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Virginie Gautron[*]
Associate Professor of criminal law and criminal science
Law and Social Change Laboratory, University of Nantes

The criminal justice system has continually been a subject of reform, as justice has always been considered to be too slow, unfathomable, opaque, and even unfair. Such criticism became harsher in the late 1970s, when the number of criminal complaints increased exponentially while the number of judges held steady, such that cases took longer to resolve and those involving petty offenses were generally dropped. In 1980, Pierre Arpaillange was quick to write that "in the current state of things, all the half-measures and half-achieved reforms give the justice system nothing more than a brief respite from mediocrity" (1980, 261). Structural and procedural reforms were hastened in an attempt to modernize the judicial system, especially after the entry into force of the organic law on financing laws (OLFL), which gave "new public management" precepts greater influence. Although long averse to a managerial approach, the courts and prosecutors' offices have now instituted cost controls, streamlined use of human, material and financial means, and output and quality requirements (Vigour 2006). But in addition to improving efficiency, prosecutors are now supposed to systematically—and more quickly—handle all the cases referred to them (rather than exercising their discretion to drop or close those they deem not worth prosecuting) while deciding on individualized sentencing alternatives in cases they do not send on for trial. To meet these demands, prosecutors and presiding judges are being forced to become "justice entrepreneurs" (Vigour 2006, 434). These changes are causing tension in the courts, as some of them are contrary to the professional ethos and traditional practices.

To explain how judges perceive and have appropriated this new managerial approach, as well as its impact on the administration of justice and on punishment (Gautron 2014a), this article goes beyond legal texts and ministerial recommendations, drawing on the results of collective, interdisciplinary, quantitative, and qualitative research into how the handling of misdemeanors has evolved over a ten-year period in five courts in the western area of France called the *Grand Ouest* (Danet 2013b)[1]. This approach enabled the research group, of which this author was a part, to conduct "intensive" studies while controlling as much as possible for the contextual particularities that can weigh heavily in the "balance" between the players, the courts, and the local scene on which the legal fate of the cases is played out. Conducted by legal academics, sociologists, and psychosociologists, our study is based not only on the statistical analysis of excerpts from the forms that provide the basis for crime-related statistics in France,[2] but more particularly (given the shortcomings of this quantitative instrument) on a

[*] English translation by Naomi Norberg.

[1] The research group produced five, comparative monographs to describe the changes in each court as accurately as possible. The five courts in the study are under the jurisdiction of three different appellate courts. The group was therefore able to analyze the differences between three of the lower courts and their corresponding appellate courts. The five courts have specific morphological features and differ in size, socio-demographic environment, and the volume and type of criminal cases. Two courts (labeled DIVE and BARI) are located in rural environments and have a fairly low volume of criminal cases (between 15,000 and 20,000 per year). Two others (ARNO and ETUC) handle between 30,000 and 45,000 criminal cases per year. The fifth court (CARD) is located in an urban center (more than 500,000 inhabitants) and handles more than 60,000 criminal cases per year. DIVE, ETUC and CARD are all under the jurisdiction of the same appellate court.

[2] Called "*cadres du parquet*," these forms are sent once a year by the prosecutors' offices to the Ministry of Justice.

representative sample of 7,562 misdemeanor cases involving adult offenders that were handled during the first two weeks of October 2000, 2003, 2006, and 2009. The roughly 100 variables related to the facts, procedure, penalties, perpetrator and victim profiles, length of time to reach judgment, etc. made for an objective study of the legal fate of cases, the changes over time in how misdemeanors are handled by the criminal courts, and the similarities and differences in procedural orientation and penalty practices. While statistical analysis of the case files enabled us to objectively determine the cases' actual (rather than theoretical) itineraries through the courts, understanding the thinking behind and justifications for these itineraries required an ethnographic inquiry. We made various direct observations (in the courts, police stations, local security and crime-prevention councils (CLSPDs), etc.) and conducted sixty semi-directed interviews with professionals in these institutions (police officers, judges and prosecutors, individuals in associations that work with offenders, etc.). By using both quantitative and qualitative methods, we were able to distinguish the various ways in which judges react to their superiors' directives and expectations, in particular in terms of speeding up the resolution of criminal cases (1). Despite their differences, they all give priority to procedural efficiency and effectiveness of punishment, even if the punishment is less-well tailored and it takes longer to get from arrest to judgment (2).

