

2019

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Matei Candea
University of Cambridge

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Recommended Citation

Candea, Matei, The Duelling Ethic and the Spirit of Libel Law: Matters and Materials of Honour in France, *Law Text Culture*, 23, 2019, 171-197.

Available at: <https://ro.uow.edu.au/ltc/vol23/iss1/11>

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Abstract

Contemporary French libel law explicitly proposes to adjudicate matters of “honour”. In so doing, it deploys terms and techniques crafted in the 19th century, at a time when law’s jurisdiction over matters of honour was strongly disputed by an alternative quasi-legal institution: the duelling code. This article returns to that historical moment from a legal materiality perspective to examine the ways in which duelling and libel law borrowed from each other’s materials in order to make honour matter. It argues that the history of libel law cannot be cast as a straightforward instance of the legal ‘formalisation’ of a mere social code, as traditional modernization narratives might lead us to expect. Rather, it shows the ways in which libel law came to be haunted by the material traces of duelling, and explains why honour remains, to this day, a recalcitrant matter for French law.

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Matei Candea

‘Law is lukewarm; honour is extreme. Law is measured; honour is absolute. Law is correct; honour is Just’ (Beignier and Foyer 2014, 39)

1 Introduction

If law has traditionally been understood as ‘the system of sovereign expressions of norms, acting ideally as an instrument towards justice’ (Kang 2018, 458), then something interesting happens at the points at which the law self-consciously encounters norms and forms of justice which are external to it. In the particular setting explored in this article – French libel law – ‘honour’ (*l’honneur*) is the name for one such complex of norms, which stands in an uneasy relationship with legal normativity.

Libel (*diffamation*) is a legal offense defined by the French law on press freedom, voted in 1881. Within this law, *diffamation* is defined as “any allegation or imputation of a fact which causes harm to the honour or esteem [à *l’honneur* ou à *la considération*] of the person or body to whom the fact is imputed”.¹ (*Loi Du 29 Juillet 1881 Sur La Liberté de La Presse* n.d.). This intrusion or inclusion of honour in the law seems archaic: after all, a well-established sociological narrative depicts honour as an obsolete, ‘pre-modern’ and inegalitarian social form, which has given

way to 'modern' conceptions of the equal dignity of individual persons (Berger 1970; Taylor 1994) – those conceptions which purportedly animate legal ontologies in contemporary Euroamerican settings such as France. And yet in recent years, a Parisian court which specialises in press law – the 17th chamber of the *Tribunal de Grande Instance de Paris* – has been hearing around 200 libel trials a year.

Just as puzzling, perhaps, is the fact that the law is frequently portrayed as a rather inefficient means to deal with matters honour. The recalcitrance of honour as a legal matter is nicely encapsulated in a quip heard amongst French judges, according to which 'a libel suit is a suit one files against oneself'. French libel trials are public, extended occasions for the incriminated allegations to be aired, discussed, examined and often publicised. The purpose of this examination, of course, is to determine whether the defendant is guilty of libel. In practice however, it is the plaintiff's life and actions which are substantially under examination, leading some critics to claim that French libel law reverses the role of victim and accuser (Beignier and Foyer 2014).

The invocation of honour in French law thus points to a set of conceptual conundrums, which have also animated juridical and lay discussions about law and honour in France. Is honour a mere archaism, a hangover from an earlier time? Has the now sociologically 'obsolete' notion of honour become a mere legal fiction without foundation in the social world? Or does the term describe some kind of persistent problematic despite its old-fashioned ring? And – since honour, in its prime, was a fundamentally extra-legal matter – what is the law doing in seeking to remedy harms to honour in the first place? How successful can it be?

In order to answer these questions, this article takes a lead from the approach proposed by the editors and asks what *materials* French libel law deploys in order to make honour *matter*. While the article begins and ends with a consideration of contemporary libel law as it is applied at the 17th chamber of the Paris Tribunal, the core of the discussion will focus on the period in the 19th century when this law was elaborated,

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debated and first applied – a time when libel law’s jurisdiction over matters of honour was strongly contested by an elaborate and self-consciously ‘extra-legal’ alternative: ‘the duelling code’. Crafted in explicit reference and contrast to the law of the land, the duelling code of 19th century France came with its own competing ‘forms, techniques, matters, non-textual media and bureaucratic arrangements’ (Kang and Kendall 2019: 36, 10). Contemporary French libel law was thus crafted, I will argue, in the shadow of the duelling code, as much as the reverse, and it bears a number of imprints of this history. Duelling codes and libel law came to share a number of key assumptions, particularly in relation to autonomy, fairness and truth, and some key materials, notably linguistic and textual forms, codes and techniques. Yet they also diverged in their way of making honour matter: where duelling materialised honour across language and physical violence, libel law materialised it across language and money.

These similarities and these differences provide an insight into the shape of contemporary French libel law. A legal materiality perspective allows us to see that the history of libel law cannot be cast as a straightforward instance of the legal ‘formalisation’ of a mere social code, as traditional modernization narratives might lead us to expect (Berger 1970). Rather, it shows the ways in which libel law came to be haunted by the material traces of duelling, and explains why honour remains, to this day a recalcitrant matter for French law.

