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Anticipating Three Models of Judicial Control, Debate and Legitimacy: The European Court of Justice, the Cour de cassation and the United States Supreme Court

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Anticipating Three Models of Judicial Control, Debate and Legitimacy: The European Court of Justice, the Cour de cassation and the United States Supreme Court

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Abstract:

This paper excerpts and summarizes Professor Lasser's forthcoming book comparing the argumentative practices of the European Court of Justice, the French Cour de cassation and the United States Supreme Court. It argues that the Cour de cassation depends primarily on an institutional approach for generating judicial control, debate and legitimacy; that the Supreme Court depends primarily on an argumentative approach; and that the ECJ depends on a conglomerate mode that pastes together facets of the institutional and argumentative approaches.

The paper claims that the discursive practices, institutional arrangements and conceptual structures of these three courts are best understood by focusing on a fundamental structural feature that distinguishes between the French and American models of judicial discourse. Stated in the simplest terms, this difference boils down to the fact that the French model bifurcates its argumentation into two distinct discursive spheres (only one of which – the syllogistic French judicial decision – is consistently made public), while the American model integrates its two modes of argument in one and the same public space, namely, in the judicial decision itself. The European Court of Justice maintains the bifurcated French discursive model, but softens it by adopting a systemic, "meta" teleological form of argumentation that it deploys publicly in both its judicial decisions and its AG Opinions.

I. Introduction

This paper summarizes my forthcoming book comparing the argumentative practices of the European Court of Justice, the French Cour de cassation and the United States Supreme Court. It argues that the Cour de cassation depends primarily on an institutional approach for generating judicial accountability, deliberation and legitimacy; that the Supreme Court depends primarily on an argumentative approach; and that the ECJ depends on a conglomerate mode that pastes together facets of the institutional and argumentative approaches.

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This paper claims that the discursive practices, institutional arrangements and conceptual structures of these three courts are best understood by focusing on a fundamental structural feature that distinguishes between the French and American models of judicial discourse. Stated in the simplest terms, this difference boils down to the fact that the French model bifurcates its argumentation into two distinct discursive spheres (only one of which – the syllogistic French judicial decision – is consistently made public), while the American model integrates its two modes of argument in one and the same public space, namely, in the judicial decision itself.

Needless to say, the bifurcation/integration distinction is not the cause of Franco-American judicial difference, nor simply a reflection of it. It is both a cause and an effect, a formal and material distinction that reflects and produces a significant difference in how French and American jurists conceive of law and of the judicial role, and that also reflects and produces significant differences in French and American legal and judicial practice. The bifurcation/ integration distinction therefore offers a particularly rich point of access for the comparative study of French and American judicial theory and practice, a study that is all the more important given the French roots of the European Court of Justice.

This paper therefore argues that the bifurcation/ integration distinction is both indicative and formative of the particular *problematics* that shape and characterize the French, American and European Union's judicial systems. The French judicial system, for example, is defined above all by how it deals with its particular problematic: how to maintain legislative supremacy while simultaneously encouraging and yet controlling judicial interpretive flexibility and normative power? Similarly, the American judicial system is defined above all by how it deals with its particular problematic: how to deploy simultaneously both more textually formal and more policy-oriented modes of

argument in such a way as to control and legitimate judicial law-making? Finally, the EU judicial system is defined above all by how it deals with its particular problematic: how to adjust the French model in order to respond to the European Union's publicly controverted normative and political environment?

The construction of, approach towards, and solution to these respective problematics go a long way towards explaining what the French, American and EU judicial systems are all about. The French solution to its particular problematic offers a careful example of conceptual and institutional design. The first element consists of the radical French discursive bifurcation, as a result of which the published French judicial decision consists of a single-sentence syllogism premised on Code-based textual grounds, while the open-ended, fundamental fairness discourse of legal adaptation and equity is relegated to a sheltered discursive sphere within the French judicial apparatus. The second element consists of the conceptual mediation of this discursive divide via the French notion of the "sources of the law," which restricts law-making status and authority to the legislature. This restriction on the legal *status* of judicial decisions proves, however, to be simultaneously liberating, as it opens the door for flexibility in judicial decision-making. In effect, French civil judges are empowered to change their interpretations as needed – in the name of "equity" in particular cases or in the name of "legal adaptation or modernization" in classes of cases over time – precisely because these interpretations do not and cannot constitute "law." Finally, the French approach involves the management of this residual, *de facto* judicial normative power: the French State creates a common and unified normative field through the educational formation of republican elites, and then polices that normative field through hierarchical institutional and professional structures.

The American solution to its particular problematic consists of the public integration of judicial discourse, one that generates an argumentative structure that controls and legitimates the judicial exercise of extensive normative power. Simultaneously granting full caselaw-making status to its judicial decisions and yet lacking the unifying and controlling institutional structures of the French legal system, the American system's solution involves the public, argumentative demonstration of properly motivated and constrained judicial decision-making. In essence, the American model places more or less the full weight of legitimating American judicial decision-making on a single document – the judicial decision itself. As a result, American Supreme Court discourse – and indeed American legal discourse generally – relies on the publicly integrated or conglomerate form of its argumentation: it combines both its more formalizing and its more policy-oriented discourses in the single public space of the judicial opinion. Incessantly and carefully deploying the two modes of discourse side by side, American judicial discourse emerges as a very carefully constructed hodgepodge of seemingly contradictory interpretive impulses, one that is simultaneously hopeful for and suspicious of each of its interpretive options. The result is a carefully modulated, resolutely centrist and enormously powerful mode of argumentative justification that tends to manifest itself in various guises as the formalization of the pragmatic.

