of a democracy (Rawls, 1993). Because people under conditions of freedom do not agree about values, public officials such as judges ought to justify the state’s action with reasons that all citizens may reasonably accept, or at least understand. This means that
just like professional judges, lay jurors—who become temporary agents of the state for the duration of a trial—ought to issue verdicts that defendants can comprehend.

Until the Taxquet decision, however, this reason-giving doctrine applied to professional judges only, not to juries. In fact, before Taxquet, the bulk of the ECHR’s case law pertained to high courts, not trial courts or first instance judges, suggesting that juries were not on the Court’s radar. The Strasbourg court was not even particularly concerned with criminal trials, as its jurisprudence focused on civil cases (Cunniberti, 2008, 28). The typical situation the Court had encountered was that of a domestic supreme court in one of the member states endorsing verbatim a lower court opinion without adding reasons of its own, raising the question whether it had adequately thought through its decision. With Taxquet, however, the ECHR specifically addresses reason-giving within the context of criminal procedure and the jury, declaring that “for the requirements of a fair trial to be satisfied, the accused, and indeed the public, must be able to understand the verdict that has been given; this is a vital safeguard against arbitrariness.” What is the meaning of this new duty for the jury system? Has the Strasbourg Court implied that common law criminal procedure, which traditionally relies on general jury verdicts, represents a violation of human rights?

The Grand Chamber decision does not impose on all European juries a hardline duty to give reasons, that much is clear, but the meaning of the new right to understand verdicts is ambiguous. On the one hand, the Court has emphasized that general jury verdicts do not provide specific legal and evidentiary justifications for a jury’s decision. Even special verdict forms and special interrogatories might be insufficient to make up for the lack of explicit explanations issuing from the jury. In the underlying case, a Belgian jury had been required to answer no less than thirty two questions posed by the presiding judge. But the Grand Chamber pinpointed the generality and vagueness of those questions as a major deficiency: “the questions put in the present case did not enable the applicant to ascertain which of the items of evidence and factual circumstances discussed at the trial had ultimately caused the jury to answer the four questions concerning him in the affirmative.”

On the other hand, the European Court took pains to assert that, “the Convention does not require jurors to give reasons for their decision,” and “that article 6 does not preclude a defendant from being tried by a lay jury even where reasons are not given for the verdict.” This ambivalence suggests that the ECHR, well aware that it is overseeing different models of lay adjudication within the Council of Europe countries, allows for the development of local conceptions of jury trial fairness. One major divide among member states differentiates countries following the common law jury in which jurors deliberate and return their verdict without any professional judicial involvement from countries in which lay jurors sit with career judges in mixed panels, referred to as “échevinage.” In such mixed courts, jurors decide both upon guilt and punishment together with professional judges (Hans, 2008; Jackson & Kovalev, 2006). The centuries-old British and Irish juries, exclusively composed of laypersons, are arguably worlds apart from other continental juries, which are more recent additions and often use mixed panels. While a reason-giving requirement may be a plausible demand for mixed
panel, there was the concern that, if applied to the classic common law jury, such a requirement might endanger rights protected in England since the Magna Carta. The Grand Chamber was therefore careful to say that it was not invalidating the institution of the common law jury system *per se*.

How then should juries go about delivering verdicts that are understandable? The ECHR, using its doctrine of margin of appreciation, declined to answer with a common, unified framework binding on all member states. It merely declared that criminal defendants across Europe should be presented with a number of procedural guarantees enabling them to “understand the reasons for [their] conviction.” While this new right could sometimes mean that an actual statement of reasons is required from the jury, this is not necessary in all contexts. To appease jurisdictions following the common law jury system, the Court recognized that other “procedural safeguards” might contribute to the judgment’s understanding, even where reasons are lacking. According to the Grand Chamber, these safeguards may include, for example, directions or guidance provided by the presiding judge to the jurors on the legal issues arising or the evidence adduced, and precise, unequivocal questions put to the jury by the judge, forming a framework on which the verdict is based or sufficiently offsetting the fact that no reasons are given for the jury’s answers . . . Lastly, regard must be had to any avenues of appeal open to the accused.

In other words, the Grand Chamber acknowledged that there might be functional equivalents to reason-giving which accomplish the goal of producing understandable verdicts.

The first two mechanisms cited by the Court, judges’ instructions and questions to the jury, arguably supply enough information about the crucial elements of the case for the accused to be able to understand what considerations may have swayed the jury. When diligently prepared and presented, they provide defendants with a picture of the evidence against them and of the grounds for their conviction. The third substitute for reason-giving, the availability of an appeal, speaks to reason-giving only indirectly. In most jurisdictions, professional judges try appeals. The Court’s implicit argument is that defendants who have not had the opportunity to “understand” their conviction in the first instance may be able to do so on appeal when appellate judges present them with a statement of reasons. Finally, the Court also seems to take into account as alternatives to reason-giving, albeit in a more limited way, the specificity of the indictment and the extent to which it contributes to the defendant’s understanding of the verdict. The more the indictment specifies the facts and the evidence, the better.

To sum up, the ECHR has not declared a positive duty for juries to give reasons. In member states using common-law-style juries, the procedural safeguards described above may serve as functional equivalents to reason-giving. However, in mixed panel
jurisdictions, more will be demanded. A presiding judge, for example, might be required to issue the jury a list of specific questions to which jurors must provide responses in delivering the verdict. But how does that work in practice? In what follows, I use France as a case study for the implications of the new right to understand verdicts in a mixed court jurisdiction.

II. Taxquet’s Aftermath in France

France was quick to respond to the Taxquet ruling. In August of 2011, less than a year after the Grand Chamber decision, the French Parliament enacted a new statute mandating reason-giving for cour d’assises verdicts, thus breaking with a two hundred year tradition.27 Who is responsible for articulating the jury’s reasons? Are reasons given orally, from the bench, or in an opinion? In what follows, I map the contours of the new, unstable regime, pointing out the difficulties it raises.28

A. A New Reason-Giving Requirement

The cours d’assises are criminal trial courts with original and appellate jurisdiction to hear cases involving defendants accused of crimes defined as felonies punishable by a prison sentence of ten years or more. Cours d’assises use mixed panels comprised of three professional judges (a president and two associate judges) as well as six lay assessors in the first instance and nine on appeal. Judges and lay assessors decide together, adjudicating both guilt and punishment.29

What aspect of the decision must be justified? According to the new statute, only the verdict must be explained, not the sentence. This rule is sure to puzzle Anglo-American observers. The traditional common law principle is for juries to deliver unreasoned general verdicts, while professional judges, in charge of determining punishment, justify sentences. Exempting sentences from reason-giving hardly makes sense from a Gallic perspective either. At the tribunaux correctionnels, defendants are entitled to an explanation of both the verdict and the sentence.

