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Secrecy, Privacy and Human Rights

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Secrecy, Privacy and Human Rights

> No one shall be subject to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks. (Article 12, Universal Declaration of Human Rights, 1948)[1]

> 1 Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2 There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. (Article 8, European Convention on Human Rights, 1950)[2].

These two texts, from the Universal Declaration of Human Rights (adopted fifty years ago in 1948) and the European Convention on Human Rights (adopted in 1950) respectively, emphasise quite clearly the importance which, during the years preceding the founding of the

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[1] *Human Rights* (Heinemann Educational Books, 1968), p. 19.[2] Harris, D J et al, *Law of the European Convention on Human Rights* (Butterworths, 1995), p. 302. [3] Bremner, C and Farrell, S, 'Paparazzi were "only doing their job"', *The Times*, 4 September 1997, p. 4.[4] Cordelier, J, 'Deux Photos, deux tarifs', *Le Point*, 6 September 1997, p. 79.[5] Malherbe, J, *La vie privée et le droit moderne*, (1968), p. 4.[6] Robert, J, *Droits de l'homme et libertés fondamentales*, 6e édition (Montchrestien, 1996), p. 413.[7] see Morange, J, *Droits de l'homme et libertés publiques*, 3è édition (PUF, 1995), p. 165.[8] The original text of the Code Pénal, loi du 17 juillet 1970 read thus: Sera puni d'un emprisonnement de deux mois à un an et d'une amende de 2 000F à 60 000F, ou de l'un de ces deux peines seulement, quiconque aura volontairement porté atteinte à l'intimité de la vie privée d'autrui:

[2] Harris, D J et al, *Law of the European Convention on Human Rights* (Butterworths, 1995), p. 302. [3] Bremner, C and Farrell, S, 'Paparazzi were "only doing their job"', *The Times*, 4 September 1997, p. 4.[4] Cordelier, J, 'Deux Photos, deux tarifs', *Le Point*, 6 September 1997, p. 79.[5] Malherbe, J, *La vie privée et le droit moderne*, (1968), p. 4.[6] Robert, J, *Droits de l'homme et libertés fondamentales*, 6e édition (Montchrestien, 1996), p. 413.[7] see Morange, J, *Droits de l'homme et libertés publiques*, 3è édition (PUF, 1995), p. 165.[8] The original text of the Code Pénal, loi du 17 juillet 1970 read thus: Sera puni d'un emprisonnement de deux mois à un an et d'une amende de 2 000F à 60 000F, ou de l'un de ces deux peines seulement, quiconque aura volontairement porté atteinte à l'intimité de la vie privée d'autrui:

Fifth Republic, was placed upon privacy, upon the right to lead one's life away from the interference of the State or prying gaze of the general public. When we consider the extravagances of the media today, and particularly the role the press has to play here, I think we could be forgiven for thinking that these principles had become lost in the mists of time. This paper is written scarcely a year after the disappearance of the Princess of Wales, hounded to her death, so many believe, by a posse of over-zealous journalists determined to scoop the definitive photo of Diana and Dodi and to hawk it for a small fortune around the world's major papers. It is not my intention here to delve into the tragedy, to discuss who was or was not responsible for the Princess' death, but rather to explore an issue which has intrigued me for quite some time now, namely, how can it be that a country such as France, which regularly treats us to the most flamboyant spreads in magazines such as *Paris Match,* complete with full-colour photographs and outrageous revelations about people in high places, how can it be that such a country can pledge itself to be *le pays des droits de l'homme* and can reputedly have extremely stringent laws relating to privacy and secrecy? And how can this same country commit incredible indiscretions about those 'helping the police with their inquiries', innocent until proven otherwise in law yet apparently proclaimed guilty by the press? In this short paper, I would like to look at legislation relating to privacy and to secrecy in France, particularly in relation to the role played by the press and in relation to the 'interference in the privacy' of well-known public figures, and to the pre-trial indiscretions which apparently are so regularly committed.

Privacy

Where English practice relating to divulging information about celebrities through the press depends to a great extent on self-regulation, French Law contains a number of texts intended to restrict quite severely intrusion into the privacy, or *vie privée*, of the individual. The Fifth Republic has seen a reinforcing of privacy laws in line with commitments expressed in the European Convention on Human Rights and the Universal Declaration of Human Rights, with recent additions to existing legislation, certainly deemed necessary due to changing times and attitudes to public figures (even if we idolise them, we still want to know all the sordid details about their private lives), to modern technologies (powerful telephoto lenses, for example, and sophisticated video cameras and recording equipment), increased competitivity amongst newspapers and periodicals in a world in which it has become difficult to survive financially (many newspapers have had to close down or 'modernise' radically to attract new readers), and global markets where newspapers are prepared to pay vast sums of money for a scoop. For example, Laurent Sole, of the SD picture agency, had offers of up to one hundred thousand pounds and two hundred and fifty thousand dollars from 'dozens and dozens of

media agencies' for photos of Diana's and Dodi's crash[3]. And the infamous photographs of 'the kiss' which appeared in early August 1997, snapped off the Coast of Sardinia by an Italian paparazzo named Mario Brenna, were reputedly sold to the *Sunday Mirror* for its exclusive coverage for the equivalent of two and a half million francs. The *Sun* and the *Daily Mail*, publishing the photos the following day, had paid the equivalent of one million Francs, and *Paris Match* had paid 1.8 million francs for its coverage. It has been calculated that the series of shots will have been sold for somewhere between ten and thirty million francs in total, it being immensely difficult to arrive at an exact figure[4]. Despite a tightening up of privacy laws, we should not, of course, presume that, prior to legislation passed during the Fifth Republic, 'anything went', but it is rather the case that, at that stage, judges ruling on interferences in privacy were obliged to resort to legislation on authorship and copyright, on the right to one's name, on *les droits du modèle photographié* (which dictated that any person was master of his effigy and of the use which was made of it), to Commercial Law in fact, and to general texts relating to privacy, as well as to a substantial body of jurisprudence, in which they were noted for being rigorous in their interpretation of violations. Nonetheless, at this point, judgements made were often based on the principle that the publication of photographs taken without the express authorisation of the subject was not tolerated. For example, in the early years of the Fifth Republic, in 1965, a magazine which intended to publish photographs of Gérard Philipe's son, taken whilst he was in hospital and without the family's knowledge, was seized and publication prevented, on the grounds of this being an 'immixtion intolérable dans la vie privée' of the family[5], and an incident only deemed worthy