Finally, the European solution to its particular problematic involves the construction and maintenance of a softened version of the French discursive bifurcation. Lacking the unifying, controlling and legitimating institutional bases of the French judicial system, the ECJ adopts a somewhat more publicly argumentative approach. The ECJ therefore publishes both of its two discourses (the ECJ decision and the Advocate General's Opinion) simultaneously in every case; it thereby effaces the rigid

French separation of the two discourses and significantly tempers the difference between them. The ECJ then holds this more moderate bifurcation together by deploying – in both spheres – a purposive, systemic "meta" teleological discourse that on the one hand aims to promote a proper legal order that could generate the kind of normative and institutional unity that the bifurcated French model takes for granted, but that simultaneously depends on a public, discursive legitimacy that the American model brings to bear.

This paper thus offers an initial summary of my forthcoming book's description of the problematics and solutions that characterize the French, American and EU judicial systems. The reader will of course have to await the book's publication for an appropriately extensive consideration of the difficult but fascinating "rule of law"/ democratic theory issues raised by these three respective judicial approaches. In the meantime, however, I thought I might whet the reader's appetite by briefly foreshadowing some of the book's analysis of how each of the three courts handles such core issues as judicial control and accountability, democratic debate and deliberation, and judicial legitimation.

II. The French Cour de cassation

As I have explained at length elsewhere, the French judicial system bifurcates its argumentation into two distinct discursive spheres.[1] On the one hand, its official, public judicial decisions – buttressed by a handful of foundational legislative provisions and a consistent line of substantive judicial interpretations of those provisions – offer an image of formalist and magisterial judicial decision-making produced by syllogistically deductive means. On the other hand, inside the high professional ranks of the French judiciary, its

[1] Mitchel Lasser, *Judicial (Self-)Portraits: Judicial Discourse in the French Legal System*, 104 Yale L.J. 1325 (1995).

debates – informed by academic *doctrine* and the arguments of other judicial *magistrats* – yield an image of informal decision-making based on the construction and deployment of socially responsive hermeneutics.

In the first, formal mode, the French judge appears as a passive agent who merely applies the codified will of the Legislature, which is embedded in the very matrix of the Code. In the second, informal mode, the judge must act. Informed by academic *doctrine*, prior judicial *jurisprudence* and the arguments of the judicial *magistrats* known as the advocates general and reporting judges, she must interpret and apply the Code in ways that make good sense. In this mode, she actively seeks to discuss, debate and produce sensible and socially meaningful normative solutions. She must therefore take seriously into account the primary concerns of the academic, *doctrinal* writers; in particular, she must make sure to be responsive to the requirements of fairness and equity and to the social needs of legal adaptation and modernization.

After briefly recounting the radically bifurcated form of French civil judicial discourse, this Part pieces together and explains how this radical French discursive dualism can be maintained – both practically and conceptually – *in good faith*. This explanation has three components. First, the French maintain a distinctive and all-important definition of "law," one that is fundamentally at odds with its American counterparts (both pre- and post-Realist). This definition emerges in the foundational French notion of "the sources of the law," which puts into play the traditional French understandings of the separation of powers, of legislative supremacy and of the judicial role. Second, the French legal system maintains a carefully balanced institutional structure that establishes and reflects a particular division of labor between its major institutional actors. Finally, the French legal system possesses a particularly State-

centered, meritocratic and republican *mentalité* that animates and justifies the French system's fundamental formal, conceptual and institutional structures.

Let us then briefly review the remarkable discursive bifurcation that characterizes French judicial discourse. The first component of the French discursive dualism consists of the official, published judicial decisions of the French civil judicial system. These decisions have been the focus of horrified American comparative fascination for at least the last one hundred years, and with good reason! These decisions offer – to American eyes – an absolutely astounding portrait of the French legal and especially judicial systems. In particular, they present a coherent and carefully choreographed image of passive and mechanical judicial subservience to the codified wishes of the French legislature.

It is difficult to convey the coherence and power of this official French portrait of the judicial role. Perhaps the best indication of its ubiquitous nature and authoritative consistency is the fact that the French civil judiciary itself disseminates the portrait over and over again on a daily basis. In particular, the French judiciary composes all of its published judicial decisions in a manner that is extreme even by Continental European civil law standards. The decisions are famously short: those of the Cour de cassation (the French supreme court in private and criminal law matters), for example, tend to run less than a single typed page! Leafing through French case reports can therefore be quite a shock for the American common law jurist.

In order to get a sense of published French judicial discourse, let simply quote a French appellate judicial decision. The following recent judgment, handed down in an important 1995 decision of the French Cour de cassation, should suffice to set the tone. The decision states, *in its entirety*:

THE COURT: -- On the only issue: -- Given art. 1382 c. civ. [Civil Code]; -- Whereas the author of a [tort] is responsible for the complete reparation of the damage

that he has caused; -- Whereas, according to the decision under appeal (Court of Appeals of Rouen, 2d chamber, 25 June 1992), Mrs. Annick X was hit and injured by the automobile of Mr. Y while riding her bicycle; Whereas Miss Catherine X, acting on her own behalf and on behalf of Mrs. Annick X, her mother, brought suit against Mr. Y and his insurer, the Norwich Union Co., the Elbeuf primary medical insurance fund, and the Elbeuf Transport Company for reparations;

Whereas, in denying Mrs. X reparations for her personal injury, the [appellate court] decision stated that, according to its expert, the victim, who is reduced to a vegetative state, is absolutely unable to feel anything at all in the way of existential concerns, be it pain, or the sentiment of diminution due to disfigurement, or the frustration of [life's] pleasures; Whereas the appellate court thereby deduced that there was insufficient proof of general damages; Whereas, by so deciding, despite the fact that the vegetative state of a human being does not exclude any type of indemnification, the damages must be repaired in full and the court of appeals violated the above text;

