Freedom of Expression in France: The Mitterrand-Dr. Gubler Affair

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X. No one should be disturbed because of his opinions, provided that their expression does not disturb public order.

XI. The free communication of thought and opinions is one of the most precious rights of man. Every citizen can therefore freely speak, write, and publish save that he is responsible for the abuse of this freedom as determined by law.

Declaration of the Rights of Man and of the Citizen, August 26, 1789[1]

The French people solemnly proclaim their attachment to the Rights of Man . . . as they are defined in the Declaration of 1789. . . .

Preamble to the Constitution
of October 4, 1958

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1. Unless otherwise indicated, all translations from the French are the author's.

I. INTRODUCTION

A court-ordered ban of a book about the deceased President of a democratic country, published by a respected publisher and involving neither national security nor obscene material, must surely be a unique event. Yet on January 18, 1996, at the request of President François Mitterrand's widow and three children, a judge of the "Tribunal de Grande Instance" in Paris[2] issued a preliminary injunction against the author and publisher of *The Great Secret*.[3] The book disclosed that Mitterrand had been afflicted in 1981 with a fatal cancer and that by 1994, though still in office, he had become incapable of performing his duties.[4] The court prohibited all further publication of the book which had gone on sale the day before and had already sold 40,000 copies.

On March 13, 1996, the Paris Court of Appeals affirmed the issuance of the preliminary injunction.[5] On July 5th the Paris Criminal Court convicted Dr. Gubler, his co-author, and his publisher of violating a "professional secret,"[6] a criminal offense. On October 23rd, the French trial court issued a permanent injunction and awarded damages to the Mitterrand family.[7]

Few will doubt that the case would have been decided differently in the United States, where even a government allegation that national security was at stake during wartime failed to protect a living president from publication of the Pentagon Papers.[8] No such considerations were even claimed in the Mitterrand case.

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2. The Tribunal de Grande Instance [hereinafter *T.G.I.*] is a court of general jurisdiction, the French equivalent of a United States federal district court.

3. *See* T.G.I. Paris, Jan. 18, 1996. There is a national reporter system in France for cases decided by the Cour de Cassation and the Conseil d'Etat, the two highest French courts, but there is no reporter system for trial and appellate level decisions. The vast majority of these cases are not reported. For example, as of September 30, 1998, the Court of Appeals in Aix-en-Provence had 40,251 civil and commercial cases remaining on its docket to be decided by its 64 judges. Only a few of those cases will be eventually reported. A selection of appellate and some trial level cases are reported in the Gazette du Palais (similar to U.S. Law Week) and in specialized journals devoted to specific subjects such as the Revue Critique de Droit International Privé, Lefebvre's Bulletin Social, and many others, but no one source publishes all opinions. As a result, cases are traditionally cited with only the name of the court and the date of the decision. This Article will adhere to that tradition.

4. Mitterrand was elected President of France in 1981 for a seven-year term. In 1988, he was elected and completed a second term. He died on January 8, 1996.

5. *See* CA Paris, 1e ch., Mar. 13, 1996.

6. *See* T.G.I Paris, 17 ch., July 5, 1996, [sitting as the *Tribunal correctionnel*]. Violation of professional secrecy is punished by the French Criminal Code, Article 226-13.

7. *See* T.G.I. Paris, 1e ch., Oct. 23, 1996.

8. *See* New York Times v. United States, 403 U.S. 713 (1971); Anthony Lewis, *The Pentagon Papers Watershed*, INT'L HERALD TRIB., June 8-9, 1996, at 8. *See generally* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1039-53 *et seq.* (2d ed. 1988).

The Mitterrand-Gubler case raises issues situated at a constitutional intersection: free speech and rights of privacy.[9] How the law negotiates this intersection reveals a society's attitude towards truth, knowledge, family, and individual autonomy. It manifests what that society purports to value and what it does value. A study of the case thus sheds light on the nature of contemporary French life and law, and the extent to which France can be considered an "open society."[10]

The case also telescopes civil and criminal procedure into a framework that can be examined without great difficulty, and that illustrates many aspects of French jurisprudence. In the space of nine months, the same relatively simple facts involving the same parties gave rise to three decisions by civil courts and one by a criminal court. The cases occupied a total of ten judges. All were decided in Paris. Three were decided at the trial court level and one on appeal. One of the cases involved civil parties suing the accused as part of a criminal proceeding.

This Article sketches the arguments made by the parties, discusses the opinions of the courts, comments on procedural aspects of French litigation, and puts the decisions into a historical and cultural context.

II. BACKGROUND TO THE LITIGATION

François Mitterrand was elected on May 10, 1981, the first Socialist President in France since Léon Blum's Popular Front in 1936, the fourth President of France's Fifth Republic. The French presidential term is seven years. Mitterrand was re-elected for a second term in 1988. He served out his term until 1995, when he was succeeded by current president, Jacques Chirac. Having served as president for fourteen years, Mitterrand's tenure was the longest of any twentieth-century French president and the longest rule of any French leader since Napoléon III who governed France from 1848 to 1870.

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9. "Interestingly, the [United States] Supreme Court has never addressed directly the central question of the constitutional contours of an action based on the publication of truth about someone who did not wish that truth to be disclosed." Frederick Schauer, *Reflections on the Value of Truth*, 41 CASE W. RES. L. REV. 699, 700 (1991). *See generally* RAYMOND WACKS, PRIVACY AND PRESS FREEDOM 14-16 (1995); DAVID FELDMAN, CIVIL LIBERTIES AND HUMAN RIGHTS IN ENGLAND AND WALES 357-65 *et seq.* (1993) (outlining American case law).

10. "[C]ivilization has not yet fully recovered from the shock of its birth—the transition from the tribal or 'closed society,' with its submission to magical forces, to the 'open society' which sets free the critical powers of man." KARL R. POPPER, THE OPEN SOCIETY AND ITS ENEMIES 3 (1950).

Mitterrand was preceded as president by Valéry Giscard d'Estaing (1974-1981), Georges Pompidou (1969-1974), and the founder of the Fifth Republic, Charles de Gaulle (1958-1969). Of his three predecessors, one, Georges Pompidou, died in office. Suffering from terminal cancer throughout his term, Pompidou concealed his illness until the end. The dangers inherent in such deception apparently caught Mitterrand's attention. Just ten days after his election in 1981, he issued a statement proclaiming that he would follow a policy of transparency in matters relating to his health: "The French people have the right to expect that the one they have chosen to fulfill the country's highest responsibility will disclose the state of his wealth and his health."[11] Several months later on September 26, 1981, Mitterrand announced that he would issue regular medical bulletins. No French president had ever followed such a policy before.

This policy would soon be tested. Less than two months after that announcement, Mitterrand's personal physician, Doctor Claude Gubler, discovered that Mitterrand was suffering from a rare form of cancer which had progressed so far that it was no longer possible to operate.[12] The medical team estimated Mitterrand's life expectancy at between three months and three years. Mitterrand died fourteen years later on January 8, 1996.

Twice a year for the next eleven years, from 1981 until 1992, Mitterrand published false medical bulletins signed by Dr. Gubler. The bulletins gave him a clean bill of health. In 1988, Mitterrand ran for a second term, still deceiving the French public, as well as those close to him,[13] about the true state of his health.[14] In 1992, Mitterrand was operated on; he then announced that he had prostate cancer that had only recently been discovered, was in its early stages, and was not

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11. Brief for Appellant (Plon) at 14, Mitterrand v. Gubler, CA Paris, 1e ch., Mar. 13, 1996.

12. *See* Jean-Yves Nau & Frank Nouchi, *Francois Mitterrand était atteint d'un cancer . . .*, LE MONDE, Jan. 10, 1996, at 32; *see also Histoire vraie d'une maladie*, LE NOUVEL OBSERVATEUR (interview with Dr. Gubler), nº 1628, Jan. 18-24, 1996, at 49.

13. *See* Brief for Appellees (Mitterrand family) at 8, Mitterrand v. Gubler, CA Paris, le ch., Mar. 13, 1996 (quoting *The Great Secret* at 35 and 167). He apparently confided in his former mistress but not in his wife.

14. This practice is not unknown to American politics. In 1960 Earl Long, then running for Congress, had a heart attack the day before the election but hid himself in his hotel room refusing to go to the hospital or even call a doctor for fear that the information would get out and influence the election result. Only after the polls were closed did he go to the hospital. He won the election but died the next day. *See* A.J. LIEBLING, THE EARL OF LOUISIANA 238 (1970).

of a nature to prevent him from carrying out his presidential functions.[15]

On December 31, 1994, Mitterrand dismissed two of his personal physicians, including Dr. Gubler, and began to consult homeopathic practitioners.[16] Dr. Gubler began to prepare a book, and in November 1995 a respected French publishing house, Editions Plon, purchased the rights to his manuscript, *The Great Secret*, which Dr. Gubler had completed with the assistance of a ghost writer. Publication was scheduled for mid-January 1996. On January 8th, Mitterrand died, and Editions Plon decided to postpone publication.[17]

Two days later on January 10th the French newspaper, *Le Monde*, carried an article publicly disclosing for the first time that the deceased President had suffered from cancer since 1981.[18] This news was widely commented on, carried on network television, and disseminated by all of the French media. A second article on the medical treatment of the deceased president appeared in *Le Monde* on January 12th.[19] The article reported that the President's widow and children had just issued a statement thanking the entire medical team that had accompanied the late President throughout his illness and expressing their confidence in that team.[20] Four days later, on January 16th, a popular weekly magazine, *Paris-Match*, appeared on newsstands throughout France carrying a seven page excerpt from Dr. Gubler's book.[21] Given this turn of events, Editions Plon reconsidered and on January 17th put the book on sale throughout France. Within the approximately twenty-four hours before the preliminary injunction was issued, 40,000 copies were sold.[22]

III. THE MITTERRAND FAMILY RESPONDS

The next day, January 18th, counsel for the President's widow, their two sons, and the deceased President's daughter by his mistress joined in invoking an emergency procedure, seeking a preliminary

15. *See* Nau & Nouchi, *supra* note 12.
16. *See id.*
17. *See* Appellant's Brief, *supra* note 11, at 2-3. See also the brief filed for the Mitterrand family at 2 [hereinafter *Brief Mitterrand II*].
18. *See* Nau & Nouchi, *supra* note 12.
19. *See* Jean-Yves Nau, *Mme. Mitterrand exprime sa confiance aux médecins de l'ancien président*, LE MONDE, Jan. 12, 1996, at 24.
20. *See id.*
21. *See Vous avez un cancer*, PARIS-MATCH, Jan. 25, 1996, at 101-07.
22. *See id.* at 3.

injunction restraining publication of the book.[23] The complaint stated that Dr. Gubler had been the personal physician of the deceased President and that the book revealed the state of the late President's health and alleged that such revelations constituted a breach of medical secrecy and a serious invasion of the late President's privacy and the privacy of those closest to him.[24]

Under French law, invasion of privacy violates Article 9 of the Civil Code which states:

> Everyone has a right to respect for his personal life. Judges can, without prejudice to the awarding of damages, order all necessary measures, such as sequestration, attachment and others, to prevent or stop an invasion of privacy; these measures can be granted by interlocutory order when there is an emergency.[25]

The allegation was not without its irony. For just as President Mitterrand had promised transparency and then proceeded to deceive, his widow had long been active in human rights causes, and her position as plaintiff in a suit to impose censorship seemed inconsistent with her prior public persona.[26] The inconsistency was further highlighted by interviews she gave in early March to various media during which she stated that she did not wish to prevent publication of the book,[27] a statement that she later clarified to such an extent that the appellate court concluded that she had in effect withdrawn it.[28]

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23. The complaint named the authors, Dr. Gubler and his ghost writer, the publisher, Editions Plon, and the *Groupe de la Cité*. The complaint against the latter defendant was dismissed by the trial judge, and this dismissal was not appealed. The author gratefully acknowledges the cooperation of both Maître Georges Kiejman, counsel to the Mitterrand family, and Maître Jean-Claude Zylberstein, counsel to the publisher. Both were extremely helpful in furnishing copies of their briefs and court judgments and in responding to inquiries.