But why should defendants charged with more serious offenses and exposed to harsher punishment lack the opportunity to know the reasons for their sentence? One would be hard pressed to find a principled justification for this disparity in the statute’s legislative history. The issue was brought to the cour de cassation, who declined to impose a reason-giving requirement on sentencing decisions, holding that the discrepancy did not raise any “serious concern” as sentences can “be explained by the requirement of a majority vote or a majority of at least six out of eight votes when the maximum prison sentence is awarded.”30 It is unclear whether legislators were persuaded by the argument that a supermajority vote compensates for unreasoned sentences. Other rationales, however, can be ventured. It could be that they legislated on the assumption that the primary decision, determinative of sentencing is the decision on guilt or innocence. On this view, justification for a sentence can be inferred from the explanations provided for the verdict as well as the jury’s answers to the special interrogatory—particularly considering that special interrogatories must include questions on aggravating or
mitigating circumstances. Another possibility is that legislators concluded that mandating reason-giving for verdicts was already such a revolution that they preferred to hold off—at least for the time being—on extending the injunction to sentencing.31

The next question is who is responsible for explaining verdicts? In Belgium, where a reason-giving requirement was enacted two years prior to that in France, jurors are responsible for reason-giving. Belgian jurors deliberate on their own, in the absence of professional judges, whom they summon to the deliberation room ex post to help them draft the statement of reasons (Jacobs, 2012, 566–7).32 By contrast, French lay assessors deliberate together with professional judges who are the direct recipients of the duty to give reasons. The new article 365-1 of the French Code of criminal procedure provides that the president of the cour d’assises or one of the two professional associate judges sitting on the panel are tasked with “drafting the judgment’s reasons” and consigning them to a document called the “reason-giving sheet.”33

In practice, the reason-giving sheet is a one-judge document, nearly always drafted by the president, who exerts a towering influence over the trial (Scharnitsky & Kalampalikis, 2007). The president is the sole specialized cour d’assises judge, recruited by the chief judge of the appellate court to serve for an undefined term.34 The two associate judges are typically appellate or trial judges assigned to serve on the cour d’assises on rotation for one or two weeks each year on top of their regular assignments.35 They may be specialized (e.g., family court judges) or generalist judges with no specific expertise in criminal law. Their outsider status in tandem with the fact that they are often overwhelmed with their own caseload may explain why presidents monopolize reason-giving. It does not help that the president has not necessarily met her two colleagues before the trial begins; it would be hard to imagine a president delegating the drafting of reasons to a judge she hardly knows.

A cour d’assises president possesses a number of prerogatives allowing her to significantly weigh in on the proceedings and the final decision.36 She only has one vote in the deliberation room, and is not supposed to divulge her opinion as to the defendant’s culpability throughout the trial.37 But unlike lay assessors and the two associate judges, who are to decide solely based on the oral evidence presented in open court, the president has access to the “dossier d’instruction,” i.e., the case file recording the investigation. Most importantly, the president has full control over the conduct of the hearings, being “vested with a discretionary power by which he may . . . take any measure he believes useful for the discovery of the truth,” which can include summoning people to testify without requiring that they take an oath.38 She does the questioning herself—directly examining the defendant, the witnesses, the victim, and the experts. She has the ability to modify the order in which participants speak. She can, for example, call to the stand the witnesses, experts, and victims before or after examining the defendant. Further, she can interrupt the defendant’s examination to call other trial participants to the stand. And, as if the president’s command of the courtroom was not strong enough, it is matched by her vast powers in the deliberation room. Indeed, she drafts the special interrogatory on which jurors vote, instructs them on the law as well as the sentencing, and leads the discussion, deciding who gets to talk and in what order.39
In light of the great powers bestowed upon the president, it is not clear in practice whether the new reason-giving requirement helps or harms the “intime conviction” standard of proof, which was initially established as a way of protecting jurors’ ability to decide free of undue influence.

B. Reasons Versus Intime Conviction

A new Code provision states that the mixed panel’s reasons “are those which are exposed during the court and the jury’s deliberation . . . prior to voting on the questions.” This language suggests that jurors are invited to state their views before voting on the defendant’s guilt or innocence. The problem is that French jurors use secret ballots. Even assuming that each participant expressed her views before proceeding to vote, the president does not have full knowledge of jurors’ reasoning. When drafting the reasons sheet, how is she to discern which of the various arguments on the table persuaded jurors if she does not know who voted “yes” or “no” on a particular question? Truly collective reason-giving would seem to demand an open group discussion, including a discussion of each participant’s vote. If individual jurors’ votes remain undisclosed, the reasons extrapolated from the discussion are bound to remain speculative rather than reflective of their actual reasoning. When participants are divided, should the arguments raised against the prevailing outcome be revealed? Even if jurors agree on a verdict but each for slightly different reasons, which reasons should be disclosed? What about jurors who chose to remain silent during the deliberation—how is the president expected to convey their position? Nothing in the Code addresses these issues. The maintained rule of secret ballot compels the president to reconstruct an ex post justification which accounts for the vote outcome, but not jurors’ actual reasons. This problem is compounded by the French standard of proof.

The notion of intime conviction, which can be translated as “inner” or “deep-seated conviction,” was initially introduced into French law as a rejection of artificially constrained and quantified Roman-canon systems of proof. In contrast to rules of formal evidence that prescribed exactly when the evidence amounted to proof, the intime conviction standard allows the court to hold against the defendant if the judge or jury are convinced that the facts brought forward by the prosecution are true. It became the standard of proof French jurors are instructed to follow. Since 2011, the revised Code of penal procedure’s provision on intime conviction begins by a convoluted, arguably oxymoronic sentence:

Subject to the reason-giving requirement, the law does not ask the judges and the jurors composing the cour d’assises to account for the means by which they convinced themselves; it does not charge them with any rule from which they shall specifically derive the fullness and adequacy of evidence.
What does “subject to the reason-giving requirement” mean? That the reason-giving requirement creates an exception to the *intime conviction* standard? Or that somehow the two seemingly antithetical aspirations must be reconciled? If the Code is indeed attempting to integrate reason-giving and *intime conviction*, the next question is what reasons should consist of if they exclude recounting the means by which decision-makers made up their minds. The Code responds, “reasons consist in the statement of the principal elements of the charged offense, which for each charge against the accused, have convinced the *cour d’assises*.”

