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## THE MILITARY TRIAL AT RENNES: TEXT AND SUBTEXT OF THE DREYFUS AFFAIR

*Vivian Grosswald Curran\**

The Dreyfus affair, known throughout France simply as “the affair” (“*l’affaire*”), caused the downfall of multiple Ministers of War, of an administration, and led France to the brink of civil war, as well as to a failed *coup d’état*.<sup>1</sup>

The military trial at Rennes, namely Dreyfus’s second military trial, which will be the central focus of this essay, was a culminating point of *l’affaire*. It was the last opportunity for the military system of justice to redeem itself. This was because of the incontrovertible evidence of Dreyfus’s innocence that existed by the time of the second trial.<sup>2</sup> The guilt of the true traitor, Esterhazy, had been established through a sample of his handwriting, widely disseminated in the press, juxtaposed with a facsimile of the *bordereau* (the treasonous piece of writing by a spy for Germany that had constituted the basis of Dreyfus’s arrest and conviction), which also was in Esterhazy’s handwriting.<sup>3</sup> A document concocted by Colonel Henry, on behalf of the army, that had been used in order to ensure that Dreyfus

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\* Distinguished Faculty Scholar, Professor of Law, University of Pittsburgh. My sincerest thanks to Professor Rodger Citron and Dean Linda Howard Weissman of Touro College Law Center for inviting me to address the panel on Dreyfus and the military tribunals from which this paper emerged, and for having organized a uniquely valuable and pleasurable intellectual experience. My thanks also to my co-panelists, General André Bach and Professor David Cole, as well as to Professors Michael Marrus and Gary Shaw, who introduced and moderated the panel on military tribunals.

<sup>1</sup> See generally JEAN-DENIS BREDIN, *THE AFFAIR: THE CASE OF ALFRED DREYFUS* (Jeffrey Mehlman trans., George Braziller, Inc. 1986) (1983) (discussing “*l’affaire*”); RUTH HARRIS, *DREYFUS: POLITICS, EMOTION, AND THE SCANDAL OF THE CENTURY 469-76* (Henry Holt & Co., LLC 2010) (2010) (including an excellent chronology of the events of “*l’affaire*”); Jean-Max Guieu, *Chronology of the Dreyfus Affair*, GEORGETOWN UNIV. (May 2000), <http://www9.georgetown.edu/faculty/guieuj/DreyfusCase/Chronology%20of%20the%20Dreyfus%20Affair.htm> (including a simple, yet comprehensive, chronology of the events of “*l’affaire*”).

<sup>2</sup> Guieu, *supra* note 1.

<sup>3</sup> BREDIN, *supra* note 1, at 224-25.

would be convicted later had been revealed to be a forgery.<sup>4</sup> By the time of the second trial, it also was known that the army had supplied a file to the military judges secretly during the course of the first trial, without divulging its contents to the defense, in violation of the law.<sup>5</sup> Still other relevant exculpatory information had been disseminated in the pro-Dreyfus press.<sup>6</sup> The Rennes military trial began with a reading to the court of the report drafted by the Court of Cassation, France's supreme court for criminal matters, which had decided to remand the Dreyfus conviction for a second military trial by the Council of War (*le Conseil de Guerre*).<sup>7</sup> The Court of Cassation's report was thorough and specific, setting forth the many irregularities of the first trial and the grounds for Dreyfus to be innocent.<sup>8</sup>

What, then, was the result of Dreyfus's second trial? He was convicted again, although this time with "attenuating circumstances," and for only ten years.<sup>9</sup> A shift had taken place in the dynamic of interaction between the public and the trial with the second Council of War. Firstly, the verdict itself would no longer be unanimous, despite the fact that, just as last time, all of the judges were in the military.<sup>10</sup> Two out of the seven judges would vote to acquit.<sup>11</sup> Secondly, the sentence voted by the remaining five would not be carried out.<sup>12</sup> Indeed, immediately after the verdict, the military court *unanimously* asked the government that Dreyfus not be subjected to military degradation.<sup>13</sup> In this paradoxical gesture by the Rennes tribunal, that just had voted to convict Dreyfus, Jean-Denis Bredin sees the first step towards the eventual, and highly controversial, presiden-

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<sup>4</sup> *Id.* at 225.