24. *See* T.G.I. Paris, *supra* note 3, at 2.

25. CODE CIVIL art. 9 (Fr.) *translated in* JOHN H. CRABB, THE FRENCH CIVIL CODE 25 (1977). The literal French phrase for what is being translated as "invasion of privacy" is somewhat more colorful. Article 9 speaks of an "*atteinte à l'intimité de la vie privée*" which literally translated would be an "attack on the intimacy of one's private life." The statutory protection accorded by Article 9 of the Civil Code only dates from 1970. *See* 1 JEAN CARBONNIER, DROIT CIVIL 1: LES PERSONNES 331 (1979).

26. *See* JULIE MONTGRAND & MICHEL PICARD, DANIELLE MITTERRAND, PORTRAIT (Editions Ramsay 1982). A new biography by J.P. Scarpita is scheduled to be published this year by Editions Ramsay.

27. "What I know is that I did not battle for a seizure [of Dr. Gubler's book], even less for censorship. Never would the Mitterrand family seek censorship, which is an administrative decision prior to publication." *Danielle Mitterrand a des grands de ce monde à Mazarine*, ELLE no. 2618, Mar. 4-10, 1996, at 61. Mme. Mitterrand's full statement in French on this issue which occurred in the context of a long interview on her life with the late President was the following: "Et, vous voyez, j'en viens à me demander si on a eu raison de porter plainte contre le livre du Dr. Gubler. Aujourd'hui, plus personne n'en parlerait. Remarquez, je ne regrette pas. Il fallait le faire. Il y a tout de même une déontologie qui a été bafouée. . . . Ce que je sais, c'est que je ne me suis pas battue pour une saisie, encore moins pour une censure. Jamais la famille Mitterrand

The trial court summarized plaintiffs' motion for relief as a request to enjoin further publication, to order the seizure of all copies of the book wherever situated, to order the production of defendants' documents showing the number of copies printed, and to order defendants to obtain the return of all copies already distributed.[29]

IV. THE DEFENSE REPLIES

The defendants' brief began by noting that the emergency procedure used by the plaintiffs had allowed them only a few hours to prepare a defense and that the complaint did not specify which passages of the book were offensive. Thus they were unable to respond, and the complaint should be held void for vagueness. They pointed out that the information published in the book had already been disseminated by *Paris-Match* and had been on the newsstands since January 16th,[30] hence prior to the book's publication. The defendants also argued that under applicable case law, the emergency relief requested required that the plaintiffs demonstrate that the consequences of publication be so serious as to entail an intolerable and irreparable injury. The plaintiffs had failed to demonstrate this.[31]

Defendants next argued that plaintiffs lacked standing to raise the issues because the only privacy involved was that of the deceased president and that a cause of action for invasion of a deceased's privacy cannot be invoked by his surviving family or heirs. They contended that the cause of action, if such existed, could not be bequeathed by the deceased.[32] In addition, they noted that the plaintiffs had not alleged that the information divulged in the book was false or distorted or published in bad faith.[33]

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ne s'est mobilisée pour une censure, qui est une décision administrative avant la sortie d'un livre. Pour ce qui me concerne, j'ai revendiqué le droit au respect de la vie privée et du secret professionnel, par voie de justice et après la sortie du livre. Pendant vingt-cinq ans, Gubler a été un de nos plus proches, un ami, il a partagé notre vie de famille. Sa trahison, qui est du dépit amoureux, a été pour nous inconcevable et insupportable. Alors, est-ce qu'on a bien réagi?" *Id.*

28. *See* CA Paris, *supra* note 5, at 5, 13-14.

29. *See* T.G.I. Paris, *supra* note 3, at 2.

30. *See* Brief for Defendants (*Les Editions Plon* and *Monsieur Gubler*) at 2, T.G.I. Paris, Jan. 17, 1996.

31. *See id.* at 4-5 (invoking Article 809 of the New French Code of Civil Procedure). Article 809 states: "The president [of the court] can always even in the presence of a genuine dispute order protective remedies or the status quo ante either to prevent an imminent damage or to terminate a manifestly illicit problem. In cases where the existence of a duty cannot be seriously questioned, it can award a temporary indemnity to a creditor or order the execution of an obligation, even if it is an obligation to do something."

32. *See* Brief for Defendants, *supra* note 30, at 6.

33. *See id.*

Insofar as the plaintiffs had alleged a breach of medical secrecy, defendants argued that violation of a professional secret, which under French law is a criminal offense,[34] was simply a subcategory of an invasion of privacy action under Article 9 of the Civil Code. Defendants argued that the element of intent necessary to constitute the offense was absent.[35] They contended that the introduction to the book clearly showed lack of criminal intent; Dr. Gubler had felt personally attacked by the late President who had complained of the quality of his medical care that he had received, and Dr. Gubler was merely responding to the attack. In support of their argument, defendants cited a French Supreme Court case holding that the duty of confidentiality could not be used to prevent a person from defending himself.[36]

Finally, defendants argued that the book raised important questions about the functioning of governmental institutions and was thus protected by the right to free speech.[37] This issue appears to be raised in defendants' trial brief only under French law and not under Article 10 of the European Convention on Human Rights.[38] Defendants argued that Dr. Gubler could be considered neither at fault nor in bad faith for raising important considerations relating to the Republic.[39] The trial brief ends by noting that an order banning the book would be ineffective because the book had already been printed

34. *See* CODE PENAL C. art. 226-13: "The disclosure of confidential information by a person who is a recipient of such information because of his status or his profession or by virtue of his function or a temporary assignment, is punishable by a prison sentence of one year and a fine of 100,000 francs."

35. In a magazine interview, Dr. Gubler fully acknowledged violating medical secrecy and stated that he did it with his eyes open, that he was prepared to assume the consequences, and that he had already tendered his resignation from the Order of Physicians. *See* LE NOUVEL OBSERVATEUR, *supra* note 12, at 48. Dr. Gubler gave three reasons for his action: (1) Mitterrand wanted him to do it and in fact would have seen the book, but he died before he could read it. (2) The problem of an incapacitated president is not dealt with in the French Constitution, and his dilemma as the president's physician would have been easier if there were a vice-president. He said that the book raised the issue of the relationship between illness and power, the limits of a policy of transparency, and the margin of security that must be taken into account in a major country. (3) He was shocked when after 1992 Mitterrand turned away from physicians who had miraculously kept him alive to practitioners of a "parallel medicine." *See id.*

36. Cass. crim., May 29, 1989, Gaz. Pal. [1989], 884, pan. jurispr.

37. *See* Brief for Defendants, *supra* note 30, at 8-9.

38. "Everyone has the right to freedom of expression." European Convention on Human Rights, art. 10, § 1. The Convention was signed on Nov. 4, 1950 and came into force on Sept. 3, 1953. This article, including the restrictions stated in art. 10, § 2, is discussed *infra* in Section XIII.

39. *See* Brief for Defendants, *supra* note 30, at 9.

and distributed and because excerpts had been reprinted in the daily newspapers.[40]

V. THE GOVERNMENT'S POSITION

While the plaintiffs' request for a preliminary injunction was a civil and not a criminal proceeding, French law permits the Government to intervene in any civil case in which it esteems that there may be an offense to *l'ordre public*, or public policy.[41] The Government did not file a brief, but it did appear before the trial court and stated its position orally. The Government's initial position was that a ban on publication of the book was justified and that a preliminary injunction should therefore be granted. The Government thereafter reconsidered, because less than two months later, before the appellate court, it argued that the allegations of the Mitterrand family were unfounded and that the order of the trial court should be reversed. At the trial on the merits to determine whether a permanent injunction should issue, the Government took the position that there was an invasion of privacy for which damages should be awarded, but an injunction should not be granted because disclosure had already occurred.[42]

VI. THE DECISION OF JANUARY 18, 1996

The trial court's discussion of the issues takes up less than one page. The court begins by stating that the constitutional principle of free speech can be restricted to protect the rights of third parties, and that these restrictions are grounded in the right to privacy and the right of every person to seek reparation for damages he suffers caused by another.[43] If there is "an abuse of free speech by an invasion of another person's fundamental rights," then the trial judge has the power to issue interlocutory protective orders.[44] The court then observes:

> every person whatever his rank, his birth, his functions has a right to have his privacy respected . . . this protection extends to those close to him when

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40. *See id.* at 11.

41. If the government decides to intervene in a civil case, it is represented by the Public Prosecutor. *See* N.C.P.C. arts. 423, 426 (Fr.) *as translated in* 1 FRANCOISE GRIVART DE KERSTRAT & WILLIAM E. CRAWFORD, NEW CODE OF CIVIL PROCEDURE IN FRANCE 88-89 (1978).

42. *See* T.G.I. Paris, *supra* note 3, at 12.

43. The court cited article 1832 of the Civil Code which is the basic text providing for tort liability.

44. T.G.I. Paris, *supra* note 3, at 3 (citing article 1382 of the New Code of Civil Procedure).

> they are justified in invoking the right to respect for their private, family life.
>
> Considering that in this case what is involved are revelations emanating from the personal physician of President François Mitterrand who cared for and accompanied him for thirteen years, the depository of the confidences of his patient and his family;
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> That they relate to the circumstances of the diagnosis of his illness, to his physical and moral struggle, to the evolution of his illness, to the treatments that were prescribed and dispensed;
>
> Considering that they were done in violation of the laws which impose professional secrecy, even more rigorous in that it concerns medical secrecy and that they are susceptible of causing their author to be subject to the criminal penalties provided for by Article 226.13 of the Criminal Code;
>
> Considering that they constitute, by their nature, a particularly serious invasion of the private and family life of President François Mitterrand and in that of his wife and his children;
>
> Considering that the invasion is rendered even more intolerable by the fact that it is occurring in the few days following the death and burial of President Mitterrand;
>
> Considering that it involves a marked abuse of free speech . . . it is appropriate to order the requested relief.[45]

The Court did not discuss the cases cited by the defense, although this is not unusual as the doctrine of *stare decisis* does not exist in France.[46] The defendants sought and obtained leave to file an expedited appeal.

VII. THE APPEAL

As might be expected, given the more extended period of preparation, the case was elaborately prepared by all of the parties before the appellate court. The court first scheduled a hearing for February 20, 1996. For this hearing the publisher Plon filed an initial twenty-two page brief, and counsel for the Mitterrand family filed a ten page appellee's brief.[47] Two organizations representing the press[48]

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45. *See* T.G.I. Paris, *supra* note 3, at 3-4.

46. *See generally* F. LAWSON, ET AL. AMOS AND WALTON'S INTRODUCTION TO FRENCH LAW 9-12 (3d ed. 1967); HENRY P. DEVRIES, CIVIL LAW AND THE ANGLO-AMERICAN LAWYER 290-91 (1976); RONALD P. SOKOL, *The French Law-Making Process*, *in* MODERN LEGAL SYSTEMS CYCLOPEDIA § 1.4(D) (Kenneth Robert Redden et al. eds., 1994).