2 The 17th Chamber as a duelling ground

I was not expecting, when I began my ethnography of the Chamber of the Press and of Public Liberties of the Paris Tribunal – more usually known just as the 17th Chamber, or simply *la dix-septième* – to have to read up on the history of duelling. And yet that theme made a strangely persistent appearance in my early conversations with judges assigned to and lawyers who frequented that court. The 17th specialises in the judgement of matters pertaining to the Press law of the 29 of July 1881, which lays out the modalities and limits of public expression in France. The law of 1881 has a rather iconic status in France as the first law to

formally end all pre-publication censorship, and to institutionalise the principles of freedom of speech which the French declaration of the rights of Man had announced but French law had honoured mostly in the breach (e.g. Droin, Charlot, and Dreyer 2011).

A key feature of the law's form which explains its meaning and symbolic charge in the French context is that it institutes an *exception* to the general principles of responsibility enshrined in the penal and civil codes, often described generally as '*le droit commun*' – an exception which extends specifically to public expression. The exception is not however absolute, as in some interpretations of the US's first amendment. Rather the law specifies a list of public speech offences, including various forms of hate speech, incitement and libel, but sets up a number of procedural guarantees and limits to the way these can be prosecuted.

Libel is the offence most commonly tried at the 17th, and it is in this connection that I encountered the recurrent trope which cast the 17th as the field in which contemporary Frenchmen and women battled out their affairs of honour. I slowly came to see that what had first sounded like a fanciful metaphor actually indexed a number of quite precise aspects of proceedings at the 17th, deriving in part from the subject matter and in part from procedural specificities of the 1881 law. Trials at the 17th concern words and images. They thus involve much exegesis and careful attention to meanings, contexts and implications, often at some length. On one occasion, for instance, I witnessed a lawyer discussing for a full 30 minutes, as part of his summing up speech (*plaidoierie*), the various contextual implications and valences of the word *con*. Trials were in general lengthier than those in neighbouring chambers of the same court, in part because of a greater emphasis on and number of witness testimonies, a fact which in turn derives from the distinctive procedural approach to matters of fact enshrined in the 1881 law – to which I return below. Dealing as it frequently does with libel claims made by politicians, intellectuals and other public figures against newspapers also means that the 17th has often been in the public eye and has had a greater share of press coverage and high-profile trials than

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other courts on its level of jurisdiction. Finally, whereas the symbolic stakes of trials at the 17th were often high, the material stakes were often perceived as being comparatively low. Whereas courts on the level of jurisdiction of the 17th can issue sentences of up to 10 years in prison, prison sentences issued in the context of libel were nearly unheard of. The levels of fines and damages, which typically ran to a few thousand euros, were often described as fairly low (compared for instance to the soaring damages known to be associated with UK libel cases).

These various features which made the 17th stand out from other courts on its jurisdictional level were all indexed in the ‘duelling ground’ metaphor. Here was a space in which parties and their witnesses clashed in a punctilious and literal-minded defense of their honour. Just as duelling had alternatively been critiqued as an indulgent and wasteful pursuit of petty resentments, and praised as the very embodiment of fundamental principles and values, the duelling metaphor set up the 17th for an ambivalent mix of praise and critique.

This metaphor was sometimes evoked with a kind of amused fondness, a fondness which was quite characteristic of a broad range of actors’ feelings for the court. Indeed, the 17th was often praised in the context of the Paris tribunal and beyond, for the quality of its judges and specialist lawyers, and the interesting nature of the cases that came there – cases in which matters of high principle and ‘burning social questions’ (*grandes questions de société*) were often at stake, such as the acceptable limits of humour or the nature of historical truth. However, the ‘duelling ground’ trope could also be deployed critically, such as when lawyer and then president of the League Against Racism and Antisemitism (LICRA), Alain Jakubowicz, deployed it as part of an argument for removing from hate speech offences the special protections afforded to public speech by the 1881 law, and treating them as ordinary law offences. Jakubowicz complained that hate speech cases had to be tried

at the 17th chamber, where the same justice ought to be dispensed as is dispensed in all the correctional² courts of France, and yet it is not. I remember a presiding judge who came to learnedly explain to

us that the 17th had become ‘the field of honour of the XXth century’: instead of throwing down a gauntlet, now you send a summons. And so we spend hours and hours in front of the 17th to find out if Mr X has been libelled, while elsewhere committal orders are issued for years in prison. (Jakubowicz in Collectif 2016, 35).

These ambivalences were stated explicitly, albeit playfully, in a speech delivered by Jean-Yves Montfort, who had been a long-time presiding judge of the 17th in the 1990s, before an audience of judges, lawyers, journalists and others at an event celebrating history and work of the court. In his closing comments, Montfort asked:

What is the 17th? Is it, as has sometimes been claimed, ‘a luxury justice in the service of pettiness’, or is it on the contrary, ‘the beating heart of democracy’? (Montfort 2018)

In sum, one might say that the duelling metaphor qualified the 17th as particular kind of ‘chronotope’ (Valverde 2015). The ‘17th-as-a-duelling-ground’ is a place where time slows in a peculiar fashion: both in the deliberateness of its deliberations, seemingly out of proportion with the importance of the matters at hand, and in the timelessness of its preoccupation with honour – which makes it continuous with the ancient world of duelling.

The recurrent metaphor of the 17th as a duelling ground was complemented by a more literal claim, which I heard on a couple of occasions, according to which the passing of the 1881 law had coincided with the official banning of duelling in France. This claim in effect set up the 17th as the literal, and not merely the metaphorical, successor of duelling grounds. The claim, as we shall see below, is factually incorrect. But it is not entirely fanciful. For the 1881 law was indeed voted at a time when duelling was an extremely common practice amongst the French bourgeoisie, and the question of the relationship between duelling and the law as competing ways of managing insult and libel was a live one. It is to this setting that I now turn.