<sup>5</sup> Guieu, *supra* note 1.

<sup>6</sup> BREDIN, *supra* note 1, at 221-22 (explaining that the press had said so much that it was clear that charges would be dropped).

<sup>7</sup> 1 LE PROCÈS DREYFUS: DEVANT LE CONSEIL DE GUERRE DE RENNES (7 AOUT – 9 SEPT. 1899) 2-7 (P.-V Stock ed., 1900).

<sup>8</sup> *Id.*; *see also* Guieu, *supra* note 1 (outlining what led to the Court of Cassation's decision and its effect).

<sup>9</sup> *See, e.g.*, BREDIN, *supra* note 1, at 427-28 (describing the sentencing); HARRIS, *supra* note 1, at 474 (describing the guilty verdict); Guieu, *supra* note 1 (stating that Dreyfus was found guilty once again).

<sup>10</sup> *See* BREDIN, *supra* note 1, at 517, 542-43 (recounting the 5-2 decision).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 545.

<sup>13</sup> *Id.* After his initial conviction, Dreyfus had been degraded and sent to Devil's Island in perpetuity. HARRIS, *supra* note 1, at 470. With the reopening of his trial, his rank had been restored, which meant that with his subsequent re-conviction; he once again should have been subjected to the same degradation.

tial pardon of Dreyfus.<sup>14</sup> Although the pardon left much to be desired, even that was not the final chapter in the *affaire*. In 1906 Dreyfus finally was fully vindicated when he won a Supreme Court reversal (“*cassation*”) of the Rennes conviction, and this time it was to be without remand (“*renvoi*”).<sup>15</sup>

This conclusion was procedurally exceptional for the French Supreme Court of criminal law, for it meant that the Court of Cassation had decided not only to void the lower court’s decision, but also that nothing subsisted which could be “qualified as a crime or a misdemeanor.”<sup>16</sup> The latter step generally was not undertaken by the court which, as its name made clear, habitually quashed (“*cassait*”) lower court decisions, but left them to be substantively retried in further, *de novo* proceedings.<sup>17</sup> In Professor Bell’s words, “The normal cassation procedure is that the Cour de cassation merely decides the disputed question of law and then refers it to a different cour d’appel [court of appeals] for a decision on the merits in the light of its ruling.”<sup>18</sup> Thus, the Cour de cassation “is not strictly an appeal court, but merely a body that quashes the rulings of appeal courts for error of law.”<sup>19</sup>

The first military tribunal had been able to insist that no hearings be conducted publicly.<sup>20</sup> At Rennes, the second military tribunal held all hearings publicly, except for one, and the fact that the court insisted on holding any at all behind closed doors both exacerbated criticism of the proceedings and was hotly contested by the defense, for this time the eyes of the country and of the world were fixed on

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<sup>14</sup> BREDIN, *supra* note 1, at 545.

<sup>15</sup> *Id.* at 547.

<sup>16</sup> *Id.*

<sup>17</sup> JOHN BELL, FRENCH LEGAL CULTURES 29 (Lexis Law Publ’g 2001) (2001). Unlike in the United States, on such remands, courts are not bound to follow the Court of Cassation’s reasoning. See Hervé Rigoli, INSTITUTIONS JUDICIAIRES 121 (3d ed. 2001). Only in recent years did the law change to oblige lower courts to conform to Supreme Court rulings on a *second* remand. Today, after a first remand, where a second lower court echoes the first one, disagreeing with the Supreme Court, the Court of Cassation will rehear the case in plenary session on appeal, after which a lower court on remand must follow its instructions. In Dreyfus’s time, even that much was not required.

<sup>18</sup> BELL, *supra* note 17.

