

A Comparison of the Freedom of Speech of Workers in French and American Law

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The First Amendment to the Constitution of the United States stipulates that the legislature will not enact any law limiting the freedom of speech.¹ The violation of this supreme stipulation is cause for legal action based on section 1 of the Civil Rights Act of 1871 which states

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress²

Moreover, the Fourteenth Amendment affirms in holding that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”³

Under the tutelary protection of these constitutional pillars, freedom of speech should be solidly guaranteed if not venerated as an absolute principle. The reality is far removed from this idyllic vision. As viewed from the United States by American businesses and investors, European laws grant employees an excessively generous amount of protection against employer authority and control. By contrast, as viewed from the Old Continent (except for this insular monarchy drifting off our shores, called the United Kingdom), America resembles hell for workers. The so-called doctrine of “employment at will”⁴ alone embodies a conservative approach toward labor relations, individual as well as collective, which is rather inconceivable in France and throughout most of Europe.

A comparative study of the freedom of speech of employees underscores the giant abyss separating European and American judicial systems. But, even if judges and national legislators do not express the law in the same fashion, an analysis of the topic nevertheless reveals a similar type of reasoning underlying the doctrine resulting in a convergence of these varying legal cultures. This possibility of intellectual convergence is apparent from our study of the freedom of expression such as it has

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1. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

2. 42 U.S.C. § 1983 (2000).

3. U.S. CONST. amend XIV, § 1.

4. See *infra* text accompanying note 11.

been accorded to workers in the United States. French law could on this account claim to serve as an example—maybe even a model—in the search being conducted across the Atlantic for a new type of legislation improving the rights of workers.

The phenomenon of close interdependence enhanced by mutual exchanges between the labor laws of different countries is further highlighted by the “transposition” (the term, as we shall see, is not improper) of the Sarbanes-Oxley law in Europe, which launched the trend of “whistleblowing.” Although this notion was previously unrecognized within European labor codes, for example in France or in Germany, it was welcomed and assimilated in these countries, after first undergoing a vigorous overhaul. The right to privacy, however, sometimes conflicts with freedom of speech. This is evident in the matter of electronic surveillance of employees. In comparison with American law, French law seems, once again, to be on another planet.

I. “DESPERATELY SEEKING” THE FIRST AMENDMENT IN THE WORKPLACE

Several factors have led to a stranglehold on employees’ freedom of expression in the United States.⁵ First is the decline of unionization. It is known that collective bargaining tends to forestall employer decisions detrimental to the worker. A collective agreement requiring “just grounds” for dismissal or one that surrounds staff reductions in procedural guarantees serves to build a favorable framework for the freedom of speech in the workplace. Shop stewards or union-management committees are precious intermediaries relaying the voice of workers to company management. Without unions, these beneficial processes vanish. Worse yet, the American legislature and U.S. courts defend with equal ardor freedom of speech on the part of unions and that of the employer to fight the unionization of its personnel and engage in antiunion electoral propaganda.⁶

Second, waves of collective dismissals (mass layoffs) introduced a shared feeling of intense anxiety regarding job security and therefore encouraged employees to practice self-censorship at their workplaces. After all, whether the economy is going through a growth or recession cycle, self-censorship is kept alive and well in America by the ideological myth of a “classless society”—a myth that inclines workers not to attribute their ills and problems outwardly to an external conflict between economic forces—and the intrinsic inequality of ownership that opposes them to their employers. Rather, the prevailing culture today “promotes . . . docility, self-censorship and acceptance of the hierarchy” in the workplace.⁷ Worse, this “culture implicitly turns workers against each other.”⁸ Continental Europe, however, is a completely different scenario. There, the Marxist critique of liberalism firmly entrenched a confrontational structure of work relations and very early on caused unions to claim new rights and liberties for the

5. David C. Yamada, *Voices from the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace*, 19 BERKLEY J. EMP. & LAB. L. 1, 8–21 (1998). Today, Yamada is a Professor at Suffolk University Law School. We borrow many ideas from this specialist in workplace violence (bullying).

6. On this aspect (equally astonishing for a Continental European jurist), see Kate E. Andrias, Note, *A Robust Public Debate: Realizing Free Speech in Workplace Representation Elections*, 112 YALE L.J. 2415 (2003).

7. Yamada, *supra* note 5, at 11.

8. *Id.*

benefit of individuals in an attempt to counterbalance the weight of employer authority and power.

Third, the electronic surveillance of personnel, such as recording phone conversations or e-mails, reviewing computer hard drives, and monitoring the comings and goings of employees by badge, digital imprints, or geo-location using GPS, creates the impression of constant employer surveillance. In other words, this “Big Brother” approach creates feelings of being monitored at any time and in almost any place. Naturally, this approach leads workers to become very careful about the content of what they write and say.

This demise of the freedom of speech is rather ironic at a time when the democratic participation of workers in business activities and the full development of employees in the workplace have become constant refrains in the copious literature written on U.S. management practices. But, this situation has historic roots. The typical American worker of the nineteenth century was a farmer or independent merchant who knew nothing about individual rights of workers and who did not perceive a relationship between an employer and an employee other than one based on the agrarian model of the feudal lord-serf relationship. It is thus very natural that the employment-at-will rule (the discretionary nature of terminating the work contract)⁹ has become the law of the land. The promulgation of the National Labor Relations Act (NLRA)¹⁰ in 1935 confirmed the preeminence of a collective approach with respect to work relations which lasted until the 1960s. At that time, the enactment of federal laws against various forms of discrimination reestablished the worker as a possible beneficiary of individual rights.

The potential foundations for protection of free speech in the workplace are insufficient. Neither the First Amendment, nor state constitutions, nor the NLRA or whistleblowing laws offer an effective shield to employees. Some authors are pressing the government to pass a federal law that fills in the gaps and erases the anomalies. French law could prove enlightening.

A. Concealed Judicial Foundations

The doctrine of employment at will states that, in the absence of a written contract of specified duration (that is to say, in the presence of an ordinary contract of unspecified duration), an employee can be dismissed “for good cause, for no cause or even for cause morally wrong.”¹¹ While this doctrine has not altogether disappeared, it has been notably restricted since the second half of the nineteenth century through legislative reforms and through common law exceptions.

The public policy exception to the employment-at-will rule provides grounds for an action for wrongful discharge when an employer discharges a worker for a reason that harms public order.¹² Forty-three states have adopted a form of public policy exception

9. See *infra* text accompanying note 11.

10. 29 U.S.C. §§ 151–169 (2000); see *infra* Part I.A.2.i.

11. *Payne v. W. & Atl. R.R. Co.*, 81 Tenn. 507, 519–20 (1884).

12. See *Petermann v. Int’l Bhd. of Teamsters*, 344 P.2d 25, 27 (Cal. Ct. App. 1959) (affirming that it would be “obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee . . . on the ground that the employee declined to commit perjury”); *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834,

(whereas seven states reject it in any form). Two other exceptions to the doctrine of employment at will (the implied-contract exception, in thirty-eight states, and the covenant of good faith and fair dealing, in eleven states) consist, according to a classical method of interpretation, of setting into motion implicit contractual obligations that curb an employer's discretionary power of termination for the benefit of the weaker party (the employee). The plaintiff who raises the public policy exception must clarify the source from which the rule of transgressed public order emanates, whether it concerns a constitution (federal or state), a law, a regulation, an administrative rule, or even a judicial decision.¹³

1. The First Amendment and Individual State Constitutions

In surprising fashion, the First Amendment proves to be of little help when a worker initiates an action for wrongful discharge claiming that he is the victim of reprisals and guilty only of expressing himself. Freedom of expression offers workers a very frail shelter. In most cases, the public policy exception is not applicable because the Constitution does not provide the necessary material. Employees rarely have a say in determining their work conditions¹⁴ because American constitutional law erects two mighty obstacles in the way of freedom of expression.

i. The Elusive Matter of Public Concern

The First Amendment was first called upon in cases implicating government employees wishing to safeguard their right to freedom of expression. The U.S. Supreme Court developed the public concern test in *Pickering*, according to which “[t]he problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.”¹⁵ The judge must exhibit a measured degree of control when it comes to restricting the liberty of the worker to express himself, as a citizen, on matters of public concern, while also having regard for the state's interest, as an employer, in promoting the efficiency of the public service that it governs through its personnel.

Afterwards, *Connick v. Myers* clarified the restrictive character of this “balance of interests.”¹⁶ The case concerned an assistant district attorney who was dismissed because of her refusal to accept a change of service and because she disseminated a questionnaire to her colleagues regarding changes in internal policies, department morale, the timeliness of implementing a grievance committee, the degree of

838–40 (Wis. 1983) (finding that the public policy exception “allows the discharged employee to recover if the termination violates a well-established and important public policy”).

13. See *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505, 512 (N.J. 1980) (denying a research doctor the right to oppose doing research on a new substance in the name of the Hippocratic Oath, which cannot be considered as a source of public order).

14. See Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 411 (2002) (“American employees also suffer from a lack of voice in workplace decision-making.”).

15. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

16. See 461 U.S. 138 (1983).

confidence toward superiors, and to ascertain whether or not employees had been pressured to contribute to political campaigns. She first initiated the case in federal court, relying on 42 U.S.C. § 1983.¹⁷ She alleged that she had been dismissed for exercising her constitutional right to freedom of expression. The district court reviewed her request and ordered her to be reinstated with retroactive salary and payment for damages and interest. The court deemed that the questionnaire had touched upon many matters of public concern. The Supreme Court reversed, however, stating

When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.¹⁸

Otherwise said, the case of a public employee only touches upon a matter of public concern if it refers to a question of political or social order or impacts in a general way the community at large. The protection deriving from the First Amendment is inaccessible when a public employee expresses himself or herself not in the role of a citizen on matters of public concern, but in the role of a worker on matters of personal interest.¹⁹

Probably no supreme tribunal in Europe would ever affirm that a worker employed in the public sector could somehow ever not act as a citizen: freedom of expression is an innate prerogative of every human being regardless of whether or not a person performs work or expresses himself on a matter of public, personal, or professional concern. In all cases, a measure of proportionality must be used in order to restrict infringements upon this natural liberty.