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3 'As if there were two laws': jurisdictional disputes

The 1881 law was born amidst a flurry of duelling.³ As Nye (1998) has shown, in the 19th century, concerns with honour pervaded French political rhetoric, informed understandings and performances of masculinity, sexuality and marital order, and were at the heart of tense contentions around the management of reputation. In particular, Nye describes the surprising vitality of the practice of duelling in the mid to late 19th century. 'Duels of honour' were pervasive: disagreements in parliament, allegations in newspapers, or insinuations of sexual impropriety made before a handful of witnesses could all lead to duels. High-profile duels were frequently reported in the press, with close and careful attention to the behaviour of the participants. National newspapers such as the *Figaro* even had fencing rooms installed in their buildings to prepare journalists for the ever-present danger of challenges by outraged subjects of their work (Nye 1998), since as antisemitic politician and newspaper owner Edouard Drumont wrote in 1886, 'behind every signature everyone expects to find a chest' (quoted in Nye 1998, 223). Duelling manuals and codes which laid out the proprieties of duelling in careful detail were still published in France into the early 20th century (Breitmayer 1918; Bruneau de Laborie 1906). The 1881 law was conceived, debated and voted in this context by parliamentarians, a number of whom were themselves former or future duellists. Those who were not were nevertheless steeped in this broader world of references and assumptions. Yet far from marking the formal takeover of the management of matters of honour by the law, the press law of 1881 was in fact considered by many contemporaries to be as impotent in that regard as previous legal efforts (Tarde 1892; cf. Nye 1998, 175–76).

This tension between duelling and the law as alternative ways of making honour matter had deep roots (Billacois 1995; Kiernan 2016; Nye 1998). From the medieval to the modern period in France, as in many other places in Europe, a duelling nobility and state-building monarchs were locked in a struggle over the monopoly of the legitimate use of violence. In this struggle, duelling often seemed to have the upper

hand. The numerous anti-duelling edicts of the pre-revolutionary period attest to its vitality. And despite much debate, no special law was ever passed in post-revolutionary France in order to quell duelling. While causing death by duel was of course categorised as murder, duellists put on trial during the 19th century were systematically acquitted by juries (Nye 1998, 175–76).

Key to this structure of feeling was the popular idea that the law could never truly mend spoiled honour, and that it should not therefore interfere with the workings of the only institution (duelling) which could. The core principle which one finds repeated *ad nauseam* in accounts by both contemporaries and later commentators is that any man who seeks redress for honour in court has forfeited it (Adolphe Tavernier 1885; Bruneau de Laborie 1906; Pitt-Rivers 2017; Nye 1998). Appiah points to the key importance of a certain kind of gendered autonomy which marked dueling out – in principle at least – as the special privilege of able-bodied men (Appiah 2011, but see Mansker 2011)⁴. Women, youths, the elderly and the infirm could put their honour under the protection of another (Adolphe Tavernier 1885). For an able-bodied man to do so – even if this other were the sovereign state – would be to lose that privilege. As one of Fielding’s characters expresses it: ‘A man of honour wears his law by his side’ (Fielding 2010, 642).

As this quote suggests, duelling was not merely extra-legal – a kind of transcendent and undefinable embodiment of justice – it also came with norms and forms which provided an alternative and competing form of legality. This was pithily and sarcastically expressed for the British case by Francis Bacon when he claimed that the duel

expressly gives the law an affront, as if there were two laws, one a kind of gown-law, and the other a law of reputation, as they term it, so that [...]he year books and statute books must give place to some French and Italian pamphlets (quoted in Appiah 2011, 30).

Talk of a ‘law of honour’ was more than a convenient metaphor. The ‘pamphlets’ to which Bacon refers were the widely circulated ‘duello codes’ originating in Italy, which minutely codified the proper

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behaviour of challenged and challenging parties to ‘affairs of honour’. The 19th century in France saw the revival of such duelling manuals, which positioned themselves explicitly in relation to the law of the land, albeit in slightly different ways.

4 Legal form: codifying duelling in the shadow of the law

A key material which both law and duelling deployed in relation to matters of honour was language, both written and spoken. In order to pin down, channel and render tractable matters of honour, both the law and duelling codes relied on the production of authoritative texts – codification, definition, accredited forms of reporting. They both also relied on explicit procedures for managing and channelling verbal discussion, negotiation, and debate.

The renaissance of duel manuals in France was begun by the Comte de Chateaullard, who set out in 1836 to codify duelling, claiming this was a ‘humanitarian’ attempt to regulate the excesses of the practice (Chateauvillard 1836; Nye 1998, 137–44). Nye argues that the paradoxical survival and indeed expansion of duelling in France after 1850, while the practice disappeared in neighbouring countries such as Britain (Appiah 2011) is to be explained in part by the success of such efforts to make the duelling code into a quasi-judicial reality, accepted even by opponents of the duel. My interest here is more particularly in the ways in which Chateauvillard, and duelling manuals which followed his, deployed the materials of law in order to stake a particular jurisdictional claim.