<sup>19</sup> *Id.*

<sup>20</sup> Steven Lubet, *Why the Dreyfus Affair Does and Doesn’t Matter*, 13 GREEN BAG 2d 329, 331 (2010) (reviewing LOUIS BEGLEY, WHY THE DREYFUS AFFAIR MATTERS (Yale Univ. Press 2009) (“Dreyfus’s attorney asked that the hearing be opened to the public, expecting to expose the transparent weakness of the prosecution case, but the military judges denied the request.”)).

Rennes.<sup>21</sup> The world press was ready to convict France if France convicted Dreyfus. And France itself, author of the *Rights of Man and Citizens*,<sup>22</sup> country of the *philosophes*, and of the Enlightenment, was only too painfully aware of this.<sup>23</sup> After the verdict, not only did the international press explode with articles critical of France, but there were also demonstrations against France in many countries, including Italy, Belgium, Great Britain, and the United States.<sup>24</sup> One of the Frances that was torn in two by “*l’affaire*” suffered, while the other celebrated Dreyfus’s second conviction.<sup>25</sup>

Outside of France, however, a different, philo-French perspective also existed, which can be seen in a description given in the recent memoir of Henri Borlant, the only survivor of six thousand Jewish children under the age of sixteen who were deported from France to Auschwitz in 1942.<sup>26</sup> Henri Borlant described his father, born in the late nineteenth century in a village near Odessa in what today is Ukraine.<sup>27</sup> Henri Borlant noted:

[His father’s] dream [had been] to come to France. At the time, people used to say that a country where half the population championed Dreyfus, an obscure Jewish officer, could only be a marvelous country where it would be good to live, a country where a Jew could become a captain.<sup>28</sup>

Just as it captured the imagination and indignation of many outside of France, the case of this officer convicted of high treason for supplying intelligence to the enemy, and sent to rot on Devil’s Island, captivated and destabilized all of France, and in so doing, both illuminated cracks that previously had not been apparent and deepened others that had been.<sup>29</sup> This hold on the imagination was of a symbolic order. The Dreyfus affair is the story of its own subtext.

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<sup>21</sup> THE ANNUAL REGISTER: A REVIEW OF PUBLIC EVENTS AT HOME AND ABROAD FOR THE YEAR 1899, at 255 (1900).

<sup>22</sup> *Rights of Man and Citizens* (1789), ASSEMBLÉE NATIONALE, <http://www.assemblee-nationale.fr/histoire/dudh/1789.asp> (last visited Dec. 27, 2012).

<sup>23</sup> See, e.g., PETER GAY, THE ENLIGHTENMENT: THE RISE OF MODERN PAGANISM (reissued 1995).

<sup>24</sup> BREDIN, *supra* note 1, at 546.

<sup>25</sup> *Id.* at 543.

<sup>26</sup> HENRI BORLANT, MERCI D’AVOIR SURVECU 27 (2011).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Lubet, *supra* note 20, at 332.

But not just of one subtext: it is the story of numerous underlying subtexts, one of the most important of which was the struggle to define, or to redefine, the French nation.

Dreyfus himself, swept up in the arcane mechanisms of penal machinery, was focused single-mindedly on reclaiming his innocence and honor.<sup>30</sup> In his reticence about other issues, those other issues, such as political matters, questions of the Enlightenment and human rights, floated on a symbolic plane. They were palimpsests underlying the two trials, or, seen another way, open spaces, in which the public became personally invested and engaged. Consequently, one can understand the sense of some who felt that Alfred Dreyfus did not measure up to the Dreyfus affair. On the other hand, to whose affair did he not measure up? It was their own, rather than his.