The fact that only the panel’s “principal” reasons must be revealed suggests that there is no requirement for the reasons sheet to track the panel’s decision process. It need not reveal all the considerations discussed in the deliberation room. Indeed, the reasons sheets I have seen are short documents, running from a half page to three pages. In theory, lay assessors mostly interpret facts, not legal rules, even though there is no strict separation of questions of fact and law like in common law jurisdictions. We should therefore expect their reasons to be fact-intensive. Despite variations across presidents, reasons sheets tend to be written in a much more accessible style than standard French judicial opinions, sometimes even adopting a colloquial tone. The bulk of the reasoning is factual and descriptive of the evidence heard at trial, stated in plain language. Technical expressions only appear inasmuch as the statement mentions the qualifications of the crimes charged. Reasons sheets, however, retain elements of the French style in their relative terseness and formalized presentation. They tend to either be composed of a list of relevant factors, such as “the defendant was positively identified by the victim,” “the defendant acknowledges to have delivered mortal blows, animated by a homicidal will and acting with premeditation,” each introduced by dashes, or of short paragraphs associated by logical connectors such as “consequently,” “however,” “hence,” which echo the traditional “whereas” used in French judicial opinions.

The combined constraints of secret ballot and *intime conviction* seem to have produced a highly factual form of reason-giving, departing from the French tradition of abstract and formulaic judicial opinions. By contrast with United States civil and criminal cases, the process of reason-giving focuses on uncontested issues and is not meant to draw the attention of the fact-finders to those issues about which the state and the defendant disagree. Plea-bargaining is still an exceptional process in France and is not (yet) available for serious offenses like those tried at the *cour d’assises*, so that many verdicts address fact-finding on uncontested issues, in cases where the defendant essentially admits his guilt.\(^45\) In such cases, reasons sheets may play the role of the factual basis in an American guilty plea, which is there essentially to document that all essential elements of a crime can be proven based on what transpired during the hearings, not to disclose the jury’s deliberations as they unfolded behind closed doors.

Having described the French regime, I next question whether France’s and the European Court’s quest for reasons is really, or solely, prompted by humanitarian concerns. I argue that in addition to furthering defendants’ rights, both the ECHR and French regulatory frameworks are motivated by systemic accountability concerns.
III. Safeguarding Defendants or Guarding the Judges?

A close analysis of the ECHR jurisprudence and the French reform shows that neither the Strasbourg court nor French legislators were exclusively motivated by a moral project when they extended the duty to give reasons. Significantly, both jurisdictions embraced reason-giving as an accountability mechanism bearing on judges rather than jurors. This focus on judges suggests that what they viewed as the problem was not the existence of unreasoned verdicts per se, but rather the fact that professional judges were participating in the production of unreasoned verdicts.

A. Regimenting European Courts

With a few notable exceptions, such as the United Kingdom, most Council of Europe countries follow the civil legal tradition broadly defined (Damaška, 2010). In that tradition, bench trials represent the model of excellence in court decisions. In part this results from the fact that jury trials are a rare and comparatively new occurrence, while bench trials have an ancient history. This is also due to differing conceptions of the judicial office. Continental European judges are typically career bureaucrats embedded in tight hierarchical institutional and professional structures, rather than independent professionals elevated to the bench through lateral appointments (Damaška, 1986). On the continent, professional judges, unlike jurors, enjoy a steady institutional legitimacy verging on infallibility. For instance, French judicial opinions, which on account of their terseness and formalized language appear less than explanatory to the American reader, are nonetheless generally well-received by litigants and the public (Wells, 1994). As Mitchell Lasser has argued (Lasser, 2004), the concision and obscurity of the French judicial opinion are partly compensated for by other aspects of a centralized and hierarchical judicial system, which carefully selects and rigidly trains its judges. French judges, like most of their continental counterparts, are considered inherently trustworthy because they are controlled by powerful educational and hierarchical means (Bell, 2010, 44-107).

Jury trials, however, do not enjoy such an institutional legitimacy. Juries are a relatively recent innovation in civil legal systems. Lay participation in continental European courts, while common in older times, practically disappeared in the Middle Ages when the Fourth Lateran Council banned trial by ordeal in 1215 (Toulemon, 1930, 20–21). Professional judges took over the increasingly technical criminal proceedings and imposed written, inquisitorial procedures (Eismein, 1913, 32; Dawson, 1960, 94–110). The jury only reappeared in France during the Revolution and spread to neighboring countries conquered in the Napoleonic campaigns during the nineteenth century. To this day, in most continental jurisdictions, rather than representing the default in criminal proceedings, jury trials are reserved for the trial of only the most serious felonies.

This history puts into perspective the ECHR’s jurisprudence on jury verdicts. While the European court’s rhetoric may suggest that a human right for defendants to
understand their conviction and sentence is in the making, in reality, that right can also be analyzed as a mechanism to monitor judges and administer the courts in line with the civil law tradition of a tightly monitored judiciary. Significantly, the Court is not concerned with the common law jury, entirely composed of laypeople. As pointed out earlier, the Court is careful to emphasize that it is not creating a reason-giving requirement for jurisdictions like the U.K. where professional judges take no part in jury deliberations and where a number of safeguards are in place to protect the jury’s independence such as a very detailed indictment and impartial instructions. Instead, it focuses on jurisdictions where professional judges dominate the proceedings either because they use mixed panels or because, like Belgium, despite using pure juries, judges retain some measure of influence. This difference in treatment implies that the Court is indirectly targeting judges. Unreasoned verdicts only appear to raise the specter of arbitrary decision-making when professional judges have participated in their production. This indicates that the demand for reasons or alternative procedural guarantees is ultimately aimed at ensuring that the judges involved in jury trials—rather than lay jurors—structure the decision-making process according to the ECHR’s notion of a fair trial.