It is worth noting that the very notion of codification was of course much in vogue at the time, in the wake of the broader legal codification begun by Napoleonic jurists with the Code Civil in 1804, the Code de Commerce in 1807, the Code penal in 1810, and so forth. A ‘Code du Duel’ would hardly have sounded metaphorical to contemporaries for whom duelling was a widely acknowledged social reality. While Chateauvillard’s code couldn’t have the official imprimatur of a legislative assembly, he echoed that mode of justification by having his Code du duel co-signed by seventy-six men from prominent families,

to which Chateauvillard added that ‘The minister of War, the prefects etc. etc., have approved by letter, and as men, what they could not sign as ministers’ (Chateauvillard 1836, 90).

In a striking instance of jurisdictional politics, the author positioned his code outside and yet in continuity with the law of the land. On the one hand, the Code du Duel stood as it were beside the law. Chateauvillard began his preamble by noting that:

Whilst the code of duelling is outside the law, whilst there can be no code but that which is sanctioned by the law, we should nevertheless not hesitate to give this name to the rules imposed by honour, for honour is no less sacred than governmental laws. (ibid 5)

Chateauvillard borrowed heavily from legal forms and terminology. The structure of his work, which includes a brief ‘code’ written in imperative numbered paragraphs, followed by a series of commentaries, and a large collection of historical jurisprudence on duelling, is very similar to that of 19th century explanatory treatises on laws, such as were written for instance about the 1881 law (Ameline de La Briselainne 1881; Faivre and Benoît-Lévy 1881; Dutruc 1882). One of Chateauvillard’s innovations (Nye 1998, 143–44) was to codify the role of the *témoins* (witnesses) whom he clearly distinguished from seconds who might join in with the fighting. Rather, the role of witnesses was to advise their party (*les parties* – another juridical term), in confidence, about the most honourable action to take, to mediate interactions between the two *parties* until the moment of the fight itself, to take upon themselves all negotiations setting the form and modalities the oncoming duel, to ensure the propriety of events on the field, and to report formally on these afterwards. The role of the *témoins*, which became a centrepiece of all later French duelling manuals, thus drew on and recombined that of various legal figures. As a later manual put it:

They were first merely friendly confidants: they become judges. Later they will be the lawyers (*avocats*) of a cause to which they are closely attached. All of the genius of the duelling procedure (*procédure*) lies in the fusion of these three characters (Bruneau de Laborie 1906, 32).

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Chateauvillard also highlighted the importance of the *procès-verbal*, the official reports or ‘minutes’. Literally a ‘verbal trial’, a *procès-verbal* is the French legal term for a detailed authenticated act of an official proceeding. In Chateauvillard’s duelling procedure, witnesses were to draw up *procès-verbaux* to record the form of the duel they had agreed upon, and another in case of any breach of the rules on the day. A *procès-verbal* would also be drawn up if one party refused the duel. Later duelling manuals (Adolphe Tavernier 1885; Bruneau de Laborie 1906) attest to the continuing centrality of the *procès-verbal* in 19th century French duelling, particularly as an official record of the duel itself, which might then be published in the newspapers ‘in order to give satisfaction to public opinion’ (Saint-Thomas, quoted in Adolphe Tavernier 1885, 114). Duelling manuals sometimes even offered ‘model’ *procès-verbaux* suited to various occasions (Bruneau de Laborie 1906).

Chateauvillard thus set up his duelling code as a parallel legality, alongside and in some respects echoing 19th century French law. Yet in another sense, he also proposed that the two should be continuous. Thus paragraph 20 of Chateauvillard’s code stipulated that it was the duty of witnesses to faithfully report and pursue in a court of law any breach of the duelling code (Chateauvillard 1836, 24). Chateauvillard was playing a careful jurisdictional game there, for nothing in his code contradicts the core principle that affairs of honour should not be taken to the courts. Rather the law of the land is given jurisdiction over breaches to the duelling code, which nevertheless stands inviolate as the primary jurisdiction for matters of honour.

Chateauvillard’s ‘juris-diction’ (cf. Richland 2013), his attempt to assert the (limited) sovereignty of the law of honour, was performatively effective, at least for a time. Nye recounts that, soon after its publication, the code was explicitly invoked in court-cases concerning duels and thus achieved a ‘quasi-juridical status’ (Nye 1998, 142).

5 Duelling spirit: codifying public speech in the shadow of the duel

If duelling manuals made frequent references to the law, legal texts

and debates surrounding libel did not talk much of duelling. And yet a close reading reveals the shadow cast on legal attempts to make honour matter, by the practices of duelling sketched above. In particular, the 1881 law folded into its logic a concern with the *autonomy* of the parties in contests of honour which recalled in some respect the figure of the duellists standing on the edge of the law.

Once again, this was achieved in part through codification. Much of the press law of 1881 drew upon definitions and regulations which had come before (Faivre and Benoît-Lévy 1881). In assembling it, legislators sifted through the entangled mess of post-revolutionary laws and ordinances concerning public expression, with the explicit aim of selecting the most 'liberal' aspects of these and collating them into one single systematic law (Lisbonne 1880). Aside from the much vaunted elimination of pre-publication censorship (which had already been attempted and reversed before), the main claim to novelty of the 1881 law therefore rested in its comprehensive and systematic form. The law covered aspects of public expression, ranging from the permitted location of postering during election periods to insults to foreign heads of state, and it replaced and abrogated no fewer than 42 extant laws concerning the press (ibid. 8317). Tellingly, Eugène Lisbonne, in the report which proposed the law to the chamber of deputies, noted that 'The law which we have the honour to propose to you is a complete code, which might be called: CODE OF CRIMES AND OFFENCES COMMITTED BY MEANS OF THE PRESS AND SPEECH' (ibid 8291).