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[3] Bremner, C and Farrell, S, 'Paparazzi were "only doing their job"', *The Times*, 4 September 1997, p. 4.[4] Cordelier, J, 'Deux Photos, deux tarifs', *Le Point*, 6 September 1997, p. 79.[5] Malherbe, J, *La vie privée et le droit moderne*, (1968), p. 4.[6] Robert, J, *Droits de l'homme et libertés fondamentales*, 6e édition (Montchrestien, 1996), p. 413.[7] see Morange, J, *Droits de l'homme et libertés publiques*, 3è édition (PUF, 1995), p. 165.[8] The original text of the Code Pénal, loi du 17 juillet 1970 read thus: Sera puni d'un emprisonnement de deux mois à un an et d'une amende de 2 000F à 60 000F, ou de l'un de ces deux peines seulement, quiconque aura volontairement porté atteinte à l'intimité de la vie privée d'autrui:

[4] Cordelier, J, 'Deux Photos, deux tarifs', *Le Point*, 6 September 1997, p. 79.[5] Malherbe, J, *La vie privée et le droit moderne*, (1968), p. 4.[6] Robert, J, *Droits de l'homme et libertés fondamentales*, 6e édition (Montchrestien, 1996), p. 413.[7] see Morange, J, *Droits de l'homme et libertés publiques*, 3è édition (PUF, 1995), p. 165.[8] The original text of the Code Pénal, loi du 17 juillet 1970 read thus: Sera puni d'un emprisonnement de deux mois à un an et d'une amende de 2 000F à 60 000F, ou de l'un de ces deux peines seulement, quiconque aura volontairement porté atteinte à l'intimité de la vie privée d'autrui:

[5] Malherbe, J, *La vie privée et le droit moderne*, (1968), p. 4.[6] Robert, J, *Droits de l'homme et libertés fondamentales*, 6e édition (Montchrestien, 1996), p. 413.[7] see Morange, J, *Droits de l'homme et libertés publiques*, 3è édition (PUF, 1995), p. 165.[8] The original text of the Code Pénal, loi du 17 juillet 1970 read thus: Sera puni

of interest because the injured party was the child of famous parents[6], the emphasis here being upon the publication of the photographs, not on the taking of them. A formalisation of activity became essential, and eventually took the shape of the law of 17 July 1970 specifically devoted to enforcing the *respect de la vie privée*. One thing, however, that is noticeable is that, in reinforcing the concept of the invasion of privacy, the legislators deliberately did not attempt to provide a definition outlining exactly what constitutes *vie privée*, since it was felt that this could - or indeed should be allowed to - vary with time and with the evolution of society, and therefore any definition of *vie privée* still has to be arrived at by judges via an interpretation and examination of past judgements and *arrêts*, i.e. jurisprudence. Indeed, the creators of the European Convention on Human Rights and the Universal Declaration of Human Rights could hardly have imagined the form or extent of media intrusion into the lives of those who become famous or infamous - even for only a brief moment - today. The accepted definition is taken to be that *vie privée* corresponds to the 'sphère secrète où l'individu aura le droit d'être laissé tranquille'[7], a definition which can be seen either as very large or perhaps as quite constraining, but one definitely open to a variety of interpretations, depending upon the circumstances and upon the person interpreting them. But perhaps we can now turn to the major texts themselves which refer to violation of *vie privée* in the context of intrusions by the press.

Legislation

I have already mentioned the law of 17 July 1970, thanks to which Article 9 of the Code Civil reads thus:

> Chacun a droit au respect de sa vie privée.
> Les juges peuvent, sans préjudice de la réparation du dommage subi, prescrire toutes mesures, telles que séquestre, saisie et autres, propres à empêcher ou faire cesser une

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d'un emprisonnement de deux mois à un an et d'une amende de 2 000F à 60 000F, ou de l'un de ces deux peines seulement, quiconque aura volontairement porté atteinte à l'intimité de la vie privée d'autrui:

[6] Robert, J, *Droits de l'homme et libertés fondamentales,* 6e édition (Montchrestien, 1996), p. 413.[7] see Morange, J, *Droits de l'homme et libertés publiques,* 3è édition (PUF, 1995), p. 165.[8] The original text of the Code Pénal, loi du 17 juillet 1970 read thus: Sera puni d'un emprisonnement de deux mois à un an et d'une amende de 2 000F à 60 000F, ou de l'un de ces deux peines seulement, quiconque aura volontairement porté atteinte à l'intimité de la vie privée d'autrui:

[7] see Morange, J, *Droits de l'homme et libertés publiques,* 3è édition (PUF, 1995), p. 165.[8] The original text of the Code Pénal, loi du 17 juillet 1970 read thus: Sera puni d'un emprisonnement de deux mois à un an et d'une amende de 2 000F à 60 000F, ou de l'un de ces deux peines seulement, quiconque aura volontairement porté atteinte à l'intimité de la vie privée d'autrui:

atteinte à l'intimité de la vie privée; ces mesures peuvent, s'il y a urgence, être ordonnées en référé. (Article 9, Code Civil, loi du 17 juillet 1970)

and altered 5 articles (articles 368-372) of the Code Pénal - revised in 1994 - the most significant of which now reads as follows:

Est puni d'un an d'emprisonnement et de 300 000 F d'amende le fait, au moyen d'un procédé quelconque, volontairement de porter atteinte à l'intimité de la vie privée d'autrui:

1 En captant, enregistrant ou transmettant, sans le consentement de leur auteur, des paroles prononcées à titre privé ou confidentiel;

2 En fixant, enregistrant ou transmettant, sans le consentement de celle-ci, l'image d'une personne se trouvant dans un lieu privé.

