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# Free Speech and Holocaust Denial

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# Holocaust Denial and Governmentally Declared "Truth": French and American Perspectives

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*Oh, East is East and West is West, and never the twain shall meet...<sup>1</sup>*

Even though no reputable historian denies the existence of the Holocaust, or the six million deaths that resulted, Holocaust denial is on the ascendance. The British Broadcasting Company has suggested that Holocaust survivors are aging and dying off, thereby resulting in more efforts to deny that the Holocaust ever really occurred.<sup>2</sup> In addition, the development of the Internet, and the ease with which it can be accessed, has made it easier for Holocaust deniers to communicate with themselves and others.<sup>3</sup> As one commentator noted, "hate has gone high tech. Hatemongers used to meet in dingy basements; now they meet online. And instead of sending their propaganda in plain brown wrappers to a limited audience, they use the Internet to distribute graphic racist images, Holocaust denials, and venomous music around the globe."<sup>4</sup> Whatever the reason, Holocaust deniers abound. In England, Richard E. Harwood's pamphlet *Did Six Million Really Die?* dismisses the Holocaust as "mythology" and as a "colossal piece of fiction," and denounces *The Diary of Anne Frank* as a hoax.<sup>5</sup> In France, Robert Faurisson, a historian, has alleged that Holocaust affirmations "bear the mark of Jewish neurosis and excessiveness" and "look sure to finish one day in the rubbish bins of history."<sup>6</sup> Also, in England, historian David Irving denied that the Holocaust occurred and sued historian Deborah Lipstadt for defamation when she challenged the veracity of his allegations.<sup>7</sup> Holocaust deniers sometimes maintain their own websites setting forth their denunciations and denials.<sup>8</sup>

Today, a number of countries have enacted laws prohibiting and criminalizing Holocaust denial. In Europe, denial laws have been enacted by Austria, Belgium, Czech Republic, France, Germany, Lithuania, Poland, Slovakia and Switzerland.<sup>9</sup> In addition, the European Union has adopted legislation criminalizing Holocaust denial, but allowing member states not to enforce the ban if their own laws do not prohibit denial.<sup>10</sup> The European Union's mandate provides for jail terms of up to three years for intentional violations that incite racial hatred based on race, color, religion, descent or national or ethnic origin, or that incite violence by "denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes."<sup>11</sup> Israel also prohibits Holocaust denial.<sup>12</sup>

This article examines the French law on Holocaust denial with a particular focus on recent prosecutions of prominent French individuals (often members of the National Front). In addition, it gives American and French perspectives on the Holocaust denial problem and the French prosecutions. As we shall see, the French approach to Holocaust denial is very different than the U.S. approach, and these differences led to quite different positions regarding the validity of Holocaust denial laws.

## **I. The French Law on Holocaust Denial**

On July 13, 1990, the French Parliament enacted the Gayssot law (named for the Communist member of Parliament who proposed it) which punishes "any racist, anti-Semitic or xenophobic act" and prohibits "any discrimination based on someone's belonging or not belonging to an ethnic group, a nation, a race or a religion..."<sup>13</sup> The law added Article 24b to the 1881 law on freedom of the press<sup>14</sup> which made it a crime to contest or call into question "the existence of one or several crimes against humanity as defined in article 6 of the statutory regulations of the International Military Tribunal annexed to the August 8, 1945 London Agreement, and involving crimes committed either by members of an organization declared criminal pursuant to article 9 of the regulations or by a person convicted for such

crimes by a French court or an international court.”<sup>15</sup>

Effectively, the Gayssot law prohibits individuals from denying the existence of the Holocaust, as well as from challenging the findings of the Nuremberg International Military Tribunal (“Nuremberg Tribunal”). In addition, the law prohibits statements that express doubt as to the existence of the Holocaust, or that minimize gas chambers in an outrageous manner (*e.g.*, speaking of “alleged” gas chambers, “presumed’ holocaust,” or “the rumour” about Auschwitz), or the fact of calling gas chambers a historic lie or “myth.”

The Gayssot law was not without precedent in France. Although France did not previously prohibit Holocaust denial *per se*, it did enact laws prohibiting group defamation and incitement to racial hatred.<sup>16</sup> In addition, the preamble to the fourth French Constitution (1946) condemned Nazism based on the 1789 Declaration of Rights,<sup>17</sup> as well as based on the fifth French Constitution (1958) which “reinforced the attachment of the French people to [the principles contained in the 1789 Declaration of Rights].”<sup>18</sup> Moreover, France is a signatory, or otherwise subject to, various international conventions or documents that prohibit racial discrimination.<sup>19</sup>

## II. Prosecutions Under the Gayssot Law and Related Laws

Relying on the Gayssot law, French courts have entertained prosecutions of, and handed down sentences against, various Holocaust deniers. In this respect, French courts have followed the lead of other European countries, and of Germany in particular.<sup>20</sup>

*The Faurisson Case.* One of the most famous French cases involved Robert Faurisson, a well-known Holocaust denier. Not long after the Gayssot law was enacted, the French monthly paper *Le Choc du Mois* (“The Shock of the Month”) published an interview with Faurisson in which he declared that the Gayssot law threatened freedom of investigation and freedom of speech, and asserted that the Nazis did not maintain homicidal gas chambers for the purpose of exterminating Jews in concentration camps.<sup>21</sup> Faurisson’s statement included the following:

I will not be made to say that two plus two equals five, that the Earth is flat, or that the Nuremberg Tribunal is not fallible. I have excellent reasons not to believe in this policy of extermination of the Jews or in the fantasy of gas chambers . . . . I wish one hundred percent of the French will realize that the myth of the gas chambers is a swindle adopted in 1945 by the winners in Nuremberg and made official on July 14, 1990, by the acting government of the French Republic with the approval of the historians loyal to the government.<sup>22</sup>

Eleven French organizations, along with former prisoners of German concentration camps, initiated legal charges against Faurisson, as well as against Patrice

Boizeau, editor of *Le Choc du Mois*

In 1991, a Paris trial court convicted both Faurisson and Boizeau of “contesting crimes against humanity,” and ordered them to pay fines amounting to 326,832 French Francs.<sup>23</sup> The Paris court of appeal upheld the sentence and ordered Faurisson and Boizeau to pay 374,045 French Francs and 50 centimes to the eleven organizations who had brought the action as compensation for moral damage.<sup>24</sup> In ruling against Faurisson, the court of appeal considered and rejected the argument that the conviction ran afoul of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its provision guaranteeing freedom of speech.<sup>25</sup> At Faurisson’s request, the United Nations’ Human Rights Committee reviewed the actions of the French courts, and concluded that Faurisson’s sentence complied with the International Covenant on Civil and Political Rights, and in particular with Article 19 dealing with freedom of speech.<sup>26</sup>