The explicit codification of the limits of public speech into one single and comparatively simple document replacing a previously murky set of overlapping constraints and controls was intended as an inherently radical move. The impulse to make the law easily knowable related to the clear line which proponents of the law sought to draw between pre-publication censorship (*le régime préventif*), illiberal and illegitimate, and legal intervention after publication (*le régime répressif*), understood to represent a legitimate and liberal form of governance (Dury 1995). The logic of this distinction turns entirely on the imagined integrity of

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the individual speaker, their willingness to express themselves publicly, even in the full knowledge of later legal consequences. Key to this is the clarity and concision of the law. The individual must know what chances they are taking. Thus, in a proposed amendment to the 1881 law, senator Jules Simon had argued that the clarity of the terms of the law is paramount, since:

‘I believe it is absolutely necessary that the one who takes upon himself to judge the conduct of a politician in a newspaper article, can do so with all freedom. I do not say ‘with all safety’, for it can indeed happen that the author intends to expose themselves to danger [courir un danger]; an author can sometimes say to himself: there is a danger to me in writing this, I know it. But he must know it’ (Simon quoted in Dutruc 1882, 117).

Without explicitly evoking dueling, this vision of the autonomous speaker ready to brave the law and face danger clearly echoed that alternative way of taking individual responsibility for one’s speech. Rather than simply manage public expression in a sovereign fashion, it sought to lay down clear rules, and left it open to individuals to break them at their risk.

This general orientation is also visible in the specific procedural exceptions introduced by the 1881 law. Not unlike the way in which Chateauvillard devised a special jurisdiction for dueling, encompassed by yet autonomous within the law of the land, the 1881 law intentionally set the management of public speech apart from other matters of law and gave it an exceptional regime (*un regime dérogatoire au droit commun*).

In that spirit, the 1881 law set out precise and rather difficult requirements upon plaintiffs – in order to be valid, an act of accusation would need to specify the specific phrase or words at stake, and which precisely of the various speech offenses were being alleged (libel against a private individual, libel against a public official, insult, etc.). Cases could be – and to this day still are – dismissed on the grounds that a statement had been identified as libellous when it was in fact insulting. In the former case, the incriminated statement must include a factual claim, whereas in the other it must not. Thus for instance to

call someone a ‘thief’ might count as libel or as an insult depending on context. Seeking redress under the wrong heading would lead one’s case to be dismissed, as would an act of accusation drawn up without a sufficiently precise quote of the passages. Similarly stringent procedural rules hemmed in the timings of the various acts of accusation and exchanges of pre-trial information, depending upon the location of the plaintiffs and defendants. The law also broke with the *droit commun* by reducing the prescription of public speech offenses to three months.

These procedural precisions echo in many ways the highly formalized rules surrounding the giving and taking of challenges in dueling. Dueling manuals of the 19th century, beginning with Chateauvillard, set out extremely precise instructions for the management of the negotiations leading up the fight itself. As with dueling, much of the ‘action’ of a libel trial, even today, happens before the matter comes to court, in the exchanges of formal communications between the lawyers of both parties.

Critics of the 1881 law frequently refer to these procedural niceties as ‘traps’ (*les chausse-trappes*, Bonnal 2011) designed to make life difficult for defendants – evidence that the law is insufficiently protective of the rights of victims of the press. Proponents of the law, on the other hand, argue that allowing any form of imprecision in the wording of acts of accusation brings back a kind of arbitrariness – implicitly echoing the arguments of Jules Simon, the idea is that an author must *know* what s/he is being accused of. Similarly, the brevity of prescription is sometimes explained by the need to deal with words while their meanings and implications are still fresh, clear and unclouded by time. Amongst judges I spoke to, the brevity of prescription often also involved some implicit assumptions about the taking of offense – genuine offense is understood as an immediate affective reaction. To take offence belatedly at something that was written a long time ago seems insincere. One is reminded here of the words of the dueling manual by Bruneau de Laborie: ‘Modern society [...] expects, not without reason that any insulting [...] remark, any offensive action must produce [...] a painful nervous impression, immediately followed by a reaction and a need

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for personal revenge' (Bruneau de Laborie 1906, 14). Dueling manuals similarly set clear temporal limits to the various steps of the pre-duelling negotiation, which must normally occur within 48 hours of the offence being committed.

Proponents of the law also note that these defenses against the arbitrariness of plaintiffs are carefully counterbalanced by other aspects in which the law breaks with *le droit commun*. Notably in the fact that, against broader French legal principles, the 1881 law holds the defendant in a libel case to be in presumed bad faith – it falls to the defendant, not to the plaintiff, to prove that they were in good faith in making the allegations they made (Bigot 2017, 6). This balance is commonly expressed in terms of the familiar tension between the protection of freedom of speech and the protection of individuals harmed by speech. But in the case of libel, it also takes on a rather different valence, namely that of a concern with 'evening out the odds' between plaintiff and defendant. This is not without recalling a similarly meticulous attention to the fairness of conditions of duels, expressed not only through an attention to the nature and characteristics of weapons used, but also through the consideration of questions such as how should one deal with differences of age or ability between duelists, can someone duel when they are wounded or otherwise physically impaired, etc.