The ruling in *Garcetti v. Ceballos*²⁰ limited (if not buried) the reasoning in *Pickering* with respect to public employees. Ceballos, a deputy district attorney, discovered that an affidavit contained inaccurate material statements and reported this finding to his superiors. He then followed up with a memo recommending that the case be dismissed. His attempts were in vain. At the time of the hearing, Ceballos reiterated his criticisms and the court rejected them. Protesting that his supervisors had afterwards taken measures of retaliation against him in violation of the First and Fourteenth Amendments, Ceballos brought a lawsuit under 42 U.S.C. § 1983. The Supreme Court objected to the argument, affirming that

[The fact that] Ceballos expressed his views inside his office, rather than publicly, is not dispositive. . . . [W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from

17. 42 U.S.C. § 1983 (2000).

18. *Connick*, 461 U.S. at 147.

19. *See* *Feldman v. Bahn*, 12 F.3d. 730 (7th Cir. 1993) (finding that the dismissal of a university professor who accused a colleague of plagiarism did not violate his rights stemming from the First Amendment); *Pappas v. Giuliani*, 118 F. Supp. 2d 433 (S.D.N.Y. 2000) (finding that a police officer's distribution of several hundred racist mailings in response to solicitations from charities was not speech about a matter of public concern).

20. 547 U.S. 410 (2006).

employer discipline. . . . It is immaterial whether he experienced some personal gratification from writing the memo; his First Amendment rights do not depend on his job satisfaction. The significant point is that the memo was written pursuant to Ceballos' official duties.²¹

A public employee who expresses himself while exercising his work duties or responsibilities does not act as a citizen vis-à-vis the First Amendment and as such is not shielded by it from any disciplinary action of the employer. In addition

Public employees . . . often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions. . . . Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.²²

Nothing could justify judicial authority supplanting employer authority in this instance. Public employees must not express opinions that contravene government policies or hinder the efficiency of governmental functions in any way. Officially, *Ceballos* does not signify a complete break from legal precedents that provide constitutional protection for remarks made by public employees within, as well as outside of, their job. The Court would like people to believe that the new rule applies to remarks and conversations made by these workers in connection with their professional capacity and duties, but there is still room for doubt. Justice Breyer, in a dissenting opinion, argued that the *Pickering* test should remain fully applicable,²³ and in fact, the Supreme Court was clearly divided (five votes to four) on that very issue.²⁴

Furthermore, the *Ceballos* ruling rests on a particularly optimistic view of the protection that American laws would be able to offer to public employees. The Court, in one way, seeks to reassure itself in observing that

Exposing governmental inefficiency and misconduct is a matter of considerable significance. As the Court noted in *Connick*, public employers should, "as a matter of good judgment," be "receptive to constructive criticism offered by their employees." The dictates of sound judgment are reinforced by the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing.²⁵

On the contrary, it comes into stark relief that the ruling in essence deprives approximately twenty-two million public employees of any constitutional guarantee against possible retaliation from their employers should they decide to expose any

21. *Id.* at 421.

22. *Id.* at 419–22.

23. *Id.* at 446 (Breyer, J., dissenting) ("In such an instance, I believe that courts should apply the *Pickering* standard, even though the government employee speaks upon matters of public concern in the course of his ordinary duties.").

24. *See id.* 418–19 (majority opinion)

25. *Id.* at 425 (citations omitted).

irregularities detected during the performance of their job duties. Moreover, it is illusory to think that the American body of law offered a satisfactory alternative of protection.

In revealing fashion, Ceballos himself had rejected founding his appeal on the Federal Whistleblower Protection Act of 1989 or on California law, even though the latter furnished an overabundant array of possibilities including the California Labor Code,²⁶ the California Government Code,²⁷ and the California Whistleblower Protection Act.²⁸ This legal strategy has an explanation, however. According to a study done by the National Whistleblowers Center,²⁹ ninety-five percent of state laws relative to whistleblowers award less protection than § 1983, notably because they do not cover statements made inside the company or job, but only those made outside. In light of such uncertainties, many public employees, like Ceballos, choose to file their lawsuits within the constitutional framework of the First Amendment and § 1983 rather than rely on state laws, under which they have little hope of success.

This approach goes against common sense: when a public employee reveals illegal incidents discovered at work by reporting them to his supervisor, which is in the interest of his employer, he may be discharged under *Ceballos*. Yet, if he decides instead to place the debate within the public arena (by directly contacting the press, for example) thereby removing himself from the perilous framework of his job duties, he is protected by the First Amendment. In a way then, *Ceballos* encourages public employees to break the chain of command and adopt an attitude otherwise more subversive and detrimental to their employer's interests.

This conception has since become outdated, as the most recent laws protecting whistleblowers adopted by Congress, the Sarbanes-Oxley Act³⁰ and the Wendell H. Ford Aviation Investment and Reform Act for the Twenty-First Century,³¹ cover inside as well as outside whistleblowing. Maintaining the inside/outside distinction sustains a degree of legal insecurity that only serves to dissuade workers from expressing themselves. Such subtleties are bound to escape ordinary mortals (if not jurists); they gag the freedom of speech of workers. This situation, finally, harms the interests of the government, whether federal or state, whose employees are akin to lookouts, quick to perceive any signs of corruption, misappropriation of public funds, or abnormal administrative management.

Fortunately, *Ceballos* sparked legislative action in both houses of Congress. The Federal Employee Protection of Disclosures Act was introduced in the Senate on

26. Section 1102.5 protects employees in both the private and public sector who become whistleblowers in order to denounce unlawful acts. See CAL. LAB. CODE § 1102.5 (West 2006).

27. Sections 53296 through 53298 protect municipal and county employees relating crass cases of poor administration and/or abuses of authority. See CAL. GOV'T CODE §§ 53296–53298 (West 2006).

28. California Whistleblower Protection Act, CAL. GOV'T CODE §§ 8547–8547.12 (West 2006).

29. The National Whistleblowers Center (NWC) is a nonprofit organization, founded in 1988, that dispenses information on laws relative to whistleblower protection. See generally National Whistleblowers Center, <http://www.whistleblowers.org>.

30. 15 U.S.C. § 78j-1 (2006).

31. 49 U.S.C. § 42121 (2000).

January 11, 2007 (“the Senate bill”).³² The Whistleblower Protection Enhancement Act of 2007 (“the House bill”) was introduced by the House of Representatives on February 12, 2007.³³ The House bill would have reinforced the protection accorded to federal employee whistleblowers who work in areas related to national security and extends it to joint contractors of the federal government. In a general way, it would have affirmed that any disclosure made under a federal whistleblowing law concerning the waste of public resources or fraud is to be protected without restriction as to time, place, form, motive, context, or prior disclosure; formal or informal communication are included therein.³⁴ The House bill aimed to respond to *Ceballos* as well as to various legal decisions that have narrowed the field of denunciations covered by federal laws.

Too often, a whistleblower who feels that he has been punished submits his complaint to the Merit Systems Protection Board (MSPB)³⁵ or to the Office of Special Counsel (OSC),³⁶ where it remains pending or is resolved only much later, usually after his contract has long been severed and years after he received his last salary. Accordingly, the bill also allows whistleblowers to refer cases to federal district courts if the MSPB or the OSC fail to undertake any action within 180 days of the filing of the complaint.³⁷ On appeal, each federal court of appeals will thus be deemed competent and no longer will the court of appeals for the federal circuit hold exclusive jurisdiction.

In the end, the Senate bill was approved by the Senate Committee on Homeland Security and Governmental Affairs on June 13, 2007.³⁸ The White House, invoking national security concerns, vowed to veto the House bill if it was adopted by Congress.³⁹ The Bush Administration’s national security justification seemed misplaced, however, for national security seems to call for the encouragement of denunciations of unlawful acts inside the Administration. Despite the White House veto threat, the Senate bill passed by unanimous consent on December 17, 2007.⁴⁰

32. S. 274, 110th Cong. (2007).

33. H.R. 985, 110th Cong. (2007).

34. *See id.*

35. The MSPB is an independent administrative agency of a judicial nature that punishes illegal practices (partisan influences, notably) affecting the federal merit system and ensures the protection of public agents working in agencies against management abuse. It also receives statements made by whistleblowers within the framework of the Whistleblower Protection Act of 1989. Its decisions can be appealed before the U.S. Court of Appeals for the Federal Circuit. *See generally* U.S. Merit Systems Protection Board, <http://www.mspb.gov/sites/mspb/default.aspx/>.

36. The OSC typically handles allegations of retaliation from employees of the Securities and Exchange Commission (SEC), the regulating authority for financial markets. *See generally* U.S. Office of Special Counsel, <http://www.osc.gov>.

37. *See* H.R. 985.

38. S. Comm. on Homeland Security and Governmental Affairs, Meeting Results (June 13, 2007), available at http://hsgac.senate.gov/public/_files/061307BusMtgRpt.pdf.

39. *See* Statement of Administration Policy, Office of Mgmt. and Budget, Executive Office of the President (Mar. 13, 2007), available at <http://www.whitehouse.gov/omb/legislative/sap/110-1/hr985sap-h.pdf>.

40. *See* Whistleblower Protection Enhancement Act of 2007—Source Watch, http://www.sourcewatch.org/index.php?title=Whistleblower_Protection_Enhancement_Act_of_2007.