On these grounds, quashes [the appellate decision], but only with regard to the issue of the personal injury of Mrs. X, and remands the case to the Court of Appeals of Paris.[2]

This example represents a typically structured and reasoned – if unusually understandable – French cour de cassation that displays all of the characteristics of the genre: it is a single-sentence syllogism, rendered in an incredibly short, impersonal and unsigned collegial form w/ no concurrences or dissents, little if any factual presentation, and no reference whatsoever to precedents, to policy or to any other non-legislative sources. In short, the Cour de cassation decision is indeed a remarkably formalist-looking document, one that goes to great pains to convey that the French civil judge is nothing more than the passive agent of the statutory law.

Needless to say, it is quite hard to imagine how any legal system could function if its judiciary actually behaved in accordance with the official French portrait of the judicial role. The list of potential problems is simply insurmountable. The French Civil Code, to pick an immediately obvious difficulty, is now some 200 years old. Can it really be the case that an advanced, Twenty-First Century Western democracy with the world's sixth largest economy functions with a legal system whose judges mechanically apply codified rules dating from the Napoleonic era? With no cited case law operating as precedent, are judges simply free to interpret the Code provision as they wish? Must

they be so inefficient as to reconsider fundamental interpretive and policy questions with each new traffic accident? Is the judicial system as a whole so inefficient and incoherent that it allows and even requires each judge to address, consider and resolve such questions individually, without either the check or the guidance provided by other judges or by prior decisions? If French judges must apply the Code in an individual and yet mechanical fashion, how is the French judiciary to engage in a meaningful institutional debate over how to respond systematically to pressing interpretive and social quandaries? To state the problem bluntly: how can such a system possibly work?

French academic writing, known as *doctrine*, represents the first answer to how the French judicial system can (and does) work. This academic writing occupies a certain in-between or intermediary status in the French legal system. On the one hand, it clearly is not the official, public work product of the legislative, executive or judicial branches of government. It also demonstrates a very different understanding of French legality than the one so carefully constructed and disseminated by the official French portrait.

That said, it would be quite difficult to overestimate the centrality of academic *doctrine* in the French legal system. First, it is important to recognize that in some significant sense, French law professors *are* in fact State actors. Not only are they all employees of the State – as all French law schools are State institutions that are part of the French national university system –, but they have all received State run and State financed educations, directed by highly centralized State educational institutions. They have passed through – and now administer – the highly State regulated French academic examination and certification process, leading, at the very highest levels, to the much-prized "agrégation." In some sense, then, French academics are by definition *State* academics.

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[2] Cass. 2e civ., Feb. 22, 1995, 1996 D. Jur. 69 (note Chartier).

Second, French *doctrine* plays a pivotal role in the day-to-day functioning of the French legal system. This role consists most notably of producing academic case "notes," that is, relatively short academic explanations and assessments of recent judicial decisions. The key to understanding the utterly central role played by these *notes* is to recognize when and where they are published. For the most part, they routinely appear in the French versions of the West Case Reporters (such as the *Recueil Dalloz*). In other words, the case *notes* most often appear as addenda to the judicial decisions themselves, and are thus printed on the very same page. These academic writings can therefore be thought of as "quasi-official" documents, as they may well represent the primary means for the French attorney to access and make sense of French judicial decisions.

These academic *notes* offer a glimpse into a radically different understanding of the French legal and judicial systems than that propounded by the official French portrait. Professor Yves Chartier, writing in an eminently conversational style in the *doctrinal note* that immediately follows the judicial decision quoted above, makes it abundantly clear that the Cour's decision in this case is hardly a one-shot deal, generated by the mechanical application of the Code, and without implications for – or awareness of – other cases. To the contrary, heavily informed by existing judicial *jurisprudence* and academic *doctrine*, the Cour's Second Civil Chamber made a tough and definitive choice; it "pushed aside" the flawed, if "logical," "subjective" notion of damages, and it did so on assorted policy, equity, ethical and social grounds. It thereby adopted what Chartier qualifies as the "ethical" position, i.e., the position that promotes human "dignity," that protects the weak and vulnerable, that recognizes factual and cognitive complexity and uncertainty (about unconsciousness), and that therefore rejects the implicitly fascist conception of "sub-humans." By stating, "in a very concise

manner which therefore stands out all the more, that because 'the vegetative state of a human being does not exclude any type of indemnification, the damages must be repaired in full,'" the Second Civil Chamber openly announced the change in its *jurisprudence*, and thereby "effectuate[d] a complete unification with the *jurisprudence* of the Criminal Chamber" of the Cour.[3]

According to Chartier's *note*, therefore, the judges of the Second Civil Chamber willfully altered and adapted the French legal landscape, and did so primarily for institutional and ethical/ equity reasons. Under this understanding, the French civil judge hardly resembles the official portrait's image of a passive and mechanical servant of the Code.

Observed on a more abstract and systematic level, the *note*, as a *genre*, marks precisely where French *doctrinal* understandings of the judicial role meet the judge's and practitioner's pragmatic universe. The presuppositions that underlie a case *note* such as Chartier's therefore clearly reflect and reproduce the primary concerns of mainstream French academic theory. Chartier's understanding of the judicial role represents but a typical deployment on the ground of mainstream French *doctrinal* conceptions, conceptions that may at first blush be difficult to square with the official French portrait of the passive and mechanical civil judge, but that have nonetheless long held sway in the French universities in which all French jurists are educated and through which they become acculturated to the French legal system.

