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THE EUROPEAN PASTEURIZATION OF FRENCH LAW

Mitchel de S.-O.-l'E. Lasser†

In a series of stunning decisions handed down in the last few years, the European Court of Human Rights (ECHR) has condemned the decisionmaking procedures traditionally used by the French Supreme Courts (i.e., the Cour de cassation and the Conseil d'Etat). This Article traces and critiques this developing "fair trial" jurisprudence, which has also resulted in the condemnation of the supreme courts of Belgium, Portugal, and the Netherlands, whose decisionmaking procedures were all patterned on the French civil law model. Finally, the Article examines the dramatic and schismatic French responses that have ensued.

This Article offers a case study at the intersection of European law, comparative law and judicial theory. It begins by describing—and distinguishing between—the interpretive practices and judicial theories that characterize the legal systems of France, the United States, and the European Union. It then analyzes the complex, multifaceted, and ongoing negotiation between these systems' divergent understandings of proper judicial practice.

Professor Lasser concludes that the largely misguided interchange between the French supreme courts and the ECHR may well have resulted in pasteurizing the French civil law procedural model into bland nonexistence. The traditionally republican and institutional modes of French judicial decisionmaking have been forced to take on some of the more democratic and argumentative features that characterize ECHR and, especially, American judicial decisionmaking. Unfortunately, these reforms may grant a new argumentative prominence—and thus normative dominance—to the French judiciary (precisely what the traditional French system was designed to avoid), without, however, counterbalancing this new judicial power with sufficiently effective individual, public, and argumentative judicial accountability. Whether these reforms mark the beginning of the end or the beginning of a creative new beginning of the French civil law model of judicial decisionmaking remains to be determined.

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INTRODUCTION

In one of his most famous articles, the late Robert Cover described courts as "characteristically 'jurispathic.'"¹ That is, they tend to kill—and perhaps exist precisely for the purpose of killing—the

¹ Robert M. Cover, *The Supreme Court, 1982 Term—Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 40 (1983).

proliferation of legal meaning.² Professor Cover's almost poetic insight holds particular import as one considers the confluence of Europe and France, where more than just tasteful cheese enzymes now stand to be "pasteurized" into bland nonexistence. In short, the entire French civil law model of judicial decisionmaking may now lie in mortal peril.

The French model of supreme court judicial procedure has a long, illustrious, and highly influential history.³ Cemented in revolutionary distrust of the judiciary and polished by Napoleonic notions of republican and meritocratic state administration,⁴ the French model spread into large sections of Europe and still holds firm in, *inter alia*, Belgium, Portugal, the Netherlands, and—interestingly enough—the European Union's Court of Justice.⁵ Thus, France has played an extremely prominent role in the development and worldwide dissemination of a particular model of judicial decisionmaking.

Nevertheless, this French model has long been the source of horrified fascination by outsiders, and with good reason.⁶ For example, the Cour de cassation⁷ composes all of its judgments as unsigned, cryptic, single-sentence decisions without concurrences or dissents.⁸ Thus, for all that such judgments purport to be the deductive result of the Code's commands, they nonetheless appear to outsiders as little more than formalistic, unexplained—and, hence, unconstrained—judicial fiat.

To make matters worse, the more the outsider learns about the traditional French model of judicial decisionmaking, the more bizarre it seems. For instance, the two French supreme courts produce and

² See *id.* at 40–42.

³ See Rolf Stürmer, *Suing the Sovereign in Europe and Germany*, 35 GEO. WASH. INT'L L. REV. 663, 663 (2003) ("The French model . . . heavily influenced the continental understanding of the relationship between administration and adjudication.").

⁴ See L. NEVILLE BROWN & JOHN S. BELL, FRENCH ADMINISTRATIVE LAW 24–25 (1998); WALTER CAIRNS & ROBERT MCKEON, INTRODUCTION TO FRENCH LAW 27 (1995).

⁵ See III ROSCOE POUND, JURISPRUDENCE § 112, at 694–96 (1959) (listing national legal systems influenced by the French Civil Code); see also Martin Shapiro, *The European Court of Justice, in THE EVOLUTION OF EU LAW* 321, 326 (Paul Craig & Gráinne de Búrca eds., 1999) ("[T]he ECJ's . . . general mode of operation clearly follows a French model . . .").

⁶ See, e.g., JOHN P. DAWSON, THE ORACLES OF THE LAW 374–431 (1968); JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 36–42 (1969) (describing French modes of judicial decisionmaking and procedure, only to conclude that, in the French system, "the judicial function is narrow, mechanical, and uncreative"); POUND, *supra* note 5, § 103, at 422–24.

⁷ The Cour de cassation is the highest court to hear private and criminal law matters, whereas the Conseil d'Etat is the supreme body with jurisdiction over most administrative, executive, and state action cases. See CAIRNS & MCKEON, *supra* note 4, at 37–42. In addition, a separate Constitutional Council (*Conseil constitutionnel*) engages in quasi-judicial review of newly passed legislation before it is promulgated. See ANDREW WEST ET AL., THE FRENCH LEGAL SYSTEM: AN INTRODUCTION 106–07 (1992).

⁸ See Bernard Rudden, *Courts and Codes in England, France and Soviet Russia*, 48 TULANE L. REV. 1010, 1021–22 (1974).

adopt draft judicial decisions *before* oral arguments ever take place.⁹ Furthermore, because the courts' judges generate these draft decisions through a sequestered internal process, the litigants cannot access—much less respond to—the drafts. Litigants are similarly hampered at oral arguments: Traditionally, after the parties have argued, a judicial amicus presents his or her conclusions about how the case should be resolved, resulting in more assertions to which the litigants cannot meaningfully respond.¹⁰ As if this were not enough, customarily, this amicus then retires with the judges for deliberations.¹¹ Thus, in many respects, the French system offers a truly distinctive, if largely misunderstood, model of judicial decisionmaking.

The traditional model, however, may well be taking the first major steps toward extinction. In a series of stunning decisions handed down over the last few years, the European Court of Human Rights (ECHR) has held that the French supreme courts, by refusing to make the internal arguments of its judicial magistrates appropriately available to litigants, infringes upon the right to a fair trial guaranteed by the European Convention on Human Rights (hereinafter the "European Convention").¹²

This Article offers a case study at the intersection of European and comparative law. Specifically, the Article examines how the ECHR and the French supreme courts have sought to resolve, or at least mediate, the fundamental divergence between their respective understandings of proper judicial decisionmaking procedure. By working through the complex, multistage, and ongoing conflict be-

⁹ See BROWN & BELL, *supra* note 4, at 102; see also MITCHEL DE S.-O.-L'E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 50–52 (2004) [hereinafter LASSER, JUDICIAL DELIBERATIONS] (describing content of these draft decisions (*projets d'arrêtés*)). For a detailed portrayal of the process by which the French administrative courts—and, in particular, the *Conseil d'Etat*—render judgments, see BROWN & BELL, *supra* note 4, at 90–113.

¹⁰ See BROWN & BELL, *supra* note 4, at 110–11.

¹¹ See *id.* at 111.

¹² Article 6 of the European Convention on Human Rights provides, in pertinent part: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing . . ." Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, Council of Europe, art. 6(1), 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) [hereinafter European Convention]. A quick explanation for the uninitiated: The ECHR, whose jurisprudence is the primary trigger for the writing of this Article, is an international tribunal situated in Strasbourg. See MARK W. JANIS ET AL., EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS 64 (2000). The ECHR has jurisdiction to secure enforcement of the European Convention, a treaty to which there are currently forty-five signatory states. See European Convention, *supra*, art. 19; see also Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, at <http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG> (listing signatures) (last visited Feb. 20, 2005). For a general introduction to the ECHR and the European human rights regime generally, see JANIS ET AL., *supra*.

tween the ECHR and various supreme courts patterned on the French model, this Article demonstrates how both the ECHR and the French have engaged in bad comparative-law practice. That is, each has failed to grasp and appreciate the logic and values underlying the other's preferred procedural model. As a result, the exchange between the ECHR and the French has largely consisted of unfocused, vaguely uncomprehending accusations, and tepid, halfhearted responses. The consequences of this exchange, however, may well prove to be the beginning of the end—or perhaps the beginning of a new beginning—of the French civil law model as we know it.

The analysis proceeds as follows: Part I briefly presents the theory and practice of the traditional French model of judicial decisionmaking.¹³ As this Part explains, the French judicial system functions on the basis of an *institutional* and ultimately *republican* conception of judicial control and legitimacy. The basic idea is that a small corps of elite, state-sanctioned jurists, culled in an appropriately representative fashion from the general population and educated, trained, and constrained in a meritocratic and hierarchical institutional framework, is entrusted with the task of debating and resolving legal controversies in such a way as to promote the general interest and the public good. To this end, these jurists are granted a privileged—and largely inaccessible—deliberative space in which to engage in particularly frank, communal, and highly substantive debates that, by virtue of this seclusion, are nonetheless denied the force and status of “law.”¹⁴

Part II traces the ongoing cycle of litigation that has pitted the ECHR against supreme courts patterned on the French procedural model. As Part II explains, the first real salvo in this exchange was the ECHR's decision in *Borgers v. Belgium*,¹⁵ in which the court held that the procedure used by the Belgian Cour de cassation violated the right to a fair trial guaranteed by Article 6 § 1 of the European Convention.¹⁶ This initial blow put the French on notice that their traditional decisionmaking procedures were at risk and opened an ongoing struggle that, to this day, has been characterized on all sides by halfhearted and makeshift positions.

Part III assesses the costs and benefits of *Borgers* and its progeny,¹⁷ concluding that the plaintiffs' hard-fought victories in the ECHR's *Reinhardt v. France* and *Kress v. France* decisions actually offer relatively

¹³ I have presented this analysis at length elsewhere. See LASSER, JUDICIAL DELIBERATIONS, *supra* note 9.

¹⁴ See CODE CIVIL [C. CIV.] art. 5, translated in Rudden, *supra* note 8, at 1012 (“Judges are forbidden to decide the cases submitted to them by laying down general rules.”).

¹⁵ 214 Eur. Ct. H.R. (Ser. A) 22 (1991).

¹⁶ See *id.* at 33.

¹⁷ See *Reinhardt and Slimane-Kaïd v. France*, 1998-II Eur. Ct. H.R. 640 (holding that the Cour de cassation's procedural scheme does not afford litigants the right to a fair

meager gains. Viewed in the particular context of the French judicial system, the access and response rights these plaintiffs gained are of little practical use to litigants. The costs, on the other hand, have been major. Not only have these decisions badly damaged the French legal system's reputation and influence, but the ECHR has also provoked the hostility of a good number of national supreme courts—courts on which the ECHR relies to properly enforce the European Convention. Perhaps most distressing, however, is the fact that the modest procedural concessions the ECHR has managed to wrest from the French may have established a continuing and unhealthy dynamic of fearful resistance, in which each supreme court finds itself compelled to abandon its condemned judicial cousins in a doomed attempt to avoid ECHR censure. In other words, the ECHR's *Borgers/Kress* litigation has exerted powerful, divisive pressures on the French supreme courts.

After working through the range of more confrontational and submissive options available to the French judiciary following the ECHR's *Reinhardt* and *Kress* decisions, Part IV reveals the response the French supreme courts have actually taken: schism. That is, the French reaction has consisted not of one response, but of two. For its part, the Conseil d'Etat has simply refused to abandon its proud Napoleonic ethos and corresponding habits, offering the stiffest possible resistance by all but ignoring the ECHR's decisions. The Cour de cassation, on the other hand, led by formidable Chief Justice Guy Canivet, has adopted a startling array of reforms that not only satisfy the ECHR's mandates, but could also mark a turning point in the history of French law.

Therefore, Part V evaluates the two distinct French supreme court responses. As this Part makes clear, a proper evaluation must take account of the fluid and ever-changing dynamic between the numerous courts in play. That is, read in the broader and shifting European context, the Conseil d'Etat's staunch—and seemingly quite successful—resistance to the ECHR appears doomed to fail in the long term, for not only have the Belgian, Dutch, and Portuguese supreme courts adapted or modified their decisionmaking procedures, but now even the French Cour de cassation has followed suit as well. In other words, the Conseil d'Etat—which, along with the French Cour de cassation, was once the flagship of the French procedural model—now consists of a retrograde remnant. The French procedural schism therefore likely represents the beginning of the end of the traditional French procedural model.

hearing); *Kress v. France*, 2001-VI Eur. Ct. H.R. 1 (holding the same for the Conseil d'Etat's procedural scheme).

In this evolving French and European context, the Cour de cassation has therefore emerged as the active and innovating force. Breaking significantly with its past, the Cour has adopted a series of procedural reforms that appreciably move French judicial practice in the direction of the more democratic and argumentative mode of judicial decisionmaking propounded by the ECHR and familiar to students of American judicial practice. In short, the Cour de cassation now grants litigants, and even the general public, an infinitely greater degree of access to the judicial process than ever before.

Whether this procedural development is to be applauded or regretted is very much open to debate. As Part VI demonstrates, although the Cour de cassation has willingly responded to the ECHR's awkward prodding, it is not at all clear that the Cour's reforms move far enough in the direction of the more democratic and argumentative model of judicial decisionmaking favored by the ECHR. This Part makes clear that the Cour's reforms do not merely grant dubious argumentative gains to litigants; they likewise endanger the future of the traditionally republican and institutional foundations of French judicial control and legitimacy.

Accordingly, this Article highlights the danger lurking in the ongoing legal exchange between Europe and France. The ECHR and the French legal system have engaged in bad comparative-law practice, lending to compromise and the development of a hodgepodge model of judicial decisionmaking procedure that is quite reminiscent of the one deployed by the European Court of Justice. As a result, the Cour de cassation's reforms grant a new argumentative prominence—and, thus, a normative dominance—to the Cour and its judges, which is precisely what the traditional French system endeavored to avoid. At this point in time, this new judicial power has yet to be sufficiently effectively counterbalanced by individual and/or public argumentative accountability.

1

THE TRADITION: FRENCH REPUBLICAN INSTITUTIONALISM

The best way to introduce the French judicial system to an American audience is to stress that the French and American legal systems rest on fundamentally different conceptions of how best to deliver justice through the judiciary.¹⁸ That is, the notions underlying French

¹⁸ See generally LASSER, JUDICIAL DELIBERATIONS, *supra* note 9, at 322–47 (comparing in detail the core conceptions driving the French and American legal systems); Mitchel de S. -O. Lasser, *Judicial (Self-)Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325 (1995) [hereinafter Lasser, *Judicial Portraits*]; Michael Wells, *French and American Judicial Opinions*, 19 YALE J. INT'L L. 81 (1994) (exploring essential values of French and American systems by comparing their decisional paradigms). For a provocative analysis of the

and American conceptions of how to generate not only good judicial decisions, but also judicial legitimacy through judicial accountability, control, debate, and deliberation, are really quite divergent.

A. Of Frameworks and Ethos

The French system functions on the basis of an *institutional* and *republican* conception of judicial control and legitimacy.¹⁹ This system aims to select, educate, and train a small corps of elite, representative, and state-sanctioned jurists to manage their judicial decisionmaking in an enlightened and coherent fashion.²⁰ The French pursue this goal by: (1) entrusting the judiciary with the task of handling legal controversies in such a way as to promote the general interest and the public good; and (2) constraining judges by placing them, throughout their careers, in a reliably meritocratic and hierarchical institutional framework.²¹ Accordingly, the traditional French system grants its judges a privileged and sequestered deliberative space in which to engage in particularly frank, communal, and highly substantive debates that, by virtue of their very seclusion, are intentionally denied the force and status of law.²²

The American system, on the other hand, is more protestant and populist in character, adopting a far more immediately participatory, *argumentative*, and *democratic* approach.²³ That is, in the absence of a centralized, career, civil service judicial hierarchy, complete with the educational, professional, and institutional carrots and sticks that characterize its French counterpart, the American system places almost the entire burden of controlling and legitimating judicial decisionmaking on the judicial decision itself.²⁴

different epistemological assumptions that govern common-law and civil-law systems, especially in the French and British context, see Pierre Legrand & Geoffrey Samuel, *Brèves épistémologiques sur le droit anglais tel qu'en lui-même*, REVUE INTERDISCIPLINAIRE D'ÉTUDES JURIDIQUES, 2005, No. 54, 1–62.

¹⁹ See LASSER, JUDICIAL DELIBERATIONS, *supra* note 9, at 303–05, 307–11, 322–37.

²⁰ See LASSER, JUDICIAL DELIBERATIONS, *supra* note 9, at 182–85; see also JOHN BELL ET AL., PRINCIPLES OF FRENCH LAW 60 (1998) [hereinafter BELL, PRINCIPLES].

²¹ See BELL, PRINCIPLES, *supra* note 20, at 64–68 (describing the promotion, duties, and discipline of French judges).

²² See also LASSER, JUDICIAL DELIBERATIONS, *supra* note 9, at 326–28 (discussing internal argumentative practice of French courts).

²³ See also *id.* at 338–47 (considering “[t]he [p]ublicly [a]rgumentative American [m]odel”).

²⁴ See, e.g., STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE 121 (2000) (“The requirements of reasoned elaboration meaningfully constrain judges in ways that executive officers, legislators, and administrators are not constrained.”); Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 994 (2004) (remarking that the U.S. Supreme Court’s public legitimacy stems from, *inter alia*, “its practice of delivering written reasons for its decisions . . . and a judicial tradition of arguing about constitutional meaning from a limited range of modalities . . .”); see also Wells, *supra* note 18, at 88 (noting that “[o]ne role of

Given that the American system traditionally grants its judges explicit honest-to-goodness lawmaking power—as evidenced by the term “case law,” for which there is, quite tellingly, no French equivalent²⁵—this burden placed on the American judicial decision is truly enormous.²⁶ As a result, American judicial argumentation represents the pledge, the proof, and the crucible of American judicial justice. Thus, it should come as no surprise that the American system demands that its judges take signed, individual, and public responsibility for their arguments and imposes a rule-of-law-based transparency requirement that these arguments be made immediately accessible to the public.²⁷ Together, these mandates result in a veritable explosion of readily available American judicial argumentative justifications.

In sum, the French and American legal systems deploy very different models of judicial integrity that express fundamentally different guiding logics: The French model offers an institutional framework and a republican ethos, while the American model offers an argumentative framework and a democratic ethos.

B. French Judicial Practice in a Nutshell

Given these deeply divergent structural and conceptual assumptions, it is only natural that American comparatists—and, indeed, non-French jurists generally—have had such difficulty analyzing, grasping, and describing the daily operation of the French judicial system.²⁸ This section therefore endeavors to elucidate the elemental features of that system, so the reader may more fully appreciate the nature of the ongoing dispute between the French courts and the ECHR.

1. *Judicial Decisions*

The public face of the French judicial system consists of a rather impenetrable mass of stunningly formulaic judicial decisions. The paradigm of such decisions is undoubtedly the typical Cour de cassation judgment, which always reads, more or less, as follows:

the reasoned opinion is to constrain the potentially misguided or destructive exercise of judicial power”); LASSER, JUDICIAL DELIBERATIONS, *supra* note 9, at 3–4 (describing the American model of judicial legitimacy).

²⁵ See BELL, PRINCIPLES, *supra* note 20, at 25 (“Case law of the courts (*la jurisprudence*) is not a binding . . . source of law.”).

²⁶ See also LASSER, JUDICIAL DELIBERATIONS, *supra* note 9, at 339.

²⁷ See Wells, *supra* note 18, at 89–91.

²⁸ See CAIRNS & McKEON, *supra* note 4, at 1 (noting the “remarkable degree of mutual incomprehension” between the English common law and French systems); see also BELL, PRINCIPLES, *supra* note 20, at 1 (“The distinctiveness of French law lies in the areas of values, legal procedure, the form of legal rules, and an attitude to law which is often described as a *mentalité*.”).

THE COURT—Having seen articles 5 and 1382 of the Civil Code; Whereas the plaintiff did X; Whereas the defendant did Y; Whereas the Appellate Court ruled Z; On these grounds, quashes the Appellate Court decision [or rejects the appeal to do so].²⁹

As is likely apparent, these unsigned, collegial, and single-sentence syllogisms—which refer to neither prior judicial decisions nor the relevant academic and professional literature, refuse to disclose judicial votes (never mind offer concurring or dissenting opinions), and make virtually no attempt to present (or even accommodate) judicial discussions or explanations—represent the very antithesis of the U.S. Supreme Court's long, individually signed, policy-oriented, and discursive opinions.

As a result, the French judicial system has been the subject of highly unflattering comparative critiques.³⁰ In one harsh analysis after another, the French system has been accused of being crude,³¹ theoretically unsophisticated,³² jurisprudentially retrograde,³³ publicly disingenuous,³⁴ and, above all, deeply and damagingly formalist.³⁵

Yet, as I have argued at length elsewhere, the key to understanding the actual operation of the French judicial system is to recognize

²⁹ See MERRYMAN, *supra* note 6, at 37–38 (“The major premise is in the statute, the facts of the case furnish the minor premise, and the conclusion inevitably follows.”); see also Lasser, *Judicial Portraits*, *supra* note 18, at 1340–43 (describing the form and structure of the French judicial decision); Mitchel de S.-O.-l’E. Lasser, “*Lit. Theory*” Put to the Test: A Comparative Literary Analysis of American Judicial Tests and French Judicial Discourse, 111 HARV. L. REV. 689, 695–96 (1998) [hereinafter Lasser, *Literary Analysis*] (same). As this model judgment suggests, when the Cour de cassation considers an appeal, it decides only whether to “quash” (*casser*) the lower court’s judgment or to reject the appeal, thus allowing the lower court’s judgment to stand. See CAIRNS & MCKEON, *supra* note 4, at 37–38.

³⁰ See, e.g., sources cited *supra* note 6; see also Wells, *supra* note 18, at 99–103 (summarizing prominent critiques).

³¹ See, e.g., DAWSON, *supra* note 6, at 415 (referring to France’s “primitive case law technique”).

³² See, e.g., MERRYMAN, *supra* note 6, at 18 (noting that the revolutionary fixation on “[t]he theory of natural rights led to an exaggerated emphasis on individual rights of property and contract and to an over-sharp distinction between public and private law”).

³³ See, e.g., Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1412 (1997) (distinguishing the American and French legal traditions on the basis of the “more realist” view of Americans, which prompts us to be “more skeptical of the source of authority,” whereas the French enjoy “what to us seems a late nineteenth century formalism”).

³⁴ See, e.g., III POUND, *supra* note 5, § 105, at 424 (concluding that “interpretation” of the French Code “is not genuine interpretation, but is given the name in order to satisfy an idea that the code covers every possible case . . .” (footnote omitted)); Wells, *supra* note 18, at 103 (“It seems fair, if somewhat harsh, to characterize French judicial form as a dysfunctional and deceptive façade, behind which judges exercise a creative role without offering genuinely reasoned explanations.”).

³⁵ See, e.g., MERRYMAN, *supra* note 6, at 82 (asserting that, in the (French) civil-law tradition, “[a]ll nonlegal considerations must be excluded from the law in the interest of certainty” and that “[c]onsiderations of justice or other ends of the law must be excluded for the same reason”).

that the syllogistic French decision is but the visible tip of an extremely deep and intricate conceptual and institutional iceberg.³⁶ That is, unlike the American judicial system, which relies so heavily on public argumentation for legitimacy, the French system *bifurcates* its judicial discourse into different argumentative spheres. In other words, the syllogistic Cour de cassation decision represents but the published component of the French judicial system.³⁷ Inside the protective walls of the Cour de cassation, a second discursive sphere exists, one that is sheltered from the general public. In that protected internal sphere, the French judiciary adopts a second, and frankly different, mode of argumentation.³⁸

2. *Preparation and Deliberation*

In brief, the French supreme courts' traditional decisionmaking procedures operate as follows. When appeal is taken to one of the French supreme courts,³⁹ the case is assigned to a judicial panel, of which one member will serve as the *rapporteur* (reporting judge) for that case.⁴⁰ The *rapporteur's* job is to produce for her brethren a report—a document often thirty to fifty pages long—in which she presents the procedural history of the case, the claims of the parties, her analysis of the relevant statutory, judicial and academic materials, her proposed solution, and finally several draft judicial decisions, each as perfectly syllogistic as the next (although they arrive, of course, at different conclusions).⁴¹

In advance of oral arguments, the *rapporteur* distributes these materials to the other members of the sitting judicial panel, as well as to a judicial amicus. In the Cour de cassation, this amicus is called the "advocate general,"⁴² and in the Conseil d'Etat he is known as the "*Commissaire du Gouvernement*" (CDG).⁴³ At oral arguments, the *rapporteur* opens the proceedings by reading her summary of the procedural history and the claims of the parties.⁴⁴ Next, the attorneys can choose to present oral arguments. Finally, the judicial amicus

³⁶ See LASSER, JUDICIAL DELIBERATIONS, *supra* note 9, at 38–61; Lasser, *Literary Analysis*, *supra* note 29, at 696–99.

³⁷ See also Lasser, *Literary Analysis*, *supra* note 29, at 696 ("[T]he official portrait is merely the public face of French adjudication.").

³⁸ See *infra* Part I.B.3.

³⁹ As noted above, there are two French supreme courts: the Cour de cassation, with jurisdiction over civil and criminal matters, and the Conseil d'Etat, with jurisdiction over public law matters. See *supra* note 7.

⁴⁰ See BROWN & BELL, *supra* note 4, at 94.

⁴¹ See *id.* at 102–03.

⁴² See Lasser, *Judicial Portraits*, *supra* note 18, at 1355.

⁴³ The title of "*Commissaire du Gouvernement*" is rather misleading, as this person does not represent the government. See BELL, PRINCIPLES, *supra* note 20, at 58–59. Instead, the CDG researches the case and delivers an opinion to the court as a neutral party. *Id.* at 58.