47. There are no court rules in France regulating the length of briefs or the length of oral argument, but typically briefs are substantially shorter than American-style briefs; they tend to be more conclusory, and while they may cite cases as representing legal principles, they rarely examine the facts of the cited case. However, as French court opinions do not give a detailed explanation of the facts of a case, they cannot readily be cited for anything but general principles.

48. *Le Syndicat de la Presse Magazine et d'Information* and *La Fédération Nationale de la Presse Française.*

and one representing the publishing industry[49] intervened in the suit as interested parties and filed briefs.[50] The Government did not file a brief but made an oral argument for reversal.

A second hearing was set for March 5th. The day before this second hearing, Mrs. Mitterrand made statements to the media indicating that she did not intend the book to be seized. At the March 5th hearing, the court invited the parties to submit supplementary briefs dealing with the effect of Mrs. Mitterrand's statements.

The appellants and the intervening parties all raised the issue of standing to sue. They alleged that if any invasion of privacy had occurred, it was that of the deceased President. They agreed that the deceased's family could not, under either Article 9 of the Civil Code or under Article 226-13 of the Criminal Code, invoke a breach of someone else's right, and that the plaintiff-appellees had not shown that publication of the book had caused them direct and personal damage.

VIII. APPELLANTS' BRIEF

Every appellate counsel faces an inevitable tactical choice.[51] Should the full spectrum of possible arguments be raised ("the shotgun approach"), or should the weaker arguments be ignored so as to permit a more intense concentration on the one or two strongest arguments ("going for the jugular")? Most appellate counsel probably

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49. *Le Syndicat National de l'Edition*.

50. Article 325 of the New Code of Civil Procedure permits a third party to intervene in a suit only if there is a "sufficient link" between the intervention and the allegations of the parties. *See* N.C.P.C. art. 325, DE KERSTRAT, *supra* note 41, at 69. The intervener then becomes a voluntary party to the suit. *See id*. art. 66. The practice of filing an amicus curiae brief, although almost unknown in France, exists. While no specific provision of French law provides for it, the mechanism has been used by both the Paris appeals court and the French Supreme Court. *See* Paris, Ass. Ch., June 21, 1988 and July 6, 1988, *Gaz. Pal., 1988* 699, note Y. Laurin; R. TRIM. D. CIV. (1989), 138, obs. Perrot; Cass. Ass. Plén. May 31, 1991, GAZ. PAL., June 2-4, 1991, at 34-35; Laurain, *La consécration de l'amicus curiae devant la Cour de cassation*, GAZ. PAL., June 14-15, 1991, 22; note Gobert, R. TRIM. D. CIV. at 91(2) (1992). The courts have grounded their authority to designate an amicus in Article 232 of the New Code of Civil Procedure which empowers the court to appoint a technical expert. *See* N.C.P.C. art. 232, DE KERSTRAT, *supra* note 41, at 69. French commentators have been quick to point out that an amicus is neither a witness nor an expert. *See* LOIC CADIET, DROIT JUDICIAIRE PRIVÉ, 501 (1992). French practice in this regard is in marked contrast to U.S. Supreme Court practice: "In the 1995-96 term, amicus briefs were filed in nearly 90 percent of the cases the Court decided." A. Alexander Wohl, *Friends with Agendas*, 82 A.B.A.J., Nov. 1996, at 46.

51 *See* RONALD P. SOKOL, LANGUAGE AND LITIGATION: A PORTRAIT OF AN APPELLATE BRIEF 41 (1967). "[C]ounsel should not dilute the force of his attack by aiming at every weak spot in the opposing case urging four or five or more contentions upon the court. Choose the point of greatest vulnerability and pitch your case on it" (quoting Bolden v. Pegelow 329 F.2d 95 (4th Cir. 1964)).

choose "the shotgun approach," because of an inherent reluctance to abandon an argument. Counsel to the French appellants chose this broad approach. They argued that the decision of the trial court had to be reversed for eleven different reasons:

1. The trial court had failed to respond fully to the void-for-vagueness argument.[52] Under French law a judge is required to answer every argument raised by each party; failure to do so is grounds for reversal.[53]
2. The French judge ruled that the privacy of the surviving Mitterrand family had been invaded, but as the complaint had not specifically raised this issue, the trial court exceeded its powers by ruling on an allegation which was not raised. The complaint had alleged that the book invaded "the private life of President Mitterrand" and "the feelings of his closest relations" but did not allege an invasion of their privacy.[54] The court thus erred in extending the gravamen of the complaint.[55]
3. The trial court erred in finding that the Mitterrand family had standing to sue because rights relating to one's personality cannot be transmitted to a deceased person's heirs, and the trial court erred in permitting the surviving heirs to invoke them.[56]
4. The violation of Article 226-13 of the Criminal Code which protects professional secrets does not give rise to a civil action for invasion of privacy which can only be based under Article 9 of the Civil Code.[57]
5. The trial court erred factually in concluding that there was an intolerable invasion of privacy.[58]
6. The Mitterrand family had not submitted any evidence to prove that they were in fact the heirs of the deceased President.[59]
7. The trial court's finding of a violation of medical secrecy reversed the presumption of innocence because there was no proof of intent which is a necessary element of the offense.[60]
8. The duty of professional secrecy ceases to apply to one who must defend himself against an unjust charge.[61]

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52. *See* Appellant's Brief, *supra* note 11, at 6.
53. "[T]he judge should rule on all demands and only on those demands. . . ." N.C.P.C. art. 5, DE KERSTRAT, *supra* note 41, at 2.
54. *See* Appellant's Brief, *supra* note 11, at 6.
55. *See id.* at 7-8.
56. *See id.* at 5, 8-11.
57. *See id.* at 10-11.
58. *See id.* at 11-13, 20.
59. *See id.* at 5, 17.
60. *See* Appellant's Brief, *supra* note 11, at 13.

9. President Mitterrand had waived any objection he might have had to a claim for invasion of privacy by publicly proclaiming in 1981 that he wanted the public to know the state of his health.[62]
10. The trial court's decision violated Article 11 of the Declaration of the Rights of Man and the Citizen and Article 10 of the European Convention on Human Rights protecting freedom of speech.[63]
11. The remedy adopted by the trial court was inept and useless. Instead of ending the discussion that had begun prior to publication, the trial court's decision intensified it and caused the book, through no fault of the appellants, to be distributed on the Internet.[64] It was thus an inappropriate remedy.

IX. APPELLEES' BRIEF

The brief submitted to the appellate court by the Mitterrand family is nine pages. Three are devoted to reproducing the trial court's opinion and to quotations from *The Great Secret*. Of the six remaining pages, two are devoted to an introduction and to contesting the right to intervene of two of the three media organizations.[65] Thus, in a case before the most important appellate court in France (excluding the French Supreme Court) involving the family of the deceased French President and raising important constitutional issues involving freedom of speech, the court benefited from only four pages of discussion.

Not a single case is cited in the brief for the appellees, although several provisions of statutory law and the Declaration of the Rights of Man and the Citizen are mentioned. A 1988 case decided by the French Supreme Court would certainly have appeared relevant.[66] In that case, a provincial newspaper published an article stating that a local judge had been temporarily suspended from his duties and that rumor had it that he had suffered a "nervous depression." The judge sued for invasion of privacy. The Court of Appeals of Dijon ruled against the judge, stating that it was permissible to inform the public about the health of a judge who exercised a public function, but the French Supreme Court reversed, citing Articles 9 and 1382 of the

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61. *See id.*
62. *See id.* at 14-15.
63. *See id.* at 16-19.
64. *See id.* at 20.
65. Lack of standing was argued on the grounds that the two organizations suffered no direct damage and that general damage to free speech rights cannot be asserted by them but must be asserted by the government. Brief for Appellees, *supra* note 13, at 2-3.
66. *See* Cass. 2e cir., Apr. 27, 1988, [Pourvoi no 86-13.304 M, Arrêt no 583 D].

Civil Code and declaring that "the disclosure of information relating to the health of a person without his permission constitutes an invasion of privacy."[67] This case was inexplicably not discussed. No attempt was made to discuss or to distinguish the cases cited by appellants.[68] As surprising as this may seem to an American reader, it is not unusual in France, where both trial and appellate briefs and court opinions often contain little analysis and are conclusory in nature. While the Mitterrand family's brief does not make a systematic attempt to analyze and refute each of appellants' arguments, it does not leave them all unanswered.

For example, in response to the argument that the trial court had raised issues not contained in the complaint, the appellees noted that Article 12 of the New Code of Civil Procedure grants the trial judge power to raise issues of pure law *sua sponte*.[69] In response to the void-for-vagueness argument, they replied that virtually every page of the book contains matter that invades the Mitterrand family's privacy, and therefore they did not need to cite specific passages.[70] With regard to the standing-to-sue argument, they replied that near relatives of a deceased "obviously"[71] had standing to invoke a violation of medical secrecy as it extended beyond the patient's death.

The argument that medical secrecy extends beyond death was conclusory. No cases were cited to support it, no articles or professorial comments were invoked to sustain the position, and there also was no discussion as to why medical secrecy should survive death.[72] There was no discussion concerning who has the right to invoke a breach of medical secrecy after the patient's death. On the final page of their brief, appellees quoted from the Declaration of the Rights of Man and the Citizen that "liberty consists in doing all that

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67. *Id.* at 4.

68. The sole response to cases cited in the Plon brief is the following comment: "If there exist a few decisions contesting the standing of certain heirs or near relatives of a deceased to sue for invasion of the deceased's privacy, they were handed down in cases that were not important or under conditions very different from those faced by the Court here." Brief for Appellees, *supra* note 13, at 9. It should be noted that it is not easy for counsel to make arguments distinguishing his own case from cases cited by opposing counsel because the French judicial opinions contain so few facts.

69. *See* Brief for Appellees, *supra* note 13, at 4.

70. *See id.* at 5-6.

71. "[L]es proches du défunt ont, à l'évidence, qualité pour faire respecter le secret médical. . . ." *Id.* at 9.

72. When counsel fails to grapple with legal and philosophic issues inherent in his case, he transforms his role from that of a professional possessing specialized knowledge, expertise, and diagnostic or analytical tools to that of the scribe who witnesses and conveys in writing the feelings and thoughts of his client. *See generally* A.S. DIAMOND, THE EVOLUTION OF LAW AND ORDER 266 et seq. A(1951); *see also infra* note 149.

does not harm others"[73] and concluded that "[t]he struggle for freedom of the press should not destroy the minimum respect that an individual has a right to expect from the society in which he lives and dies."[74] The appellate decision, handed down on March 13, 1996, essentially adopted the position of the Mitterrand family.

X. THE APPELLATE DECISION OF MARCH 13, 1996

The three-judge appellate court begins by joining the two appeals of Dr. Gubler and the publishing house Plon and ruling that the media organizations had a legitimate interest in the litigation because it raised a fundamental question of interest to the press.[75] In reaching its conclusion that the preliminary injunction was justified and affirming the trial court's decision, the appellate judges follow an *ex cathedra*, syllogistic methodology without any in-depth discussion of the competing considerations or the weight to be accorded them.

The court's point of departure is the French Code of Ethics[76] for physicians which states that medical secrecy covers "everything that comes to the knowledge of the physician in the exercise of his profession, that is, not just that which has been confided to him but also what he has seen, heard or understood."[77] The reason for this rule, according to the judges, was "the relationship of confidence, indispensable to the medical act, which is established between the physician and the patient"[78] and "assures the patient that what he confides . . . to the physician . . . will not be revealed."[79]

From this conclusion, the court derived the corollary that "death of the patient does not release the physician from his duty of secrecy."[80] The court did not elaborate on this corollary to explain

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73. "La liberté consiste à faire tout ce qui ne nuit pas à autrui. . . ." Declaration of the Rights of Man art. 4, Brief for Appellees, *supra* note 13, at 10.