Lorsque les actes mentionnés au présent article ont été accomplis au vu et au su des intéressés sans qu'ils s'y soient opposés, alors qu'ils étaient en mesure de le faire, le consentement de ceux-ci est présumé. (Nouveau Code Pénal, article 226-1, loi du 17 juillet 1970)[8]

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[8] The original text of the Code Pénal, loi du 17 juillet 1970 read thus: Sera puni d'un emprisonnement de deux mois à un an et d'une amende de 2 000F à 60 000F, ou de l'un de ces deux peines seulement, quiconque aura volontairement porté atteinte à l'intimité de la vie privée d'autrui:

1 en écoutant, en enregistrant ou transmettant au moyen d'un appareil quelconque des paroles prononcées dans un lieu privé par une personne, sans le consentement de celle-ci;

2 En fixant ou transmettant, au moyen d'un appareil quelconque, l'image d'une personne se trouvant dans un lieu privé, sans le consentement de celle-ci.

Lorsque les actes énoncés au présent article auront été accomplis au cours d'une réunion au vu et au su de ses participants, le consentement de ceux-ci sera présumé (Article 368, Ancien Code Pénal, loi du 17 juillet 1970).[9] Decision of the Cour de Paris, on appeal, 27 février 1967, see Malherbe, J, p. 5. [10] Morange, J, p. 170.[11] Bilger, P et Lebedel, P, *Abrégé des droits de la presse*, 3e édition (CFPJ, 1991), pp. 43-44.[12] *droit au secret de l'être*: see Lebreton, G, *Libertés publiques et droits de l'homme*, 2e édition (Armand Colin, 1996), p. 258.[13] Rivero, J, *Les libertés publiques*, vol 2 (PUF, 1977), p. 75.[14] 'Montand - deux femmes, deux façons de l'aimer', *France-Dimanche*, 28 May - 3 June 1994, back page, and 'Montand - Autour de son souvenir et de l'amour qu'elles lui ont porté', p 24.[15] Décret du 19-22 juin 1791; the Constitutions of 1791 (titre I), of year III (article 359), of year VIII (article 76), of 1848 (article 3); by an act 1815 (article 63) and by the Charters of 1814 (article 9) and 1830 (article 8). See Lebreton, G, p. 257.[16] See Morange, J, p p 174-5.[17] Decison of the Cour d'Appel de Paris, 30 mars 1981, see Costa, J-P, *Libertés publiques en France et dans le monde* (Editions Sciences techniques et humaines, 1986), p. 79.[18] Chatelain, C and d'Antoni, D, 'La presse a-t-elle le droit de tout raconter?' *Ça m'intéresse*, June 1998,

This law at the time was nicknamed the *loi BB*, since it was aimed principally at protecting film stars from the over-zealous attentions of the paparazzi, and, as you will by now have guessed, in the 1960s, France's main prey, stalked incessantly, was none other than Brigitte Bardot. Prior to the 1970 legislation, Bardot had protested against intrusions, and won, notably on one occasion when she had been photographed in *petite tenue* on her own premises. The Court deemed that the use of a telephoto lens to take pictures without her knowledge, in her own home and when she was not engaged in any professional activity was an unreasonable invasion of her privacy, and that 'le droit de la personne sur son image ne saurait souffrir d'exception pour les vedettes de l'art ou les personnalités publiques'[9], unless they were on public duty and their permission had therefore been presumed to have been given. The law of 17 July 1970 ensures that there are explicit civil and criminal sanctions available to deal with violations, article 9 in the Code Civil clearly mentioning seizure as a preventative step and even authorising the vague and far-reaching threat of 'toutes mesures', all to be carried out as emergency or urgent measures if deemed necessary by the judge and providing for compensation for hurt - usually proportionate to the gravity of the fault and the amount of money made (or potentially made) from the revelations[10]. Under the terms of the Code Pénal, an offender can receive a prison sentence accompanied by a fairly heavy fine. The person to suffer the penalty in such a case would normally be the perpetrator of the

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[9] Decision of the Cour de Paris, on appeal, 27 février 1967, see Malherbe, J, p. 5. [10] Morange, J, p. 170.[11] Bilger, P et Lebedel, P, *Abrégé des droits de la presse*, 3e édition (CFPJ, 1991), pp. 43-44.[12] *droit au secret de l'être*: see Lebreton, G, *Libertés publiques et droits de l'homme*, 2e édition (Armand Colin, 1996), p. 258.[13] Rivero, J, *Les libertés publiques*, vol 2 (PUF, 1977), p. 75.[14] 'Montand - deux femmes, deux façons de l'aimer', *France-Dimanche*, 28 May - 3 June 1994, back page, and 'Montand - Autour de son souvenir et de l'amour qu'elles lui ont porté', p 24.[15] Décret du 19-22 juin 1791; the Constitutions of 1791 (titre I), of year III (article 359), of year VIII (article 76), of 1848 (article 3); by an act 1815 (article 63) and by the Charters of 1814 (article 9) and 1830 (article 8). See Lebreton, G, p. 257.[16] See Morange, J, p p 174-5.[17] Decison of the Cour d'Appel de Paris, 30 mars 1981, see Costa, J-P, *Libertés publiques en France et dans le monde* (Editions Sciences techniques et humaines, 1986), p. 79.[18] Chatelain, C and d'Antoni, D, 'La presse a-t-elle le droit de tout raconter?' *Ça m'intéresse*, June 1998,