In some respects, it is almost as if the 1881 law – in relation to matters of honour – sought to make the sovereign power of law stand aside *even in criminal matters* in order to make space for the parties to take things into their own hands. Thus the 1881 law stipulated that, exceptionally in the case of the criminal offenses of libel and insult against private persons, the state can only prosecute on the basis of a complaint by the plaintiff (and that the prosecution would cease if the plaintiff removes their complaint). The plaintiff also had a choice: they could decide whether to pursue their case in a civil or in a penal jurisdiction. The latter brought with it a certain added weight – the censure of the state and the risk of a fine, added to damages – but the former freed the plaintiff from a number of the procedural requirements attached to criminal prosecution (Dupeux and Massis

2002 unpaginated). Contemporaries could hardly have missed the obvious echo between this provision and the fundamental rule of dueling codes according to which the offended party has the choice of weapons. These analogies still resonate a century later in lawyers Dupeux and Massis' recent comment that 'this choice left to the victim created a disequilibrium and a break in the equality of weapons between the criminal trial and the civil trial' (ibid.).

But the procedural exceptions which contribute most to the distinctive character of trials relating to the 1881 law concern the rules around proof. As has often been noted, French criminal justice tends towards an inquisitorial rather than an adversarial regime of veridiction (Garapon, Papadopoulos, and Breyer 2003; Hodgson 2005; Terrio 2009, 44–46). From the involvement of magistrates in investigations (*l'instruction*), via the central importance of written files, through to the physical and procedural set up of French courtrooms and trials, French criminal justice is frequently taken to epitomize the extraction of truth by institutional examination – as opposed to the adversarial production of truth in dramatic courtroom clashes between parties. Yet press law introduced an exception in this respect also by systematically excluding the question of the truthfulness of libelous allegations from the inquisitorial apparatus, and sometimes from the space of the court itself. To understand this seemingly paradoxical relationship to truth, we need to take a step back to examine the mode of veridiction associated with dueling. This brings us to a consideration of the diverse materials, beyond texts and words, out of which law and dueling sought to make honour matter.

6 Matters of honour and matters of fact

The fact that duelling was a procedure essentially concerned with truth is borne out by the importance of 'giving the lie' (*le démenti*) as an element of dueling procedure. On most accounts of duels involving insulting or libelous allegations, it is not the allegation itself, but rather the response – the claim that the allegation is a lie – which marks the formal start of proceedings (Shapin 2011, 107–10; Nye 1998, 177).

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By the 19th century, the thought that winning a contest of arms might demonstrate (perhaps by divine intervention) the truth of one's factual allegation had certainly fallen away. The truth at stake in dueling was not directly the truth of the factual statement which had sparked the matter, but rather the truth of one's honourability. A factual allegation impugned one party's honourability, they responded by impugning that of the accuser (by calling him a liar). Both parties then had to prove their challenged honourability by respectively issuing and accepting a challenge to duel – and by observing the correct conduct throughout the proceedings to their bloody end. The *procès-verbaux* which recorded at the end of the duel that 'honour had been satisfied' certainly did not return to consider the epistemic status of whatever allegation had initially sparked the affair. In other words, dueling was concerned with the truth of matters of honour, not the truth of matters of fact.

The distinctive way of managing matters of fact and proof in the 1881 law reflects this problematic. Proponents of the law drew on a history of legal theory predating the revolution to argue that an allegation could be defamatory even if it were true, since 'one can hurt someone by publishing the evil one knows, just as much as in publishing the evil one imagines' (Dareau, quoted in Lisbonne 1880, 8302). As in the case of dueling, the facts of the matter were, in essence, immaterial to matters of honour. The law therefore initially also forbade a defendant in a libel case to seek to prove in court the truth of their allegation, since such a proof would be legally immaterial and would merely continue to publicise the offense – 'to prove the truth of one's libelous claim would be to libel twice over' (Ibid. 8304). A number of contemporaries complained that this unwillingness of law to enter into matters of fact contributed to encouraging duelling in order to clear one's name (Tarde 1892, 87–99), a perspective shared by Nye (1998, 176). Yet it is worth noting that, in this way, the law rejoined dueling in shifting the onus from questions of fact to questions of honour. What remained to be debated in a libel trial, once matters of fact were taken out of the equation, was precisely matters of honour: were the alleged facts in fact contrary to honour? Was the alleged libeler in 'good faith' in alleging them?

A liberal-minded libel law encased within a 'code' of the press nevertheless ran into difficulties in seeking to apply this anti-factual principle consistently. For aside from the problematic of honour, the 1881 law also inherited the liberal problematic of allowing the press to act as checks on the behavior of public officials (Habermas 1992). The 1881 law thus made an exception to its prohibition against matters of fact, in the case of libels directed at public officials. In that case, the proof of one's libelous claims was allowed and accepted as a defence. Yet it remained a matter for the parties to prove or disprove these facts in court, and the judges themselves did not take on an inquisitorial role in this regard.

7 (Im)material consequences: language, money and blood

However much libel law replicated or echoed the form of dueling codes in relation to matters of honour, it was however hampered by its fundamental reliance on that 'primary legal material' (Kang and Kendall, 2019: 19) – language. However much they may shy away from matters of fact, courtroom attempts to resolve matters of honour necessarily operated by heaping more talk on injurious talk – and thus always ran the risk of exacerbating them.