⁴⁴ See BROWN & BELL, *supra* note 4, at 110.

presents his own independent opinion (*conclusions*).⁴⁵ The judicial panel then retires to deliberate, often accompanied by the judicial amicus, although he may not vote and is traditionally expected to keep fairly quiet, as he has just given his opinion.⁴⁶

How, then, do traditional procedures shield the argumentation of the *rapporteur* and judicial amicus from public view? First, the *rapporteur's* draft judicial decisions are understood to be covered by the secrecy of deliberations, and are therefore unavailable to the public.⁴⁷ Second, the analytic and argumentative sections of her report are traditionally considered to be highly personal documents.⁴⁸ Therefore, once the Cour has decided the case, the *rapporteur* customarily reclaims these sections of her report (known as her *avis*, i.e., her opinion) from the dossier.⁴⁹ Third, although attorneys and clients can, though infrequently do, attend oral arguments at the Cour de cassation and Conseil d'Etat, and can, therefore, hear those sections of the *rapporteur's* report and of the amicus's *conclusions* that are read or spoken in open court,⁵⁰ it has traditionally been extremely rare for even these incomplete judicial arguments to be published.⁵¹ For instance, the French equivalent of West Reports, the Recueil Dalloz, customarily publishes—in highly edited form—some four to six *conclusions* and only one or two *rappports* per year from the Cour de cassation,⁵² despite the fact that a *conclusions* and a *rapport* are produced in preparation of every decision, and the Cour decides some 30,000 cases every year.⁵³

⁴⁵ See *id.* at 110–11.

⁴⁶ See *id.* at 111 (noting that “[a]t the most [the amicus] may be asked to clarify a point” he made in his conclusions). In contrast, as a member of the sitting judicial panel, the *rapporteur* does participate in voting and deliberations. See Lasser, *Judicial Portraits*, *supra* note 18, at 1356–57.

⁴⁷ See NOUVEAU CODE DE PROCÉDURE CIVILE [N.C.P.C.] art. 448, translated in Lasser, *Judicial Portraits*, *supra* note 18, at 1357 n.143 (“[T]he deliberations of the judges are secret.”). For a discussion of the enormous difficulty involved in getting access to these documents, see Lasser, *Judicial Portraits*, *supra* note 18, at 1357.

⁴⁸ See Lasser, *Judicial Portraits*, *supra* note 18, at 1357.

⁴⁹ *Id.* at 1371 & n.190.

⁵⁰ See BROWN & BELL, *supra* note 4, at 109–10 (discussing the rare attendance of and opportunity to be heard for clients and their counsel (*avocats*) in the Conseil d'Etat).

⁵¹ See Lasser, *Judicial Portraits*, *supra* note 18, at 1357; Lasser, *Literary Analysis*, *supra* note 29, at 696. But see BELL, PRINCIPLES, *supra* note 20, at 58 (asserting that in the case of the Conseil d'Etat, “[t]he *conclusions* leading to important cases are usually published in legal journals, in the *Recueil des arrêts du Conseil d'Etat* or in [the Conseil d'Etat's] annual report” (emphasis added)).

⁵² Correspondingly, the Cour de cassation's *Annual Report*, which describes the Cour's activity during the preceding year, typically publishes just two or three additional important *conclusions* and one more *rapport*. See, e.g., 1992 RAPPORT DE LA COUR DE CASSATION (1993).

⁵³ In 2002, the Cour de cassation judged 23,482 civil cases and 8,814 criminal cases. See Ministère de la Justice, *Les chiffres-clés de la justice: L'ACTIVITE JUDICIAIRE*, at <http://www.justice.gouv.fr/chiffres/activ03.htm> (last visited Feb. 20, 2005).

Finally, pre- and post-oral argument judicial deliberations are—not surprisingly—closed to the public.⁵⁴

As one might reasonably expect, and as I have demonstrated at length elsewhere,⁵⁵ when engaging in these protracted internal judicial debates, the *rappporteur* and judicial amicus hardly replicate the brief, mechanical, and Code-based syllogisms of the official French judicial decision.⁵⁶ Instead, heavily informed by academic writing, they argue at length about why a particular line of judicial decisions should—or should not—be maintained, modified or overturned.⁵⁷ Far from offering dry textual deductions, these arguments primarily focus on institutional, economic, social, or other policy concerns, the need to modernize the law to adapt to changing social realities, and, most often, issues of fundamental fairness and good old-fashioned equity.⁵⁸

In short, there exists a truly remarkable disparity between the internal and external modes of French judicial argumentation. Nevertheless, this duality of French judicial argument should not be perceived as some form of judicial duplicity or disingenuousness.⁵⁹ Rather, the French have devised a very carefully and cleverly designed judicial system that simply operates on a tremendously different set of conceptual and material assumptions than its American counterpart.

3. *The Argumentative Sphere*

As the preceding section has shown, the French judicial system takes great care to establish a protected discursive sphere in which its *magistrats* may engage in frank and high-level judicial conversations about how best to handle the cases submitted to them. Thus, it is terribly important that any analysis of the French legal system come to terms with the judicial discourse that operates within this internal

⁵⁴ See *supra* note 47 (discussing the secrecy of judicial deliberations).

⁵⁵ See Lasser, *Judicial Portraits*, *supra* note 18, at 1355–1402 (scrutinizing the “unofficial discourse” of French *magistrats*).

⁵⁶ See LASSER, JUDICIAL DELIBERATIONS, *supra* note 9, at 47–60 (analyzing the argumentative style of *conclusions* and *rapport* taken from actual cases before the Cour de cassation); Lasser, *Judicial Portraits*, *supra* note 18, at 1358–69 (same).

⁵⁷ See Lasser, *Judicial Portraits*, *supra* note 18, at 1358–69. For an utterly exhaustive analysis of *revirements* in the French administrative law appellate tribunals, see HUGUES LE BERRE, LES REVIREMENTS DE JURISPRUDENCE EN DROIT ADMINISTRATIF DE L’AN VIII À 1998 (1999).

⁵⁸ See Lasser, *Judicial Portraits*, *supra* note 18, at 1388; Lasser, *Literary Analysis*, *supra* note 29, at 698–99; see also Vernon Valentine Palmer, *From Embrace to Banishment: A Study of Judicial Equity in France*, 47 AM. J. COMP. L. 277, 300–301 (1999) (observing that the *conclusions* and report “show an intense study of the interplay between the public interest, policy, equity, the learned doctrine, and prior court rulings”).

⁵⁹ See *id.* at 699; cf. DAWSON, *supra* note 6, at 410–11 (speaking of French judicial “ventriloquism”); Palmer, *supra* note 58, at 299–301 (describing the “underground” exercise of French judicial equity power as terribly misleading but inevitable).

sphere. First, this discourse offers the argumentation used by French judges in the performance of their daily tasks. Second, this internal discourse is enabled, and even promoted, by traditional French judicial procedure. Finally, this discourse possesses a complex and meaningful relation to the syllogistic public discourse of French judicial decisions.

By establishing such conventions as the submission of the advocate general's *conclusions* and *rapporteur's* report—which includes at least two draft decisions—to the sitting judicial panel in each important case, the French system normalizes and institutionalizes the custom of particularly lengthy and detailed judicial debate.⁶⁰ Although the French model thus promotes serious and frank judicial dialogue, such dialogue overwhelmingly occurs *within* the French judicial institution.⁶¹ That is, to promote candid and open debate, traditional procedures quite zealously protect judicial deliberations from the view of the general public.⁶² This argumentative seclusion allows French *magistrats* to engage in forms of debate that rarely occur in public judicial arenas—namely, open-ended discussions that explicitly revolve around the charged issues of equity, substantive justice, and socially responsive legal adaptation.⁶³

4. *Sources of the Law*

Although the French legal system thus fosters the development of these frank, high-level, and normative judicial debates, it makes sure to meet the dangers that they pose by instituting appropriate structural constraints. The primary maneuver—which represents the intellectual key to the entire French approach—is the doctrine of “sources of the law,” which denies to judicial interpretations, decisions, and norms the status of full-fledged law.⁶⁴

According to this theory, only the political branches of government can produce law. Judges *must not* usurp this legislative (and ex-

⁶⁰ See *supra* notes 55–59 and accompanying text. The reader should note that this Article primarily discusses the practice of the Cour de cassation as exemplary of the French procedural model. The Conseil d'Etat employs parallel procedural structures, albeit with some significant differences. Nicolas Rainaud offers perhaps the most sustained and suggestive French analysis of the internal decisionmaking procedures of the Conseil d'Etat. See NICOLAS RAINAUD, *LE COMMISSAIRE DU GOUVERNEMENT PRÈS LE CONSEIL D'ÉTAT* (1996). For a thorough survey in English, see BROWN & BELL, *supra* note 4.

⁶¹ See Lasser, *Judicial Portraits*, *supra* note 18, at 1357 (noting that the *conclusions* and *rappports*, which embody this frank judicial dialogue, “represent documents internal to the French judicial system”).

⁶² See *supra* note 47.

⁶³ See LASSER, *JUDICIAL DELIBERATIONS*, *supra* note 9, at 324; sources cited *supra* note 59.

⁶⁴ See generally BELL, *PRINCIPLES*, *supra* note 20, at 13–36 (discussing sources of law and hierarchy of norms in the French legal system).

ecutive) lawmaking power, because to do so would violate the most fundamental premise of a republican form of government.⁶⁵ That is, judges are unelected civil servants whose very purpose is to apply the popular will as codified by elected representatives functioning in the name of the People.⁶⁶

In an important sense, furthermore, judges *cannot* usurp this lawmaking power, because the theory of the sources of the law categorically defines law as legislative in origin.⁶⁷ Law is not simply a normative rule that produces and reflects legal relations, effects, or consequences, nor is it simply a prediction or description of how judicial or administrative officials will act in particular cases.⁶⁸ Above all, law is a rule, or set of rules, that has been formally adopted by the legislature in the form of *loi* (legislation) or by the executive in the form of decrees or regulations.⁶⁹ At the edges, law may sometimes be popular in origin, taking the form of custom.⁷⁰ But generally, law is composed of norms that possess a special and binding *status*, a status traditionally reserved for the products of the political branches as an expression of the popular will⁷¹ and thus refused, both by definition and on principle, to judicial decisions.

That said, the French are by no means blind to the fact that judges play a highly significant role in the elaboration, development, and modification of normative rules.⁷² Indeed, everything in the internal French judicial discursive sphere and in the arguments of academic *doctrine* demonstrates otherwise. Since at least the end of the

⁶⁵ See *id.* at 14 (“In Rousseau’s terms, legislation is an expression of the general will, such that a free people is only bound by the laws which they have made for themselves.”).

⁶⁶ See *id.* at 14–15; see also LASSER, JUDICIAL DELIBERATIONS, *supra* note 9, at 35 (defining “fundamental parameters” of the judicial function according to French separation of powers).

⁶⁷ See LASSER, JUDICIAL DELIBERATIONS, *supra* note 9, at 171–72.

⁶⁸ This is to be compared to definitions of law advanced by the American tradition of Legal Realism, namely, that law is what “courts are likely to do in fact” or what “officials do about disputes.” See, e.g., KARL LLEWELLYN, THE BRAMBLE BUSH: SOME LECTURES ON LAW AND ITS STUDY 3 (1930); O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

⁶⁹ See BELL, PRINCIPLES, *supra* note 20, at 14–15 (distinguishing these “formal” sources of law from other influential legal writings).

⁷⁰ See *id.* at 14 (“Custom derives its legal force from the practice of the people who believe it is legally obligatory.”).

⁷¹ Article 6 of the Declaration of the Rights of Man and of the Citizen of 1789 categorically states: “*Loi* [legislation] is the expression of the general will. All citizens have the right to participate in its creation, either personally or through their representatives . . .” Ministry of Justice, Declaration of the Rights of Man and of the Citizen, 26 Aug. 1789, at <http://www.justice.gouv.fr/anglais/europe/addhc.htm> (last visited Feb. 21, 2005).

⁷² See BELL, PRINCIPLES, *supra* note 20, at 15 (observing that, although judicial decisions lack the constitutional legitimacy of legislation and executive enactments, the French system “does not deny that they have a great influential role in shaping [the] understanding of law”).

nineteenth century,⁷³ and perhaps all the way back to the very inception of the Civil Code,⁷⁴ French jurists have taken it for granted that the law inevitably would contain gaps, conflicts, and ambiguities that would become more important over time.⁷⁵ As a result, these jurists recognized that judges would necessarily exercise significant normative authority and control in the French civil legal system, notwithstanding public appearances to the contrary. But this does *not* mean, according to the theory, that French judges create law.⁷⁶ Even if these judicial norms may operate in fact as important normative rules and may become real law (by eventual legislative action or the development of custom), that does not mean that they *are* law, in and of themselves.

This canonical understanding of the sources of law can be analogized to Bruce Ackerman's two-track constitutionalism.⁷⁷ That is, the French legal system engages in two different, but highly related and interdependent, modes of decisionmaking.⁷⁸ These two modes function by different means and yield norms of fundamentally different status: first, routine decisionmaking, performed by judicial *magistrats* as they decide ordinary disputes; and second, especially important decisionmaking, performed by popularly elected, representative, and primarily legislative bodies.⁷⁹ The first type of decisionmaking generates *jurisprudence* (not binding "case law" in the American sense),⁸⁰ whereas the second yields law proper (*loi*).⁸¹ All players in the French legal system recognize that both *loi* and *jurisprudence* produce important normative effects, but this absolutely does not mean that French judges "make law."⁸²

⁷³ See FRANÇOIS GÉNY, *MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF* (2d ed. 1919).

⁷⁴ To appreciate this point, one need only read the highly perceptive and pragmatic introductory remarks made by the Code's primary author, Portalis. See Portalis, *Discours préliminaire, prononcé le 24 thermidor an VIII* (1799), reprinted in OTTO KAHN-FREUND ET AL., *A SOURCE-BOOK ON FRENCH LAW* 233-39 (rev. 3d ed. 1991).

⁷⁵ See LASSER, *JUDICIAL DELIBERATIONS*, *supra* note 9, at 45. See generally RENÉ DAVID, *FRENCH LAW: ITS STRUCTURE, SOURCES AND METHODOLOGY* 179 (Michael Kindred trans., 1972) (noting that "[t]he principles posed by the codes . . . must be made more precise in their practical application, adapted to new needs, interpreted in accordance with circumstances of all kinds").

⁷⁶ See *id.* at 181 ("[J]udicial decisions are not a source of law in France. Strictly speaking, they never create legal rules.").

⁷⁷ See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6 (1991) (distinguishing between decisions made by the American people and decisions made by their government). See LASSER, *JUDICIAL DELIBERATIONS*, *supra* note 9, at 174.

⁷⁸ See LASSER, *JUDICIAL DELIBERATIONS*, *supra* note 9, at 174.

⁷⁹ See *id.*

⁸⁰ See BELL, *PRINCIPLES*, *supra* note 20, at 25.

⁸¹ See LASSER, *JUDICIAL DELIBERATIONS*, *supra* note 9, at 174.

⁸² See *id.*

This characteristic French notion of the sources of law therefore serves a fundamental mediating function in the French legal system. It recognizes the creative normative role played by the French judiciary, while simultaneously denying the resulting judicial norms the status of law. This difference in status between judicial norms and legislated law allows for judicial norm creation precisely because it denies such norms the status of law. This mediation therefore maintains French legislative supremacy and the strict separation of powers while recognizing, and even encouraging, a legitimate, *de facto* judicial role in the creation, development, and management of legal norms.

5. *The Judicial Syllogism in Context*

The judicial syllogism symbolizes and entrenches the carefully constructed limitation that the “sources of the law” doctrine places on judicial authority. Thus, the traditionally syllogistic form of the French Cour de cassation decision has little or nothing to do with formalism, in the sense of an over-developed faith in the ability of textual norms to lead deductively and inexorably to required interpretive solutions. Instead, this syllogistic form makes a point about priorities: only the political branches are the legitimate producers of truly *legal* norms. In addition, however, it serves a highly practical purpose: it de-fangs the judicial decision. Requiring the decision to be composed in a highly formulaic style that refuses to cite past decisions renders that decision too uninformative to serve effectively as the sole focal point of future legal analysis, never mind to appropriate the status of law. In an important sense, placing this inherent conceptual cap on the legal authority of their work product liberates French judicial *magistrats* to engage in careful, but routine, residual normative management.

Nonetheless, even this formal constraint does not offer enough protection. Accordingly, the French system further weakens and decenters the impact of its formulaic judicial decisions by pairing them with distinctly more informative academic analyses.⁸³ In any case of importance, the French actually publish an academic essay right alongside the brief—even cryptic—judicial decision.⁸⁴ This case commentary presents and explains the judgment in some detail, places it in the context of other relevant judicial decisions and academic analyses, and assesses the decision’s doctrinal, theoretical, and

⁸³ See *id.* at 40–45 (elucidating the “utterly central role” academic *notes* play in the French legal system).

⁸⁴ See *id.* at 40; see also Lasser, *Judicial Portraits*, *supra* note 18, at 1343–44 (examining case note published alongside leading case concerning the calculation of damages).

pragmatic policy significance.⁸⁵ Published in the major case reports, these *doctrinal notes* therefore forever frame and critique—and thus serve as the mediating filter for—the judgments they accompany.⁸⁶

As a result, the French judiciary loses much of its ability to control the normative content and impact of its own decisions. In any given instance, both the judgment and the note play significant interpretive and normative roles. Over time, therefore, the two engage in a long-term conversation⁸⁷ that necessarily emphasizes the more accessible debates contained in the jurist's doctrinal note far more than the inaccessible—and, indeed, nonexistent—opinions of individual judges.⁸⁸ Given this ongoing dialogue, it makes sense that French legal theory classically categorizes both the judicial decisions and the academic *notes* as *autorités*;⁸⁹ both are highly persuasive authorities on what the law is, but neither constitutes law, plain and simple.⁹⁰

6. *Hierarchy and Meritocracy*

Having thus controlled the normative authority of the courts, the French also make sure to control the individual judges who operate in those courts. To begin, the French reject the use of single-judge courts in all but the most trivial cases.⁹¹ Moreover, because the French system insists on univocal, collegial decisions, any individual judge is always surrounded and bounded by peers and superiors, who can exert significant influence on his vested career interests.⁹²

This *institutional* mode of judicial control lies at the heart of the French legal system, the guiding principles of which are centralization, education, meritocracy, hierarchy, teamwork, and expertise.⁹³ Thus the Cour de cassation, for example, consists of an elite, carefully

⁸⁵ See LASSER, JUDICIAL DELIBERATIONS, *supra* note 9, at 40–45; Lasser, *Judicial Portraits*, *supra* note 18, at 1343–44.

⁸⁶ See LASSER, JUDICIAL DELIBERATIONS, *supra* note 9, at 304 (“The French practice of publishing . . . notes alongside important judicial decisions significantly changes the process of reading, understanding, and evaluating those judicial decisions.”).

⁸⁷ See *id.*

⁸⁸ See *id.* (remarking that “the *doctrinal note* explicitly offers much that the French judicial decision does not . . .”).

⁸⁹ See Lasser, *Judicial Portraits*, *supra* note 18, at 1405.

⁹⁰ See BELL, PRINCIPLES, *supra* note 20, at 15; JEAN CARBONNIER, 1 DROIT CIVIL 122–27 (1967); 2 GÉNY, *supra* note 73, at 53–56; FRANÇOIS TERRÉ, INTRODUCTION GÉNÉRALE AU DROIT 257 (4th ed. 1998).

⁹¹ See DAVID, *supra* note 75, at 55; *e.g.*, WEST ET AL., *supra* note 7, at 87 (describing guidelines for how many judges will sit in a given case before the civil courts of first instance (*Tribunaux de Grande Instance*)). The telling French expression is: “*Juge unique, juge inique*.” (“A single judge is an inequitable judge”).

⁹² See DAVID, *supra* note 75, at 55; see also WEST ET AL., *supra* note 7, at 110–12 (discussing formal restrictions and modes of discipline of the French judiciary).

⁹³ See LASSER, JUDICIAL DELIBERATIONS, *supra* note 9, at 308. For a discussion of the history, course of training, and general character of France's career judiciary, see generally DAVID, *supra* note 75, at 53–59.

selected and rigidly trained corps of career civil servant *magistrats* groomed—or “formed,” to use a particularly telling French expression—by the French State itself.⁹⁴ The same holds true of all the other major, repeat players who have a significant daily say in French judicial decisionmaking.⁹⁵

Perhaps the clearest example of this model emerges in the French administrative law context. The Conseil d'Etat represents the very symbol of the Napoleonic republican and meritocratic ethic of a properly state-selected and trained administrative elite, entrusted with the task of debating and resolving issues of legal policy in the name of the public good and general interest.⁹⁶ In this characteristically French system, students hoping to enter the administrative hierarchy work their way through the relentless—but free—state education system,⁹⁷ taking an endless series of national exams, through which they are officially ranked relative to their peers; accordingly, getting or not getting admitted into the national school of administration, the *Ecole nationale d'administration* (ENA); taking even more exams for further ordinal ranking; and, finally, choosing their initial posts in the strict order of the final class rankings.⁹⁸ Once successful candidates have thus earned a place in the judiciary, they will ascend through the ranks in a similarly ordered and meritocratic fashion.⁹⁹

The same basic model holds true in the French civil judiciary, where the Cour de cassation lies at the top of an endless career judicial civil service hierarchy that begins—assuming sufficiently high grades—with the post-law school, state-administered entrance examinations for the French national judge school, the *Ecole nationale de la magistrature* (ENM), with its three-year classroom and internship training.¹⁰⁰ This same model recurs in the academic context, where an explicitly meritocratic, national examination-based State legal aca-

⁹⁴ Needless to say, the professional values such a form of advancement inculcates may be subject to critique. In an aptly titled book, Alain Bancaud raises such concerns. See ALAIN BANCAUD, *LA HAUTE MAGISTRATURE JUDICIAIRE ENTRE POLITIQUE ET SACERDOCE: OU LE CULTE DES VERTUS MOYENNES* (1993).

⁹⁵ See DAVID, *supra* note 75, at 53.

⁹⁶ See generally SUDHIR HAZAREESINGH, *POLITICAL TRADITIONS IN MODERN FRANCE* 65–96 (1994) (setting forth the ideology underlying the Napoleonic conception of a republican administrative state); EZRA N. SULEIMAN, *POLITICS, POWER, AND BUREAUCRACY IN FRANCE: THE ADMINISTRATIVE ELITE* (1974) (same).

⁹⁷ See SULEIMAN, *supra* note 96, at 83–84 (discussing the importance of the examination as the “chief criterion” for selection and elimination).

⁹⁸ See *id.* at 94–98.

⁹⁹ See Mitchel de S.-O.-l'E. Lasser, *Trois Palais: Deux Styles?*, in *LE DROIT CIVIL, AVANT TOUT UN STYLE?* 121, 141–43 (Nicholas Kasirer ed., 2003). Jean-Luc Bodiguel offers a particularly fine-grained sociological and almost ethnographic analysis of the French judicial system's promotion process. See JEAN-LUC BODIGUEL, *LES MAGISTRATS, UN CORPS SANS ÂME?* 63–124 (1991).

¹⁰⁰ See CAIRNS & MCKEON, *supra* note 4, at 45–46. For an excellent description of the recruitment and training of these judges, see GROUPE DE TRAVAIL PRÉSIDIÉ PAR MAGISTRATS

democratic hierarchy (crowned at the top by the *agrégation*) establishes the elite corps of hugely influential writers of *doctrine*, who assume primary responsibility for explaining, disseminating, and thus, developing French judicial *jurisprudence*.¹⁰¹ In fact, even the attorneys who argue before the two French supreme courts comprise a small corps of some 100 attorneys—known as the *avocats aux conseils*—who hold a license controlled by state monopoly.¹⁰²

In short, the dualism and bifurcation of French judicial discourse are part and parcel of a highly centralized, intentionally meritocratic, republican hierarchy of state-sanctioned elites who operate dynamically together to guide the daily operation of the judicial system. To this end, all important cases are funneled through a tiny group of attorneys and decided by a very small corps of expert judges, in close deliberative collaboration with a similarly small number of highly influential academics. The guiding idea is that daily judicial administration and interpretive management, as opposed to lawmaking, should proceed internally by means of particularly frank, personal, communal, and highly substantive debates between a corps of properly selected, inculcated, trained, motivated, state-sanctioned—and thus representative—and rather normatively unified elites. These elites are considered trustworthy because they are controlled by powerful educational, meritocratic, and institutional means.

7. *Tying it All Together*

The French offer a carefully considered judicial system, of which the syllogistic judicial decision represents but one important facet. On the one hand, this system limits the individual and collective power of its judges. On the other, it recognizes the need for these judges to exercise routine interpretive and normative management. The system responds, therefore, by constructing a sheltered argumentative sphere that enables frank, informed, and expert debate while simultaneously denying the judiciary the ability to exert monopoly control over the resulting interpretive and normative decisions. In

ET AVOCATS: FORMATION, CARRIÈRE, ACTIVITÉ PROFESSIONNELLE—RAPPORT AU GARDE DES SCEAUX 38 (Collection des rapports officiels, 1987).

¹⁰¹ For a wonderful comparative analysis of the role played by French academic *doctrine*, see PHILIPPE JESTAZ & CHRISTOPHE JAMIN, *LA DOCTRINE* (2004). See *supra* notes 86–90 and accompanying text.

¹⁰² Décret n° 91-1125 du 28 octobre 1991 relatif aux conditions d'accès à la profession d'avocat au Conseil d'État et à la Cour de cassation ; l'ordonnance du 10 septembre 1817 relative aux avocats aux conseils et à la Cour de cassation, modifiée en dernier lieu par la loi n° 90-1259 du 31 décembre 1990 portant réforme de certaines professions judiciaires et juridiques, et notamment son article 3; le décret n° 78-380 du 15 mars 1978 portant application à la profession d'avocat au Conseil d'État et à la Cour de cassation de la loi n° 66-879 du 29 novembre 1966 relative aux sociétés civiles professionnelles; see also WEST ET AL., *supra* note 7, at 113 (describing the privileges and duties of *avocats*).

summary, the French legal system legitimates judicial decisionmaking first by limiting its legal status; then by creating a common and unified normative field through the educational formation of republican elites; and finally by policing that normative field through hierarchical institutional structures.