[10] Morange, J, p. 170.[11] Bilger, P et Lebedel, P, *Abrégé des droits de la presse*, 3e édition (CFPJ, 1991), pp. 43-44.[12] *droit au secret de l'être*: see Lebreton, G, *Libertés publiques et droits de l'homme*, 2e édition (Armand Colin, 1996), p. 258.[13] Rivero, J, *Les libertés publiques*, vol 2 (PUF, 1977), p. 75.[14] 'Montand - deux femmes, deux façons de l'aimer', *France-Dimanche*, 28 May - 3 June 1994, back page, and 'Montand - Autour de son souvenir et de l'amour qu'elles lui ont porté', p 24.[15] Décret du 19-22 juin 1791; the Constitutions of 1791 (titre I), of year III (article 359), of year VIII (article 76), of 1848 (article 3); by an act 1815 (article 63) and by the Charters of 1814 (article 9) and 1830 (article 8). See Lebreton, G, p. 257.[16] See Morange, J, p p 174-5.[17] Decison of the Cour d'Appel de Paris, 30 mars 1981, see Costa, J-P, *Libertés publiques en France et dans le monde* (Editions Sciences techniques et humaines, 1986), p. 79.[18] Chatelain, C and d'Antoni, D, 'La presse a-t-elle le droit de tout raconter?' *Ça m'intéresse*, June 1998,

offence, although the editor of the publication, the printers and those making the publication available for sale can also be sued as accomplices, and in any event the editor of the publication is ultimately liable if the perpetrator of the offence is unknown or unavailable[11].

Droit à l'image

As we have seen, article 9 of the Code Civil simply refers to *respect de la vie privée* and *l'intimité de la vie privée*, but the Code Pénal goes further and outlines certain specific violations of *vie privée,* and notably, of interest for the purposes of this paper, taking or publishing the *image d'une personne* without their consent. This *droit à l'image*, also described by Professor Jacques Robert as the *droit au secret de l'être*[12], is seen as an extension of the rights that each individual has over his own body, of which the image is a visual representation[13], and understands one's image or photograph to be an item of one's private

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[11] Bilger, P et Lebedel, P, *Abrégé des droits de la presse*, 3e édition (CFPJ, 1991), pp. 43-44.[12] *droit au secret de l'être*: see Lebreton, G, *Libertés publiques et droits de l'homme*, 2e édition (Armand Colin, 1996), p. 258.[13] Rivero, J, *Les libertés publiques*, vol 2 (PUF, 1977), p. 75.[14] 'Montand - deux femmes, deux façons de l'aimer', *France-Dimanche*, 28 May - 3 June 1994, back page, and 'Montand - Autour de son souvenir et de l'amour qu'elles lui ont porté', p 24.[15] Décret du 19-22 juin 1791; the Constitutions of 1791 (titre I), of year III (article 359), of year VIII (article 76), of 1848 (article 3); by an act 1815 (article 63) and by the Charters of 1814 (article 9) and 1830 (article 8). See Lebreton, G, p. 257.[16] See Morange, J, p p 174-5.[17] Decison of the Cour d'Appel de Paris, 30 mars 1981, see Costa, J-P, *Libertés publiques en France et dans le monde* (Editions Sciences techniques et humaines, 1986), p. 79.[18] Chatelain, C and d'Antoni, D, 'La presse a-t-elle le droit de tout raconter?' *Ça m'intéresse*, June 1998,

[12] *droit au secret de l'être*: see Lebreton, G, *Libertés publiques et droits de l'homme*, 2e édition (Armand Colin, 1996), p. 258.[13] Rivero, J, *Les libertés publiques*, vol 2 (PUF, 1977), p. 75.[14] 'Montand - deux femmes, deux façons de l'aimer', *France-Dimanche*, 28 May - 3 June 1994, back page, and 'Montand - Autour de son souvenir et de l'amour qu'elles lui ont porté', p 24.[15] Décret du 19-22 juin 1791; the Constitutions of 1791 (titre I), of year III (article 359), of year VIII (article 76), of 1848 (article 3); by an act 1815 (article 63) and by the Charters of 1814 (article 9) and 1830 (article 8). See Lebreton, G, p. 257.[16] See Morange, J, p p 174-5.[17] Decison of the Cour d'Appel de Paris, 30 mars 1981, see Costa, J-P, *Libertés publiques en France et dans le monde* (Editions Sciences techniques et humaines, 1986), p. 79.[18] Chatelain, C and d'Antoni, D, 'La presse a-t-elle le droit de tout raconter?' *Ça m'intéresse*, June 1998,

[13] Rivero, J, *Les libertés publiques*, vol 2 (PUF, 1977), p. 75.[14] 'Montand - deux femmes, deux façons de l'aimer', *France-Dimanche*, 28 May - 3 June 1994, back page, and 'Montand - Autour de son souvenir et de l'amour qu'elles lui ont porté', p 24.[15] Décret du 19-22 juin 1791; the Constitutions of 1791 (titre I), of year III (article 359), of year VIII (article 76), of 1848 (article 3); by an act 1815 (article 63) and by the Charters of 1814 (article 9) and 1830 (article 8). See Lebreton, G, p. 257.[16] See Morange, J, p p 174-5.[17] Decison of the Cour d'Appel de Paris, 30 mars 1981, see Costa, J-P, *Libertés publiques en France et dans le monde* (Editions Sciences techniques et

property, a concept completely foreign to English Law. The Code Pénal also refers specifically to the intrusion of a private place (*lieu privé*), suggesting perhaps therefore that those snapped in public places are 'fair game', however even this appears to be open to interpretation. For example, the Tribunal de Grande Instance of Nanterre made the following ruling on 15 February 1995:

> Tout individu, fût-il célèbre, a droit au respect de l'intimité de sa vie privée et est fondé à en obtenir la protection en fixant lui-même les limites de ce qui peut être diffusé à ce sujet.
>
> Dans les mêmes conditions, chacun dispose sur sa propre image, attribut de sa personnalité et sur l'utilisation de celle-ci, d'un droit exclusif qui lui permet de s'opposer à sa reproduction et à sa diffusion sans autorisation de sa part. (*Gazette du Palais*, 1995, Vie privée, (4 1500) p 348)

This ruling was made in connection with several articles published in *France-Dimanche*[14] dedicated to an alleged rift between Yves Montand's adopted daughter, Catherine Allégret, and Carole Amiel, his companion in later years, articles which were accompanied by four photographs of Catherine Allégret. Although it is true that in this case the entire spread came under fire, the articles being deemed as having 'porté atteinte à l'intimité de la vie privée de Catherine Allégret', the photographs are given a special mention - three were taken in public places, and therefore possibly excusable, but two of them showed purely private circumstances (Catherine Allégret grieving at Montand's funeral, and another with him before his death), and were used in such a way as to give credibility to the offending text. The Court considered that there had indeed been an infringement to Allégret's *droit sur son image*.

Lieu privé

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humaines, 1986), p. 79.[18] Chatelain, C and d'Antoni, D, 'La presse a-t-elle le droit de tout raconter?' *Ça m'intéresse*, June 1998,

[14] 'Montand - deux femmes, deux façons de l'aimer', *France-Dimanche*, 28 May - 3 June 1994, back page, and 'Montand - Autour de son souvenir et de l'amour qu'elles lui ont porté', p 24.[15] Décret du 19-22 juin 1791; the Constitutions of 1791 (titre I), of year III (article 359), of year VIII (article 76), of 1848 (article 3); by an act 1815 (article 63) and by the Charters of 1814 (article 9) and 1830 (article 8). See Lebreton, G, p. 257.[16] See Morange, J, p p 174-5.[17] Decison of the Cour d'Appel de Paris, 30 mars 1981, see Costa, J-P, *Libertés publiques en France et dans le monde* (Editions Sciences techniques et humaines, 1986), p. 79.[18] Chatelain, C and d'Antoni, D, 'La presse a-t-elle le droit de tout raconter?' *Ça m'intéresse*, June 1998,

So what is considered to be a *lieu privé*? It would seem that the Courts consider the *respect de la vie privée* as an extension of the *inviolabilité du domicile* (the sanctity of the home), a concept which existed in French Law long before the founding of the Fifth Republic, formalised by decree in 1791and recognised by various constitutions and charters[15] subsequently. Regularly considered as a person's *domicile*, and therefore inviolable, are not only a person's principal residence, but also any other residences or holiday homes, their grounds, balconies, courtyards and so on, regardless of their state of repair or of the fact that they may not actually be inhabited, so long as this could theoretically be a possibility. Boats and caravans, hotel rooms and occasionally the place of work are also considered as *domiciles*, but not, however, cars, nor yet restaurants, cafés or shops during opening hours[16]. So cases have been brought - and won - by film stars and princesses photographed on boats[17] (the Grimaldi family), and by the Duchess of York against *Paris Match* for its coverage of the famous toe-nibbling incident with her financial adviser, featured in its edition of 3 September, 1992, for which she was unable to gain any sympathy in this country against the English tabloids[18]. Eric Cantona was also successful in a case against the magazine *But* in 1995, but

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[15] Décret du 19-22 juin 1791; the Constitutions of 1791 (titre I), of year III (article 359), of year VIII (article 76), of 1848 (article 3); by an act 1815 (article 63) and by the Charters of 1814 (article 9) and 1830 (article 8). See Lebreton, G, p. 257.[16] See Morange, J, p p 174-5.[17] Decison of the Cour d'Appel de Paris, 30 mars 1981, see Costa, J-P, *Libertés publiques en France et dans le monde* (Editions Sciences techniques et humaines, 1986), p. 79.[18] Chatelain, C and d'Antoni, D, 'La presse a-t-elle le droit de tout raconter?' *Ça m'intéresse*, June 1998,

[16] See Morange, J, p p 174-5.[17] Decison of the Cour d'Appel de Paris, 30 mars 1981, see Costa, J-P, *Libertés publiques en France et dans le monde* (Editions Sciences techniques et humaines, 1986), p. 79.[18] Chatelain, C and d'Antoni, D, 'La presse a-t-elle le droit de tout raconter?' *Ça m'intéresse*, June 1998,

[17] Decison of the Cour d'Appel de Paris, 30 mars 1981, see Costa, J-P, *Libertés publiques en France et dans le monde* (Editions Sciences techniques et humaines, 1986), p. 79.[18] Chatelain, C and d'Antoni, D, 'La presse a-t-elle le droit de tout raconter?' *Ça m'intéresse*, June 1998,