*The Marais Case.* In 1996, the European Commission of Human Rights rendered a similar decision (to the one rendered by the United Nations’ Human Rights Committee against Faurisson) against Pierre Marais. Marais had been charged under the Gayssot law based on his denial people had been gassed with particular chemicals in Nazi extermination camps.<sup>27</sup> Marais was ultimately convicted and sentenced, and the European Commission of Human Rights concluded that Marais’ sentence was justified

and was compatible with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>28</sup>

*The Gollnisch Case.* The more recent prosecution of Bruno Gollnisch, the number two person in the National Front (the main French far right wing political party) and a Member of the European Parliament, has created much controversy in France. The case arose in 2002 when Jacques Lang, France's Minister for Education, established a Commission on Racism and Holocaust Denial within the University Jean Moulin, Lyon III. Presided over by Henry Rousso, Director of the Institute of History of Present Time, the Commission investigated the existence of racism and Holocaust denial within the University of Lyon. In October, 2004, the Commission submitted its report which found that the University had "a far right nucleus" whose main representatives included Bruno Gollnisch, a professor of Japanese language and civilization, and Pierre Vial. The report also noted that Jean Plantin, one of Robert Faurisson's disciples who was pursuing a fifth year degree at the University of Lyon II (the university where Robert Faurisson was a professor in the 1970s), had submitted a paper on typhus fever epidemics in Nazi concentration camps. Because it was assumed that Plantin was contesting the Holocaust (by suggesting that prisoner deaths were due to typhus rather than murder), Plantin's degrees from the University were initially cancelled. Although the degrees were reinstated by a French administrative judge,<sup>29</sup> Plantin was criminally sentenced for his statements and his editorial activities.<sup>30</sup> Although the Commission was unable to establish links between the alleged "far right nucleus" and Jean Plantin, the Commission declared that some University of Lyon III faculty are Holocaust deniers, that these individuals consider the University a gathering place, and that between the years 1970-1980 the University had become a shelter for a dozen far right activists.<sup>31</sup>

A few days after the report was delivered to the Minister of Education, Bruno Gollnisch publicly contested the neutrality of the report in a press conference at the National Front's Lyon headquarters. Although Gollnisch's statements were not recorded, *L'Express*, a weekly paper, reported that Gollnisch told the audience that Rousso was of Jewish descent, and that he was committed to fighting against "revisionists."<sup>32</sup> *Le Figaro* reported that Gollnisch had stated that "Henry Rousso is a committed historian, he is a Jewish person, someone highly respectable, but there is no assurance of his being neutral."<sup>33</sup> In an interview on French TV Channel One's website, Gollnisch said that "Monsieur Rousso is an opponent to those who call into question the official truth about World War II. He was on both sides, judge and judged. He is a Jewish person. It is a fact. This could have foreshadowed a not so impartial report."<sup>34</sup> In various interviews, Gollnisch acknowledged that his own specialty was in Japanese history, as well as in Asian-Pacific matters during World War II, rather than in European history.

Although Gollnisch made it clear that "he did not contest the drama of the concentration camps," he did claim that he was "entitled to discuss the issue freely," and that he was also entitled to "discuss the actual number of people killed."<sup>35</sup> "I want things to be clear, as far as I am concerned, I do not deny the existence of homicidal gas chambers," and also stated: "I'll not question the existence of concentration camps, but on the issue of the number of people killed, historians should be left free to discuss it. As for the existence of gas chambers, it is up to historians to decide."<sup>36</sup> Many of Gollnisch's comments on the Holocaust seemed to focus on the importance of academic freedom, and the ability of historians to discuss such matters. In the days after the press conference, Gollnisch made similar statements. For example, when Gollnisch was asked in an interview whether he contested the existence of gas chambers, he declared that "this is a matter for historians to discuss" and flatly stated "that historians do not agree."<sup>37</sup>

All of Gollnisch's statements were immediately condemned by various governmental officials. The President of the University of Lyon III, Guy Lavorel, labeled Gollnisch's statements "unacceptable," stated that they caused serious damage "to the honor and credit of the University in its entirety," and suspended Gollnisch from his post for four weeks following student demonstrations in order "to prevent any potential risk of disorder."<sup>38</sup> An administrative judge subsequently struck down President Lavorel's

decision,<sup>39</sup> and Gollnisch resumed his teaching duties despite the presence of protestors and scuffles between pro- and anti-right wingers which included members of the National Front and Oeuvre Francaise. In February, 2005, Francois Fillon, Minister of Education, suspended Gollnisch from his teaching post,<sup>40</sup> and the following month the University of Lyon III's disciplinary commission suspended Gollnisch for five years. CNESER (France's National Council for Higher Education and Research) upheld the five year suspension as well as the decision to reduce Gollnisch's salary in half on the basis that he intervened as an academic by willingly mentioning Rousso's Report in his October 2004 press conference, that he contested Rousso's impartiality (in saying that Rousso was "a Jewish individual, highly respected, but whose neutrality was not guaranteed") which the CNESER regarded as "discriminatory" and "contrary to academic ethics," and that he made "ambiguous remarks" about the existence of gas chambers and the number of people killed which were contrary to the findings of the Nuremberg Tribunal and contributed to Holocaust denial arguments. CNESER concluded that Gollnisch knew perfectly well that his words would have repercussions and would prompt disruptive behavior, and therefore his actions involved gross negligence.<sup>41</sup>

In November, 2004, Monsieur Richaud, the Lyon Procureur de la République (the local trial level prosecutor), after a preliminary inquiry, declared that Gollnisch could not be prosecuted.<sup>42</sup> Subsequently, Monsieur Viout, the Procureur General pres la cour d'appel (the Lyon prosecutor at the court of appeal), under orders from Dominique Perben, Minister of Justice (France's equivalent to the United States Attorney General), ordered Monsieur Richaud to bring charges against Gollnisch for "contesting crimes against humanity."<sup>43</sup> Interestingly, at the time of the prosecution, Gollnisch was opposing Perben in the Lyon municipal elections.<sup>44</sup> On March 14, 2005, Jacques Chauvot, juge d'instruction (the court official charged with collecting evidence), dismissed the charges on the ground that "one cannot doubt that Monsieur Gollnisch clearly expressed his reprobation towards Nazi crimes, evoking the millions of people killed and the massacres committed in the gas chambers"; he also added that "there is no objective element constituting crime against humanity."<sup>45</sup> On December 13, 2005, the European Parliament voted to remove Bruno Gollnisch's parliamentary immunity (he was a member of the European Parliament as a member of the National Front), concluding that he did not make his statements "in the exercise of his functions of European MP but as a professor of the University of Lyon III."<sup>46</sup>