II

THE FRANCO-EUROPEAN STRUGGLES: INTERJUDICIAL PARRY AND THRUST

In a series of astonishing decisions handed down over the past few years,¹⁰³ the ECHR has held that, by refusing to make the internal arguments of its two key *magistrats* (the *rapporteur* and the judicial amicus) appropriately available to litigants, both French supreme courts violate the right to a fair trial guaranteed by the European Convention.¹⁰⁴ The impact of this line of decisions, however, extends well beyond Paris and, for that matter, well beyond France. For what is at stake in these decisions is not merely “French” judicial procedure, but rather the highly influential French civil-law *model* of supreme court judicial decisionmaking, as the influence of the French model of judicial decisionmaking carried over into the supreme courts of, *inter alia*, Belgium, Portugal, the Netherlands, and, perhaps most interesting of all, to the European Court of Justice (ECJ) itself.¹⁰⁵

Given these tremendously high stakes, the ECHR’s line of decisions has provoked a long and ongoing sequence of parries and thrusts between these various high courts and the ECHR. The national courts have tried, seriatim, to convince the ECHR (1) of the legality of their respective age-old legal traditions and, failing that, (2) of the adequacy of the remedial measures that they have taken in response to the ECHR’s budding Article 6(1) jurisprudence. This struggle takes on increased importance in light of the fact that the predicament of the French supreme courts is embedded in a wider and more significant European civil-law context.

¹⁰³ See *supra* note 17.

¹⁰⁴ See *id.*

¹⁰⁵ See *supra* notes 3 and 5 and accompanying text. The ECJ, which sits in Luxembourg, is an entirely different court than the ECHR. It is, in effect, the court of last resort of the judicial branch of the European Union (EU). See James E. Pfander, *Government Accountability in Europe: A Comparative Assessment*, 35 GEO. WASH. INT’L L. REV. 611, 635–36 (2003) (summarizing the ECJ’s position as an enforcement authority in the EU). The EU is a complex transnational and intergovernmental organization of twenty-five member states, all of which are also signatories of the European Convention of Human Rights. See Stephen C. Sieberson, *The Proposed European Constitution—Will It Eliminate the EU’s Democratic Deficit?*, 10 COLUM. J. EUR. L. 173, 249 (2004).

A. Round 1: The Gathering Storm

The ECHR's condemnation of the French procedural model came as something of a surprise. As far back as 1970, the Court had entertained a challenge to the Belgian Supreme Court's procedure in the context of criminal appeals.¹⁰⁶ In its seminal *Delcourt v. Belgium* judgment, however, the ECHR rejected that challenge in terms that could hardly have been more categorical.¹⁰⁷ The crux of the *Delcourt* judgment is as follows: The judicial amicus before the Belgian Supreme Court in criminal matters (the *Procureur général*) "cannot . . . be considered [to function] as a party" and was, therefore, not subject to partisan adversarial procedure.¹⁰⁸ The amicus is neither "the virtual adversary" of criminal defendants, "nor does he become their actual adversary when he submits in open court [his "conclusions"] that their arguments cannot be accepted."¹⁰⁹ The *Procureur général* was simply "an independent official attached to the highest court in Belgium as its assistant and adviser."¹¹⁰

The Court explained:

The *Procureur général*'s department at the Court of Cassation is, in a word, an adjunct and an adviser of the Court; it discharges a function of a quasi-judicial nature. By the opinions which it gives according to its legal conscience, it assists the Court to supervise the lawfulness of the decisions attacked [by the appeal] and to ensure the uniformity of judicial precedent.

Examination of the facts shows that these considerations are not abstract or theoretical but are indeed real and actual.¹¹¹

Given that the judicial amicus could not be considered a party to the proceeding or an adversary of the accused, neither the accused's inability to receive prior notice of or respond orally to the amicus's opinion (his "conclusions"), nor the amicus's presence in deliberations violated the principle of equality of arms.¹¹² In short, *Delcourt* represented a thorough vindication of the French-derived Belgian procedure.

¹⁰⁶ See *Delcourt v. Belgium*, 11 Eur. Ct. H.R. (Ser. A) 1 (1970).

¹⁰⁷ See *id.*

¹⁰⁸ See *id.* at 16 (internal quotations and citation omitted).

¹⁰⁹ *Id.* at 18.

¹¹⁰ *Id.* at 20.

¹¹¹ *Id.* at 18.

¹¹² See *id.* at 19–20. The right to "equality of arms" provides that each party to a proceeding should have equivalent procedural opportunities to be heard. See M. Chcrif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 278 ("In large part it can be said that this right is the European counterpart to the common law right of due process.").

Nonetheless, some twenty years later, thunder struck. In the *Borgers v. Belgium* case, the ECHR faced a virtually identical challenge to the same procedures of the Belgian Cour de cassation.¹¹³ This time, however, the ECHR held that the Belgian approach did indeed violate the right to a fair trial guaranteed by the European Convention on Human Rights.¹¹⁴

Arguing in terms almost diametrically opposed to those it used in *Delcourt*, the ECHR cast grave doubts on the traditional decisionmaking procedures employed by all European supreme courts patterned on the French model. Explaining that the ECHR's "fair trial" case law had "undergone a considerable evolution . . . notably in respect of the importance attached to appearances and to the increased sensitivity of the public to the fair administration of justice," the Strasbourg Court methodically undid its *Delcourt* jurisprudence.¹¹⁵

First and foremost, the ECHR now reasoned, the judicial amicus could not be considered neutral vis-à-vis the accused.¹¹⁶ Although "the independence and impartiality of the Court of Cassation and its *procureur général's* department remain entirely valid,"¹¹⁷ the ECHR declared:

Nevertheless the opinion of the *procureur général's* department cannot be regarded as neutral from the point of view of the parties to the cassation proceedings. By recommending that an accused's appeal be allowed or dismissed, the official of the *procureur général's* department becomes objectively speaking his ally or his opponent. In the latter event, Article 6 § 1 requires that the rights of the defence and the principle of equality of arms be respected.¹¹⁸

The ECHR's reasoning was straightforward. As per the French model, the accused (*Borgers*) had not received prior notice of the advocate general's opinion, nor was he granted the opportunity to respond to it, either orally (as the advocate general speaks last at oral arguments) or in writing (as this is forbidden by statute).¹¹⁹ Given that the advocate general's opinion was unfavorable to his position, *Borgers* "had a clear interest" in being able to respond to it.¹²⁰ Therefore, the Strasbourg Court could not "see the justification for such [Belgian] restrictions" on the accused's ability to address the advocate general's legal conclusions.¹²¹

¹¹³ See *Borgers v. Belgium*, 214 Eur. Ct. H.R. (Ser. A) 22 (1991).

¹¹⁴ See *id.* at 33.

¹¹⁵ See *id.* at 31.

¹¹⁶ See *id.* at 32.

¹¹⁷ *Id.* at 31.

¹¹⁸ *Id.* at 32.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

Finally, the ECHR faulted the traditional practice of allowing the advocate general to join the judicial panel in deliberations:

Further and above all, the inequality was increased even more by the *avocat général's* participation, in an advisory capacity, in the Court's deliberations Even if such assistance was . . . limited in the present case [to merely stylistic help in drafting the Court's judgment], it could reasonably be thought that the deliberations afforded the *avocat général* an additional opportunity to promote, without fear of contradiction by the applicant, his submissions to the effect that the appeal should be dismissed.¹²²

Thus, the Belgian procedure violated Article 6(1) of the European Convention by infringing upon the "rights of the defence . . . the principle of the equality of arms," and the doctrine of "appearances."¹²³

Needless to say, the *Borgers* decision came as no small shock to those European supreme courts patterned on the French model, most notably those of Belgium, the Netherlands, Portugal, and, of course, France itself. Suddenly cast under a cloud of suspicion, each now scrambled to respond; and once again, the Belgian Cour de cassation was the first to draw the ECHR's attention.

The other shoe dropped in *Vermeulen v. Belgium*.¹²⁴ In response to the *Borgers* decision, the Belgian Cour de cassation had significantly changed its procedural rules in criminal cases. Now, not only could the accused respond to the oral arguments of the judicial amicus, but the amicus was also barred from attending the deliberations of the sitting judicial panel.¹²⁵ In civil cases, however, the Belgian court saw no reason to change its time-honored procedure, because neither party in a private law action would be in a structurally different position than the other or could reasonably be mistaken for the prosecutorial arm of the state.¹²⁶ Furthermore, members of the specialized Cour de cassation bar would represent both parties.¹²⁷ Thus, even in the unlikely event that the parties themselves were to attend oral argument, they could hardly mistake the judicial amicus for an opponent.¹²⁸

The ECHR rejected these Belgian justifications out of hand. Noting first that "the nature of the functions of the *procureur général's* department at the Court of Cassation . . . does not vary according as the case is a civil or a criminal one,"¹²⁹ the ECHR reasoned as follows:

¹²² *Id.* at 32.

¹²³ *Id.* at 32.

¹²⁴ 1996-I Eur. Ct. H.R. 224.

¹²⁵ *See id.* at 231.

¹²⁶ *See id.* at 232-33.

¹²⁷ *Id.* at 232.

¹²⁸ *Id.* at 232-33.

¹²⁹ *Id.* at 233.

31. As in its judgment in the *Borgers* case (see p. 32, § 26), the Court considers . . . that great importance must be attached to the part actually played in the proceedings by the member of the *procureur général's* department, and more particularly to the content and effects of his submissions. These contain an opinion which derives its authority from that of the *procureur général's* department itself. Although it is objective and reasoned in law, the opinion is nevertheless intended to advise and accordingly influence the Court of Cassation

33. Regard being had, therefore, to what was at stake for the applicant in the proceedings in the Court of Cassation and to the nature of the submissions made by . . . the *avocat général*, the fact that it was impossible for Mr. Vermeulen to reply to them before the end of the hearing infringed his right to adversarial proceedings. That right means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision

The Court finds that this fact in itself amounts to a breach of Article 6 § 1.

34. The breach in question was aggravated by the *avocat général's* participation in the court's deliberations, albeit only in an advisory capacity. The deliberations afforded the *avocat général*, if only to outward appearances, an additional opportunity to bolster his submissions in private, without fear of contradiction (see the *Borgers* judgment previously cited, p. 32, § 28)

There has therefore been a breach of Article 6 § 1 in this respect also.¹³⁰

The ECHR thus entrenched its *Borgers* holding while expanding its applicability. The only consolation for the Belgian Cour de cassation was that it was no longer to suffer in isolation: On the very same day that the ECHR rendered its *Vermeulen* judgment, the Court also condemned—in strictly identical terms—the parallel procedure used by the Portuguese Supreme Court in its labor and employment cases.¹³¹

B. Round 2: The French Under Fire

Needless to say, French jurists could hardly fail to grasp the significance of the ECHR's growing *Borgers* jurisprudence. Each of these ECHR judgments was duly reported in the major French case reporters, and each of these judgments appeared alongside a commentary

¹³⁰ *Id.* at 233–34.

¹³¹ See *Lobo Machado v. Portugal*, 1996-I Eur. Ct. H.R. 195, 206–07.

written by a noted French academic, who drew the obvious conclusion that the traditional French procedures were at risk.¹³²

In anticipation of the ECHR challenges that were sure to follow, the French supreme courts took preemptive measures that can most generously be described as makeshift. The Cour de cassation in particular adopted a defensive strategy comprised of pasting together minor procedural adjustments while foregrounding and formally recognizing what had previously been informal and rarely used professional courtesies. The net effect of the French Cour de cassation's approach was to produce a colorable argument that its procedures were distinguishable from those of its Belgian counterpart.

First, the Cour would provide litigants with summary indications of the *rapporteur's* and advocate general's respective positions during the week before oral arguments. Thus, a new practice was instituted, whereby the *rapporteur* would include an annotation "on the list of cases distributed a week before the hearing to the [specialized] lawyers practicing [before the French supreme courts]."¹³³ This annotation would indicate whether the reporting judge recommended "allowing the appeal in whole or in part, declaring it inadmissible, or dismissing it . . ."¹³⁴ Similarly, the advocate general was systematically to "inform the parties' lawyers no later than the day preceding the [oral] hearing of the tenor of his submissions . . ."¹³⁵ Second, the Cour would allow parties to respond to the advocate general's oral arguments, either orally or—more typically—by submitting a written note for the judges to read in deliberations.¹³⁶ The French argued that these measures, combined with "the high degree of specialisation of the lawyers practicing [before the French supreme courts]," were sufficient to ensure that the Cour de cassation's procedures complied with "the adversarial principle."¹³⁷

The ECHR was not convinced. In *Reinhardt and Slimane-Kaïd v. France*, the Strasbourg Court held that the French Cour de cassation—the very symbol of the French model of civilian judicial decisionmaking—violated the right to a fair trial guaranteed by Article 6(I) of the European Convention. Nevertheless, the makeshift French measures did force the ECHR to base its *Reinhardt* decision on somewhat differ-

¹³² See, e.g., *Respect du principe du contradictoire: interdiction pour le demandeur dans une instance civile en cassation de répondre aux conclusions prises à l'audience par un magistrat du ministère public près la Cour de cassation*, CEDH, Feb. 20, 1996, D. 1997 somm. 208, Note Ericero; Raymond Martin, *Faut-il supprimer le ministère public? (devant les juridictions administratives)*, RTD civil 1998, at 873.

¹³³ See *Reinhardt and Slimane-Kaïd v. France*, 1998-II Eur. Ct. H.R. 640, 664.

¹³⁴ *Id.*

¹³⁵ *Id.* at 666.

¹³⁶ See *id.* at 657.

¹³⁷ *Id.* at 664–65.

ent grounds than those it had proffered in its previous judgments denouncing the Belgian and Portuguese courts. The primary problem with the revamped French procedures, according to the ECHR, was that they still granted *unequal access* to the *rapporteur's* work product.¹³⁸ Traditional practice required the *rapporteur* to transmit to the advocate general the totality of his written work product well in advance of oral argument.¹³⁹ This work product included: (a) the *rapporteur's* report, consisting of "a description of the facts, procedure and grounds of appeal and . . . a legal analysis of the case and an opinion on the merits of the appeal";¹⁴⁰ as well as (b) the draft judgments, of which there may be several (in important cases).¹⁴¹ The parties, however, never got meaningful access to these documents. Instead, prior to the oral hearing, they received only the newly required summary annotations about the *rapporteur's* position and, at the oral hearing itself, the first—and merely informational—part of the report.

The ECHR objected:

Given the importance of the reporting judge's report (and in particular the second part thereof), the advocate-general's role and the consequences of the outcome of the proceedings for Mrs. Reinhardt and Mr. Slimane-Kaïd, the imbalance thus created by the failure to give like disclosure of the report to the applicants' advisers is not reconcilable with the requirements of a fair trial.¹⁴²

Thus, even with its newly modified procedures, the Cour de cassation still failed to satisfy the ECHR's fair trial requirements.

Of course, the *Reinhardt* decision could only spell doom for the Conseil d'Etat's procedures, which had not been modified at all. Undoubtedly aware that it would soon find itself in the hot seat, the Conseil anticipated the ECHR's next move by rendering a powerful decision on the fair trial issue only four months after the *Reinhardt* decision.¹⁴³ Explaining in its inimitable way that the judicial amicus in a Conseil d'Etat case, the CDG,¹⁴⁴ is, in fact, a judge who is a member of the court itself, the Conseil concluded:

But considering that the *commissaire du Gouvernement*, whose mission is to present the questions raised by each appeal and to make known, by formulating his conclusions in total independence, his assessment, which must be impartial, of the factual and legal issues as well as his opinion on the solutions that, according to his conscience, are called for by the case pending before the court of

¹³⁸ See *id.* at 666.

¹³⁹ See *id.* at 665.

¹⁴⁰ *Id.*

¹⁴¹ See *id.*

¹⁴² *Id.* at 666.

¹⁴³ See *Esclatine*, Conseil d'Etat, July 29, 1998, D. 1999, 85, concl. Chauvaux.

¹⁴⁴ See *supra* note 43 and accompanying text.

which he is a member, pronounces his conclusions after the closure of the instruction phase of the procedure, which is conducted in a confrontational manner; considering that he participates in the judging functions that devolve upon the court of which he is a member; that the exercise of this function is not subject to the principle of confrontation applicable to the instruction phase; considering that it follows that, no more than the Reporting Judge's note [i.e., the second part of his Report] or the draft judgment, the conclusions of the *commissaire du Gouvernement*—which furthermore need not be reduced to writing—are not subject to prior communication to the parties, who, furthermore, are not invited to respond to them; [the appeal is therefore rejected].¹⁴⁵

As this passage makes quite clear—notwithstanding the grammatical constraints posed by the traditional French single-sentence judicial syllogism—the Conseil d'Etat refused to give quarter. Its response to the ECHR's *Borgers* jurisprudence was to insist, as a categorical matter, that the CDG was in fact a judge; one who “participates in the judging functions that devolve upon the court of which he is a member.”¹⁴⁶ As a member of the court, the CDG is not subject to confrontation, so his conclusions are neither distributed in advance to the parties, nor subject to rebuttal. QED.

The Conseil d'Etat's hard line in *Esclatine* was further stressed by the *conclusions* of the *commissaire du Gouvernement* in the case, Didier Chauvaux.¹⁴⁷ In these *conclusions*, which were rather atypically published alongside the Conseil d'Etat's *Esclatine* judgment in the *Recueil Dalloz*, Chauvaux put forward arguments that served as an anticipatory public brief in defense of the Conseil d'Etat's time-honored procedures.

Chauvaux's arguments operated on two fronts: the categorical and the pragmatic. On the categorical front, Chauvaux stressed the position that the CDG is actually a member of the court. Thus, properly described and understood, argued Chauvaux, “the function [of a CDG] is not truly distinguishable from that of a judge,” despite the fact that the CDG does not vote.¹⁴⁸ He explained:

[The CDG] is a judicial magistrate who must come to a decision just as does any other judge, but who, instead of participating in deliberations and voting, presents the elements of the litigation to the other judges in the presence of the public.

¹⁴⁵ See *Esclatine*, Conseil d'Etat, July 29, 1998, D. 1999, at 89 (translation by author). This passage actually quotes heavily from the Conseil d'Etat's 1957 *Gervaise* decision to the same effect. See Conseil d'Etat, July 10, 1957, Rec. CE, p. 466.

¹⁴⁶ *Esclatine*, Conseil d'Etat, July 29, 1998, D. 1999, at 89 (translation by author).

¹⁴⁷ See *id.* Jur. 85, concl. Chauvaux.

¹⁴⁸ *Id.* (translation by author).

But in its essence, his function is judicial.¹⁴⁹

According to Chauvaux, the CDG intervenes *after* the adversarial phase of the procedure, during which each party may confront all of the evidentiary elements and legal arguments. His arguments are, thus, part of the court's deliberations; they represent internal judicial work in preparation of the court's judgment and are, therefore, not subject to prior communication or partisan rebuttal.

On the pragmatic front, Chauvaux argued in two directions. First, he decried the negative effects that would result from unwisely subjecting the Conseil d'Etat's CDGs to the ECHR's *Borgers* line of jurisprudence.¹⁵⁰ For example, if the parties were invited to respond to the CDG's *conclusions*, the oral arguments—which the CDG's intervention had closed—would suddenly be reopened, so the arguments could continue ad infinitum.

Worse by far, however, would be the foolish extension of the *Reinhardt* judgment's equal access doctrine. If the parties were entitled to receive all of the same information as the CDG, then the CDG would have to be removed from the inner workings of the court.¹⁵¹ That is, because the secrecy of judicial deliberations shields the sensitive sections of the *rapporteur's* work product (i.e., the second part of her report and the draft judicial decisions) from the public, the requirement of equal access could only mean denying the CDG access to these essential documents. The CDG would thus be frozen out of his own court, killing the all-important internal dialogue between the *rapporteur*, the CDG, and the rest of the sitting judicial panel. Chauvaux lamented: "A communal form of work which has proven so effective would thus be condemned."¹⁵²

Finally, Chauvaux made what can only be considered to be a thinly veiled threat. Speaking to the Conseil d'Etat, though obviously directing his remarks towards Strasbourg, he declared:

The paradox, furthermore, is that the CDG position could be abolished entirely without violating any of the requirements that the ECHR has deduced from Article 6 of the European Convention. Your [i.e., the Conseil d'Etat's] public sessions would thus be limited to reading the submissions of the parties. The presentation and analysis of each affair would then be made behind closed doors [i.e., in chambers] by a Reporting Judge. But the parties and the public would stand to gain nothing from such a system, which

149 *Id.* (translation by author).

150 *See id.*

151 *See id.*

152 *Id.* (translation by author).

might well be the end result should the current procedural equilibrium be put into question.¹⁵³

In this wily passage, which raises fascinating substantive and policy claims soon to be discussed in further detail, Chauvaux moved into the realm of realpolitik. He put the ECHR on notice that extending its *Borgers* jurisprudence to the Conseil d'Etat could result in a net loss for the very policies that jurisprudence seeks to promote. In particular, the Conseil could very well respond by adopting tactically driven procedural options that would effectively gut the ECHR's requirements while nominally satisfying them. Abolishing the CDG position, for example, would simply drive all meaningful discussion underground, leaving the parties even more completely out of the argumentative loop.

Faced with this crafty, unyielding, and even vaguely threatening resistance by the Conseil d'Etat and its CDG, the ECHR flinched in *Kress v. France*.¹⁵⁴ On the one hand, the ECHR extended its *Borgers* jurisprudence in *Kress* by condemning the CDG's "participation in the deliberations of the trial bench."¹⁵⁵ The ECHR rejected the French contention that the CDG is "a full member of the trial bench, on which he functions, in a manner of speaking, like a second Reporting Judge."¹⁵⁶ The Court reasoned that the CDG could not truly be a judge, because "a judge cannot abstain from voting unless he stands down[,] . . . [and] it is hard to accept the idea that some judges may express their views in public while the others may do so only during secret deliberations."¹⁵⁷

Furthermore, argued the ECHR, "the doctrine of appearances must also come into play."¹⁵⁸ The Court explained:

In publicly expressing his opinion on the rejection or acceptance of the grounds submitted by one of the parties, the [CDG] could legitimately be regarded by the parties as taking sides with one or other of them.

In the Court's view, a litigant not familiar with the mysteries of [French] administrative proceedings may quite naturally be inclined to view as an adversary a [CDG] who submits that his appeal on points of law should be dismissed. Conversely, a litigant whose case is supported by the [CDG] would see him as his ally.

The Court can also imagine that a party may have a feeling of inequality if, after hearing the [CDG] make submissions unfavourable to his case at the end of the public hearing, he sees him

153 *Id.*

154 2001-VI Eur Ct. H.R. 1.

155 *Id.* at 72.

156 *Id.* at 70.

157 *Id.*

158 *Id.* at 71.

withdraw with the judges of the trial bench to attend the deliberations held in the privacy of chambers (see, *mutatis mutandis*, *Delcourt* pp. 16–17, § 30).¹⁵⁹

The ECHR thus concluded that the CDG was not “truly a judge” to begin with, certainly did not look like one to the uninitiated, and, therefore, could no longer be allowed to attend or participate in deliberations.

On the other hand, the ECHR was apparently unwilling to take this holding to what one might consider to be its logical conclusion: to recognize the right of parties to stand on equal procedural footing with the CDG. Far from requiring that the parties receive (a) the same access as the CDG to the *rapporteur’s* work product; (b) significant prior access to the CDG’s *conclusions*; and/or (c) a full opportunity to respond to the CDG’s oral arguments, the ECHR actually signed off on the rest of the Conseil d’Etat’s procedures. In a white-washing passage that seeks—unconvincingly—to distinguish certain elements of the Conseil d’Etat’s procedures from their Cour de cassation equivalents, the Strasbourg Court reasoned:

Contrary to the position in *Reinhardt and Slimane-Kaïd*, it is not disputed that in proceedings in the *Conseil d’Etat* lawyers who so wish can ask the [CDG], before the hearing, to indicate the general tenor of his submissions. Nor is it contested that the parties may reply to the [CDG’s] submissions by means of a memorandum for the deliberations, a practice which—and this is vital in the Court’s view—helps to ensure compliance with the adversarial principle

That being so, the Court considers that the procedure followed in the *Conseil d’Etat* affords litigants sufficient safeguards and that no problem arises from the point of view of the right to a fair trial as regards compliance with the principle that proceedings should be adversarial.

There has consequently been no violation of Article 6 § 1 of the Convention in this respect.¹⁶⁰

In other words, the ECHR gave a clean bill of health to most of the Conseil d’Etat’s procedures, despite the fact that they were not significantly distinguishable from the modified procedures the Cour de cassation deployed. As a result, the ECHR’s *Kress* decision—for all the uproar it has raised in French legal circles for condemning the

159 *Id.* at 71.

160 *Id.* at 69.

CDG's role in deliberations—has legitimately, if perhaps generously, been described as “Solomonic.”¹⁶¹

C. Splitting the Pear (or the Baby?) in Two, Again and Again

Having presented the most important judgments in this doctrinal area, it is worth taking a moment to recognize the desultory and uncommitted dynamic of the ongoing exchange between the plaintiffs, the ECHR, and the French supreme courts. All of the players in this extended saga have repeatedly pulled punches, given halfhearted responses, and offered or accepted disingenuous solutions.