74. *Id.* at 10.

75. *See* CA Paris, *supra* note 5, at 8.

76. The struggle of French physicians to obtain a code of ethics took a century and a half. The current code was adopted in 1955 and was based on the first code which, ironically, was adopted during the wartime Vichy Régime. *See* DOMINIQUE THOUVENIN, LE SECRET MEDICAL ET L'INFORMATION DU MALADE 37-38 (1982).

77. CA Paris, *supra* note 5, at 9 (quoting Article 4 of the CODE DE DÉONTOLOGIE MÉDICALE (J.O., Edition Septembre, 1995) [hereinafter CODE OF MEDICAL ETHICS]). The full text of Article 4 is the following: "Professional secrecy, instituted in the interest of patients, applies to every physician under the conditions established by law. The secrecy covers everything that came to the knowledge of the physician in the exercise of his profession, that is, not only that which is confided to him, but also that which he has seen, heard or understood." CODE OF MEDICAL ETHICS art. 4(Fr.).

78. CA Paris, *supra* note 5, at 9.

79. *Id.*

80. *Id.*

why death does not terminate the obligation or whether it is ever terminated or whether there might be exceptions.[81] The court simply concludes that although there are some exceptions, none have been invoked by the appellants.[82] The court later notes that the defense exception to confidentiality only comes into play when one has been accused in a court of law and cannot be utilized by Dr. Gubler who had not been judicially accused.[83]

The court then extracts about two pages of quotes from *The Great Secret* and concludes that there was a clear violation of medical secrecy.[84] No cases are cited or discussed by the court, and there is no genuine discussion of the issues (at least not in terms familiar to American lawyers) or of the arguments raised by the defense. They are simply dismissed as "without relevance."[85] What is evident from the opinion is the fact that the judges are shocked by the breach of medical secrecy. Their shock is reflected in their language:

> Considering that Mrs. Mitterrand and the children of François Mitterrand have been assaulted in their deepest feelings by this public revelation by the personal physician of the deceased President of the Republic who placed his confidence in the protection of medical secrecy legally instituted and solemnly recalled to each physician by his reading of the oath of Hippocrates upon his entry into the profession, of elements pertaining to the personality and private life of their husband and father as well as to their own intimacy. . . .[86]

The court dismissed the free speech provisions of Article 11 of the Declaration of the Rights of Man and the Citizen, and Article 10 of the European Convention on Human Rights, stating that there are exceptions in cases of abuse and that "the diffusion of a printed work

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81. The lawyers' ethical obligations make a distinction between "secrets" and "confidences." "The confidence rule simply duplicates the coverage of the attorney-client testimonial privilege with its technical rules of coverage, exceptions, and waiver. The secrets protection, on the other hand, covers a great deal more. . . . Secrets have no necessary connection with the privacy of communication concept that underlies the protection of confidences." CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 297 (1986). "[O]nce information has been received under circumstances and at a time such that it becomes secret, the information retains its confidential status indefinitely. . . . But other parts of DR 4-101 begin to chip away at its awesome structure, and other rules carry the prospect of significant further reduction." *Id.* at 298.

82. *See* CA Paris, *supra* note 5, at 9.

83. *See id.* at 12.

84. *See id.* at 11.

85. *See id.* at 12 ("les arguments invoqués par les appelants et les intervenants . . . sont dépourvus de pertinence. . . .").

86. *Id.* None of the parties had invoked Hippocrates whose relevance is not wholly evident. The major French work on medical secrecy states that Hippocrates says nothing about confidentiality and that early notions of medical secrecy existed to protect the physician's reputation and not to protect the patient. *See* THOUVENIN, *supra* note 76, at 21.

of facts protected by a duty of secrecy owed by the author" constitutes such an abuse.[87] The court thus affirmed the lower court decision, but noted that it was a provisional remedy and gave the Mitterrand family one month to bring suit on the merits for a final injunction, after which the preliminary injunction would cease.[88] From this March 13, 1996, decision of the Paris Court of Appeals, Dr. Gubler and Plon appealed to the highest French court, the *Cour de Cassation*.[89] A decision from that court is expected in the year 2000.[90]

XI. THE CRIMINAL COURT DECISION OF JULY 5, 1996

Meanwhile, the criminal complaint that the Mitterrand family filed with the Public Prosecutor on January 16, 1996 came to trial on June 13th and 14th. Under French law, a citizen who has been directly affected by a criminal offense can initiate a criminal proceeding,[91] require that an alleged offense be investigated,[92] compel the accused to be brought before the criminal court,[93] and become a party to the criminal action and obtain damages.[94]

The criminal trial took place on June 13th and 14th before the Paris "Tribunal correctionnel." There is no right to a jury trial before this court, and there is no formal arraignment at which the defendant enters a plea. In this case, Dr. Gubler openly admitted that he had violated the rules of medical secrecy, yet the trial proceeded. The trial before the "Tribunal correctionnel" was the only proceeding at which there was live witness testimony and at which the defendants were required to appear and testify. After the two-day trial, the court convicted Dr. Gubler of violating a professional secret and also found his co-author and the publisher guilty of complicity. Dr. Gubler was

87. CA Paris, *supra* note 5, at 13.

88. *See id.* at 15.

89. *See* Letter of May 2, 1996, from Maître Jean-Claude Zylberstein to the author. Counsel to the publisher has advised the author that in the event the highest French court delivers an unfavorable ruling, it will appeal to the European Court of Human Rights. *See* Letter of February 25, 1998 from Maître Jean-Claude Zylberstein to the author. If that occurs, it would add at least three more years to the appellate process.

90. The French Supreme Court produces an annual report in which it includes statistics of its activities, but it notes that it has lacked the financial means since 1987 to determine the average delay of its decisions, but it estimates them at 17 months. *Rapport de la Cour de Cassation 1993*, at 454. Based on his own experience the author estimates that between two and three years more accurately reflects the usual delay in a civil case with the delay being closer to three years than two.

91. *See* C. PR. PÉN. art. 2 *as translated in* GERALD L. KOCK & RICHARD S. FRASE, THE FRENCH CODE OF CRIMINAL PROCEDURE 41 (1988).

92. *See id.* art. 85 at 82.

93. *See id.* arts. 392, 392-1 at 185.

94. *See id.* art. 418 at 196.

given a four month suspended sentence and no fine. His co-author was fined 60,000 FF ($12,000) and the publisher 30,000 FF (abut $6,000).[95]

The criminal court begins its analysis by observing that the revelation of secrets to Dr. Gubler's co-author and to the publisher occurred while President Mitterrand was still alive in November and December 1995 and January 1996. The president was therefore a direct victim of the crime, and the civil action that he would have had fell into his estate and was inherited by his heirs.[96] For the first time the issue of standing was thus directly addressed.

The court analyzes the offense itself as consisting of three elements: a confidant and a secret, an act of disclosure, and a guilty intent.[97] The court wastes no time in concluding that Dr. Gubler was a confidant and what he knew was secret by virtue of his profession. The act of disclosure existed even if what he divulged was already known to the public.[98] The act is constituted simply by disclosing a confidence to a third party.[99] As for guilty intent, the court held that it "consists in the awareness that he disclosed the secret of which he had knowledge."[100]

In discussing the defense of waiver, the court concludes that medical secrecy exists not only to protect the interests of the individual patient whose secrets are involved but also to protect the reputation of the medical profession and the interests of all patients. The court thus implicitly rules that President Mitterrand could not have waived his right to medical secrecy but adds that the defendants had failed to show any proof of an agreement by President Mitterrand to waive his rights.

In response to defendants' argument that political figures do not have the same rights to confidentiality as other citizens regarding their health, the court judged that "no disposition [of law] authorizes a doctor to transform himself into the guarantor of the proper functioning of [state] institutions or into a witness to History."[101] Because no allegation had been made that Dr. Gubler had acted in bad faith or "was motivated by hateful considerations, for example,

95. *See* T.G.I. Paris, *supra* note 7, at 16-17.
96. *See id.* at 7.
97. *See id.* at 9.
98. *See id.* at 10.
99. *See id.* at 11.
100. T.G.I. Paris, *supra* note 6, at 12.
101. *Id.* at 14.

mercantile,"[102] the court did not fine him and only gave him a suspended sentence.

The criminal convictions of July 5th were not appealed by any of the parties.[103]

XII. THE DECISION OF OCTOBER 23, 1996

On April 4, 1996 the Mitterrand family filed suit on the merits using an expedited procedure. The case was argued September 11th, and on October 23, 1996, the Paris trial court issued a permanent injunction and awarded damages of 100,000 francs (about $20,000) to Mrs. Mitterrand and 80,000 francs (about $16,000) to each of the three children.[104]

In making its judgment the trial court relied heavily on the July 5th opinion of the Tribunal correctionnel. It repeated the phrase that ". . . medical secrecy has a general and absolute quality which does not authorize a physician to transform himself into the guarantor for the proper functioning of institutions or to be a witness to history."[105] In reaching its conclusion, it had first to deal with what appeared to be an ingenious argument raised by defense counsel who noted that the criminal court had concluded that the invasion of privacy had taken place during Mitterrand's lifetime and that the plaintiffs had simply inherited his right of action. Counsel argued that this determination by the criminal court had the effect of res judicata and meant that damages ceased when Mitterrand died.

The court gave short shrift to this argument by concluding that the criminal court did not need to go beyond the point of Mitterrand's death to conclude that there was a criminal violation and that it had not excluded the possibility that the plaintiffs had other legitimate claims.[106]

As in the earlier judgments, there was no real analysis of the issues but rather simply the obligatory mentioning of each of

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102. *Id.* at 16.

103. Letter of November 13, 1996, from Jean-Claude Zylberstein to the author. It is perhaps relevant that the appellate court can, and often does, increase the sentence when a convicted person appeals.

104. *See* T.G.I. Paris, *supra* note 7; *see also* Anne Chemin, *Le Tribunal de Paris Confirme l'interdiction du Livre du Docteur Gubler, "Le Grand Secret"*, LE MONDE, Oct. 25, 1996, at 11.

105. Chemin, *supra* note 104. The absence of genuine analysis, sometimes referred to as the "new conceptualism," is not unknown to American jurisprudence and may even be enjoying a resurrection. *See* Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131 (1995).

106. *See* T.G.I. Paris, *supra* note 7, at 13.

counsel's arguments followed by a conclusory rejection of them. Once again, the judges' language revealed their shock:

> [T]he plaintiffs as well benefit in their own right to be indemnified, on the one hand, for the intolerable attack on their deepest sentiments caused by the publication of information relating to the person of their husband and father a few days after death in contempt of the respect due to the grief of the families and, on the other hand, to the reference or allusions to their own private and intimate lives. . . .[107]

The court then concluded that the damages would begin again if the injunction were not maintained and that banning a book was one of the measures allowed a judge "not to impose a preventive control of press publications but, having found an abuse of free speech, to repair the damage."[108]

XIII. REFLECTIONS ON THE JUDICIAL DECISIONS

The decisions surprise one more by what they do not contain than by what they do.[109] The free speech analysis differs significantly from an American analysis under the First Amendment. Procedural differences also strike the American reader. Some of the omitted questions will be examined first.