At his trial in November, 2006, following reinstatement of the charges by another judge,<sup>47</sup> Gollnisch acknowledged that "the extermination of Jews in Europe by the National Socialist regime during World War II constitutes a crime against humanity that cannot be denied. This crime has notably been committed through the use of gas chambers in extermination camps."<sup>48</sup> He thus agreed with the International League Against Racism and Anti-Semitism (LICRA), and its LICRA's President withdrew from the proceedings stating that "it was important to hear the number two person of the National Front publicly acknowledge the Holocaust and the use of gas chambers," and he further stated that "he had won the trial."<sup>49</sup> In his written submissions to the Lyon trial court, Gollnisch asserted that the words attributed to him by the press were "manipulated, curtailed and worst of all taken out of context. Some journalists, when typing their hand-written notes, knowingly modified his statements so as to ascribe to him controversial words."<sup>50</sup> He denied "having said that historians could also question 'the number of people killed.'"<sup>51</sup>

Despite Gollnisch's admissions and LICRA's withdrawal, the court found Gollnisch guilty of the offense of "orally contesting the existence of crimes against humanity."<sup>52</sup> The court imposed a three month suspended prison sentence on Gollnisch, a 5,000 Euro fine, and ordered him to pay 55,000 Euros in damages distributed among nine plaintiffs and to pay for the publication of the court decision in newspapers.<sup>53</sup> The court held that Gollnisch resorted to "disguising devices, insinuating doubts, contrary to other negationists such as Robert Faurisson or Roger Garaudy who expressed themselves openly."<sup>54</sup>

Gollnisch appealed the decision, and his lawyer is contemplating an appeal to the Cour de Cassation and the European Court of Human Rights. To date, no decision has been rendered.

*The Garaudy Case.* Although most Gayssot law prosecutions have been brought against members of the National Front, there is one major exception. On February 27, 1998, Roger Garaudy, a former French Communist member of the French National Assembly, was sentenced for contesting crimes against humanity and racial defamation.<sup>55</sup> The prosecution was based on Garaudy's book, *The Founding Myths of Israeli Politics*, in which he alleged that the Holocaust did not occur, and that Jews died in the concentration camps from starvation and disease rather than from poison gas.<sup>56</sup> Garaudy was convicted and ordered to pay 240,000 French Francs (approximately U.S. \$40,000 at the time).<sup>57</sup> In its decision, the court concluded that "far from limiting himself to a criticism of Zionism [...] Roger Garaudy engaged in a virulent and systematic contestation of crimes against humanity committed against the Jewish community." Even if the Gayssot law was applied in the Garaudy case one should bear in mind that most of the time it is used to allow legal actions against the ambiguities perpetuated by members of the French far right wing. The decision was upheld on appeal.<sup>58</sup>

*The Le Pen Cases.* Jean-Marie Le Pen, President of the National Front was not prosecuted under the Gayssot law until recently, but he has been sentenced on several occasions for "public order disruption," "incitement to racial hatred," "praising war crimes," and "trivializing crimes against humanity" for making comments about the Holocaust.<sup>59</sup> The Holocaust denial prosecution was commenced in late 2007 when Le Pen, and resulted in a conviction and 10,000 Euro fine plus a 3-month suspended sentence by the Paris trial court on February 8, 2008.<sup>60</sup>

The most serious cases involved Le Pen's statements regarding gas chambers. In September, 1987, Le Pen declared "I'm asking myself a certain number of questions. I'm not saying that gas chambers did not exist. I haven't been able to see some myself. I haven't studied the question in depth. But I think that they are a detail in the history of the Second World War.... Indeed, they are a detail in the War! Are you telling me that it is a disclosed truth that everyone has to believe, that it is a moral obligation? What I'm saying is that there are historians who are debating those issues."<sup>61</sup> On March 18, 1991, the Versailles court of appeal sentenced Le Pen for "trivializing crimes against humanity" and for "giving his consent to horrible deeds," and ordered him to pay 10 French Francs to MRAP (a group fighting against racism and anti-semitism), and 100,000 French Francs to the other plaintiffs (who were also associations fighting against racism and anti-semitism), and also ordered him to pay for publication of the decision in five national daily newspapers up to the amount of 15,000 French Francs per publication, as well as in five weekly newspapers up to a total amount of 30,000 French Francs.<sup>62</sup> In addition, he was ordered to pay the costs of the trial and 1,000 French Francs to each of the 10 associations who brought the case under Article 700 of the Code of Civil Procedure.<sup>63</sup>

On December 5, 1997, Le Pen repeated his argument that the gas chambers were "a detail" in a press conference in Munich: "If you take a book of a thousand pages on the Second World War, in which 50 million people died, the concentration camps occupy two pages and the gas chambers ten or 15 lines, and that's what one calls a detail."<sup>64</sup> On December 26, 1997, the Nanterre trial court sentenced Le Pen for "trivializing crimes against humanity," and for "giving his consent to horrible things."<sup>65</sup> He was ordered to pay a 300,000 French Franc deposit for publication of the court decision in newspapers, a sum of 1 - 5,000 French Francs to eleven plaintiff associations plus their costs.<sup>66</sup> On September 10, 1999, the Versailles court of appeal upheld the Nanterre trial court decision.<sup>67</sup>

Although Jean Marie Le Pen has never been convicted under the Gayssot law, he will appear before a French court on December 14, 2007 on charges of contesting crimes. The charges relate to an interview he gave to the French weekly paper *Rivarol* in which he declared that "in France, at least, the German Occupation has not been particularly inhuman even though unfortunate errors happened that were inevitable in a country of 500,000 square kilometers."<sup>68</sup>

### **III. The French Perspective**

Although some aspects of the Gayssot law may be open to criticism, in particular the fact that the law engraves in marble the “truth” of one period of time and prohibits discussion, one can still justify the existence of the crime of “contesting crimes against humanity” under France’s legal tradition and criminal policies.

#### **A. The Gayssot Law’s Consistency with France’s Legal Tradition**

The underlying spirit of the Gayssot law can be traced to Article IV of the 1789 French Declaration of the Rights of Man and of the Citizen. Article IV of that document provides: “Liberty consists for someone of being allowed to do anything as long as it does not harm someone else. As a consequence, every man’s exercise of his natural rights is limited only by those limits that ensure all other members of society the benefit of the same rights. The limits cannot be determined otherwise than by law.”<sup>69</sup> This statement, derived from the eighteenth century Enlightenment, exemplifies the spirit and ideas that have animated the French approach to fundamental rights since the French Revolution: tolerance and equality for all individuals in the exercise and enjoyment of their rights.<sup>70</sup> The French concept of fundamental rights does not establish a hierarchy among the various rights. On the contrary, the Declaration of the Rights of Man and of the Citizen provides that an individual’s rights can be limited when the exercise of those rights intrudes upon another individual’s right to enjoy his/her rights.<sup>71</sup> Indeed, the Conseil Constitutionnel has specifically rejected the idea of a hierarchy of constitutional rights, as well as the idea that some constitutional rights should prevail over others.<sup>72</sup> As a result, French court decisions typically discuss the need to strike a balance between rights whose exercise leads to antagonism, and the goal of making sure that one right does not violate the exercise of another right in a disproportionate manner.<sup>73</sup>

