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## The Conspiracy of Law and the State in Anatole France's "Crainquebille"; or Law and Literature Comes of Age

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# The Conspiracy of Law and the State in Anatole France's "Crainquebille"; or Law and Literature Comes of Age

James D. Redwood\*

A quoi servirait de changer les institutions si l'on ne change pas les mœurs? Il faudrait que [le juge] changeât de cœur. Que sont les juges aujourd'hui pour la plupart? Des machines à condamner, des moulins à moulin des sentences. Il faudrait qu'ils prissent un cœur humain. Il faudrait qu' . . . un juge fût un homme. Mais c'est beaucoup demander.<sup>1</sup>

## I. INTRODUCTION

The law and literature movement appears at last to have come of age. Generally considered born in 1973 after a labor and delivery that can only be described as daunting,<sup>2</sup> the movement, if such it can be called, passed a rather quiet and uneventful childhood before bursting into adolescence with all the frenetic energy char-

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1. MARIE-CLAIRE BANCQUART, ANATOLE FRANCE, POLÉMISTE 367 (1962) [hereinafter POLÉMISTE] (citation omitted). This author's translation of the quoted passage is as follows:

What good would it do to change the institutions of society without first changing its morals? Judges must change their hearts. What are most judges today? Conviction machines, mills which simply grind out their sentences. They need to have a human heart. A judge must . . . be a man. But to ask that is to ask a lot.

Throughout this Article, the author's English translation of passages taken from secondary sources in French will appear in the text of the Article or in a footnote, followed by the French text in the footnote.

All quotations from "Crainquebille" are from the English translation that appears in *The World of Law*. Anatole France, *Crainquebille*, in 1 THE WORLD OF LAW 237-57 (Ephraim London ed., 1960) [hereinafter *English Translation*]. The footnotes with respect to these excerpts from the story cite first to this translation and then, without quotation, to the appropriate page of the French original as it appears in ANATOLE FRANCE, *CRAINQUEBILLE, PUTOIS, RIQUET, ET PLUSIEURS AUTRES RÉCITS PROFITABLES* 5-63 (1904) [hereinafter *French Original*].

2. See JAMES BOYD WHITE, *THE LEGAL IMAGINATION* (1973).

acteristic of such a troubled time.<sup>3</sup> No longer faced with serious threats to its identity as an academic discipline, law and literature appears to have finally settled down; and though it is perhaps not yet blessed with the respectability of that serest of interdisciplinary endeavors, law and economics, the "Lawlit"<sup>4</sup> movement now promises to survive to a substantial age and accomplish many great things along the way.<sup>5</sup>

Perhaps it is incorrect to speak of law and literature as "young." Although critical and theoretical articles linking the two fields may indeed be of rather recent vintage, works of literature dealing with law and lawyers are by no means new.<sup>6</sup> What do appear to be relatively novel, however, are articles in which the author, rather than espousing a particular literary theory or suggesting a pet way of interpreting texts, simply attempts to show the value of a partic-

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3. The first major treatises in the field were published in 1984. Since then, numerous other treatises have been published or will be published soon. See, e.g., ROBERT A. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* (1984); RICHARD H. WEISBERG, *THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION* (1984); JAMES BOYD WHITE, *WHEN WORDS LOST THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER AND COMMUNITY* (1984); JAMES BOYD WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985); BROOK THOMAS, *CROSS-EXAMINATIONS OF LAW AND LITERATURE: COOPER, HAWTHORNE, STOWE, AND MELVILLE* (1987); *INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER* (Sanford Levinson & Steven Mailloux eds., 1988); RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988); *LAW: A TREASURY OF ART AND LITERATURE* (Sara Robbins ed., 1990); *NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORY TELLING AND THE LAW* (David R. Papke ed., 1991); ELIZABETH V. GEMMETTE, *LAW IN LITERATURE: LEGAL THEMES IN SHORT STORIES* (1992); MICHAEL L. RICHMOND & RICHARD H. WEISBERG, *READINGS IN LAW AND LITERATURE* (forthcoming 1993). This does not include, of course, the more than one hundred law review articles that have appeared in the field since the publication of two symposia on the subject in the *Rutgers Law Review*. Symposium, *Law and Literature*, 29 RUTGERS L. REV. 228 (1976); Symposium, *Law and Literature*, 32 RUTGERS L. REV. 608 (1979). Mention should also be made of the following professional journals: *Yale Journal of Law and the Humanities*, *Cardozo Studies in Law and Literature*, and *Southern California Interdisciplinary Law Journal*.

4. Such is the less than respectable shorthand title with which the seminar offered by this author in his law school greets the eyes of the curious student in the school's most recent list of course offerings. One is forced to acknowledge, however, that so-called Lawlits glide with the ease of raw oysters down the academic gullet when compared with so-called Crits, which in the view of some merely stick in the craw.

5. For a recent listing of academic course offerings in the law and literature field, see Elizabeth V. Gemmette, *Law and Literature: An Unnecessarily Suspect Class in the Liberal Arts Component of the Law School Curriculum*, 23 VAL. U. L. REV. 267 app. I at 303-21 (1989).

6. One need merely cite to the *Oresteia*, written around the year 458 B.C. by a man who fought at the battle of Marathon. See AESCHYLUS, *AESCHYLUS I: ORESTEIA* 1 (Richmond Lattimore trans., 1953).

ular literary work to lawyers.<sup>7</sup> This Article, in which one short story by Anatole France is explored, represents such an attempt.

The plot of "Crainquebille,"<sup>8</sup> which first appeared in 1900, is as simple as the character himself. On October 20 of an undisclosed year, Jérôme Crainquebille, a wandering vegetable hawker,<sup>9</sup> trundles his laden cart, as he has for 50 years, through the streets of Montmartre calling out his wares to attract customers.<sup>10</sup> He stops his barrow outside a shoemaker's shop on the rue Montmartre, and Madame Bayard, the shoemaker's wife, haggles with him over the price of leeks.<sup>11</sup> It is noon, and the streets of Paris are filling with traffic; a police constable orders Crainquebille to move his cart so as not to block the way. Though disposed through habit and respect for authority to obey the policeman's order, Crainquebille awaits the pleasure of Madame Bayard, who at last chooses a bundle of leeks, takes them, and returns to her shop for money.<sup>12</sup> The constable returns to Crainquebille's cart and repeats his order to "move on,"<sup>13</sup> but at this most unfortunate moment, Madame Bayard engages a customer in her shop and cannot return with the money she owes the street hawker. Torn between his individual right to be paid for his goods and his social duty to obey authority, Crainquebille refuses a third time to obey the policeman's command.<sup>14</sup> Traffic is now blocked; a curious crowd gathers around Constable 64 and the perplexed Crainquebille, and "the constable,

7. This is true notwithstanding the call to arms of Paul Gewirtz in his fine essay. Paul Gewirtz, *Aeschylus' Law*, 101 HARV. L. REV. 1043 (1988).

8. The story first appeared under the title "L'affaire Crainquebille." See POLÉMISTE, *supra* note 1, at 330 n.21.

9. France identifies Crainquebille as a "*marchand ambulant*," a wandering vegetable hawker. See *French Original*, *supra* note 1, at 5. Though Crainquebille is gainfully employed, his status as a *marchand ambulant* is significant, for it suggests he is a vagabond and puts him in a class peculiarly appropriate for the ministrations of the law. See *infra* part III.A.

10. *English Translation*, *supra* note 1, at 238-39; *French Original*, *supra* note 1, at 10.

11. *English Translation*, *supra* note 1, at 239; *French Original*, *supra* note 1, at 11-12.

12. *English Translation*, *supra* note 1, at 239; *French Original*, *supra* note 1, at 11-12.

13. *English Translation*, *supra* note 1, at 239. In French, the command is "Circulez." *French Original*, *supra* note 1, at 11-12. One is reminded of one of Dickens' *misérables*, the crossing-sweeper Jo in *Bleak House*:

Never done nothink to get myself into no trouble 'sept in not moving on. . . .  
But I'm a-moving on now. I'm a-moving on to the berryin ground — that's the  
move as I'm up to.

. . . .  
"Hook it! Nobody wants you here," he ses. "You hook it. You go and  
tramp," he ses. "You move on," he ses.

CHARLES DICKENS, *BLEAK HOUSE* 634 (Oxford Univ. Press 1st ed. 12th prtng. 1987) (1853).

14. *English Translation*, *supra* note 1, at 240; *French Original*, *supra* note 1, at 13.

finding himself the center of attention, [begins] to think it time to display his authority[.]”<sup>15</sup> He starts to write a ticket, and the despairing Crainquebille shouts out “Misère de misère! Bon sang de bon sang!”<sup>16</sup> which the policeman mistakes for the ominous threat “Mort aux vaches!”<sup>17</sup> Crainquebille is arrested for threatening the police, notwithstanding the eyewitness testimony of one Doctor Matthieu, who insists to Constable 64 that Crainquebille never said “Mort aux vaches!” to him.<sup>18</sup> The doctor’s pleas, and those of the costermonger, are unavailing.

At Crainquebille’s subsequent trial for threatening Constable 64, President Bourriche, the presiding judge, devotes a full six minutes to examining the accused,<sup>19</sup> and the inarticulate street hawker is unable to convince the magistrate that he did not utter the threat with which he is charged. Constable 64 (one Bastien Matra) is called to testify. Though his evidence is mistaken, and according to a trial observer, President Bourriche had “never thought that Bastien Matra was gifted with any great faculty of observation,”<sup>20</sup> Matra’s testimony is believed over that of Dr. Matthieu. The doctor’s contradictory evidence, given earlier in front of a police commissioner, was dismissed in part because “just then men of science were regarded with suspicion in France.”<sup>21</sup> Believing an outright confession to be in the best interests of all, Maître Lemerle, Crainquebille’s attorney, defends his client in a rather desultory fashion, with an eye more to winning favor with the court than to seeing justice done.<sup>22</sup> Crainquebille is convicted on the evidence of Con-

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15. *English Translation*, *supra* note 1, at 241; *French Original*, *supra* note 1, at 16.

16. “What a misery! What a bloody mess!” Crainquebille’s dismay is due to his dilemma: he is caught between his right to payment and his duty to obey Constable 64.

17. Literally translated, *Mort aux Vaches!* means “Death to spies!” *English Translation*, *supra* note 1, at 241; *French Original*, *supra* note 1, at 17. In French, the word *vaches* also translates to *police* and in French slang, *vaches* can translate to *swine*. CASSELL’S FRENCH DICTIONARY (French-English Part) 742 (Denis Gerard et al. eds., 1978). Thus, one can interpret the insulting phrase *Mort aux Vaches!* as the familiar English slang *Death to pigs!*

18. *English Translation*, *supra* note 1, at 241; *French Original*, *supra* note 1, at 18-19.

19. *English Translation*, *supra* note 1, at 243; *French Original*, *supra* note 1, at 22. The acquittal by the French military courts of Prince Esterhazy, the man who actually authored the infamous *bordereau* used to condemn Alfred Dreyfus to Devil’s Island, took only three minutes. See MARIE-CLAIRE BANQUART, ANATOLE FRANCE, UN SCEPTIQUE PASSIONNÉ 229 (1984) [hereinafter SCEPTIQUE]. “Trois minutes de délibération: Esterhazy est acquitté.” *Id.*; see also *infra* part II.