Reproaches have often been leveled against Dreyfus that he did not speak out in his own defense, and that he appeared emotionless throughout the Rennes trial.<sup>31</sup> A review of the transcript of the trial compels the opposite conclusion. Dreyfus spoke at length, and always confidently and with impressive specificity and precision, reconstituting events, showing how and why his accusers could not be telling the truth.<sup>32</sup> By now he, too, had been obliged to recognize that his accusers were guilty of fabrications and inventions, and not just of errors. On numerous occasions throughout the trial, he broke out in protest against the injustice and inaccuracy of testimony and, as he put it, its calumnious nature.<sup>33</sup>

Dreyfus's own abstention from entering into the struggle to define his nation came from the unshakeable faith in France that this brilliant man and soldier bore, and that he was to fight for again in the First World War.<sup>34</sup> Charles de Gaulle would say of himself in his memoirs that he always had had "a certain idea of France."<sup>35</sup> Of Dreyfus, one can say that he had "an *idea certain*" of France admitting no doubts. Dreyfus remained a man of exemplary honor and in-

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<sup>30</sup> ALFRED DREYFUS & L.G. MOREAU, THE LETTERS OF CAPTAIN DREYFUS TO HIS WIFE 112 (1900).

<sup>31</sup> See BREDIN, *supra* note 1, at 405-07 (describing the trial generally and the impression made by Dreyfus specifically, on others, some of whom were in attendance).

<sup>32</sup> See LE PROCÉS DREYFUS, *supra* note 7, vol. 1, at 22-45, 654-56, vol. 2, at 231-32, 234-35, (detailed letter by Dreyfus read into court), 459, 490, 526, 549.

<sup>33</sup> E.g., BREDIN, *supra* note 1, at 525.

<sup>34</sup> *Id.* at 619.

<sup>35</sup> CHARLES DE GAULLE, MEMOIRES DE GUERRE - L'APPEL (1940-1942) 7 (Plon, 1954) (Pocket 2007).

tegrity throughout his ordeal, and the extraordinary suffering he underwent did not seem to make him bitter.<sup>36</sup> Along with Jean-Denis Bredin, I am prepared to consider Dreyfus a hero, and certainly to submit that he fully measured up to *l'affaire* that bears his name.<sup>37</sup>

By the time the Rennes trial took place, proof of his innocence abounded.<sup>38</sup> In addition to the evidence noted earlier,<sup>39</sup> Colonel Picquart offered impeccable testimony.<sup>40</sup> Picquart had discovered Dreyfus's innocence by chance when, as a faithful army man, he had believed in the captain's guilt because Picquart's superiors had announced Dreyfus's guilt as a certainty.<sup>41</sup> Picquart, who never had had the slightest motivation or inclination to favor Dreyfus, and who personally had brought the infamous secret file about Dreyfus to the military judges during the first trial, offered testimony of Dreyfus's total innocence, and of acts on the army's part to obtain Dreyfus's conviction and to hide the truth by dint of conspiracy, lying, and forgery.<sup>42</sup> His testimony was particularly convincing thanks to its high degree of thoroughness.

The so-called graphology, or handwriting expert, who still maintained that Dreyfus's handwriting was the same as that on the treasonous note, the *borderie*, did his best to testify in an ultra-technical manner, but instead sounded tendentious.<sup>43</sup> Another expert demolished his testimony swiftly, and with unconcealed contempt and indignation.<sup>44</sup> The essential fact remained that the complete identity between the writing of the real traitor, Esterhazy, and that of the *borderie* did not require any expertise: it was apparent to the naked eye.

In France, there is no quantitative standard in criminal law for the defendant's conviction.<sup>45</sup> Whereas in the United States, the stan-

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<sup>36</sup> ALFRED DREYFUS, *SOUVENIRS ET CORRESPONDANCE PUBLIES PAR SON FILS* (1936).

<sup>37</sup> BREDIN, *supra* note 1, at 692.

<sup>38</sup> *Id.* at 224-25.

<sup>39</sup> *Supra* notes 2-4 and accompanying text.

<sup>40</sup> LE PROCÉS DREYFUS, *supra* note 7, at 368-73, 480-82.

<sup>41</sup> See BREDIN, *supra* note 1, at 151-52 (discussing how Picquart came to realize the handwriting was indicative of Dreyfus's innocence).

<sup>42</sup> WILLIAM HARDING, *DREYFUS: THE PRISONER OF DEVIL'S ISLAND* 162-72 (n.p. Associated Publ'g Co. 1899).

<sup>43</sup> LE PROCÉS DREYFUS, *supra* note 7, vol. 2, at 218-21, 318-86.