Recently, the Whistleblower Protection Enhancement Act of 2009⁴¹ was introduced in the Senate on February 3, 2009. Compared to the previous initiative, the legislation strengthens whistleblower protections to federal employees who expose fraud, waste and abuse. Likewise, it extends whistleblower protections to employees of all government contractors—such as the private recipients of stimulus funds—given that no similar safeguard was included when Congress passed the Emergency Economic Stabilization Act of 2008.⁴² The Congress is now aware that the lack of surveillance over the private companies contracting with federal, state and local governments could shatter the hopes of success embodied in the “bailout” of the U.S. financial system.

ii. The Insurmountable Requirement of State Action

The Supreme Court has often invoked, since its *Civil Rights Cases* decision,⁴³ the principle firmly embedded in American constitutional law by which the “action” inhibited by the first section of the Fourteenth Amendment is only that which can be attributed to the state. That is, the text raises no barrier against purely private conduct, even if it is discriminatory or illicit.⁴⁴ In the same way, the First Amendment, forbidding Congress from making any laws abridging the freedom of speech, aims solely at the action of a government, federal or state, capable of infringing this civil liberty.⁴⁵ “It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state.”⁴⁶ In a general way, the Constitution only encompasses governmental and not private behavior (with the exception of the Thirteenth Amendment, which prohibits slavery). To use a metaphor, the Constitution is not applied horizontally—among individuals or private entities—but rather vertically—between an individual or a private entity and a state or an entity embodying the state.

Yet, the rule can be circumvented in certain situations where the action of the government “intertwines” with that of private parties accused of having violated constitutional laws. For example, if a public function is involved,⁴⁷ if judicial

41. S. 372, 111th Cong. (2009).

42. Pub. L. No. 110-343, 122 Stat. 3765.

43. 109 U.S. 3 (1883) (establishing that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the states and that the Amendment erects no shield against merely private conduct, however discriminatory or wrongful).

44. *See id.*

45. *See* U.S. CONST. amend. I.

46. *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976).

47. The public function theory was introduced by the Supreme Court regarding a “whites-only” park, which was bequeathed by a senator to a city on the condition that racial segregation would continue. *Evans v. Newton*, 382 U.S. 296 (1966). The Court noted that “[c]onduct that is formally ‘private’ may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action,” and “when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.” *Id.* at 299. In *Evans*, the Equal Protection Clause of the Fourteenth Amendment was recognized as applicable. *See id.* at 298.

enforcement is involved,⁴⁸ or if there is a symbiotic relationship between the State and a private party.⁴⁹ In other words, there are times, at least from the vantage point of the First Amendment, when private property is treated as if it were public.

In *Marsh v. Alabama*,⁵⁰ the Supreme Court was called upon to issue a judgment regarding the application of the First Amendment to Chickasaw, a company town in Alabama belonging entirely to a commercial business. A Jehovah's Witness, who had begun distributing religious literature on a street corner, was summoned to cease his activity. After refusing to do so, he was sued and convicted of trespassing on another's property. The Court threw out this conviction, judging that Chickasaw was the functional equivalent of a municipality, that the residents were citizens of the state and of the country, and that the First Amendment was fully applicable toward the expression of their activities on sidewalks and in streets (purely private) of this city. In short, these places had a public function.

In *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*,⁵¹ which occurred at a time when Supreme Court jurisprudence was at the height of its liberal period under the leadership of Justice Warren, a decision was handed down concerning employees protesting their work conditions. In this decision, the rule contained in *Marsh* was extended to opinions expressed in the parking lot of a suburban commercial complex. The Court deemed that shopping centers today are in essence the equivalent of the downtown commercial areas of yesteryear.

Nevertheless, in *Hudgens v. NLRB*,⁵² which concerned a group of unionists participating in a peaceful strike within the confines of a private shopping mall, the Court broke with the precedent set in *Logan Valley*. The Court recalled that, in a case decided subsequently to *Logan Valley*,⁵³ it had restricted the holding of *Logan Valley* to words aimed at one of the merchants present in the shopping center and judged that the First Amendment did not confer the right of distributing antiwar pamphlets inside a large suburban mall.⁵⁴ The Court concluded that the legal reasoning underlying *Logan Valley* had therefore been rejected by *Tanner*, and that the time had come to bury

48. The judicial enforcement theory qualifies the legal implementation of private discrimination as State action, where appeals brought before courts in the State of Missouri allowed the expulsion of members of a black family from a house they had purchased in violation of a contract signed by the white owners. *See Shelley v. Kraemer*, 334 U.S. 1 (1948). The contract contained a stipulation barring those not belonging to the Caucasian race from having any occupancy rights. *See id.* at 4–5. According to the Supreme Court, “in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws.” *Id.* at 20; *see also Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 618–22 (1991) (finding the objection to black members sitting on a civil jury as constituting an action of the government to the degree that federal law authorizes such an objection and whereby justice lends assistance to this type of racial discrimination by clearing its perpetrator).

49. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (deeming that the presence of a symbiotic relationship between the city and the private perpetrators of discrimination served as support for the Fourteenth Amendment violation).

50. 326 U.S. 501 (1946).

51. 391 U.S. 308 (1968).

52. 424 U.S. 507 (1976).

53. *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972).

54. *See id.* at 570.

Logan Valley for good.⁵⁵ In summary, the Court held that the Constitution could in no way require the public appropriation of private property.⁵⁶ The Court indicated, however, that this decision did not alter the holding in *Marsh*, which continues to preserve freedom of speech in company towns located on private property.⁵⁷

Hudgens did not put an end to the saga of the public function theory in commercial centers. In many state constitutions, the requirement of state action is invisible. Thus, for example, the California Constitution provides, without restriction, that “[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.”⁵⁸ No condition tied to state action is posited. Accordingly, the idea thus developed that state constitutions were likely to bore a hole into the wall of the First Amendment, obstructed by the state action requirement. In fact, several state supreme courts decided that freedom of speech, as defined by their own constitutions, granted to citizens the right to express themselves in public areas within the confines of private shopping centers. The most renowned decision, emanating from the California Supreme Court in *Pruneyard Shopping Center v. Robins*,⁵⁹ extended this constitutional protection of substitution to high school students who had solicited signatures for a petition opposing a United Nations resolution against Zionism in a private shopping mall. The Supreme Court did not take offense to the existence of this loophole to *Hudgens*. Instead, the Court voted unanimously that a state does not violate the First Amendment by interpreting its constitution in such a way as to grant citizens the right to reasonably express themselves by circulating petitions in private shopping malls.⁶⁰

In almost all of these cases, it seems, courts limit the application of the First Amendment. Employees in the private sector, who are arguably even worse off than employees in the public sector, can be certain that a wrongful discharge lawsuit will not thrive on the foundation of the Federal Constitution. The individual who expresses himself in a commercial center or at his place of work is stripped from the constitutional protection of the First Amendment. On this point, a large chasm separates French law from American law. French law, by virtue of Articles 10 and 11 of the Declaration of the Rights of Man and of the Citizen of August 26, 1789, unconditionally guarantees the freedom of speech.⁶¹ In addition to this constitutional corpus, we must add Article 10 of the European Convention on Human Rights⁶² and

55. *Hudgens*, 424 U.S. at 519.

56. *Id.* at 519 (“The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use.” (quoting *Lloyd*, 407 U.S. at 569)).

57. *See id.*

58. CAL. CONST. art. I, § 2(a).

59. 447 U.S. 74 (1980).

60. *See id.*

61. THE DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN art. 10 (1789) (Fr.) (“No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law.”); *id.* art. 11 (“The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law.”).

62. Article 10 states:

Article 11 of the new European Union Charter of Fundamental Rights,⁶³ which both authorize every citizen to take legal action without having to prove state action.

Even though the European Convention on Human Rights applies only to member states of the Council of Europe and the people coming under their jurisdiction in a vertical direction, the European Court of Human Rights manages the theory of affirmative obligations in order to make horizontal the rights and liberties enacted by the Convention. Additionally, the Court of Cassation directly targets the European Convention on Human Rights in an effort to impose respect for private relations (horizontal), specifically regarding work contracts that bind employers and employees. Freedom of expression is an integral part of French internal law, while freedom of expression in American law stumbles over the requirement of state action. French and European law, however, resemble the constitutional provisions of individual states in the United States which, following the example of the California Constitution, recognize the freedom of speech in its entirety.

Until now, doctrinal appeals in favor of reform of the classical analysis⁶⁴ have received only lip service. Professor Lisa B. Bingham,⁶⁵ in particular, has advanced a solid argument that offers effective protection to employees in the private sector while at the same time preserving the dogma of state action. She emphasizes that the role delegated to a state court to which a case for wrongful discharge has been referred alone characterizes state action.⁶⁶ Specifically, when a court affirms that the Constitution does not cover the spoken comments of a worker, it denies him, as an

1. 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.

2. 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.

Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 221, 230.

63. The European Union Charter of Fundamental Rights, initially adopted on December 7, 2000, having no legally binding authority, was again proclaimed on December 14, 2007. 2007 O.J. (C 364) 1. It will enter into force—and this time be mandatory—following the ratification of the Lisbon treaty by twenty-seven member states of the European Union, which must intervene by June 2009 at the latest. Article 11 provides that “[e]veryone 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.” *Id.* at 11.

64. See Lisa B. Bingham, *Employee Free Speech in the Workplace: Using the First Amendment as Public Policy for Wrongful Discharge Actions*, 55 OHIO ST. L.J. 341 (1994); Terry Ann Halbert, *The First Amendment in the Workplace: An Analysis and Call for Reform*, 17 SETON HALL L. REV. 42, 70 (1987).