20. *English Translation*, *supra* note 1, at 247; *French Original*, *supra* note 1, at 35.

21. *English Translation*, *supra* note 1, at 242; *French Original*, *supra* note 1, at 19.

22. *English Translation*, *supra* note 1, at 244-45; *French Original*, *supra* note 1, at 26-29.

stable 64, fined fifty francs, and sentenced to two weeks in jail.<sup>23</sup> His case, his lawyer hastens to point out, is "by no means rare, far from it."<sup>24</sup>

Upon his release from prison, Crainquebille is treated with disdain by his former customers and associates, who want nothing to do with an ex-convict. He loses business, takes to drinking, and steadily deteriorates.<sup>25</sup> At the end of his tether, homeless and starving, he fastens on the idea of actually insulting another policeman so as to get himself rearrested and supported by the State as he was for what he now considers to have been one glorious fortnight. One cold, rainy night Crainquebille slinks up to a patrolman standing under a street lamp and shouts out the talismanic "Mort aux vaches!" This time, however, the forbidden phrase, actually spoken, does not produce the desired effect.<sup>26</sup> This particular constable ignores the insult and orders Crainquebille to move on, and "Crainquebille, with head bent and arms hanging limp, plunged into the rain and the darkness."<sup>27</sup>

What is one to make of this little *récit profitable*?<sup>28</sup> Four things are worthy of note and form the subject of this Article. First, the story, fantastic though it may seem, was in fact based, albeit loosely, on the infamous Dreyfus Affair, which scandalized France during the years 1894-1906. Any analysis of the tale must take, at least in passing, the historical allusion into account. Second, the story elaborates what is in effect a legal "conspiracy"<sup>29</sup> among accused, advocate, and judge, designed to culminate in the inevitable conviction of Crainquebille and the affirmation of the power and legitimacy of the State. Third, the very existence and nature of this conspiracy, given the historical underpinnings of the story, reveal the justice system to be, in the view of Anatole France, little more

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23. *English Translation*, *supra* note 1, at 245; *French Original*, *supra* note 1, at 29.

24. *English Translation*, *supra* note 1, at 251; *French Original*, *supra* note 1, at 45.

25. *English Translation*, *supra* note 1, at 251-55; *French Original*, *supra* note 1, at 47-58.

26. *English Translation*, *supra* note 1, at 256-57; *French Original*, *supra* note 1, at 61-63.

27. *English Translation*, *supra* note 1, at 257; *French Original*, *supra* note 1, at 63. As Anatole France once remarked, "Of course, . . . Crainquebille will still throw himself into the Seine later on. But the public won't see it. You have to consider the public." FRANCE 115 (Maxwell A. Smith ed., 1968) [hereinafter Smith].

28. "Crainquebille" appeared in a collection as one of several "profitable tales." See *French Original*, *supra* note 1.

29. This author uses the word *conspiracy* not in a strictly legal sense but merely to show how Crainquebille, Lemerle, and Bourriche all work toward the same goal, namely, the conviction of the accused vegetable seller.

than a *machine infernale*.<sup>30</sup> The system is designed literally to manufacture and churn out regular convictions of carefully selected victims in order to maintain social order and sanction established injustice.<sup>31</sup> Finally, drawing again on the events and personalities of his time, Anatole France does suggest a solution to the problems he perceives in the justice system: a good judge who, in contrast with President Bourriche, does not hesitate to bring humanity and compassion to the raised dais behind the bar.

## II. "CRAINQUEBILLE" AND THE DREYFUS AFFAIR<sup>32</sup>

Toward the end of the nineteenth century, Alfred Dreyfus was a French army captain assigned to the War Ministry.<sup>33</sup> Significantly, he was also the only Jewish officer on the general staff.<sup>34</sup> France was still licking its wounds from the disastrous Franco-Prussian War of 1870-71 when, in September 1894, a scrap of paper (*bordereau*) that had been discovered in the wastepaper basket of the German military attaché in Paris was found to contain anonymous promises to convey highly secret military information to Germany.<sup>35</sup> The stage was thus set to cleanse the army and at the same time to shore up its sagging morale, which had suffered so badly in the war.<sup>36</sup> The trick, as in "Crainquebille" six years later, was to find the right victim.

This was not a difficult task. When some resemblance was found between the handwriting on the *bordereau* and that of the *only Jewish officer* in a position to have written it,<sup>37</sup> little time was needed to convict Captain Dreyfus and pack him off for life to Devil's Island off the coast of French Guiana.<sup>38</sup>

30. See JEAN COCTEAU, *LA MACHINE INFERNALE* (1934).

31. "Justice is the sanction of established injustice." *English Translation*, *supra* note 1, at 249; *French Original*, *supra* note 1, at 38.

32. This is not the time or place for an extended discussion of what very quickly became known in France simply as *l'Affaire*. For more information on this topic, see *THE DREYFUS AFFAIR: ART, TRUTH & JUSTICE* (Norman L. Kleeblatt ed., 1987).

33. 3 *ENCYCLOPAEDIA BRITANNICA* 666 (15th ed. 1974).

34. "Dreyfus was the only Jew on the general staff." See *SCEPTIQUE*, *supra* note 19, at 226. "Dreyfus était le seul Juif de l'état-major." *Id.*

35. 9 *ENCYCLOPEDIA AMERICANA* 395 (1980).

36. "France had been conquered, two provinces [Alsace and Lorraine] amputated. She was isolated. To doubt the judgment of the armed forces was to many to doubt the entire state." See *SCEPTIQUE*, *supra* note 19, at 227. "La France a été vaincue, amputée de deux provinces. Elle est très isolée. Mettre en doute le jugement des membres de son armée, c'est, dans l'imagination de beaucoup, la mettre en doute elle-même." *Id.*

37. 9 *ENCYCLOPEDIA AMERICANA* 395 (1980).

38. The *bordereau* was discovered in September 1894. Dreyfus was arrested on October 15, *id.*, and he was convicted and sentenced on December 22, in "legal proceedings,

Justice had been vindicated, an embarrassing stain on the tarnished military cloak<sup>39</sup> had been washed away, and France returned to normal. It was clear that to most of the French the life imprisonment of a Jew on Devil's Island was a small price to pay for renewed faith in the State,<sup>40</sup> but it was not long before Emile Zola, and later, Anatole France,<sup>41</sup> denounced the Dreyfus trial as a travesty of justice and moved to have the proceedings reopened. Though subsequently brought to trial, the real author of the *bordereau*, Major Esterhazy, fled France shortly after he was acquitted. After the suicide of an intelligence officer who confessed to having forged a document central to the case against Dreyfus, the captain was brought back from Devil's Island and retried in 1899.<sup>42</sup> Though again convicted, Dreyfus was pardoned by the President of France, and he was eventually reinstated in the army and

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which were based on insufficient evidence, [and which] were highly irregular," 3 ENCYCLOPAEDIA BRITANNICA 666 (15th ed. 1974).

39. One might also say a stain was washed from the dagger. The legal proceedings, to Anatole France's extreme dismay, were handled entirely in secrecy, by process of *huis clos* (trial *in camera*). In December 1897, as part of his *Histoire contemporaine* cycle of novels, France, through the fictional professor M. Bergeret, decried "the useless and disastrous practice of closed trials [which] caused the current evil [referring presumably to Dreyfus' continued imprisonment] and which will, if renewed, cause an even greater one." See SCEPTIQUE, *supra* note 19, at 230. "[M. Bergeret] nous déclarait hier . . . que la pratique inutile et funeste du huis clos causa le mal présent et peut, si on la renouvelle, en causer un plus grand encore." *Id.* Less than a month later, Major Esterhazy, the real author of the *bordereau*, was acquitted in three minutes in a closed trial. See SCEPTIQUE, *supra* note 19, at 229.

40. Antisemitism in France was widespread at the time: "There were many antisemites in France, huge numbers of them in the army." See *id.* at 225-26. "Il y en a beaucoup [d'antisémites] en France, énormément dans l'armée." *Id.*; see also 3 ENCYCLOPAEDIA BRITANNICA 666 (15th ed. 1974) ("At first, the public supported the conviction; it was willing to believe in the guilt of Dreyfus, who was Jewish.").

41. Anatole France's awareness of the Dreyfus Affair apparently predated the famous *dîner Balzac* at Durand's on December 7, 1897, but it was at that dinner that Emile Zola spoke out passionately against the injustice done to Captain Dreyfus and that France "affirmed his conviction that it was necessary to reopen the Dreyfus trial." See SCEPTIQUE, *supra* note 19, at 229. "France affermit sa conviction qu'il faut réviser le procès Dreyfus." *Id.* "[H]e devoted himself entirely to 'the Affair', especially after having received from Zola, at the Balzac dinner in December 1897, proof of the injustice of the trial." See POLÉMISTE, *supra* note 1, at 326. "[I] se soit tout entier donné à l' 'Affaire,' surtout après avoir reçu de Zola, au dîner Balzac de décembre 1897, les preuves de l'injustice du procès." *Id.* (citation omitted). Speaking in 1906, Anatole France stated that "[e]ight years ago, when I learned about it from Zola, the injustice done to [Dreyfus] filled me with astonishment and horror. I didn't know what to do. It was thus that I was led to take up just causes." See Jacques Suffel, *Anatole France et l'Affaire Dreyfus*, in LES ECRIVAINS ET L'AFFAIRE DREYFUS 237 (Gerald Leroy ed., 1983) [hereinafter Suffel]. "Il y a huit ans, quand je les appris de la bouche de Zola, les crimes de l'Etat-major m'ont rempli d'étonnement et d'horreur. Je n'ai pu me faire. J'ai été conduit ainsi sur le chemin des justes causes." *Id.*

42. 9 ENCYCLOPEDIA AMERICANA 396 (1980).



awarded the Legion of Honor.<sup>43</sup> Finally, in 1906, twelve years after the affair had begun, the second verdict against Dreyfus was overturned by the Supreme Court of Appeals.<sup>44</sup> The affair was over.

The events stuck in the mind and imagination of Anatole France. The undeserved punishment of a powerless member of an outcast group for a crime he did not commit found its fictional expression in, among other works, the story "Crainquebille," written at the height of the affair.<sup>45</sup> A modern male Iphigenia served up on the pyre of military expediency, Dreyfus won the sympathy of an author ever ready to identify with the plight of the oppressed.<sup>46</sup> Though Dreyfus and his adherents merely took on the military, in his *récit profitable* Anatole France indicted the entire French justice system and convicted it of conspiracy in the downfall of the oppressed who came within its power.