As the above example suggests, French *doctrinal* debates about equity, legal adaptation and judicial institutional competence are not relegated to academic isolation. Thanks to the French publication system, the case *notes* offer these academic debates a point of contact with French judicial practice, a means of entry into the daily discussions about how French judges should decide cases (both substantively and methodologically).

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[3] Id.

It would be a mistake, however, to think that such socially oriented ethical and equity concerns are only academic or *doctrinal* in origin and that their motivating, if somewhat unofficial, conception of the judiciary – complete with its preoccupation with equity, legal adaptation/ modernization and the institutional role of the civil judge – is therefore only brought to the judiciary from the outside. In fact, it turns out that this unofficial conception of the judge's social equity role also manifests itself deep within the French judiciary itself, in a discursive sphere internal to the French judicial system, in which *magistrats* present arguments to their brethren about how the cases before them should be decided.

In these internal judicial debates, two judicial *magistrats* play particularly important roles: the advocate general and the reporting judge. After the parties have pled their respective cases, the advocate general argues from the "floor" in an *amicus curiae* capacity on behalf of the public welfare, society's interest, and the proper application of the law.[4] She then presents her arguments in a written document known as her *conclusions*.[5] Institutionally and professionally, the advocates general are truly the judiciary's brethren: they receive their education and training in the same school, L'Écôle Nationale de la Magistrature.[6] As members of the same *magistrature* corps, those *magistrats* assigned to the bench can transfer to the floor, and vice versa.[7]

The other key *magistrat* is the reporting judge, who is that member of the court who is assigned primary responsibility, in any given case, to review the lower court records, formulate and research the legal issues, suggest to the rest of the Cour how to resolve the case, and draft the Cour's judgment. Before engaging in judicial deliberations and voting

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4 ROGER PERROT, INSTITUTIONS JUDICIAIRES 260 (3d ed. 1989).

5 *Id*. at 269. The member of the *ministère* does not take part in the deliberations or judgment of the court. C. org. jud. art. R. 751-1.

Whenever I refer to a particular *conclusions*, I shall treat it as a singular noun. This will avoid confusion when I later refer to several *conclusions* at a time, or when I refer to *conclusions* in general (in which case I will treat the noun as a plural).

6 Perrot, *supra* note 3, at 264, 310.

with the other sitting magistrates, the reporting judge presents his brethren with his findings and proposed resolution in a document known as his *rapport.*

In every Cour de cassation case, therefore, two judicial *magistrats* argue to their brethren about how the case should be decided, and why. What is so remarkable, however, is the type of argumentation that these *magistrats* deploy in their *conclusions* and reports. As these documents make quite clear, the advocates general and reporting judges are *expected* to argue in a particularly frank, detailed and personal manner to their brethren, and to do so in terms of past judicial decisions, in terms of academic commentary, in terms of the need for judges to adapt or modernize the law in order to respond to evolving social needs, and even – and perhaps especially – in the open-ended, fundamental fairness terms of good old-fashioned *equity*. In short, in this second discursive mode, French *magistrats* argue in a manner that is about as far removed from the Cour's official judicial decisions as one could imagine.[8]

What is so distinctive about the French judicial system, however, is not only that it possesses two such radically different modes of judicial argument, but that one of them is kept more or less entirely hidden from public view. Only a tiny handful of conclusions and reports are published in any given year, despite the fact that they are produced in every French Cour de cassation case; and even on those extremely rare occasions when they do see the light of day in the court reporters, they tend to be very severely edited. In short, it turns out that the French civil judicial system maintains two radically different modes of argument at the same time: the rigidly syllogistic deductions that are published in the Cour's official judicial decisions, and the stunningly frank and wide-open equity debates over social needs that are hidden within the walls of the Cour's closed chambers.

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7 *Id*. at 264–65.

8 *See* Lasser, *supra* note 1, at 1355-1402.

How, then, as both a practical and a conceptual matter, does the French judiciary maintain such a radical discursive dualism/ bifurcation *in good faith*? The answer is that the French civil judicial system is held together by a combination of conceptual and especially *institutional* structures that motivate and justify its radically bifurcated form.

The first part of the French approach is conceptual. Although the French fully recognize and understand, and have fully recognized and understood for at least one hundred years,[9] that judicial decisions can carry significant – and even controlling – *normative authority*, the French traditionally *refuse* to conclude, unlike post-Realist – and even, frankly, pre-Realist – Americans, that this de facto judicial *power* constitutes "law."[10] "Law" is instead treated as a special, high status category of norm that is reserved primarily (and intentionally) to the legislature. In some important sense, the syllogistic form of the French judicial decision is both a symbol of, and a practical constraint on, the French judge's limited normative authority.

At the same time, however, this restriction on the normative status of judicial decisions is simultaneously liberating, as it opens the door for flexibility in judicial decision-making. In effect, it is perfectly acceptable for judges to change their interpretations as needed – in the name of "equity" in particular cases or in the name of "legal adaptation or modernization" in classes of cases over time – precisely because these interpretations do not and *cannot* constitute "law." As a result of this conceptual arrangement, the special status of codified or other legislated law is maintained, while judicial decision-making is consciously permitted to play its flexible and socially responsive normative role.

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9 *See* FRANÇOIS GÉNY, METHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF (1899).

10 *See, e.g.*, 2 id. at 51-52; 1 JEAN CARBONNIER, DROIT CIVIL 111-115 (1967). *But see* FRANÇOIS TERRÉ, INTRODUCTION GÉNÉRALE AU DROIT 235-51 (1998). SADOK BELAID, ESSAI SUR LE POUVOIR CRÉATEUR ET NORMATIF DU JUGE (1974).