65. See Bingham, *supra* note 64.

66. See *id.*

organ of the state, the due process of law guaranteed by the Fourteenth Amendment.⁶⁷ In other words, the refusal of a state judge to include freedom of speech in the notion of public order and his subsequent decision to nonsuit the worker who raised the public policy exception would eclipse the private act of the job dismissal attributable to the employer and highlight the causal role of the jurisdictional public act. If one claims that the argument is representative of the decision in *Edmondson v. Leesville Concrete Co.*,⁶⁸ it starts a vicious cycle that weakens the decision. For if it is considered that the judge is joining camp with the private employer, and in some way, is standing by his side in the role of codefendant, the dispute can no longer be settled in an impartial manner other than by using another court; but the other court, in turn, will have to recuse itself for the benefit of a third jurisdiction if it foresees nonsuiting the worker, and so on. The reality is that a state court contributes in no way to the violation of the freedom of speech whose applicability it excludes. Its natural function consists simply of determining whether or not the First Amendment is applicable. This prior determination produces its material competence; it is not united by a link of causality to the wrongful dismissal, the sole and true cause of the damage sustained by the worker whose freedom of speech has been gagged.

There is another foreseeable approach which consists of imposing affirmative obligations on states to protect the freedom of speech. The idea comes from the dissenting opinion issued by Justice Black in *Feiner v. New York*.⁶⁹ According to Justice Black, it would be the government's duty to protect the right of people to express themselves freely as well as to punish others that disrupt the enjoyment of said right.⁷⁰ This reasoning is occasionally adhered to by the European Court on Human Rights in its attempts to increase the horizontal scope (in relationships between private individuals) of the European Convention.⁷¹

2. Legislative Foundations

There are statutes that without a doubt protect workers' freedom of speech. But in the end, they prove disappointing as well.

i. The National Labor Relations Act

The National Labor Relations Act (NLRA), or Wagner Act,⁷² signed by President Roosevelt on July 5, 1935, governs collective relations between unions and management in the private sector. It is implemented by the National Labor Relations Board (NLRB), under the control of federal courts, by an independent authority endowed with jurisdictional power including the power of injunction over management and unions suspected of unfair labor practice. The NLRA, although amended in hostile

67. *See id.*

68. 500 U.S. 614 (1991).

69. 340 U.S. 315, 321 (1951) (Black, J., dissenting).

70. *See id.* at 327–28.

71. *See* Jean-François Flauss, *The European Court of Human Rights and the Freedom of Expression*, 84 *IND. L.J.* 809, 812 (2009).

72. 29 U.S.C. §§ 151–169 (2000).

fashion by the Labor-Management Relations Act⁷³ to include union rights and the right to strike, offers normative support to freedom of expression within private companies. This support is, unfortunately, crippled by restrictive conditions. Moreover, many jurists ignore the very existence of this legal protection.

Section 7 of the NLRA, entitled “Rights of Employees,” stipulates that “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .”⁷⁴ Within this context of strong trade unionism, it is worth recalling that the concept of concerted activity applies to all employees and not only to those affiliated with unions or participating in collective bargaining. As for the remainder of the text, its magnitude gets reduced to almost nothing by a series of requirements.

First, according to the Court of Appeals for the D.C. Circuit in *Prill v. NLRB*,⁷⁵

[A]n employee’s action may be concerted for the purposes of the NLRA only if the action is “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” . . . A worker no longer takes “concerted” action by himself unless he acts on the authority of his fellow workers.⁷⁶

This legal precedent strongly calls to mind the definition of a strike given by the French Court of Cassation: “A strike is a concerted and collective suspension of work in view of backing up professional demands; an employee, except in the case where he is obeying an order formulated at the national level, cannot claim to exercise the right to strike in isolation.”⁷⁷ Besides the case of a strike order launched at the national level, this rule has a logical and almost anecdotal exception: “[I]n companies where there is only one worker, this worker, who is the only person capable of presenting and defending his professional demands, can exercise this constitutionally recognized right.”⁷⁸ But, where French law restricts only the exercise of the right to strike (and very minimally), American law prohibits any individual action purporting to defend a legitimate social interest (such as safety of the worker). The solution of the *Prill* holding is unjust and artificial because it would have been sufficient for the plaintiff to have a work colleague rally to his cause or to speak also in his name, in order to benefit from legal protection.

73. Labor Management Relations Act, 1947, Pub. L. No. 80-101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141–144, 151–167, 171–187, 557 (2000)). This law has come to be known as the “Taft-Hartley” law.

74. 29 U.S.C. § 157.

75. 835 F.2d 1481 (D.C. Cir. 1987).

76. *Id.* at 1482–83. Prill was a truck driver who, after an accident caused by the poor condition of his truck’s brakes, alerted his employer. Getting no response, he then went to the authorities, which immobilized the vehicle. He was later dismissed because the company could not tolerate his “calling the cops like this all the time.” *Id.* at 1482.

77. Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], Mar. 29, 1995, Bull. civ. V, No. 111.

78. Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], Nov. 13, 1996, Bull. civ. V, No. 379.

Second, the requirement of “mutual aid and protection” is likely to limit the freedom of expression in order to safeguard the common interest and not the specific interest of workers.

Third, the NLRA excludes many categories of workers. For example, it does not cover independent workers, agricultural workers, domestic employees, managers, or supervisors.⁷⁹ The Taft-Hartley law, in effect, excluded supervisors from the field of the NLRA by defining them as follows:

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.⁸⁰

An employee must be qualified as a supervisor if he assumes any of the twelve aforementioned duties, displays “independent judgment,” and holds his authority in the interest of the employer. The Supreme Court subsequently condemned this restrictive interpretation and the requirement of the NLRB that the burden of proof rest on the employer.⁸¹ In a revealing fashion, and to the embarrassment of the NLRB, it was not until October 3, 2006 that the Court decided to resolve the *Kentucky River* case. Although the notion of supervisor, which goes back to 1947, is today somewhat archaic and seriously limits the right of millions of workers to engage in collective action, the Supreme Court foiled the attempts of the NLRB to restrict it.

ii. Statutes Protecting Whistleblowers

a. American Law

As has been shown, the United States has many laws ensuring whistleblower protection—that is, protection of an employee who reports or denounces a dangerous or unlawful activity to a public authority against the risk of retaliation from his private, or especially public, employer. Sectors that particularly run the risk of offense include companies listed on the stock exchange, credit institutions, and accounting and financial firms. Activities that run the risk of offense include environmental protection. There are numerous possibilities relating to environmental protection including water quality, air pollution, mining operations, waste disposal, toxic substance management, and pipeline security. Additional environmental examples include ground transportation, maritime activities, and air transportation. Moreover, discrimination and infringement of civil liberties occurs in the areas of job, health, or work security; regulation of work conditions and salary; criminal investigations; public works contracts; ethics of federal personnel; military activities; and tax fraud all raise the possibility of offense. To this end, dozens of tests have been adopted.⁸²

79. See 29 U.S.C. § 152(3) (2000).

80. 29 U.S.C. § 152(11).

81. See *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706 (2001).

82. For an extensive review of laws and regulations, see STEPHEN M. KOHN, *FEDERAL*

Thus, according to a classic example, the nonretaliation provision of the Occupational Safety and Health Act,⁸³ stipulates that

[n]o person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.⁸⁴

The text adds that any worker who feels that he has been discharged or otherwise discriminated against in violation of this rule can, within thirty days following the violation, submit a formal complaint to the Occupational Safety and Health Administration (OSHA), the federal agency handling such investigations.⁸⁵ If necessary, OSHA can refer the matter to a district court in order to obtain reinstatement of the employee.

OSHA is also competent to handle similar complaints submitted within the framework of the sixteen other whistleblower protection statutes involving land, air and rail transport, nuclear energy, pipelines, environmental protection, and more.⁸⁶ Appearing on this list is section 806 of the Corporate and Criminal Fraud Accountability Act of 2002 (CCFA),⁸⁷ which protects employees of publicly traded companies who provide evidence of fraud.⁸⁸ Section 806 protects members of Congress and managerial whistleblowers from any discriminatory measure that results from their denunciation of acts violating rules imposed on publicly traded companies by the Securities Exchange Commission (SEC). Section 806 also protects these individuals when the information is furnished to a member of Congress or in cases where investigations are conducted by a federal agency. At the same time, many states have adopted a general whistleblower statute. All of these legal provisions can be invoked as a public policy exception to the employment-at-will rule⁸⁹ in order to demonstrate wrongful discharge.

But these laws are a patchwork. Their field of application varies considerably and the conditions for granting legal protection are diverse. Thus, Title VII of the Civil Rights Act of 1964⁹⁰ offers extended protection to whistleblowers:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other

WHISTLEBLOWER LAWS AND REGULATIONS (2008).

83. 29 U.S.C. §§ 651–678 (2000).

84. *Id.* § 660(c)(1).

85. *Id.* § 660(c)(2).

86. *See* OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LABOR, THE WHISTLEBLOWER PROTECTION PROGRAM, <http://www.osha.gov/dep/oia/whistleblower>.

87. Pub. L. No. 107-204, 116 Stat. 800 (codified as amended at 18 U.S.C. §§ 1348, 1514A, 1519, 1520 (2006)).

88. *See* 18 U.S.C. § 1514A (2006).

89. *See* *Payne v. W. & Atl. R.R. Co.*, 81 Tenn. 507, 519–20 (1884).

90. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a–2000h-6 (2000)). Title VII deals in part with discrimination for making charges, testifying, assisting, or participating in enforcement proceedings.

training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this subchapter.⁹¹

Sometimes federal case law generously interprets this provision by requiring only from the plaintiff that he justify with reasonable belief that the act denounced was illegal, not of confirmed illegality. Moreover, on January 26, 2009, the Supreme Court decided a case concerning a public employee who had testified not spontaneously but in response to questions from an investigator regarding acts of sexual harassment at his workplace. The Court decided that the antiretaliation provision's protection of 42 U.S.C. § 2000e-3(a)—which makes it unlawful “for an employer to discriminate against any . . . employe[e]” who “has opposed any practice made an unlawful employment practice by this subchapter”—extends to an employee who speaks out about discrimination not on her own initiative but in answering questions during an employer's internal investigation.⁹²

The aforementioned Sarbanes-Oxley Act likewise targets the employee who reasonably believes that the conduct he is denouncing is illegal. By contrast, certain federal laws, including those interpreted by state judges, require that the whistleblower prove a definite violation of the law. Under these conditions, it is no wonder that “only the surest, or dumbest, of private-sector employees would be willing to report illegal activity under the assumption that they are covered by law.”⁹³

Statutes protecting whistleblowers are equally weakened by a distinction between internal and external denunciations. Generally, only denunciations made to competent administrative authorities are protected. Denunciations made to company supervisors or managers are covered only by certain texts (for example, section 806 of the aforementioned CCFA) and under specific conditions that result in completely dissuading employees from pursuing this course of action. The logic behind this distinction is strange because it seems to encourage employees to squelch criticisms made internally and to instead carry their disgruntlements to the public arena, to a public authority, or even to the media, usually to the detriment of the company.⁹⁴

Connecticut could be cited as a model⁹⁵ since it is the only state to have adopted a law that comprehensively protects employees in both private and public sectors. In reality, however, local jurisprudence transposes here the “public concern test” which, since *Connick v. Myers*,⁹⁶ banishes freedom of expression when contentious acts or comments involve the personal interests of employees and not matters of public concern, even if the notion of public concern seems sometimes overestimated.⁹⁷

91. 42 U.S.C. § 2000e-3(a) (2000).

92. *Crawford v. Metro. Gov't*, 129 S. Ct. 846, 850 (2009).

93. *Yamada*, *supra* note 5, at 40.

94. See *Garcetti v. Ceballos*, 547 U.S. 410 (2006), for more on this criticism.

95. See *Halbert*, *supra* note 64, at 70.

96. 461 U.S. 138 (1993).

97. See *Daley v. Aetna Life & Cas. Co.*, 734 A.2d 112 (Conn. 1999) (upholding the termination of an employee upon her return from maternity leave after she had criticized her

b. Whistleblowing in French Law

The surge within Europe of the whistleblowing concept is a product of section 301 of the Sarbanes-Oxley Act⁹⁸ according to which: “Each audit committee shall establish procedures for—(A) the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and (B) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.”⁹⁹ As a result, this provision of offshore reach constrained European subsidiaries of American companies and groups of European companies traded on U.S. stock exchanges to implement so-called “ethics alert” systems which use toll-free numbers or hotlines to offer whistleblowers an appropriate resource for the denunciation of any accounting and financial irregularities or corrupt acts which have come to their knowledge. In France, these whistleblowing systems implemented in 2002 created an unprecedented overlap between American and French law. The overlap ended up having a negative impact on this innovation. It must be said that the ghost of informing, inherited from the darkest hours in France’s history, is still alive and well. It has never ceased to hover around the matter of whistleblowing and explains, more than a supposed anti-Americanism, the violent reactions sparked by this practice.

Initially, the French National Data Protection Agency (CNIL)¹⁰⁰ expressed, in two decisions on May 26, 2005,¹⁰¹ very strong reservations concerning the validity of “professional informant” systems that had been put into effect by McDonald’s France and Compagnie Européenne d’Accumulateurs (CEAC) with regard to Act No. 78-17 of January 6, 1978 on Data Processing, Data Files and Individual Liberties (“Data Protection Act”).¹⁰² This law subordinates the implementation of “automatically processed personal data” to prior declarations made to the CNIL and, in certain cases, requires CNIL approval. In support of its rejection, the CNIL recalled in particular that according to the first article of the 1978 law, “information technology must be at the service of each citizen. It must not infringe on personal identity, on human rights, one’s private life or individual or public freedoms.”¹⁰³ Moreover, Article 7 of the Data Protection Act requires that the processing of personal data obtain, in advance, “consent from the concerned party” or fulfill one of the following conditions: “meeting

employer for failing to implement its highly publicized family friendly workplace policies).

98. Sarbanes-Oxley Act of 2002 § 301, 15 U.S.C. § 78j-1 (2006).

99. *Id.* § 78j-1(m)(4). In publicly traded companies, the “audit committee” must establish a procedure allowing employees to submit in a confidential and anonymous manner any dubious financial record-keeping and audit accounting situations.

100. The CNIL is an independent administrative authority responsible for ensuring the protection of personal information and data. *See generally* CNIL, <http://www.cnil.fr/index.php?id=4>.

101. *See* CEAC & Exide Techs., CNIL Decision No. 2005-111 (May 26, 2005), *available at* <http://www.legifrance.gouv.fr/affichCnil.do?oldAction=rechExpCnil&id=CNILTEXT000017653327&fastReqId=326767900&fastPos=1>; McDonald’s, CNIL Decision No. 2005-110 (May 26, 2005), *available at* <http://www.legifrance.gouv.fr/affichCnil.do?oldAction=rechExpCnil&id=CNILTEXT000017653326&fastReqId=1321386284&fastPos=1>.

102. An English translation of the Data Protection Act is available at <http://www.cnil.fr/fileadmin/documents/uk/78-17VA.pdf>.

103. Law No. 78-17 of Jan. 6, 1978, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Jan. 7, 1978, p. 227.

legal obligations incumbent upon the processor of data information” or “carrying out such activities with the legitimate interest in mind, under the provision that the interests or fundamental rights and liberties of the concerned party are not disregarded by the data information processor or its recipient.”¹⁰⁴ The penultimate requirement is excluded in this case as the Sarbanes-Oxley Act is not a French law, but it does undeniably establish the “legitimate interest” of companies traded on U.S. stock exchanges to put into place a whistleblowing system in France.

Finally, European Union Directive No. 95-46 of October 24, 1995¹⁰⁵ (incorporated in France by Law No. 2004-801, which modified the Data Protection Act) prohibits the transfer of personal data to a non-member state of the European Community that does not offer an “adequate level of protection.” The United States is not considered to offer an adequate level of protection.

Numerous opinions have ordered and continue to order the withdrawal of whistleblowing systems put into place at companies in contempt of the Data Protection Act. But the CNIL did an immediate turnaround. On December 8, 2005, a delegation of its members met with staff from the SEC in Washington, D.C. The CNIL observed that during the meeting, it failed to find “any major incompatibility” between section 301(4) of the Sarbanes-Oxley Act and “the orientation document” it had just created. The contents of this document were incorporated into Decision No. 2005-305 of December 8, 2005, “having sole authorization over the automatic processing of personal data implemented within the framework of whistleblowing systems.”¹⁰⁶

From this time on, the validity of whistleblowing systems vis-à-vis the January 6, 1978 law is acquired in accordance with the law. A simplified declaration from the CNIL is in and of itself sufficient as long as the systems meet the conditions outlined in the decision of December 8, 2005. The December 8, 2005 decision delineates the categories of data that can be processed in total confidentiality, necessitates obtaining the identity of the issuer of the alert (anonymity must remain the exception), permits the transfer of data to the United States on the condition that the company adheres to the Safe Harbor Framework,¹⁰⁷ requires informing potential system users of its procedures, and above all, requires informing the person designated by the whistleblower that she has the right to access the data as well as to demand its correction (a condition rarely met by whistleblowing systems).¹⁰⁸ The fact remains, however, that the CNIL is still not competent to apply labor law, which can raise other obstacles.

Initially, there was no conflict between American and French labor law. Conflict developed over time when the companies concerned began adopting a very broad interpretation of the Sarbanes-Oxley Act, often inviting their personnel to denounce

104. *Id.*

105. Council Directive 95/46, arts. 25–26, 1995 O.J. (L 281) 31 (EC).

106. Decision No. 2005-305 of Dec. 8, 2005, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Jan. 4, 2006, p. 79.

107. The U.S.-European Union Safe Harbor Framework allows American companies to conform with EC Directive 95/46 concerning the protection of personal data and information if they fully demonstrate adherence to a body of seven international principles on the respect for one’s private life. *See generally* U.S. Department of Commerce, Welcome to the Safe Harbor, <http://www.export.gov/safeharbor>.

108. *See* Decision No. 2005-305 of Dec. 8, 2005.

activities, using company whistleblowing systems (under various names such as code of good conduct, ethics charter, etc.), that were foreign to the preoccupations of Congress—whose principal target was only accounting and financial fraud or other acts of corruption.

Several high courts¹⁰⁹ have condemned whistleblowing systems for having too far a reach—typically because of the blatant violations of the Data Protection Act. For example, the code of ethics (called the Code of Business Conduct) implemented in 2004 within the Dassault Systèmes group asked staff to notify management of breaches regarding intellectual property rights, disclosures of strictly confidential information, internal conflicts, insider trading, unlawful discrimination, and incidents of psychological or sexual harassment jeopardizing the vital interest of the group or the physical or psychological well-being of an individual. Certainly, this list only contained acts that were already prohibited by French law. But notably, an employee is not the intermediary of the public. In the Dassault Systèmes case, the Tribunal de grande instance de Nanterre deemed that the code's scope was too broad and risked encouraging slanderous denunciations (themselves criminally reprehensible).¹¹⁰ As a result, the extension of the whistleblowing system to these categories was “disproportionate to the goals pursued” according to the terms of Article 7 of the Data Protection Act. Worse, certain codes disregard the right to respect one's private life or the dignity of employees by including shortcomings that fall within the domain of morality: the marital infidelity of an employee can be denounced, *a priori*, even though it hardly poses a threat to the interests of the company.

On a more technical note, many charters or ethics codes, in as much as they encompass “general and permanent regulations” according to Article L. 1321-5 (former Article L. 122-39) of the Labor Code,¹¹¹ have been described as being a mere supplement to the company's own handbook of rules and regulations. Now, such a supplement can only be introduced after holding consultations with delegates elected by the work staff and previously informing the government labor inspector.