### III. THE CONSPIRATORS: ACCUSED, ADVOCATE, AND JUDGE

One can better accept the fate of Alfred Dreyfus or of Jérôme Crainquebille by discarding what is, in the opinion of one of the observers at Crainquebille's trial, the notion that the justice system is intended to serve justice: "Above all things do not ask justice to

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43. *Id.*

44. *Id.*

45. France writes: "The true judge weighs his evidence with weights that are weapons. So it was in the Crainquebille affair, and in other more famous cases." *English Translation, supra* note 1, at 249; *French Original, supra* note 1, at 40. This reference to "other more famous cases" has been deemed to be a direct allusion to the Dreyfus Affair. See, e.g., Smith, *supra* note 27, at 115: "[Crainquebille] presents . . . the issues of the Dreyfus Case. Like the army officer, the old vegetable-seller falls victim to society's machinery of 'justice.'" *Id.* "'Crainquebille' [and other tales] dealt with the Dreyfus Affair or its immediate consequences; they all reflect actual events." See POLÉMISTE, *supra* note 1, at 329. "'Crainquebille' et [d'autres récits] ont tous trait à l'affaire Dreyfus ou à ses conséquences immédiates, ils concernent tous l'actualité . . ." *Id.* "The first title of 'Crainquebille' was 'The Crainquebille Affair,' and to make the relationship between the story and the Dreyfus Affair even clearer, France wrote: 'I do not much like one to weigh testimony with the weight of weapons, as is seen in the Crainquebille affair, and in other more famous cases.'" See *id.* at 330. "Le premier titre de 'Crainquebille' est 'L'affaire Crainquebille' et pour rendre la relation plus sensible encore, France a écrit: 'Je n'aime pas beaucoup . . . qu'on pèse les témoignages au poids des armes, comme cela s'est vu dans l'affaire Crainquebille, et dans d'autres causes plus célèbres.'" *Id.* (citations omitted).

46. As one scholar writes: "From childhood, Anatole France learned to appreciate 'the innocence of the wretched.'" See MAURICE GAFFIOT, *LES THÉORIES D'ANATOLE FRANCE SUR L'ORGANISATION SOCIALE DE SON TEMPS* 214 (1928) [hereinafter GAFFIOT]. "Dès son enfance, Anatole France apprit à reconnaître 'l'innocence des misérables.'" *Id.* (citation omitted).

be just, *it has no need to be just since it is justice . . .*”<sup>47</sup> A close reading of the criminal code is hardly necessary to convince the average reader of France’s story that what constitutes justice will vary depending on the facts of an individual case, including the nature of the act committed, the state of mind of the actor when he or she committed it, the presence or absence of mitigating or aggravating circumstances, and other factors. In this regard, the fate of Crainquebille is metaphorically even more absurd than that of Victor Hugo’s *misérable*, Jean Valjean, who, though condemned to serve a harsh sentence for a petty crime, had at least *in fact* committed the theft for which he was brought to trial.<sup>48</sup> Anatole France suggests that the duty of the judge lies elsewhere than in the analysis of the facts of individual cases, even the rather important fact of whether the accused committed the crime at all: “Those who demand that sentences pronounced in law courts should be founded upon a methodical examination of facts, are dangerous sophists, and perfidious enemies of justice both civil and military.”<sup>49</sup> One must not lose sight of the fact that the justice system is designed to be a conviction machine, a mill to grind out sentences.<sup>50</sup> Just as the executioner is well advised to grease the blades of the guillotine from time to time to prevent any build-up of extraneous rust, the judges who are responsible for providing him customers are also well advised not to cut down on supply by an overly scrupulous examination of extraneous facts that might warrant an occasional acquittal. This is all the easier to do when, as in the case of Jérôme Crainquebille, the accused is only too willing to put his neck under the blade.

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47. *English Translation*, *supra* note 1, at 249; *French Original*, *supra* note 1, at 39 (emphasis in English translation only).

48. See VICTOR HUGO, *LES MISÉRABLES* 93 (Norman Denny trans., Penguin Classics 1982):

One Sunday night when Maubert Isabeau, the baker on the Place de l'Eglise in Faverolles, was getting ready for bed, he heard a sound of shattered glass from his barred shop-window. He reached the spot in time to see an arm thrust through a hole in the pane. The hand grasped a loaf and the thief made off at a run. . . . The thief was Jean Valjean.

. . . .

Jean Valjean was found guilty. The Penal Code was explicit. There are terrible occasions in our civilization, those when the Law decrees the wrecking of a human life. It is a fateful moment when society draws back its skirts and consigns a sentient being to irrevocable abandonment. Jean Valjean was sentenced to five years hard labour.

49. *English Translation*, *supra* note 1, at 247; *French Original*, *supra* note 1, at 33-34.

50. See *supra* note 1 and accompanying text.

### A. Crainquebille: *The Willing Accused*

Almost from the moment the reader first sees him, Crainquebille is only too happy to oblige, only too willing to conspire in the judgment that awaits him within the justice system. He appears before his judges on a raised seat, as though he should somehow feel honored that they have condescended to bring *him*, a simple costermonger, into their sights.<sup>51</sup> Overwhelmed by the majestic and awesome display of the full panoply of justice before him, Crainquebille quickly forgets the rather bothersome fact that he did not, in fact, insult Constable 64 by shouting at him "Mort aux vaches!":

All the ceremonial, with which he was surrounded, impressed him with a very lofty idea of justice. Filled with reverence, overcome with terror, he was ready to submit to his judges in the matter of his guilt. In his own conscience he was convinced of his innocence; but he felt how insignificant is the conscience of a costermonger in the face of the panoply of the law, and the ministers of public prosecution.<sup>52</sup>

Earlier, when he was incarcerated before trial, Crainquebille had found prison to be neither sad nor humiliating, only necessary;<sup>53</sup> and after his sentencing, he acknowledged to his attorney, Maître Lemerle, that he was impressed by how very kind and polite the judges were to him while they were in the process of handing down their sentence. This appeared to him to be "a solemn and superior ritual, something dazzling and incomprehensible, which is not to be discussed, and for which one is neither to be praised nor pitied."<sup>54</sup> Nothing that has happened to him appears irregular, unnecessary, or unfitting.<sup>55</sup> After all, the justice system *needs* an occasional Crainquebille in the dock: Whether the wheel is strong depends on whether there is a stone for it to crush underneath.

Moreover, the justice system knows how to choose its victims well. Crainquebille is one of the oppressed, the ignorant, the out-

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51. *English Translation*, *supra* note 1, at 237; *French Original*, *supra* note 1, at 6 (emphasis added).

52. *English Translation*, *supra* note 1, at 238; *French Original*, *supra* note 1, at 8-9.

53. *English Translation*, *supra* note 1, at 242; *French Original*, *supra* note 1, at 20.

54. *English Translation*, *supra* note 1, at 250; *French Original*, *supra* note 1, at 44.

55. After returning from the court after his sentencing, Crainquebille was filled with astonishment and admiration. He, himself, was not quite sure whether the magistrates were mistaken. The tribunal had concealed its essential weakness beneath the majesty of form. He could not believe he was in the right, as against magistrates whose reasons he had not understood: it was impossible for him to conceive that anything could go wrong in so elaborate a ceremony. . . . [H]e had never in his life witnessed anything so grand as a police court trial.

*English Translation*, *supra* note 1, at 250; *French Original*, *supra* note 1, at 42-43.

cast, a *marchand ambulant* barely subsisting on the fringes of society, whom a two-week brush with the law will suffice to obliterate. He is simple, uneducated, one of the *misérables*: "Crainquebille is the natural child of a costermonger, depraved by years of drinking and other evil courses. Crainquebille was born alcoholic. You behold him brutalized by sixty years of poverty."<sup>56</sup> He is too bewildered and diffident to raise the "black flag of rebellion"<sup>57</sup> against Constable 64, and thus he can be counted on to swallow the bitter pill of injustice without making a fuss. The humble do not rebel.

Crainquebille's failure to rebel stems not merely from the fact that he is "too old, too resigned, too weary, too guileless to raise the black standard of insurrection."<sup>58</sup> He is incapable of revolt because he is incapable of the *idea* of revolt, and in this sense the justice system proves to have selected a most fitting victim indeed. Crainquebille represents nothing greater than himself, a simple, insignificant individual pitted against the State, or more properly, as will be seen,<sup>59</sup> against a certain *idea* or philosophy of the State expressed through the observations of a trial observer.<sup>60</sup> When an individual comes up against an idea, it is the idea that must prevail. This explains why "the magistrates did not hesitate to reject the evidence of the mere man, Dr. David Matthieu, and to admit that of Constable 64, who is the pure idea [of the State]."<sup>61</sup> It also explains why the conviction of Crainquebille is a foregone conclusion from the moment he is placed in the dock before President Bourriche, who explains:

It was for you, Crainquebille, to be the strongest. If, after having cried: "Mort aux vaches!" you had declared yourself emperor, dictator, President of the Republic or even town councillor, I assure you, you would not have been sentenced to pass a fortnight in prison, and to pay a fine of fifty francs. I should have acquitted you.<sup>62</sup>

In other words, had Crainquebille symbolized an idea greater than that of the existing State, such as, for example, the concept of

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56. *English Translation*, *supra* note 1, at 245; *French Original*, *supra* note 1, at 28-29.

57. *English Translation*, *supra* note 1, at 240; *French Original*, *supra* note 1, at 15.

58. Joseph Conrad, *Anatole France*, *THE SPECTATOR*, Oct. 4, 1904, at 700.

59. *See infra* part IV.B.

60. *See* BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 12 (1921). "[E]very one of us has in truth an underlying philosophy of life. . . . There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals." *Id.* (footnote omitted).

61. *English Translation*, *supra* note 1, at 248; *French Original*, *supra* note 1, at 36.

62. *English Translation*, *supra* note 1, at 249; *French Original*, *supra* note 1, at 39.

legitimate revolution against a corrupt and repressive government, President Bourriche would have been constrained to declare the stronger idea the victor. However, the police are not foolish enough to hale into court on trumpety charges those intellectually or morally capable of legitimate rebellion, lest the decision go against them. Those with the will, intellect, and capacity to overturn the State may be expected to defend themselves better than a confused, cowed, and simple vegetable hawker. Furthermore, the very purpose of the justice system is to keep the wheels of oppression running smoothly with the maximum cooperation of the accused; something which is unlikely to happen if the defendant knows that right is on his or her side.

This time the State has chosen well; by the time Crainquebille begins to nurse the seed of possible rebellion by reflecting on the imperfections of society after his release from prison,<sup>63</sup> it is too late. He has lost his friends and associates, who might have helped him fashion his disaffection into an idea worthy of locking horns with the State. When he finally chooses to do so, he is unsuccessful in raising "le drapeau noir de la révolte".<sup>64</sup>

"I didn't mean to say: '*Mort aux vaches!*' to you. It was not for you more than for another. It was only an idea."

The constable replied sternly but kindly:

"Whether an idea or anything else it ought not to be said, because when a man does his duty and endures much, he ought not to be insulted with idle words. . . . I tell you again to pass on."<sup>65</sup>

Finally, it should be noted that Crainquebille is inarticulate, incapable of defending himself, and easily swayed into believing and confessing that it is he, and not Constable 64, who first uttered the dreaded oath "*Mort aux vaches!*"<sup>66</sup> His silence in the courtroom

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63. *English Translation*, *supra* note 1, at 254; *French Original*, *supra* note 1, at 54.