The second part of the French approach involves the management of this residual, de facto judicial normative power. On this second front, the means of control are primarily institutional, structural and ideological; and the operative notions are centralization, education, meritocracy, hierarchy and expertise.

In the internal discursive sphere of the high-level French civil judiciary, it is the job in every case for two important French institutional players (the reporting judge and advocate general) to research the state of the law and of prior decisions; to canvass the extensive academic literature; and to lay out the social as well as the legal pros and cons of potential judicial solutions, including the one that they eventually propose to their brethren.

Given the key role played by these two institutional players, it is terribly important to understand *who* these people are and *how* they are expected to do their work. As will soon become apparent, this information is deeply revealing of the material, intellectual, political and *cultural* presuppositions of the French legal system, that is, of the *mentalité* and corresponding *institutional structure* of that system.

In short, the *Cour de cassation* consists of an elite, carefully selected and rigidly trained *corps* of *magistrats* groomed – or "formed," to use a particularly telling French expression – by the French State itself. And the same holds true of all the other major, repeat players who have a significant daily say in French judicial decision-making.

Perhaps the clearest example of this actually emerges in the French administrative law context, in which the French Supreme Court in public law cases – the Conseil d'Etat – is the very symbol of the Napoleonic republican, meritocratic ethic of a properly selected and trained State administrative nobility charged and entrusted

with the task of debating and resolving issues of legal policy in the name of the public good and interest.[11]

Over the course of the relentless, but *free* French State education system, the students hopeful of entering the administrative hierarchy take an endless series of national exams through which they are officially ranked relative to their peers, accordingly do or do not get into ENA (the highly elite "grande école" national school of administration), take endless further exams for further ordinal ranking, and then get to choose their initial posts in the strict order of their final class rankings.[12] They then move up through the ranks in a similarly ordered, graded and meritocratic fashion.[13]

The same basic model holds true in the French civil judiciary, with the Cour de cassation lying 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,[14] with its three-year long classroom and internship training.[15]

The organization of the French legal academic and professional spheres demonstrates the same fundamental attributes of concentration, centralization, hierarchy and expertise. In each case, the institutions associated with the French civil legal system yield a stunningly small and accordingly prestigious elite that plays a particularly influential role in the daily operation of the system.

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11 The use of the term "nobility" to describe the upper echelons of the French educational and administrative elites has been most notably championed by the French sociologist Pierre Bourdieu. *See* PIERRE BOURDIEU, LA NOBLESSE D'ÉTAT : GRANDES ÉCOLES ET ESPRIT DE CORPS (1989), translated as THE STATE NOBILITY: ELITE SCHOOLS IN THE FIELD OF POWER (Lauretta Clough, trans.) (1996).

12 *See* JOHN BELL, SOPHIE BOYRON and SIMON WHITAKER, PRINCIPLES OF FRENCH LAW 61 (Oxford, Oxford University Press 1998).

13 *See* EZRA N. SULEIMAN, POLITICS, POWER, AND BEAUREACRACY IN FRANCE: THE ADMINISTRATIVE ELITE (1974).

14 In the year 2000, only some 8.5% of inscribed candidates successfully passed the ENM's primary entrance examination. See http://www.enm.justice.fr/concours/statistiques/2000/stats_1er_concours00.htm (last visited 17 January 2003).

In the *academic* context, therefore, an explicitly "meritocratic," national examination-based State legal academic hierarchy establishes the small elite corps of hugely influential "doctrine" writers – almost all of whom have acquired their "agrégation" – who explain and comment the Court decisions in the French court reporters themselves (right alongside the official decisions), and thus exercise – in tandem with, and to some extent at the expense of, their judicial brethren – primary responsibility for the explanation, dissemination and thus development of French judicial *jurisprudence*.

It turns out, furthermore, that even the practicing legal profession demonstrates a similarly formalized system of concentrated and centralized control, expertise and leadership. Most importantly, for our purposes, the French legal system only permits a stunningly small number of attorneys to submit pleadings before the two supreme courts (the Cour de cassation and the Conseil d'état). These attorneys, known as the "*avocats aux conseils*," are the only ones to hold "charges" that entitle them to submit pleadings to these two tribunals.[16] In other words, they hold a State recognized and State enforced monopoly to plead before the courts at the top of the French civil and administrative judicial hierarchy. The full extent of this State enforced professional hierarchy only becomes apparent when one realizes that the number of these "charges" is limited to

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15 *See* FRANCOIS TERRÉ, ET AL, MAGISTRATS ET AVOCATS: FORMATION, CARRIÈRE, ACTIVITÉ PROFESSIONNELLE – RAPPORT AU GARDE DES SCEAUX 38-42 (1987).

16 ANDREW WEST, ET AL., THE FRENCH LEGAL SYSTEM: AN INTRODUCTION (London, Fourmat Publishing, 1992) 113; see also décret n° 91-1125 du 28 octobre 1991 relatif aux conditions d'accès à la profession d'avocat au Conseil d'Etat 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 ; Vu le décret n° 78-380 du 15 mars 1978 portant application à la profession d'avocat au Conseil d'Etat et à la Cour de cassation de la loi n° 66-879 du 29 novembre 1966 relative aux sociétés civiles professionnelles.

sixty,[17] despite the fact that the Cour de cassation alone disposes of some thirty thousand cases every year![18]

To boil down French civil legal process to its most basic elements: some one hundred judges in one large court decide tens of thousands of appellate cases brought by some one hundred attorneys, thereby producing necessarily brief written decisions that are commented by a tiny number of expert academics in *doctrinal* case notes published alongside the decisions themselves.