1. How criminal-justice policies have changed in response to managerial requirements: diverse local practices

In the attempt to achieve the three objectives of productivity, efficiency, and "*customer*" service (Kaminski 2009, 87), "*managerial justice*" (Garapon 2010, 46) has not been imposed suddenly through spectacular, controversial reforms, but through quiet, "*seemingly peripheral*" changes (Garapon 2010, 13) that are frequently procedural and/or result from non-binding sources of law and are appreciated for their "*reactivity*" and "*technicality*" (Commaille, *in* Kaminski 2013, 28). They all tout the streamlining of human and financial means, greater responsibilities for judges, quickly determined individualized punishments, and various "quality-related approaches" to producing criminal judgments and receiving the public (Vigour 2007). Every court in our study had adopted the requirements of their ministry, and the government more generally, as their own (Gautron 2014a). However, they chose slightly different methods to increase judicial reactivity (1.1), systematize punishment at the lowest possible cost (1.2) without sacrificing the individualized quality of the punishment (1.3), and manage an increasing caseload (1.4).

1.1 Greater judicial reactivity

Methods borrowing from Taylorism (Rothmayr Allison 2013) were introduced in an effort to streamline the judicial system's activities. Tested by prosecutors seeking to innovate in the Paris area in the early 1990s, telephone hotlines to prosecutors' offices provided real gains in productivity and a symbolic indication of prosecutorial reactivity (Bastard and Mouhanna 2007). To answer calls quickly, take immediate action, and avoid widely diverging decisions, the prosecutors' offices also rendered their decisions automatic and uniform by drawing up "summaries" or "indexes" that, by detailing the procedural orientation and penalties/requests applicable to each offense (Gautron 2014b), tell prosecutors how to handle cases in an entire range of situations and/or determine the penalty scale, mainly for "common" offenses. Now that the police communicate by mail with prosecutors in fewer than 5% of misdemeanor cases, the "real-time-processing" departments[3] are frequently backlogged, which causes some

[3] Previously, the police held suspects in custody after arrest and conducted their investigation without contacting the prosecutor (except in the case of felonies and the most serious misdemeanors), then sent their file by mail.

prosecutors to suffer genuinely at work and above all has elicited numerous recriminations from the police (Roussel, Gautron, and Pouget, *in* Danet 2013). Without ruing the earlier handling of cases by mail, prosecutors admit that they are under constant pressure and forced to shorten their discussions with detectives (*officiers de police judiciaire)* to keep up with phone calls. On the other end of the line, the wait has grown longer and detectives are becoming exasperated. To correct this situation, and with encouragement from the Ministry of Justice, prosecutors' offices now give precedence to contact by email, such that email exchanges constitute close to 75% of the interactions in certain jurisdictions. They have also drawn up directives for the police (thereby eliminating all interaction with investigators) that, like the indexes for the prosecutors, indicate the procedural orientations and even the penalties the police themselves should impose according to criteria such as blood-alcohol rate, type and quantity of narcotics, value of stolen property, type of weapons, and prior offenses according to police records which, however, are full of errors (Gautron 2014b). This system was long used only for misdemeanor vehicle-code violations, but is now used for many other petty offenses in overloaded courts.

1.2 Systematizing punishment at the lowest possible cost

Every year the draft finance law includes the objective of systematizing punishment at the lowest possible cost. Doing so is considered to be an indicator of how well the judicial system is accomplishing its mission, the ultimate goal being to improve that system's performance and translate a criminal-justice philosophy based on Anglo-American "zero tolerance" into concrete results. Every prosecutor's office has complied with the ministerial order to drastically reduce the number of cases they drop, such that the average crime-response rate rose from 67.9% in 2000 to 88.4% in 2010 (Lenoir and Gautron 2014). There are, however, significant variations in the percentage of prosecutable cases that were dropped in the jurisdictions we studied that are not related to the size of these jurisdictions (from 2.4% in BARI's jurisdiction to 16.9% in ETUC's jurisdiction in 2009, while the overall average in metropolitan France was 12.3). To compensate for this fall in the number of dropped cases, there was an explosion in alternative measures[4] throughout France. Such measures were ordered in 37.5% of prosecutable cases in 2009 (excluding guilty pleas), with considerable differences among jurisdictions (between 25.6% in BARI's jurisdiction and more than 40% in CARD's and ARNO's jurisdictions). In 2009, 15.8% of all prosecutable cases were resolved through guilty pleas[5] in BARI's jurisdiction, versus fewer than 5% in CARD's and DIVE's jurisdictions (4.9% on average in France). The expansion of alternatives has not reduced the number of prosecutions before the misdemeanor court (*tribunal correctionnel*), which increased by 44% between 2000 and 2009 (all jurisdictions in the study taken together), in proportions that vary per specific territory (from 34% in DIVE to 104% in ETUC). At the end

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Real-time processing means they must call the prosecutor at the end of custody to obtain his or her instructions as to the next steps to take: continue the investigation, question witnesses, transfer the suspect to the prosecutor's office, issue a warning, etc.