Although it had been brought to the appellate court's attention that the book had been put on the Internet in French after issuance of the preliminary injunction and that it was also being translated into English "by eager Internet volunteers,"[110] no mention is made by any of the courts of this *de facto* publication.[111] For reasons which are not readily apparent, neither counsel for Dr. Gubler nor counsel for Plon or for the intervening parties developed the argument. Yet the fact that the book had already entered the public domain through the Internet would certainly appear relevant. The general rule in France, as in common law countries, is that once information has entered the public domain it can no longer be protected against further disclosure to the public at large.[112]

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107. *Id.* at 20.

108. *Id.* at 22.

109. Talleyrand always advised diplomats to prepare very carefully what not to say. *See generally* DUFF COOPER, TALLEYRAND (1932).

110. *Internet Spells Trouble, Book Publishers Declare*, INT'L HERALD TRIB., Mar. 19, 1996, at 1.

111. *See generally* Barry James, *Court Defied in French Cyberspace: No Precedent for Putting Banned Book on Internet*, INT'L HERALD TRIB., Jan. 25, 1996, at 7.

112. *See generally* J. ROBERT & J. DUFFAR, DROITS DE L'HOMME ET LIBERTÉS FONDAMENTALES ch. V (*La Vie Privée*) (5th ed. 1994). In *Infringement of Privacy, Lord Chancellor's Department, Scottish Office (1993)*, a patient gave confidential information to his

In some respects this case parallels the British Government's efforts to ban a book by a former spy which had already been published in Australia, Canada, and the United States. The ready availability of the work was determinative for the House of Lords in the *Spycatcher Cases*.[113] It may still turn out to be determinative for the French Supreme Court, but it was passed over in silence by the Court of Appeals of Paris.

The right of the people in a democratic society to be informed is likewise not discussed, although forty-thousand French readers had already expressed their interest in being so informed by buying the book.[114] While Article 10(2) of the European Convention on Human Rights does permit restrictions on free speech, only those restrictions are permitted which are "*necessary in a democratic society . . .* for preventing the disclosure of information received in confidence." The court made no attempt either to make its own examination of what this phrase means or to examine the interpretation already given to it by the European Court of Human Rights.[115]

Implicitly the court concluded that book censorship and democracy are not incompatible, at least in the circumstances of this case. However, the crucial role of free speech in a democratic society, the contours of the permitted restrictions on it, and the occasions in which they might be permitted do not receive judicial attention. Not mentioned at all is the promise of The Declaration of the Rights of Man and the Citizen that "[t]he free communication of thought and

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physician who disclosed it to a small local newspaper which published it. The story was then taken up by the national press. The patient's suit to restrain publication was unsuccessful.

113. Attorney-General v. Guardian Newspapers Ltd., 1 App. Cas. 109 (1990).

114. One could argue that an individual French citizen had the right to intervene in the case under Article 325 of the New Code of Civil Procedure because his right to read Dr. Gubler's book would turn on the decision of the court and that this was a "sufficient link" between the intervention and the allegations of the parties. It is exceedingly unlikely that the court would have allowed such intervention.

115. *See generally* R. BEDDARD, HUMAN RIGHTS AND EUROPE 98 *et seq.* (3d ed. 1993). The French Supreme Court will have to deal with this issue as the European Court of Human Rights on January 21, 1999, subsequent to the preparation of this article, condemned France for violating article 10 of the Convention. Affaire Fressoz & Roire v. France (Raquéte no. 29183/95). In that case the director of a French satirical magazine and a journalist were convicted for violating the same professional secret rule as in the Mitterrand-Gubler case because they printed the tax return of the president of the Peugeot automobile company. At the time of the publication in 1989, French auto workers were demonstrating for wage increases. The Peugeot management argued that they had increased 6.7% and could not be increased further. The magazine noted that during that same period the president's wages had increased 45.9%. The European Court found that the publication was in the public interest and that the conviction of the director and journalist violated the free speech provisions (article 10) of the Convention. While the case is not on all fours, the European Court's discussion of whether the conviction was "necessary in a democratic society" is highly relevant.

opinions is one of the most precious rights of man." There is in fact no intimation that a distinction can exist between issues relating to prior restraint of publication and issues relating to invasion of privacy. None of the decisions discuss the public's right to know.

Ignored too are the public figure aspects of the case. For almost his entire adult life Mitterrand had been a public figure, and for the last fourteen years of his life he was president of his country. His life had been publicly examined from every angle, and hostile and revealing books had been published during his lifetime. Not only was Mitterrand himself a public figure but so was his wife, not just as the First Lady of France but in her own right as a reformer, world traveler, and leading advocate of leftist causes and people. In 1995, Fidel Castro was a guest in France at her invitation. What rights to privacy does a public figure have? So strong is the protection of the First Amendment in the United States that it is difficult to imagine a case in which prior restraint of a book not involving national security or obscene material about a major public figure would be upheld on the grounds of invasion of privacy.[116]

The French criminal court resolved this issue by finding no exception to the statutory rules protecting professional secrets, and the civil court in its decision of October 23rd echoed this view.

The question of waiver likewise receives only superficial attention from the courts. Assuming that Mitterrand did have a right to keep the state of his health secret while he was president, did he waive that right in 1981 by his statements to Dr. Gubler and to the French people in favor of transparency? Under the Medical Code of Ethics, medical secrecy exists to protect the patient alone and can be waived by the patient; it is not deemed to be of *ordre public*, which would preclude a waiver.[117] And of course it is by no means axiomatic that a violation of medical secrecy should ipso facto give rise to a right to ban publication rather than simply a right to damages. It is of course not the rule in the United States.[118]

The criminal court announced that there was no evidence that Mitterrand had agreed to waive his right to privacy.[119] This was not strictly true, as Mitterrand had publicly announced his intention to disclose the state of his health. Although the court rejected this evidence, the announcement clearly showed intent to waive privacy. The criminal court also labored to conclude, contrary to existing case

116. *See* TRIBE, *supra* note 8, chs. 12, 15.
117. CODE OF MEDICAL ETHICS art. 4, § 1.
118. *See* WACKS, *supra* note 9, at 93 et seq.
119. *See* T.G.I. Paris, *supra* note 6, at 13.

law, that medical secrecy did not exist just to protect the patient, but also to protect the medical profession and all patients.[120] Yet from this position it follows that a patient could never waive his right to medical secrecy unless the medical profession and all patients agreed. This is clearly not existing French law.

The scope of the protection afforded by medical secrecy and who can invoke it was not explicitly examined by the court. Does medical secrecy protect just the patient or does it extend to his family? Does it extend beyond the death of the patient and, if so, why? Normally in France, as in the United States, information concerning a deceased person falls into the public domain unless some specific restriction applies. If medical secrecy extends beyond death, who has the right to invoke it? Is it a property right that can bequeathed? Who determines whether a violation of a deceased patient's right has occurred? Is it the governing body of the medical profession or the public prosecutor? Must there be a prior administrative ruling that a violation occurred? Must there be a criminal conviction?

While Dr. Gubler was in fact convicted, his conviction had not yet occurred at the time of either the hearing that granted the preliminary injunction or at the time of the appellate decision. Is it relevant that the Paris physicians' governing body, the "Conseil d'Ordre," elected not to participate as one of the complaining parties and that the criminal procedure was put in motion solely by the Mitterrand family?

At no point was national defense or security invoked by any of the parties or by any of the judges. At no point was there any condemnation of Dr. Gubler for his signing false medical bulletins every six months for a period of eleven years. In fact, as one observer noted, Dr. Gubler was not convicted and punished for having lied for eleven years but for having finally told the truth.[121]

One looks in vain for any discussion by counsel, by the courts or in the media of the fact that President Mitterrand, in deceiving the public through false medical bulletins, had violated various criminal provisions of French law.[122] In the U.S., the usual rule is that "[t]he

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120. *See id.* at 13.

121. *Catholic and Protestant Justice*, THE KEVORKIAN NEWSLETTER, vol. XVIII, Nº 4, July, 1996, at 28.

122. Article 432-1 of the French Criminal Code makes punishable by a prison sentence of five years and a 500,000 franc fine the taking of measures by a public official designed to prevent application of the law. *See* C. PÉN. art. 432-1 (Fr.). Article L.97 of the French Electoral Code makes it a criminal offense to change votes by the use of false information, and Article L.116 of the same code makes it a criminal offense to use any kind of fraudulent means to affect or attempt to affect the honesty of a ballot or to change or attempt to change the result of an election by such

privilege stemming from confidential relationships does not extend to communications in furtherance of a course of criminal conduct."[123] As the Supreme Court put it in 1933: "A privilege [survives] until the relation is abused and [vanishes] when abuse is shown."[124] In the mid-nineteenth century, the English courts ruled that "there is no confidence as to the disclosure of an iniquity. You cannot make me the confidant of a crime or a fraud, and be entitled to close up my lips upon any secret which you have the audacity to disclose to me."[125]

If one assumes that the only possible privacy involved is that of Mrs. Mitterrand and the three children because deceased persons are not normally considered to have rights, then one can ask what was the nature of the invasion. No allegations referred specifically to the children. As far as one can discern from the briefs, judicial opinions, and press extracts, the children are not even mentioned in Dr. Gubler's book. Is it an invasion of the children's privacy to disclose the diagnosis, diseases, and treatment of their deceased father? The issue is not discussed.

Neither the briefs nor the judicial opinions distinguish among the complaining parties. There are no intimations that their positions might not be identical. Mrs. Mitterrand appears to be sparingly mentioned in the book; no allegations were made that any of her secrets were revealed. Does a surviving spouse have legal rights in her husband's secrets? What aspect of her privacy was invaded? The court states that the surviving family members were "assaulted in their deepest feelings." Yet far more hostile things had been published about Mitterrand. Dr. Gubler's book was limited, according to the Court's own description, to the diagnosis, treatment, and evolution of his disease.[126]

It is not in fact clear from the judicial decisions whether the judges are dealing with a violation of the Article 9 privacy rights of the president's heirs or with the general tort statute of the French Civil Code, which provides that anyone who suffers injury through the fault

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means. There was no discussion of any of these articles by the parties or by the courts, nor has there been any discussion of them to date in the French press.

123. Paul A. Freund, *Foreword: On Presidential Privilege*, 88 HARV. L. REV. 13 (1974).

124. Clark v. United States, 289 U.S. 1, 16 (1933).

125. Gartside v. Outram, 26 L.J.R. 113 (Ch. 1857).

126. "But the claim to own secrets about oneself is often far-fetched. Thus the school bus driver who has a severe heart condition cannot rightfully claim to *own* this medical information, even though it concerns him intimately." SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 24 (1989).

of another is entitled to damages.[127] While the opinions talk about privacy, the analysis, to the extent there is an analysis, sounds more like what an American court would consider as the intentional infliction of emotional harm or extreme outrage. The fuzziness of the analysis is characteristic of both lawyers' briefs and judicial opinions in France and is no doubt directly related to the considerations discussed in the last section.

Clearly the Mitterrand-Gubler affair does not present the typical fact pattern of an invasion of privacy case. It is unlike the famous "Red Kimono" case where a married woman's past as a prostitute and defendant in a murder trial was revealed[128] or the celebrated child prodigy turned hermit who was subjected in a *New Yorker* article to unwanted publicity.[129] It is equally unlike the fictionalized account of a family's ordeal as hostages held in their home by a group of escaped prisoners[130] or the revelation of a private citizen's homosexuality after he performed a heroic act.[131]

The information revealed in the Mitterrand case concerned a deceased person, and the people involved, with the possible exception of the children, were the most public figures in France. Throughout their lives they had actively sought publicity. Public exposure was an integral and necessary part of their lives. There may remain a residual scope of privacy even for public figures but the burden of establishing it should be greater than a simple allegation of hurt feelings.