In other words, a tiny elite of State-affiliated experts at the apex of each legal sub-institution (the *magistrat*/judicial, the academic/*doctrinal* and the practicing/professional) come together 1) to manage, discuss and resolve the large segment of legal controversies that wind their way up to the top of the French civil judicial system, and 2) to manage, educate and lead the junior grades of their respective sub-institutions. The French civil legal system therefore demonstrates a remarkable and characteristic concentration and centralization, one that depends on and produces a deeply related arrangement of hierarchy and expertise.

The dualism or bifurcation of French discursive styles is therefore neither new nor an accident: it is part and parcel of a very centralized, intentionally meritocratic, republican hierarchy of State-sanctioned elites who operate dynamically together to guide the daily operation of the judicial system, with all important cases funneled through a tiny group of attorneys, and with decisions made by a very small corps of expert judges in close deliberative collaboration with a similarly small number of highly influential academics.

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[17] Anne Boigeol, "The French Bar: The Difficulties of Unifying a Divided Profession," in RICHARD ABEL and PHILIP S. LEWIS, eds., LAWYERS IN SOCIETY: THE CIVIL LAW WORLD 258, 260 (1988); WEST, *supra* note 16, at 129;

[18] According to the Cour's 2000 Annual Report, the Cour judged 21,394 civil cases and 8,714 criminal ones in the year 2000. http://www.courdecassation.fr/_rapport/rapport.htm. *See also* http://www.justice.gouv.fr/chiffres/activ01.htm. Furthermore, the Conseil d'état disposed of 12,159 cases in 2001. http://www.justice.gouv.fr/chiffres/admini01.htm.

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* who are considered *trustworthy* precisely because they are controlled by powerful educational, meritocratic and thus *institutional* means.

The core of the French judicial system lies in the establishment of a distinctly republican vision of elite and sheltered judicial debate and deliberation. This French approach is composed of multiple and interlocking elements. The highly organized French institutional structure ensures that judicial decision-making functions as the catalyst for multiple professional hierarchies to work together to produce truly informed, high-level debates between long-term professionals. The protection or seclusion provided by the characteristic French discursive bifurcation then enables those professionals to engage in particularly important types of debate that – as has been well described in the American literature reviewing the problematic effects of "sunshine laws" on governmental debate[19] – rarely occur in public (never mind publicly judicial) arenas, namely, open-ended discussions that revolve explicitly around the charged issues of equity, substantive justice, and socially responsive legal adaptation.

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[19] *See, e.g.*, Kathy Bradley, *Note, Do You Feel The Sunshine? Government In The Sunshine Act: Its Objectives, Goals, And Effect On The FCC And You*, 49 Fed. Comm. L.J. 473, 475 (1997) ; Michael A. Lawrence, *Finding Shade From The "Government In The Sunshine Act": A Proposal To Permit Private Informal Background Discussions At The United States International Trade Commission*, 45 Cath. U. L. Rev. 1, 10-12 (1995), (citing, among others, Thomas H. Tucker, *"Sunshine" – The Dubious New God*, 32 Admin. L. Rev. 537, 5389-9, 545, 550 (1980); David M. Welborn, et al., *Implementation and Effects of the Federal Government in the Sunshine Act*, 1984 ADMIN. CONF. OF THE U.S. 199 (1984)); Jim Rossi, *Participation Run Amok: The Costs Of Mass Participation For Deliberative Agency Decisionmaking*, 92 Nw. U. L. Rev. 173, 196-241 (1997); James T. O'Reilly and Gracia M. Berg, *Stealth Caused By Sunshine: How Sunshine Act Interpretation Results In Less Information For The Public About The Decision-Making Process Of The International Trade Commission*, 36 Harv. Int'l L.J. 425, 457-59, 463 (1995); Stuart M. Statler, *Let the Sunshine In*?, 67 A.B.A. J. 573 (1981); David A. Barrett, *Note, Facilitating Government Decision Making: Distinguishing Between Meetings and Nonmeetings Under The Federal Sunshine Act*, 66 Tex. L. Rev. 1195, 1211 (1988).

Of course, the construction of such a privileged internal judicial discursive sphere poses certain risks and creates certain problems. Having encouraged such frank and high-level judicial conversations, the French system therefore deploys the doctrine of the "sources of the law" to cap the legal status of the resulting judicial decisions. As if this were not enough, the French make sure to decenter these judicial decisions not only by composing them as relatively uninformative and highly formulaic syllogisms that do not refer to prior *jurisprudence*, but also by saddling important decisions with decidedly more forthcoming *doctrinal notes* that forever frame and critique those decisions and that therefore share significantly in the normative management generated by those decisions over time.

Finally, the French State does all in its power to establish (or maintain) a particularly strong normative system through the rigorous educational formation of Republican elites, and then to police that normative field through hierarchical institutional and professional structures. Individual operators (such as judges) in the judicial system are therefore carefully trained, motivated and reviewed, while group actors (such as courts) are made subject to highly visible debates and critiques. These means of individual and group pressure organize and control the exercise of the residual judicial normative power.

The normative control over individual judges begins long before those judges actually decide cases. The French judiciary is the product of a life-long selection, education, "formation" and training process that yields a particularly coherent *corps* of judicial *magistrats* who have all spent several years engaged in rigorous classroom and field training at the French State's Ecole Nationale de la Magistrature. But this is only the beginning. In the French legal system, a judicial career is a life-long profession in a large civil service hierarchy that functions on the basis of merit-based promotion.