[4] Alternatives to prosecution exist for cases in which prosecution seems inappropriate or too harsh. Rather than send the defendant to trial, the prosecutor's office may order a so-called "third-way" measure (warning, mediation, etc.), which is sometimes carried out with the help of external partners (associations, city officials/employees, etc.), when it deems such a measure sufficient to put an end to the disturbance caused by the offense, ensure compensation of the victim's harm, and contribute to the perpetrator's rehabilitation (French Code of Criminal Procedure (CPP) Art. 41-1). Legally however, this constitutes dropping the case.

[5] Instituted in 1999 pursuant to French Code of Criminal Procedure (CPP) Art. 41-2, pleading plea (as defined in note 3 above) is the harshest alternative to prosecution. Unlike the other alternatives, it must therefore be approved by a judge. The penalties that may be ordered in this context are highly similar to criminal penalties in the strict sense (fines, surrender of one's driver's license, unpaid labor, etc.). Pleading guilty is therefore an intermediate solution between simple alternatives and trial.

of the study period, the share of all prosecutable cases actually prosecuted reached 34.7% in CARD, 32.9% in ARNO, 44.7% in ETUC, 46.5% in BARI, and 49.5% in DIVE (36.3% on average in metropolitan France). To avoid further encumbering the courts, which were generally saturated, prosecutors began using the various simplified judgment procedures lawmakers had instituted over time: misdemeanor orders (*ordonnances pénale délictuelle*)[6] and, to a lesser extent, sentencing without trial after an admission of guilt (*comparution sur reconnaissance préalable de culpabilité*)[7]. Misdemeanor orders, which are judgments without a hearing, notice of which may be given by mail, did not meet with the same success in all five courts: BARI, ETUC, and DIVE heartily embraced this procedure, such that it constituted 59.6%, 51%, and 38%, respectively, of all prosecutions in 2009, whereas ARNO only began using it in 2008 (9.7% of prosecutions in 2009). The ARNO prosecutor's office preferred sentencing without trial (32% of prosecutions in 2009, 10% of prosecutable cases), while the other jurisdictions employed this alternative at a much lower rate than the national average (14.3% of prosecutions in 2009, 5.2% of prosecutable offenses). These two procedures changed the way the courts operated, since they transferred the handling of the majority of cases to the prosecutor's office. In almost four of ten cases, prosecutors alone have been the "first responders," without the slightest judicial intervention. If we add guilty pleas, misdemeanor orders, and sentencing without trial, in which judges intervene only when it is time to approve the requested penalties (and only rarely deny them), the prosecutors' offices themselves mete out punishment in 60% to 70% of cases.

1.3 Quality-related approaches focused on a new strategy of graduated penalties

To prescribe adequate penalties for offenses that are not very serious without sacrificing quality despite their heavy caseloads, some prosecutors have developed alternatives to prosecution (mediation, referral to a medical, social or professional facility, training courses, etc.) that are derived from case law and aim to make offenders aware of their obligations (Gautron and Raphalen 2013). Prosecutors have also started to graduate punishment, such that they have real power to individualize procedures, if not penalties. Between the warnings[8] given to first-time offenders who have committed minor offenses and trials, which are reserved for the most serious offenses and/or those committed by multirecidivists, there is a whole panoply of intermediate, more or less qualitative procedures and penalties. After a warning has been given, minor offenses are usually followed by a guilty plea, then a misdemeanor order or sentencing without trial, and ultimately a classic trial. In this way, prosecutors are quite often the first to punish any repeat violations, at least as regards common, minor offenses (vehicle-code violations, use of narcotics, etc.). Since each court has its own procedural "map" indicating case itineraries according to the features of each case and the defendant's profile, the "graduated-response strategy" (prosecutor, BARI) varies from court to court, including within each appellate jurisdiction. The types of alternatives used

[6] These were initially issued only for misdemeanor vehicle-code violations, but lawmakers extended their scope in 2007 and 2011 such that they may now be issued for narcotics use, theft, receiving stolen goods, destruction, deterioration, carrying a knife or blade, etc. (CPP Art. 495 et seq.).