In fact, the importance of reason-giving in the Strasbourg jurisprudence partly stems from an interest in accountability. The Court’s case law is worded in the language of human rights and morality, but it also reflects a managerial concern. The Court had previously held that the judicial duty to give reasons is “linked to the proper administration of justice”—not primarily attached to a moral project. The duty is as much about guaranteeing that litigants understand the judicial process as it is about policing judges. This accountability goal is most visible in the connection between reason-giving and the right to appeal. The right to appeal in criminal matters has been affirmed as a basic human right by a 1984 protocol added to the European Convention. The effectiveness of a higher court’s power to review is usually premised, at least in part, on the existence of a statement of reasons by the judge at first instance. Reason giving is key for verdicts to be understandable to appellate judges fulfilling their reviewing function. Reviewing courts need those reasons to isolate correct and incorrect outcomes at the trial level. The Court embraced this argument in Taxquet: without a statement of reasons, it would be much harder for an appellate court to pin-point and correct possible errors, compromising its mission to ensure principled decision-making in the trial courts and diffusing accountability within the legal system. The European pressure for juries to give reasons, therefore, may be a right against judges as much as it is a right for defendants.

B. Keeping French Judges in Check?

The French interest in reason-giving is just as ambivalent as the European—partly spurred by humanitarian concerns and partly prompted by a judicial accountability agenda. In imposing upon its juries a burden of explanation, French legislators have not only sought to advance defendants’ rights, but also to keep professional judges in tighter check, and chief among them, the cour d’assises presidents.
**Reasons By Whom and for Whom?**

**Reason-Givers**

The French reform has brought about a system whereby the jury’s reasons are controlled by professional judges and primarily addressed to higher courts. At the *cour d’assises*, professional judges have the upper hand over the jury in the deliberation room because they enjoy a superior legal expertise and master the informal norms at work at the court (Jellab & Giglio-Jacquemot, 2012, 157–8). As discussed earlier, the president leads the trial and is seen as the bearer of objective knowledge. These prerogatives bestow on him such great legitimacy and influence over the two other judges as well as the lay assessors that a number of commentators (e.g., Barraud, 2012, 399) have claimed that lay assessors’ presence essentially serves as a façade of democratic legitimacy for judge-made, or even president-made decisions.

A look at the way in which the reasons sheet is prepared reveals the extent of the president’s ascendency. Following the typical French judicial practice, presidents appear to draft the sheet *in advance* of jury deliberations (Cohen, 2014). The presidents I talked to acknowledge that they systematically write two drafts before the trial even begins: one supporting a conviction and one supporting an acquittal. Throughout the trial, during evenings and weekends, they “refine” their drafts based on what happens in the courtroom. Reasons, therefore, are articulated well before any verdict has been reached.

There are obviously considerable advantages from the point of view of the president’s work organization in proceeding *ex ante*. To justify this method, one president mentioned that he “explains to the jury that you can’t draft collectively with nine or twelve people otherwise it would take the entire night.” He reported that once the panel reaches a decision, he immediately reads out loud whichever draft matches the verdict, soliciting feedback from participants sentence by sentence. He claims that he always asks the jurors in the minority if they want to consult the alternative draft which supports their view. According to him, they generally take him up on his offer so as to “see for themselves that the system isn’t rigged, that their position was also defensible.” By contrast, another president confided that she felt “very uncomfortable” with this modus operandi. Even though she too writes two different drafts supporting contrary verdicts, she does not share that fact with the panel, for fear of disheartening jurors.

Case management and efficiency concerns seem to motivate this *ex ante* approach. For standard cases, deliberations run between three to six hours. As one president remarked, if he had to go back to his office to draft reasons after the deliberation, he would keep the jury waiting a couple of hours (assuming it were a relatively easy case) before returning to the deliberation room with a full draft. Upon his return, the panel would need to debate the proposed reasoning, which could take an additional couple of hours. According to him, jurors would be reticent to stay at the court for such an extended period of time. Another option would be for the president to dismiss the jury once the panel has reached a verdict and determined the sentence so as to
take a few days to write the statement of reasons. An obstacle to this solution is that the 2011 statute requires that the reasons sheet be signed by the jury foreperson. The travaux préparatoires show that the Senate requested this signature “in order to guarantee the jury’s control over the reasons retained by the judge.” If the president drafted the statement after dismissing the panel, however, she would need to summon the foreperson back to court to sign it. Given that the president operates under strict time limits—she must return the reasons sheet at the latest three days after the verdict—this callback procedure could prove dicey should the foreperson disagree with the reasoning. The statute, therefore, seems to have built in incentives for presidents to follow the ex ante approach, which goes against the proclaimed goal of bolstering lay jurors’ contribution to reason-giving. If reformers had been serious about promoting lay influence, the new regime would have been organized differently. Following the Spanish example, one or several lay jurors could draft a statement on their own, save for requesting a clerk’s help if needed. Alternatively, the French could have adopted the scheme suggested by criminal lawyer François Saint-Pierre: each juror jots down on a piece of paper her reasons for or against a guilty verdict. Based on these notes, the president deduces a majority and a minority position and drafts an opinion reflecting both views (Saint-Pierre, 2013, 122).

**Reason-Recipients**

In sum, the reasons sheet appears to be a judge-made document rather than a lay juror document. But to whom is it addressed? In theory, its primary beneficiary should have been the criminal defendant. However, in practice, it seems that its primary audience is the reviewing court, followed by the general public. Retracing the cour d’assises’ decision-making steps illustrates this. After deliberating, when the mixed jury returns to the courtroom, the Code prescribes that the president give a reading of the answers to the special interrogatory, stating only whether they are positive or negative. Astonishingly for a reform aimed at making verdicts understandable to defendants, the statute does not require that the reasons sheet be read out loud publicly or communicated to the parties. Technically, the statement of reasons is a procedural, not a public document. Practices vary, with some presidents inclined to read it whenever they deem it feasible, i.e., when they think that the risk of disturbance in the courtroom is low. Others simply announce the verdict from the bench, keeping silent as to the reasons.

The judgment itself, i.e., the official document stating the verdict (“guilty” or “not guilty”) and the sentence does not always include reasons. The statute leaves it up to judges to incorporate the reasons into the judgment or to keep them in a separate reasons sheet. In practice, this means that presidents have the choice between copy-pasting their reasons into the judgment or “annexing” the reasons sheet to the judgment, i.e., stapling the two hard copies before archiving them. A couple of presidents I talked to report that they prefer to annex the reasons sheet because it is easier and faster. One president noted that copy-pasting reasons into the judgment would be particularly time consuming because it disturbs the formatting of the template. The difference between the two methods is far from trivial, however. When reasons appear in a separate document,
defendants do not automatically get access to them, given that only judgments are sent to parties, not reasons sheets. Should they want copies for their clients, attorneys must specifically request reasons sheets from the court’s registry.