[18] Chatelain, C and d'Antoni, D, 'La presse a-t-elle le droit de tout raconter?' *Ça m'intéresse*, June 1998, p. 34.[19] *Gazette du Palais*, 1995, Vie privée (4 1500), p. 347.[20] 'Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.' (Code Civil, article 1382).[21] Chatelain, C et d'Antoni, D, p. 34.[22] La révélation d'une information à caractère secret par une personne qui en est dépositoire, soit par état soit par profession soit en raison d'une fonction ou d'une mission temporaire, est punie d'un an d'emprisonnement et de 100 000 francs d'amende (Code Pénal, article 226-13).[23] Decision of the Tribunal de Grand Instance, Paris, 18 janvier 1996. The author and editor were found guilty of *violation du secret professionnel* (Tribunal de Grand Instance, Paris, 5 juillet 1996); see Turpin, D, *Les libertés publiques*, 3e édition (Mémentos, 1996), p. 224.[24] Article 6(2) of the European Convention on Human Rights reads: Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.[25] See Braudeau, M, 'Un Américain en colère', *Le Monde*, 25 February 1998, p. 12.[26] Commission justice pénale et droits de l'homme, *La mise en etat des affaires pénales* (La documentation française, 1991), p. 309.[27] La libre communication des

not under article 9 of the Code Civil, since the photographs concerned in this incident had not been taken 'dans un lieu privé ou dans des circonstances de cet ordre'[19] (note the reference to *circonstances de cet ordre*, seeming to extend the definition of what constitutes a *lieu privé*); however, it was felt that the rights to his image had been violated, and that compensation should be awarded under the terms of article 1382 of the Code Civil, relating to

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pensées et des opinions est un des droits les plus précieux de l'homme; tout citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté dans les cas déterminés par la loi (Article 11, Déclaration des droits de l'homme et du citoyen).[28] Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises (Article 10 (1) , European Convention on Human Rights).[29] Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers (Article 19, Universal Declaration of Human Rights).[30] *non-assistance à personnes en danger* carries a sentence of up to five years in prison; *homicide involontaire*, a sentence of up to three years in prison.

[19] *Gazette du Palais*, 1995, Vie privée (4 1500), p. 347.[20] 'Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.' (Code Civil, article 1382).[21] Chatelain, C et d'Antoni, D, p. 34.[22] La révélation d'une information à caractère secret par une personne qui en est dépositoire, soit par état soit par profession soit en raison d'une fonction ou d'une mission temporaire, est punie d'un an d'emprisonnement et de 100 000 francs d'amende (Code Pénal, article 226-13).[23] Decision of the Tribunal de Grand Instance, Paris, 18 janvier 1996. The author and editor were found guilty of *violation du secret professionnel* (Tribunal de Grand Instance, Paris, 5 juillet 1996); see Turpin, D, *Les libertés publiques*, 3e édition (Mémentos, 1996), p. 224.[24] Article 6(2) of the European Convention on Human Rights reads: Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.[25] See Braudeau, M, 'Un Américain en colère', *Le Monde*, 25 February 1998, p. 12.[26] Commission justice pénale et droits de l'homme, *La mise en etat des affaires pénales* (La documentation française, 1991), p. 309.[27] La libre communication des pensées et des opinions est un des droits les plus précieux de l'homme; tout citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté dans les cas déterminés par la loi (Article 11, Déclaration des droits de l'homme et du citoyen).[28] Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises (Article 10 (1) , European Convention on Human Rights).[29] Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers (Article 19, Universal Declaration of Human Rights).[30] *non-assistance à personnes en danger* carries a sentence of up to five years in prison; *homicide involontaire*, a sentence of up to three years in prison.

compensation[20]**.** Although a celebrity is presumed to consent tacitly to being photographed in a public place while going about his professional business, as soon as this consent is seen to be withdrawn by a deliberate refusal from the victim to see photographs of himself published, then an offence has been committed. For Cantona, this was all the more so since his image was already associated with various commercial activities, and was therefore a source of revenue, and it was clear that *But* was using photographs taken without the star's consent to attract purchasers. However, Courts are known to be rather less sympathetic in their judgements towards stars who, by the nature of their profession and of their own behaviour, appear to be drawing the attention of the media in order to benefit from it. In other words, you can't both have your cake and eat it. In the Cantona case, the bottom line was that he had not consented to use of his image, because rights had already been sold to others. The Court did not hesitate to underline that

> Il ne s'agit pas d'informations d'ordre intime excédant ce qu'une personnalité notoirement connue, ayant accepté d'exercer son activité professionnelle en s'exhibant sous les yeux du public, spécialement exposée en cela au 'feu' des médias qui contribuent d'ailleurs à sa notoriété, et dont la sphère de la vie privée ne peut dès lors

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[20] 'Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.' (Code Civil, article 1382).[21] Chatelain, C et d'Antoni, D, p. 34.[22] La révélation d'une information à caractère secret par une personne qui en est dépositoire, soit par état soit par profession soit en raison d'une fonction ou d'une mission temporaire, est punie d'un an d'emprisonnement et de 100 000 francs d'amende (Code Pénal, article 226-13).[23] Decision of the Tribunal de Grand Instance, Paris, 18 janvier 1996. The author and editor were found guilty of *violation du secret professionnel* (Tribunal de Grand Instance, Paris, 5 juillet 1996); see Turpin, D, *Les libertés publiques*, 3e édition (Mémentos, 1996), p. 224.[24] Article 6(2) of the European Convention on Human Rights reads: Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.[25] See Braudeau, M, 'Un Américain en colère', *Le Monde*, 25 February 1998, p. 12.[26] Commission justice pénale et droits de l'homme, *La mise en etat des affaires pénales* (La documentation française, 1991), p. 309.[27] La libre communication des pensées et des opinions est un des droits les plus précieux de l'homme; tout citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté dans les cas déterminés par la loi (Article 11, Déclaration des droits de l'homme et du citoyen).[28] Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises (Article 10 (1) , European Convention on Human Rights).[29] Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers (Article 19, Universal Declaration of Human Rights).[30] *non-assistance à personnes en danger* carries a sentence of up to five years in prison; *homicide involontaire*, a sentence of up to three years in prison.