Take the plaintiffs' demands: The more one takes them seriously, the more it becomes obvious that, even if satisfied, the solutions would still only amount to half-measures. What is it, after all, that plaintiffs are seeking in the *Borgers* line of litigation? First, they seek access to certain debates that have traditionally occurred *within* French-inspired judicial systems. Accordingly, the plaintiffs have repeatedly sought significant prior access to the arguments and *conclusions* generated by various judicial amici, such as the Belgian *procureur général* and the French advocate general or CDG. To a more limited extent, the French plaintiffs have also sought access to the same internal documents as are provided to the judicial amicus, namely the second half of the *rapporteur's* report and her draft judicial decision(s).¹⁶² But surely these plaintiffs have never seriously believed that they would gain access to such documents, for what court ever divulges the bench memoranda and draft decisions produced in preparation of judgment? Thus, it seems that this insistence upon receiving the more sensitive and analytical sections of the *rapporteur's* written work product must be a ploy.

Certainly, the plaintiffs' real purpose in the *Borgers* line of litigation—other than finding a way to overturn unfavorable decisions in their particular cases—must have been to ensure that parties before the French-style supreme courts would have the opportunity to argue fully and meaningfully before the sitting judicial panel. But if such is the case, then why not altogether eliminate the all-important—but intentionally inaccessible—*pre-oral* argument judicial deliberations that characterize the French procedural model? Might not the primary problem be that, through an elaborate and protracted set of internal judicial discussions, the French model is designed to generate one or more draft judicial decisions *before* the case even goes to oral argument?

¹⁶¹ See *Le Conseil d'Etat français et la Convention européenne des droits de l'homme*, CEDH, June 7, 2001, D 2001, note Drago 2619.

¹⁶² See, e.g., *Reinhardt and Slimane-Kaïd v. France*, 1998-II Eur Ct. H.R. 640, 666.

Moreover, if the idea is to provide the parties access to, use of, and a fighting chance against the important arguments that traditionally take place within the judicial apparatus, then why not insist on changes that might truly make a major argumentative difference for the litigating public? Why not, for example, require discursive judicial decisions, rather than the typically cryptic, formulaic, and syllogistic decisions that typify the French appellate tradition? Or furthermore, why not insist on individually signed judicial opinions, complete with concurrences and dissents? In short, why focus on providing the individual parties' attorneys *individual* and *personal* access to certain internal judicial arguments, rather than requiring that such arguments be made available *to all* through publication of discursive judicial decisions? Any or all of these modifications would—one might think—give the litigating public an infinitely clearer idea of what arguments to press before which judges in what kind of a case; but almost none of these more serious and comprehensive proposals were ever put on the table.

Despite the limited nature of the plaintiffs' requests, and notwithstanding the limited nature of the ECHR's initial rulings—which, in cases such as *Borgers*, *Vermeulen*, and *Lobo Machado*, did little more than require that parties be able to respond to the judicial amicus, who could no longer attend deliberations—the French reacted with half-hearted defensive measures intended to preempt successful challenges in the future. As we have seen, the French merely pointed to some preexisting professional courtesies and threw together some minor procedural modifications.¹⁶³

Anyone versed in French supreme court procedure should immediately recognize that these prophylactic procedural adjustments were half-measures, the real purpose of which was to salvage as much of the French judicial corps's traditionally extensive and protected internal debates as possible. First, the French procedures continued to permit the *rapporteur* to grant the judicial amicus privileged access to her work product (including, most importantly, her draft judicial decisions and the second part of her report). Second, the preemptive French measures never questioned the continued presence of the judicial amicus in deliberations. In fact, not only did the French measures not remove the advocate general or CDG from the tremendously important *pre-oral* argument deliberations internal to the Cour de cassation and Conseil d'Etat, but these measures did not even remove the amici from the *post-oral* argument deliberations, as the *Borgers* and *Vermeulen* decisions clearly demanded.¹⁶⁴ Remarkably,

¹⁶³ See *supra* notes 133–37 and accompanying text.

¹⁶⁴ See *Borgers v. Belgium*, 214 Eur. Ct. H.R. (Ser. A) 22, 32; *Vermeulen v. Belgium*, 1996-1 Eur. Ct. H.R. 224, 234.

even after the ECHR's *Reinhardt* judgment condemned the advocate general's continued presence or participation in the French Cour de cassation's post-oral argument deliberations,¹⁶⁵ the Conseil d'Etat still refused to remove its CDGs from its own deliberations.

And yet, perhaps appropriately, the Strasbourg Court's responses to these French half-measures were half-baked in their own right, as the *Kress* decision demonstrates quite nicely. On the one hand, the ECHR signed off on a number of the makeshift French solutions, including, *inter alia*, the limited advance notice to parties of the *rapporteur's* and judicial amicus's respective positions and the parties' limited ability to respond to the amicus's oral arguments.¹⁶⁶ On the other hand, however, the ECHR continued to condemn the judicial amicus's presence in post-oral argument judicial deliberations and, perhaps, the unequal access afforded parties to the *rapporteur's* work product (though only at the Cour de cassation).¹⁶⁷

Thus, at every stage, half-hearted demands, responses, judgments, adjustments, and the like have characterized these ongoing disputes before the ECHR and French supreme courts. Having traced this long and winding series of half-measures, which runs from the ECHR's *Borgers* decision through its *Kress* decision, the time has come for some assessment.

III

FREEZE FRAME: COSTS AND BENEFITS

As should be increasingly apparent, a cost-benefit analysis of the *Borgers* jurisprudence at the outcome of the *Kress* litigation yields decidedly uninspiring results in the context of the French supreme courts. The plaintiffs' hard-fought victories have actually been quite minor. But the costs—not only for the French courts but also for the ECHR itself—have been extremely high.

A. Benefits

To begin, what exactly have parties before the French supreme courts actually gained? Three victories are apparent: (1) in some instances, the procedural right to receive some form of advance notification of the positions taken by the two important French *magistrats*—the *rapporteur* and the judicial amicus; (2) the right to respond, in some way, to the amicus's oral arguments; and (3) what amount to *negative* rights regarding the amicus, namely, that he *not* receive privileged access to the *rapporteur's* complete work product and that he *not*

¹⁶⁵ See *Reinhardt*, 1998-II Eur. Ct. H.R. at 657, 665.

¹⁶⁶ See *Kress v. France*, 2001-VI Eur. Ct. H.R. 1, 68–69.

¹⁶⁷ See *Reinhardt*, 1998-II Eur. Ct. H.R. at 666.

be able to participate in post-oral argument/judicial deliberations. Let us take a closer look at these three hard-fought victories.

1. *The Right to Advance Notice of the Magistrats' Arguments*

Parties before the French supreme courts have gained limited rights to receive some form of advance notification of the positions taken by the *rapporteur* and the judicial amicus. But what kind of information are the parties to receive, from whom, and when? The Conseil d'Etat, for its part, simply refused to make any concessions.¹⁶⁸ Instead, the Conseil merely stressed that its existing practice permitted the members of the specialized supreme court bar to request that the judicial amicus inform them of the general tenor of his or her intended submissions.¹⁶⁹ Despite this refusal to budge, the ECHR nonetheless upheld these existing procedures.¹⁷⁰ Thus, parties appearing before the Conseil d'Etat have gained nothing at all.

On the other hand, the Cour de cassation demonstrated a willingness to make certain conciliatory gestures. In response to the *Borgers* and *Vermeulen* decisions, the Cour thus built upon the Conseil d'Etat's practice of allowing counsel to learn the gist of the judicial amicus's position by also requiring the *rapporteur* to give a summary indication of his position.¹⁷¹

But what advantage might parties gain by having access to such limited information? Frankly, not much. The most the parties can learn is (1) whether the *rapporteur* has already written a report in favor or against cassation, in whole or in part; and (2) the gist of the amicus's position. The former piece of information is essentially useless, because it gives no substantive explanation for the *rapporteur's* position. At best, it gives an attorney the chance to handicap his case; as the member of the sitting judicial panel with the best knowledge of the case, the *rapporteur* obviously carries significant influence. The latter information is not significantly more helpful, as the Advocate General or CDG must only convey the "tenor" of his arguments, not the arguments themselves. Needless to say, such summary information can only be of limited use.

At least as important as the tremendously limited nature of the information available to the parties about the *magistrats'* respective positions is the issue of *when* the parties actually receive that shorthand information. The *rapporteur's* annotation appears with the list of cases to be argued the following week before the Cour de cassation, and the amicus need only convey the gist of his position the day before oral

¹⁶⁸ See *supra* notes 144–53 and accompanying text.

¹⁶⁹ See *supra* note 160 and accompanying text.

¹⁷⁰ *Id.*

¹⁷¹ See *supra* notes 45 and 50 and accompanying text.

arguments.¹⁷² Needless to say, such limited advance notice hardly affords the attorneys much time to rethink and recast their positions before oral arguments, but this may be the least of the problem.

Infinitely more damaging is the fact that the parties will not have had the opportunity to rework their *written* submissions. After all, the French legal system—whether in its private law, administrative law, or constitutional law variants—is overwhelmingly oriented towards written, as opposed to oral, procedure.¹⁷³ For the two French *magistrats* to release such limited information so late in the day therefore deprives the attorneys of the opportunity to recast the all-important written pleadings that they submit to the French supreme courts.

2. *The Right to Respond to the Amicus's Arguments*

The significance of this insight into the realities of French legal argumentation only becomes fully apparent when one considers the second victory parties apparently gained in the *Borgers* line of litigation: the right to respond to the amicus's oral arguments, either orally or by submitting a written note in deliberations. At first blush, this "right" appears to be a major concession by the French to the ECHR; but anyone versed in the traditional operation of French appellate procedure should immediately recognize that—at least at this point in time—this concession likely represents little more than an empty formality.

Why does this French concession turn out to be almost no concession at all? Because French supreme court attorneys actually make oral arguments in *less than one out of every hundred cases* before the Cour de cassation and the Conseil d'Etat.¹⁷⁴ The reasons for this state of affairs should be increasingly obvious to the reader. First, as just explained, and as is characteristic of civilian systems generally, French

¹⁷² See Reinhardt, 1998-II Eur. Ct. H.R. at 655–56.

¹⁷³ See Charles H. Koch, Jr., *Envisioning a Global Legal Culture*, 25 MICH. J. INT'L L. 1, 63 (2003) ("The civil law depends much more [than the common law] on writing.").

Thus, to convey that they belong to a civil law country, French jurists tend to say that they belong to a "country of written law" (*pays de droit écrit*). See, e.g., *L'impartialité du juge, entre apparence et réalité*, D 2001 Chron. 2427 note Beignier and Bléry; *Le commissaire du Gouvernement près le Conseil d'Etat et l'article 6 §1 de la Convention européenne des droits de l'homme*, D 2001 Chron. 1188, Andriantsimbazovina. For a strong defense of the superiority of written versus oral procedure in the *Borgers* context, see *Le Commissaire du gouvernement respecte le principe du contradictoire. Mieux, il l'approfondit*, Gaz. Pal., 1998, Doct. 183, note Libert.

¹⁷⁴ See interview with Guy Canivet, *Premier Président de la Cour de cassation*, in Paris, France (June 25, 2003); interview with Marie-Aimée Latournerie, *Conseiller d'Etat*, in Paris, France (June 26, 2003); MARIE-NOËLLE JOBARD-BACHELLIER ET XAVIER BACHELLIER, *LA TECHNIQUE DE CASSATION: POURVOIS ET ARRÊTS EN MATIÈRE CIVILE* 15 (5th ed. 2003) (explaining the paucity of partisan oral argument at the French Cour de cassation on the grounds that "procedure being written, attorneys rarely plead, although they may request to do so in cases of first impression") (translation by author).

procedure is traditionally written in orientation.¹⁷⁵ Therefore, almost by definition, serious argument means *written* argument. Given that written pleadings traditionally dominate French appellate procedure, oral arguments wither, especially at the highest, most technical, and most professionally advanced levels (i.e., before the French supreme courts).

The second reason for this paucity of partisan oral arguments becomes apparent as one considers the full scope of the pre-oral argument deliberations that occur within the French judicial corps. As we have seen, long before oral arguments by the parties ever take place, the *rapporteur* produces and distributes her report, which is often thirty to fifty pages long. This report not only summarizes the factual and procedural history of the case and the parties' respective pleadings, but also presents the *rapporteur's* own detailed analysis of the relevant statutory, judicial, and academic materials and offers and justifies her proposed solution. In addition, of course, the *rapporteur* produces one or more draft judicial decisions, which she distributes to her brethren along with the report.

Furthermore, the *rapporteur's* detailed and influential work product hardly represents the totality of the preparatory deliberative effort performed by members of the Cour de cassation and Conseil d'Etat. Instead, this work product forms but one—albeit very important—element of the elaborate judicial deliberations that occur internally *prior* to oral argument in a given case. Here, for example, is the ECHR's description of the procedure the Conseil d'Etat follows once the *rapporteur* distributes her report and draft judgment(s):

The file subsequently goes to the reviser, an office assumed in each section by the president or one of the other two *assesseurs* [supreme court judges] constituting the bench. The reviser re-examines the evidence and forms a view as to how the case should be decided. He may himself prepare another draft decision in the event of disagreement with the reporting judge. Once the draft decision has been revised, the case is listed for consideration at a preparatory sitting of the section, at which it will be discussed in the presence of the [CDG], who does not, however, take part in the vote on the draft. Only when the draft decision has been adopted by the section will the file be forwarded to the [CDG] to enable him either to prepare his submissions or to ask for a fresh preparatory sitting to be convened or for the case to be transferred to a differently constituted court.

...
 . . . When [the CDG's] view of a case differs from that of the section, he can come and discuss it with the section at another pre-

¹⁷⁵ See *supra* note 171 and accompanying text.

paratory sitting. If the disagreement remains and he considers that the case is of sufficient importance, he has the right (rarely exercised in practice) to request that the case should be referred to the Judicial Division or to the Judicial Assembly. Only after that will he prepare his submissions for the actual trial, which is open to the public.¹⁷⁶

Given these remarkably long, detailed, and communal preparatory judicial procedures, it should no longer come as a surprise that parties would rarely request to present oral arguments at the French supreme court level. After all, by the time oral arguments occur, the judicial panel will have already received and actively discussed the *rapporteur's* report and, as is now apparent, will have often edited and even provisionally adopted one of her draft judgments. For an attorney to request oral arguments is therefore vaguely frowned upon. Such a request suggests that the attorney either failed to do his job properly in the first place (i.e., when submitting his written pleadings), is presumptuously suggesting that the massive internal judicial deliberations were somehow insufficient to flush out and consider the alternative arguments, or, most likely, is simply engaging in last-minute grandstanding.

The ECHR-induced right of the parties to respond to the oral arguments of the advocate general or CDG is thus a largely empty formality. For a host of practical, professional, institutional, procedural, and cultural reasons, French supreme court attorneys almost never present oral arguments to begin with. For all intents and purposes, therefore, it is of almost no consequence for the ECHR to provoke an apparent strengthening of this oral practice without addressing the underlying reasons for which this oral practice is traditionally ignored in the first place.

3. *The Right to Limit the Amicus's Access to Deliberations*

The plaintiffs' final victory—the negative right to cut off the judicial amicus's access to certain pre- and post-oral argument internal judicial discussions—hardly represents a more significant achievement. After all, the whole reason the advocate general or CDG exists is to provide the sitting judicial panel with an independent assessment of the case at hand.¹⁷⁷ The advocate general, for example, argues on behalf of the public welfare, society's interest, and the proper applica-

¹⁷⁶ *Kress v. France*, 2001-VI Eur. Ct. H.R. 1, 54–55 (citations omitted). For the ECHR's summary description of the Cour de cassation's parallel procedures, see Reinhardt and Slimane-Kaïd v. France, 1998-II Eur. Ct. H.R. 640, 655–56. For an unprecedented and eye-opening account of the internal workings of the Conseil d'Etat, see generally BRUNO LA-TOUR, *LA FABRIQUE DU DROIT: UNE ETHNOGRAPHIE DU CONSEIL D'ÉTAT* (2002).

¹⁷⁷ See BELL, PRINCIPLES, *supra* note 20, at 58–59.

tion of the law.¹⁷⁸ Similarly, the CDG “formulat[es] his conclusions in total independence, [offering] his assessment, which must be impartial, of the factual and legal issues as well as his opinion on the solutions that, according to his conscience, are called for by the case pending before the court.”¹⁷⁹ In other words, the judicial amicus is just as likely to argue *in favor of* a given party’s position as *against* it.

As a practical matter, to exclude the advocate general or CDG from pre- or post-oral argument judicial deliberations, therefore, represents no victory at all for French supreme court litigants. Instead, to do so merely alienates the amicus from the sitting judicial panel without generating increased knowledge, information, or access for the parties themselves. After all, no one could seriously believe that the French supreme courts would be willing to open their internal deliberations to the litigants or to the public in order to allow the judicial amici to continue to attend.

B. Costs

To make the decidedly meager omelet produced by its *Borgers* line of jurisdiction, the ECHR has broken, or at least badly cracked, a large number of eggs. To begin, the ECHR jurisprudence has imposed severe reputational costs on the French supreme courts and on the French legal system generally. After all, this is not just a plain vanilla, one-shot instance of the ECHR ruling that some substantive position the French administration or French courts have taken—for example, the banning of ostentatious religious symbols in schools or the refusal to recognize sex changes—is incompatible with the European Convention. Such adverse substantive decisions, though undoubtedly an embarrassment, address relatively discrete positions or practices that are somewhat easily severable from the rest of the legal, political, and judicial systems.

The ECHR’s *Borgers* line of decisions is another matter altogether. These judgments inform the French that the very processes by which they thought they were *defending* human and civil rights over the last two hundred years actually, in and of themselves, *violate* those rights. Needless to say, this is no small pill for the French to swallow. After all, not only was France the country that produced the great revolutionary-era Declaration of the Rights of Man and the Citizen of 1789, but it also created and exported one of the earliest and most effective forms of individual protection against illegal state action—the Napole-

¹⁷⁸ ROGER PERROT, INSTITUTIONS JUDICAIRES 260 (3d ed. 1989).

¹⁷⁹ See *supra* note 145 and accompanying text.

onic system of centralized administrative review, headed by the Conseil d'Etat.¹⁸⁰

In short, the ECHR jurisprudence thus strikes not at mere French substantive law but at the inner workings of the French judicial system itself. The *Borgers* line of decisions confronts, and even condemns, the very core of the French judicial system: the age-old methods by which the highest levels of the French judiciary perform their essential functions. The *Borgers* jurisprudence thus casts a shadow over the totality of French judicial decisionmaking, past and present.

Leaving aside the eminently practical and tremendously important issue of what such ECHR condemnation means for the legal effect of French supreme court judgments,¹⁸¹ the ECHR's jurisprudence, therefore, undercuts the status and influence of the traditional French model of judicial decisionmaking. Nowhere is this more evident than on the international plane. Given that the French model has influenced so much of Europe, including not only Belgium, the Netherlands, and Portugal,¹⁸² but also the European Union's own Court of Justice, the legality of that French model is being called severely into question.

As a result, the *Borgers* jurisprudence compromises one of the great symbols of French national pride: its significant international legal legacy.¹⁸³ Furthermore, that jurisprudence also tarnishes a particularly cherished French national icon: the judicial amicus at the Conseil d'Etat, the *commissaire du Gouvernement*. The CDG represents one of the most potent French symbols of the rule of law. Thus, for the ECHR to strike at the CDG is paradoxically to undermine an institution the French mind closely associates with the defense of civil liberties and, thus, to sully the cherished memory of that institution's greatest names: Edouard Laferrière, Jean Romieu, and above all, the legendary Léon Blum.¹⁸⁴

¹⁸⁰ For an excellent presentation and assessment of the French administrative legal system, see generally BROWN & BELL, *supra* note 4.

¹⁸¹ For example: Can other European national courts simply refuse to recognize these judgments? What impact would the EU's incorporation and ratification of the European Convention of Human Rights have on this question? Etc. For an extremely intriguing analysis of the emerging European judicial treatment of procedural fairness issues, see Horatia Muir Watt, *Evidence of an Emergent European Legal Culture: Public Policy Requirements of Procedural Fairness Under the Brussels and Lugano Conventions*, 36 TEX. INT'L L.J. 539 (2001).

¹⁸² The *Borgers* line of jurisprudence thus includes cases drawn from each of these countries. For instance, *Borgers* and *Vermeulen* both examined Belgium's procedures, whereas *Lobo Machado* condemned Portugal's. See also *K.D.B. v. the Netherlands*, 1998-II Eur. Ct. H.R. 620.

¹⁸³ See, e.g., OLIVIER DUTHEILLET DE LAMOTHE & MARIE-AIMÉE LATOURNERIE, *L'INFLUENCE INTERNATIONALE DU DROIT FRANÇAIS* 54–57 (2001) (referring to “the influential [international] radiance of French administrative law”).

¹⁸⁴ As Jean-Paul Costa, the French vice president of the European Court of Human Rights, recently explained, Chief Justice Marshall would probably be the American judicial

On a more immediately practical level, the ECHR's rulings stand to significantly alter the French supreme courts' decisionmaking procedure, as these rulings threaten the judicial amicus with irrelevance, if not extinction. That is, instead of engaging in an institutionally privileged conversation with the courts—first with the *rapporteur* (and, to some extent, with the rest of the sitting judicial panel) before oral arguments, and then with the sitting panel in deliberations—the amicus might actually be removed from both of those special deliberative sites.

For the French judiciary, such banishment of the judicial amicus would mark a profound and disturbing change, striking precisely, if perhaps unwittingly, at the core of the French system's guiding logic: the judicial control and legitimacy produced by institutional education, training, meritocracy, hierarchy, teamwork, and expertise.¹⁸⁵ First, this banishment would damage the depth, frankness, and quality of the internal French judicial debates. After all, to the extent that the amicus could no longer access the *rapporteur's* work product, an entire slice—and traditionally, probably the single most important and substantive slice—of the internal judicial debates stands to be lost altogether. Moreover, this says nothing about the very real problem, stressed by the Cour de cassation's advocates general, that without access to the *rapporteur's* preparatory work, the advocate general would have to start his or her research into each case from scratch.¹⁸⁶ The small corps of advocates general is institutionally incapable of handling this highly inefficient replication of work.¹⁸⁷

Secondly, banishing the judicial amicus would significantly interfere with the all-important French meritocratic institutional hierarchy.¹⁸⁸ The key to understanding this institutional dimension of the issue is to recognize that the CDGs, for example, are the *crème de la crème* of the young members of the Conseil d'Etat itself. In fact, these judicial amici are the Conseil's young stars, who perform the amicus function for a couple of years as a particularly prestigious initial experience in intellectual and institutional leadership.¹⁸⁹

figure that most closely approximates the iconographic status of Léon Blum. Interview with Jean-Paul Costa, Vice-President, European Court of Human Rights, in Strasbourg, France (June 16, 2003).

¹⁸⁵ See *supra* Part I.

¹⁸⁶ See Régis de Gouttes, *Les ambivalences de la jurisprudence de la Cour européenne des droits de l'Homme en 2001*, in ACTES DE LA HUITIÈME SESSION D'INFORMATION (ARRÊTS RENDUS EN 2001, CAHIERS DU CREDHO, NO. 8), available at <http://www.credho.org/cedh/session08/session08-02-01.htm> (last visited Feb. 21, 2005). Mr. de Gouttes is one of the two Chief Advocates General (*Premiers Avocats généraux*) of the Cour de cassation. See *id.*

¹⁸⁷ See *id.*

¹⁸⁸ See *supra* Part I.B.6.

¹⁸⁹ Interview with Guy Braibant, Conseiller d'Etat, in Paris, France (June 25, 2003); interview with Latournerie, *supra* note 174; interview with Vice President Costa, *supra* note

Thus, to remove the judicial amicus from both pre- and post-oral argument deliberations would amount to *alienating* these future judicial leaders from the rest of their own judicial institutions, thereby stunting their institutional training and formation, lowering the short- and long-term quality of internal judicial deliberations, and subverting the all-important republican and institutional bases of French judicial control and legitimacy. In other words, the potential banishment of the judicial amicus threatens irreparable harm to the traditional working methods, training system, and corps identity of the French supreme courts. Not only would the most promising young members of the Conseil d'Etat no longer perform a privileged role within the Conseil's internal deliberations, but unlike all other members of the tribunal, they would be barred altogether from attending—and learning from—those internal deliberations.

As a result, the ECHR's challenge to the French supreme courts' traditional procedural and institutional structures in the *Borgers* jurisprudence has hardly endeared the Strasbourg Court to French jurists. That jurisprudence not only posed practical problems regarding the daily operation of the upper reaches of the French judiciary, but it also struck at highly emblematic and revered French institutions. Indeed, one would be hard pressed to come up with two institutions that lie closer to the core of the French state and its self-conception than the Conseil d'Etat (the conscience of the French State) and the Cour de cassation (the ultimate interpreter of the Civil Code).

One must therefore recognize the considerable hostility engendered by the *Borgers* line of decisions as a significant cost. With every new ECHR judgment, the French doctrinal outcry only grew more strident. By the time of the *Kress* decision, French academics were publishing highly visible articles with such titles as "Knowing is Nothing, Imagining is Everything: A Free Conversation about the ECHR's *Kress* Decision"¹⁹⁰ and "Should the European Court of Human Rights be Abolished?"¹⁹¹

Although a serious discussion of the implications of these French critiques will have to wait until Part V of this Article, it is worth noting the tenor of such commentaries at this point. The outrage the *Borgers* jurisprudence provoked and the resulting scorn French commentators heaped upon the ECHR not only make for highly entertaining reading, but also indicate that the *Borgers* jurisprudence undoubtedly

184; see also ANTOINE GARAPON & IOANNIS PAPADOPOULOS, *JUGER EN AMERIQUE ET EN FRANCE: CULTURE JURIDIQUE FRANCAISE ET COMMON LAW* 111–12 (2004) (speaking of the "formation" of young members of the Conseil d'Etat).

¹⁹⁰ See Joël Andriantsimbazovina, "*Savoir n'est rien, imaginer est tout*": Libre conversation autour de l'arrêt *Kress* de la Cour européenne des droits de l'homme, D. 2001, Chron. 2611.