64. *English Translation*, *supra* note 1, at 240 ("the black flag of rebellion"); *French Original*, *supra* note 1, at 15.

65. *English Translation*, *supra* note 1, at 257; *French Original*, *supra* note 1, at 63. The decision to opt for the State over the individual is not a concept limited to "Crainquebille," and in fact a real-life counterpart provided another link between France's story and the Dreyfus Affair. Though sympathetic to the fate of the unjustly convicted captain, the French author Maurice Barrès, a participant at the *dîner Balzac* in December 1897 who was "much impressed with Zola's revelations" about the affair that night, nonetheless "felt that the cause of a single man [was] less important than that of the French nation, of the French army." See SCEPTIQUE, *supra* note 19, at 232. "Barrès avait été fortement impressionné par les révélations de Zola [mais] . . . il jugeait la cause d'un seul homme moins fondamentale que celle de la nation française, de l'armée française." *Id.*

66. In the story, Crainquebille is tricked into believing that he *did* in fact first say "*Mort aux vaches!*" three times. After Constable 64 first accuses him of uttering the threat, Crainquebille never denies in definitive terms the policeman's charges: first he

speaks against him; his inability to articulate becomes his own worst enemy.<sup>67</sup> A better stone for the wheel of justice could not have come from the quarry. The whip never lacks a willing back.

### *B. Defense Counsel Lemerle: A Willing Advocate (for the State)*

It was perhaps fortunate that Crainquebille was so willing to oblige the justice system by acquiescing in the judgment against him, for otherwise he might have been somewhat disappointed in

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questions them, but then several lines later he blurts out, "Then I did say '*Mort aux vaches!*' Oh!" *English Translation, supra* note 1, at 241; *French Original, supra* note 1, at 18. The reader then learns at the trial that:

Crainquebille was unaccustomed to discussion; and in [the judges'] company his lips were sealed by reverence and fear. So he was silent: and the President answered his own question; his replies were staggering. He concluded: "Finally, you admit having said, '*Mort aux vaches.*'"

"I said, '*Mort aux vaches!*' because the policeman said, '*Mort aux vaches!*' so then I said, '*Mort aux vaches!*'"

*English Translation, supra* note 1, at 243; *French Original, supra* note 1, at 22-23. Finally, after his trial and back in his cell, though "[h]e was perfectly aware that he had never cried, '*Mort aux vaches!*'", Crainquebille soon convinces himself of the contrary: "His sentence had taught him that he had cried: '*Mort aux vaches!*' He must, therefore, have cried '*Mort aux vaches!*' in some mysterious manner, unknown to himself." *English Translation, supra* note 1, at 250; *French Original, supra* note 1, at 43. Marie-Claire Blancquart notes that "[i]n writing *Crainquebille*, France wished to denounce ignorance, the basis of social oppression, of which Crainquebille is a victim because he accepts the judgment against him." See POLÉMISTE, *supra* note 1, at 367. "En écrivant '*Crainquebille*,' France a voulu dénoncer l'ignorance qui se trouve à l'origine de l'oppression sociale, et dont Crainquebille est victime parce qu'il accepte le jugement . . ." *Id.* And Gaffiot writes: "[t]he idea that laws are just is admitted even by those who violate them: in criminal cases, the guilty party and the judge both recognize the legitimacy of punishing those who rebel." See GAFFIOT, *supra* note 46, at 183. "[L]'idée de la justice des lois est admise même par ceux qui ne s'y conforment pas: devant les juridictions pénales, le coupable et le juge sont toujours d'accord pour reconnaître la légitimité de la peine qui menace les rebelles[.]" *Id.*

67. "Do you maintain," [President Bourriche] said, "that the policeman was, himself, the first to utter the exclamation?"

Crainquebille gave up trying to explain. It was too difficult.

"You do not persist in your statement. You are quite right," said the President.

*English Translation, supra* note 1, at 243; *French Original, supra* note 1, at 23. Crainquebille's plight reminds the reader of another hapless, inarticulate victim of the justice system, Billy Budd. See HERMAN MELVILLE, *BILLY BUDD AND OTHER STORIES* 349 (Penguin Classics 1986).

"Speak man!" said Captain Vere to the transfixed one [Billy Budd]. . . . "Speak! Defend yourself!" Which appeal caused but a strange dumb gesturing and gurgling in Billy; amazement at such an accusation [of harboring mutinous designs against his captain] so suddenly sprung on inexperienced nonage . . . serving to bring out his lurking defect and in this instance for the time intensifying it into a convulsed tongue-tie. . . .

Though at the time Captain Vere was quite ignorant of Billy's liability to vocal impediment, he now immediately divined it.

*Id.*

the defense counsel chosen to represent him. The reader quickly learns that Maître Lemerle, apparently unfamiliar with the concept of zealously representing the client within the bounds of the law,<sup>68</sup> has already half-persuaded Crainquebille, even before his trial, that he is not innocent.<sup>69</sup> In their first interview in prison,<sup>70</sup> Crainquebille finds it difficult to articulate to Lemerle precisely what has led to his arrest. Although the author suggests that with a little help, the poor costermonger might have succeeded in getting his story out to the attorney, one is left with the impression that the result would have been the same:

Then, in a bored tone, twirling his fair mustache [Lemerle] said:

"In your own interest it would be advisable, perhaps, for you to confess. Your persistence in absolute denial seems to me extremely unwise."

And from that moment Crainquebille would have made confession if he had known what to confess.<sup>71</sup>

After the trial ends, Lemerle congratulates the imprisoned Crainquebille on the wise decision to "confess,"<sup>72</sup> although Crainquebille never entered a plea at trial and to the contrary, cowed by the awful majesty of President Bourriche, merely remained silent, allowing the judge to answer his own questions with replies that were "staggering."<sup>73</sup> Lemerle is perhaps congratulating his client on the fact that his case was so easily processed through the justice system, with a minimum of time and effort.

Lemerle does at least have much on which to congratulate *himself*. Though an indispensable party to the trial, Crainquebille was in fact little more than a sideshow for the *real* performance—Lemerle's glorification of the established authorities and, of course, himself. Although at one point in his speech to the jury, he does pose the interesting question of whether Crainquebille actually said "Mort aux vaches!" to Constable 64,<sup>74</sup> Lemerle defends his client by concentrating on *how* Crainquebille uttered the threat rather than on *whether* he said it at all. Then, after suggesting the possibility that Constable 64 was suffering from aural hallucinations,

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68. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980).

69. *English Translation*, *supra* note 1, at 238; *French Original*, *supra* note 1, at 9.

70. This first interview took place on Crainquebille's third day in prison. *English Translation*, *supra* note 1, at 242; *French Original*, *supra* note 1, at 20. Apparently, the French had a somewhat leisurely idea of representing a client like Crainquebille.

71. *English Translation*, *supra* note 1, at 243; *French Original*, *supra* note 1, at 21.

72. *English Translation*, *supra* note 1, at 251; *French Original*, *supra* note 1, at 44.

73. *English Translation*, *supra* note 1, at 243; *French Original*, *supra* note 1, at 22.

74. *English Translation*, *supra* note 1, at 245; *French Original*, *supra* note 1, at 28.

Lemerle concludes his defense by blandly asserting that given his depraved upbringing, Crainquebille was simply irresponsible in the way he had handled his run-in with the police.<sup>75</sup>

This was hardly a good showing for the client, but it was an excellent opportunity for the defense counsel to gain points with the judge. Lemerle commenced his address to the court with an eloquent eulogy of policemen: "They were soldiers once, and soldiers they remain; soldiers, that word expresses everything. . . ."<sup>76</sup> Lemerle then went on to praise the military, being one of those "who would not allow a finger to be laid on the army, on that national army, to which he was so proud to belong."<sup>77</sup> The lawyer finds favor with this little remark, for in response to it President Bourriche gives him a bow.<sup>78</sup> A candidate for public office and a struggling young attorney, Lemerle wins *his* case, though not his client's. His speech attracts the notice of the president of the tribunal, a powerful man who is not likely to forget him. Thus indeed might he say to his imprisoned client, "'Well, my good fellow, things aren't so bad after all! Don't be discouraged. A fortnight is soon over. We have not much to complain of.'"<sup>79</sup> Maître Lemerle, whose star is on the rise, has not much to complain of indeed. If only the same could be said of his client.

### C. *President Bourriche: A Basket for Willing Game*<sup>80</sup>

Not one to be left behind when it comes to condemning an innocent man, President Bourriche quickly tosses his hat into the ring and surrounds Crainquebille like a noose around the neck of justice. He devotes only six minutes to examining the accused, an-

75. *English Translation*, *supra* note 1, at 245; *French Original*, *supra* note 1, at 27-29.

76. *English Translation*, *supra* note 1, at 244; *French Original*, *supra* note 1, at 26.

77. *English Translation*, *supra* note 1 at 244-45; *French Original*, *supra* note 1, at 26. "Maître Lemerle happened to be lieutenant in the Reserves. He was also nationalist candidate for Les Vieilles Haudriettes." *English Translation*, *supra* note 1 at 244-45; *French Original*, *supra* note 1, at 26. The slap at the anti-Dreyfus faction is telling: "As for Maître Lemerle the lawyer, he exhibits the characteristics of the anti-Dreyfus movement: 'nationalist candidate for Les Vieilles Haudriettes,' he eulogizes the army, and he is convinced in advance of the guilt of the accused. Thus is the relationship between the Crainquebille Affair and the Dreyfus Affair made stronger." See POLÉMISTE, *supra* note 1, at 365. "Quant à Maître Lemerle l'avocat, il réunit les caractéristiques des antidreyfusistes: 'candidat nationaliste dans le quartier des Vieilles-Haudriettes', il prononce l'éloge de l'armée, et il est convaincu par avance de la culpabilité de l'accusé. Ainsi la relation entre l'affaire Crainquebille et l'affaire Dreyfus est-elle rendue plus forte." *Id.*

78. *English Translation*, *supra* note 1, at 245; *French Original*, *supra* note 1, at 26.

79. *English Translation*, *supra* note 1, at 250; *French Original*, *supra* note 1, at 44.

80. A *bourriche* is a basket or hamper in which to keep game. HARRAP'S NEW COLLEGE FRENCH AND ENGLISH DICTIONARY (French-English Part) 94 (Peter Collin et al. eds., 1982).



swers his own questions when Crainquebille hesitates, receives the mistaken evidence of Constable 64 "with obvious approbation,"<sup>81</sup> bows at the flattery of defense counsel Lemerle, and convicts the poor costermonger "on the strength of the evidence given by Constable Matra."<sup>82</sup> It is all a quick, tidy affair, with everyone joining hands to dispatch the accused to prison and move on to the next case:

After the sentence had been pronounced, several members of the audience and two or three lawyers left the hall. The clerk was already calling another case. Those who went out did not reflect on the Crainquebille affair, which had not greatly interested them; and they thought no more about it.<sup>83</sup>

In fact, what has happened to Crainquebille is of interest only to himself. To the court, including Bourriche and Lemerle, Jérôme Crainquebille is simply another statistic in the convicted column, an example and reminder to society of the efficient workings of the machinery of justice:

And Crainquebille murmured [to Lemerle] meditatively: "It's something out of the common that's happening to me."