This accessibility deficit, together with the predominant role of the president in the drafting, suggests that the reform is aimed as much at keeping presidents in check as at making verdicts understandable to defendants. Paradoxically, some cours d’assises’ reasons are now more widely available to the general public through the press than they are to defendants. Until the reform, not only were cours d’assises not forthcoming with explanations; they were positively prohibited from giving reasons. This prevented an important form of democratic accountability through the general public and the media; trial participants’ indiscretions were often the only source of information available. One president thus applauded the reform in that the reason-giving requirement provided a new way for the court to “communicate with the press.” He had adopted the practice of handing out a copy of the reasons sheet to journalists at the end of the proceedings and prided himself on the fact that “the day after, I see the verbatim transcript of certain aspects of the reasoning in news reporting.”

Beyond the question of who holds the pen and who is the recipient of the reasons, another aspect of the reason-giving requirement indicates that it is meant as a check on judicial discretion as well as a protection for defendants: insufficient reasons are not protected by a harmless error rule.

_A Right With Teeth_

In the United States, as a general matter, a judge’s failure to give reasons does not amount to reversible error (Mashaw, 2001, 20; Stack, 2007, 955). Traditionally, no appeal lies on the sole grounds that a court gave inadequate or insufficient reasons. The validity of a judgment is typically evaluated independently from the reasons given for it. Unreasoned decisions are protected by the “harmless error” doctrine. The rationale behind this rule appears to be judicial economy: the courts’ limited resources should be conserved for the correction of legal errors rather than failures to explain.

In France, reasons can be the basis for an appeal or for overturning the verdict in part because, as I argue below, reason-giving is one of the few ways in which reviewing courts can scrutinize lower court judges. Two tiers of appeals are successively available: the first runs from the cours d’assises (the first instance trial court) to the cours d’assises d’appel (which retries the case before a new mixed jury) and the second from the cours d’assises d’appel to the cours de cassation. Reasons play out differently for these two forms of appeal.

The first type of appeal transfers the entire matter to the cours d’assises d’appel, with respect to both questions of fact and law. Both the defendant and the prosecution can appeal—meaning that the prosecution can appeal a verdict of acquittal. The cours d’assises d’appel empanels a new mixed jury to conduct new fact-finding under a de
novo standard, rather than a critical review of the record developed at the first trial. It is debatable whether the quality and quantity of reasons given at first instance matter on appeal. On the one hand, neither defendants nor prosecutors need to explain why they wish to appeal in their notice of appeal. They enjoy an absolute right to a new trial, regardless of the cause for their dissatisfaction. In that sense, the reasons given at first instance are somewhat irrelevant. On the other hand, having access to the considerations that determined a finding of guilt or innocence at first instance might help both sides build a better case on appeal. The Code provides that the president of the cour d’assises d’appel must read the first instance reasons sheet in public at the opening of the second trial. This provides one of the only glimpses of information as to what happened at first instance, given that, until 2014, hearings were neither recorded nor transcribed. By and large, but for what transpires in the statement of reasons, the new mixed panel does not know what was said or debated at first instance. Only the president has access to the dossier, and the dossier focuses on the pre-trial investigation. For example, if the defendant, witnesses, or experts completely change their testimony on appeal, the primary way for the panel to be aware of the turnaround and to question witnesses with their inconsistent prior version of events would be through the statement of reasons.

As a criminal lawyer with a wide experience of the cour d’assises confided to me, “until recently, the cours d’assises presidents did not allow [the witnesses’] testimonies to be included in the minutes and on appeal they did not want to know what had been said at first instance, invoking the sacrosanct principle of the orality of criminal proceedings.” To counteract this problem, since October 1, 2014 Article 308 of the Code de procédure pénale mandates the audio recording of the cours d’assises’ hearings. Implementation has been tumultuous so far. Several cours d’assises lack the equipment required to produce adequate recordings. Due to the burden involved in recording an entire trial, some presidents seem to restrict the recording to trials that are expected to stir controversy. It does not help that Article 308 provides that the failure to record the proceedings does not affect the legal validity of the trial and that transcriptions will not be issued automatically. Without readily available transcripts, lawyers trying to verify a witness’ account from a previous trial may need to listen to days and days of recordings. Given the time and expense required, in practice the reasons sheet remains the best available source of information on a previous trial. The new recording rule may put pressure on judges, prosecutors, and lawyers’ courtroom behavior and statements, but so far it fell short of creating an accessible record.

Assuming an exhaustive record, including a detailed statement of reasons, were available to the cour d’assises d’appel, the defense team, and the prosecution, the question remains whether it would be of any use. The appellate court is in no way bound by the first instance court’s fact-finding and reasoning. As a president stated, “on appeal, we don’t judge whether the case had been well or badly judged, we judge again.” The role of reasons given at first instance, therefore, remains ambiguous. They can help both the prosecution and the defense strategize their appellate battle plan. They may also be understood as a mechanism for creating a record or something that functions like a record to assist with cross-examination of witnesses and allow for a meaningful right to appeal. Beyond that, the reasons given at the first trial do not seem to influence what happens in
the de novo trial on the merits on appeal.

Reasons given at the second trial matter considerably more for the second type of appeal, which is only open to defendants. Those convicted on appeal by a cour d’assises d’appel can file a second appeal, this time to the cour de cassation, a court of last resort which only reviews for legal or procedural errors under a highly deferential standard. The notice of appeal must allege that specific substantive or procedural errors have been made during the trial, one of which could be the insufficiency of the cour d’assises d’appel’s reasons. Controlling lower courts’ reasoning has been one of the cour de cassation’s essential tasks since its creation in 1790, the same year French judges were first required to give reasons for their decisions. Since then, French law has recognized violations of the duty to give reasons as independent causes to quash judicial decisions. Correspondingly, the cour de cassation has a well-established jurisprudence according to which judgments that are unreasoned or badly reasoned will be vacated and/or remanded to lower courts for a new trial. The court typically uses this mechanism to police lower court judges and check their exercise of discretion. Will the cour de cassation extend this approach to the jury, so that reasons become a basis for overturning criminal verdicts?