[7] Sentencing without trial enables the public prosecutor to propose punishment, including prison, to a person who has confessed to committing the acts of which s/he is accused. Such punishment must then be approved by a judge (CPP Art. 495-7 et seq.).

[8] A warning consists of "indicating to the perpetrator, in the context of a serious discussion, the rule of law, the punishment provided for by the law, and the risk of punihment s/he runs if s/he repeats the offense. The objective is for the perpetrator to realize the consequences of her/his actions for society, for the victim, and for her/himself, without these being reduced to mere moral considerations." Circular of March 16, 2004 on the criminal justice policy regarding alternatives to prosecution and use of deputy prosecutors, NOR: JUSD0430045C, *BOMJ*, no. 93, 2004.

differ markedly. For example, the percentage of warnings (excluding guilty pleas and only for adults) reached 74.7% in 2008 in DIVE, versus 32.8% in ARNO (46.5% on average in metropolitan France). ARNO uses more of the available alternatives, especially having the complaint withdrawn,[9] regularizing at the prosecutor's request,[10] and referring the offender to a medical or social facility.[11]

Table 1- Distribution of procedural alternatives in 2008[12] (cases involving adults only)

	National average	CARD	ARNO	ETUC	BARI	DIVE
Mediation (%)	5.0	3.6	4.0	8.8	3.2	2.1
Order to obtain care (%)	0.9	0.0	0.1	1.3	0.0	0.0
Withdrawal of the complaint (%)	4.5	5.2	12.6	11.0	4.3	1.6
Regularization (%)	13.9	6.4	24.6	9.1	15.8	7.0
Warning (%)	46.5	59.8	32.8	42.7	47.3	74.7
Referral to a medical or social facility (%)	3.1	1.6	13.9	4.2	0.0	0.4
Other sentencing alternatives (%)	26.2	23.4	11.9	22.9	29.4	14.2

Source: Ministry of justice statistics.

In the prosecution phase, the various procedural channels are not used for the same types of conduct and/or the same defendants. Some prosecutors' offices refuse to use, or on the contrary prefer to use, certain ways of handling particular offenses when committed by first-time offenders versus recidivists. For example, misdemeanor orders are used in the majority of cases involving defendants with no priors at CARD (77.2% of such orders in our sample) and DIVE (88.3%), whereas only about 40% of such orders were issued with regard to individuals who had at least one prior conviction at ETUC and BARI.

1.4 Caseload management: a constant struggle

To manage the increasing number of prosecutable cases, judges and prosecutors have thought about how to optimize their management of cases (including the backlog), especially since their superiors' evaluations of their performance largely depend on it. To process the numerous cases without inordinately lengthening the time it takes to do so and avoid creating new backlogs, prosecutors frequently change their procedural-orientation guidelines. Using a table that is, according to the judges and prosecutors themselves, sometimes based on arguable or not very reliable indicators, prosecutors and judges try to pinpoint where the bottlenecks occur in each procedural channel and, if necessary, replace one procedure with another. These orientation guidelines thus constitute essential tools for managing and reducing the time spent on cases. Legally speaking, the lack of strict limits on the various

[9] This alternative constitutes conditional closure of the case: the prosecutor conditions dropping the case on the victim's being compensated (restitution of the item taken fraudulently or monetary compensation).

[10] The prosecutor may condition dropping the case on the regularization of the situation constituting the offense. In other words, s/he can rquire the offender to comply with the law after s/he has been found to be in violation of the law (e.g., by purchasing auto insurance in the case of an uninsured driver). Since the circular of April 88, 2005 on the struggle against drug addiction and dependencies went into effect, prosecutors may require drug users to take medical tests designed to prove that they have stopped using drugs.

[11] Although such referrals generally concern drug users, there is no requirement to obtain care. This form of conditional case closure consists of asking the offender to make an appointment with a medical-social facility and transmit proof that s/he did so (certificate provided by the structure).