B. Freedom of Speech and Employees' “Right of Expression” in French Law¹¹²

Is there a possibility that American legislators could draw their inspiration from French law? They would find therein a peaceful coexistence between “freedom” of speech, vast in scope and magnitude, and the “right” of expression, defined and conditioned in favor of employees, without distinction as to who one is or what one does.

109. For some examples, see *Charte Éthique et Alerte Professionnelle en Débat*, 1310 SEMAINE SOCIALE LAMY SUPP. 75 (2007) (Fr.).

110. Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Nanterre, Oct. 19, 2007. For a summary of this case, see *Annulation d'un dispositif d'alerte professionnelle* LIAISONS SOCIALES, BREF SOCIAL, Dec. 5, 2007, at 1 (Fr.).

111. C. TRAV. art. L. 122-39.

112. The rulings of the French Cassation Court cited hereafter are available at Legifrance.gouv.fr, La jurisprudence judiciaire, <http://www.legifrance.gouv.fr/initRechJuriJudi.do>.

1. Employees

In 1982, in the wake of the Auroux Report,¹¹³ a French legislator wanted to open up business establishments to democracy and grant a new type of “citizenship” to employees in order to fill in the gap “between the situation of dependence of employees at their workplace and the freedom of speech acquired in the city.”¹¹⁴ It is this hurdle that American law refuses to jump over: the employee cannot be regarded as a citizen within the company when he expresses himself on matters of personal concern (employees in the private sector) or within the scope of his job duties (employees in the public sector).

Law No. 82-689 of August 4, 1982 instituted, for the benefit of employees, “the right to direct and collective expression regarding the content, conditions and organization of their work The opinions put forward by employees, regardless of their ranking in the organizational chart, in the exercise of their right of expression, cannot lead to their punishment or dismissal.”¹¹⁵ The uniqueness of this right of expression has been underscored in that it is both a collective right to participation and an individual right to express one’s own opinion within the group. Like the right to strike, the right of expression would thus be deemed an individual right that is exercised and enjoyed collectively.

Law No. 86-1 of January 3, 1986 added several clarifications regarding the purpose of the right of expression: “The purpose of this expression is to outline the steps to be taken so as to improve work conditions, the organization of work activity and the quality of production in the work area where employees are assigned and within the company.”¹¹⁶ The obligation to negotiate the terms for exercising the right of expression (introduced in 1982) was extended to all companies having an appointed union delegate; the right of expression was to be enjoyed and exercised during work hours and on work premises. The time devoted to this expression was to be paid in the same manner as ordinary work time.¹¹⁷

The only thing remaining was to combine the right of expression with that of freedom of speech. Did the first overshadow the second? Did the special rule depart from the general principle? In France, the right of expression is simply a restricted and particular form of freedom of speech which remains in full force both in and out of company confines. This is the major difference between French and American law. The latter, in reality, under the guise of freedom of speech, only recognizes a strictly conditioned and limited right of expression. In a case concerning a financial administrative director dismissed for having sent a document critical of the new

113. JEAN AUROUX, REPORT ON THE RIGHTS OF WORKERS (1981).

114. Michèle Bonnechere, *Expression des Travailleurs sur les Conditions et L’Organisation du Travail, un Droit à Saisir*, DROIT OUVRIER, Dec. 1982, at 463 (quoting Mme G. Toutain) (Fr.).

115. Law No. 82-689 of Aug. 4, 1982, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Aug. 6, 1982, p. 2520. This provision, as amended, is currently known as C. TRAV. art. L. 2281-1 and L. 2281-3.

116. Law No. 86-1 of Jan. 3, 1986, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Jan. 4, 1986, p. 199 (amending C. TRAV. art. L. 461-1 to become art. L. 2281-1 and L. 2281-3).

117. *See id.* (amending C. TRAV. art. L. 461-2).

organization put into place by management to members of the board of directors on which he served, the French Court of Cassation stated that:

If, with good reason, the Court of Appeal judged that the act for which the employee was being reprimanded could not be connected to the right of expression of employees regarding the content, conditions and organization of their work as provided for by Article L. 461-1 of the Labor Code, which is exercised and enjoyed only within the framework of collective meetings organized on work premises and during work time, it disregarded the fact that, with the exception of cases of abuse, the employee still enjoys within as well as outside of the company, his individual right of speech and as a result, no restrictions can be placed upon this right except for those that are justified by the nature of the task to accomplish and in proportion to the goal pursued.¹¹⁸

Otherwise stated, within the company, the employee enjoys the right of expression according to narrowly defined circumstances and under specific terms. As a consequence, “the conversations held by an employee outside of the company do not constitute an exercise of the right of expression as set forth by Article L. 461-1 of the Labor Code” even if the employee who hurled untrue accusations with the intention of doing harm did in fact abuse his freedom of speech.¹¹⁹ On the other hand, his freedom of speech, an attribute of being a citizen, is enjoyed and expressed, except in cases of abuse, both in and out of the company.¹²⁰ Judges are to carry out a measured balance of control vis-à-vis infringements against freedom of speech, based on Article L. 1121-1 (former Article L. 120-2) of the Labor Code: “Nothing can place restrictions on the rights of individuals and on individual and collective liberties unless justified by the nature of the task to accomplish and in proportion to the goal pursued.”¹²¹

As in American law, it is outside of the workplace that freedom of speech has the furthest reach and is the least susceptible of being cause for dismissal. Thus, a judge cannot be content with merely observing the trouble created in a company due to the participation of an employee in a public demonstration, without indicating how, taking into consideration the employee’s job function and nature of the business, the work connection alone could justify the employer’s banning the exercise of a collective liberty outside of work hours.¹²² Totally opposite from American law, French law does not strip the worker from his right to freedom of speech within the framework of his professional duties. The employee remains a full citizen.

118. Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], Dec. 14, 1999, Bull. civ. V, No. 488.

119. Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], Nov. 16, 1993, Bull. civ. V, No. 278.

120. Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], Oct. 5, 2004, No. 02-44487, available at <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007482714&fastReqId=1924893115&fastPos=3>.

121. C. TRAV. art. L. 1121-1.

122. Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], May 23, 2007, No. 05-41375, available at <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007531940&fastReqId=248207328&fastPos=1>.

In 1988, the famous *Clavaud* ruling attested to the vigor of freedom of speech for employees. In this case, an employee working for the Dunlop Company decided to publish an article in the *Humanity* newspaper (which was tied to the French Communist Party), describing in critical fashion one of his nights at work. The Court of Cassation considered that the employee had acted within the limits of his right to freedom of expression, a right accorded to all citizens, and thus could express an opinion on his work conditions without violating his duty of company loyalty.¹²³ The court has also held that an employee could not be held at fault for sending a letter to the government inspector in charge of monitoring compliance with health, safety, and labor legislation to report instances of embezzlement, money mishandling, or misappropriation of funds committed by the employer.¹²⁴

The same would apply to an employee who denounces directly to the Public Prosecutor acts of mistreatment and victimization of elderly people living in an institution for the handicapped,¹²⁵ provided that the accusations are not false and the employee acted in good faith. Generally speaking, the employee who alerts “the higher echelons of management in good faith informing them of events in relation to his area of competence”¹²⁶ commits no wrongdoing. This rule completely contradicts *Ceballos*, which takes public employee “whistleblowers” out of the realm of the First Amendment when expressing themselves “pursuant to their official duties.”¹²⁷ For the French judge, and in contrast to the American federal judge (although not officially disputed by the latter), the employee remains a “citizen” within the framework of his professional activity.

Freedom of expression thus succeeds in covering, without reserve, genuine instances of whistleblowing. This is why it is superfluous in France, unlike in the United States, to enact myriad laws that protect whistleblowers. However, French legislators have occasionally given in to temptation. For example, Law No. 2007-1598 of November 13, 2007,¹²⁸ regarding the fight against corruption, resolved that no

123. See Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], Apr. 28, 1988, Bull. civ. V, No. 257.

124. See Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], Mar. 14, 2000, Bull. civ. V, No. 104; cf. Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], Dec. 18, 2002, No. 01-40498, available at <http://legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007439526&fastReqId=1081556811&fastPos=1>. The case involved a psychologist who worked in a children’s nursery. The psychologist denounced the dysfunctional behaviors present at the nursery and “notified her managerial superiors for a long time and on several occasions, to no avail.” *Id.*

125. Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], July 12, 2006, Bull. civ. V, No. 245.

126. Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], Nov. 8, 2006, Bull. civ. V, No. 331. The case involved an employee in charge of ensuring ethical compliance who had placed into the very hands of the company president a confidential letter in which she drew his attention to racial comments made by the hiring manager.

127. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

128. Law No. 2007-1598 of Nov. 13, 2007, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Nov. 14, 2007, p. 18648. Article 9 of Law No. 2007-1598

individual could be rejected from the recruitment process, punished, discharged, or directly or indirectly discriminated against “for having in good faith recounted or given evidence of, whether to his employer or to the legal and administrative authorities, acts of corruption learned about during the exercise of his job duties.”¹²⁹ In reality, however, this innovation results from Article 9 of the Civil Law Convention on Corruption of the Council of Europe of November 4, 1999, which invites member states to make provisions within their domestic law for “appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities.”¹³⁰ But, identical protection had already been granted by law to employees having testified to incidents of unlawful discrimination¹³¹ or of sexual or psychological harassment.¹³²

Exercise of the freedom of expression, like that of freedom of speech, is guaranteed through the threat of a particularly stiff penalty: the nullification of the discriminatory measure. Specifically, an invalid dismissal, by virtue of a legal text or due to an infringement of a fundamental liberty,¹³³ entitles the employee the right of reinstatement, with retroactive salary paid from the time of dismissal to reinstatement, if so requested.