French legislators were well aware of the cour de cassation’s jurisprudence on reason-giving when they prepared the 2011 reform, and one cannot help but think that they were counting on its extension to juries. While it is too soon to draw positive conclusions, there has already been one instance in which the cour de cassation quashed a conviction because of insufficient reasons. In that case, the defendant, Mekki Boughouas-Campagne, had been sentenced to thirty years of imprisonment for participating in a robbery. The robbery took place at the night club where he was employed as a doorman and resulted in the death of the club’s artistic director. The victim was found lying in a field behind the night club, fatally stabbed. That night’s earnings had disappeared from the club. Mekki Boughouas-Campagne was found guilty of murder and armed robbery at first instance and sentenced to thirty years’ imprisonment. The cour d’assises d’appel convicted him on the lesser charge of “armed robbery accompanied by violence leading to death,” but concurred with the thirty-year sentence. By way of explanation, it issued the following reasons sheet, here quoted in full:

On the reasons: the elements of the case file do not permit to establish the identity of the author of the blows, the elements of the charged offense which have been gathered against the accused suggesting his presence on the premises rather than a homicidal act, the theft offense being uncontested.

According to the cour de cassation’s case law, adequate reasons should show the relationship between the facts of the case and the verdict. A reasoned explanation should enable the cour de cassation to determine whether irrelevant considerations have been taken into account or relevant considerations ignored. Here, the cour de cassation found that the cour d’assises d’appel’s cryptic explanation neither identified the elements of the
charged offense nor the link between the defendant’s presence on the crime scene and his implication in the victim’s death. Following its own tradition of short and elliptical opinion writing\textsuperscript{1}, the \textit{cour de cassation} did not say much about the type of reasoning it looked for. Perhaps it expected more discussion of the defendant’s role as distinguished from that of his alleged accomplice, whom the first instance \textit{cour d’assises} had found guilty of conspiracy to commit a crime and sentenced to four years of imprisonment. What is clear is that the \textit{cour de cassation} concluded that the \textit{cour d’assises d’appel} had “enunciated confused and abstract reasons, which in no way distinguish the elements of the charged offense which have persuaded the courts regarding each of the facts attributed to the accused.” Rather than remanding to a different \textit{cour d’assises} for a new trial as it usually does, the \textit{cour de cassation} remanded to the same \textit{cour d’assises} that had issued the deficient statement of reasons. This departure from standard procedure sends a strong signal to \textit{cours d’assises’} presidents. It is almost as if the \textit{cour de cassation} wanted to “punish” the professional judges for unsatisfactory reason-giving and force them to do their homework by sending the case back to their court.

Based on this first precedent, the failure to give reasons of sufficient quality, clarity, or consistency for jury verdicts will not benefit from a harmless error analysis. The \textit{cour de cassation} appears willing to apply the same standard of review for reason-giving by the \textit{cours d’assises} as it does for regular courts. If the appellant can show that the defect is important enough, inadequate reasons will likely suffice to reverse the original decision and to warrant a new trial. The new reason-giving requirement, therefore, provides defendants a right with teeth, which can be the basis for overturning a verdict. By the same token, however, French legislators have provided the \textit{cour de cassation} with a crucial instrument to facilitate its review of \textit{cours d’assises’} decisions. Before the reform, the \textit{cour de cassation} could hardly perform its error correction mission given that there was neither a transcript of the oral argument to look over nor a statement of reasons explaining the verdict. The high court had to guess why the \textit{cour d’assises} had decided the way it did, with very few clues as to whether procedural rules had been followed and what the mixed court’s reasoning was for retaining a particular qualification of the crime for finding particular elements of the crime to have been proved. This state of affairs left \textit{cours d’assises} presidents with considerable discretion as to how to run their trials.

To be sure, this accountability effect is not necessarily at odds with the humanitarian premises behind the reason-giving requirement. Providing the \textit{cour de cassation} with an instrument to facilitate review is also a way for legislators to reinforce defendants’ rights. Based on the last publicly available statistics from 2008, only 43% of acquittals at first instance were confirmed by the \textit{cours d’assises d’appel} when the prosecution appealed.\textsuperscript{69} And that is the case even though on appeal there are nine lay jurors deciding together with the three professional judges—instead of six lay jurors and three professional judges at the first instance. It is therefore paramount for defendants to have access to the reasons underlying the second \textit{cour d’assises} verdict. The absence of explanations could frustrate their right to appeal to the \textit{cour de cassation} and their hope
of reinstating their first instance acquittal.
Conclusion

The European approach to jury reason-giving is still somewhat in flux. The ECHR has yet to announce its views on the revamped French reason-giving regime or on comparable efforts carried out in other jurisdictions. It will take a few more years for cases to percolate through the Council of Europe’s member states’ judicial systems before the Strasbourg court can decide them. So far, however, what we can observe is consistent with a theory that a global norm of reason-giving is gradually emerging, putting pressure on local decision-making contexts such as jury trials which historically had developed without a reason-giving requirement. We live at a moment in time that is characterized by the profusion of reasons in all aspects of public life rather than by a shortage of reasons. Reason-giving is often brandished as a panacea to secure transparent governance. So much so that the continued existence of spheres of legal decision-making devoid of explanations seems unacceptable to the contemporary observer. This trend explains why reason-giving has been revitalized in criminal proceedings, where European judges and juries had long enjoyed considerable authority without the corresponding duty to justify their decisions. The most interesting question raised by Taxquet and its French reaction concerns the inextricable cluster of values underlying the imposition of stronger reason-giving. Both at the supranational, European level and at the domestic, French level, reason-giving seems to be both about running a system and fairness to defendants, about increasing judges’ accountability and moralizing the criminal trial. It could be that these values are complementary; after all, part of what it means to moralize a trial is for decision-makers to be accountable for their reasons. This reflection on the values at stake behind the new reason-giving requirement raises another set of questions, in particular whether the European right to understand verdicts is linked to the right to challenge them as unreasonable. In that case, defendants would not just have the right to obtain reasons, but also the right to raise a meaningful challenge to the verdict below, based on its irrationality.

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1 United States courts have mostly rejected special verdicts because they interfere with jury deliberations. But see Nepveu, Kate H. 2003. “Beyond “Guilty” or “Not Guilty”: Giving Special Verdicts in Criminal Jury Trials,” 21 Yale Law & Policy Review 263-300 (2003) (arguing that juries increasingly rely on special verdict forms and special
interrogatories so that juries commonly return information beyond a simple “guilty” or “not guilty” in a wide range of criminal cases).