¹⁹¹ See Victor Haim, *Faut-il supprimer la Cour européenne des droits de l'homme ?*, D. 2001, Chron. 2988.

entails a certain loss of ECHR credibility within the French legal community.

In the following passage, for example, Professor Victor Haim makes no attempt to hide his contempt:

That said, notwithstanding the fact that the CDG is a member of the tribunal to which he presents his conclusions, would it not be preferable that his conclusions be obligatorily communicated to the parties, who could therefore respond to them?

This is a claim that is no longer rare to make, usually on the basis of deeply flawed reasoning. Clearly, there would be something pleasant about adopting such a stance: now that participation and interactivity are all the rage, the parties would be able to participate in the elaboration, and why not even in the composition, of the judgments in their own cases. Just as there exist such toys as “the book in which you are the hero” for ten to twelve year-olds, there could exist for somewhat older ones “the judicial decision adopted in view of your own conclusions along with those of the CDG.”¹⁹²

Commenting on the ECHR’s *Voisine* decision,¹⁹³ Jean Thierry, Honorary Justice of the Cour de cassation, is hardly less dismissive:

It is important to note that the ECHR abandons in its *Voisine* decision the reasoning of its *Borgers* decision, according to which, “by recommending in favor or against the appeal of an accused,” the Advocate General thereby “becomes his objective ally or opponent.” According to such reasoning, the Cour de cassation, when it rejects the appeal of an accused, would also become his objective opponent, which is simply absurd.¹⁹⁴

Though it goes without saying that screams of “bloody murder” typically accompany any international condemnation of national practices, this line of French academic responses adopts a somewhat different—and perhaps even more damaging—stance. That is, a long list of widely respected French commentators were willing to treat the ECHR’s jurisprudence as plainly ridiculous.

That said, the French have fully understood that the *Borgers* line of decisions represents a very real and imminent threat to the traditional French approach to judicial decisionmaking, a threat the French simply lack the power to resist. Thus Professor Joël Andriant-simbazovina, summarizing and assessing the *Kress* claims, decries:

There is nothing really new [about the *Kress* claims]. These arguments sum up the ECHR jurisprudence regarding the principle of equality of arms and the principle of confrontation. And in the face

¹⁹² See Victor Haim, *Le commissaire du gouvernement et le respect du contradictoire*, D. 1999, Chron. 201 (translation by author).

¹⁹³ See *Voisine v. France*, CEDH, Feb. 8, 2000, D. 2000, 651, note Thierry.

¹⁹⁴ *Id.* at 653 (citations omitted) (translation by author).

of the relentless advance of this steamroller, the attempt to remove the CDG's conclusions from the application of article 6-1 of the European Convention amounts to a rearguard action One could well say that this appears to be no more than the chronicle of a predetermined submission [to the ECHR].¹⁹⁵

The ECHR thus comes off quite often in the French commentary as a misguided, yet unstoppable, destructive force.

Needless to say, such a perception actively damages the ECHR's overall effectiveness. Like all systems of international law, the Council of Europe's human rights regime requires a significant dose of goodwill and cooperation to operate effectively.¹⁹⁶ In a slightly different context, Joseph Weiler has convincingly argued that the unusual penetration of the European Union's legal system into the national legal systems of its constituent member states has hinged—and continues to hinge—precisely on the EU's ability to enlist the national courts to act cooperatively as the first and most important line of application of EU law.¹⁹⁷ Consequently, for the ECHR to alienate the French judiciary compromises the very effectiveness of the ECHR system in general, as the ECHR itself can only oversee a tiny fraction of human rights claims.

Of course, any international system of human rights protection worthy of the title must, by its very nature, be willing to render judgments that will be embarrassing and unpopular on the national level. But as we have seen, the *Borgers* jurisprudence is unusually delicate in this regard, as it does not merely condemn some particular substantive law, governmental policy, or judicial position. Instead, it condemns the very processes and traditions by which the judiciary itself operates. The *Borgers* line of case law directly and concertedly attacks precisely the institutions upon which the ECHR relies the most: the national courts.

As a result, the collateral costs of disrupting and antagonizing the French supreme courts in this way could prove to be quite significant, most likely taking the form of French judicial foot-dragging or unenthusiastic cooperation, if not overt resistance. By menacing the high French judiciary, the *Borgers* jurisprudence thus threatens to alienate a traditionally strong ally and a particularly important vector

¹⁹⁵ Andriantsimbazovina, *supra* note 190 (translation by author).

¹⁹⁶ See JANIS ET AL., *supra* note 12, at 86 (remarking that "most meaningful enforcement of Strasbourg's substantive law must take place before national courts"). For the now canonical analysis of the reasons for which nations comply or cooperate with international law, see Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (book review).

¹⁹⁷ See J.H.H. WEILER, *THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION* 27-29, 192-97 (1999).

for the effective judicial enforcement of the European human rights system.

Furthermore, because what is at stake in these cases is not only French judicial procedure, but also the highly influential French *model* of judicial decisionmaking, the potential damage is far greater. First, the *Borgers* line of decisions threatens, *inter alia*, the Belgian, Dutch, Portuguese, and French supreme courts, to say nothing of the European Court of Justice. Second, and perhaps as a result, the divisions created *within* the European Court of Human Rights itself have been deep, vocal, and, frankly, nasty. For example, the *Kress* decision, which condemned the Conseil d'Etat's procedures, was decided by a margin of ten votes to seven.¹⁹⁸ This unusually close vote prompted all seven dissenting judges to sign onto a particularly vehement opinion about the illegitimacy of the majority's actions.¹⁹⁹

In fact, the depth of the cleavage within the ECHR was so great that the dissent deployed tellingly blunt and disrespectful language to express its disagreement with the majority—language sufficiently atypical that it is worth quoting at some length:

5. In its first argument, set out in paragraph 79 of the judgment, the majority of the Court criticise the fact that the [CDG] participates in the deliberations without voting. That argument strikes us as being paradoxical. Would amending the rules to provide that the [CDG] votes on the draft judgment really be sufficient for his attendance at the deliberations to be given the Court's blessing? Secondly, the last sentence of paragraph 79 adds that all judges must express their views in public—or none must. But that statement, which begs the question, is not based on any precedent of our Court and is not founded on any authoritative argument. It is an affirmation pure and simple, and is scarcely persuasive.

6. The second argument rests, in our view, on a false symmetry The majority of the Court infer that a litigant should enjoy similar [procedural] safeguards in respect of the deliberations. Yes, but what does that mean? That the private party's lawyer, or the representative of the administrative authority in dispute with that party, or both, should also attend the deliberations? They would be silent and passive, as the [CDG] is, and yet their presence would neutralise his own? Merely to imagine such possibilities is to demonstrate how unrealistic they are. We therefore consider that this argument is ingenious but contrived.

7. The Court's third argument is based on the doctrine of appearances. According to that doctrine, justice must be seen to be done impartially (even though neither the applicant nor the Court

¹⁹⁸ See *Kress v. France*, 2001–VI Eur. Ct. H.R. 1, 75 (Wildhaber, Costa, Pastor Ridruejo, Küris, Birsan, Botoucharova, and Ugrekhelidze, JJ., partly dissenting).

¹⁹⁹ See *id.* at 77–80.

itself has ever cast doubt on the independence or impartiality of the [CDG] or of similar institutions at supreme courts . . .).

8. Many authors and even eminent judges of this Court have written that the doctrine of appearances, which is in any case not accepted to the same extent in all the legal systems represented in the Council of Europe, has in the past been pushed much too far, whether *vis-à-vis* the Court of Cassation in Belgium or France, the Supreme Court in Portugal or the Supreme Court of the Netherlands. Despite those criticisms, the majority go further still. It is illogical that the same applicant, who in no way calls in question the subjective impartiality of a judge or his independence may justifiably “have a feeling of inequality” if she sees him “withdraw with the judges of the trial bench to attend the deliberations held in the privacy of chambers.” It is not only illogical; it is open to criticism, since any informed litigant, and at all events any informed lawyer, knows that the participation in the deliberations of someone who has publicly expressed his “*opinio juris*” is not, by the mere fact of his presence, going to increase the impact of that opinion on the judges who have to deliberate and vote. To hold any differently would be to insult the latter and impute to them a lack of independence and impartiality.

. . .

13. [I]t would be desirable, in our view, that the Court should review the whole of its case-law on proceedings in supreme courts in Europe, case-law which places too much emphasis on appearances, to the detriment of respectable national traditions and, ultimately, of litigants’ real interests.²⁰⁰

As one may readily surmise, the *Borgers* jurisprudence is so divisive within the ECHR precisely because it attacks a readily identifiable bloc of historically interconnected national courts whose traditional judicial procedures stand to be steamrolled by the ECHR majority.

Finally, and perhaps most problematically, the *Borgers* jurisprudence has established an ongoing and unhealthy dynamic of fearful resistance by the affected legal systems. Attempting to escape the full brunt of the ECHR’s decisions, each of the challenged judicial systems has tried desperately to distinguish itself from the others. Indeed, even the ECHR has recognized this defensive tactical dynamic. In response to the latest such attempt by France, the Strasbourg Court remarked:

67. [The ECHR] observes that since *Borgers* . . . all the governments have endeavoured to show before the Court that in their legal systems their advocates-general or principal State counsel were different from the Belgian *procureur général*, from the point of view

²⁰⁰ *Id.* at 77–80 (Wildhaber, Costa, Pastor Ridruejo, Kūris, Birsan, Botoucharova, and Ugrehelidze, JJ., partly dissenting) (internal citations omitted).

both of organisation and of function. Their role was said, for instance, to differ according to the nature of the proceedings (criminal, civil or even disciplinary); they were said not to be parties to the proceedings or the adversaries of anyone; their independence was said to be guaranteed and their role limited to that of an *amicus curiae* acting in the public interest or to ensure that case-law was consistent.

68. The Government [of France is] no exception. [It] too maintained that the institution of [the CDG] in French administrative proceedings differed from the other institutions criticised in the judgments cited above²⁰¹

The ECHR has thus acknowledged this all-too-obvious pattern of attempted “resistance by distinction,” but has apparently chosen to brush it off in a rather dismissive manner.

Ever alert to the resulting difficulty of successfully distinguishing their supreme court practices from those the ECHR has already condemned, the French have responded with assorted half-hearted procedural adjustments, launching the next in its ongoing series of inter-judicial parries and thrusts. But even this unseemly—and largely unproductive—pattern of half-measures does not fully capture the degree of insincere, self-serving, and ultimately destructive argumentation the ECHR’s decisions have provoked.

Once the ECHR added the French Cour de cassation to its growing list of supreme courts whose traditional procedures violated Article 6(1) of the European Convention, it was only a matter of time before the Conseil d’Etat would find itself on the block. At that juncture, the Conseil and its supporters felt compelled to adopt a thoroughly understandable—but nonetheless highly distasteful—tactic: They abandoned the Cour de cassation altogether. In the wake of the *Reinhardt* decision condemning the Cour de cassation, French legal commentary suddenly brimmed with arguments about why the Conseil d’Etat’s CDGs—*unlike* the Cour de cassation’s advocates general—really do function as fully independent judicial amici.

In a typical example, Professor Victor Haïm thus argued:

Today, it is no longer possible even to conceive of analogizing the CDG and the *ministère public* [i.e., the corps of Advocates General before the regular courts, headed by the Cour de cassation].

First of all, the *ministère public* is composed of judicial magistrates who, just like the sitting judges, belong to the judicial corps, but who nevertheless differ from them in every way: they are not immovable, they are subject to a different disciplinary system, and even if “they have freedom of speech at oral arguments,” it nonetheless remains the case that they exercise their functions “under the

²⁰¹ *Id.* at 67.

direction and control of their hierarchical superiors and under the authority of the Minister of Justice.” Nothing comparable exists at the Conseil d’Etat²⁰²

Making much of the fact that the CDG is but another “internal” member of the Conseil d’Etat, Professor Haïm all but applauds the ECHR’s condemnation of the Cour de cassation:

But what if the court’s internal documents are only made externally available in a selective fashion? What if the judge lends, to one of the parties, a helping hand—one full of notes, texts and documents that tend to grant that party a certain advantage over his adversary? In such a case, the procedure will have been irregular and the judgment defective. On this point, one can only be in agreement with the reasoning of the Strasbourg Court. Such is precisely the case for the [Advocate General of the Cour de cassation], who *alone* receives a copy of the [second part of] of the Reporting Judge’s Report as well as the draft judgment that he has composed.²⁰³

Haïm thus bolsters his defense of the Conseil d’Etat by signing onto the ECHR’s condemnation of the Cour de cassation.

Such disloyal breaking of ranks within the French camp has by no means been limited to academics. Thus, in the Conseil d’Etat’s *Esclatine* case—which, as we have seen, functioned as an anticipatory public defense of the Conseil d’Etat’s procedures²⁰⁴—CDG Chauvaux followed the same basic line of reasoning. Arguing that the CDG is a judicial member of the Conseil d’Etat panel that handles a given case, Chauvaux publicly abandoned the Cour de cassation in a desperate attempt to distinguish the Conseil’s working methods from those condemned by the ECHR:

In this respect, the CDG’s position differs clearly from that of the Advocates General at the Cour de cassation. The Advocates General are not members of the Cour. They belong to the *ministère public* attached to the Cour and are placed under the authority of the *procureur général*. By virtue of Art. R. 132-1 of the Code of Judicial Organization, they exercise their functions under the direction of the *procureur général*. Although a perpetually respected tradition holds that their independence be respected, Art. R. 132-3 calls for the Advocate General, in important cases, to forward his conclusions to the *procureur général* who, if he does not approve of them, can designate another Advocate General or take the floor himself at oral arguments.

²⁰² Haïm, *supra* note 192 (citations omitted). *See also* Andriantsimbazovina, *supra* note 190 (“The Advocate General can be considered comparable to a party to the case, but the CDG cannot.”)

²⁰³ Haïm, *supra* note 192.

²⁰⁴ *See supra* notes 143–53 and accompanying text.

These characteristics are not to be found [at the Conseil d'Etat]. The CDG is placed in a situation analogous to all the other members of the tribunal. His position is similar to that of the Reporting Judge, except that he expresses himself in public and then does not vote. His functions could thus be defined as those of a public Reporting Judge. This is what explains and legitimates his participation with the judges in all the successive stages of the procedure, from the preparatory phase to the final deliberations.²⁰⁵

CDG Chauvaux thus joined the Conseil's academic supporters in their post-*Reinhardt* critiques of the Cour de cassation.

The ECHR's *Borgers* jurisprudence has thus provoked a cleavage within French legal culture. To be sure, there had always existed a complex series of turf-battles between the "ordinary" and "administrative" French courts; but the very real and tangible danger posed by the threat of ECHR sanction has transformed these almost charming sibling rivalries into institutional life and death struggles. Accordingly, it should come as no surprise that the Conseil d'Etat would turn on the Cour de cassation in an attempt to save its own skin.

However understandable it may be, such selfish institutional behavior is demeaning to all involved. Notably, even as he struggled to distinguish the Conseil d'Etat to salvage its traditional working methods, CDG Chauvaux betrayed a certain embarrassment at breaking ranks with his Cour de cassation colleagues. Completing the argument quoted directly above, he concludes:

The exteriority [of the judicial amicus] relative to the tribunal, which perhaps justifies the solution adopted by the ECHR regarding other supreme courts, is therefore entirely inapposite regarding the CDGs [To transpose this solution to the Conseil d'Etat] would, in my estimation, therefore constitute a false application of Article 6 of the European Convention.²⁰⁶

Nonetheless, CDG Chauvaux's discomfort—so palpable in his use of the adverb "perhaps"—could not have done much to soften the blow caused by his willingness to abandon his Cour de cassation colleagues.

Thus, in addition to the friction the ECHR's *Borgers* jurisprudence has created between the French and the ECHR and within the ECHR itself, that line of cases has sown discord within the French ranks as well. As Guy Canivet, the *Premier Président* (Chief Justice) of the Cour de cassation, explained in a tone that expressed equal parts understanding, resignation, and resentment, the Conseil d'Etat had sacrificed the Cour de cassation as "*la part du feu*" (the fire's due); that is, the Cour had been surrendered in order to create a fire break.²⁰⁷

²⁰⁵ *Esclatine*, Conseil d'Etat, July 29, 1998, D. 1999, 85, 88, concl. Chauvaux.

²⁰⁶ *Id.*

²⁰⁷ Interview with Canivet, *supra* note 174.

IV

THE FRENCH PREDICAMENT AND RESPONSE

A. The French Predicament: Options Under Duress

Faced with the ECHR's judgments in *Reinhardt* and *Kress*, the French could have taken any number of tacks. For all of the reasons Harold Koh stresses in his seminal article, *Why Do Nations Obey International Law?*,²⁰⁸ the only truly untenable position—notwithstanding Professor Haïm's provocatively entitled article *Should the European Court of Human Rights be Abolished?*²⁰⁹—was willful and overt disobedience. Such disobedience could have taken either the form of opting out of the European human rights system altogether or the form of explicitly defying the *Borgers* line of jurisprudence. That said, the French still had plenty of options to consider, ranging from the more confrontational to the more submissive.

1. *Tactical Resistance*

Throughout the ongoing conflict with the ECHR, the French had taken a path of tactical resistance. On the one hand, they had attempted to resist by setting forth distinctions between their supreme court practices and those already condemned by the ECHR. On the other, the French had simultaneously instituted a series of half-hearted and makeshift procedural adjustments designed to preempt ECHR censure. In the wake of the ECHR's *Reinhardt* and *Kress* judgments, the French could certainly have continued in the same vein.

Nonetheless, it is clear that they were rapidly reaching the limits of what would qualify as arguably good-faith foot-dragging. How were they to get around an ECHR "equality of arms" mandate to provide litigants and the judicial amicus equal access to the *rapporteur's* work product? Would they, or could they, simply give less access to both the litigants and the amicus? Could they grant litigants full access to the *rapporteur's* work product for the purposes of arguing the case but somehow require that the released information remain confidential? Furthermore, how might the French get around the ECHR's ban on the advocate general's or CDG's presence and/or participation in post-oral argument judicial deliberations? Could the judicial amicus be linked to the deliberations by some sort of closed circuit television with one-way sound, so that he or she might learn from the deliberations without intervening? In short, mere foot-dragging was unquestionably becoming more difficult as the ECHR continued to flesh out its *Borgers* jurisprudence.

²⁰⁸ See Koh, *supra* note 196, at 2645–59.

²⁰⁹ See Haïm, *supra* note 191.

Of course, the French could also have chosen to adopt a far more confrontational approach that would unmistakably represent a bad-faith subversion of the ECHR's jurisprudence. For instance, the French could theoretically eliminate the Cour de cassation and Conseil d'Etat altogether.²¹⁰ A somewhat less extreme possibility would be to act on the thinly veiled threat CDG Chauvaux voiced in the *Esclatine* case.²¹¹ That is, cutting off its nose to spite its face, the French legal system could undermine the *Borgers* jurisprudence by simply abolishing the advocate general and CDG institutions. Should the French be so inclined, a *rapporteur*, or perhaps a second *rapporteur*, could take up the slack by effectively—and, above all, internally—playing the role of the advocate general.²¹² Of course, the litigants would lose out in the process, as they would no longer be able to hear the judicial amicus's oral argument, but at least the essence of the traditional French judicial approach might be salvaged without the French supreme courts having to prostrate themselves before the ECHR.

In fact, a relatively minor, though blatantly tactical, change of the CDG's title could accomplish a great deal. Insofar as the CDG's independence and/or his status as a member of the judicial panel might be in question, the solution could be simply to underline his judicial status by giving him a title reminiscent of that of the *rapporteur* in Conseil d'Etat cases (called the *conseiller rapporteur*). As Professor Andriantsimbazovina slyly, proudly, and perhaps mockingly notes:

To prevent any possible misunderstanding or ambiguity resulting from bad information or bad faith, one might consider modifying the title of the function. In the near future, the *commissaire du gouvernement* [i.e., the CDG] could thus be called the "*commissaire-rapporteur*." Two words would vaporize; a single one would replace them. The *commissaire* would survive thanks to his history, his independence, his impartiality and the service he has rendered, still renders and will continue to render on behalf of justice, the public and the law.²¹³

Needless to say, such sarcastic "solutions" do not appear to be motivated by much more than derisive and antagonistic evasion of the ECHR's commands.

2. Good-Faith Compliance

Obviously, the French were by no means required to adopt such an obstructionist stance, whether in a confrontational or subdued variant. They could simply have taken the tack of good-faith submission

²¹⁰ See *id.*

²¹¹ See *supra* note 153 and accompanying text.

²¹² See Haïm, *supra* note 192; Andriantsimbazovina, *supra* note 190.

²¹³ See Andriantsimbazovina, *supra* note 190.

to the ECHR's dictates. For example, in addition to the makeshift measures already adopted, the French supreme courts could also have barred the judicial amicus from attending post-oral argument judicial deliberations.

But frankly, how much could the French bank on the ECHR standing pat on its existing jurisprudence? The *Delcourt* judgment—which upheld the Belgian Supreme Court practices²¹⁴—had long since been overturned in *Borgers*.²¹⁵ And in the *Kress* decision, the Strasbourg Court had made it abundantly clear that evolutive interpretation would prevail. As the ECHR stated, “[T]he Convention is a living instrument to be interpreted in the light of current conditions and of the ideas prevailing in democratic States today.”²¹⁶ Was there any reason to suppose, therefore, that the French half-measures the ECHR had currently accepted—even if supplemented by barring the amicus from deliberations—would continue to stand, particularly in light of their largely half-baked nature?

Furthermore, even if the French went the extra mile by putting an end to the *rapporteur's* pre-oral hearing transmission of her work to the judicial amicus, was there any reason to suppose that this, any more than the existing half-measures, would withstand ECHR scrutiny over time? How long would it be before other critically important facets of the French supreme courts' internal procedures would come into question?

As this Article has suggested, French judicial decisionmaking processes involve a very heavy dose of internal, and thus sequestered, judicial debate, during which a long list of judicial magistrates—ranging from the *rapporteur*, to the advocate general, to the CDG, to the reviser, and so on—analyze, consider, and reconsider the merits and implications of the case, going so far as to vote on and adopt provisional judicial decisions well before oral argument ever takes place.²¹⁷ As should be quite apparent by now, there exists more than enough argumentative ammunition in the *Borgers* jurisprudence—whether under the rubric of “equality of arms,” or “the doctrine of appearances,” or “the adversarial principle”—to justify the overthrow of almost all the working methods traditionally employed by the French supreme courts.

Finally, it is not as though the ECHR exerts complete control over the litigation that comes before it. Parties demonstrate, after all, highly tactical behavior. There is no reason whatsoever to believe that an ongoing stream of plaintiffs would not continue to push the envel-

214 See 11 Eur. Ct. H.R. 1.

215 See 214 Eur. Ct. H.R. (Ser. A) 22.

216 See *Kress v. France*, 2001-VI Eur. Ct. H.R. 1, 67–68 (citations omitted).

217 See Part I.B.2–3.

ope of the *Borgers* jurisprudence, exerting a constant pressure on the ECHR to finish the job that, to date, it has only halfheartedly pursued. And, of course, every further incursion into the French supreme courts' decisionmaking processes would only further defeat the rationales and advantages of the French judiciary's traditionally republican and institutional mode of decisionmaking. In other words, French submission would pose as many problems as French resistance.

B. The Actual French Response(s): Schism

In the relatively short period of time since June 2001, when the ECHR announced its decision in *Kress*, the contours of the official French response have come fairly clearly into view. The key to understanding this French response is to recognize that it has not consisted of one response, but of two. The Conseil d'Etat and Cour de cassation have parted ways, adopting radically different approaches and solutions to the ECHR's developing *Borgers* jurisprudence.

1. *The Conseil d'Etat*

The Conseil d'Etat—the great Napoleonic institution—has decided to stick to its guns, so to speak. Its approach has been to offer the stiffest possible resistance by all but ignoring the ECHR's decisions. The Conseil d'Etat has maintained all of the traditional procedures and more recent preemptive half-measures arguably tolerated by the ECHR's *Kress* decision. As we have seen, the ECHR has flinched at this staunch resistance to its developing jurisprudence.²¹⁸

In addition to taking all that the *Kress* decision arguably permitted (and then some), the Conseil d'Etat effectively stonewalled on the one important remaining issue: the presence or participation of the CDG in post-oral argument judicial deliberations. In the very last paragraph of the relevant portion of its *Kress* decision, the ECHR had held: "In conclusion, there has been a violation of Article 6 § I of the Convention on account of the [CDG's] participation in the deliberations of the trial bench."²¹⁹ On this remaining front, the Conseil d'Etat has adopted what must be considered a distinctly disingenuous position. In response to this potentially institutionally debilitating holding, the Conseil d'Etat has resorted to interpretation so creative as to border on the comical. The Conseil has taken the position that, because this holding states that the CDG's "*participation in deliberations*" violates the European Convention,²²⁰ the CDG can continue to

²¹⁸ See *supra* notes 154–61 and accompanying text.

²¹⁹ *Kress*, 2001-VI Eur. Ct. H.R. at 72.

²²⁰ *Id.* (emphasis added).

attend deliberations, so long as he does not “participate” in them by *speaking!*²²¹

Although such a highly imaginative interpretation does find some support in the literal language of the ECHR’s holding, it hardly withstands a more earnest analysis. As the ECHR made abundantly clear, the problem with the CDG’s presence in deliberations was largely one of appearances:

81. Lastly, the *doctrine of appearances* must also come into play. In publicly expressing his opinion on the rejection or acceptance of the grounds submitted by one of the parties, the [CDG] could legitimately be regarded by the parties as taking sides with one or other of them

. . .

The Court can also imagine that a party may have a feeling of inequality if, after hearing the [CDG] make submissions unfavourable to his case at the end of the public hearing, he sees him withdraw with the judges of the trial bench *to attend the deliberations* held in the privacy of chambers.