"Don't exaggerate, Crainquebille. Your case is by no means rare, far from it."<sup>84</sup>

What makes the august Bourriche such a willing hamper to catch such paltry game? Anatole France's theory of justice, as it appears in the story, forms the subject of the next section of this Article.<sup>85</sup> Suffice it to say for now that President Bourriche condescends to devote some of his precious time to the plight of a poor vegetable hawker from the streets of Montmartre for the most cogent of reasons: his own survival. Bourriche's concern is not for physical or personal survival—for it is clear<sup>86</sup> that Crainquebille is incapable of raising "the black flag of rebellion"<sup>87</sup>—but rather, his concern is for professional survival. France suggests through the musings of a trial observer that President Bourriche recognizes fully that a judge's power and influence rest on his perceived ability to have his decrees obeyed and his judgments executed. He must decide in favor of those who must enforce his edicts, lest *they* decide to defy him in retaliation for his finding against them. The

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81. *English Translation*, *supra* note 1, at 244; *French Original*, *supra* note 1, at 24.

82. *English Translation*, *supra* note 1, at 245; *French Original*, *supra* note 1, at 29.

83. *English Translation*, *supra* note 1, at 246; *French Original*, *supra* note 1, at 31.

84. *English Translation*, *supra* note 1, at 251; *French Original*, *supra* note 1, at 45.

85. See *infra* part IV.

86. See *supra* part III.A.

87. *English Translation*, *supra* note 1, at 240; *French Original*, *supra* note 1, at 15.

trial observer imagines that Bourriche would explain his position in the following terms:

[I]f my judgments were in opposition to force, they would never be executed. Notice, gentlemen, that judges are only obeyed when force is on their side. A judge without policemen would be but an idle dreamer. I should be doing myself an injury if I admitted a policeman to be in the wrong.<sup>88</sup>

Once the State has bagged the hapless Crainquebille, the mouth of the hamper yawns wide to accept the chosen prey. No questions are asked; rather, those one might expect to be asked are in fact answered before they are even raised. President Bourriche knows in which direction his interest lies. After all, the club that beats the game has also the power to crush the hamper. The minions of justice know best how to order their priorities: "The interest of the accused is sacred; the interest of society is doubly sacred; but the interest of justice is trebly sacred."<sup>89</sup>

It should come as no surprise, then, to learn that the three major performers in the circus that packs Crainquebille off to jail—the accused, his lawyer, and the judge—all conspire to accomplish the same goal: to keep the conviction machine, the sentence mill, operating at top speed. Crainquebille conspires in his doom out of a conviction that law is right and necessary; and he is convinced that since he has been singled out for the peculiar honor of appearing in the dock, he must be guilty. Lemerle conspires in Crainquebille's undoing out of ambition and regard for his own advancement, the puissant judge being better able than a poor costermonger to bestow the good things of the world on him. And President Bourriche slams the lid down on the State's willing game out of a need

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88. *English Translation, supra* note 1, at 248-49; *French Original, supra* note 1, at 38. At the same time the judge shares the same preoccupation as the lawyer with his own advancement and ambition:

[T]he career judge, especially preoccupied as he is with his own advancement, can scarcely free himself up for philosophical inquiry into the rules of law which he must apply. . . .

If then the judge wishes to advance, he must submit himself to the established rules. He must always look out for the interests of the powerful and the rich. See GAFFIOT, *supra* note 46, at 205-06.

[L]e magistrat de carrière, préoccupé surtout de son avancement, ne peut guère se livrer à des méditations philosophiques sur les dispositions qu'il doit appliquer . . . .

Si donc le magistrat veut avancer, il doit se soumettre aux règles établies. Son estime doit aller tout entière vers les puissants et les riches.

*Id.*

89. See GAFFIOT, *supra* note 46, at 200. "L'intérêt de l'accusé est sacré, l'intérêt de la société est deux fois sacré, l'intérêt de la justice est trois fois sacré." *Id.* (footnote omitted).

to survive in power and to keep the sword of the State turned from his own throat.<sup>90</sup> They are a fitting group, these three. The only difficulty is that their mission, to grease the wheels of the justice system, has nothing to do with justice.

#### IV. THE NATURE OF LAW AND JUSTICE IN "CRAINQUEBILLE"

##### A. *Getting into Justice: A Game of Chance*

What strikes the reader most, perhaps, about the nature of law as it is portrayed in *Crainquebille* is the arbitrariness of the official system of catching unwary game in Bourriche's justice basket. Though once inside the courtroom Crainquebille's fate is sealed, given who he is and whom he has purportedly insulted, how he arrives there is a matter of chance, of accident. Fate has merely selected him to be this eventful day's latest victim of justice. It is as though the dutiful minions of Bourriche, the poacher of innocence, have been instructed to stock the hamper with anything they can find and have merely happened first upon Crainquebille.

Crainquebille's harrowing experience with justice begins at noon,<sup>91</sup> at the precise moment, one may assume, between dawn and the end of the workday when the rue Montmartre is most likely to be blocked by traffic and when there will thus be the greatest social obligation<sup>92</sup> to obey the order to "move on." It is hardly his fault

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90. As France's trial observer notes: "All the swords of the State are turned in the same direction. To oppose one to the other is to overthrow the Republic." *English Translation*, *supra* note 1, at 248; *French Original*, *supra* note 1, at 37.

91. *English Translation*, *supra* note 1, at 239; *French Original*, *supra* note 1, at 10.

92. The story shows how Crainquebille is torn between his right to be paid for his leaks and his duty to obey Constable 64, the duly constituted representative of the State:

For the half century that he had been pushing his barrow through the streets, Crainquebille had been learning respect for authority. But now his position was a peculiar one: he was torn asunder between what was his due and what was his duty. His was not a judicial mind. He failed to understand that the possession of an individual's right in no way exonerated him from the performance of a social duty.

*English Translation*, *supra* note 1, at 239; *French Original*, *supra* note 1, at 13. As an individual, particularly as one of the *misérables*, of course, Crainquebille's social duty was paramount, as he should have recognized; it was not for him to rely too heavily on his individual rights:

Let us now see what, one hundred and ten years after the publication [of the Declaration of the Rights of Man during the French Revolution], life in the new France holds for Jérôme Crainquebille. What good are the protections granted to the people by the Revolution, if a poor devil can be crushed by the laws of the Republic in the same fashion as if he were still living under the tyranny of despots?

See JACQUES ROUJON, *LA VIE ET LES OPINIONS D'ANATOLE FRANCE* 261-62 (1925).

that Madame Bayard, the shoemaker's wife, has not brought her money with her to his cart or that she takes the leeks back to her shop rather than first returning to it to get the amount she needs to pay him.<sup>93</sup> Nor can Crainquebille prevent her from becoming distracted by a customer who detains her inside.<sup>94</sup> Crainquebille is also not responsible for the fact that after he has been told by Constable 64 to move his cart for the third time, "just at that moment the block of traffic in the rue Montmartre was at its worst";<sup>95</sup> even had he decided to obey Constable 64, "it was now impossible for him either to move on or to draw back. The wheel of his barrow was unfortunately caught in that of a milkman's cart."<sup>96</sup> Finally, the poor costermonger can hardly be faulted because the respectable Dr. Matthieu, the sole witness in his behalf—the one who can testify that Constable Matra has made a mistake—labors under a political disability: "[a]t another time such evidence would have been sufficient for the Commissioner. But just then men of science were regarded with suspicion in France."<sup>97</sup>

Most telling on the point of how arbitrarily the justice system selects those whom it wishes to "honor"<sup>98</sup> is the fact that while Constable 64 arrests Crainquebille for what he did *not* say, the old constable at the end of the story refuses to arrest him when he finally *does* utter the threat "Mort aux vaches!"<sup>99</sup> There is more than irony here. Crainquebille has served his purpose and lived out his usefulness for the justice system. The fortuitous elements that once brought him to its attention are lacking at the end of the story: it is now night, it is rainy, there are no large crowds or congestion in the street. Most of all, there is no Constable 64, no Bastien Matra who considers himself insulted<sup>100</sup> and who "think[s]

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Maintenant observons comment, cent dix ans après la publication de cet Evangile [la déclaration des Droits de l'homme], les choses se passent dans la France nouvelle pour Jérôme Crainquebille. A quoi servent les garanties octroyées aux citoyens par la Révolution, si un pauvre diable peut être broyé par les lois de la République de la même façon que par l'arbitraire des tyrans?

*Id.*

93. *English Translation*, *supra* note 1, at 239; *French Original*, *supra* note 1, at 11-12.

94. *English Translation*, *supra* note 1, at 239; *French Original*, *supra* note 1, at 12.

95. *English Translation*, *supra* note 1, at 240; *French Original*, *supra* note 1, at 15.

96. *English Translation*, *supra* note 1, at 241; *French Original*, *supra* note 1, at 16.

97. *English Translation*, *supra* note 1, at 242; *French Original*, *supra* note 1, at 19.

98. *English Translation*, *supra* note 1, at 237; *French Original*, *supra* note 1, at 6.

99. *English Translation*, *supra* note 1, at 256-57; *French Original*, *supra* note 1, at 62-63.

100. *English Translation*, *supra* note 1, at 241; *French Original*, *supra* note 1, at 16-17.

it time to display his authority."<sup>101</sup> There is only an old policeman who listens to Crainquebille's idle threats with "sadness, vigilance and scorn,"<sup>102</sup> and who, possessed of a more philosophical mind than Constable 64,<sup>103</sup> recognizes that the police would have their hands too full to be able to chase *real* criminals if they went around arresting "all the addlepaters who say what they oughtn't to . . . ."<sup>104</sup>

Had he run into *this* old constable instead of Constable 64 at noon on October 20, Crainquebille would have remained a free man, just as he would have regained his freedom had he declared himself "emperor, dictator, President of the Republic or even town councillor"<sup>105</sup> right after supposedly insulting Bastien Matra. But then the justice system would not have been able to take him out on the dance floor to perform with him its ritual little *danse macabre*<sup>106</sup> reserved for society's oppressed.<sup>107</sup>

101. *English Translation, supra* note 1, at 241; *French Original, supra* note 1, at 16.

102. *English Translation, supra* note 1, at 256; *French Original, supra* note 1, at 62.

103. "[President Bourriche] never thought that Bastien Matra was gifted with any great faculty of observation, nor that he applied any secret and vigorous method to the examination of facts." *English Translation, supra* note 1, at 247; *French Original, supra* note 1, at 35.

104. *English Translation, supra* note 1, at 256-57; *French Original, supra* note 1, at 62-63.

105. *English Translation, supra* note 1, at 249; *French Original, supra* note 1, at 39.

106. The word *macabre* is used because Anatole France has admitted that at the end, having failed to be rearrested, Crainquebille will throw himself into the Seine. *See supra* note 27.