In addition, the French approach overtly envisages limitations on freedom of speech because it is simply one among several rights proclaimed in the 1789 Declaration, and the Declaration specifically provides that any right may be restricted when it prevents the enjoyment of one or more other rights.<sup>74</sup> Article XI of the Declaration reads: “Free communication of thoughts and of opinions is one of man’s most precious rights; any citizen may therefore speak, write, or publish freely, except that he must answer for the abuse of that freedom in the circumstances determined by law.”<sup>75</sup> On this issue, French law conforms to the European Convention of Human Rights (ECHR) which is binding on national systems, allows member states to limit the exercise of the freedoms mentioned in the ECHR, among which is included the right to freedom of expression.<sup>76</sup> In reliance on the ECHR, France has restricted free speech in order to maintain public order. For example, France has recently enacted laws (*Loi pour la Sécurité Intérieure*) prohibiting individuals from holding the French national flag or the French national anthem in contempt.<sup>77</sup> In upholding these laws, the Conseil Constitutionnel has held that lawmakers did not transgress the necessary balance “between the protection of public order and the protection of the freedoms guaranteed by the Constitution”<sup>78</sup>

Under French law, the Gayssot law can be regarded as a necessary limit on freedom of speech for several reasons. First, the law protects Holocaust victims’ and their families’ fundamental right to human dignity. French criminal law provides for a 15,000 Euro fine for publication of a document that causes serious damage to a victim’s dignity which is published without the victim’s approval.<sup>79</sup> Although the human dignity law does not prohibit statements denying the Holocaust, the law’s reasoning suggests that freedom of speech may be limited when it conflicts with the a crime victim’s right to dignity. In addition, the right to dignity is protected under international law,<sup>80</sup> as well as under the draft treaty amending the treaty of the European Union (a/k/a, the proposed “European Constitution”).<sup>81</sup> One can argue that the Gayssot law protects the dignity of Holocaust victims and their families by prohibiting statements contesting, denigrating, even denying the existence of “crimes against humanity.” Second, the Gayssot law is necessary to maintain public order given the disturbances that have resulted when the circumstances of the Holocaust have been called into question, and given the tensions that such attitudes can spark between ethnic communities.<sup>82</sup> Third, the Gayssot law is justified given that the Nazis

deported Jews from France during the Occupation, and there is a fear in France of forgetting the events of World War II, especially as those connected to the events have grown old or died.

### **B. A Law Consistent with France's Criminal Policies**

In recent years, French criminal policy has repeatedly emphasized the “duty of memory” through several measures designed to prevent World War II events from being trivialized. For instance, the Criminal Code prohibits the wearing or displaying in public (except in movies or shows) of “uniforms, badges or emblems resembling those worn by members of an organization that was declared criminal” by the Nuremberg Tribunal, or that was worn “by an individual convicted of crimes against humanity by a French court or an international court.”<sup>83</sup> This offense seeks to ensure the dignity of victims of crimes against humanity in general, and victims of the Holocaust in particular, and to prohibit the trivializing of such crimes. The law also imposes a life sentence, the most severe penalty in the French legal system, on those responsible for, or participating in, genocides, deportations, war crimes, etc.<sup>84</sup>

It is also important to emphasize that the findings of the Nuremberg Tribunal have been systematically integrated into French law, and therefore the sentences pronounced by the Nuremberg Tribunal are considered *res judicata*.<sup>85</sup> In addition, French law prohibits individuals from discrediting a court decision through words, images, or actions of any kind under such circumstances as to cause damage to the authority of justice or its independence.<sup>86</sup> The crime is punishable by a 3,750 Euro fine.<sup>87</sup> Because the Nuremberg Tribunal's findings are binding under French law, the Gayssot law makes the French criminal law applicable to the Nuremberg Tribunal's findings.

However, the Gayssot law has been controversial because of the concept of “official truth.” Neither French criminal law, nor the Gayssot law, are concerned with the truth of the denial. For example, French law punishes defamation of individuals “on the ground of their origin, or their belonging or not to an ethnic group, a nation, a race or a religion,”<sup>88</sup> and the Cour de Cassation has held that the allegations that American Jews exploit the “legend of the Holocaust” is regarded as targeting a group of individuals because of their belonging to a particular religion, and therefore the allegations fall within the prohibition of the law without regard to truth.<sup>89</sup> Similarly, the publication of statements insinuating that some principles of the Catholic religion contain elements of anti-Semitism, and therefore encouraged the Holocaust, are prohibited under the law.<sup>90</sup> Concerning case law, the French judges have for many years admitted that, in cases involving defamation on the basis of race or religion, evidence of the truth of the defamatory allegations will not exonerate the individual who makes such statements from criminal sanctions.<sup>91</sup> Case law focuses on, and sanctions, the fact that the allegations cause damage to the honor and esteem of an identifiable community. Consequently, since the Gayssot law is designed to protect the honor and dignity of the targeted groups of individuals, and to protect social peace, the Gayssot law is less concerned with the protection of the truth than with protection of the victims of the Holocaust.

In the *Faurisson* case, which involved the first challenge to the Gayssot law, supporters of the law argued that the law promoted the duty of memory and punished a new form of racism while Faurisson claimed the law infringed freedom of speech and freedom of investigation in the field of history. The French courts rejected Faurisson's arguments. In imposing criminal sentences against those calling into question the genocide of the Jewish people and the existence of gas chambers, the Gayssot law was designed to eliminate a gap in French law. Under the prior law, negationist views were exempt from criminal sanction because they were not construed as involving racial discrimination, defamation, abuse based on race, incitement to discrimination, hatred or violence based on race, or the praising of war crimes or crimes against humanity. The absence of legal sanctions under the prior law caused concern in light of instances of Jewish grave desecration, as well as because of Le Pen's repeated statements that the gas chambers constituted “a detail in the history of France.”

In defense of the Gayssot law, the French government has argued that the Gayssot law does not sanction the expression of an opinion, but simply prohibits the negation of a universally accepted historical reality as reflected in the findings of the Nuremberg Tribunal. In reaching this conclusion, France relied on a European Commission on Human Rights decision to the effect that Article 10 of the



European Convention for the Protection of Human Rights and Fundamental Freedoms permits states to prohibit negationist literature. In that decision, the Commission held that ‘in calling a lie and a Zionist swindle the historic fact that the killing of millions of Jews [...], the brochures in question not only gave a distorted image of historic facts but also tarnished the reputation of all those they called liars and swindlers.’<sup>92</sup> However, the government’s arguments were widely criticized by a cross-section of society on the basis that they made one version of History incontestable so that anyone contesting this version can be imposed penal sanctions, and conflicted with the right to freedom of speech and freedom of investigation.<sup>93</sup> The Gayssot law had a similar effect by endowing the verdicts of the Nuremberg Tribunal with the value of infallible dogma. In other words, French law imposes strict limits on the right to formulate doubts as well as on the right to re-investigate history.