<sup>44</sup> *Id.* at 475-85.

<sup>45</sup> See CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] art. 427 (Fr.); Christoph Engel, *Preponderance of the Evidence Versus Intimate Conviction: A Behavioral Perspective on a Conflict Between American and Continental European Law*, 33 VT. L. REV. 435, 435 (2009).

dard for conviction is “beyond a reasonable doubt,”<sup>46</sup> in France the standard is that of the judge’s “intimate conviction.”<sup>47</sup> The process preceding the trial, known as the *instruction*, or investigation period, functions as a filtering mechanism, such that if the *instruction* leads to a trial, the judge in charge of the *instruction* believes there is a strong probability that the defendant committed the crime.<sup>48</sup> Thus, unsurprisingly, an overwhelmingly high percentage of criminal trials in France result in a conviction.<sup>49</sup>

At Rennes, the predisposition of the presiding judge of the Council of War was discernible from the start.<sup>50</sup> He refused to acknowledge Dreyfus’s military rank, even though the order of the Court of Cassation to refer Dreyfus’s case for remand<sup>51</sup> had automatically reinstated Dreyfus to his military rank of captain.<sup>52</sup> The presiding judge would address Dreyfus brutally: “Stand, accused one!” and other forms of abruptness from which it would not have been difficult to form an idea of Presiding Judge Jouaust’s “intimate conviction”<sup>53</sup> concerning Dreyfus’s guilt even before the beginning of the proceedings.<sup>54</sup> It was only in the final hearing that the presiding judge would acknowledge Dreyfus’s rank by referring to him, finally, as “Captain Dreyfus.”<sup>55</sup> Against all likelihood, Presiding Judge Jouaust, who had treated Dreyfus roughly and disrespectfully throughout the trial, was persuaded to credit the defense, and was one of the two votes in favor of acquittal.<sup>56</sup> That act of courage caused him to lose his career, however, as the army retired him on January 28, 1900, close on the

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<sup>46</sup> *In re Winship*, 397 U.S. 358, 364 (1970).

<sup>47</sup> *Supra* note 45 and accompanying text.

<sup>48</sup> CHRISTIAN DADOMO & SUSAN FARRAN, *THE FRENCH LEGAL SYSTEM* 192 (1993).

<sup>49</sup> *See* BELL, *supra* note 17, at 112 (noting that the acquittal rate for crimes in France was 4.6% as of 1998). *See generally* JACQUELINE HODGSON, *FRENCH CRIMINAL JUSTICE: A COMPARATIVE ACCOUNT OF THE INVESTIGATION AND PROSECUTION OF CRIME IN FRANCE* (2005) (discussing the French criminal law system).

<sup>50</sup> NICHOLAS HALASZ, *CAPTAIN DREYFUS: THE STORY OF A MASS HYSTERIA* 222 (1955) (“The browbeating attitude of the court’s president, Colonel Jouaust, to Dreyfus and his attorneys contrasted grossly with the deference he showed General Mercier and the witnesses for the prosecution.”).

<sup>51</sup> *See* BREDIN, *supra* note 1, at 405-06 (discussing the harsh nature of questioning of Dreyfus by Colonel Jouaust).

<sup>52</sup> *See id.* at 404 (describing Dreyfus appearing in court in his army uniform).

<sup>53</sup> *See supra* note 45 and accompanying text (on the French standard for criminal conviction).

<sup>54</sup> LE PROCÉS DE DREYFUS, *supra* note 7, vol. 1, at 2, 21, vol. 2, at 484.

<sup>55</sup> *Id.* vol. 2, at 484.