107. It is this author's contention that the identity of the particular victim to be selected by the justice system for distinction on any given day is largely a matter of chance. Once that person is haled into court, however, the result is anything but a haphazard affair. The conviction is inevitable, a matter of canon, a foregone conclusion. This author, therefore, disagrees with Suffel, who reads "Crainquebille" as showing Anatole France's *unfavorable opinion* (*son opinion défavorable*) of "those judges who decide cases following the manner of Rabelais[s] Judge Bridlegoose, by chance, as if they were throwing dice." *See Suffel, supra* note 41, at 239. "[L]es juges . . . qui rendent la justice à la manière du Bidoie de Rabelais, au hasard, comme s'ils agitaient les dés." *Id.* President Bourriche does not condemn Crainquebille by a toss of the dice; on the contrary, once the costermonger gets within the president's clutches, he is *destined* to end up in the hamper. Bourriche is indeed the ultimate gamekeeper in this little game of chance, but the chance lies all in the initial selection, not in the sentencing, of the appropriate culprit. For an interesting excerpt on Judge Bridlegoose, see François Rabelais, *On Judge Bridlegoose and Lord John the Loony, in Gargantua and Pantagruel* (1945), reprinted in 1 *THE WORLD OF LAW* 600-19 (Ephraim London ed., 1960).

It should also be noted in passing that Maurice Gaffiot is surely incorrect when he suggests that the idea of deciding cases by a lucky toss of the dice was the invention of Anatole France: "[I]t would be better to put one's faith 'in deciding lots by a toss of the dice; in matters of justice, that's the surest method.' This solution has at least the virtue of originality and simplicity: we therefore owe a certain debt of gratitude to Anatole France for suggesting the idea to us." *See GAFFIOT, supra* note 46, at 204-05 (footnote omitted). "Il vaudrait mieux s'en rapporter 'au sort des dés; en matière de justice, c'est encore le

*B. Getting Out of Justice: Grinding Through  
the Infernal Machine*

It is not often, perhaps, that one sees judges, particularly those at the appellate level, willing to acknowledge their limitations. However, Justice Jackson once stated, "[w]e are not final because we are infallible, but we are infallible only because we are final."<sup>108</sup> This sensitivity to the dangers of judging, given the human tendency to err in matters judicial as in others, is not entirely lost on President Bourriche, who merely conceals it well: "[t]he tribunal had concealed its essential weakness beneath the majesty of form."<sup>109</sup> Bourriche is indeed aware of the imperfections that plague the judicial process as they do all other mortal endeavors, but he reconciles himself to his task out of a perceived necessity for law: the alternative, anarchy, is simply unacceptable. For Bourriche, a law that is unjust is still better than absolute lawlessness.

Through the observations of a spectator at Crainquebille's trial, Bourriche's conduct is condoned and even lauded. In this trial observer's view, "[w]e may despair of knowing, we must not despair of judging."<sup>110</sup> Even though he recognizes that justice "*has no*

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plus sûr.' Cette solution a du moins le mérite de l'originalité et de la simplicité; nous devons donc une certaine reconnaissance à Anatole France, qui a bien voulu nous en suggérer l'idée." *Id.* (footnote omitted). As this footnote makes clear, the idea was Rabelais's, not France's.

108. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring). As Gaffiot observes:

[T]here is an assumption that judges of the highest rank are possessed of a divine spirit lacking to others [of lesser rank]. However, in reality, judges [of whatever degree] are all equally susceptible of error. . . . [Anatole France] refuses to acknowledge that appellate judges possess a greater understanding than do lower court judges . . . . As far as courts of last resort are concerned, their preeminence derives from the fact that there exists no other court superior to them . . . .

See GAFFIOT, *supra* note 46, at 192.

[I]l faudrait admettre que les juges du degré le plus élevé sont pénétrés d'un esprit divin qui manque aux autres. Or, dans la réalité des choses, ils sont tous également sujets à l'erreur. . . . [Anatole France] refuse de reconnaître aux juges supérieurs une compréhension plus grande que celle des juges inférieurs . . . . Quant aux juridictions qui jugent en dernier ressort, leur privilège s'explique par le fait qu'il n'en existe pas qui leur soient supérieures . . . .

*Id.*

109. *English Translation*, *supra* note 1, at 250; *French Original*, *supra* note 1, at 42.

110. *English Translation*, *supra* note 1, at 247; *French Original*, *supra* note 1, at 33. In this section of the story entitled "An Apology for President Bourriche," Anatole France uses the comments of a trial observer, Monsieur Jean Lermite, to support President Bourriche's conduct in the disposition of Crainquebille's case.

*need to be just since it is justice*,"<sup>111</sup> it must still *appear* to be just in the eyes of the public if they are to continue to accept that greatest absurdity of law which

imposes on man obligations utterly contrary to his nature: "These hideous creatures, existing only to devour or embrace each other furiously, live together, submitting themselves to laws which forbid precisely the satisfaction of these two greatest of their desires. These artless animals, having become citizens, voluntarily impose privations of all sorts on themselves, respect the property of others, which is astonishing given their greedy nature, and profess a false prudery which is an enormous but common hypocrisy, prohibiting them as it does from talking but rarely of that about which they think incessantly."<sup>112</sup>

The restless public, chafing ever at the bit of slaughter or promiscuity, can only accept law if it is seen to rest on two solid and irrefutable foundations: infallibility and force.

### 1. The Infallibility of Justice

The "Apology for President Bourriche"<sup>113</sup> that follows his six-minute examination<sup>114</sup> and subsequent sentencing of Crainquebille condones in ironic fashion the president's scrupulous efforts to attain the only kind of infallibility to which "a magistrate may aspire."<sup>115</sup> In all cases, without exception, this "infallibility" involves nothing more, once the selected prey has been run to ground, than clapping it into the hamper. For law must not be permitted to depend on the insidious "method of examining facts [in individual cases] in a critical spirit," which would be "fatal to the administration of justice,"<sup>116</sup> since the judge, much like Consta-

111. *English Translation*, *supra* note 1, at 249; *French Original*, *supra* note 1, at 39 (emphasis in English translation only).

112. See GAFFIOT, *supra* note 46, at 183-84 (footnote omitted).

La loi . . . impose aux hommes des obligations contraires à la nature humaine: "Ces créatures hideuses, qui ne sont tendues qu'à s'entredévorer ou à s'entr'embrasser furieusement, vivent ensemble, soumises à des lois qui leur interdisent précisément la satisfaction de cette double et fondamentale concupiscence. Ces animaux ingénus, devenus citoyens, s'imposent volontiers des privations de toutes sortes, respectent le bien d'autrui, ce qui est prodigieux, eu égard à leur nature avide; et ils observent la pudeur, qui est une hypocrisie énorme, mais commune, consistant à ne dire que rarement ce à quoi on pense sans cesse."

*Id.*

113. This is the title of the fourth and central chapter of the story. *English Translation*, *supra* note 1, at 246; *French Original*, *supra* note 1, at 31.

114. *English Translation*, *supra* note 1, at 243; *French Original*, *supra* note 1, at 22.

115. *English Translation*, *supra* note 1, at 248; *French Original*, *supra* note 1, at 36.

116. *English Translation*, *supra* note 1, at 246; *French Original*, *supra* note 1, at 32.

ble 64, Dr. Matthieu, and Crainquebille, is only human and capable of error. Law must instead depend on an invariable outcome ordained in advance. Though there is a certain arbitrariness in excising mitigating and aggravating factors, the *mens rea* of the accused, or even, as with Crainquebille and Alfred Dreyfus, the *actus reus* of the offense itself, from any given case, there is at least the virtue of consistency in knowing that the accused in Bourriche's court will always end up in jail.<sup>117</sup> The perceptive reader of France's tale is perhaps not inclined to render much respect to this bald display of the "hobgoblin of little minds,"<sup>118</sup> but he must accept the fact that Bourriche, not unlike those over whom he has the power of judging, possesses just such a little mind himself.<sup>119</sup> Knowing this, the trial observer notes that Bourriche has "too judicial a mind to permit his sentences to depend on reason and knowledge, the conclusions of which are eternally open to question."<sup>120</sup>

Instead, in order to remove from the process of judging any perceived taint of human fallibility, President Bourriche founds his decisions on "dogma," as though they were canonical in nature and fashioned in a manner that would appear divine and perfect.<sup>121</sup>

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117. This same kind of crude consistency is similar to the position taken by the first chief judge in history, Pallas Athena, on domestic relations:

It is my task to render final judgment: / this vote which I possess / I will give on Orestes'[s] side. / For no mother had a part in *my* birth; / I am entirely for the male, with all my heart, / except in marriage; I am entirely my father's. / I will never give precedence in honor / to a woman who killed her man, the guardian of her house.

*Aeschylus, The Oresteia* 161-62 (David Grene & Wendy Doniger O'Flaherty trans., 1989) [hereinafter Grene & O'Flaherty].

118. See Ralph Waldo Emerson, *Essays: First Series, Self-Reliance*, in *THE SELECTED WRITINGS OF RALPH WALDO EMERSON* 152 (Brooks Atkinson ed., 1940): "A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines. With consistency a great soul has simply nothing to do." *Id.*

119. "If the judge were so imprudent as to follow that method [of examining the facts in each individual case], his sentences would depend on his personal sagacity, of which he has generally no very great store, and on human infirmity which is universal." *English Translation, supra* note 1, at 246; *French Original, supra* note 1, at 32.

120. *English Translation, supra* note 1, at 247; *French Original, supra* note 1, at 34.

121. *English Translation, supra* note 1, at 247; *French Original, supra* note 1, at 34. It is the *appearance* of canonical perfection that is important, of course, since in reality the imperfect human basis of laws administered by imperfect judges renders them essentially unjust: "Thus laws are preeminently arbitrary. Their human origin deprives them of a solid foundation which might assure that they conformed with nature. For the same reason they are impermanent and variable: if they were derived from God they would be immutable and imperfectible like him . . . ." See GAFFIOT, *supra* note 46, at 179-80. "Ainsi les lois sont éminemment arbitraires. Leur origine humaine les prive d'une base solide qui seule pourrait assurer leur conformité avec la nature. Pour la même raison,



This makes them easier to accept by a reluctant public.<sup>122</sup> The *acceptance* of the decisions handed down by the court by virtue of their *perceived* justice, not their real justice, is the goal of the justice system.