Duelling, by contrast, grounded its ability to shift the onus from matters of fact to matters of honour in the way it combined language and textual codification with something radically different: violence, blood and bodily harm. In his preface to Tavernier's manual, journalist and duellist Aurelien Scholl writes that:

The offender and the offended, when they come out of the courtroom, keep the hatred which had brought them to the feet of the law. The poisoned words of lawyers have only added to the anger of the parties [...] A duel on the field ends quite otherwise. Whatever the result of the fight, [...] whether the sword has entered the chest or glanced off a rib, everything is truly over. The offense has been washed and no judgement, no court decision can rival the procès-verbal in which witnesses declare that honour has been satisfied. Duelling is a convention which not only has force of law but is even superior to the

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law since the judge can only give satisfaction to one party, whereas the [dueller's] witnesses return both parties unscathed and free from any future reproach. (Schöll in Adolphe Tavernier 1885, Iv).

This focus on violence and embodiment runs through the duelling manuals, the bulk of which consist of detailed regulations concerning the nature and use of weapons, the propriety of wearing or removing protective clothing, the acceptability of certain kinds of movements on the field, the nature and extent of wounds, and other such matters. Similarly it is through an attention to the fine nuances of the behaviour of duellists on the field, carefully relayed by newspaper articles, that late 19th century Frenchmen and women evaluated whether, in point of fact, honour had been satisfied at the end of a duel (Nye 1998).

This meticulous attention to violence and the play of bodies marked duelling's specificity as a 'technology of honor', as Piccato (1999) has argued for contemporary Mexico. By stretching matters of honour over a material canvas made of words and (regulated) bodily harm, duelling raised the stakes in a way which allowed verbal insults to be 'washed', and matters of factual allegation to be dissolved in proof positive of honourable courage.

The law's way of raising the stakes, by contrast, relied on attaching language to violence only in the relatively mild form of prison sentences (ranging from a 5 days to six months for libel and 5 days to two months for insult). Rather, the main extra-linguistic material through which the law sought and still seeks to raise the stakes of libel and insult is money. Each speech offence came with a specified fine, to which the law of course added the possibility for victims to demand damages.

This reliance on money, far from competing with duelling's reliance on blood to raise the stakes, was perhaps the most obvious respect in which the law failed as a technology of honour for 19th century French adepts of the duel. For duelling codes made clear that monetary considerations and calculations were radically incompatible with honour. These codes for instance stipulated complex rules to avoid sully matters of honour with matters of money in cases where the offender owed a debt to the offended or vice versa. The law's reliance

on money was thus singled out explicitly by some authors as the mark of its inability to truly manage matters of honour:

Unfit to evaluate and differentiate the damages [of honour], courts would also be incapable to compensate them without bringing into play a system of conventional equivalences to which the character of some peoples, and ours in particular, will always be hostile. We belong to a race amongst whom honour doesn't come with a price list. (Bruneau de Laborie 1906, 9).

Accordingly, one variation on the notion that an offended person lost their right to duel if they went to the court stipulated that this only applied if they had received financial damages (Ibid. 145). The same author also notes that some newspapers clearly use libel as a commercial strategy to boost sales, and that this justifies that such newspaper owners and journalists be 'excluded from the laws of honour' and quite simply taken to court (ibid 143).

I would argue, however, that it was not so much money itself, but rather *calculation*, which made the 1881 law's system of fines seem to so many an improper technology for managing matters of honour. The thought that fines set by the law were too low was a frequent complaint (A. Croabbon 1894, 399). But none of these commentators suggested what would constitute a proper 'tarif' for matters of honour. Rather, I would suggest that these complaints follow a different implicit logic: in order to provide an equivalence for honour, money would need to be used in such a way that it moved beyond normal calculability (the world of 'price lists'): a fine of '25 to 2000 francs' remained within the bounds of everyday calculation, such that one might imagine, as it were, buying the right to insult someone at that price, or valuing one's honour as in a market transaction. By contrast, the enormous sums reputed to be paid in English libel trials moved money beyond matters of calculation, of buying and selling, and into existential grounds – one's life might be fundamentally altered by such transactions. A reasonable amount of money sullies honour. An incalculable amount of money might repair it.

One can also exit calculation from below. The manual which forbids duelling after financial damages have been received specifically excepts

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from this rule the plaintiff who only asked for one Franc in damages – a demand known in French law as ‘le franc symbolique’ (Bruneau de Laborie 1906, 146). Taking matters to court while reducing a demand to a symbolic minimum – in effect waiving one’s legal right to more substantial damages – enabled plaintiffs to speak of honour in the language of money. This use of money to signify honour remains important to this day. Many libel plaintiffs sue for the *euro symbolique*, or, when they ask for more, are nevertheless only granted one euro in damages when the court finds in their favour.

Conversely, some late 19th century duellers began to worry that their key material currency, violence, might be cheapened in such a way as to become calculable. Whereas, as we saw above, a key concern of Chateauvillard’s manual in 1836 had been to ‘tame’ and civilise the duel, using a legalistic framework in order to limit in particular the occurrence of deaths by duelling, early 20th century manuals (Bruneau de Laborie 1906; Bibesco 1900) were consciously invested in actually trying to *heighten* the physical stakes of duelling, to avoid them ending ‘without blood being spilled’. These concerns were prescient. When duelling eventually died out in early 20th century France, it was neither through the effect of legal repression nor through the success of libel law in wresting matters of honour from the grip of duello codes. According to Nye, the demise of duelling is best explained by broader shifts in early 20th century configurations surrounding violence, masculinity and self-sacrifice, in which the mass deaths of world war I played no inconsiderable part. To court one’s death (or more probably a few fleshwounds) over matters of reputation in an elaborate ritual fashion came to seem quite simply ridiculous in the light of the protracted horrors of that conflict (Nye 1998, 216).