If there was once a period in time when, because of his status as a member of top management, a high-level executive was not counted among company personnel and deprived of the right to strike as well as of the freedom of expression, that time is over. French law excludes no category of employees from the realm of the freedom of expression, contrary to the NLRA, which does not apply to supervisors.¹³⁴ Thus, the following do not constitute abuses of the freedom of expression:

- When an administrative or financial director who sits on the board of directors remits to its members a document criticizing the new organization put into place by management, refraining from using harmful, defamatory, or excessive language;¹³⁵
- When a financial director sends a letter sharp in tone but polite and solely for internal use, with the purpose of expressing his disagreement regarding the resolution of problems;¹³⁶ or

created C. TRAV. art. L. 1161-1.

129. *Id.*

130. Civil Law Convention on Corruption, Nov. 4, 1999, Europ. T.S. No. 174, *available at* <http://conventions.coe.int/treaty/en/treaties/html/174.htm>.

131. C. TRAV. art. L. 1132-3 (former art. L. 122-45, line 3).

132. C. TRAV. art. L. 1152-2 (former art. L. 122-49, line 2).

133. The judge can only nullify a dismissal and order the continuation of a contractual relationship by virtue of a law or in the case of a violation of a “fundamental liberty.” Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], Mar. 13, 2001, Bull. civ. V, No. 87.

134. *See* 29 U.S.C. § 152(11) (2000).

135. Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], Dec. 14, 1999, Bull. civ. V, No. 488.

136. Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], May 10, 2006, No. 04-47772, *available at* <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEX>

- When during a meeting, a high-level executive disputes the general manager's comments on a technical question, thus implicating one of his colleagues without using defamatory, harmful, or excessive language.¹³⁷

Punishable abuses of freedom of expression are of different types. First, the use of harmful, offensive, or dishonorable language constitutes real and serious grounds for dismissal, and indeed, gross misconduct. Gross misconduct results from an attitude denoting the deliberate intent to provoke or create disorder through a documented act of insubordination. Thus, dismissal of an employee is justified:

- When an employee publishes an article in a reputable national newspaper implicating the company and his colleagues calling them, "a bunch of whoremongers," "two-faced bastards," and "first-class collaborators";¹³⁸
- When an employee uses racial slurs;¹³⁹ or
- When an employee writes that he feels it is urgent to distance himself from company managers with whom he shares "neither the same code of ethics or civic sense most notably manifested via the repeated juggling of the company books;" these remarks comprise "the imputation of acts contrary to honor and respect."¹⁴⁰

On the contrary, breaking the work contract is not justified in the following cases:

- When an employee strongly reacts to his employer's decision to release him from his work duties, states that he will not stay, and throws his work keys on the table instead of returning them as asked;¹⁴¹

T000007504902&fastReqId=1297586853&fastPos=1.

137. Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], June 7, 2006, No. 04-45781, available at <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEX T000007496986&fastReqId=1968222850&fastPos=3>.

138. Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], July 6, 2005, No. 04-46085, available at <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEX T000007509697&fastReqId=1206373701&fastPos=1>.

139. Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], Apr. 6, 2004, No. 02-41166, available at <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEX T000007472628&fastReqId=1730427480&fastPos=1>.

140. Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], Oct. 30, 2002, No. 00-40868, available at <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEX T000007444573&fastReqId=863144119&fastPos=1>.

141. Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], Mar. 16, 2004, No. 01-46316, available at <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEX T000007473526&fastReqId=1411019906&fastPos=1>.

- When an employee sends numerous letters within a short period of time to his employer in response to a job warning that the employee deemed unjustified. The letters contained no harmful, defamatory, or excessive language;¹⁴² or
- When employee distributes an open letter in response to one previously sent by management to the entire work staff personally implicating him. The employee's complaints were not excessive in nature in the letter and were in proportion to the emotional trauma endured after having his professional work ethic and ability called into question, even though his work performance until then had never been a cause for reproach.¹⁴³

Finally, the criticisms addressed to company management by the employee must not degenerate into an excessive denigration or undermining of management. Thus, the remarks contained in an employee's letter, denigrating his boss and going beyond acceptable limits, amount to an abuse of the employee's right of expression.¹⁴⁴ Moreover, it was considered a case of gross misconduct when the managing director on several occasions "publicly challenged the competence and legitimacy of new company managers" and "as a result, went beyond the limits of the freedom of speech granted to an employee."¹⁴⁵ The gross misconduct stems from the deliberate intention to harm a superior, by denigrating both him or her personally and the manner in which he or she is running the company in front of other employees.¹⁴⁶ In a questionable ruling, the Court of Cassation even validated a disciplinary measure taken against a Syrian airline employee guilty of having expressed discourteous comments toward the Syrian Head of State.¹⁴⁷ Although the *Clavaud* ruling¹⁴⁸ has often been introduced as precedent, case

142. Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], May 2, 2001, Bull. civ. V, No. 142.

143. Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], June 22, 2004, Bull. civ. V, No. 175.

144. Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], Feb. 9, 2000, No. 97-43664, available at <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEX T000007405242&fastReqId=1711149365&fastPos=1>.

145. Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], June 12, 2007, No. 05-45333, available at <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEX T000007512255&fastReqId=1646052972&fastPos=1>.

146. See Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], Jan. 20, 1993, No. 91-42005, available at <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEX T000007174791&fastReqId=1967343848&fastPos=1>; Cour d'appel [CA] [regional court of appeal] Paris, Sept. 16, 2003. This second case involved a letter sent by an employee that questioned the basic elements of a corporate business plan. The letter used excessive and defamatory language by casting suspicion on the president of the board of directors. Because of the manner in which the letter was disseminated (reading it out loud to members of the board of directors), the letter's author had decided to make known his diverging views from the management team to the company auditor and to the entire staff, thus attempting to destabilize the company.

147. Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction,

law has frequently recognized that the behavior or comments of employees do, in fact, constitute an abuse of the right to free expression.¹⁴⁹ However, “a simple indiscretion in speech, even one made in public, would not be enough to characterize an abuse of the right of freedom of speech which is enjoyed by the employee, both within and outside of the company.”¹⁵⁰

2. Public Servants

“The freedom to express one’s opinion is guaranteed to government workers,” affirms Article 6 of the general statute of civil service workers for the state and its territorial communities.¹⁵¹ Nevertheless, French administrative law imposes a “duty of confidentiality” on all public servants (permanent or contractual), requiring them to refrain from expressing their opinions about their department, at all times and in all places, even outside of work and the performance of their job duties, under penalty of demotion and disciplinary action. This obligation was defined and sanctioned for the first time by the Council of State in the *Bouzanguet* decision¹⁵² and has been constantly affirmed ever since. It does not appear in the general statute of civil service workers, but it does appear in specific legal texts (e.g., statutes of the magistracy, decisions of the Council of State, military service, and in the code of ethics of the national police).

Obviously, a criminal offense constitutes a breach of confidentiality, such as defamatory remarks¹⁵³ or an offense against the head of state.¹⁵⁴ In other cases, there is cause to make reference to the circumstances surrounding the event (e.g., the nature of the duties and job responsibilities held, the place where the opinion was expressed and the publicity arising from it, and the possible use of a union mandate). The duty of confidentiality becomes all the more intense the higher the ranking of the civil servant.¹⁵⁵ Participating in a prohibited demonstration¹⁵⁶ or distributing tracts that

social chamber], Oct. 6, 1993, No. 91-45053, available at <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEX T000007205764&fastReqId=1239284207&fastPos=1>.

148. Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], Apr. 28, 1988, Bull. civ. V., No. 257.

149. See, e.g., Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], Mar. 28, 2000, No. 97-42943, available at <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEX T000007405804&fastReqId=1927573160&fastPos=1>; Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], Oct. 7, 1997, Bull. civ. V, No. 303; Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], Nov. 16, 1993, Bull. civ. V, No. 278.

150. Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], Jan. 9, 2002, No. 99-45875, available at <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEX T000007449205&fastReqId=2115295073&fastPos=1>.

151. Law No. 83-634 of July 13, 1983, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 14, 1983, p. 2174.

152. Conseil d’Etat [CE] [highest administrative court], Jan. 11, 1935, Rec. Lebon 44.

153. Conseil d’Etat [CE] [highest administrative court], Feb. 11, 1953, Rec. Lebon 709.

154. Conseil d’Etat [CE] [highest administrative court], Jan. 10, 1969, Rec. Lebon 24.

155. See Conseil d’Etat [CE] [highest administrative court], Mar. 10, 1971, Rec. Lebon 202; Conseil d’Etat [CE] [highest administrative court], Mar. 13, 1953, Rec. Lebon 133.

incite others to participate in a political strike¹⁵⁷ also constitute a breach of confidentiality. Generally speaking, the public servant must abstain from discrediting the job or department. A public servant who violently criticizes his minister's management style through pamphlets or by participating in an electoral meeting¹⁵⁸ breaches the duty of confidentiality, just like the departmental manager of the archives department who sends a letter to another department manager on official letterhead vehemently criticizing the government's archive policy.¹⁵⁹ These behaviors are similar to those punished in labor law. Breaching the duty of confidentiality is nothing other than the flip side of abusing the freedom of speech.

As in American law, the situation of public employees is clearly distinguished from that of private employees. The mission of public service confers a particular dimension and seriousness to the concept of subordination. The purpose of subordination is to demand obedience and discipline of personnel not in one's own interest, but in the general interest. Beyond this common distinction, French and American law diverge widely, as much as they do on the issue of private employees. Public employees remain regarded, in all circumstances, as citizens enjoying the freedom of speech. The balancing of interests—so familiar in American law, where it was originally conceived—remains the preferred reasoning. On the contrary, it has been disdained in the United States ever since the *Ceballos* ruling.