The dogma on which his judgments are based is that the representatives of the State are always right. It is his application of the simple precept—that if the accused were not guilty he would not be in court in the first place—that constitutes the genius behind Bourriche's decisions. All presumptions of innocence are carefully laid aside. To more readily accept the correctness of the trial observer's maxim that "[i]rrefutable for [Bourriche] is the evidence of a guardian of the peace,"<sup>123</sup> the reader must indulge the so-called guardian of the peace in a little sleight of hand. Whether he be Constable 64 (Bastien Matra) or the old constable at the end of the story, the man is only human, after all, and does not appear to Bourriche to be any more incapable of error than he is himself. Thus, the constable's humanity must be "abstracted" and he must be seen to represent an idea that is both larger than himself and incapable of error:<sup>124</sup>

We may all err and at any moment. The causes of error are innumerable. The perceptions of our senses [Bastien Matra's aural hallucinations] and the judgment of our minds are sources of illusion and causes of uncertainty. We dare not rely on the evidence of a single man . . . . But Constable 64, when abstraction has been made of his humanity, cannot err. He is an entity. And entity has nothing in common with a man; it is free from all that confuses, corrupts and deceives men. It is pure, unchangeable, and unalloyed.<sup>125</sup>

The essence of judicial infallibility is that the judge, who decides on the basis of dogma rather than his passions or senses, weighs the evidence of an individual man (Dr. Matthieu or Crainquebille) against that of an entity, an idea (Constable 64, not Bastien Ma-

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elles sont transitoires et changeantes: si elles procédaient de Dieu, elles seraient immuables et perfectibles comme lui . . . ." *Id.*

122. "It is absurd to attribute a divine basis to laws . . . such a conception would lead men to accept a law, even that which is bad about it, the minute that [they believe that] God is its author . . . ." See GAFFIOT, *supra* note 46, at 177. "Il est dès lors absurde de leur attribuer une base divine . . . une semblable conception amène les hommes à accepter, dans la loi, même ce qui est mauvais, du moment que Dieu en est l'auteur . . . ." *Id.*

123. *English Translation, supra* note 1, at 247; *French Original, supra* note 1, at 34.

124. *English Translation, supra* note 1, at 247-48; *French Original, supra* note 1, at 34-35.

125. *English Translation, supra* note 1, at 248; *French Original, supra* note 1, at 35-36.

tra). Whereas the individual can err, the idea cannot. And decision must perforce be in favor of the entity: "Wherefore the magistrates did not hesitate to reject the evidence of the mere man, Dr. David Matthieu, and to admit that of Constable 64, who is the pure idea, an emanation from divinity come down to the judgment bar."<sup>126</sup>

There is more. The infallible judge weighs not the evidence of just *any* idea against that of the man: the idea is that of the *State*. Moreover, the judge "weighs his evidence with weights that are weapons."<sup>127</sup> The justice system, in Anatole France's view, does not lend its eager ear to all testimony alike. Constable 64 is not simply a "pure idea"; he is the idea of *force*, the ultimate foundation of society and its system of justice: "When the man who bears witness is armed with a sword, it is the sword's evidence that must be listened to, not the man's."<sup>128</sup> And this is so for two simple reasons. Bourriche knows on which side his judicial bread is buttered,<sup>129</sup> so he can be counted on always to bless the representatives of authority in order to defang the serpent sucking at his breast.<sup>130</sup> According to the trial observer, Bourriche also recognizes that "[t]o disarm the strong and to arm the weak would be to subvert that social order which it is [his] duty to preserve."<sup>131</sup> A dutiful judge with a "judicial mind . . . [Bourriche] knows what a magistrate owes to society."<sup>132</sup> He knows that force alone keeps the fabric of society from unravelling. Sheep are docile because a fence exists.

126. *English Translation*, *supra* note 1, at 248; *French Original*, *supra* note 1, at 36.

127. *English Translation*, *supra* note 1, at 249; *French Original*, *supra* note 1, at 40. This translation is perhaps infelicitous since the French implies more than simply that the power of the State stands behind the judge to execute his judgments: "Le vrai juge pèse les témoignages au poids des armes." The implication is natural, given the passage that precedes this quote, that the judge's judgment must always be skewed in favor of the State, which holds in its hands the double-edged sword that can cut the magistrate as well as the criminal. This is a clear reference, it seems, to the second salient feature of the justice system. In addition to its need to appear infallible: "Society rests on force . . . Justice is the administration of force." *English Translation*, *supra* note 1, at 248; *French Original*, *supra* note 1, at 36-37.

128. *English Translation*, *supra* note 1, at 248; *French Original*, *supra* note 1, at 36.

129. See *supra* part III.C.

130. Bourriche is unlike Clytemnestra, who, when about to be killed by her returned son Orestes, complains that "[t]his is the snake I brought to birth and suckled." Grene & O'Flaherty, *supra* note 117, at 127.

131. *English Translation*, *supra* note 1, at 249; *French Original*, *supra* note 1, at 38.

132. *English Translation*, *supra* note 1, at 249; *French Original*, *supra* note 1, at 39.

## 2. Justice in the Service of the State: Maintaining Social Order and Established Injustice, or May the Force Be with You

President Bourriche does not hold any grandiose theory of his job. Although he seems to enjoy clothing himself in all the outer trappings of judicial majesty so as to cow those who confront him at the bar,<sup>133</sup> his conception of the uses of justice is almost syllogistic in nature: "Society rests on force; force must be respected as the august foundation of society. Justice is the administration of force."<sup>134</sup> It is as simple as that.

President Bourriche listens to the State's evidence, meaning that of Constable 64, not that of Bastien Matra as an individual. He knows that Constable 64 is an essential though small part of the government and that to discredit the testimony of the State would be to weaken it. Weakening the State is a potentially apocalyptic prospect that remains largely unexamined by those desirous of supporting the status quo in this "and in other more famous cases."<sup>135</sup> It is thus necessary that the judicial sword turn ever in the same direction as the executive sword that is charged with administering the magistrate's decrees and carrying out his sentences. The swords must never be allowed to clash: "To oppose one to the other is to overthrow the Republic."<sup>136</sup> The judge and the constable must lock arms together to face the common enemy, who

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133. The outer forms of justice certainly succeed in terrifying Crainquebille. *English Translation, supra* note 1, at 237-38; *French Original, supra* note 1, at 5-6.

134. *English Translation, supra* note 1, at 248; *French Original, supra* note 1, at 36-37. As Gaffiot points out, "[i]n reality, the right to punish derives from force and not from philosophy . . . ." See GAFFIOT, *supra* note 46, at 211. "En réalité, le droit de punir est issu de la force et non de la philosophie . . . ." *Id.* After she establishes the court of the Areopagus, Athena understands the need to keep the Furies in the new justice system, for they will serve a vital role as the enforcers of authority:

Do not cast terror utterly  
out of your city; for what man is just  
that has no fear of anything?

. . . .

For great is the power of the dread Fury,  
amongst the immortals and also beneath the earth;  
and amongst men, especially . . . .

. . . .

From these fearful countenances

I see great blessing come to my citizens . . . .

Greene & O'Flaherty, *supra* note 117, at 160, 169-70.

135. *English Translation, supra* note 1, at 248-49; *French Original, supra* note 1, at 40. France takes a direct slap at the Dreyfus Affair, in which the very idea of questioning the probity of the French military was unthinkable. See *supra* part II.

136. *English Translation, supra* note 1, at 248; *French Original, supra* note 1, at 37.

might otherwise step into the breach and raise "the black flag of rebellion."<sup>137</sup> But there is nothing of Danton or Robespierre<sup>138</sup> in Jérôme Crainquebille, who is quick to hoist the white flag of surrender the minute Constable 64 whips out his notebook<sup>139</sup> to issue the poor costermonger an unexpected invitation to Bourriche's judicial *danse macabre*.

Why all this hue and cry about an inoffensive costermonger? Why this need to support Constable 64, the misguided "emanation of public force"<sup>140</sup> who suddenly "began to think it time to display his authority?"<sup>141</sup> Because it is necessary to nip in the bud any potential signs of revolt that might jeopardize the State: "[Laws] are simple expedients imposed on society out of the need to suppress all violence which might threaten the established social order . . ."<sup>142</sup> According to the trial observer, Bourriche would be quick to acknowledge that "[j]ustice is social,"<sup>143</sup> and the primary mission of its ministers is clearly *not* to be just, but simply to ensure that they unquestioningly support the representatives of the ex-

137. *English Translation*, *supra* note 1, at 240; *French Original*, *supra* note 1, at 15.

138. Danton and Robespierre were the infamous French revolutionary enthusiasts who were removed as heads of state (literally, beheaded) during the turmoil of 1794. See 5 *ENCYCLOPAEDIA BRITANNICA* 486-88 (15th ed. 1974) (Danton); 5 *id.* at 907-10 (Robespierre).

139. *English Translation*, *supra* note 1, at 241; *French Original*, *supra* note 1, at 16. Anatole France's distaste for the rationale that it is the judge's duty to blindly support the keepers of the sword stems from his rejection of the theories of Blaise Pascal. See *POLÉMISTE*, *supra* note 1, at 366. Marie-Claire Bancquart points out that "The Apology for President Bourriche" was Anatole France's anti-Pascalian tract, noting the novelist's concern about ideas such as the following:

One must juxtapose justice and force, and either make that which is just, strong, or that which is strong, just. . . . Not being able to do the former, society has at least been able to accomplish the latter. . . .

It would be good for society to obey laws and customs, [simply] because they are laws, and there is no need to instill them with truth or justice. . . . It is dangerous to tell the public that laws are not just. . . .

See *id.* n.200 (quoting BLAISE PASCAL, *PENSÉES* 285-86, 288 (1950)).

Il faut mettre ensemble la justice et la force, et, pour cela, faire que ce qui est juste soit fort, ou que ce qui est fort soit juste [. . .] Ne pouvant faire que ce qui est juste fût fort, on a fait que ce qui est fort fût juste. Il serait [. . .] bon qu'on obéît aux lois et aux coutumes, parce qu'elles sont lois; qu'on sût qu'il n'y en a aucune vraie et juste à introduire. . . . Il est dangereux de dire au peuple que les lois ne sont pas justes. . . .

*Id.* (citation omitted).

140. *English Translation*, *supra* note 1, at 248; *French Original*, *supra* note 1, at 38.

141. *English Translation*, *supra* note 1, at 241; *French Original*, *supra* note 1, at 16.

142. See GAFFIOT, *supra* note 46, at 178. "[Les lois] sont de simples expédients imposés par la nécessité de réprimer toute violence susceptible de porter atteinte à l'ordre social établi . . ." *Id.*

143. *English Translation*, *supra* note 1, at 249; *French Original*, *supra* note 1, at 39.

isting government. In fact, justice exists as a system of rules and law for no purpose other than to "sanction . . . established injustice":<sup>144</sup>

Men could not be just, even if they wanted to, because their sad duty is to judge the actions of their fellows not in and of themselves and in their essence, but solely with a view to the interests of society, that is, with regard to that mass of egoism, avarice, error, and abuse which constitutes the human community, and of which they are the blind guardians.<sup>145</sup>

A mere watchdog who guards the gates of the State, the judge can be expected to snap at the heels of any perceived intruder on authority, no matter who he may be. The fact that the State-created miscreant may not have authored a certain treasonous note or uttered a certain treasonous threat is of no moment: the State has called him to account, not for anything he may or may not have done, but simply because it needs him at that particular moment to shore up the morale of the army,<sup>146</sup> to enhance the power of those responsible for social order, or simply to make an example out of him to ward off other potential wrongdoers. That is enough for the judge. Gone may be the days of gibbets on the highway, but still very much alive is the notion that the manacles that tear at the wrists have been "justly" clapped on for the edification and ultimate good of society. If the wrists are those of a Crainquebille or a Dreyfus, it is still the "sad duty"<sup>147</sup> of the judge to see that the fetters stay on: "We may despair of knowing, we must not despair of judging."<sup>148</sup>

## V. THE RAY OF HOPE: THE GOOD JUDGE MAGNAUD

All is not gloom and doom in Anatole France's legal world, however. "Crainquebille" is not some sort of legal *Beowulf* in which characters struggle in vain against the dark forces of a

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144. *English Translation, supra* note 1, at 249; *French Original, supra* note 1, at 38.