The Gayssot law is now interpreted as prohibiting all forms of “contesting” of crimes against humanity, be it in part, qualified, conditional or even in the form of questions. However, it does not extend to simple statements minimizing the number of victims. As a consequence, for some commentators, the verdict against Bruno Gollnisch seemed severe and inappropriate. Indeed, although the court decision was very detailed, it recognized that Bruno Gollnisch did not deny the existence of gas chambers. Nevertheless, the judges took into consideration other minimizing statements by Gollnisch, and emphasized that the law punishes the act of contesting crimes against humanity, be they partial, qualified, or conditional. The judges declared nevertheless, that “Bruno Gollnisch is neither as virulent nor as brutal as Roger Garaudy, a former supporter of Stalin, but basically all the steps he takes although more subtle and muffled and conveyed through innuendo have the same aim namely the contesting of crimes against humanity.” The Court went on to note that Gollnisch’s statements “cast light on one another and can be interpreted one after the other in such a way that insidiously a listener or a reader who is moderately well informed will be made to think that one can have doubts about the existence of one or several crimes against humanity.”<sup>94</sup>

The French approach to Holocaust denial, which to outside observers may be interpreted as being ambiguous if not hypocritical, attempts to balance respect for pluralism, freedom of speech and respect for democratic and republican principles, as well as the values of equality, non discrimination, dignity, to name only a few. Freedom of speech constitutes simply one of the fundamental principles of the French Republic. Banning the anti-republican ideas conveyed by the National Front thus amounts to violating the French Republic’s principles of freedom of speech and democracy, and thereby undermines the very values the French State claims to defend and protect. In the French view, failing to limit the National Front’s expression would empty all values of the French Republic of their substance.

#### **IV. An American Perspective on the French Law and Prosecutions**

It is difficult not to empathize with the motives that led to the adoption of the Gayssot law. After all, as the American Historical Association declared, “[n]o serious historian questions that the Holocaust took place.”<sup>95</sup> In addition, and more seriously, Holocaust deniers undoubtedly cause distress to those who suffered through the horrors of that period, as well as to Jewish people generally. Moreover, some (most?) who deny the Holocaust are undoubtedly motivated by racist or anti-Semitic motives.<sup>96</sup> Despite the harms, and despite the fact that I’m uncomfortable with the idea of protecting Holocaust deniers, it is extraordinarily difficult to justify the Gayssot law in light of First Amendment protections for expression.<sup>97</sup> There are a number of concerns, and I will try to state them very briefly.

In the United States, a series of objections could be raised against the Gayssot law. The law could be challenged on both vagueness and overbreadth grounds because it does not provide sufficient breathing space for freedom of expression.<sup>98</sup> The law is vague because it is extremely difficult to provide a constitutionally permissible definition for terms like “racist,” “anti-Semitic,” or “xenophobic,” and the law is therefore overbroad because it threatens to sweep in constitutionally protected speech. The vagueness is illustrated by the Gollnisch conviction. It is difficult to argue that the Gayssot law put Gollnisch on notice that the government can prohibit him from questioning Rousso’s impartiality or from stating that it is up to historians to decide how many people were killed in Nazi concentration camps. If

the Gayssot law prohibits individuals from calling into question the judgments of the Nuremberg Tribunal, what is the scope of the prohibition? Is every detail of every Nuremberg tribunal off-limits?

The more troubling aspect of the Gayssot law is that the French government arrogates to itself the power to declare the truth. In this respect, the Gayssot law conjures up images of the crime of seditious libel. That crime, created by England's Star Chamber in 1606,<sup>99</sup> made it illegal to criticize the government or governmental officials (and, at one point, the clergy as well).<sup>100</sup> The crime was justified by the idea that criticism of the government might cause the people to disrespect authority. Moreover, since truthful criticism could cause disrespect for government, as effectively if not more effectively than untruthful statements, truth was not a defense. Indeed, truthful criticisms were punished more severely because it was assumed they had a greater potential to damage the government than untrue statements.

The crime of seditious libel was also imposed in the American colonies, and was used by British authorities to persecute their opponents.<sup>101</sup> For example, in 1722, Benjamin Franklin's brother, James Franklin, a dissident newspaper publisher, was imprisoned for suggesting that the Massachusetts authorities had not pursued pirates with sufficient vigor, and for sarcastically stating regarding the captain of a ship commissioned to pursue pirates: "Tis thought he will sail sometime this month, if wind and weather permit."<sup>102</sup> He was released from jail after a month, after making a public apology, based on a physician's recommendation that he be released for health reasons.<sup>103</sup>

Although the United States Constitution explicitly protects freedom of speech, seditious libel prosecutions continued following the adoption of that amendment. While the Sedition Act was never formally reviewed by the United States Supreme Court, the Court concluded in *New York Times, Inc. v. Sullivan*<sup>104</sup> that the Act was inconsistent with the "central meaning of the First Amendment." Indeed, Justice Black went so far as to argue that the Sedition Act "by common consent has generally been treated as having been a wholly unjustifiable and much to be regretted violation of the First Amendment."<sup>105</sup> As Professor Harry Kalven argued, "[t]he concept of seditious libel strikes at the heart of democracy . . . . [D]efamation of the government is an impossible notion for a democracy."<sup>106</sup> As another commentator stated, "the attack upon its [the Sedition Act's] validity has carried the day in the court of history."<sup>107</sup>

Nevertheless, even after the Sedition Acts were repealed and the fines were repaid, the United States government, as well as state and local governments, continued to use the crime of seditious libel (or its equivalents) to repress speech over the centuries.<sup>108</sup> In *Garrison v. Louisiana*,<sup>109</sup> the Court sounded the death knell for the crime of seditious libel in the United States. Indeed, because of the *Sullivan* decision, governmental officials rarely sue the media even civilly, and even more rarely succeed. This was no mere accident. In arguing the *Sullivan* case to the United States Supreme Court, Professor Herbert Wechsler, went to great pains to invoke the specter of seditious libel and the suppression of dissent.<sup>110</sup>

The Gayssot law, and the prosecutions under that law, raise troubling questions regarding government's ability to "declare the truth" and to bring seditious libel prosecutions. The Gayssot law declares that certain facts cannot be contested, and imposes severe criminal penalties on those who have the temerity to raise questions. For example, the law prohibits anyone from questioning the number of Jews killed during World War II. The Gollnisch case is particularly disturbing in this respect. Gollnisch did not deny the existence of gas chambers during World War II, and did not deny that Jews were killed in the gas chambers. He simply declared that these matters should be resolved by historians. In considering the validity of Gollnisch's conviction, it is difficult to believe that a reputable historian, or a member of the anti-defamation league, would have been prosecuted for making the statement that Gollnisch made. He did not argue that the number of Jews killed was incredibly low (*e.g.*, 100), but simply suggested that historians must ultimately decide how many Jews were killed. Nevertheless, Gollnisch suffered draconian consequences. In addition to suffering severe financial penalties, he was ultimately banned from his teaching position at Lyon III for a period of five years.