French judicial magistrates spend their entire working lives under the careful and appraising eyes of their superiors, who submit regular reviews about the quality and efficiency of their junior colleagues. The unified French judicial system therefore deploys pervasive internal checks and controls that have life-long career implications for the individual judge and that ensure significant normative unity for the judicial institution as a whole. The French judicial system, in short, prepares the normative judicial ground extremely carefully, and then reinforces this preparation through an elaborate and effective system of professional carrots and sticks. The French mode of control of individual judges is therefore profoundly and rigorously *institutional*.

In summary, the French judicial system produces judicial accountability and control by deploying a sophisticated combination of theoretical, educational, professional, institutional and normative factors. First, the French lower the judicial stakes by denying judicial decisions the force of law. Second, the French construct a carefully centralized corps of lifelong judicial magistrates. Members of this corps undergo a rigorous educational and professional formation that inculcates the desired institutional values, values that are then policed through hierarchical professional means. Finally, the judiciary's exercise of residual interpretive authority is permanently subject to particularly visible academic/ *doctrinal* critique, which shapes and thus shares its normative content and impact.

Ultimately, the republican elitism of the French institutional approach also draws its underlying democratic legitimacy from the rigorously egalitarian and meritocratic republican ethos and structure of the French state. This source of legitimacy establishes and reflects a representative and republican link between the citizenry and the State's public servants. This representative link possesses two primary, and deeply interconnected, components. The first is procedural: the French

State goes to great pains to institute – and to publicize – a truly meritocratic examination and peer-review based system for the selection, formation, and advancement of the civil servants that operate the machinery of the State. This yields a continuous, meritocratic pyramid that reaches from the free and State-administered education system all the way through the highest administrative levels of the State itself. The second is more substantive. From pre-school onwards, the French State traditionally propounds and inculcates a singularly unitary, cohesive and almost monolithic conception of the French Nation and its populace.[20]

By combining these substantive and procedural elements, the French State establishes – or at least presumes – a representative link between itself and the French citizenry.[21] To the French State, its meticulously institutionalized republican elitism is therefore *inclusive*. The resulting interpretive and normative judicial administration therefore emerges as a shared or communal enterprise of institutionally selected and trained – but also institutionally responsible and constrained – judicial, academic and professional, State-sanctioned, republican elites.

III. The United States Supreme Court

Unlike the French civil law system, which does all in its power to bifurcate its two discourses (the official formal syllogism and the unofficial social responsiveness debates) into two segregated argumentative spheres, the American legal system goes out

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[20] *See*, *e.g.*, SUDHIR HAZAREESINGH, POLITICAL TRADITIONS IN MODERN FRANCE (1994); THOMAS OSBORNE, A GRANDE ECOLE FOR THE GRANDS CORPS: THE RECRUITMENT AND TRAINING OF THE FRENCH ADMINISTRATIVE ELITE IN THE NINETEENTH CENTURY (1983).

[21] Needless to say, this presumption – based on a supposedly neutral educational meritocracy – stands on somewhat shaky grounds, as Pierre Bourdieu, Louis Althusser and Ezra Suleiman have made depressingly clear. See, e.g., BOURDIEUsupra note 11; SULEIMAN, *supra* note 13; Louis Althusser, "Ideology and the Ideological State Apparatuses," in LENIN AND PHILOSOPHY 127 (Ben Brewster, trans.) (1971); JOHN ARDAGH, FRANCE IN THE NEW CENTURY: PORTRAIT OF A CHANGING SOCIETY 99 (2000).

This is also to say nothing of the increasingly vocal opposition to the French State's longstanding assimilationist philosophy regarding ethnic and cultural minorities. *See*, *e.g.*, ARDAGH, *supra* note 21, at 221-25; W.A.R. SHADID and P. S. VAN KONINGSVELD, RELIGIOUS FREEDOM

of its way to combine its formalist and policy discourses in one and the same place: the American judicial opinion. This Part illustrates and describes this characteristic American argumentative unification, one that ensures that American judicial argument publicly includes and deploys both modes of discourse at all times.

The American judicial system, and the United States Supreme Court in particular, obviously function on a fundamentally different set of conceptual and material assumptions than does the French. Most importantly, the American judicial system does not possess much in the way of dominant, defining and legitimating educational or professional *institutional* structures.

To begin with (and to state the obvious), there is no such thing as American judicial education. American judges do, of course, tend to have gone to law school; and they do tend to get some form of judicial orientation when they join the federal or state benches; but one would be hard-pressed to argue that these count as significant professional judicial education per se, whether theoretical or practical.[22]

Second, only very rarely does the bench represent a true, lifelong career for an American jurist. Whether selected by election or appointment, the paths to the federal or even state bench usually involve a successful prior career in some other legal venue (be it private practice, government office, academics, etc.).[23] As a result, the American judicial system usually cannot bring to bear the kind of professional carrots and sticks that characterize its French counterpart. As there is no centralized judicial hierarchy, the American judge has little or no reason to expect meritocratic advancement up the ranks of the judiciary. Furthermore, the American judge tends to be a rather seasoned jurist,

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AND THE POSITION OF ISLAM IN WESTERN EUROPE: OPPORTUNITIES AND OBSTACLES IN THE ACQUISITION OF EQUAL RIGHTS (1995).

[22] Frank Upham, *The Role of Lawyers in Social Change: United States*, 25 Case W. Res. J. Int'l L. 147, 156-57 (1993).