145. See GAFFIOT, *supra* note 46, at 194 (quoting ANATOLE FRANCE, *LES OPINIONS DE M. JÉRÔME COIGNARD* 276).

[L]es hommes ne pourraient pas se montrer justes, même s'ils le voulaient, puisque leur triste devoir est de considérer les actions de leurs semblables non en elles-mêmes et dans leur essence, mais au seul point de vue de l'intérêt social, c'est-à-dire en raison de cet amas d'égoïsme, d'avarice, d'erreurs et d'abus qui forme les cités, et dont ils sont les aveugles conservateurs.

*Id.*

146. See *supra* note 36 and accompanying text.

147. See text accompanying *supra* note 142.

148. *English Translation, supra* note 1, at 247; *French Original, supra* note 1, at 33.

*wyrd*<sup>149</sup> from which they cannot escape. This little *récit profitable* at least contains a ray of hope, albeit only one.

Anatole France mentions it in passing at the end of a paragraph devoted to the trial observer's comfortable conclusion that justice has no need to be just: "True, President Magnaud pronounces just sentences; but if they are reversed, that is still justice."<sup>150</sup> The point made is that trial court and appellate decisions are all part of the same game and that the outcome in a lower court is irrelevant, since it is subject to reversal in any event. More importantly, lower and higher courts exhibit "justice" no matter which way they come out on individual cases. They display the justice system at work, quietly and efficiently doing its assigned task. This task is to support the system and the representatives of established authority. Judges never lack the opportunity to demonstrate to all the world how swiftly and effectively they can bring to task any potential malefactor inclined to hoist that ever-dreaded, ubiquitous "black flag of rebellion."<sup>151</sup>

The eye catches at the name in the quoted passage. Who is President Magnaud? Just as France derived his little legal problem in *Crainquebille* from the fate of a real person, Captain Dreyfus, so did he rest his solution on the history of another. President Magnaud was a real judge who held court in Château-Thierry at the end of the nineteenth century and who to Anatole France represented the model of a good judge:

Since 1897, Judge Magnaud fell into the habit of acquitting offenders who had committed crimes because of the misery of their circumstances, in return convicting those guilty of crimes which were customarily lightly punished or totally ignored by the law. He based his judgments on the iniquity of the social system<sup>152</sup> and did not believe that a judge had any great metaphysical understanding of the law: "A judge is fallible and imperfect,"

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149. *Wyrd* is defined as "[t]he principle, power, or agency by which events are predetermined; fate, destiny." II THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY P-Z 272 (1971) (listed under the noun *weird*).

150. *English Translation*, *supra* note 1, at 249; *French Original*, *supra* note 1, at 40.

151. *English Translation*, *supra* note 1, at 240; *French Original*, *supra* note 1, at 15.

152. France's description of Judge Magnaud reminds the reader of Balzac's good Judge Popinot. See Honore de Balzac, *The Commission in Lunacy*, in THE WORKS OF BALZAC 355, 364 (1926) [hereinafter Balzac]. Balzac describes Judge Popinot as:

The great lawyer, the clear-sighted criminal judge, whose superiority seemed to his colleagues a form of aberration, had for five years been watching legal results without seeing their causes. As he scrambled up into lofts, as he saw the poverty, as he studied the desperate necessities which gradually bring the poor to criminal acts, as he estimated their long struggles, compassion filled his soul.

*Id.*

he would say.<sup>153</sup>

To France, the good judge had a duty higher than that of serving the State, nursing his own ambition, and keeping the sword away from his own throat:

The interests of humanity impose on him the obligation to inquire into whether [laws] are just, to apply them to a case only if they are so, and even more to conform his decisions to their spirit rather than simply to their letter; he must, like President Magnaud, always remember the human origin of laws and keep this in mind as he performs his duty.<sup>154</sup>

All of this is not an easy task, however, and the legal world will not look kindly on a judge who is as much out of step with his peers as the good Judge Magnaud. Certainly Bourriche is not the man to lay aside the traditions and prejudices that for years have been the tools of his trade, including the easy maxim that his most devoted and regular customer, the State, is always right: in the opinion of one observer at Crainquebille's trial, "when he received as true the evidence of Constable 64, [Bourriche] merely acted according to precedent. Imitation lies at the root of most human actions. A respectable person is one who conforms to custom. People are called good when they do as others do."<sup>155</sup>

One suspects in fact that Bourriche's spurs, the "palm leaves of an officer of the Academy [which] decorated his breast,"<sup>156</sup> were hard won by years of sycophancy to the State and volumes of repressive rulings. One also suspects that the ultimate fate of Magnaud was different, that he was, like his decisions, ultimately "broken."<sup>157</sup> Though he had the support of a number of French legislators, the judiciary disapproved of the way he decided

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153. See POLÉMISTE, *supra* note 1, at 352.

Depuis 1897, le juge Magnaud acquittait les délinquants coupables par misère, et condamnait en revanche des actions mal punies ou non punies par la loi. Il fondait ses jugements sur l'iniquité des structures sociales, et ne concevait pas qu'un juge eût une puissance métaphysique: 'Le juge est faillible et imparfait,' déclarait-il.

*Id.*

154. See GAFFIOT, *supra* note 46, at 186.

[L]'humanité lui impose la tâche de rechercher si elles [les lois] sont justes, de ne les appliquer que dans ce cas, et encore de se conformer à leur esprit au lieu d'en suivre la lettre; il doit, comme le président Magnaud, se rappeler leur origine humaine et s'inspirer de cette idée dans l'accomplissement de sa charge.

*Id.* (footnote omitted).

155. *English Translation*, *supra* note 1, at 249; *French Original*, *supra* note 1, at 40-41.

156. *English Translation*, *supra* note 1, at 237; *French Original*, *supra* note 1, at 6.

157. *Cassé* is the French word for a reversed or annulled decision: "The sentences of judges are always unjust; those which, by exception, are not so will immediately be re-

cases,<sup>158</sup> and

in showing himself different from his colleagues, [the good judge] exhibits a higher morality than that of his immoral times, and he will only be scorned by all. . . . He will finally be deemed lacking in judicial temperament and his judgments will be reversed: such is the fate of any judge who displays human feelings.<sup>159</sup>

One need not worry about President Bourriche—he has far “too judicial a mind”<sup>160</sup> to be so foolish as to rest his decisions on considerations of equity and humanity. Never would he grind his nose into the dust in a fit of Magnaud-like self-abasement premised on the recognition that he is fallible and imperfect. Bourriche is no Magnaud. The State is safe.

## VI. CONCLUSION

What profit does the reader derive from Anatole France’s “profitable tale?” On one level, the author narrates the story of a simple man in the wrong place at the wrong time, snatched up and thrust, like Alfred Dreyfus, into the basket of justice like dust into a dustbin, purportedly to keep the State intact and enhance the perceived rectitude of government. To fulfill its essential mission as a servitor of the State, the justice system cozens the accused not merely into accepting his fate as a sacrificial victim to social order and established injustice but into actually believing that he has somehow received a bizarre honor in being thus singled out for punishment.<sup>161</sup> The neck should be grateful to the halter. The main actors in this little drama are carefully selected, and the accused, the advocate, and the judge are all only too happy to conspire in the conviction of the old costermonger. Crainquebille is quite the man for his job, as Bourriche and Lemerle are for theirs. The hangman can tighten the noose around a struggling neck, but the task is far easier if the neck is willing. The judge’s job is hardly

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versed.” See GAFFIOT, *supra* note 46, at 198. “Les sentences des juges sont toujours injustes; celles qui par exception ne le seraient pas seraient aussitôt cassées.” *Id.*

158. “President Magnaud received the support of a certain number of legislators, but the judiciary looked on him unfavorably.” See POLÉMISTE, *supra* note 1, at 352. “Le président Magnaud recevait l’appui d’un certain nombre de parlementaires; mais la magistrature lui était défavorable.” *Id.*

159. See GAFFIOT, *supra* note 46, at 205.

[E]n se montrant différent de ses collègues, il ferait paraître une morale supérieure à celle de son temps, donc immorale, et il essuierait le mépris de tous. Il serait enfin considéré comme n’ayant pas l’esprit juridique et ses jugements seraient cassés: c’est le sort de tout juge qui manifeste des sentiments humains.

*Id.* (footnote omitted).

160. *English Translation*, *supra* note 1, at 247; *French Original*, *supra* note 1, at 34.

161. *English Translation*, *supra* note 1, at 237; *French Original*, *supra* note 1, at 6.



difficult here. A more willing neck than that of Jérôme Crainquebille could not be found.

On quite a different level, the story contains a glimmer of hope, like "a periwinkle piercing through the snow."<sup>162</sup> Though Jérôme Crainquebille may throw himself into the Seine, Alfred Dreyfus did not, and the real-life counterpart of the story's protagonist not only survived his extended brush with the law long enough to be completely vindicated of his "crime" but he was also reinstated in the army and received the Legion of Honor.<sup>163</sup> Anatole France also gives the reader the excellent example of President Magnaud, the good judge, who had the courage to fit the punishment to the crime and the good sense to convict the crime rather than the criminal when, out of compassion and understanding for the plight of the accused, he felt it was necessary to do so. He, at least, was a judge who lived and breathed the true "spirit of the law" rather than blindly following its letter.<sup>164</sup> This is not an insignificant message from a tale so slight. Notwithstanding the pessimism of Anatole France's little *récit profitable*, the reader can perhaps still agree with Maître Lemerle that "things aren't so bad after all!"<sup>165</sup>

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162. Balzac, *supra* note 152, at 187.

163. 9 ENCYCLOPEDIA AMERICANA 396 (1980).

164. Compare President Magnaud with President Bourriche, who, the reader is ironically told, "has seen deeply into the spirit of laws" in the process of judging Crainquebille. *English Translation*, *supra* note 1, at 248; *French Original*, *supra* note 1, at 36. Anatole France had as little affection for Montesquieu as he had for Pascal. "Naturally the title [of the article "Crainquebille, or the spirit of laws," which appeared on January 10, 1901] is also an ironic reference to Montesquieu, of whom France was critical since [his novel] *La Rôtisserie de la Reine Pédauque*." See POLÉMISTE, *supra* note 1, at 367 n.202. "Naturellement, ce titre est aussi une ironie envers Montesquieu, contre lequel France se déclarait depuis *la Rôtisserie de la Reine Pédauque*." *Id.*

165. *English Translation*, *supra* note 1, at 250. The translation varies slightly from the French, which reads "Eh bien! mon bonhomme, vous n'êtes pas trop mal?" ("Well, my good man, you aren't too badly off?"). *French Original*, *supra* note 1, at 44.