French law seems to suggest that Gollnisch's punishment is justified by the context in which they

were made, and the imputations that flow from his overall statements. But those justifications are very troubling, and make one wonder whether Gollnisch was prosecuted for his statement or for his association with the National Front. If the President of the Anti-Defamation League had stated that it is up to historians to decide how many people died in the Holocaust, it is virtually inconceivable that he/she would have been prosecuted under the Gayssot law. As a result, France appears to have done nothing more than adopt a law (equivalent to seditious libel) that can be used to prosecute dissidents or those who hold views that the government finds objectionable. Granted, the prosecutions are being brought (in most instances) by private individuals rather than groups. But it should not be forgotten that prominent dissident politicians (the # 1 and # 2 individuals in the National Front) have been prosecuted under the Gayssot law, have been forced to pay damages, and have been forced to pay to publish the judicial decisions against them. With one exception, the Gayssot law has only been invoked by left-wing groups who seek damages and criminal prosecution against right-wing politicians and right-wing thinkers. As a result, the Gayssot law has provided a prominent means of left-wing persecution of right-wing beliefs and dissident right wing politicians.

As a matter of free speech, should a society be prepared to allow government to declare official truths (*e.g.*, the findings of the Nuremberg Tribunal) that are incontestable? The difficulty is that reputable historians sometimes disagree with the findings of that tribunal. And, indeed, an interesting aspect of the *Gollnisch* case is that he did dispute certain aspects of the Nuremberg Tribunal's findings. Although he did not dispute the idea that a large group of individuals had been murdered, he claimed that they were murdered by Russians rather than by Nazis. Are the Nuremberg findings so sacrosanct that they can no longer be questioned except on pain of criminal penalty? And, of course, in the *Gollnisch* case, the penalty was quite substantial. . Can we really say that such a line of inquiry is strictly off-limits? Even if additional historical evidence comes to light, can the Nuremberg Tribunal's judgments never be questioned?

### **Conclusion**

France and the United States start from such different assumptions regarding freedom of speech, and the relationship between speech and other rights, that it is virtually impossible to reconcile their competing approaches to the problem of Holocaust denial. Although the U.S. approach is very protective of speech, and is even protective of hate speech, France takes a very different approach. Indeed, under French law, limits can be imposed on freedom of expression in an effort to ensure that all members of society enjoy equal rights and are protected from others. In other words, France maintains (seemingly paradoxically) that society has the right to impose limits on individual freedoms in order to protect those freedoms. As numerous decisions make clear, the Gayssot law is constitutional under French, European and United Nations law. In balancing the right to human dignity against the right to free expression, the right to dignity controls in this context.

By contrast, it is difficult to believe that the United States Supreme Court would sustain a similar law if Congress chose to enact it. The United States' aversion to governmental censorship is summed up by one American commentator who noted that, "an unregulated marketplace of ideas is preferable to government restrictions on freedom of expression, not because the marketplace of ideas is efficient and always leads to benign results, but because the alternative of government regulation is far worse."<sup>111</sup> This fact may be evidence in the French outcomes where the Gayssot law is usually invoked by governmental officials, or left wing activists, to pursue those on the right, some of whom are prominent politicians.

The greater difficulty with the Gayssot law relates to efficacy. For those who believe that the Holocaust did not occur, the Gayssot law does not alter their fundamental beliefs, and does not preclude such individuals from publicly denying the event. Robert Faurisson, who was convicted of Holocaust denial and spent a year in prison, later spoke at an Iranian conference where he claimed that "The Holocaust is a gigantic lie and the gas chambers should be put in the rubbish bin of history."<sup>112</sup> Faurisson later sued a governmental official for defamation, when the official accused him of falsifying history, and lost. At the time of this writing, Robert Faurisson's website was still active, and he continued

to maintain that the Holocaust is a colossal lie.<sup>113</sup> From an American perspective, the only meaningful response to individuals like Faurisson, Gollnisch and Le Pen is more speech. The good news is that there is a significant amount of speech in response to the Holocaust deniers.<sup>114</sup>

From the French perspective, the efficacy of the Gayssot law should not be determined by reference to those who deny the Holocaust. Those individuals, as noted above, are unlikely to change their minds. However, under French law, it is hoped that the Gayssot law will impact those who might be tempted to join the Holocaust deniers. To the extent that the Gayssot law prevents the dissemination of Holocaust denial statements, French law (presumes and hopes) that the law will limit the access of potential converts to denial statements.

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<sup>1</sup> Rudyard Kipling, *Ballad of East and West* (1895).

<sup>2</sup> See <http://www.ihr.org/books/harwood/dsmrd01.html>; see also Raffi Berg, *The Fight Against Holocaust Denial*, <http://news.bbc.co.uk/1/hi/world/europe/4436275.stm> (hereafter "The Fight Against Holocaust Denial").

<sup>3</sup> See *The Fight Against Holocaust Denial*, *supra* note 2.

<sup>4</sup> Christopher Wolf, *A Comment on Private Harms in the Cyber-World*, 62 Wash. & Lee L. Rev. 355, 360 (2005).

<sup>5</sup> See *The Fight Against Holocaust Denial*, *supra* note 2.

<sup>6</sup> See <http://bbc.net/faurisson/eng/holo-more-Dangerous.htm>; see also Frances Harrison, *Where Holocaust Denial is Welcomed*, [http://news.bbc.co.uk/2/hi/programmes/from\\_our\\_own\\_correspondent/6183061.stm](http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/6183061.stm).

<sup>7</sup> See <http://www.guardian.co.uk/irving/article/0,,181049,00.html> (summarizing Lipstadt's victory in the litigation).

<sup>8</sup> See <http://www.ihr.org/books/harwood/dsmrd01.html> (Harwood website); <http://bbc.net/faurisson/eng/holo-more-Dangerous.htm> (Faurisson website).

<sup>9</sup> See *The Fight Against Holocaust Denial*, *supra* note 1.

<sup>10</sup> See Dan Bifelsky, *EU Adopts Measure Outlawing Holocaust Denial*, Int'l. Herald Tribune (April 19, 2007) (see <http://www.iht.com/articles/2007/04/19/news/eu.php>).

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

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

<sup>13</sup> La loi Gayssot, No. 90-615 (July 13, 1990).

<sup>14</sup> See <http://www.legifrance.gouv.fr/texteconsolide/PCEAA.htm>.

<sup>15</sup> La loi Gayssot, No. 90-615 (July 13, 1990).

<sup>16</sup> The 1939 Marchandau law modified the 1881 law on press freedom, and made it illegal to defame or abuse groups of persons belonging to specified races or religions with a view towards inciting hatred. Although the 1939 law was repealed by the Vichy regime, it was re-enacted after World War II. Cf. "Proposition de loi tendant a réprimer tout acte raciste, antisémite ou xénophobe," Senate Report No. 337, at 6 (May 31, 1990) (prepared by Charles Lederman). In 1972, the French Parliament enacted a law against racism (loi no. 72-546), and that law was reinforced by a 1989 law "repeating the principles of hospitality and tolerance and condemnation of racism, anti-semitism and xenophobia." See *id.*

<sup>19</sup> In 1965, the United Nations General Assembly adopted the International Convention on Elimination of All Forms of Racial Discrimination, and France ratified the convention in 1971. See *id.* France ratified the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms in 1974. See *id.*

<sup>23</sup> Paris Tribunal de Grande Instance (trial court), 17<sup>th</sup> Chambre Correctionnelle (criminal court) (April 18, 1991); see also *Le Monde*, April 29, 1991.

