

INTRODUCTION:
PERSECUTION THROUGH PROSECUTION: REVISITING
TOURO LAW CENTER’S CONFERENCE IN PARIS ON THE
ALFRED DREYFUS AFFAIR AND THE LEO FRANK TRIAL

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In July 2011, Touro Law Center hosted a three-day conference on the Alfred Dreyfus affair and Leo Frank trial in Paris, France. The conference was held at a number of historical sites in Paris—including the École Militaire, France’s Royal Military Academy; the French Senate; and the Cour de Cassation, the highest court in the French judiciary—and featured many prominent speakers.¹

The theme of the conference, developed by the Honorable Sol Wachtler, was persecution through prosecution. Perhaps no case so clearly presents that theme as that of Alfred Dreyfus. The Dreyfus affair began in 1894 when Alfred, a Jewish French officer, was falsely charged with treason. He was subsequently convicted on the basis of flimsy evidence (including forged documents) in a secret court-

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¹ Among the speakers were Charles Dreyfus, grandson of Alfred Dreyfus; Steven Erlanger, Paris bureau chief of *The New York Times*; Steve Oney, author of *AND THE DEAD SHALL RISE: THE MURDER OF MARY PHAGAN AND THE LYNCHING OF LEO FRANK* (2004); Simone Rodan-Benzaquen, Paris representative for the American Jewish Committee (AJC); François Zimeray, French Ambassador for Human Rights; Martine Le Blond-Zola, great granddaughter of Émile Zola; Charles J. Hynes, Brooklyn District Attorney; Bishop Francis Deniau, Bishop of Nevers; Theo Klein, founding president of the European Jewish Congress; and Samuel Pizar, international lawyer, author, and advocate. The conference was co-sponsored by the AJC, the Representative Council of French Jewish Institutions (CRIF) and SciencesPo, and received the high patronage of Mr. Nicolas Sarkozy, then President of the French Republic. SNCF, the French National Railway Corporation, provided generous support for the conference. Vincent Duclert, an associate professor of history at the École des Hautes Études, provided substantial advice and assistance to the Conference Organizing Committee, which included the Honorable Sol Wachtler, Dean Emeritus Howard Glickstein, Associate Dean Linda Howard Weissman, and Professor Rodger Citron.

martial proceeding and sentenced to prison on Devil's Island. Anti-Semitism played a critical role in the military's decision to charge and then convict Dreyfus.

Despite the extraordinary hostility for a Jewish officer convicted of treason, Dreyfus's family nevertheless rallied supporters to their campaign to clear Alfred's name. The publication in 1898 of Emile Zola's *J'Accuse*, a lengthy newspaper article denouncing Dreyfus's conviction, marked a turning point in the affair. Eventually, despite a second conviction before a military tribunal based upon even more bogus evidence, Dreyfus was pardoned by the President of the French Republic. Subsequently, Dreyfus was fully exonerated by the Cour de Cassation. As the case progressed, it developed into a full-blown political affair that involved France's highest public officials and captured the prolonged attention of much of the public.

Persecution through prosecution is certainly not an exclusively French phenomenon. As the case of Leo Frank demonstrates, the United States of America has its own history of justice led astray by passion and prejudice. Frank, a Jewish factory superintendent in Atlanta, was convicted in 1913 of the murder of Mary Phagan, a 13-year-old girl who had worked in the factory and was found murdered there. The case against Frank was questionable but he nevertheless was found guilty and sentenced to death. The Governor of Georgia was persuaded to commute Frank's sentence to life imprisonment in June 1915. Two months later, a lynch mob seized Frank from prison and drove him to Marietta, Georgia, where he was hanged from a tree.

Over the course of three days, the conference examined various aspects of the Dreyfus and Frank affairs.² On the last day, the conference devoted a session to the topic of military justice. As the Dreyfus affair continued, the French army increasingly resisted review of the original conviction on the grounds that such a review would compromise the authority of the military and leave France vulnerable to attack. In the parlance of contemporary United States