8 Conclusion: honour as a recalcitrant matter of law

In sum, libel law did not, in the end, kill the duel. It did however survive it. Libel law, which had developed in the shadow of duelling as an alternative way of making honour *matter*, now holds the field. And yet, now bereft of its competitor, the law seems slightly uncertain about

how precisely to make honour matter. As one judge – I will call him Judge R – put it,

The notion of honour and esteem – it’s hardly as clear in people’s minds in the 21st century as it was in the 19th, when these notions... one could speak of a ‘code of honour’ if you like, there were rules, there was what was done and what wasn’t done.

Once these explicit codes had fallen away, the law’s purchase on honour required a partial redefinition of the problem. One judge, responding to the formulation of my question (‘How does one judge questions of honour?’), replied by highlighting the fact that his focus was not on honour *per se*, but on legal categories and definitions:

Judge S: in reality we’re not judging questions of honour, [...] we’re judging if a statement is [an allegation of] *a precise fact, which can be subjected to a debate about its truth, which causes harm to the honour or esteem of the person.* [...] Me: so, precisely, what is that...? [...] To me, seeing it from the outside, it seems pretty complex... Judge S: No, because ‘honour’, like that doesn’t mean anything, but it’s not honour we are judging it’s “*infringements on honour and esteem as understood by the law of the 29th of July 1881*” which could be either the allegation of a criminal offence, or the allegation of a morally condemnable behaviour.

This is a prime instance of the type of metalinguistic move described by scholars as ‘juris-diction’: “law language in use” (Richland 2013, 213). The portions I have highlighted in italic are either direct quotes from the 1881 law, or stock jurisprudential formulations, repeated in judgement after judgement. Judge S is not merely arguing about law’s ability to encompass questions of honour, to make honour into a legal matter – he is demonstrating and performatively shoring up the existence of ‘honour as defined by law’.

The judge’s final sentence points to an important jurisprudential mechanism through which libel law has managed to loop the bulk of the materiality of honour back into itself: the majority of things which are damaging to honour, judges frequently noted, are also against the law. On this view, then the law becomes (mostly) self-sufficient since it has already defined elsewhere the content of that category. Libel

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becomes (mostly) an allegation of illegal behaviour (murder, theft, abuse in its various forms and so forth), and ‘honour’ is thus captured by the terms set by the law.

The residual category of ‘morally condemnable behaviour’ admittedly eludes this complete self-referential closure. Yet judges can point to jurisprudence in which the French high court has brought aspects of this residual category into the law – for instance by ruling that allegations of marital infidelity *no longer* constituted an affront to honour in view of ‘the evolutions of social mores and conceptions of morality’ (implicitly, in contemporary France) (Cour de cassation, civile, Chambre civile 1, 17 décembre 2015, 14-29.549, Publié au bulletin 2015). The ruling is partial – it only captures into law one infinitesimal part of the endless field of ‘morally condemnable behaviour’. But its value is exemplary: it makes clear in principle that this kind of capture is possible.

And yet, by the same token, the capture of honour by the law remains necessarily incomplete. In deciding whether a particular statement can be legally qualified – can come to matter, legally – as libel, French judges reach ‘outside’ the legal, to ask whether the defendant’s honour has been harmed. But in reaching for ‘honour’, judges implicitly acknowledge an alternative form of “societal” adjudication – the ghost of a duelling code which has now passed away. Today as in the 19th century, honour not only exceeds but also reduplicates law’s ways of making things matter.

Endnotes

I would like to thank, first and foremost, the judges, lawyers and others who generously welcomed me into the world of French press law. I am very grateful to Taras Fedirko, Paolo Heywood, David Sneath, and participants in the Cambridge Socio-Legal Seminar for helpful comments, critiques and suggestions. The writing of this article was supported by the European Research Council (ERC) under the European Union’s Horizon 2020 research and innovation programme (grant agreement 683033).

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1. *'Toute allégation ou imputation d'un fait qui porte atteinte à l'honneur ou à la considération de la personne ou du corps auquel le fait est imputé est une diffamation'*
2. The *tribunal correctionnel* is a French first-instance court in penal matters. Its equivalent in civil matters is the *Tribunal de Grande Instance*.
3. The discussion that follows draws significantly on Nye's outstanding account of the place of duelling in 19th century France (Nye 1998, 127–216), as well as on my own reading of a number of 19th century duelling manuals. Nye's main concern is with changing forms of masculinity and male codes of honour in modern France, but he discusses at various points the law's weakness in the face of duelling. While this is an important observation, my own focus here is more on the ways in which duelling and libel law borrowed from each others' form, concerns and materials.
4. The gendered politics of 19th century French honour are actually rather more complex than they appear, both in the contemporary literature and in much later historiography, which has overwhelmingly tended to describe honor codes as definitively premised on the exclusion of women. Andrea Mansker (2011) has shown that 19th century honour codes in France in fact became a tool for women as well as men to reshape and challenge traditional gendered roles. Her book explores disputes around honor, duelling and insult as an unexpected context for early French feminist politics. To forget the agentive role of women in making claims in defence of their own honor, she rightly notes, is precisely to reinscribe the stereotype of women's passivity inherent in dominant discourses of honor in the 19th century.

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