recouvrir les mêmes limites restrictives que celle d'un particulier anonyme, doit s'attendre à voir divulguer sur elle. (*Gazette du Palais*, 1995, Vie Privée (41500) p 347)

Relations familiales et sentimentales

There would appear to be yet another strand to *vie privée*, which protects human relationships. Traditionally, in France, family relationships have been protected by jurisprudence, and also more recently, under the Fifth Republic, by article 8(i) of the European Convention on Human Rights, which declares that everyone has the right to respect for his private and family life, his home and his correspondence, and this right would appear to be extended to sentimental relationships outside of the family circle as well. Thus, although François Mitterrand's double life and illegitimate daughter, Mazarine, were no secret to the press, their existence was only revealed when it suited Mitterrand to do so[21], a far cry from the leaking of sleaze which obsesses the anglo-saxon world. Furthermore, Article 226-13 of the Code Pénal also punishes violation of the *secret professionnel*[22], divulging

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[21] Chatelain, C et d'Antoni, D, p. 34.[22] La révélation d'une information à caractère secret par une personne qui en est dépositoire, soit par état soit par profession soit en raison d'une fonction ou d'une mission temporaire, est punie d'un an d'emprisonnement et de 100 000 francs d'amende (Code Pénal, article 226-13).[23] Decision of the Tribunal de Grand Instance, Paris, 18 janvier 1996. The author and editor were found guilty of *violation du secret professionnel* (Tribunal de Grand Instance, Paris, 5 juillet 1996); see Turpin, D, *Les libertés publiques*, 3e édition (Mémentos, 1996), p. 224.[24] Article 6(2) of the European Convention on Human Rights reads: Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.[25] See Braudeau, M, 'Un Américain en colère', *Le Monde*, 25 February 1998, p. 12.[26] Commission justice pénale et droits de l'homme, *La mise en etat des affaires pénales* (La documentation française, 1991), p. 309.[27] La libre communication des pensées et des opinions est un des droits les plus précieux de l'homme; tout citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté dans les cas déterminés par la loi (Article 11, Déclaration des droits de l'homme et du citoyen).[28] Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises (Article 10 (1) , European Convention on Human Rights).[29] Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers (Article 19, Universal Declaration of Human Rights).[30] *non-assistance à personnes en danger* carries a sentence of up to five years in prison; *homicide involontaire*, a sentence of up to three years in prison.

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information which can be of the most intimate nature, legislation of which Mitterrand's doctor, Gübler, fell foul in his book *Le Grand Secret*, whose publication was withheld on the grounds of 'intrusion particulièrement grave dans l'intimité de la vie privée familiale du Président F Mitterrand et dans celle de son épouse et de ses enfants'[23].

I would now like to turn to look briefly at the matter of secrecy in criminal trials.

Paris, 5 juillet 1996); see Turpin, D, *Les libertés publiques*, 3e édition (Mémentos, 1996), p. 224.[24] Article 6(2) of the European Convention on Human Rights reads: Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.[25] See Braudeau, M, 'Un Américain en colère', *Le Monde*, 25 February 1998, p. 12.[26] Commission justice pénale et droits de l'homme, *La mise en etat des affaires pénales* (La documentation française, 1991), p. 309.[27] La libre communication des pensées et des opinions est un des droits les plus précieux de l'homme; tout citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté dans les cas déterminés par la loi (Article 11, Déclaration des droits de l'homme et du citoyen).[28] Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises (Article 10 (1) , European Convention on Human Rights).[29] Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers (Article 19, Universal Declaration of Human Rights).[30] *non-assistance à personnes en danger* carries a sentence of up to five years in prison; *homicide involontaire*, a sentence of up to three years in prison.

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Secrecy

As well as exuberant coverage given to confidential information and photography of the rich and famous, another type of unwelcome publicity is the violation of the *présomption d'innocence* and of what is referred to in France as the *secret de l'instruction*, and it can, of course, be particularly dangerous. The *instruction* is the investigation process carried out by the examining magistrate, or *juge d'instruction*, in a criminal case, a function carried out by the police in this country. According to French Law, as in other democratic countries, a person is innocent until proven guilty, a principle underlined by article 6(2) of the European Convention on Human Rights[24] however, many - increasingly including very well-known celebrities - have had cause to doubt this principle, a recent victim being non other than Robert de Niro, questioned in connection with a scandal involving call-girls whilst filming in France in February 1998[25] and treated, he claimed, as a criminal by the *juge d'instruction*

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responsible for the case. De Niro was horrified to see his photograph, the name of his hotel, details of the case in the newspapers, to the extent that he decided to sue juge N'Guyen, the *juge d'instruction,* for violation of the *secret de l'instruction* under the terms of article 9-1 of the Code Civil, which states

> Chacun a droit au respect de la présomption d'innocence. (Code Civil, article 9-1, loi 4 janvier 1993)
> Lorsqu'une personne placée en garde à vue, mise en examen ou faisant l'objet d'une citation à comparaître en justice, d'un réquisitoire du Procureur de la République ou d'une plainte avec constitution de partie civile, est, avant toute condamnation, présentée publiquement comme étant coupable de faits faisant l'objet de l'enquête ou de l'intsruction judiciaire, le juge peut, même en référé, ordonner l'insertion dans la publication concernée d'un communiqué aux fins de faire cesser l'atteinte à la pésomption d'innocence, sans préjudice d'une action en réparation des dommages subis et des autres mesures qui peuvent être prescrites en application du nouveau Code de procédure civile et ce, aux frais de la personne, physique ou morale, responsable de l'atteinte à la présomption d'innocence. (Code Civil, article 9-1, loi du 24 août 1993)