- <sup>24</sup> Paris Cour d'Appel (court of appeal) (11<sup>th</sup> Chambre, Dec. 9, 1992).
- <sup>25</sup> The text of the convention can be found at: <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>
- <sup>26</sup> United Nations Human Rights Committee, Communication No. 550 (1993). The decision is reported at: <http://www.unhcr.ch/tbs/doc.nsf/0/4c47b59ea48f7343802566f200352fea?Opendocument>
- <sup>27</sup> Revision No. 40 (September, 1992).
- <sup>28</sup> Pierre Marais v. France, Case # 31159, European Commission on Human Rights (June 24, 1996).
- <sup>29</sup> See Lyon Tribunal Administratif (June 17, 2003); Lyon Cour d'Appel Administrative (January 13, 2004).
- <sup>30</sup> Cour de Cassation (France's highest court), April 27, 2004, req. No. 03-85288 (confirming the conviction, but lifting the prison sentence, imposed by the lower courts).
- <sup>31</sup> Commission sur le racisme et le négationnisme à l'université Jean-Moulin Lyon III, report to the French Minister of Education (September, 2004). [Http://media.education.gouv.fr/file/02/3/6023.pdf](http://media.education.gouv.fr/file/02/3/6023.pdf)
- <sup>32</sup> R. Rosso & B. Thioly, "Ce que risque Gollnisch," *L'Express*, November 8, 2004. <http://www.lexpress.fr/info/france/dossier/lepen/dossier.asp?idea=430282>.
- <sup>33</sup> *Le Figaro* at 8 (Oct. 11, 2004).
- <sup>34</sup> [www.tfl.fr](http://www.tfl.fr).
- <sup>35</sup> Christophe Forcari, "Dix-sept ans après son leader, le numéro 2 du FN met en doute leur existence. Chambres à gaz: Gollnisch fait son Le Pen," *Libération* at 12 (October 12, 2004); "Bruno Gollnisch (FN) émet des doutes sur l'existence des chambres à gaz et relativise l'ampleur de la Shoah," *Le Monde* at 9 (October 13, 2004).
- <sup>36</sup> *Id.*
- <sup>37</sup> "Bruno Gollnisch maintient ses propos jugés négationnistes," *Le Nouvel Observateur* (October 12, 2004). <http://archquo.nouvelobs.com/cgi/articles?ad=politique/20041012.FAP6010.html&host=http://permanent.nouvelobs.com/>
- <sup>38</sup> *See* "Révocation de Bruno Gollnisch: la fac Lyon III poussée dans ses retranchements," [http://www.amnistia.net/news/articles/negdoss/revgolln/revgolln\\_208.htm](http://www.amnistia.net/news/articles/negdoss/revgolln/revgolln_208.htm).
- <sup>39</sup> Conseil d'Etat (France's highest administrative court), Ordonnance No. 275509 (January 14, 2005). [http://www.conseil-etat.fr/ce/jurispd/index\\_ac\\_ld0501.shtml](http://www.conseil-etat.fr/ce/jurispd/index_ac_ld0501.shtml).
- <sup>40</sup> Communiqué de presse (February 4, 2005). <http://hippocampe.lyon3.free.fr/communiqu.htm#040205>.
- <sup>41</sup> "Suspension de l'Université confirmée pour Bruno Gollnisch," *Le Monde* at 5 (May 23, 2006); "Gollnisch suspendu 5 ans de l'Université," *Le Nouvel Observateur* (May 23, 2006). [Http://archquo.nouvelobs.com/cgi/articles?ad=societe/20060523.OBS8701.html&hose=http://permanent.nouvelobs.com/](http://archquo.nouvelobs.com/cgi/articles?ad=societe/20060523.OBS8701.html&hose=http://permanent.nouvelobs.com/).
- <sup>42</sup> Parlement Européen, Rapport sur la demande de défense de l'immunité et des privilèges de Bruno Gollnisch, Ref. No. A6-0376/2005 (November 29, 2005). [Http://hippocampe.lyon3.free.fr/Rapport%20dianawallis.pdf](http://hippocampe.lyon3.free.fr/Rapport%20dianawallis.pdf) at 4. This position was also reported by the Conseil d'Etat. Conseil d'Etat, Ordonnance No. 275509 (January 14, 2005). [Http://www.conseil-etat.fr/ce/jurispd/index\\_ac\\_ld0501.shtml](http://www.conseil-etat.fr/ce/jurispd/index_ac_ld0501.shtml).
- <sup>43</sup> *Id.*
- <sup>44</sup> *Id.*
- <sup>45</sup> "Non-lieu pour le numéro deux du FN," *Le Monde* at 6 (March 21, 2005).
- <sup>46</sup> Parlement Européen, Commission des affaires juridiques, Décision sur la demande de défense de l'immunité et des privilèges de Bruno Gollnisch (2005/2072 (IMM)), P6 TA (2005) 0509.
- <sup>47</sup> Lyon Cour d'Appel (June 13, 2006).
- <sup>48</sup> Olivier Bertrand, "Gollnisch cède et 'reconnait' l'extermination. Le leader frontiste était jugé hier pour des propos sur les chambres à gaz," *Libération* (November 8, 2006). [Http://www.liberation.fr/actualite/societe/215698.FR.php](http://www.liberation.fr/actualite/societe/215698.FR.php).
- <sup>49</sup> *Id.*
- <sup>50</sup> [http://www.gollnisch.com/affaire/conclusions%20\\_st\\_just.doc](http://www.gollnisch.com/affaire/conclusions%20_st_just.doc).
- <sup>51</sup> *Id.*
- <sup>52</sup> "Bruno Gollnisch (FN) condamné pour ses 'insinuations' sur les chambres à gaz," *Le Monde* at 6 (January 20, 2007); Olivier Bertrand, "Pour les juges, Gollnisch est négationniste," *Libération* at 4 (January 19, 2007).

53 *Id.*

54 *Id.*

55 Paris Tribunal de Grande Instance, 17th criminal chamber (February 27, 1998).

56 *Id.* For a summary of the case, see [http://www.adl.org/poisoning\\_web/cole.asp](http://www.adl.org/poisoning_web/cole.asp).