II. ELECTRONIC SURVEILLANCE AND THE FREEDOM OF SPEECH OF EMPLOYEES

The topic of electronic surveillance of workers is often linked to the right to privacy because it is evident that surveillance severely restricts workers' freedom of speech.¹⁶⁰ In the United States, very few laws regulate the electronic surveillance of workers. At the federal level, the Electronic Communications Privacy Act (ECPA) only limits "interceptions" of electronic communications.¹⁶¹ Providers of electronic communication services may intercept electronic communications if doing so is necessary for the performance of service or necessary to protect their rights or property.¹⁶² An employer can utilize this exception from the moment that the message he intercepts circulates within his own computer system.¹⁶³ "Intercept" implies assuming control over the contentious message while it is in transit; however,

156. Conseil d'Etat [CE] [highest administrative court], May 27, 1955, Rec. Lebon 297.

157. Conseil d'Etat [CE] [highest administrative court], Oct. 12, 1956, Rec. Lebon 362.

158. See Conseil d'Etat [CE] [highest administrative court], Apr. 4, 1973, Rec. Lebon 283 (holding that the opposite applies to the reading of a union motion by a professor); Conseil d'Etat [CE] [highest administrative court], Jan. 3, 1962, Rec. Lebon 365.

159. Conseil d'Etat [CE] [highest administrative court], June 2, 1989, Rec. Lebon No. 70084.

160. Yamada, *supra* note 5, at 17 ("[E]lectronic surveillance in the workplace severely chills employee free speech.").

161. 18 U.S.C. § 2511 (2006).

162. *Id.* § 2511(2)(a)(i) ("It shall not be unlawful . . . for an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire or electronic communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service . . .").

163. See *Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107 (3d Cir. 2003).

information that has already been stored (e-mails stored on a hard disk, for example) can be freely read by the employer.¹⁶⁴ Connecticut adopted a law in 1987 that banned the surveillance of employees “in areas designed for the health or personal comfort of the employees or for safeguarding their possessions”¹⁶⁵ and subjected the recording or listening of conversations relative to negotiation of the work contract to the consent of the interested party.¹⁶⁶ But the field of interdictions is narrow with regard to the variety of data that can be monitored.¹⁶⁷

A recent decision of the NLRB, handed down on December 16, 2007, sheds some light on the matter of e-mails.¹⁶⁸ Among the various resolutions upheld, two in particular merit attention. First, employees cannot demand the use of their employer’s e-mail system in order to exercise the rights listed in section 7 of the NLRA (the freedom to establish unions and become a member, the right to participate in collective bargaining negotiations, or to lead a concerted activity).¹⁶⁹ Second, the NLRB had already refused to grant to employees engaged in collective action the right to use a billboard, television, copy machine, or telephone belonging to their employer, and permitted the employer to restrict usage of these items for professional purposes only.¹⁷⁰

In this instance, the NLRB considered that the more frequent use of e-mail in the workplace has not extinguished other more traditional methods of communication existing among employees. As a result, the NLRB found that free e-mail usage should not be offered to employees contrary to the employer’s wishes. Moreover, the employer’s policy of prohibiting the use of e-mail for “solicitations” unrelated to work does not disregard section 8(a)(1) of the NLRA, which categorizes a situation whereby an employer interferes, restricts, or restrains employees in the exercise of their rights guaranteed by section 7 as an unfair labor practice.¹⁷¹

French law offers a striking contrast in that its Court of Cassation has been passionate about this issue since 2001. French case law today has two series of precedents, each with three proposals. In essence, the employer cannot implement an employee surveillance system without first fulfilling three obligations—namely, information, consultation, and declaration.

- First, the employer must personally inform the employee in advance. According to Article L. 121-8 of the Labor Code, “no information personally concerning an employee or a job candidate can be collected by a method that has not been brought in advance to the attention of the employee or job candidate.”¹⁷²

164. *Id.* at 113–14.

165. CONN. GEN. STAT. § 31-48b(b) (2003).

166. *See id.* § 31-48b(d).

167. These data include telephone conversations, e-mails, hard disks, geographical location of the employee through GPS, the comings and goings on the premises using a coded badge system, or biometric information.

168. Guard Publ’g Co., 351 N.L.R.B. No. 70 (Dec. 16, 2007).

169. *Id.*

170. *Id.*

171. *See* 29 U.S.C. § 158 (2000).

172. C. TRAV. art. L. 121-8.

- Second, the employer must inform and consult in advance with the labor-management committee (if the employer has at least fifty employees). According to Article L. 432-2-1 of the Labor Code, “the labor-management committee is to be informed and consulted prior to the decision to implement within the company methods and techniques enabling the monitoring of employee activity.”¹⁷³ If the labor-management committee is not informed, the recordings from a customer video surveillance system put into place by an employer that are also used to monitor employees would constitute an unlawful means of proof to support a job dismissal.¹⁷⁴
- Third, declaration to the CNIL is mandatory in cases where personal data are to be automatically processed.¹⁷⁵

Basically, three other proposals demarcate the field of the right to privacy:

- First, according to the *Nikon* ruling, an employee “has the right, even during work hours and on work premises, to respect for his private life; this means in particular the confidentiality of his correspondence; the employer cannot henceforth without violating this fundamental freedom access the personal messages sent and received by the employee because of a computer tool placed at his disposal for work and this applies even in cases where the employer has prohibited nonprofessional use of the computer.”¹⁷⁶
- Second, the files are presumed to be of a professional nature unless explicitly stated otherwise by the employee: The files and records created by an employee thanks to the computer tool put at his disposal by the employer in order to perform his work duties are presumed, unless identified by the employee as being personal, to be of a professional nature such that the employer can access them in his absence.¹⁷⁷ According to a clarification inserted in the 2006 Annual Report of the Court of Cassation, “such identification must occur by means of a specific mention or heading,

173. C. TRAV. art. L. 432-2-1.

174. Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], June 7, 2006, Bull. civ. V, No. 206.

175. *See* Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], Apr. 6, 2004, Bull. civ. V, No. 103. An employee who was dismissed without real and serious cause due to his refusal to swipe his badge at the company exit as required by internal regulation was erroneously dismissed.

The combination of articles 16, 27 and 34 of law no. 78-17 of January 6, 1978 relative to information technology, files and liberties, 226-16 of the Criminal Code, L. 121-8 and L. 432-2-1 of the Labor Code [means] that in the absence of a declaration to the French National Data Protection Agency (CNIL) regarding the automatic processing of personal data concerning an employee, his refusal to defer to the employer’s demand involving the implementation of said data processing can not be held against him.

Id.

176. Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], Oct. 1, 2002, Bull. civ. V, No. 291.

177. Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], Oct. 18, 2006, Bull. civ. V, No. 308.

or the creation of an ad hoc file by the employee and not simply by filing the document, for example, in the 'my documents' folder that most programs automatically include."¹⁷⁸

- Third, the employer cannot open personal files outside of the presence of the employee "without a specific risk or imminent danger" necessitating such action.¹⁷⁹ This necessity was found in a similar situation when it was judged that a series of terrorist attempts had warranted a company targeted by bomb alerts to demand that employees open, only on a temporary basis, their bags in front of security agents. "This measure, justified by exceptional circumstances and security requirements was in proportion to the end goal since it ruled out bag searches." As a consequence, the refusal of an employee to show the contents of his bag, apart from any union activity, was wrong.¹⁸⁰

Thus, French law rests on a distinction that is between the work-related and personal or nonwork-related domains. In addition, two general rules frame the permissible grounds for employee dismissal:

- Employees cannot be dismissed as a result of disciplinary action founded upon the "personal life" of the employee (an expression deliberately preferred to that of "private life" as it is more encompassing).
- A dismissal as a result of disciplinary action can only be pronounced when the "personal life" of an employee causes "objective unrest" within the company or violates a contractual obligation.

Thus, for example, "the receipt of a [pornographic] magazine which an employee had sent to his work place [where it was openly viewed by his colleagues] does not constitute a breach of his contractual obligations."¹⁸¹ Likewise, sending an e-mail that constitutes a misdemeanor does justify the disciplinary action of dismissal vis-à-vis the sender because a criminal offense inevitably goes beyond the scope of one's personal life. Thus, "an employee who uses electronic mail made available to him by his employer in order to send anti-Semitic messages in such a way that the employer is identified, necessarily constitutes a case of gross misconduct."¹⁸²

Throughout its decisions, the Court of Cassation has been mindful to apply a measured degree of proportionality with respect to infringements of liberties committed by the employer. The court takes its source from Article L. 1121-1 (former Article L. 120-2) of the Labor Code, according to which "[n]othing can place

178. LA COUR DE CASSATION ET LA CONSTRUCTION JURIDIQUE EUROPÉENNE, RAPPORT ANNUEL 2006, at 305 (2006).

179. Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], May 17, 2005, Bull. civ. V, No. 165.

180. Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], Apr. 3, 2001, Bull. civ. V, No. 115.

181. Cour de cassation, Chambre mixte [Cass. ch. mixte] [highest court of ordinary jurisdiction, mixed chamber], May 18, 2007, Bull. 2007, Chambre mixte, No. 3.

182. Cour de cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction, social chamber], June 2, 2004, Bull. civ. V, No. 152.

restrictions on the rights of individuals and on individual and collective liberties unless justified by the nature of the task to be accomplished and in proportion to the goal pursued.¹⁸³ This measured control of proportionality strongly evokes the balancing of interests which American judges lean on when reconciling the rights of workers with those of public sector employers.¹⁸⁴

CONCLUSION

In conclusion, the methods of reasoning that outline the contours of freedom of speech in United States and French law are generally similar. An infinite number of reasoning methods cannot exist, as the mind always takes the same roads, whether these roads are beaten paths or side streets. Nevertheless, the conclusions of the judges do strongly diverge, influenced by the current of history, a constitutional system, and an economy and culture that have shaped and produced profoundly dissimilar court decisions.

183. C. TRAV. art. L. 1121-1 (former art. L. 120-2).

184. *See supra* text accompanying note 15; *cf.* *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505 (N.J. 1980).