[12] Due to the progressive installation of court-management software starting in the mid-2000s, the data for 2009 regarding adults only are not available for BARI or DIVE.

procedures' scope of application is a clear advantage. Lawmakers were careful not to link the procedures exclusively to certain types of offenses or offenders. The procedures for handling misdemeanors are therefore competing "processes" that prosecutors must use as best they can depending on the needs and resources of their court (organization of cases, human and material resources, case backlog, etc.). Ministerial attempts to take control of the prosecutors' offices since the mid-2000s coexist easily with their increased margin of maneuver with regard to common offenses of low to medium seriousness. New public management promotes less hierarchical organizational structures, substantial autonomy so that depending on local particularities and constraints, public officials may attain the expected results in terms of effectiveness and efficiency (Rothmayr Allison 2013). The changes proceeding from the "*judicial policy-making model*" (Commaille, *in* Kaminski, 2013, 28) described above have changed the very status of law as we have moved from an "*essentialist conception to a flexible, negotiated, relativistic, pluralist, pragmatic conception of the legal standard*" (Commaille 2007, 303). But the increasing independence of French prosecutors' offices from the ministry of justice hides the fact that more subtle forms of control are developing, such as the "accountability" movement that effects more than just defendants. Accountability demands that prosecutors provide regular performance reports, at least on performance that can be measured directly.

In fact, our empirical research reveals that the three objectives of efficiency, effectiveness, and efficaciousness receive significantly different treatment from the courts in the study. Of course, various contextual particularities influence the ultimate fate of cases, such as the volume of prosecutable cases and the specifics of cases. But management constraints affect the procedural options chosen: case backlog, number of misdemeanor trials that may be envisioned in light of available personnel, time to trial, number of deputy prosecutors, etc.). The variety of practices is inextricably linked to the local institutional context. In particular, prosecutors' actions depend on local resources and the number of available associations or external partners, which are key to qualitatively diversifying the alternatives to prosecution or imprisonment. Factors related to the court's configuration, in particular the position of judges on the diversification of procedural avenues, also affect the choice of procedural options. The most recently instituted procedures (guilty plea, sentencing without trial, misdemeanor order) must be approved by a judge. Efficient caseload management therefore requires obtaining approval of such measures as frequently as possible by reaching agreement with judges on the scope of the procedures and the penalties in light of criteria such as the nature of the offense, the perpetrator's criminal record, the harm suffered by the victim, etc. While procedural diversification tends to turn prosecutors into quasi-trial judges, judges find the prerogatives they have lost in the approval phase in earlier phases. The results of local arrangements vary since no two judges or prosecutors associate the same advantages and/or disadvantages with the various procedures, for reasons related to personal values and beliefs, habits, and careers. In the process of implementing new ways of handling misdemeanors, their positions vacillate from accommodating them to more or less openly resisting them. For both judges and prosecutors, the changes in how misdemeanors are handled, especially the rarefaction of trials and the accompanying loss of ritual, are often seen as an attack on the ideal of justice as they learned it and incorporated it into their professional ethos (Gautron, 2014a; Danet 2013). They all mentioned the ritual of the trial and how its disappearance has meant a loss of meaning for defendants. Unlike the administrative, standardized treatment of cases, only the judicial ritual, the trial and the fact that it is public, makes it possible to individualize the penalty, be educational, and make sure defendants gain genuine awareness of the seriousness of their actions. For a while, prosecutors and/or their substituted therefore resisted instituting the

guilty plea and sentencing without trial at DIVE and misdemeanor orders at ARNO. And very few at CARD have a positive opinion of sentencing without trial.

2. Counterproductive effects in terms individualized punishments

Managerial concerns have upturned the meaning and nature of punishment as well as judicial practices, at least as far as misdemeanors are concerned. An obsession with quantity tends to take precedence over finding the most appropriate punishment, such that the mere fact of providing some kind of penal response seems to count more than the punishment itself in some cases (2.1). In addition, the increasing independence of prosecutors' offices is increasing the risk of inequality between defenders in different jurisdictions (2.2), and while the practices discussed above might have increased productivity, they have not made for speedier justice (2.3).