<sup>56</sup> BREDIN, *supra* note 1, at 428.



heels of the trial.<sup>57</sup>

The trial proceedings did not stay within the limits of relevant issues, as several witnesses were interested in testifying only about concerns that touched them personally. For instance, Casimir-Pèrier, who had been President of France at the time of Dreyfus's arrest, seemed either unaware of or unconcerned about the stakes the trial involved for Dreyfus, and seemed interested, only principally, in drawing the court's attention to alleged errors that had been published recently in a newspaper.<sup>58</sup> According to Casimir-Pèrier, an article had appeared which portrayed him as having made a promise to Dreyfus that he never had made.<sup>59</sup> With apparent lack of awareness of his own pompousness, he declared himself to be insisting on the incident, not out of any selfish motivation, but only because his numerous former illustrious positions on behalf of France required as much for the national good:

It is not the private citizen that is upset [about my situation]; [but] for the honor of the position of judge that I had, for the honor of the Republic, I shall not permit it to be said that he who was President of the Republic and commander in chief of the army so much as exchanged words with a captain accused of treason.<sup>60</sup>

The transcript indicates that the audience applauded upon hearing this.<sup>61</sup> Instead of cutting him off, the presiding judge let him speak

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<sup>57</sup> *Id.* at 543.

<sup>58</sup> *See* LE PROCÉS DE DREYFUS, *supra* note 7, vol. 1, at 64.

<sup>59</sup> *Id.* at 60-66.

<sup>60</sup> *Id.* at 66.

<sup>61</sup> *Id.* In France, there were no official, detailed trial transcripts, due to historical reasons dating from the time of the French Revolution of keeping open courts. *See* HOWARD G. BROWN, ENDING THE FRENCH REVOLUTION: VIOLENCE, JUSTICE, AND REPRESSION FROM THE TERROR TO NAPOLEAN 76, 97 (2006) (discussing how historically, trials were left open to the public and relied heavily on oral testimony rather than trial transcripts). However, private newspapers soon after the Revolution were permitted to send their own stenographers. The resulting trial transcripts, composed for newspaper readers, tend to incorporate the reactions of the public at every moment in the trial, including, especially, boos, hisses, applause, cheers, ironic laughter, etc. The revolutionaries had introduced into French law what became the "principle of orality" ("*le principe de l'oralité*") to end the pre-Revolutionary hidden, written orders that could doom a person without a fair trial. Initially this meant no recording of proceedings. Orality was supposed also to avoid problems for the many who could not read or write. Within six months, newspapers had received permission to send private stenographers to trials of public interest, and they gave a livelier account of all that transpired in the courtroom than the United States stenographers' transcripts, which are limited to the words of the witness. It was only with a twenty-first century scandal (*l'affaire*

his piece.

Is the army's perfidy the only explanation of the trial's outcome? What other explanations might there be for Dreyfus's second conviction and for the zeal of the anti-Dreyfus groups? How can we understand, if at all, the lies and deceptions of the army? It made a mistake when it mistook Dreyfus's handwriting for the one in the *bordereau*, which it resembled somewhat,<sup>62</sup> but then it became engulfed in a Machiavellian conspiracy to make the world believe the initial error.<sup>63</sup>

The temptation to lie can prove difficult to resist. The pressure on prosecutors occasionally can contribute to their allowing or presenting false testimony.<sup>64</sup>

Anti-Semitism played an important, perhaps even overwhelming, role in the temptation to lie, but there also were other causes. For instance, the French army had been humiliated by the military defeat of 1870 and the great suffering that had followed.<sup>65</sup> In the context of its own past failures, it is likely the army did not want to betray its failings and mistakes, and especially not have them be displayed in public.

For its part, the country expected from its army eventual revenge against Germany, and it needed the army to protect it from attack. Some of those in the anti-Dreyfus part of the population sought to support the army at any price so that it would be as powerful as possible and feared weakening it through a public trial of its ineptitude. This motive came from a double, although perhaps related, origin. In the first part, France felt, and was, vulnerable, and the anti-Dreyfusards were hoping through their blind support to situate the army as well as possible to protect the country from external attack.

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*d'Outreau*) that reforms in French criminal procedure created a duty to record all proceedings. See Evelyne Serverin & Sylvie Bruxelles, *Restituer l'oral dans la procédure pénale, in Enregistrements, procès-verbaux, transcriptions devant la Commission d'enquête: le traitement de l'oral en questions*, 55 DROIT ET CULTURES 149-80 (2008).

<sup>62</sup> Guieu, *supra* note 1.