2 In Britain, it is illegal to interrogate jurors to gather information about the deliberation process. Contempt Court Act, 1981, c. 49, § 8(1) (“It is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberation in any legal proceedings.”).


6 Projet de loi sur la participation des citoyens au fonctionnement de la justice pénale et le jugement des mineurs. Étude d’impact 30, 37 (Apr. 11, 2011) (author’s translation) (Even
though the study’s authors underlined that the reform was not “imposed” by Strasbourg, a number of cases in the ECHR’s pipeline suggested that the European court might not review favorably the safeguards which existed in lieu of reason-giving, such as special interrogatories. In the case of Papon v. France, handed down on November 15, 2001 the ECHR upheld an unreasoned verdict on account of the precision of the special interrogatory’s questions which, according to the court, “adequately compensated the lack of reasons.” Papon v. France (No. 2), 2001-XII Eur. Ct. H.R. This rationale indicated that, conversely, should a special interrogatory lack precision, the Court would not find it sufficient to compensate for an unreasoned verdict, as was confirmed by France’s condemnation in Agnelet v. France. See generally Agnelet v. France App. No., 61198/08 (Eur. Ct. H.R. Jan. 10, 2013)).

7 Projet de loi sur la participation des citoyens au fonctionnement de la justice pénale et le jugement des mineurs. Étude d’impact. 31 (Apr. 11, 2011) (author’s translation).

8 See CODE DE PROCÉDURE PÉNALE [C. pr. pén.] art. 485 (Fr.) (“Every judgment must include reasons and enacting terms. The reasons form the basis of the decision. The enacting terms state the offences for which the persons cited are declared guilty or liable, and also the penalty, the legal provisions implemented and the civil award.”). It should be noted, however, that the quality of reason-giving by tribunaux correctionnels is often lagging, with judges occasionally copying and pasting the elements developed in the indictment (Guinchard, 2009, 940).

9 Jean-René Lecerf, Rapport au sénat no. 489 (2011) at 77 (Fr.).

10 Protcol 7, art. 2 of the Convention lays down the principle of a right to appeal (“double degré de juridiction”). The ECHR had not condemned France, considering that the
possibility of appealing a verdict to the *cour de cassation* satisfied the requirement, but many in France feared that it might if an extended right to appeal were not forthcoming.


15 In previous cases dealing with jury verdicts, the ECHR had held that other features of the process, such as the right to waive a jury trial or directions provided by judges to jurors, sufficiently compensated for the absence of reasons. *See, e.g.*, Saric v. Denmark, App. No., 31913/96, (Eur. Ct. H.R. Feb. 2, 1999).

17 Taxquet v. Belgium II, supra note 8, at § 90.
18 Id. § 97.
20 Among its member states, the European court found that ten have adopted the “traditional” jury system, defined as that in which “professional judges are unable to take part in the jurors’ deliberations on the verdict.” Taxquet II, supra note, §§ 43, 47. These states are: Austria, Belgium, Georgia, Ireland, Malta, Norway (for serious crimes and on appeal), the Russian Federation, Spain, Switzerland, and the United Kingdom (England, Wales, Scotland and Northern Ireland). Id. § 47.
21 According to the Court, twenty four states use the mixed form of jury: Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Liechtenstein, Monaco, Montenegro, Norway (for most cases), Poland, Portugal, Serbia, Slovakia, Slovenia, Sweden, “the former Yugoslav Republic of Macedonia,” and Ukraine. Id. § 46.
22 The majority emphasized that the notion of a fair trial is not univocal across member states: “While the right of an accused to a fair trial should never be compromised, it could be attained in different ways in the Contracting States’ criminal justice systems. States were to be afforded a margin of appreciation in arranging the judicial procedures through
which the right to a fair trial was secured.” Taxquet II, *supra* note 5, § 72.

23 *Id.* § 26.

24 *Id.* § 50.

25 There are notable exceptions, such as France and Norway, which employ lay assessors at the appellate level. (Jackson & Kovalev, 2006, 118). Italy also uses mixed panels of judges and lay judges on appeal, in so called *corte d’assise d’appello*.

26 Taxquet II, *supra* note 5, § 95.


28 The statute went into effect in January of 2012 and is still in a state of experimentation.

29 Until the 1930s, similar to the common law jury, French jurors only decided on guilt. Since passage of a 1932 statute, they also decide on punishment. *See* *Loi du 5 mars 1932 ayant pour objet d’associer le jury à la cour d’assises pour l’application de la peine* [Law of March 1932 associating the jury to the *cour d’assises* for the application of punishment] (author’s translation).

30 Cour de cassation [Cass.] [supreme court for judicial matters] crim., Jun. 26, 2013, nos. 12-87.863, 12-87.637 (not published) & crim., Oct. 17, 2012, Bull No. 221 (Fr.) In the same decision, the *cour de cassation* refused to remand the issue to the constitutional court, the *Conseil constitutionnel*.

31 Of course, a number of legal decisions are insulated from the duty to give reasons, from supreme courts’ denial of certiorari to summary dispositions to peremptory
challenges to executive pardons, etc. I have shown elsewhere that the current trend toward increased reason-giving in the judicial context is a modern phenomenon. (Cohen, 2015). As Jacqueline Ross has suggested in conversation response to this chapter, mercy functions similarly to sentencing. Mercy is a prerogative of the sovereign reminiscent of the baroque conception of power epitomized by the maxim sic volo sic jubeo, stat pro ratione voluntas, which can be translated as “Thus I will, thus I command, my will shall stand for a reason.” In modern times, mercy has remained a matter of “grace” rather than desert, thus closer to sentencing rather than adjudication of guilt or innocence. This may explain the relative unwillingness to require reason-giving at sentencing; though ironically it is where the United States system currently requires most reason giving. See 18 USC § 3553(c).

32 See Code d’Instruction Criminelle [Cl.cr.] art. 334 (Belg.).

33 Code de Procédure Pénale [C. pr. pén.] art. 365-1 (Fr.) (mandating that “reasons be memorialized in a document annexed to the questions sheet,” called “reason-giving sheet” (feuille de motivation) (author’s translation)).

34 See Code de Procédure Pénale [C. pr. pén.] arts. 244–47 (Fr.).

35 Id. art. 248–50.

36 Id. arts. 311, 328; see also Cour de cassation [Cass.] [supreme court for judicial matters] crim., Jun. 14, 1989, Bull. Crim. (Fr.).