In an American context one can ask whether publication of the book constituted the tort of intentional infliction of emotional distress, but proving that tort would have required the Mitterrand family to have shown both physical symptoms and damages.[132] French law does not have an equivalent to this. They might have been able to maintain an action in some states for the tort of extreme outrage for which emotional distress alone is sufficient.[133] Neither of those torts would have justified an injunction. The French courts show no inclination or even awareness of the possible separation between the

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127. See C. CIV. arts. 1382-1386, *supra* note 25. *See generally* André Tunc, The Twentieth Century Development and Function of the Law of Torts in France, 14 INT'L & Comp. L.Q. 1089 (1965); YVONNE LAMBERT-FAIVRE, LE DROIT DU DOMMAGE CORPOREL 277 et seq. (1990); Ministère de la Justice, Guide des Droits des Victimes (Editions Gallimard 1982).

128. See Melvin v. Reid, 297 P. 91 (Cal. Dist. Ct. App. 4th Dist. 1931).

129. *See* Sidis v. F & R Pub. Corp., 113 F.2d 806 (2d Cir. 1940).

130. *See* Time Inc. v. Hill, 385 U.S. 374 (1967) (finding no invasion of privacy; the play depicting the event was in the public interest and, in the absence of malice, there could be no recovery).

131. *See* Sipple v. Chronicle Publ'g Co., 201 Cal. Rptr. 665 (Cal. Ct. App. 1984).

132. *See* WACKS, *supra* note 9, at 80 *et seq.*

133. *See id.* at 87.

harm caused by prior restraint on publication and remedying an invasion of privacy solely by means of a damage award. One wonders what the significance might be of the fact that French law does not contain the concept of punitive damages.

Issues relating to the burden and standard of proof were not discussed in the French decisions. While French procedural law is familiar with the concept of the burden of proof, it does not incorporate concepts of different levels of proof except in the distinction between civil and criminal proceedings. The normal French rule as to the burden of proof is similar to the American rule. The initial burden is on the party making the claim. If the French courts had focused on the burden of proof and had applied the English rule, they would have found it very difficult to grant an injunction. That rule requires that the plaintiff prove that the publication of the confidential information is *not* in the public interest.[134]

If the French courts had applied the American defense of "newsworthiness,"[135] they could not have reached the same result. In the French judicial decisions, there is no weighing of the interests of the public versus the interests of the Mitterrand family. Once the court concluded that medical secrecy had been violated, the court saw no other remedy but suppression of the book. The court did not acknowledge that "[i]n a free society there is a continuing public interest that the workings of government should be open to scrutiny and criticism."[136] No one pretended that Dr. Gubler's book involved "a morbid and sensational prying into private lives for its own sake."[137] After two days of testimony by Mitterrand's other attending physicians, the criminal court acknowledged that Dr. Gubler had not written his book for financial reasons but from honorable motives.[138]

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134. *See id.* at 96-97.

135. "[T]he law now appears to be such that a plaintiff must prove three elements in order to recover in an action for invasion of privacy based on the public disclosure of truth: First, the information disclosed must previously have been private; second, the disclosure must have been 'highly offensive to a reasonable person;' and third, the facts disclosed must not be 'of legitimate concern to the public,' or, as it is more commonly put, 'newsworthy.'" Schauer, *supra* note 9, at 699, 700-01 (1991) (footnotes omitted); *see also* WACKS, *supra* note 9, at 113 *et seq.*; BOK, *supra* note 126, at 252 ("The serious illness of a political candidate or the paranoia of a government leader are surely matters for legitimate public concern. Health professionals should not conceal them, much less lie about them as has so often been done, nor should reporters help keep the public in the dark through misguided discretion. Such concealment helped disguise from the public the mental deterioration suffered by Winston Churchill in his last years, and Hubert Humphrey's worsening cancer at the time when he announced he would campaign to be the Democratic candidate in the 1976 presidential election.").

136. Attorney-General, *supra* note 113, at 283.

137. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b.

138. *See* T.G.I. Paris, *supra* note 6, at 16.

Still, we find not the slightest inference in any of the French decisions that, as Lord Denning stated, a "public interest in maintaining the confidence must be balanced against the public interest in knowing the truth."[139]

If we turn to look at the evidence, neither the briefs nor judicial opinions disclose any evidence submitted to prove either the precise nature of the invasion or the nature of the damage resulting from publication, nor do they disclose why the payment of damages alone would not remedy the harm. Whatever evidence the courts took into consideration must have been admitted by means of what a common law court would characterize as judicial notice, a doctrine unknown to French law.[140]

XIV. THE HISTORICAL AND CULTURAL CONTEXT

The cursory discussion, at least by American standards, by the principal French appellate court of the issues raised by the Mitterrand case is characteristic of French judicial opinions. If we are surprised by the brevity of the discussion, it is no doubt due to our unfamiliarity with French literary style in opinion writing and with other distinctions between French and American appellate courts. Some knowledge of those differences should prove useful to an understanding of the Mitterrand-Gubler decisions.

The United States, with a population of about 270 million people, has a total of 1,149 appellate judges in the fifty state judicial systems and 179 judgeships in the federal courts of appeal.[141] The annual case filings in the federal courts of appeal are about 47,000.[142] France, which has a population of about 57 million people, has annual case filings in its appellate courts of about 169,000 civil cases

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139. Woodward v. Hutchins, 1 W.L.R. 760, 764 (1977).

140. Article 143 of the New Code of Civil Procedure provides that "the facts upon which the resolution of the suit depends, may, at the request of the parties or *sua sponte*, be the subject of any order of investigation legally permissible." N.C.P.C. art. 143, DE KERSTRAT, *supra* note 41, at 31. Investigative measures by the judge must respect the principle known as *contradictoire*, which means that all parties must be present and be able to debate the issues. This principle, in effect, precludes the use of judicial notice which is always *ex parte*. "Judicial Notice. The act by which a court in conducting a trial, or framing its decision, will, of its own motion, and without the production of evidence, recognize the existence and truth of certain facts, having a bearing on the controversy at bar, which, from their nature, are not properly the subject of testimony, or which are universally regarded as established by common notoriety. . . ." BLACK'S LAW DICTIONARY 986 (4th ed. 1951).

141. DANIEL JOHN MEADOR & JORDANA SIMONE BERNSTEIN, APPELLATE COURTS IN THE UNITED STATES 92 (1994).

142. *See id.* at 12.

alone.[143] The United States Supreme Court receives about 5000 petitions for certiorari per year and hands down just under 100 opinions.[144] In 1993, the French Supreme Court or "Cour de Cassation" received over 25,000 cases and decided just over 24,000.[145]

At the end of 1993, the French Supreme Court still had over 36,209 cases on its docket waiting to be judged.[146] To handle that caseload it has just over 100 judges while the Paris Court of Appeals has about eighty judges.[147] Most French judges have neither their own office nor a secretary nor any other assistance.[148] Significant differences are thus apparent between the two systems.[149]

Although the judicial systems differ significantly both in nature and in the style of judicial opinions, the judgment reached by the French courts remains strikingly contrary to the result that an American court would have reached, yet it emanates from a country that we associate with the eloquent words from the Declaration of the Rights of Man and the Citizen quoted at the outset. What explains the issuance of an injunction to ban publication of a book involving no issues of national security about one of the most important French leaders of the last 100 years?

In the author's view it is not so much that the judgment is surprising but that surprise is misplaced. Despite the 1789 Declaration of Human Rights and its incorporation into the 1958 Constitution of the Fifth Republic, it is an unfortunate fact that there exist practices in France today that are more customarily found in a state where the rule of law remains undeveloped. For example, pre-trial preventive detention is regularly used as a mechanism for

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143. *See* CAHIERS FRANÇAIS, *La Justice*, nº 251, (May-June, 1991), at 50.

144. *See The Supreme Court, 1994 Term*, 109 HARV. L. REV. 344 (1995).

145. *See Rapport*, *supra* note 90, at 446. There is also a second French Supreme Court, the Conseil d'Etat, which handles cases coming from the administrative courts. Those cases involve suits against the government and tax cases. *See generally* L. NEVILE BROWN & J.F. GARNER, FRENCH ADMINISTRATIVE LAW (2d ed. 1973). It should be noted that neither of the French Supreme Courts hears oral argument. The entire procedure is written.

146. *See Rapport*, *supra* note 90, at 446.

147. H. PINSSEAU, L'ORGANISATION JUDICIAIRE EN FRANCE 31-36 (1978).

148. *See* G. Danet, *Une Institution Délabrée*, 57 REVUE FRANÇAISE D'ADMINISTRATION PUBLIQUE 15, 19 (Jan.-March 1991) ("But very often, crushed under their work, the judges are hardly able to devote more than a few minutes to each of their judgments."). *See also* Laurent Greilsamer & D. Schneidermann, *Des juges à tout faire*, LE MONDE, Sept. 12, 1991, at 14.

149. To the extent that a judge need not analyze, weigh, and explain competing considerations in a reasoned decision, it becomes problematic whether he is fulfilling the role of a bureaucrat (one possessing authority) or the role of a professional with all that implies. *See* Arthur Isak Applebaum, *Professional Detachment: The Executioner of Paris*, 109 HARV. L. REV. 458, 472 (1995); *see also The Professions*, 92 Daedalus, no 4 (1963).

inducing confessions. French magistrates have publicly acknowledged using it solely for that purpose.[150] Much of the criminal process is actually required by law to take place in secret.[151]

A significant number of court judgments, particularly those against the government, are not enforced,[152] and laws are routinely ignored even by those charged with upholding them.[153]

In the area of free speech, censorship in France has a long history. Prior to the French Revolution, freedom to publish did not exist. Every publication required prior authorization and submission to a board of censors.[154] Diderot, cherished today as part of France's literary heritage, was imprisoned in 1749 for publishing his book on atheism.[155] In 1735, Voltaire's *Lettres Philosophiques* were burned; in 1762, Rousseau was arrested for publishing *Emile*, and his book was burned in front of the courthouse.[156] Montesquieu, in 1748, had to publish the first edition of his *Spirit of the Laws* in Switzerland.[157] Publication of banned books was punished by both fines and imprisonment. In the *Marriage of Figaro*, Beaumarchais mocked the existing system of censorship:

> Provided that I speak in my writings neither of the authorities nor of religion, nor of politics, nor of morals, nor of people in office, nor of finance, nor of the opera, nor of other events, nor of people who believe in something, I can publish freely, under the surveillance of two or three censors.[158]

That Beaumarchais's lament remains apt was demonstrated in October, 1995 when France set off underground nuclear tests in the Pacific Ocean. At that time of heightened tension and anti-French

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150. "What a strange country where pretrial detention which the law states is an exceptional measure continues more than ever to be massively used with the complicity of a large part of the magistrature. . . ." Joseph Rovan, *Quel étrange pays*, LE MONDE, Mar. 4, 1993, at 2 (The author was a former assistant to the Minister of Justice.). *See also Catholic and Protestant Justice*, *supra* note 121, at 26-27.

151. C. PR. PÉN. art. 11, *supra* note 91, at 49.

152. *See Circulaire du 9 fév. 1995 Relative au Respect des Décisions du Juge Judiciaire*, J.O., Feb. 15, 1995, which openly acknowledges the problem.