The *secret de l'instruction* is also protected by article 11 of the Code de Procédure Pénale, which reads as follows:

> Sauf dans les cas où la loi en dispose autrement et sans préjudice des droits de la défense, la procédure au cours de l'enquête et de l'instruction est secrète.
>
> Toute personne qui concourt à cette procédure est tenue au secret professionnel dans les conditions et sous les peines des articles 226-13 et 226-14 du Code Pénal. (Code de Procédure Pénale, article 11)

Article 226-13 of the Code Pénal promises heavy fines of one hundred thousand francs and a year in prison to those violating the *secret professionnel*, and article 226-14 simply outlines occasions when the law authorises or requires the revelation of such confidential information. A newspaper publishing information which violates the *secret de l'instruction* becomes an accomplice, and also liable to prosecution. So, if the *secret de l'instruciton* and *présomption d'innocence* are so well-protected, how does it happen that they are apparently so frequently flouted? Part of the reason would appear to lie in the interpretation of the terms of article 11

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regardless of frontiers (Article 19, Universal Declaration of Human Rights).[30] *non-assistance à personnes en danger* carries a sentence of up to five years in prison; *homicide involontaire*, a sentence of up to three years in prison.

of the Code de Procédure Pénale. *Toute personne qui concourt à cette procédure* is usually interpreted by the courts as referring to the judges, the prosecution, the police and lawyers of the various parties, i.e. the legal professionals, but not to the accused, the victim or the witnesses involved in an investigation in progress, who may speak freely, within certain limits, of course, beyond which one transgresses laws on defamation. The accusation is often made that 'ceux qui ne savent rien parlent et ceux qui savent quelque chose sont tenus au silence'[26]. However, the *juge d'instruction* and the public prosecutor are also legally entitled to publish information relating to the case if they feel this may help advance the case, and in particular, if they feel it is necessary to correct a wrong impression which has been gained through media coverage. This somewhat ambiguous state of affairs regarding a commitment to the *présomption d'innocence* goes some way to explaining the constant leaking of information, coupled with a desire by often over-burdened *juges d'instruction* to further their investigations, especially those where the culprit is unknown, to 'nail' high-ranking offenders, hitherto often perceived as being out of the reaches of the law, where publicity is seen as the only way to avoid a scandal being hushed up (we need only consider the wave of scandals involving political and business personalities in the eighties and nineties) and of course the rise in investigative journalism and technological advances in the world of the media. It may, of course, also be true that a fine of one hundred thousand francs is considered a fairly light penalty to pay for being the first newspaper to break a story. Unfortunately for the victim of such indiscretions, the results can be devastating, leading to sullying the name of the innocent - for many will think that there is no smoke without fire - or influencing the chances of a fair trial for the suspect who ultimately is charged.

The legislation, therefore, is in place to protect the interests of the individual in terms of privacy and secrecy, and from rulings which have been made, we can see the will of judges and courts to enforce this legislation. There is, however, a certain unease and this is seen

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especially in matters where confiscating or seizing a publication is concerned, and judges are loath to take this step unless they consider an 'immixtion intolérable' in the privacy of an individual has been committed, since this is seen as a very real threat to the freedom of expression, a principle defended by the Déclaration des droits de l'homme et du citoyen[27], by the European Convention on Human Rights[28] and the Universal Declaration of Human Rights[29] respectively, and a principle especially dear to the French since the restrictions imposed on news communications during the two world wars. Numerous laws, regularly updated, dictate what the press may or may not do, with legislation passed on 29 July 1881 still being the basis. It is all too easy to see journalists as the 'bad guys', although as they themselves point out, they also play an important role in the protecting of human rights, delving into miscarriages of justice conveniently ignored by the authorities, focussing media attention on politicians' and leading industrialists' shady deals.

So where does all this leave Diana and Dodi (tragic victims of intrusions into their privacy) and the paparazzi (named by the press when under police investigation and seized upon as scapegoats by all and sundry)? You will certainly remember that the charges levied against

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[27] La libre communication des pensées et des opinions est un des droits les plus précieux de l'homme; tout citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté dans les cas déterminés par la loi (Article 11, Déclaration des droits de l'homme et du citoyen).[28] Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises (Article 10 (1) , European Convention on Human Rights).[29] Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers (Article 19, Universal Declaration of Human Rights).[30] *non-assistance à personnes en danger* carries a sentence of up to five years in prison; *homicide involontaire*, a sentence of up to three years in prison.

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the interfering photographers shortly after the crash were none of those outlined above, but rather *non-assistance à personnes en danger, homicides et blessures involontaires,* offences which admittedly carry heavier penalties than those outlined here[30], but it is interesting that the legal professionals do not mention *atteinte à la vie privée* - after all, cars and restaurants may in the minds of some constitute an area of that imprecise *sphère secrète*, but they are not considered *domiciles*, and there is potential for an interesting debate here. Dodi's father Mohammed al-Fayed, however, does refer to the invasion of privacy, regarding press intrusion during the totality of the couple's holiday in his care in the summer of 1997. This is perhaps not surprising, since the Princess of Wales' estate may sue al-Fayed's business for eight million pounds, the inheritance tax bill which it had to pay upon her death, and for a further twenty-five million pounds representing the interest on this sum had she lived, in the event of his business being found responsible for her death at the hands of a drunken chauffeur, rather than the paparazzi. The results of the French criminal investigation, when they eventually materialise, will almost certainly spark further debate and controversy, which the interested parties will no doubt endeavour to exploit each to their own advantage.

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