37 Code de Procédure Pénale [C. pr. pén.] arts. 328 (Fr.) (providing that the president “has the duty not to disclose his opinion as to [the defendant’s] guilt”).

38 See id. art. 310 (providing that “[w]itnesses summoned in this way do not take an oath and their statements are only considered as a source of information.”).
See id. art. 309.

Id. art. 365-1 (author’s translation).

See id. art. 357 (maintaining the rule according to which mixed courts must use secret ballots.)

A senate committee had underlined this possibility. See Lecerf, supra note 9, at 79.

See id. art. 353. The Belgian Code d’instruction criminelle, which used to contain similar language, (at art. 342), was substantially revised in 2009 when the new Belgium reason-giving requirement was imposed upon juries to eliminate the reference to intime conviction. See CODE D’INSTRUCTION CRIMINELLE [C.I.CR.] arts. 326(2), 327(2) (Belg.).

See id. art. 365-1 (author’s translation).

Plea-bargaining was only introduced in France in 2004. It is strictly reserved for minor offenses, and so far talks of extending it to serious crimes have failed to elicit a legislative response. See loi 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité [Law 2004-204 of March 2004 Adapting Justice to Changes in Criminality], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.], Mar. 10, 2004, p. 4565.

Continental judges are more analogous to American administrative officials in terms of education, recruitment, and career than to Article III judges. In France, a judicial career begins with the post-law school, state-operated French national judge school and continues with yearly evaluations and reviews, sanctioned by promotions and transfers between courts. (Bell, 2010, 44-107)

See CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] art. 231 (Fr.). As Stephen Thaman notes, for example, when Belgium became independent of the Netherlands, Article 98 of


50 Thus, according to the ECHR, in the first Taxquet case, because of the absence of reasons at the Belgian cour d’assises, “the Court of Cassation was prevented from carrying out an effective review and from identifying, for example, any insufficiency or inconsistency in the reasoning.” Taxquet I supra 5, at § 49.

51 CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] art. 364 (Fr.).

52 See Lecerf, supra note 9, at 79 (“[T]he reasons sheet [is] signed by the president and the jury foreperson in order to guarantee the jury’s control over the reasoning retained by the professional judge.” (author’s translation)).

53 CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] art. 366 (Fr.).

54 The cour de cassation had struck down a cour d’assises judgment which contained explanations on the ground that giving reasons violated the intime conviction standard. In doing so, it reaffirmed its view that the mixed panel’s responses to the special
interrogatory form provided sufficient information as to the verdict’s basis. Cour de cassation [Cass.] supreme court for judicial matters] crim., Dec. 15, 1999, no. 99-84099, Bull No. 308 (Fr.).

55 Yet federal criminal law departs from this tradition. United States federal judges are under a statutory duty to provide a justification for their sentencing decisions. 18 U.S.C. § 3553(c)(2) (2006). Moreover, since the Supreme Court’s United States v. Booker decision in 2005 and its progeny, district judges are subject to a judicially imposed requirement to “adequately explain the chosen sentence to allow for a meaningful appellate review and to promote the perception of fair sentencing.” Gall v. United States, 552 U.S. 38, 50 (2007).

56 See People’s Mojahedin Org. of Iran v. U.S. Dep’t of State, 182 F.3d 17, 23 (D.C. Cir. 1999) (“In cases on appeal from the district court, we are to review “judgments, not opinions.” Orders issued by agencies are treated differently. In administrative law, we do not sustain a ‘right-result, wrong-reason’ decision of an agency. We send the case back to the agency so that it may fix its reasoning or change its result.”) (citations omitted).

57 See Helvering v. Gowran, 302 U.S. 238, 245 (1937) (“In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed although the lower court relied upon a wrong ground or gave a wrong reason.”).

58 See Fed. R. Civ. P. 61 (requiring that federal courts “disregard any error or defect in the proceedings which does not affect the substantial rights of the parties”).

59 Every initial trial verdict must to go through a second de novo trial before it gets to the cour de cassation.
The cour d’assises d’appel is not hierarchically superior to the first instance cour d’assises. The only difference between the two courts is the number of decision-makers: on appeal, the number of lay assessors is increased from six to nine. See loi 2000-516 du 15 juin 2000 renforçant la protection de la présomption d’innocence et les droits de la victime [Law 2000-516 of June 2000 reinforcing the presumption of innocence and the rights of victims], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.], June 16, 2000, p. 9038.

This rule has been revised during the summer of 2014 by the loi n° 2014-640 du 20 juin 2014 relative à la réforme des procédures de révision et de réexamen d’une condamnation pénale définitive. The revised Code of penal procedure now states that “the cour d’assises’ debates are audio recorded under the president’s control. The president can also order, at the victim or the civil party’s request, . . . that their examination or deposition be video recorded.” (author’s translation). That same article also allows the president to audio or video record jury deliberations. CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.], art. 308. (Fr.).

See CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.], art. 308. (Fr.).

See CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.], art. 308(6) & (7). (Fr.).

The prosecution’s right to appeal verdicts of acquittals to the cour de cassation is limited a to an appeal “in the interests of law alone and without prejudice to the party acquitted.” CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.], art. 572. (Fr.).

The cour de cassation only reviews the reasons of the cour d’assises d’appel, not first set of reasons, from the first cour d’assises trial.
Loi des 16 et 24 août 1790 sur l’organisation judiciaire, art. 15 (codified in art. 485 and 543 of the Code of penal procedure.) In the name of consistent application of the law throughout the nation, that same statute established the *cour de cassation* empowered to overrule lower court decisions based on an erroneous application of the law.

Under the general category of “défaut de motifs” (which could be translated as defective reasons) the *cour de cassation* has struck down decisions on four different grounds: inexistent reasons, inconsistent reasons, non-response to a party’s submissions, hypothetical or doubtful reasons.

Cour de cassation [Cass.] [supreme court for judicial matters] crim., Nov. 20, 2013, no. 12-86630, Bull No. 234 (Fr.).

*See* Pierre-Victor Tournier, Arpenter le champ pénal, nos. 85–86, April 14 2008 available at http://arpenter-champ-penal.blogspot.com/2008/04/toujours-plus-acp-85-86-supplment.html (Pierre-Victor Tournier is a demographer and social scientist at the French national research institute, the CNRS, who created a blog/newsletter which on many criminal justice topics is the only publicly available source of information.).

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**References**