153. An example is the law which prohibits smoking in public places and which is routinely ignored even in courthouses where both lawyers and judges smoke in front of the "Smoking Forbidden" signs. It is also routinely ignored in airports. Code of Public Health, Art. L. 355-28: "It is forbidden to smoke in places that receive the public, especially schools and in public transportation, except in expressly designated areas." This law came into effect on January 1, 1993 and has been ignored ever since.

154. *See* ROBERT, *supra* note 112, at 584-91.

155. The book was *Lettre sur les aveugles à l'usage de ceux qui voient [Letter about the blind for the use of those who see]*. *See* DICTIONNAIRE DES AUTEURS FRANÇAIS 120-21 (1961).

156. *See* CLAUDE-ALBERT COLLIARD, LIBERTÉS PUBLIQUES 445 (5th ed. 1975).

157. *See* ROBERT, *supra* note 112, at 585.

158. Beaumarchais, *The Marriage of Figaro*, Act V, Scene III.

demonstrations around the world, twenty-five Danish high school students who were visiting Paris were deported for wearing T-shirts emblazoned with "Chirac Non!"[159] It was demonstrated again a year later in November, 1996 when two well-known, French rap singers were convicted in Toulon for "verbal outrage relating to public authorities."[160]

In July 1996, the singers had appeared at a "liberty concert" protesting against the mayoral election won in Toulon by the racist National Front. Some of the policemen attending the concert filed a complaint against the rappers because of lyrics the policemen deemed insulting. In November, they were convicted and given a six month prison sentence of which three months were suspended. The rappers will thus spend three months in prison for their songs. They were also fined 50,000 FF (about $10,000) and prohibited from exercising their profession for a period of six months.[161] The Minister of Justice judged that the penalty was too harsh and ordered the prosecutor to appeal,[162] whereupon two of the unions representing the judges publicly criticized the Justice Minister and the third union publicly came out in his support.[163] While the rappers have not yet begun to serve time, they will unless their sentence is modified by the appellate court. The following year in 1997, the Minister of the Interior announced publicly that he would criminally pursue any person who criticized the police.[164]

While France today remains nominally a Roman Catholic country, many of its citizens appear to have been persuaded by Diderot; a large percentage describe themselves as atheists, and the

159. C.R. Whitney, *Anti-Nuke Shirts Get Under Paris's Skin*, INT'L HERALD TRIB., Oct. 17, 1995, at 10.

160. C. PÉN art. 224, *supra* note 33, at 85.

161. *See* Nathaniel Herzberg & Erich Inciyan, *Les Chanteurs de NTM Condamnés à la Prison Ferme Pour Outrage à La Police*, LE MONDE, Nov. 16, 1996, at 9; *see also* Barry James, *2 French Rappers Get Jail for Insults to Police*, INT'L HERALD TRIB., Nov. 16-17, 1996, at 5 (The full text of the song is printed by *Le Monde*. Compared to American rap music it is extremely mild.).

162. *See* Erich Inciyan & Arlane Chemin, *Le Garde des Sceaux Tente de Désamorcer la Crise Dans l'affaire NTM*, LE MONDE, Nov. 19, 1996, at 9.

163. *See* Phillipe Broussard, *Plusieurs Syndicats de Droite Critiquent l'intervention de M. Toubon Dans l'affaire NTM*, LE MONDE, Nov. 20, 1996, at 11. Curiously, the principal union representing the police came out in favor of the Justice Minister's decision to appeal the sentence stating that "we only asked for one symbolic franc damages . . . the judgment appears to us much too severe and disproportionate. The police do not want to make war on youth. . . ." *Id.*

164. M. Debré, Pursuivra systématiquement tous ceux qui critiquent la police, LE MONDE, Feb. 1, 1997, at 10.

percentage of churchgoers is very low.[165] Yet it is not encouraging to discover that more than two centuries after the Revolution and nearly one hundred years after the separation of Church and State,[166] the same criminal sanctions that were applied to authors and publishers before the French Revolution were applied at the end of the twentieth century to Dr. Gubler and to the president of the publishing house Plon. The French proverb that "the more things change, the more they stay the same" bears unhappy witness to this very French phenomenon and perhaps to the inherent conservatism of all human communities.

While the Constitution of 1791 established a right to freedom of the press, only a year later that right was significantly diluted by limiting it to that portion of the press that was favorable to the ruling party.[167] Thus even after 1789, the same mechanisms of government authorization to publish and censorship used by kings prior to the Revolution were put back in place and continued as an integral part of French life and law with only sporadic interruptions throughout the nineteenth and twentieth centuries.[168]

In 1881, a major law governing the press was introduced, and, although modified a number of times, it is still in effect today.[169] This law eliminated the requirement of prior governmental authorization, censorship, and the criminal offense of holding certain opinions. Yet censorship was re-introduced during the First World War and again in 1939. Holding certain opinions (the "délit d'opinion"), which throughout most of French history has been a criminal offense, remains a part of the criminal code. Remnants of that tradition still exist; it is a crime, for example, to express an opinion denying the existence of the Holocaust,[170] and there have been recent convictions under that law.[171]

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165. *See Religion in France Today* 186-87 (J.E. Flower ed., 1993) (noting that fewer than 10 percent of Catholics regularly attend mass and that 22,000 of 38,000 parishes in France are without their own priest); *see also* JOHN ARDAGH, FRANCE IN THE 1980S 487 (1982) ("the percentage of people claiming to believe in God has fallen since 1968 from 74 to 65, and the drop is sharpest among the young").

166. Law of Sept. 9, 1905.

167. Between 1791 and 1803 France adopted four different constitutions, each beginning with declarations of fundamental rights. *See* M. LYONS, NAPOLEON BONAPARTE AND THE LEGACY OF THE FRENCH REVOLUTION 60 (1994). There have been five more since that date. *See* Cynthia Vroom, *Constitutional Protection of Individual Liberties in France: The Conseil Constitutionnel Since 1971*, 63 TUL. L. REV. 265 *passim* (1988).

168. *See* ROBERT, *supra* note 112, at 584-91.

169. Law of July 29, 1881.

170. *See* Law of July 29, 1881, art. 24, par. 3, as modified by Law no. 51-18 of Jan. 5, 1951 and Law no. 87-1157 of Dec. 31, 1987, and article 24 bis added by the Law no. 90-615 of

It is a criminal offense subject to imprisonment to cast "discredit on a judicial decision. . . ."[172] In 1994, a prominent French lawyer was indicted under this provision. After unsuccessfully defending a North African immigrant on a murder charge at which there was meager and unreliable evidence, he said to an assembled group outside the courthouse in the city of Grasse in the south of France, referring obliquely to the *Dreyfus* case, "One hundred years ago a young officer was condemned whose sole fault was to be Jewish. Today a gardener is condemned whose sole wrong is to be North African."[173] The statement was vindicated two years later when President Chirac substantially reduced his sentence by an executive pardon.[174]

That a lawyer was actually indicted for making such a statement mirrors darkly the official attitude to free speech rights enshrined in the Declaration of the Rights of Man and later incorporated in the 1958 Constitution. For the indictment undoubtedly required not only a decision by the public prosecutor in Nice, but the authorization of his hierarchical superior at the Ministry of Justice in Paris and, quite possibly, the Minister of Justice himself.

It is noteworthy that the Minister of Justice is rarely drawn from the bar. The current Minister of Justice was formerly the Minister of Culture. No legal rule or historical tradition mandates that the Justice Ministry be headed by a member of the bar or even have a legal education.[175] The implicit philosophy reflected in this position is that law is not an independent discipline, so that professional legal skills,

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July 13, 1990, included in the CODE PÉNAL, NOUVEAU CODE PÉNAL 1396, 1398 (Dalloz 1992-1993).

171. *See* Cass. crim., Jan. 14, 1971, Bull. crim. no. 14 (1er arrêt); Paris, Oct. 31, 1990, GAZ. PAL. 1991.1.311, note Bilger.

172. C. PÉN., art. 226. Although the article contains an exception for comment in legal journals, it did not preclude the indictment of two law professors for criminal defamation. *See* Paris, Dec. 12, 1956 J.C.P. 1957, II 9702; *and* Paris, Mar. 20, 1956, J.C.P. 1956, II, 9449 (*cited in* ROBERT, *supra* note 112, at 607).

173. Anne Chemin, *Jacques Chirac Gracie Omar Raddad d'une Partie de sa Peine de Réclusion Criminelle*, LE MONDE, May 11, 1996, at 32. Charges were finally dropped against the lawyer in mid 1997. *See* LE MONDE, July 3, 1997, at 10.

174. *See* LE MONDE, *supra* note 172.

175. In the past twenty-five years the author knows of only one instance when the French Ministry of Justice was headed by a lawyer. Robert Badinter was Minister of Justice during President Mitterrand's first term and was instrumental in abolishing capital punishment and in abolishing France's reservation to the European Convention on Human Rights, which precluded French citizens from having individual recourse to the European Court of Human Rights. In addition to Badinter, counsel to the Mitterrand family, Georges Kiejman, served as Delegated Minister (*Ministre Délégué à la Justice*) from October 1, 1990 to April 30, 1991 and shared the direction of the Justice Ministry.

knowledge, and experience in the practice of law are not crucial to responsibility for administering the French justice system.

The perception of law as a part of general knowledge rather than a specialized calling is reflected as well in the educational system. French law schools are not professional schools but undergraduate faculties roughly equivalent to a political science department in an American university.[176] The actual professional education of French lawyers is taken on by a highly fragmented profession divided into 183 different bar associations[177] and is far more abbreviated than American legal education.

Finally, the perception of law as an ideal which inevitably will be transgressed rather than as a pragmatic rule to be applied illuminates as well a fundamental schism between common law and Latin traditions. This was well expressed recently by the Secretary-General of the French Institute of Superior Studies on Justice:

> All our laws have been adopted on the basis of two implicit assumptions that must never be disclosed. The first is that the law is not necessarily adopted in order to be applied but also to be brandished. This is a Catholic relationship to the law that is profound. For Latin cultures, the law is an ideal for an ideal world. We must refer to it, aim to apply it, no more . . . . The second implicit assumption rests on the fact that the judiciary will not fulfill its role. We adopt our laws on the cheap knowing that the judiciary does not constitute a true power. This is the Catholic and Latin relationship to criminal law. We accumulate prohibitions without worrying too much about obeying them. We live in transgression. The law is there to be violated.[178]

Unlike the American constitutional structure, the French judiciary is not a co-equal branch of government, but is constitutionally subordinate to the executive branch.[179] That this

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176. It should be noted that law is taught as part of the undergraduate curriculum in England as well, but the postgraduate professional training is considerably longer than in France.

177. *See* Ronald P. Sokol, *Reforming the French Legal Profession*, 26 INT'L. LAW. 1025 (1992).

178. Garapon, A., *La procédure inquisitoire se retourne contre le Prince*, LE MONDE, Feb. 6, 1999, Supplement, *Trois Ministres en Procès L'affaire du sang contaminé*, p. VIII, col. 2. "Toutes nos lois étaient votées sur deux implicités, qu'il ne fallait surtout pas révéler. Le premier, c'est que la loi n'est pas nécessairement faite pour être appliquée mais aussi pour être brandie. C'est un rapport catholique à la loi qui est très profond. Pour les cultures latines, la loi, c'est l'idéal pour un monde idéal. Il faut s'y référer, tendre à l'appliquer, pas d'avantage . . . . Le second implicité reposait sur le fait que la magistrature ne jouerait pas son rôle. On voterait les lois à moindre frais parce qu'on savait que la magistrature ne constituait pas un véritable pouvoir. C'est le rapport catholique et latin á la loi pénale: on accumule les interdictions sans trop se soucier de les respecter. On vit dans la transgression. La loi est là pour être transgressée."