57 *See id.*

58 Cour de Cassation (12 September 2000); ECHR, *Garaudy v. France* (n°65831/01); see also <http://www.echr.coe.int/eng/Press/2003/july/DecisionGaraudyvFrance4July2003.htm> & [http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentID=682271&portal=hbkm&source=externalbydo\\_cnumber&table=F69A27FD8FB8142BF01C1166DEA398649](http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentID=682271&portal=hbkm&source=externalbydo_cnumber&table=F69A27FD8FB8142BF01C1166DEA398649)

59 See, e.g., Cass. Crim (January 14, 1971) (praising war crimes); Tribunal de Grande Instance Paris (April 2, 2004) (inciting to racial hatred); Cass. Crim. (May 11, 2006) (inciting to racial hatred); Cour d'Appel Versailles (Sept. 19, 1999) (trivializing crimes against humanity); Tribunal de Grande Instance Nanterre (Dec. 26, 1997) (trivializing crimes against humanity); Tribunal de Grande Instance Lyon (January, 1991) (disrupting public order); Cour d'Appel Versailles (March 18, 1991) (trivializing crimes against humanity). For a more extensive list of court decisions against Le Pen, see "La justice a plusieurs fois condamné le chef du FN pour des propos racistes ou antisémites," *Le Monde* (April 24, 2002).

60 Paris Tribunal de Grande Instance (17th criminal chamber, Febr. 8,2008); see also *L'Express* 'Le Pen condamné à 3 mois de prison avec sursis', February 8,2008 <http://www.lexpress.fr/info/quotidien/actu.asp?id=465659>

61 News at Noon, French Public Television Channel Two. The broadcast can be consulted on Midi 2, Antenne 2 (Sept. 18, 1987). [Http://www.ina.fr/archivespourtout/index.php?vue=notice&from=fulltext&mc=chambre%20à%20gaz&num\\_notice=7&total\\_notices=12](http://www.ina.fr/archivespourtout/index.php?vue=notice&from=fulltext&mc=chambre%20à%20gaz&num_notice=7&total_notices=12), and [http://www.dailymotion.com/myselfo/video/xxiot\\_jeanmarie-le-pen-point-de-detail-19\\_politics](http://www.dailymotion.com/myselfo/video/xxiot_jeanmarie-le-pen-point-de-detail-19_politics).

62 "L'affaire du 'point de détail.' La cour d'appel de Versailles aggrave les peines prononcées contre M. LePen." *LeMonde* (Mar. 20, 1991).

63 *Id.*

64 See [http://www.ihr.org/jhr/v21/v21n2p-2\\_LePen.html](http://www.ihr.org/jhr/v21/v21n2p-2_LePen.html)

65 Nanterre Tribunal de Grande Instance (Dec. 26, 1997).

66 *Id.*

67 *Le Monde* (Sept. 15, 1999).

68 See <http://www.ejpress.org/article/9766>.

69 French Declaration of the Rights of Man and of the Citizen, Article IV (1789).

70 *Id.*

71 *See id.*

72 Conseil Constitutionnel, 81-132 DC, 16 January 1992, *Rec.* p. 18.

73 See Paris Cour d'Appel, November 16, 2005, Section A, *Esso c/Greenpeace France* (The decision applied the free speech defense, but held that an individual's free speech rights must be reconciled with respect for the rights of other individuals); Paris Tribunal de Grande Instance, July 9, 2004, *SPCEA c. Greenpeace France, Greenpeace New Zealand and Internet.fr.* (Although the Court accepted the defendants' free speech defense, the court limited the defense to the extent that Greenpeace's conduct defamed plaintiffs.).

74 French Declaration of the Rights of Man and of the Citizen, Article IV (1789).

75 1789 Declaration, Article XI.

76 ECHR, Article X, Par. 2 (The ECHR declares the following regarding the protection of freedom of expression: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.").

77 French Criminal Code, Art. 433-5-1.

78 Conseil Constitutionnel, 2003-467 DC, 13 March 2003, Rec. p. 211.

79 Law of 29 July 1881, Article 35-quater. [Http://www.legifrance.gouv.fr/texteconsolide/PCEAA.htm](http://www.legifrance.gouv.fr/texteconsolide/PCEAA.htm)

80 See Preamble to the 1948 Universal Declaration of Human Rights.

81 Draft Treaty Amending the Treaty of the European Union and the Treaty Establishing the European Community (Conference of the Representatives of the Governments of the Member States, CIG 1/1/07, October 5, 2007). Article VI of this Treaty refers to explanations regarding the Charter of Fundamental Rights (emphasizing that “dignity for every human being is not merely a fundamental right in itself, it in fact constitutes the very foundation of all fundamental rights,” and also provides that “none of the rights inscribed in the Charter can be used to restrict somebody’s right to dignity, and dignity of any human being is part of the substance from which all rights inscribed in this Charter spring.”).

82 The Conseil d’Etat has held that an individual’s “dignity is one of the many components of public order.” Conseil d’Etat, 27 October 1995, Commune de Morsan-sur-Orge, Rec. p. 372 (holding that dwarves right to dignity precluded them from choosing whether to allow themselves to be “launched” into the air).

83 French Criminal Code, Article R 645-1.

84 French Criminal Code, Articles 211-1 to 213-5.

85 Article 7 of the Statutory Regulations of the Nuremberg International Military Tribunal Annexed to the August 8, 1945, London Agreement. See also October 6, 1945, Decree of the provisional government of the French Republic.

86 French Criminal Code, Article 434-25.

87 *Id.*

88 French Criminal Code, Article 32 (July 29, 1881).

89 Cass. Crim., 8 October 1991, Bull. crim. No. 334.

90 Cass. Crim., 28 April 1998, Gaz. Pal. 1998, 2, chron. Crim. 137.

91 Cass. Crim., 11 July 1972, Bull. crim No. 236.

92 CommEDH, July 16 1982, *X c. République Fédérale d’Allemagne*, Req. N° 9235/81.

93 See Madeleine Rebérioux, “Le Génocide, le juge et l’historien,” *L’Histoire*, no. 138, 1999, pp. 90-98. See [http://archiv.jura.uni-saarland.de/france/Law-France/mr\\_monde.htm](http://archiv.jura.uni-saarland.de/france/Law-France/mr_monde.htm). Other historians (Bédarida, Furet, Tournier, Daniel), politicians (Perben, Fillon, Chirac), judges, lawyers, philosophers (Ricoeur) and journalists opposed the law.

94 Lyon Tribunal de Grande Instance, 6<sup>th</sup> criminal chamber (January 18, 2007).

95 See Stanley Fish, *Holocaust Denial and Academic Freedom*, 35 Valpariso U. L. Rev. 499, 512 (2001).

96 A number of writers have suggested that government should, perhaps, have the right to regulate hate speech. See Richard Delgado & Jean Stefancic, *Understanding Words That Wound* (2004); Owen Fiss, *The Irony of Free Speech* 79-83 (1996); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431, 480-82.

97 See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *American Booksellers Association v. Hudnut*, 771 F.2d 323 (7<sup>th</sup> Cir. 1985), *aff’d*, 475 U.S. 1001 (1986); *Collin v. Smith*, 578 F.2d 1197 (7<sup>th</sup> Cir.1978).