82. Since *Delcourt*, the Court has noted on numerous occasions that while the independence and impartiality of the Advocate-General or similar officer at certain supreme courts were not open to criticism, the public’s increased sensitivity to the fair administration of justice justified the growing importance attached to *appearances*.

It is for this reason that the Court has held that regardless of the acknowledged objectivity of the Advocate-General or his equivalent, that officer, in recommending that an appeal on points of law should be allowed or dismissed, became objectively speaking the ally or opponent of one of the parties and that his *presence at the deliberations* afforded him, *if only to outward appearances*, an additional opportunity to bolster his submissions in private, without fear of contradiction.²²²

Thus, as one might imagine, the ECHR bases its condemnation of the judicial amicus’s “presence” or “attendance” in deliberations largely on the “doctrine of appearances,” concluding that, whatever the CDG’s actual participatory role in the judicial debate, a party who did not know better might be dismayed that an amicus who had concluded against the party’s position in oral arguments could then retire with the judges in deliberations.

In short, the Conseil d’Etat’s reaction to the *Kress* holding on this issue amounts to the Conseil sticking its tongue out at the ECHR. Given that the ECHR refers explicitly to the CDG’s “presence” or “attendance” in deliberations no less than six times in the relevant seven

²²¹ Interview with Braibant, *supra* note 189; interview with Latournerie, *supra* note 174.

²²² *Kress*, 2001-VI Eur. Ct. H.R. at 71 (internal citations omitted) (emphasis added).

paragraphs of its *Kress* judgment,²²³ it is easy to understand why members of the Conseil d'Etat get a certain twinkle in their eye when they seize upon the single instance in which the ECHR refers to the CDG's "participation" in deliberations. Indeed, the *conseillers'* amusement must be all the greater, given the heading of the relevant section of the ECHR's *Kress* judgment: "As regards the *presence* of the [CDG] at the *Conseil d'Etat's* deliberations."²²⁴ In conclusion, then, the Conseil d'Etat's response to the *Borgers* jurisprudence has been to minimize the damage by doing no more than unenthusiastically adopting half-measures.

2. *The Cour de Cassation*

If the effects of the ECHR's *Borgers* jurisprudence on the Conseil d'Etat's procedures appear, to this point, relatively minor, its effects on the Cour de cassation's procedures must be recognized as truly paradigm-shifting. Far from resisting the ECHR, the Cour de cassation's judicial leadership—most notably *Premier Président* Guy Canivet—has seized upon the opportunity provided by the ECHR to institute a major overhaul of the Cour's internal procedure.

Adopting a zealously cooperative approach, the Cour de cassation has taken the *Kress* decision seriously, despite the fact that it was addressed to the Conseil d'Etat.²²⁵ In stark contrast to the Conseil d'Etat's disingenuous evasion, the Cour de cassation has taken the ECHR's admonitions to heart by radically altering the role the judicial amicus plays in all of its cases. For the first time in some two hundred years, the advocate general will no longer attend—much less participate in—post-oral argument judicial deliberations.²²⁶

Moreover, this banishment of the advocate general represents but one facet of the Cour de cassation's restructuring of its internal judicial decisionmaking procedures. Rather than stand pat on the preemptive half-measures apparently sanctioned by the ECHR in its *Kress* decision, the Cour has radically reconstructed the entire flow of information and communication leading up to its decisions.

To begin with, the *rapporteur* will no longer grant the advocate general privileged access to her work product. To the contrary, neither the advocate general nor the parties will receive copies of the *rapporteur's* draft judicial decisions or of the second part of her report (i.e., her personal opinion). Instead, both the advocate general and

²²³ See *id.*

²²⁴ *Id.* at 70.

²²⁵ See *id.* at 43.

²²⁶ Interview with Canivet, *supra* note 174. Of course, the Cour's head amicus, the *Procureur général*, has argued strenuously against this removal of the advocates general from deliberations. See Jean-François Burgelin, *L'avocat général à la Cour de cassation et la Convention européenne de sauvegarde des Droits de l'Homme*, *Gaz. Pal.* mai, 1997.

the parties will obtain the rest of her report well in advance of oral arguments.²²⁷ In other words, the parties will receive this information early enough to fashion a meaningful response. Thus, in the Cour de cassation, the troublesome unequal access to the *rapporteur's* work product has become a thing of the past.

But that is not all: The *rapporteur's* report itself has been significantly changed. Traditionally, the report had been composed of two sections. The first, which was read aloud at the opening of oral arguments, contained a barebones summary of the parties' positions (the "*rapport objectif*"); the second consisted of the *rapporteur's* all-important, yet externally unavailable, opinion (her "*avis*").²²⁸ Now that the *rapport objectif* is fully accessible to the litigants in a timely fashion and represents the sum total of what the advocate general will receive from the *rapporteur*, this "objective" section of the report has been significantly expanded.

In addition to a summary of the parties' positions, the core of this section now consists of a detailed presentation and explanation of the *rapporteur's* legal and analytic framework.²²⁹ Although the *rapporteur's* subjective opinion remains inaccessible to all but the sitting members of the judicial panel,²³⁰ the amount of analytic and decisional information granted to the litigants has significantly increased, while the informational loss suffered by the advocate general has been somewhat mitigated.

Most remarkable, however, is the suddenly public availability of this *rapport objectif*.²³¹ Indeed, the idea that the *rapporteur's* report might escape the personal control of its author and be given to the parties was, at least at first, virtually inconceivable. It was precisely for this reason that, as a glib graduate student seeking to provoke his audience at a Cour de cassation conference, I once suggested that the Cour should actually *publish* the *rapporteurs'* reports, thus making them available to the general public.²³²

Amazingly, some ten years later, that is precisely what the Cour de cassation has decided to do. In all important cases—i.e., the 150 to 200 cases handled every year by the assorted plenary formations of the Cour (the *Plénières* and *Plénières de Chambre*)—the official bulletin actually publishes this signed and detailed "objective report." In fact, the

227 *Id.*

228 *See supra* note 41 and accompanying text.

229 Interview with Canivet, *supra* note 174.

230 *See supra* note 47 and accompanying text.

231 *See supra* notes 47–54 and accompanying text.

232 *See* Mitchel de S.-O.-l'E. Lasser, *Autoportraits judiciaires: le discours interne et externe de la Cour de cassation*, in "Langages de justice," *Les cahiers de l'IHEJ*, no. 2, p. 28 (Octobre 1994).

Cour now automatically e-mails this bulletin twice a month to anyone who signs up online to receive it.²³³

In sum, unlike the Conseil d'Etat, the Cour de cassation has taken bold and decisive action to respond to the procedural concerns raised by the ECHR's evolving jurisprudence. Now that the ECHR has at least tentatively and temporarily set the procedural parameters, the Cour has taken the initiative and adopted an approach that even gives substance to previously half-hearted and makeshift measures. For example, now that litigants receive significant and timely access to the core of the *rapporteur's* legal analysis, the right to respond to that legal analysis, whether orally or by a written note in deliberations, suddenly acquires purpose and meaning. Thus, the interplay between the Cour de cassation and the ECHR has profoundly altered the traditional French model of judicial decisionmaking, if only in one of the French supreme courts.

V

EVALUATING THE FRENCH COURTS' RESPONSES

It is terribly important to recognize that the interchange between the ECHR and the French supreme courts represents, by definition, a fluid and constantly shifting affair. The *Borgers* jurisprudence is not a stable object of analysis. It consists of an ongoing exchange between the ECHR and the national legal systems, in which each of the numerous players involved responds to each of the others in a complex series of preemptive, reactive, and proactive moves. For this reason, this Article offers two separate sections analyzing costs and benefits. An assessment of the state of affairs immediately after the *Kress* decision could not legitimately include—and, without a crystal ball, likely could not have anticipated—the schismatic French responses that would follow. Similarly, the current French supreme court schism has serious ramifications for each of the many institutional and other actors directly and indirectly affected. Thus, although some of the advantages and disadvantages highlighted in Part IV continue to apply in much the same way today, many of them do not.

The French schism thus deeply affects our analysis, as the assessment of costs and benefits must now be made in two distinctly different procedural contexts: that of the Conseil d'Etat and that of the

²³³ The web address to sign up to receive electronic copies of the *Bulletin d'information de la Cour de cassation* is http://courdecassation.fr/_BICC/bicc.htm (last visited Feb. 22, 2005). Even in less prominent cases, the Cour de cassation has decided to give these reports far greater publicity. Instead of remaining the property of the *rapporteur*, every report—even if unpublished—now remains in the Cour's dossiers and is available via the Cour's internal server. The *rapporteurs'* reports thus now serve as the Cour's "institutional memory." Interview with Canivet, *supra* note 174.

Cour de cassation. Furthermore, the schism itself undoubtedly entails significant costs and benefits. If nothing else, it has generated not only an inelegant and illogical split between the two French supreme courts, but, as we have seen, it has also provoked the Conseil d'Etat's highly distasteful—though perfectly understandable—abandonment of the Cour de cassation.²³⁴ One must be very shortsighted indeed to believe that such disloyalty would not produce ongoing effects both inside and outside the French legal system.

A. The Conseil d'Etat

For the Conseil d'Etat itself, the costs and benefits of the current state of affairs do not seem to be terribly different than they were at the time of the *Kress* decision. This apparent stability rests on the combination of two factors: first, the tepid or Solomonic nature of the *Kress* decision, and second, the Conseil d'Etat's disingenuous refusal to satisfy meaningfully the *Kress* judgment's relatively tame demands.

At first blush, therefore, the current state of affairs does not appear to represent a major loss for the Conseil d'Etat. Most important, in the *Kress* decision, the ECHR gave its blessing to the CDG's continued existence: "As to the [CDG], the Court equally accepts that it is undisputed that his role is not that of a State counsel's office and that it is a *sui generis* institution peculiar to the organisation of administrative-court proceedings in France."²³⁵ The decision also condoned, if only obliquely, the traditional practice whereby the CDG delivers his opinion (*conclusions*) at oral arguments without having transmitted them in advance to the parties.²³⁶

Furthermore, the condition of stasis in the Conseil d'Etat has been all the more complete, because the Conseil had already done the bare minimum in the way of preemptive adjustment prior to the *Kress* case before simply stonewalling with respect to the rest. For example, litigants were traditionally permitted both to ask the CDG for the gist of his position prior to oral argument and to submit a written note in deliberations after oral argument. Thus, the developing *Borgers* jurisprudence merely prompted the Conseil to formalize this longstanding practice. If one adds to this stunningly modest achievement not only (1) the *Kress* decision's total failure to address the unequal access accorded to the *rapporteur's* work product, but also (2) the Conseil d'Etat's highly creative interpretation of *Kress's* condemnation of the CDG's "participation in" deliberations,²³⁷ it is difficult to imagine how much less effect the ECHR's jurisprudence could possibly

²³⁴ See *supra* notes 202–07 and accompanying text.

²³⁵ *Kress*, 2001-VI Eur. Ct. H.R. at 67.

²³⁶ See *id.* at 68–69.

²³⁷ See *supra* notes 219–24 and accompanying text.

have had on the Conseil d'Etat's traditional decisionmaking procedures. Indeed, those procedures have survived more or less unscathed. Undoubtedly, such stasis must be counted as a major loss for the disgruntled ECHR plaintiffs—and perhaps for the ECHR itself.

But such a narrow focus on the current procedural effects of the ECHR's jurisprudence fails to recognize the tremendous institutional cost that "*la crise Kress*" has nonetheless imposed on the Conseil d'Etat. On one level, the Conseil has expended a tremendous amount of time and energy to survive the ECHR litigation onslaught. But this represents the least of the Conseil's troubles. Oddly enough, the real problem is that the Conseil d'Etat has largely *succeeded* in its resistance. It is the only European supreme court still meaningfully withstanding the ECHR's *Borgers* jurisprudence, for not only have the Belgian, Dutch, and Portuguese supreme courts adapted or modified their decision-making procedures, but now even the French Cour de cassation has done so as well. This leaves the Conseil d'Etat utterly stranded, its status thus transformed from the exemplary into the exceptional. Far from representing, alongside the French Cour de cassation, the flagship of the French procedural model, the Conseil now consists of a retrograde relic.

Furthermore, although the Conseil may take pride in having salvaged as much as possible of its traditional decisionmaking practices, those practices—and indeed its entire institution—have now been tainted with a strong hint of impropriety. Constructed in this unflattering way, it is hard to believe that the Conseil d'Etat will maintain its current procedural structure for long.

First, there is every reason to assume that tactically minded plaintiffs will continue to bring litigation challenging the Conseil's procedures. Second, the *Kress* decision's equivocation makes it very difficult to determine the legal consequences of the Conseil d'Etat's continued defiance. Is the Conseil actually violating the ECHR's *Borgers/Kress* jurisprudence? That is, can the Conseil's almost comically disingenuous interpretation of one sentence of the *Kress* decision truly pass muster in the ECHR? Similarly, can the Conseil d'Etat legally continue to provide unequal access to the *rapporteur's* work product merely because the *Kress* decision did not squarely address the issue, despite the fact that the ECHR's *Reinhardt* decision explicitly condemned the Cour de cassation's parallel—and largely indistinguishable—practice? This jurisprudential uncertainty, which undoubtedly represents a major disadvantage to the current state of affairs for almost everyone involved (most notably the litigants and the ECHR), only increases pressure on the Conseil d'Etat to conform.

Third, there is no particular reason to suppose that the ECHR will continue to provide cover for the Conseil indefinitely. The rela-

tively forgiving *Kress* decision undoubtedly goes somewhat against the current of the ECHR's developing *Borgers* jurisprudence. As a result, it seems unlikely that the ECHR will continue to weaken the consistency and coherence of its own jurisprudence just to soften the blow for what is now a single island of resistance—one whose very status as an exceptional leftover only invites further litigation. Moreover, the very inconsistency and equivocation of the *Kress* decision imposes systemic credibility costs on the ECHR, which appears in some respects to have balked, and perhaps even yielded, in the face of the Conseil d'Etat's staunch resistance. Having pulled its punches in *Kress*, the ECHR may reasonably be expected to bring down the hammer at some point in the future.

Fourth, and perhaps most important, the Conseil d'Etat's isolation, complete with the attendant whiff of impropriety, may make it untenable for the Conseil to maintain its exceptional stance over the long term. For all of the reasons explained by Harold Koh, disobedience—and, I might add, dubious or disingenuous satisfaction—of international law norms is a highly unpleasant affair for everyone involved.²³⁸ For all of the *conseillers'* righteous indignation, for all of their sincere disagreement with the logic of the *Borgers* jurisprudence, and for all of their pride in resisting its demands, the professional and social discomfort generated by maintaining a now vaguely disreputable decisionmaking procedure is likely more than sufficient to induce the Conseil to change its practice. The members of the Conseil d'Etat have long been quite proud of their status as vigilant defenders of civil liberties, and it is, therefore, particularly jarring for them to defend against the charge of systematically violating international human rights norms. Longtime members of the Conseil may be willing to defend the old ways to the end, but younger members, increasingly internationally conscious and connected, are ever more unlikely to find such a disagreeable defense worth the effort, recognizing that their own status can be measured less and less in national isolation.

The costs and benefits of the current state of the *Borgers* litigation are, therefore, fairly difficult to assess in the Conseil d'Etat context. On the one hand, the litigation has generated very little in the way of tangible results. The Conseil d'Etat has merely formalized already existing practices, leaving not only the ECHR plaintiffs, but also the ECHR itself, with almost nothing to show for their work. To add insult to injury, the Conseil d'Etat and its supporters, truly indignant that a pall of suspicion has fallen over the Conseil's time-honored working methods, have mobilized to denounce and resist the ECHR despite the relatively slight concessions the Strasbourg Court has, so

²³⁸ See Koh, *supra* note 196, at 2648–59.

far, required the Conseil to make. In short, the tally looks poor: minimal procedural change, significant reputational losses for both the Conseil and the ECHR, and plenty of ill will to go around.

On the other hand, the current state of the *Borgers* litigation can be viewed as a brilliant, if rather subtle, success. In essence, the ECHR has fashioned a relatively velvet-glove method for inducing the Conseil d'Etat to change its procedures of its own accord. In the short-term, the ECHR has allowed the Conseil d'Etat and its CDGs to maintain virtually all of their traditions and working methods. Although this stasis may appear to be a loss for litigants—especially the ECHR plaintiffs—and for the ECHR itself, it represents a form of self-induced and eventually untenable isolation on the part of the Conseil d'Etat. Unable to bear its now exceptional and vaguely disreputable position over the long haul, the Conseil d'Etat will likely—if perhaps incrementally and somewhat grudgingly—come to conform to the *Borgers/Kress* jurisprudence without the ECHR having to condemn the proud French institution outright.

B. The Cour de Cassation

Unlike the Conseil d'Etat, which has resisted procedural change in the wake of the *Kress* decision, the Cour de cassation has seized upon the opportunity provided by the ECHR by instituting a major overhaul of the Cour's internal procedure. This bold development utterly transforms the nature of French judicial decisionmaking procedure and calls for a major reassessment of the costs and benefits of the ECHR's *Borgers* jurisprudence in the context of France's ordinary courts.

1. *A Wealth of Benefits*

First and foremost, the Cour de cassation's procedural shift tremendously increases the transparency of its decisionmaking process. The newfound accessibility of the *rapporteur's* "objective report" represents a major opening of the judicial universe to the general public, which can now observe what issues are considered important to the judiciary. After all, the purpose of the objective report is to make the *rapporteur's* legal and analytic framework available not only to the judges and litigants, but also to the public at large—at least in important cases.

It goes without saying that this new judicial transparency radically reduces the degree of guesswork traditionally associated with French judicial interpretation. Customarily, it was the French academic who functioned as the broker of French judicial knowledge. The job of the *arrêviste*—the *doctrinal* (academic) writer who commented on major judicial decisions (*arrêts*) in the French case reporters—consisted

precisely of analyzing and explaining the famously brief and opaque judgments of the French judiciary. Thus, it was the academic, not the court itself, who provided primary access to the logic of the French judicial decision.²³⁹ That said, the French academic did not generally have special access to the court's reasoning. Although in certain instances the academic may have gained access to a friendly *rapporteur's* report, he was not privy to the court's deliberations and, therefore, could hardly claim to act on behalf of the sitting judicial panel. Indeed, the *arrétiste's* considerable expertise consisted precisely of deciphering the oracular syllogisms of the French high judiciary. He meticulously compared the language of current and past decisions, consulted the analyses of his academic colleagues in the *notes* they had written about and appended to prior judicial decisions, and offered a critical assessment of the state of the existing judicial *jurisprudence*. In short, the academic could not claim to *possess* a special form of knowledge about judicial decisions; instead, his job consisted in some important sense of *constructing* and disseminating this knowledge.

The Cour de cassation's new procedure radically changes this state of affairs. Access to the Cour's reasoning now primarily comes not from the academic, but from one of the judges actually sitting in a given case: the *rapporteur*. What is more, the parties themselves now have access to this hard internal information well before oral argument and can adjust their arguments accordingly. Better yet, this information is now publicly available through publication by the Cour itself. For the first time, therefore, the French judicial publication system discloses hard judicial information rather than informed academic conjecture.

This new judicial transparency obviously greatly increases the level of external judicial supervision and responsibility in the French judicial system. The parties, the academic writers, and the general public can monitor the quality of judicial work, which can now be assessed and critiqued in an informed manner. Furthermore, it is not just the Cour as a whole that operates in more plain view. The *rapporteur* finds her own position radically altered: For the first time in French history, and whether or not she so wishes, her personally signed work product is now systematically published. The French judge thus finds herself individually accountable in a way that simply never existed before.

The Cour de cassation's reforms, therefore, significantly modernize the French judicial system. On a basic level, they put the Cour de cassation in compliance with the ECHR's developing *Borgers/Kress* jurisprudence. But this compliance is not only important for its own

²³⁹ See *supra* notes 83–90 and accompanying text.

sake. Besides fostering the abstract value of harmonization, this new publication procedure also renders the Cour de cassation's judgments more understandable to outsiders, which can only help in this era of exploding cross-border, and especially intra-European, transactions.

By modernizing and harmonizing in this way, it is likely that the Cour de cassation will significantly increase its visibility and status. Thus, according to Chief Justice Canivet, these reforms mean that members of the Cour de cassation will no longer have to struggle to make apparent the serious and imaginative intellectual work that lies behind the French judicial syllogism.²⁴⁰ Moreover, the justices of the Cour will no longer have to labor in personal obscurity. Instead, they will take their rightful position among the great jurists of their day, just as the Cour itself—now that it will expose the finesse of what lies behind its elegant syllogisms—will take its rightful place among the great supreme courts of the world.²⁴¹

Finally, the Cour's reforms offer the significant advantage of increasing the Cour de cassation's status relative to the Conseil d'Etat. The importance of this reputational bonus should not be underestimated. The Conseil d'Etat's exceptional internal status as a "grand corps" of the French state—an exalted position shared by only two other great French administrative institutions (i.e., the *Inspection générale des finances* and the *Cour des comptes*)—has always grated on the members of the Cour de cassation, who, despite their own highly elevated status as members of the supreme court that ultimately interprets the Napoleonic Code, have never carried the special *cachet* reserved for those lofty few who have attended and excelled at one of the French *grandes écoles*.²⁴² If one adds to this longstanding source of frustration the Conseil d'Etat's unseemly, disloyal, and self-serving abandonment of the Cour de cassation during "*la crise Kress*," one can readily understand the particular pleasure members of the Cour might take at becoming the "modern" and "human rights-friendly" French supreme court. Essentially, the Conseil d'Etat's apparent willingness to play the role of retrograde represents a status opportunity for the Cour de cassation.

To sum up, the Cour de cassation's reforms offer an excellent balance of interests and policies. These reforms move the Cour into compliance with the ECHR's jurisprudence and, in so doing, facilitate harmonization and understanding with the rest of Europe. In addi-

²⁴⁰ Interview with Canivet, *supra* note 174.

²⁴¹ *Id.*

²⁴² Pierre Bourdieu offers the now authoritative critique of the social and political hierarchy established by the French education system. See PIERRE BOURDIEU, *LA NOBLESSE D'ETAT : GRANDES ÉCOLES ET ESPRIT DE CORPS* (1989), translated as *THE STATE NOBILITY: ELITE SCHOOLS IN THE FIELD OF POWER* (Lauretta Clough trans., 1996).

tion, they significantly increase transparency and intelligibility for litigants, the French public at large, and the greater European public. Finally, they improve the reputation of the Cour de cassation, in particular, and perhaps that of the French judiciary in general.

Furthermore, it should be recognized that the Cour's reforms may not strike unduly harshly at the Cour's traditional decisionmaking processes. First, they maintain many of the Cour's collegial work methods and expert forms of debate. After all, the *rapporteur* and advocate general continue to perform their important discursive roles, even if the advocate general has lost some of his privileged argumentative position in favor of improving that of the litigants. Second, the reforms have by no means entirely eliminated the protected seclusion that has traditionally characterized French judicial decisionmaking. Indeed, in spite of its reforms, the Cour has made sure to preserve the time-honored form of its judicial decisions. The Cour's judgments continue to be composed as unsigned and single-sentence collegial syllogisms devoid of concurrences or dissents. In other words, the publication of the objective report has not affected the ability of the judicial panel as a whole to continue to keep its secrets.

Moreover, even the *rapporteur* is not fully exposed. Although the objective report does present the legal and analytic framework governing the case, it makes sure not to offer for public consumption the *rapporteur's avis*—i.e., his personal opinion about how that framework should in the end be mobilized in response to the case at hand. In many respects, therefore, French judicial decisionmaking remains a protected “black box,” notwithstanding the Cour de cassation's notable reforms.²⁴³

2. *The Demise of the Ministère Public?*

Nevertheless, this rosy assessment of the balancing of interests accomplished by the Cour de cassation's reforms fails to recognize the full magnitude of the changes wrought by these reforms. Most importantly, the Cour's procedural changes have rested on what must be described as the effective annihilation of the entire institution of the advocates general, the *Ministère public*. The advocate general, for hundreds of years a privileged player in the French internal judicial debates, has been reduced to a mundane discursive player more akin to a party than to a judicial magistrate.²⁴⁴ As such, the advocate general no longer receives privileged access to the *rapporteur's* key work product: her *avis* and draft judgment(s).

²⁴³ Interview with Canivet, *supra* note 174.

²⁴⁴ See Jean-Claude Bonichot et Ronny Abraham, *Le commissaire du gouvernement dans la juridiction administrative et la Convention européenne des droits de l'homme*, JCP 1998, I, n° 176.

Needless to say, this loss of information represents the death of a special conversation that had long been the defining characteristic of the internal French judicial decisionmaking process, i.e., the privileged and highly informed pre-oral argument discussions between the *rapporteur* and the advocate general. This removal of the advocate general from the secluded inner sanctum of French judicial decision-making has even been made physically explicit: The advocate general is now barred altogether from attending the all-important judicial discussions *in preparation for* oral arguments.

As if this were not enough, the Cour's reforms have likewise removed the advocate general from the *post*-oral argument judicial deliberations. As a result, not only can the advocate general no longer take part in the final judicial deliberations, but he now also loses out on the understanding and professional training that exposure to these deliberations traditionally provided.²⁴⁵ Instead of receiving an informed internal perspective on the judicial discussions that followed on the heels of the *conclusions* he had presented at oral arguments, the advocate general must simply sit back and await the Cour's cryptic syllogisms just like any other observer. In other words, except for his initial judicial education at ENM (the national judge school in Bordeaux) and his professional experience as a repeat player, the advocate general no longer possesses or develops any form of distinctive professional knowledge that he can bring to the judicial decisionmaking process.

This educational and professional loss, when combined with the everyday loss of access to the *rapporteur's* key documents, necessarily entails a dramatic long-term loss of status and influence. Although today's seasoned advocates general will still be able to employ the professional training, knowledge, and comradeship they have traditionally possessed, this will be the last such generation. From this point forward, incoming advocates general will develop few of those internal and institutional ties in the first place.