179. *See* FR. CONST., title VIII, art. 64 (1958), "The President is the guarantor of the independence of the judicial authority." As one judge has written, "But it is notorious that

subordination is considered a normal part of French political life was recently confirmed by a prominent politician who, in an interview stated that "Justice should not be constructed as a totally independent power. There exists a judicial authority, but not a judicial power equal to the legislative or executive power."[180] In addition to its subordination to the executive branch, the French judiciary is today, and has historically been throughout the Fifth Republic, severely underfinanced.[181]

French judges are not drawn from the practicing bar but rather are civil servants who enter the judiciary as a separate profession upon completing their legal studies in their early 20s. They then rise slowly through a civil service hierarchy to higher courts and more desirable locations. The French Supreme Court is at the top of the pyramid with the Paris Court of Appeals just below. An analogy can be made to American Foreign Service Officers in the State Department. They too are civil servants who move up a hierarchical ladder. They start out in consular posts deemed less desirable and work their way up to the highest posts of ambassador or deputy chief of mission at a major embassy.

Because French judges are civil servants, they are graded by their superiors, give grades to those below themselves,[182] receive promotions, have unions,[183] go on strike, and generally behave like civil servants. There is no significant lateral job movement between

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Montesquieu's thought has hardly inspired French public powers, and that the mingling of the executive in the functioning of the judiciary has recently attained new heights." Valéry Turcey, *Redonner Confiance Aux Juges*, LE MONDE, Apr. 22, 1993, at 2; *see also Le Syndicat de la Magistrature Définit Dix Principes Pour l'indépendance de la Justice*, LE MONDE, Dec. 3, 1996, at 11.

180. "La justice ne doit pas être érigée en pouvoir indépendant: L'ancien ministre se dit hostile à la rupture du lien entre le parquet et le gouvernement," *Jean-Pierre Chevènement*, LE MONDE, Nov. 12, 1996, at 10. Under the current government of Lionel Jospin, Mr. Chevènement is Minister of the Interior.

181. During the first 30 years of the Fifth Republic France devoted less than one percent of its national budget to the Ministry of Justice, which includes the prison system as well as the entire civil and criminal systems—courts, judges, prosecutors, maintenance of old buildings and construction of new ones. *See* Henri Nallet, *Justice: Une Rénovation en Profondeur*, LE MONDE, Sept. 28, 1991, at 2 (Nallet was Minister of Justice when he wrote this article.). The percentage has been slowly rising and for 1995 was projected at 22.2 billion francs [about $4.4 billion] or 1.9% of the total budget. *See* Anne Chemin, *Les Credits de la Justice Sont en Housse de 4%*, LE MONDE, Oct. 4, 1994, at 13. By contrast, the U.S. Department of Justice spent in 1995 $10.3 billion just to enforce criminal laws. Lincoln Caplan, *Unequal Loyalty*, A.B.A.J., July 1995, at 57.

182. Laurent Greilsamer & Daniel Schneidermann, *Enquête: Des Juges à Tout Faire*, LE MONDE, Sept. 11, 1991, at 12.

183. The French judges are represented by three different unions: a moderate union—53%; a leftist union—31%; and a right-wing union—13%. *See* LE MONDE, June 25, 1996, at 9.

the magistracy, practicing lawyers, academics, and other legally-trained people. Each profession in France that deals with legal problems is hermetic.

French legal theory adheres to the principle of an independent judiciary. The principle is rationalized by use of a doctrine known as "inamovibilité" which means "unmoveable."[184] A judge has the legal right to refuse to be removed from his current post, and this right of "inamovibilité" is deemed, under French theory, to make him independent, but the right is of little use to a magistrate whose entire career path is dependent upon his ascension in a civil service. Instances of use of inamovibilité are rare, although instances of interference by the executive branch are frequent.[185]

While there have been recent attempts by the French judiciary to assume more independence, the executive branch has shown little enthusiasm to relinquish its power. It is doubtful that the judiciary can ever become independent in an American sense without constitutional changes making it a coequal branch of government and without instituting more meaningful protections for judges.[186]

In a system where judges are civil servants subservient to the executive branch of government and lawyers are not thoroughly trained, it is not wholly surprising that the procedural protections of citizens in the area of fundamental rights are, in turn, fragile. There can be little doubt that the historically feeble judicial protection of free speech rights is intimately linked to the weakness of the judiciary itself.

XV. CONCLUSION

Having thus reported on this recent French judicial failure to protect freedom of expression, it must be noted that the story has not yet ended. While it is true that Dr. Gubler's book has been banned

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184. The principle of *Inamovibilité* is guaranteed by Article 64 of the 1958 Constitution. *See* FR. CONST., art. 64 (1958).

185. "But in France the magistrat is a career which runs from tribunals of first instance to the courts of appeal, then from the courts of appeal to the Court of Cassation. Permanent tenure thus appears an insufficient guarantee, for while it gives one who enjoys it the assurance of not being deprived of the position which he occupies, it does not assure him a normal career; it gives him no right to promotion. . . ." M. Letourneur & R. Drago, *The Rule of Law as Understood in France*, 7 AM. J. COMP. LAW 147, 166 (1958); *see also* Jean-Claude Bouvier, *L'indispensable Révolution Judiciaire*, LE MONDE, July 4, 1996, at 15 ("And he [the judge] awaits instructions [from the Minister of Justice]. It's that or his job; the choice—or rather non-choice- is clear.").

186. "[N]o reform can untie the judicial crisis if it does not first liquidate the arrears of history which otherwise threatens the entire effort." Phillipe Robert, *Justice: Le poids de l'Histoire*, LE MONDE, Apr. 22, 1993, at 2. Cécile Prieur *Le Syndicat de la Magistrature Définit Dix Principes Pour l'indépendance de la Justice*, LE MONDE, Dec. 3, 1996, at 11.

and is no longer in the bookshops, the French Supreme Court may, in a few years, reverse the decision. This author predicts that it will. Of course, the damage has already been done. In the 1960s, during the French-Algerian War a similar case occurred when books published by a respected French publisher were banned. Ultimately the ban was struck down, but by the time publication began again, the times had so changed that the books were no longer topical, and this was precisely the government's objective.[187]

In the Mitterrand-Gubler affair, the executive branch took the position that publication should be allowed, but the judiciary disagreed.[188] French judges thus prevented the distribution of a book that on the day of publication 40,000 French citizens expressed their desire to read by buying the book.

If and when other French judges decide to reverse their brethren, there can be little question that the book will be far less topical. Judicial protection of a deceased national leader thus prevailed over the sacred rights to which "the French people solemnly proclaim[ed] their attachment" in 1789 and again at the beginning of the Fifth Republic in 1958, but what French leaders like to term the "serenity of justice" will have been preserved from untimely disturbances. As Professor Cobban so aptly observed thirty years ago in prefacing his great study of modern French history, "For a thousand years France was a monarchy; it has been a republic for less than a hundred."[189]

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187. *See* Jérome Lindon, *J'aurais Publié le Docteur Gubler*, LE MONDE, June 18, 1996, at 17.

188. "Of course, every country has its scandals, its *affaires*, but there is something special about the French variety. The French affairs have a ritualistic aspect . . . They come along every year or so, large affairs or small ones, shredding a bit the fabric of political lif . . . There is something about the nature of French life and French concerns that gets them regularly into this kind of difficulty . . . Classically, they involve conflict between a moral or legal principle on the one side and the perceived interests of the state on the other. They put the French in a bind. As a people, they want to observe the principle that has been flouted, and it is the urge toward examination that produces the *affaire* in the first place. . . . But the French revere also the concept of the interests of the state what they call *la raison d'état*, 'the reason of state'—which is, after all, the vehicle by which the national pride and grandeur are to be achieved. This reverence for two often competing values, the interests of principle against the interests of the state, lands them in that most modern of dilemmas the desire to act morally and openly in an amoral world while at the same time recognizing the need to behave amorally in the service of the national interest. The dilemma works itself out almost always in more or less the same fashion. The *affaire* becomes the event of the moment, generating an undue portion of noise and commentary; then, just as suddenly, it disappears, still unresolved, from public view. And that is yet another enduring characteristic of the French *affaires*. They leave behind them a thick residue of mystery, a fog of unanswered questions, sometimes even unresolved crimes, certainly tangles of loose ends. Recent French history is heavily weighted with the burden of the unknown." RICHARD BERNSTEIN, FRAGILE GLORY 280-81 (1991).

189. 3 A. COBBAN, A HISTORY OF MODERN FRANCE 1871-1962, at 9 (1965).

More recently a French commentator observed that "[t]he Republic does not have the justice of its principles."[190] Enforced ironically by the judiciary rather than the executive, censorship, a vested right of the monarchy, prevailed in this case. As the newspaper *Le Monde* editorialized, if France cannot surmount this kind of problem, "France will confirm once again that it remains a prisoner of its monarchical culture where the powerful, even when gone, are sheltered from all public curiosity."[191]

In the final analysis, secrecy prevailed because French patterns of thought remain firmly rooted in a monarchical tradition, because the French Establishment is fearful of an open society, and because in France much is hidden and confidentiality esteemed. Censorship prevailed because the press is weak,[192] the broadcasting media fearful of a government which has historically owned, and subsidized it.[193] Furthermore, secrecy and censorship prevailed because the judiciary is timid and impoverished, the legal profession ill trained and without power, and perhaps, to a lesser extent, because, as in all societies, death is sacred, and "[t]he sacred and the secret have been linked from earliest times."[194] National mourning, still in progress when the book was published, instilled a kind of tribal unity from which even judges cannot easily escape.[195] As the sanctity of death recedes and Mitterrand assumes his place in the pantheon of history, the judicially ordered ban on publication may drop mysteriously away and freedom of the press be reinstated, enabling France once again solemnly to declare its belief in the Rights of Man and the Citizen. France's

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190. Phillipe Robert, *Justice: Le poids de l'Histoire*, LE MONDE, Apr. 22, 1993, at 2. A similar point is made by Bernstein who considers that "DeGaulle's achievement in creating the Fifth Republic was to allow the French to be led by a democratic *grand homme*, by a figure who embodied a certain authoritarianism, a certain royalist panache, while being unmistakably committed to the values of the Republic. . . . Given the French propensity for partisan violence, for undermining their own republican principles by their yearning for a king, it is not a slight achievement." *See* BERNSTEIN, *supra* note 188, at 326.

191. *Contre le Secret d'État*, LE MONDE, Nov. 1, 1996, at 18.

192. "France is now placed thirtieth in the world tables of newspapers consumed per one thousand inhabitants. . . . In 1914, France with America headed the world tables. . . ." R. DAVIS, THE PRESS IN FRANCE TODAY 207 (1993); *see also* ROBERT, *supra* note 112, at 584-612.

193. *See generally* G. HARE, THE BROADCASTING MEDIA IN FRANCE TODAY, 238-70 (1993); Alain Salles, *Le Divorce Entre la Presse et le pouvoir*, LE MONDE, Dec. 6, 1996, at 1.

194. BOK, *supra* note 126, at 6. "The theme of burial touches on elemental chords in private and public sentiment." STEINER, G., ANTIGONES (Yale University Press, 1984), 114.

195. RONALD P. SOKOL, JUSTICE AFTER DARWIN (1975). Also see the interesting work done by the Gruter Institute for Law and Behavioral Research. It should be noted, though, that the permanent injunction was granted at the end of October 1996, almost ten months after Mitterrand's death.

Revolutionary aspirations would then be reintegrated into its national mythology.