² Texts of the remarks of Rodger D. Citron, Charles Dreyfus, Steve Oney and Steven Erlanger have been published in THE TOURO LAWYER, Fall 2012. Rodger D. Citron, Charles Dreyfus, Steve Oney & Steven Erlanger, *Persecution Through Prosecution: Alfred Dreyfus, Leo Frank and the Infernal Machine*, THE TOURO LAWYER, Fall 2012, at 12, available at <http://www.tourolaw.edu/tourolawyer/>; see also *Persecution Through Prosecution: Alfred Dreyfus, Leo Frank and the Infernal Machine*, TOURO LAW, <http://www.tourolaw.edu/DreyfusAffair/?pageid=566> (last visited Dec. 27, 2012) (providing the program for the conference).

constitutional law, the French army asserted that national security interests trumped Dreyfus's due process rights. The contentions of the French army were contested, to say the least, and ultimately Dreyfus was exonerated. Long after Dreyfus returned to the army, the debate over the conflict between national security and due process continues, especially in the United States in the aftermath of the attacks on September 11, 2001.

At the conference in Paris, the session on military justice was divided between the Dreyfus affair and contemporary United States constitutional law. We have reproduced the texts of the presentations from that session, supplemented by the extensive citations familiar to readers of law review articles. In doing so, we seek to maintain the tone of the conference speeches while simultaneously allowing interested readers to further investigate the issues discussed in the articles based upon the sources cited in the accompanying footnotes. The first two articles, by Professor Vivian Curran and Andre Bach, a former army general, were presented at the conference in French. They are presented here in English, with Professor Curran doing her own translation.

In her article, Professor Curran examines Dreyfus's second military trial, which occurred in Rennes in August 1899. As she details, this trial had been ordered by the Cour de Cassation and occurred after substantial exculpatory evidence of Dreyfus had been developed. Nevertheless, Dreyfus again was convicted, although this time the vote was not unanimous. Furthermore, Dreyfus was found guilty with "extenuating circumstances"—an unusual verdict, to say the least—and the tribunal imposed a sentence of no longer than ten years in prison. That the decision was both not unanimous and qualified suggested that even the judges on the military tribunal, at least some of them, realized that the prestige of the army depended not upon sustaining the conviction but in allowing its validity to be questioned. In any event, political opposition to the Rennes verdict contributed to the decision to pardon Dreyfus.

General André Bach is the author of *L'ARMÉE DE DREYFUS: UNE HISTOIRE POLITIQUE DE L'ARMÉE FRANÇAISE DE CHARLES X A 'L'AFFAIRE'* (Tallandier 2004). As part of his career in the French army, he was the head of the military archives, which include the "secret file" used to convict Dreyfus. His book provides the history of the Dreyfus affair from the institutional perspective of the military. In his article, he provides a brief summary of his findings, discussing

the espionage incident giving rise to the case, the conduct of the first Dreyfus trial, and the politics of Dreyfus's pardon and ultimate exoneration.

Having considered the operation of military justice in the history of the Dreyfus affair, we now explore its contemporary relevance in the United States' ongoing "war on terror." In his article, Gary Shaw describes the legal principles articulated by the Supreme Court in a series of Supreme Court cases decided after September 11, 2001. He notes that "[t]he recurring theme that arises in the Court's decisions resolving these issues is the power struggle between the Executive and Judicial branches of the United States government as to which branch possesses the power to determine due process for enemy combatants"—and that the judiciary consistently has held that it gets the last word in this struggle.

Professor Shaw's article provides the legal framework for Professor David Cole's article on the relationship between law and politics in the context of conflict between national security and due process. Professor Cole brings to the subject not only his scholarly expertise but also his experience as civil rights lawyer, having litigated a number of national security cases, including several in the United States Supreme Court. Noting that Dreyfus twice was wrongly convicted, Professor Cole argues that the rule of law ultimately prevailed "only because of the substantial political pressure brought to bear on [Dreyfus's] behalf." According to Professor Cole, a "similar story can be told about Guantánamo and the United States' 'war on terror' in the wake of the terrorist attacks of September 11, 2011." His article develops this argument in detail.

In addition to the articles on military justice, we present one additional article by Professor Peter Zablotsky. Professor Zablotsky moderated session IV of the conference, which discussed the libel trial of Emile Zola. In his article, Professor Zablotsky examines contemporary New York defamation law and applies those principles to the Zola trial. This exercise is, as he notes, "academic." Nevertheless, his survey of New York law certainly will be helpful to practicing lawyers and "may be relevant when defamation is claimed by public officials during the course of highly charged debates on contemporary social and political issues."