Needless to say, this change in professional status can only yield a change in daily professional practice. To the extent that the advocates general no longer have access to the work product of the *rapporteurs*, they will no longer be able to exercise effectively their traditional amicus role. On a deeply practical level, it must first be recognized that the *Ministère public* corps attached to the Cour de cassation consists of a mere twenty-four advocates general.²⁴⁶ Given the Cour's truly massive caseload,²⁴⁷ it is simply inconceivable that the

²⁴⁵ See Jean-François Burgelin, *Droit et liberté fondamentaux: La paille et la poutre*, D. 2004, Chron. 1249, 1250.

²⁴⁶ See de Gouttes, *supra* note 186.

²⁴⁷ See *supra* note 53.

small corps of advocates general could effectively overcome the loss of the *rapporteurs'* preparatory materials.²⁴⁸ Forced to replicate that preliminary work, the advocates general will either have to reduce the number of cases in which they intervene or reduce the proportion of time they spend performing their valuable analytic and dialogic functions.

Furthermore, this strictly numerical inefficiency does not even begin to address the argumentative loss. No longer privileged internal players, the advocates general have lost their traditional capacity to develop an intimate internal understanding of the intellectual currents within the Cour de cassation, and without that internal understanding, they can no longer engage in the kind of dialogue and interchange that had been the hallmark of their work and the very *raison d'être* of their institutional position. Their arguments have thus been reduced to just that: *arguments*. They are no longer part and parcel of the Cour's most important *deliberations*.

It should probably come as no surprise, therefore, that the members of the *Ministère public* have responded with hostility to the Cour de cassation's ECHR-provoked diminution of their longstanding institutional role. The exasperation of the Cour de cassation's chief advocate general, Jean-François Burgelin, thus shines through the remarks he gave upon the ceremonial opening of the 2002 judicial year:

The legislator . . . thus required the Advocate General to give his opinion in all cases brought before the Cour. This is mandated [by the Codes of Criminal and Civil Procedure].

But alas! This exalted mission will no longer be performed in a proper fashion.

In fact, due to a dubious interpretation of several decisions rendered in the last few years by the ECHR—an interpretation contested by all of the judicial magistrates of our *Ministère public*—the Advocate General will now be able to perform only partially his public interest mission.

He is now denied access to the judicial conference in preparation of oral arguments and to the Cour's deliberations; he will therefore no longer follow the intellectual developments and the legal discussions that are expressed there.

He is now denied as well communication of the opinion and draft judgment of the Reporting Judge, and will no longer, due to the small size of the judicial *amicus* corps, be able to give his opinion in every case, despite the requirements of the legislative texts.

Justice at the Cour de cassation will thus be rendered in many cases without the Advocate General having had the opportunity to

²⁴⁸ See *supra* notes 187–88 and accompanying text.

stress the general interest or to express his opinion on the proper interpretation of the law.

This represents a significant setback for the quality of our justice. It serves no good to hide this fact; and history will be able to say who was responsible for this loss.

The second look that the Advocate General gave, after the Reporting Judge, to each dossier was an essential procedural guarantee given to the litigants, who had the certitude that two high magistrates belonging to separate judicial institutions—the sitting judiciary and the *amicus* corps—had fully studied their dossier.

...

These ancient customs, which had no other foundation than the common good and the interest of those who have recourse to the judicial system will disappear or at least wither away without anyone being able to give a good reason why.

...

I find myself utterly unable to discern the progress that these changes, instituted against our will, might make for human rights. As I have indicated, I see to the contrary a weakening of these rights.²⁴⁹

Burgelin's pitiful complaints thus mark, in many respects, the death throes of the corps of the advocates general. Stripped of their traditional institutional prerogatives, the advocates general can probably no longer be considered a major, much less integral, player in the French judicial decisionmaking process.

It, therefore, makes perfect sense that the advocates general, in a desperate, last-ditch attempt to sidetrack the Cour's destructive procedural reforms, actually went on strike.²⁵⁰ Insisting on²⁵¹—and awaiting in vain—the passage of a legislative or administrative text whose consequences might be less dire than the reforms instituted against their will by Chief Justice Canivet, the advocates general simply decided to stop producing their *conclusions* altogether.²⁵² This resistance, though ultimately ineffective, was not illogical. *Premier président* Canivet had imposed drastic reforms despite the fact that it was not entirely clear that he actually had the authority to do so. As *Procureur général* Burgelin's remarks indicate above,²⁵³ the duty of the advocates general to give their opinion in all Cour de cassation cases is based in

²⁴⁹ Jean-Francois Burgelin, Speech at the Cour de cassation in Paris on the occasion of the solemn hearing opening of the new judicial year (Jan. 11, 2002), in Annual Report of the Cour de cassation, *Etudes et documents*, at http://courdecassation.fr/_rapport/rapport.htm (translation by the author).

²⁵⁰ See interview with Canivet, *supra* note 174; interview with Braibant, *supra* note 189.

²⁵¹ See Burgelin, *supra* note 249.

²⁵² See Embassy of France in the United States, France from A to Z: Marianne, available at <http://www.info-france-usa.org/atoz/marianne.asp> (last visited Jan. 12, 2005).

²⁵³ See Burgelin, *supra* note 249.

the Code.²⁵⁴ Procedural adjustments that affect this codified duty might not, therefore, be appropriately effectuated by informal, non-text-based means.

Moreover, it is tellingly unclear whether the Cour's *Premier président* could traditionally be considered the hierarchical superior of the Cour's head advocate general. In some important sense, the Cour de cassation was perhaps best understood, at least until these reforms, as possessing two "chief justices": the head of the sitting members of the judiciary (currently *Premier Président* Canivet) and the head of the judicial amicus corps (currently *Procureur général* Burgelin).²⁵⁵ This leadership bifurcation not only gives a very good indication of the traditional importance of the advocates general, but also adds fuel to the advocates general's claim that "textual" measures were needed to transform French judicial decisionmaking procedure so radically.

In short, there is no particular reason to minimize the effect or magnitude of the reforms provoked by the ECHR. These procedural developments have effectively sacrificed the time-honored French institution of the advocates general and have, therefore, significantly shifted the traditional balance of argumentative power within the French judicial system.

3. *The French Judiciary's Rise to Institutional Power*

The Cour de cassation's reforms must, therefore, be recognized as a truly seminal moment in the history of French and European law. To state the point bluntly, these reforms have paved the way for an enormous rise in French judicial power, status, and authority. This shift in the balance of French argumentative power flows not only from the marginalization of the advocate general's role, but also from the publication of the *rapporteur's* objective report, which consists largely of the *rapporteur's* analysis of what Americans might call "the state of the law" in a given doctrinal area. Most notably, it retraces and examines in depth *la jurisprudence*—the most important and pertinent judicial decisions. As a result, the routine publication of the *rapporteur's* objective report means, by definition, a tremendous increase not only in the status and availability, but also in the analytic and normative centrality, of French judicial *jurisprudence* in the published judicial record and thus in all future legal debates.

There is nothing new about publishing important French judicial decisions alongside contextualizing documents that present and analyze the development of the courts' *jurisprudence*. After all, important French judicial decisions have traditionally been accompanied in the

²⁵⁴ See *id.*

²⁵⁵ Interview with Braibant, *supra* note 189.

case reporters by an analytic *note* composed by a reputable French academic specialized in the substantive area of the case.²⁵⁶ That said, it is one thing for the contextualizing document to be written by an academic who possesses no particular internal knowledge about the judgment in question;²⁵⁷ it is quite another thing for that document to be generated by the single most procedurally important member of the sitting judicial panel, the *rapporteur*.

In short, the publication of the objective reports will likely change quite dramatically the status and authority of French Cour de cassation decisions. Whereas the rather formulaic French judicial decision has historically been accompanied by external, and thus somewhat conjectural, ruminations about judicial developments, that decision will now be supported by relatively reliable judicial explanations of the Cour's own reasoning. Consequently, publication of the reports changes the status of the public's knowledge of French judicial decisions; now that internal knowledge is publicly available, only an incompetent attorney would not put this *jurisprudential* information at the very center of his own legal analyses.

The production and publication of the *rapporteurs'* objective reports thus threatens to drive judicial *jurisprudence* into the limelight of future French legal debate. Such publication will allow, and eventually likely require, French legal discussion to be framed by an analysis of past judicial decisions, and it seems likely that French judicial decisions will shift from merely persuasive to veritably controlling normative authority. In other words, one may fairly assume that it will only be a matter of time before French judicial *jurisprudence* formally becomes a true "source of the law" in its own right.²⁵⁸ It should be noted that this conceptual transformation would represent the wholesale abandonment of the most fundamental and defining imperative of the traditional French politico-legal system—that judges cannot make law.²⁵⁹

In addition to this important conceptual transformation, the publication of the objective report also profoundly alters the balance of argumentative and normative power between the various players in the French judicial process. Most important, this rise in judicial authority comes most directly at the French legal academic's expense.²⁶⁰

²⁵⁶ See *supra* notes 83–90 and accompanying text.

²⁵⁷ See *id.*

²⁵⁸ Cf. *supra* Part I.B.4.

²⁵⁹ See *id.*

²⁶⁰ Maryse Deguergue's analysis of the traditional relationship between the academic writers and the *commissaires du Gouvernement* at the Conseil d'Etat beautifully demonstrates the prior state of affairs. She refers to the CDGs as the "messengers of *la doctrine*." See MARYSE DEGUERGUE, JURISPRUDENCE ET DOCTRINE DANS L'ELABORATION DU DROIT DE LA RESPONSABILITE ADMINISTRATIVE 722–39 (1994).

This is because in some important sense, the French doctrinal author—rather than the judiciary—has traditionally represented, by means of the *doctrinal note*, the primary vector for the formulation and transmission of knowledge about French judicial decisions.²⁶¹ Now that such knowledge is overtly formulated and disseminated by the sitting members of the judiciary, the academic necessarily becomes yet another passive judicial observer. The argumentative and normative status of *la doctrine* will likely decline accordingly.

This rise in the availability, and thus the authority, of French judicial argument will also likely entail a concomitant fall in the openness of French legal debate. The linguistic opacity and lack of formal legal status of the French judicial decision has traditionally provided the opportunity for nonjudicial institutional players to debate the meaning and importance of particular judicial decisions and thereby to exercise significant argumentative and normative authority. The new publication of previously internal judicial documents that contain the judiciary's analysis of its own *jurisprudence* will tend to concentrate such authority in the hands of French judges, likely resulting in a loss of argumentative freedom for the system's other institutional players. In other words, the French judiciary will now be in a position to do something that has traditionally been beyond its purview: to exercise spin control over the meaning and import of its own judicial decisions.

Perhaps the clearest symbol of this shift in judicial status is the startling fact that not only will the objective report be published in every important Cour de cassation case, but that it will also be signed by the *rapporteur*. This publication of individually signed judicial analyses clearly alters the rigidly communal and institutional nature of the Cour's traditional work processes. For the first time, individual judges will routinely have the ability to appeal directly to people, interests, and standards beyond the Cour. In other words, individual judicial authority and effectiveness can now be linked to factors external to the Cour itself. This new crack in the Cour de cassation's protective seclusion could, therefore, entail a certain loss in French judicial independence—with individual notoriety and influence comes external critique and pressure.

Furthermore, the new French judicial signature breaks the self-effacing anonymity and collegiality that have always been the earmarks of French judicial decisionmaking. Individual judges may gain a certain enduring publicity and notoriety. One may assume that such an increase in individual judicial celebrity will provoke a general rise

²⁶¹ See discussion *supra* Part I.B.5; see also LASSER, JUDICIAL DELIBERATIONS, *supra* note 9, at 304 (exploring the relationship between the judicial syllogism and its companion *doctrinal note*).

in the visibility of the judiciary as a whole, defeating once again the fundamental logic of the traditional French judicial system. The Cour de cassation's reforms thus grant its justices—and eventually the Cour itself—a personal, analytic, and normative prominence which, until now, they had been rather carefully and most intentionally denied.

Although the Cour de cassation's reforms have done quite a bit to increase the argumentative visibility—and thus normative dominance—of the Cour and its justices, one cannot stress enough that these reforms have done remarkably little to grant direct access to the Cour's judicial reasoning. After all, the classic form of the Cour de cassation judgment remains firmly in place; it still consists of an unsigned, single-sentence, collegial syllogism that reveals very little of its underlying logic. In short, it offers nothing more than it ever has.

Moreover, even the published objective report offers distinctly less information than one might have imagined. Its name—the *objective* report—in fact quite effectively conveys the limited nature of its charge. That is, this report summarizes and presents the state of the relevant legislation, judicial *jurisprudence*, and academic *doctrine*. As such, it lays out the fundamental legal framework and analytic context of the case before the Cour. Although the judicial disclosure of this material and conceptual background undoubtedly represents a significant increase in the transparency of the Cour de cassation's decision-making process, it should also be apparent that such schematic disclosure hardly grants full and direct access to the *rapporteur's*—much less the Cour de cassation's—evaluation and eventual resolution of the legal and other issues raised by the case at bar.

Although the objective report offers an important prism through which the Cour's observers can glimpse the basic lay of the legal land as seen by at least one of the Cour's members, that report certainly does not provide a clear, direct, or authoritative statement of the important legal, policy, interpretive, or other factors guiding and eventually motivating the Cour's decision. In fact, it is precisely at this all-important moment, when objective factors and subjective appreciation come together, that the Cour de cassation continues to deny its external observers access to its thought process. It is, therefore, no accident that the Cour publishes only the *rapporteur's objective* report. The second part of her work product—her personal opinion and draft judgment(s)—remains secreted within the inaccessible internal discursive sphere of the high French judiciary. And intentionally so: The internal discourse of the upper reaches of the French judiciary remains in a black box that protects the interpersonal and highly sub-

jective equity arguments that have long been an essential component of the Cour de cassation's reasoning.²⁶²

In other words, the Cour de cassation's reforms represent a compromise. They increase access to the analytic framework presented by the *rapporteur*, but they make sure to maintain the Cour's collegial syllogisms and to preserve a shielded discursive sphere in which the high French judiciary can continue to exercise its traditional modes of judicial decisionmaking.

Like all compromises, this compromise may be assessed in very different lights. As we have seen, the Cour's reforms may represent a brilliantly nuanced solution to the dilemma posed by the ECHR's *Borgers/Kress* jurisprudence. The parties and the general public can learn in a timely and ongoing fashion about the existing state of the law and can thus meaningfully converse with their opponents, the advocate general, the *rapporteur*, and the Cour as a whole. The Cour's reforms can therefore be understood to increase public access to the Cour's reasoning without compromising the more substantive and equitable elements of that reasoning through excessive exposure.

On the other hand, one might easily understand the Cour's reforms to represent the worst of both worlds. First, they compromise almost all of the important objectives of the traditional French judicial system. These reforms allow, and even encourage, the visibility and authority of judicial decisions, individual judges, and the judiciary to rise exponentially. With the abandonment of the advocates general, the depth and quality of internal judicial debate threatens to deteriorate. Finally, the increase in judicial exposure deals a crippling blow to the argumentative input and normative control of academic *doctrine*. In short, the Cour de cassation's own reforms have willingly sacrificed the complex fragmentation of French legal debate, which has traditionally offered a highly effective technique for limiting the ability of the judiciary to exercise concentrated normative power.

As a matter of further concern, this potentially massive increase in the judiciary's argumentative prominence and normative dominance may not be tamed or counterbalanced by sufficient individual, public, and argumentative judicial accountability. The Cour de cassation's sphinx-like judicial decisions remain unchanged in their unsigned, single-sentence, collegial and syllogistic form. Although the *rapporteur's* objective report will now supplement the Cour's most important decisions, that document offers little in the way of individual, argumentative judicial accountability. After all, this document contains the work of only one of the sitting members of the judicial

²⁶² See *supra* notes 46–53 and accompanying text.

panel—work that may or may not accurately reflect the analytic framework of the judicial panel as a whole.

Indeed, this objective report hardly represents the totality of the *rapporteur's* own production. It intentionally refuses access to precisely the information that meaningful judicial accountability and public understanding might require, i.e., a serious account of the—potentially different—means by which the various members of the court approached, considered, and ultimately resolved the difficult issues that underlie the case at bar. In short, it is not at all clear that the limited increase in access to the Cour de cassation's decisionmaking process sufficiently compensates for the significant deliberative, institutional, and cultural losses that the Cour's reforms have occasioned.

VI

THE FULL DIMENSION OF THE PROBLEM

The foregoing analysis elucidates the fact that the fundamental problem underlying the *Borgers/Kress* line of litigation is the clash of two quite different understandings of judicial control and legitimacy. The French system has traditionally rested on a distinctly republican vision of elite and sheltered institutional debate and deliberation.²⁶³ By contrast, the system promoted by the ECHR's *Borgers* jurisprudence rests on a far more populist vision of individual and public legal argumentation. It is precisely the incommensurability of these two distinct visions that has provoked the painful and ongoing conflicts between the ECHR, the French supreme courts, and other European supreme courts patterned on the French model.

A. A Quick Recap

As Part I demonstrated, the traditional French model has long been constructed of multiple and interlocking elements. The rigidly organized French institutional structure has ensured that judicial decisionmaking functions as the catalyst for several professional hierarchies to work together to produce truly informed, high-level debates between seasoned professionals.²⁶⁴ In turn, the seclusion and protection provided by the characteristic French discursive bifurcation has enabled those professionals to engage in particularly important types of debate that tend to be off-limits to the public—namely, open-ended discussions that explicitly consider issues of equity, substantive justice, and socially responsive legal adaptation.²⁶⁵

²⁶³ See *supra* notes 19–22 and accompanying text.

²⁶⁴ See discussion *supra* Part I.B.2.

²⁶⁵ See discussion *supra* Part I.B.3.

Having thus encouraged such frank and high-level judicial conversations, the French system has deployed the “sources of the law” doctrine to cap the legal status of the resulting judicial decisions.²⁶⁶ As a further safeguard, the French have minimized the argumentative and normative centrality of these judicial decisions both by composing them as relatively uninformative and highly formulaic syllogisms that do not refer to prior *jurisprudence* and by pairing important judgments with decidedly more forthcoming *doctrinal notes*.²⁶⁷ Finally, the French system’s state-administered and meritocratic educational, vocational, institutional, and even conceptual structures have provided the judicial system with the necessary political and social legitimacy by establishing an ethos of justifiably elite representation.²⁶⁸ In short, all legal actors involved in French judicial decisionmaking have had to earn their positions through rigidly meritocratic and explicitly state-sanctioned processes.

As a result, the French system of judicial control, accountability, and legitimacy rests upon the notion of *quality*. Appropriately elite representation through explicitly meritocratic state institutions creates the requisite deliberative space for a select corps of actors to respond to the issues raised through litigation in an appropriately subtle, communal, knowledgeable, and institutionally controlled manner. The quality of the judicial institution, of its membership, and of its work—as measured by other elite initiates both inside and alongside the institution—functions as the primary guarantee of the institution’s legitimacy.²⁶⁹

B. Incompatible Visions?

Needless to say, the ECHR’s *Borgers/Kress* jurisprudence does not mesh well with this closed, elite, republican, institutional, and quality-based approach to judicial procedure. Demonstrating a far more populist and individualist bent, the ECHR has imposed procedural requirements that assume that the appropriate foundation of judicial control and legitimacy lies in public access to, and engagement in, legal argument. According to this democratic argumentative model, public access to the arguments of individual judges functions as the primary guarantee of accountable and legitimate judicial behavior.

²⁶⁶ See discussion *supra* Part I.B.4.

²⁶⁷ See *supra* notes 83–91 and accompanying text.

²⁶⁸ See discussion *supra* Part I.B.6.

²⁶⁹ It should, of course, be noted that this notion of quality assumes the existence of a unified conceptual, educational, professional and institutional apparatus that ensures that the judiciary is meaningfully representative of French society. For a more detailed analysis of these problematic assumptions, see LASSER, *JUDICIAL DELIBERATIONS*, *supra* note 9, at 322–37.

Now that we can clearly visualize the fundamental division between the two visions of judicial procedural justice operative in the *Borgers* line of disputes, it should be abundantly clear why the ECHR's jurisprudence has so shaken the French. Not only is the ECHR's reasoning, in some important sense, incomprehensible to the traditional French understanding of the proper foundations of judicial legitimacy, but that reasoning even appears to require that those traditional foundations be actively subverted, if not entirely dismantled.²⁷⁰

To those committed to the classic French conception, the ECHR's *Borgers* jurisprudence appears as an affront: It effectively and incomprehensibly mandates a decline in the quality of judicial decisionmaking. To the extent the judicial amicus can no longer play a meaningful role within the legitimately protective walls of the judicial institution, the quality—and thus the very integrity—of the French judicial decisionmaking process is compromised. Mirroring the substance of *Procureur général Burgelin's* anguished remarks,²⁷¹ *Premier Avocat de Gouttes* thus argues:

[The ECHR-imposed inability of the Advocates General to take part fully in the Cour de cassation's deliberations] would be damaging . . . especially for the litigants themselves, who would be deprived in many cases of the guarantee provided by a second examination of their cases by an Advocate General

Thus, paradoxically, the ECHR's jurisprudence runs the risk of lowering the quality of the Cour de cassation's judgments, to create inequalities in the treatment of cases, to limit the guarantees provided to the litigants and their attorneys, to lower the transparency of the procedure and to impoverish and sterilize the debates, all of which would, one would expect, run counter to the fundamental objectives of the European Convention on Human Rights.²⁷²

The exasperation of these French jurists is entirely rational. The ECHR's jurisprudence does, in fact, rest on a fundamentally different conception of judicial accountability and legitimacy than that underlying the traditional French system. As a result, the quality of French judicial decisionmaking is being sacrificed to the ECHR's noncomprehension of the French system and to its incompatible notion of proper judicial procedure.²⁷³

²⁷⁰ Thus, Professor Andriantsimbazovina argues:

The European Convention is naturally an instrument for the deconstruction of state norms or practices that violate it. But it must not become a tool for dismantling state institutions and practices that have proven themselves in the defense of fundamental rights: such is the case of the CDG in the French administrative courts.

Andriantsimbazovina, *supra* note 190 (translation by author).

²⁷¹ See *supra* note 250 and accompanying text.

²⁷² de Gouttes, *supra* note 186 (translation by author).

²⁷³ *Id.*; see also Haïm, *supra* note 192.

But this is only the first part of the problem. Complicating matters is the fact that many French jurists have come to understand the division between these two largely inconsistent judicial conceptions as reflecting the common law/civil law divide. That is, to many French commentators, the ECHR's *Borgers/Kress* jurisprudence has come to represent the foisting of a common-law conception of adjudication upon an unwilling French legal system. Thus Professors Bernard Beignier and Corinne Bléry argue:

It is undeniable that European law has already had a significant influence on national law: whether by fear or by conviction, national supreme courts have codified and continue to modify their *jurisprudence* to follow that of the Strasbourg Court. All of this follows more or less from the European Convention on Human Rights. That said, the ECHR, whose mission is supposed to consist of producing "standards, sources of inspiration for national leaders ("responsables")," is not limiting itself to that mission. In fact, we are witnessing not the creation of standards born of "the meeting of diverse national cultures, laws and experiences within common structures," but rather the transformation of a legal rule particular to a single legal system into a European dogma, the imposition on all the member states of a law belonging to only one of them. It is of course a truism to say that two radically different systems coexist within Europe: the Common Law countries and the (written law) countries of the Romano-Germanic tradition [i.e., the Civil Law countries]. The reconciliation of the two is most often impossible, which is to say that one or the other conception must be chosen [in any given instance]. The notion of [judicial] impartiality offers a perfect illustration of this obligation to choose. As Mrs. Magnier has so well demonstrated, the French conception is that of *subjective impartiality*. But the French *jurisprudence*, under the influence of the ECHR, has been driven to recognize the notion of *objective impartiality*, which rests essentially on appearances, an Anglo-American notion if there ever was one.²⁷⁴

Similarly, in an article absolutely dripping with sarcasm and indignation—not to mention humor—Professor Andriantsimbazovina relates a dream conversation between an eminent colleague and a Marianne-like²⁷⁵ fairy of French law who, in order to provoke the learned colleague, mockingly inserts the ECHR's *Borgers/Kress* line of decisions into—horror of horrors—the published editions collecting "The

²⁷⁴ Beignier and Bléry, *supra* note 173 (internal citations omitted) (translation by author).

²⁷⁵ Marianne is the name of the female icon of the French Revolution, who wears a red Phrygian cap of liberty. See generally Embassy of France in the United States, France from A to Z: Marianne, available at <http://www.info-france-usa.org/atoz/marianne.asp> (last visited Jan. 12, 2005).

Great Cases and Decisions of French Law.”²⁷⁶ In response to the learned scholar’s indignant outbursts about the ECHR’s destruction of French legal culture and traditions, the fairy sarcastically answers:

Given that the ECHR possesses a hybrid conception of law that mixes written and non-written law, Continental and Common Law, it is satisfied with the current status of the [Conseil d’Etat’s] notes in deliberations, even if these notes are not formally established by some legislative or administrative text. It is your training as a jurist from the written law tradition that drives you to search at all costs in the *Kress* decision for a non-existent requirement to legislate formally on this matter. And of course, what a paradox in your search! A certain Anglo-Saxon approach to equitable procedure disembarks onto the shores of French law, knocking everything over. Yet all you can say to adapt your law to the requirements of the European Convention is: “Let’s Legislate!” In conformity with this [new] European conception of equitable trial procedure, you should not disturb the Anglo-Saxon charm of your administrative [executive] law. The note in deliberations contributes to the respect of the adversarial principle. That’s good. What more do you want?²⁷⁷

As these two passages demonstrate, French jurists commonly perceive the ECHR’s *Borgers/Kress* jurisprudence not only to be destructive of the quality, and thus the legitimacy, of French judicial decisionmaking, but also to represent an unwelcome common-law incursion. In fact, even advocate general Colomer of the European Court of Justice (ECJ) has interpreted the ECHR’s jurisprudence in that light, arguing:

[T]he requirements of an adversarial process only call for particular judicial attention when a failure to observe them results in the breach of a fundamental right, that is to say, when it causes a breach of the rights of defence.