<sup>63</sup> *Id.*

<sup>64</sup> See Shaila Dewan, *Duke Prosecutor Jailed; Students Seek Settlement*, N.Y. TIMES (Sept. 8, 2007), <http://www.nytimes.com/2007/09/08/us/08duke.html?ref=michaelbnifong> (describing how prosecutors in the United States sometimes also have become committed to hiding the truth, as in the case of the Duke University lacrosse players falsely accused of rape, where a number of innocent young men came close to spending a good part of their lives behind bars because of an unscrupulous prosecutor).

<sup>65</sup> ROGER L. WILLIAMS, *THE FRENCH REVOLUTION OF 1870-1871*, at 2-3 (Jack P. Greene ed., W.W. Norton & Co. Inc. 1969) (1969).

In the second part, as Michel Drouin has suggested, a large part of France's population, like Dreyfus himself, held the army in the greatest admiration, if not in idealization or near-idolatry.<sup>66</sup> To them, doubting the word of the army seemed unpatriotic.

Was France's military justice system less reliable than its civil counterpart? Excepting the hearing behind closed doors, even that is not so clear. It is more than possible that the military judges who voted to convict Dreyfus may have followed the wishes of the army rather than their "intimate conviction" with respect to the defendant's guilt. The failure to comply with required criminal procedure in the first trial in the affair of the secret file certainly constituted a violation of the law. On the other hand, the role procedure plays is less important in countries of civilian (in this context, Continental European, codified) law like France than in common-law countries like the United States.

While the distinctions between the two systems in this regard are beyond the scope of this essay, it may be said summarily that United States law imposes rigid limitations on what may be presented during trials and that procedure is inextricably linked to the idea of fair play, to such an extent that procedural fairness is a matter of constitutional law.<sup>67</sup> In France, substantive truth, and the search for the truth, takes primacy.<sup>68</sup> Therefore, the idea that the court may have obtained access to evidence through irregular means, in violation of what procedural law had in mind, is less shocking to the French legal spirit than its American counterpart, at least if the information is of assistance in the universal objective of understanding the truth. This was still truer in the nineteenth century than today.

Thus, Colonel Picquart who would be ready to sacrifice his career and liberty for Dreyfus, a man he barely knew, had not hesitated to transmit the secret file to the judges in the first military trial as long as he did not suspect his army colleagues of having fabricated evidence against an innocent man.<sup>69</sup> Similarly, an attempt to insert a secret file into the closed hearing at the Rennes trial did not succeed, but nevertheless was not evaluated as being a particularly serious vi-

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<sup>66</sup> Michel Drouin, *Political and Religious Forces* (author's notes from Drouin lecture at Touro Dreyfus conference).

<sup>67</sup> *E.g.*, U.S. CONST. amend. V; U.S. CONST. amend. XIV.

<sup>68</sup> Martin A. Rogoff, *A Comparison of Constitutionalism In France and the United States*, 49 ME. L. REV. 21, 53 (1997).

<sup>69</sup> BREDIN, *supra* note 1, at 155 (discussing the low priority of procedural requirements to the French sense of justice).

olation in the eyes of the tribunal.

When one considers the conduct of the Court of Cassation, namely, of non-military justice, it also must be conceded that the reason Dreyfus had to wait many years for his vindication was that the Court of Cassation obeyed another master, namely the government.<sup>70</sup> In both institutions, military as well as civilian, there were also some exceptional individuals prepared to fight for the truth at any cost.

In ending this essay, I would like to disclose my own Dreyfus affair, the subtext that I read between the lines of this riveting story. It is that society's institutions, whether juridical or not, depend on those individuals, those human beings, who inhabit them, who people them. Therein lies society's Achilles' heel, but also no doubt its hope.

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<sup>70</sup> *Id.* at 595 (showing that even after the innumerable tergiversations that caused Dreyfus to have to wait until 1905, he was to have to wait yet a bit longer for the Court of Cassation to render its judgment of vindication, because, as Bredin puts it, everyone thought it better to wait for the general elections to be over beforehand).