2.1 A marginal qualitative adaptation

The preoccupation with preserving, if not improving, the individualized quality of punishment has taken a backseat to caseload management constraints, first of all because procedural choices are made in a rush: whereas many alternatives require prior evaluation of the perpetrator's profile (mediations, training courses, referrals to medical or social facilities, etc.), real-time orientation practices seek to provide an immediate response and therefore do not leave prosecutors time to check the background of the person whose case they are handling. In addition, increasing the use of email has led to exchanging less information, as detectives generally provide only the offender's identity, which is necessary to determine their prior convictions, the date of the offense, and where it took place. Prosecutors do not have time to ask for further information or ask investigators what they think about the perpetrator's personality. Given the limited, essentially factual information provided and the inability of prosecutors to engage in more extensive discussions with detectives regarding offenders' profiles, prosecutors make their decisions on the basis of the seriousness of the offense and the offender's prior convictions. Similarly, creating "indexes" tends to make personalizing punishment secondary. The only item taken into account in an offender's profile is usually their criminal record (known or not to the police in the context of permanent directives, repeat offenses or recidivism for prior convictions). The effect of indexes must be qualified, however, as they are not entirely binding. Several prosecutors we spoke to considered them simply guides or aids to decision making. Items that do not appear in the indices are taken into account: how old the prior convictions or arrests were, the quantity of drugs used or possessed, the suspect's behavior when being arrested, their income, etc. (Gautron 2014b). The effect of such indices must also be compared to that of the "implicit indices" that have long been used by some judges, in particular when there is only one trial judge, and the "*unspoken criminal judgment culture*" (Beyens and Vanhamme 2007, 210) that unites all judges and prosecutors, as evidenced by the strong agreement between what prosecutors request and judges grant or in terms of penalties (Gautron 2014b).

Qualitative adaptation of sanctions is only relative, if not entirely fictional. Continued diversification of procedures and sanctions is in fact guided by accounting rather than axiological concerns. For common offenses that are not very serious, warnings are the primary alternative to prosecution (46.7% of all alternatives, except guilty pleas, involving adults in 2009, and more than 70% in some courts). Orders to obtain care (0.8% of alternatives involving adults in 2009, 0.3% of prosecutable cases) and referrals to medical or social facilities (3% of alternatives involving adults in 2009, 1% of prosecutable cases) are

rare, however. Mediation involving adult offenders decreased by 24.1% between 2000 and 2009 to reach 1.5% of prosecutablee cases at the end of the study period. Warnings are thus an adjustment variable that reflects fluctuations in the number of prosecutable cases from year to year, as well as a sure way to increase prosecutors' response rate for a modest price that might even be lower than the price of simply dropping a case because the cost is transferred to the police (Lenoir and Gautron 2014). Some prosecutors do of course try to develop alternatives of greater quality, in particular conditional case closures which, unlike warnings, require greater involvement on the part of the defendants (withdrawal of the complaint by the victim, mandatory regularization, referral to medical or social facilities, etc.). In the past decade, the ARNO prosecutors' offices, and to a lesser extent those of ETUC, have chosen from a broader range of alternatives to offer, with the help of various partners (Gautron and Rétière, *in* Danet 2013), "real content, something that means something" (ARNO prosecutor). Some courts are therefore trying to add an educational component to the simplified procedures, or inventing new judicial rituals in the form of effective signs rather than symbols (Danet, Grunvald and Saas, *in* Danet 2013). For example, without the slightest legal obligation to do so, some prosecutors' offices have chosen to have misdemeanor orders given orally by a deputy prosecutor who receives the offenders individually or together and sometimes gives them road-safety documentation. Although the new judicial practices alter their view of the justice system as being exceptional and "*productive of values and symbols*" (Vigour 2007, 55) and disturb their professional ethos, most judges and prosecutors have accepted them. Some even view them very positively, convinced that these new ways of responding to crime have educational advantages. They have doubts about the real impact of the traditional ritual and relativize the extent to which penalties are personalized as the result of a trial, seeing trials as largely the subject of myth, and instead praise the positive aspects of guilty pleas and sentencing without trial. Most of the judges and prosecutors we interviewed doubt that the new procedures are effective in preventing recidivism, however. Both pragmatic and resigned, they see these new tools as an unavoidable way to absorb their numerous cases without clogging up the courts any further. As they all attempt to meet this goal, their agreements largely outweigh their disagreements. And it behooves judges to accept the diversification of procedures, since it helps avoid excessive delays in hearing cases and limits trials to serious and/or complex cases requiring lengthy questioning and more thorough knowledge of the defendant's profile.