However, the European Court of Human Rights has adopted the Anglo-Saxon notion of an adversarial process stating, in its judgment of 20 February 1996 in *Vermeulen v Belgium*, that it meant “the opportunity for the parties in civil or criminal proceedings to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court’s decision.” That case-law has been approved on many occasions, without the utter impartiality and independence of the various judicial figures concerned

²⁷⁶ See Andriantsimbazovina, *supra* note 190.

²⁷⁷ *Id.* (translation by author); see also Jean-François Burgelin, *La Paille et la poutre*, 2004 D. Chron. 1249, 1252 (denouncing the ECHR’s approach to the judiciary as “the advance guard of American influence”).

(an impartiality and independence which permeates their acts) having made the least impression on that line of argument.²⁷⁸

Thus, the French are not the only ones reading the ECHR's jurisprudence as an "Anglo-Saxon" invasion.

This conflation of the *Borgers* jurisprudence and common law legality should not be surprising. In fact, in certain respects, it is quite understandable. The fundamental division between the French and American conceptions of judicial control and legitimacy consists precisely of the distinction between the French republican-institutional model and the American democratic-argumentative one.²⁷⁹ The French notion places its faith in the ability of meritocratic state institutions to represent the French citizenry in an organized and rational manner. The American system, far more suspicious both of such a unified understanding of the citizenry and of such an elite state institutional structure, places its trust in the ability of individual actors to challenge argumentatively other individual actors who happen to argue from the bench.

In this French versus American context, the European Union's chief judicial institution—the ECJ, as opposed to the ECHR—emerges as a simultaneously promising and problematic in-between model.²⁸⁰ On the one hand, its bifurcated discursive structure—including both a short, collegial, unsigned, formal, and magisterial judicial decision and a longer, signed, and more personal opinion of its individual advocates general—obviously reflects the French model upon which it was originally based. On the other hand, its publication of the distinctly more policy-based advocate general opinions alongside the ECJ's formal judicial decisions clearly represents a shift towards the more individually oriented and argumentative American model. Operating in the EU's highly contested transnational normative context, and thus lacking the unified and meritocratic educational, professional, and institutional structures of the French system from which it derived, the ECJ thus militates distinctly towards a more argumentative mode of judicial control and legitimacy.²⁸¹

If the ECJ, therefore, represents an in-between model of judicial control and legitimacy, the ECHR itself—never mind its *Borgers/Kress* jurisprudence—falls distinctly on the latter side of the republican-institutional versus democratic-argumentative divide. After all, the ECHR's decisions are composed of relatively long, discursive, individually signed judicial opinions that come complete with concurrences

²⁷⁸ Opinion of Advocate General Ruiz-Jarabo Colomer in *Gerry Plant and others v. Commission of the European Communities*, 2001 E.C.R. 0* (citations omitted).

²⁷⁹ See LASSER, *JUDICIAL DELIBERATIONS*, *supra* note 9, at 322–47.

²⁸⁰ See *id.* at 347–60.

²⁸¹ *Id.*

and dissents, overt and often heated disagreements, and the like.²⁸² To the French, therefore, the ECHR simply does not appear to be a neutral arbiter in the *Borgers* line of litigation. To the contrary, one of the two modes of judicial procedure is deeply intertwined with the Strasbourg Court's own procedural model. This explains why the French doctrinal literature is studded with what might otherwise appear to be vaguely paranoid suggestions that the ECHR's *Borgers* jurisprudence represents an Anglo-American, Anglo-Saxon, and common-law attack on French civil-law judicial traditions.²⁸³

As *Procureur général* Burgelin maintains in an almost shockingly overt passage:

Not that one should harbor excessive illusions: the Europe of the Rights of Man is but the advance guard of American influence, whose judicial culture is in the process of flooding the entire world. Europeanization is but the mask of a globalization that is currently submerging all of us.²⁸⁴

The link between the European decisions (and Europe generally), American judicial imperialism, and the death of French civil-law particularism could hardly be more apparent.

Of course, the cross-cultural noncomprehension demonstrated by the ECHR's insensitive—and perhaps even destructive—jurisprudence is all but matched by the cross-cultural noncomprehension demonstrated by the French academics' vehement and reductive responses. Indeed, it borders on the absurd for French jurists to suggest that the ECHR's "doctrine of appearances" represents, in and of itself, a central element of the common-law notion of equitable judicial procedure, never mind of common-law legality as a whole. If nothing else, it is clearly simplistic to suggest that there exists *a* (single) Anglo-Saxon or common-law notion of equitable judicial procedure. Although this French oversimplification is tellingly blind to context, it is not the key point.

What really matters is the fact that transparency and accessibility are indeed extremely important to American common-law notions of judicial control and legitimacy, but not merely for the sake of appearances. This misleading French oversimplification really sends the ensuing discussion down blind alleys, just as does, for example, the misleading ECHR oversimplification that the French judicial amicus should be considered an objective opponent of one of the parties to a

²⁸² See, e.g., *Kress v. France*, 2001-VI Eur. Ct. H.R. 1, 41.

²⁸³ Guy Braibant—a noted scholar of French administrative law, longtime member of the Conseil d'Etat, and French representative to the Convention for the drafting of European Union Charter of Fundamental Rights—suggests that this attack derives from the high density of Anglo-Saxon attorneys pleading before the ECHR, as compared with the relatively small number of French attorneys. Interview with Braibant, *supra* note 189.

²⁸⁴ See Burgelin, *supra* note 245, at 1252.

given case merely because his suggested solution is likely to favor one party's position over another.

Each of these generalizations fails to seek or consider—never mind grasp—the guiding logic that underlies the other system. Each oversimplification focuses on characteristics that foreign observers may readily observe and then categorize in ways that make perfect sense in the context of their home systems. Yet each fundamentally misses the ways in which the observed characteristics may fit sensibly—and perhaps quite centrally—into the framework of the other system. As a result, each ends up discussing radically decontextualized individual facets of the other system's decisionmaking procedure without ever grasping either (a) how that particular facet fits into the system's material and conceptual whole, or (b) how seemingly minor proposed adjustments might, in fact, quite seriously undermine the ethos and operation of the other system.

Thus, the ECHR's oversimplification and the indignant French *doctrinal* response each miserably fails to grasp the other. It is probably for this very reason that the *Borgers* line of litigation so often appears to consist of unfocused and vaguely uncomprehending accusations, tepid and half-hearted responses, and the like. Neither side ever really engages the other straight-on by recognizing, acknowledging, and appropriately responding to its concerns. Instead, the debate gets shunted off into subissues such as "equality of arms," "objective opponents," "quality," and "appearances," each of which seems vitally important to one side in the dispute but relatively trivial, misguided, or even silly to the other.

For instance, the ECHR's insistence upon the right of the parties to respond to the oral arguments of the judicial amicus, which to any American common-law jurist would undoubtedly seem so central to equitable trial procedure that one could hardly imagine a fair trial without it, represents little more than a nominal professional courtesy to knowledgeable French jurists. Given that no part of traditional French judicial procedure endeavors to encourage or require an attorney's oral response, the ECHR's demands function as nothing more than a useless and awkward intervention.

After all, what is the use of setting up an elaborate new oral procedure when litigants almost never attend or participate in oral arguments in the first place? Why invite the reopening of adversarial responses when the parties have already had ample opportunities to put forward their respective arguments, responses, counter-responses, and the like (in writing)?²⁸⁵ Moreover, why do so at precisely the point when partisan argument has finally come to an end and the case

²⁸⁵ See *supra* Part III.A.2.

has been handed over to the judicial magistrates? Why drive the highly knowledgeable, deeply respected, and totally nonpartisan judicial amicus out of deliberations at all, especially when the French bar has argued so staunchly against such exclusion?²⁸⁶ And why, in so doing, force some ridiculous procedural solution, such as requiring either the judicial amicus or the judicial panel to leave the typically deserted courtroom so that they can be sequestered from each other for the sake of the (now impoverished) deliberations, only to reunite shortly thereafter to move onto the next case?²⁸⁷

Therefore, and quite frustratingly, the ECHR and French jurists constantly seem to be missing the other's true point. The French *doctrinal* literature, for its part, has repeatedly reduced the ECHR's *Borgers/Kress* litigation to a struggle between real, high-quality judicial procedure on the one hand and mere "appearances" on the other. Professor Haïm argues sarcastically:

Since, after the *Kress* decision, it must be recognized that the appearance of equitable trial process carries more weight than the reality thereof, and that to save appearances one must deprive litigants of the guarantee provided by the CDG's active participation in the work performed by the judicial panel of which he is a member, let's just abolish the CDG altogether.²⁸⁸

At the close of a more sober article, Professor Haïm makes this point in a more straightforward fashion: "In these conditions . . . it is far from certain that litigants or the quality of the decisions of the administrative courts would have much to gain from the mirage of more open collegial debate."²⁸⁹

Demonstrating the same fundamental conceptual framework, Professors Beignier and Bléry declare:

To invoke a principle [in this case, "impartiality"] against its application truly amounts, in the precise sense of the term, to pervert it. It is not really to distort principles; to misrepresent their scope is to dissolve them. Academic *doctrine* appreciates very much the English legal adage that it has happily discovered and now plays with as if it were a play of mirrors: "Justice must not only be done, it must also be seen to be done." To this, the Cour de cassation has sanely answered: "Justice involves reality, not merely appearances."²⁹⁰

²⁸⁶ The French bar argued strongly for maintaining the traditional French system of decisionmaking. See *Kress*, 2001-VI Eur. Ct. H.R. at 65 (discussing the significance of the French bar's position).

²⁸⁷ See *Les réquisitions de l'avocat général ne peuvent être transmises avant l'audience au demandeur en cassation, celles-ci étant présentées oralement à l'audience*, D. 1998 Somm. 176, note Pradel; Burgelin, *supra* note 245, at 1250.

²⁸⁸ Haïm, *supra* note 191.

²⁸⁹ Haïm, *supra* note 192.

²⁹⁰ Beignier and Bléry, *supra* note 173.

In each of these instances, the French academic responds to the poorly contextualized, badly theorized, and thus, clumsy and misdirected ECHR jurisprudence with equally poorly contextualized, badly theorized, clumsy, and misdirected defensive responses. To state the obvious, the ECHR's jurisprudence—or, for that matter, “Anglo-American,” “Anglo-Saxon,” or some other form of common-law legality—is no more about mere appearances than French legality is about partisan judges.

In contrast, if the current ECHR disputes over fair judicial procedure were to be addressed in a serious and knowledgeable fashion, the resulting discussion would look very different. Suddenly, instead of focusing on decontextualized side issues, the debate would consider far more meaningful, broader, and thus, by necessity, far more difficult and perhaps even disturbing, questions. In essence, the key question is nothing more elaborate than this: *Is the French republican-institutional model of judicial decisionmaking equitable?*

Despite its patently massive scope, it is not really possible to reduce this distressingly broad question into significantly smaller and more manageable parts. This is because, as we have seen over and over again, equality of arms, informational rights, response rights, and the like are far too parochial in meaning and relevance to function effectively as cross-contextually sensitive standards of analysis. As Antoine Garapon insightfully explains in his new book, even the notion of adversarial exchange does not mean the same thing or function in the same way in different legal systems:

The French system feels the need for adversarial debate in order to improve the quality of justice, but unable—or unwilling—to leave it to private parties, it has largely internalized this adversarial dimension. Adversarial argument is provided by another professional judicial magistrate who provides an independent point of view. That is the *raison d'être* of the Advocate General at the Cour de cassation or of the CDG, of which one hears so much about these days now that the ECHR has called them into question.

Both the Conseil d'Etat and the Cour de cassation demonstrate the need to promote adversarial exchange both for the sake of the good administration of justice and in order to stimulate the legal imagination, but they are leery of leaving it to the parties themselves

.....

....

[In France,] this [judicial] exchange must remain internal. In fact, “if the [judicial *amicus*] opinion were made subject to response by the parties, this would necessarily damage the frankness of his dialogue with the sitting judicial panel and would therefore damage the quality of the decisions of the Conseil d'Etat.” The internal nature of the dialogue thus contributes to the quality of the judicial

process—or such is the belief in France—while the Common Law takes exactly the opposite view

. . . [I]n French legal culture, rigorous dialogue within a collegial institution inspires more confidence than does an “external” argument.²⁹¹

In short, one must approach and consider the French (or any other) approach to judicial decisionmaking with enormous sensitivity to the rich, complex, and distinctive intellectual, cultural, and material framework in which, through which, and by which that approach operates.

Needless to say, the sheer magnitude of such a task is terribly daunting. But, frankly, without making such an investment, the interaction between the ECHR and the French supreme courts is condemned to be a largely piecemeal, haphazard, and even rather random affair, in which each side latches onto some specific position or practice of the other, misrepresents and misunderstands it by decontextualizing it, and thus provokes changes, the eventual repercussions and significance of which—if predictable at all—are never understood in the first place. Analyzing the facets of each judicial or legal system in an atomized and acontextual manner simply drives the discussion away from what really ought to be the overarching and determinative question: Is the French—or for that matter, the ECHR—model of judicial decisionmaking *fair*?²⁹²

To my mind, it is enormously helpful to develop certain shorthand heuristic structures that both direct and check the manner in which one approaches such an enormous and yet slippery question. For this reason, I have taken to using the terms “republican-institutional” and “democratic-argumentative” to conceptualize and analyze the relationship between French, American, and European judicial decisionmaking.²⁹³ These terms are summary descriptions that nonetheless highlight the rich conceptual and material universes in which any given facet of the observed legal system perpetually resides. The terms thus function simultaneously as reminders and warnings of all that surrounds the specific issues and practices under analysis. To the extent that such heuristic crutches help the comparatist to keep the contextual big-picture in mind, the key question—is the given (French, ECHR, or even U.S.) model of judicial decisionmaking *fair*?—can then be approached in a manner that is not only more comprehensive, but also more nuanced and precise.

²⁹¹ GARAPON & PAPADOPOULOS, *supra* note 189, at 110–12 (quoting Frédéric Rollin, Note under C.E. 29 July 1998, L'Actualité juridique—Droit administratif, 20 Jan. 1999, 72).

²⁹² Interview with COSTA, *supra* note 184.

²⁹³ See, e.g., LASSER, JUDICIAL DELIBERATIONS, *supra* note 9, *passim*; see also, e.g., *supra* Part I.A.

Thus, for example, one of the most remarkable aspects of the *Borgers/Kress* jurisprudence is the ECHR's categorical refusal to distinguish at all on the basis of the different subject matter jurisdictions of the various supreme courts at issue. In fact, as we have seen, the ECHR has openly scoffed at the repeated attempts of the national supreme courts to distinguish themselves on such grounds from the Belgian *procureur général* criticized in *Borgers*.²⁹⁴

Although the ECHR's implicit suggestion that self-preservation was a significant motivation in the arguments made on behalf of the assorted French-style supreme courts is undoubtedly correct, the subject matter distinctions were, nonetheless, well worth taking seriously. It is, in fact, a very good question whether an institutional mode of elite and expert representation of litigated issues might be quite desirable and effective in certain kinds of disputes but decidedly less appealing in others. For example, even the American legal system is full of substantive areas of law in which specialized administrative agencies, such as the NLRB or the EEOC, press claims on behalf of particular types of plaintiffs. This kind of specialized institutional handling of litigated issues is by no means inherently unusual or suspect.²⁹⁵ Indeed, for public law controversies involving the proper exercise of interbranch governmental power, it may be entirely reasonable to deploy a system in which individual citizen complaints trigger an institutional mode of review by seasoned, knowledgeable and elite administrative veterans, who, shielded by collegial—and thus externally opaque—institutional structures, would be protected from governmental pressure.

On the other hand, the assessment of such an expert institutional approach could reasonably lead to different conclusions in the criminal context. It is entirely plausible that the deeply personal liberty interests at stake in criminal trials might lean in favor of a more individually controlled, democratic-argumentative model. With personal reputation and even freedom at stake, the criminal defendant may prefer to control his or her own fate in such matters. Thus, he or she could reasonably conclude that defending against a criminal prosecution is not the time to trust the operation of the judicial decisionmaking process, no matter how representative the institutional structures may be of the population as a whole, and no matter how elite and expert the institutional actors may be. In other words, the more individually pressing the subject matter of the judicial proceeding, the

²⁹⁴ See *supra* note 201 and accompanying text.

²⁹⁵ Of course, there have been lively arguments for and against such agency representation. See, e.g., Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401 (1998); Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1 (1996).

more the citizen may wish to manage the case on his or her own behalf.

Of course, this more nuanced and subject-sensitive analysis, in which the ECHR has simply refused to engage, immediately drives one to consider ever more specific and contextually embedded issues. For example, is there any reason to believe that anyone aside from a statistically microscopic number of criminal defendants might actually be better off—materially, philosophically, politically, or otherwise—for having been granted the nominal capacity to manage the argumentation of their criminally litigated affairs?²⁹⁶ Needless to say, the answer to this kind of question is hotly debated, even in the American academic literature. There certainly exists no shortage of commentators/comparativists who argue that the crushing reality of American-style plea bargaining has almost totally undermined the great individual constitutional protections theoretically afforded by full-blown American criminal trial procedure.²⁹⁷

It is not my intention to resolve such questions on the merits in this Article. Instead, my point is simply to illustrate just how different such questions are from those addressed by the ECHR in its *Borgers/Kress* jurisprudence. These questions call for highly specific and deeply contextualized examinations: What are, *inter alia*, the litigation structures, the professional frameworks, the educational processes, the administrative hierarchies, the institutional and political modes of oversight, the selection and advancement mechanisms, the daily professional routines, the institutional budgets, and the attorney fee arrangements—never mind the dominant and/or conflicting mindsets and social welfare mechanisms—that operate in the particular branch of the national legal system under scrutiny, as well as in the legal and political culture as a whole? How could one possibly try to resolve questions of comparative procedural justice on the merits without addressing such issues head-on?

²⁹⁶ Some thirty years ago, Mirjan Damaška asked, in his inimitable way, whether the elaborate, but rare, American evidentiary style is preferable to a more realistic, and thus more generally available, one:

Assuming that we are not bound by preexisting legal *données*, is it better to have a very elaborate evidentiary style which, in an age of ever increasing crime rates, we can afford to use only in a miniscule fraction of cases, or to devise factfinding systems which, while less demanding, might then be applied universally? It is almost like asking a lady whether she prefers an orchid once a year or a modest bouquet every day.

Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 552 (1973).

²⁹⁷ Al Alschuler has long been the central figure in this debate. See, e.g., Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652 (1981); Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931 (1983).

In short, the frighteningly broad question—is the procedural model fair?—informed and guided by well-developed heuristic tools, pushes not only towards more comprehensive and holistic, but also toward more nuanced and precise, comparative analysis. Such a question invites and even requires one to contextualize. The issue of comparative procedural justice cannot merely consist of measuring each system's promises. In other words, the heuristic tools are not an end in themselves. They are not only meant to arrive at a massively abstract, though actually quite illuminating and interesting, analysis of the theoretical pros and cons of Jacobin versus libertarian visions, or of democratic versus republican approaches. They are also meant to raise these conceptual frameworks precisely in order to embed them in, and to allow them to inform our understanding of, the specific material and institutional environments in which and through which they operate.

To summarize in broad terms, the *Borgers* litigation puts two fundamentally different models of judicial decisionmaking into play. The first, which is fairly reminiscent of the American model, and which the ECHR itself largely replicates, offers an *argumentative* framework and a *democratic* ethos. The second, which is characteristic of the French model and its descendents, offers an *institutional* framework and a *republican* ethos. Focusing as it has on decontextualized particulars, the ECHR has missed this big picture and has, therefore, failed to tie these particulars into their complex conceptual and material frameworks.

To be blunt, the ECHR has been engaging in bad comparative-law practice. The Court has been fiddling around the edges of the French model of judicial decisionmaking, attempting to paste onto it some more democratic and participatory-looking argumentative trappings. Given the institutional context of the French system, however, such accouterments add little that is of practical use to litigants, despite the fact that they seriously threaten to undermine the existing republican and institutional bases of French judicial control and legitimacy.

The paradox is that things could have been a lot worse. In some important sense, the ECHR's blindness to the bigger conceptual and material picture has limited the scope of the potential conflict between the ECHR and French procedural models. Had the ECHR worked out a coherently theorized understanding of the different logics implicitly underlying the two models, the budding quarrel between them could easily have turned into an immediate fight for the French model's very survival. In this way, the *Borgers/Kress* litigation provides an example of the old adage that ignorance is bliss. This very ignorance has permitted the ECHR to focus on inducing what may—de-

pending on the ongoing negotiation of the numerous institutions and players involved—prove in the long-term to be relatively cosmetic French adjustments, rather than provoking a more comprehensive and thus potentially final and irreparable confrontation.

CONCLUSION

The ECHR's *Borgers/Kress* jurisprudence has entailed a highly problematic trade-off. In exchange for dubious argumentative gains for litigants, the ECHR has, at the very least, endangered the future of the traditionally republican and institutional foundations of French judicial control and legitimacy.

On one side of the equation, the republican and institutional structures of French judicial decisionmaking have undoubtedly been somewhat weakened. The judicial amicus has been threatened with professional isolation. Such banishment not only sacrifices the vital conversation between the judicial amicus and the *rapporteur*, but also compromises the meritocratic French system of professional education, training, promotion, and oversight. As a result, both the short- and long-term quality of internal French judicial deliberations have been damaged, which subverts precisely the republican and institutional logic that justifies the traditional French system of judicial control and legitimacy.

On the other side of the equation, the ECHR has pushed for reforms that fit awkwardly in the French procedural framework. For example, the ECHR has sought to promote litigants' ability to access and respond to what had traditionally been largely internal judicial arguments, and the Court has worked to reshape appearances by barring the amicus from judicial deliberations. But, as we have seen, however sensible such reforms may seem when viewed through the more individual and adversarial lens of the democratic-argumentative model, they border on arbitrary and nonsensical when viewed through the more collegial and deliberative lens of the republican-institutional model. Grafted pell-mell onto the traditional French decisionmaking procedures, such reforms—without more—do little to improve the argumentative capacity of the litigating public.

As a result, this rather poor trade-off has provoked strong French responses. To those most closely tied—intellectually, professionally and symbolically—to the traditional French order, namely, the Conseil d'Etat, the answer has been to minimize the damage by half-heartedly adopting half-measures. Stonewalling as best it can, the Conseil d'Etat has held onto its old ways with much resolve and a certain measure of success.

But for others, such as the *Premier Président* of the Cour de cassation, the answer has been to make the most of the situation by institut-

ing a wave of absolutely fascinating—and, perhaps not surprisingly, tactically advantageous—reform. Far from resisting the ECHR, Chief Justice Canivet has thus seized the opportunity to institute what can only be considered a major overhaul of the Cour's internal procedure. This set of procedural reforms all but sacrifices the advocate general. Indeed, banished from pre- and post-oral argument judicial deliberations and denied access to the *rapporteur's* preparatory work, the advocate general is suddenly skating on the edge of procedural irrelevance. Similarly, now that public explanation and transmission of knowledge about French judicial decisions has been entrusted to the *rapporteur*, the academic writer—traditionally at the very center of the ongoing French process of judicial normative development—has largely become yet another passive judicial observer. In short, these reforms stand to alter the theory and practice of the Cour de cassation's decisionmaking quite significantly and are eventually likely to do the same at the Conseil d'Etat.

Needless to say, such internal French jockeying in response to the ECHR's awkward external prodding represents a field day for comparativists interested in the complex interplay between the French and European legal systems. But only time will tell whether this schismatic French response actually benefits the French public in some significant way or offers a fertile environment for the potentially large-scale reordering of the balance of normative power in the French judicial system.

The danger, of course, lies in the possibility that the Cour de cassation's reforms grant a new argumentative prominence—and thus normative dominance—to the Cour and its judges (precisely what the traditional French system was designed to avoid), without counterbalancing or taming this new judicial power with sufficiently effective individual, public, and argumentative judicial accountability. In other words, these reforms may undermine the existing republican and institutional bases of French judicial control and legitimacy without going far enough in the direction of the democratic-argumentative model to make up for the loss.

Instead, the Cour de cassation's reforms appear to move distinctly in the direction of what one may properly identify as the emergent, pasteurized, and bland hodge-podge model that characterizes the European Court of Justice. That is, these reforms maintain much of the traditional French forms from which they derive, but also adopt a certain—and perhaps insufficient—measure of the more argumentative features that tend to characterize ECHR, and especially American, judicial decisionmaking.²⁹⁸

²⁹⁸ For a more detailed analysis of the ECJ's conglomerate decisionmaking model, see generally LASSER, JUDICIAL DELIBERATIONS, *supra* note 9.

In an amusing historical twist, therefore, the very existence of the ECJ's own conglomerate model places an effective cap on just how far the ECHR is likely to force the French in the direction of the democratic-argumentative ideal. As a matter of sheer realpolitik, it is more or less inconceivable that the ECHR would condemn the French, for example, for failing to provide sufficient public access to the arguments of individual judges, or for failing to allow concurrences and dissents, because then the ECHR would have to do the politically unthinkable: condemn the ECJ as well.

Amazingly enough, it may be that the French model's once-powerful influence will turn out to be precisely what now ensures its continued survival, if only in the foreseeable future. But the cost of that survival may be the adoption of more individually oriented argumentative features that might undermine the very justification for that model's existence, i.e., the complex republican and institutional matrix that has given the traditional French system its unusually deliberative—though highly externally uncommunicative—character. In the long-term, therefore, the ECHR's *Borgers/Kress* jurisprudence and the Cour de cassation's ensuing reforms really could mark the beginning of the end—or the beginning of a creative new beginning—of the French civil-law model of judicial decisionmaking.