Imposing managerial concerns on the justice system has thus given a stronger hold to a "*new, neoliberal way of governing people and institutions*" (Garapon 2010, 14). While the consensus on the need to repress petty offenses and those of medium seriousness, even if through "*soft*" justice, is fueling a process through which justice is becoming an "*aspect of macrosocial regulation*" (Commaille 2000, 37), the resulting forms of intervention are proof of prosecution's "*purposelessness*" (Kaminski 2009, 64). Under the influence of neoliberal precepts, the rhetoric of modernization offers only a "*promise of progress, without a direction*" (Kaminski 2009, 40), the "*technicalization of the treatment of the issue of justice [producing] a correlative euphemization of politics*" (Commaille 2007, 310). While it does not push for minimal criminal law and, on the contrary, uses the judicial system to remedy social and institutional failures (Kaminski 2009), "*neoliberalism dismisses all external perspectives, all comprehensive reasoning, all global views ([which it]considers to be ideological)*" (Garapon 2010, 24). "*Crime management masks the objectives in favor of the means, creates procedures to the detriment of the substantive standards of justice, and transforms a system's social performance into internal performance by virtue of which the important thing is to do things well, not to do good things*" (Kaminski 2009, 40).

2.2 Increasing inequality between defendants in different jurisdictions

Having similar orientation and punishment practices causes, or rather increases, the risk that defendants will be treated unequally. Beyond the type and quantum of punishments that may be ordered, the procedural choices also have consequences for defendants. A prior guilty plea, even if it is recorded on Bulletin 1 of the defendant's criminal record, cannot be retained later as an aggravating circumstance (recidivism). However, sentencing without trial and misdemeanor orders constitute the first term of a repeat offense, with clear effects on the severity of the punishment ordered. Prison sentences, whether suspended or not, cannot be ordered following a guilty plea or a misdemeanor order, but can be ordered in the context of sentencing without trial. While judges claim that this is due to each court's specific constraints, they also recognize that it creates a risk of unequal treatment, which is not new and is not limited to "indexed" procedures. Both the ministry of justice, through circulars, and prosecutors at the regional level try to avoid excessive disparities. Although they do not distribute precise directives, prosecutors general (*procureurs généraux*) hold meetings with the prosecutors in their respective jurisdictions to harmonize their criminal justice policies, sometimes also taking into account the practices of the customs administration in drug cases and those of prefectures with regard to how long drivers' licenses should be suspended. These efforts fall far short of creating uniform local criminal justice policies, instituting only a minimum level of harmonization that takes into account local particularities over which the ministry and the prosecutors have little control. Since practices are not consistent throughout France, prosecutors present their orientation charts and indices as means to harmonize their court's responses to crime. Such practices might make it possible to overcome the inequality of the sanctions ordered by judges in classic trials, which some of them admit to.

2.3 Limited effect on speed

Although all the reforms discussed here have led to real gains in productivity, there has been hardly any improvement in the speed with which adults come to trial for misdemeanors (Danet, Brizais and Lorvellec, *in* Danet 2013). Diversifying procedures has not saved any time, merely made it easier to absorb the rising number of cases without a marked increase in the time it takes to reach a verdict: the courts have managed to contain the number of cases tried more than nine months after the offense was committed (28.9% of cases in 2000 to 28.4% in 2009), but have been unable to avoid a decrease in the number of cases tried within less than three months (36.9% to 24.7%) and a concomitant rise in the number of cases taking three to nine months to be tried (34.2% to 46.9%). A look at the speed with which "justice" is delivered, that is, the time between the prosecutor's office taking charge of the case and the court's reaching a verdict shows a decrease in speed. The median time to trial increased by 60 days between 2003 and 2006, going from 88 to 134 days, then to 143 days in 2009. In ten years, the average time to trial increased by 70 days. The first decile increased from less than 38 days to more than 51 days, while the last decile increased from more than 236 days to more than 350 days. Between 2004 and 2009, diversifying prosecution methods, combined with the rise of sentencing alternatives, was not enough to maintain the same time to trial as in the preceding period (2000-2004).

Table 2- Time between the real-time processing date and misdemeanor-court judgment

	25%	25%	Median	25%	25%	Average
2000	From 0 to 57 days	From 57 to 93 days	**93**	From 93 to 104 days	More than 104 days	**118**
	The quickest 10% were processed in under 38 days			The slowest 10% took 236 days to be processed		
2003	From 0 to 53 days	From 53 to 88 days	**88**	From 88 to 116 days	> 116 days	**131**
	The quickest 10% were processed in under 27 days			The slowest 10% took more than 196 days to be processed		
2006	From 0 to 107 days	From 107 to 134 days	**134**	From 134 to 193 days	> 193 days	**165**
	The quickest 10% were processed in under 31 days			The slowest 10% took more than 214 days to be processed		
2009	From 0 to 96 days	From 96 to 143 days	**143**	From 143 to 225 days	> 225 days	**188**
	The quickest 10% were processed in under 51 days			The slowest 10% took more than 350 days to be processed		

Based on a sample of prosecuted cases (N=3,537)

Conclusion

While prosecutors and judges all recognize that their new work methods, the generalization of alternatives, and simplified procedures have made it possible to improve productivity and avoid inordinately increasing the time to trial, some fear the criminal justice system will again reach saturation. Systematizing responses to crime has led to casting a wider criminal net and progressively increasing the harshness of sanctions. Alternative procedures are rarely used for conduct that previously would have led to prosecution. They there do not replace heavier convictions, but reveal a process of insidious overcriminalization targeting populations that had heretofore avoided control through the criminal justice system or situations that previously fell within the scope of societal regulations (see, in particular, Gautron and Raphalen 2013). In addition, the progression in the rate of response to crime (more than twenty points in fifteen years) is causing an artificial increase in the number of repeat offenders and recidivists within the legal meaning of the term, who are convicted essentially for offenses of low to medium seriousness. Those who, due to the frequency with which cases involving such offenses used to be dropped, were previously found to be repeat offenders or recidivists only after a long criminal history, are now presented as having a prior as of the second offense, as having a record on the third offense after a guilty plea, then as being a recidivist. Taking up to the three first offenses committed by the first defendants in our sample of prosecutions, the share of recidivism (in the legal meaning of the term and noted in the conviction) was 5.7% in 2000, 10.9% in 2006, and 14.5% in 2009. In the long run, and even though the volume and/or structure of offenses will not change, these changes will probably result in harsher sentences and a new trial backlog, because trials generally involve recidivists or repeat offenders (who do not meet the legal definition of recidivist). If the criminal justice system continues to artificially produce recidivism, more and more misdemeanor trials will be required, but there is little likelihood of this given budget constraints. And if it is not possible to hold a trial for every case that requires one, our

procedural model will undergo a genuine crisis. Managerial methods are apparently not enough to stem the tide and avoid the saturation of the judicial system in the near future.

Bastard B., Mouhanna C. 2007, *Une justice dans l'urgence. Le traitement en temps réel des affaires pénales*, Paris, PUF.

Beyens K., Vanhamme F. 2007, La recherche en sentencing: un survol contextualisé, *Déviance et Société*, 31, 199-228.

Commaille J. 2000, *Territoires de justice. Une sociologie politique de la carte judiciaire*, Paris, PUF.

Commaille J. 2007, La justice entre détraditionnalisation, néolibéralisation et démocratisation: vers une théorie de sociologie politique de la justice, *in* Commaille J., Kaluszynski M. (ed.), *La fonction politique de la justice*, Paris, La Découverte, 293-321.

Danet J. (coord.) 2013, *La réponse pénale. Dix ans de traitement des délits*, Rennes, PUR.

Garapon A. 2010, *La raison du moindre État. Le néolibéralisme et la justice*, Paris, Odile Jacob.

Gautron V., Raphalen P. 2013, Les stages: une nouvelle forme de pénalité ?, *Déviance et Société*, 37, 1, 27-50.

Gautron V. 2014a, "L'impact des préoccupations managériales sur l'administration locale de la justice pénale française," Champ pénal/Penal field [En ligne], Vol. XI, URL: http://champpenal.revues.org/8715; DOI: 10.4000/champpenal.8715.

Gautron V. 2014b, "La "barémisation" et la standardisation des réponses pénales saisies au travers d'une étude quantitative et qualitative de l'administration de la justice pénale," *in* Sayn I. (ed.), Le droit mis en barèmes, Paris, Dalloz, 85-97.

Garapon A. 2010, *La raison du moindre État. Le néolibéralisme et la justice*, Paris, Odile Jacob.

Kaminski D. 2009, *Pénalité, management, innovation*, Namur, Presses Universitaires de Namur.

Kaminski D. (ed.) 2013, *La flexibilité des sanctions*, Bruxelles, Bruylant.

Lenoir A., Gautron V. 2014, Les pratiques des parquets face à l'injonction politique de réduire le taux de classement sans suite, *Droit et Société*, 88, 591-606.

Rothmayr Allison C. 2013, Le droit et l'administration de la justice face aux instruments managériaux, *Droit et Société*, 84, 277-288.

Vigour C. 2006, Justice: l'introduction d'une rationalité managériale comme euphémisation des enjeux politiques, *Droit et société*, 63-64, 425-455.