[23] *See* MIRJAN DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 45-46 (1986). *See also* Elliot Slotnick, *The Paths to the Federal Bench: Gender, Race, and Judicial Recruitment Variation*, 67 Judicature 370 (1984).

one whose very maturity may also make him less amenable to conform to interpretive pressures from "above." Finally, by comparative standards, the pervasiveness and effectiveness of the American judicial system's appellate oversight and review are rather weak and haphazard to begin with.[24] One need only recall that the French Cour de cassation alone reviews some thirty thousand cases a year…

American judicial accountability and control are therefore produced primarily in other ways, namely, by *argumentative* – rather than institutional – means. In essence, the judicial decision – the judicial opinion – is left for the most part to carry its own justification and legitimation burden. And this burden is nothing less than enormous: for all of the weakness of its institutional structures, the American judicial system traditionally and explicitly grants its judges law-making power, as evidenced by the term "caselaw," for which there is – quite tellingly – no French equivalent.

This caselaw-making power significantly changes the nature of what needs to be accomplished in and by the American judicial decision in general and the American Supreme Court decision in particular. Unable to rely on an independently trust-producing institutional structure, the American Supreme Court decision must shoulder almost the entire legitimation burden by itself, thereby placing a colossal emphasis on the judicial decision's argumentation.

The American judicial decision therefore carries a significant transparency burden. Given that the decision can make *caselaw*, and given that there is relatively little in the way of institutional mechanisms for the formation and control of such law-making, the judicial decision obviously must – as a simple Rule of Law matter – publish and explain itself. This generates a veritable explosion of argumentative justifications: the legitimation stakes are just too great for *pro forma* opinions. As a result, not only does the Supreme Court decisions produce incredibly long and involved explanations,

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[24] *See* DAMASKA, *supra* note 23, at 45-46.

but they also offer numerous important stylistic characteristics, ranging from the individually signed judicial opinions, to the drafting and publication of concurring and dissenting opinions, to the disclosure of judicial votes, to the deeply personal (and at times remarkably discourteous) tone of the writing.

This argumentative, transparency burden also preempts in large measure the kind of discursive bifurcation that characterizes French judicial discourse. Unlike the French system, which does all in its power to *segregate* its more socially responsive discourse (which it reserves for its privileged internal debates) from its more textually formalizing discourse (which it publishes as its syllogistic decisions), the American system must *integrate* or fuse its version of those two discourses in one and the same place: the judicial opinion itself.

This complex American argumentative integration does however create some difficulties. In particular, it entails the development of discursive solutions that enable the more formal discourse of textual application and the more socially responsive discourse of policy analysis to exist – or coexist – simultaneously, side by side. American "multi-part" or "multi-prong" "judicial tests" represent just such a solution to this delicate American discursive integration, albeit a particularly elegant one.[25]

The *Lemon v. Kurtzman* three-prong test, developed and applied by the Supreme Court in order to determine whether legislation violates the First Amendment's Establishment Clause, offers a particularly fine case-in-point. The Court's test states: "*First*, the statute must have a secular legislative *purpose*; *second*, its principal or primary *effect* must be one that neither advances nor inhibits religion; *finally*, the statute must not foster 'an excessive government entanglement with religion.'"[26] As can

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[25] I have analyzed these tests in detail elsewhere. *See* Mitchel Lasser, *'Lit. Theory' Put to the Test: A Comparative Literary Analysis of American Judicial Tests and French Judicial Discourse*, 111 Harv. L.Rev. 689 (1998).

[26] 403 U.S. 602, 612 (1971) (emphasis added).

readily be seen, this "test" cleverly combines both the formal indicia of highly structured textual application and the purpose and effect consciousness of policy orientation.

That said, for all that American judicial discourse combines both its more formalizing and its more socially responsive discourses in the same, all-important space of the judicial opinion – thereby yielding a characteristically double-sided orientation that can perhaps best be described as "the formalization of the pragmatic" –, it needs to be recognized that this forced coexistence is not without strain. In fact, the characteristic American argumentative integration generates constantly conflicting interpretive pressures and thus perpetually simmering discursive *distrust.*

Examples of this distrust do not only emerge in Supreme Court decisions that establish and apply multi-prong tests – although these do tend to voice particularly vehement anti-formalist harangues, despite their own adoption of expressly rigid textual forms.[27] They also surface in other (and often decidedly less elegant) American judicial forms of discursive integration, such as the Court's recurrent "plain meaning" debates – which routinely pit pro- and anti- "plain meaning" advocates against each other, despite the fact that the most cursory analysis reveals that each side consistently morphs into the other (both in theory and in practice).[28] American judicial discourse is thus perpetually divided against itself, with each side persistently displaying its distrust by publicly critiquing – and thus policing – the other.

In this context of (self-) distrust, critique and control, it becomes worthy of note, for example, that *no* Supreme Court opinion in the last several years – whether majority,

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[27] *See*, *e.g.*, Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602, 611-14 (1951) (Clark, J., dissenting); Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 278-81, 286, 288-89 (1977); American Trucking Ass'n v. Scheiner, 483 U.S. 266, 294-95 (1987); Goldberg v. Sweet, 488 U.S. 252, 259-60 n.11 (1989).

[28] *See*, *e.g.*, Tyler v. Cain, 121 S.Ct. 2478, 2482 (2001) (referring to "the plain meaning of the text read as a whole"); Sternberg v. Cahart, 120 S.Ct. 2597, 2637, 2642 (2000) (conflating plain meaning

concurrence or dissent –, deploys the term "formalism" in any other way than as an insult, one that accuses the object of the critique of mechanically applying merely linguistic dictates. As Justice Souter states in a particularly repetitious example:

> The significance of winks and nods in state-action doctrine seems to be one of the points of the dissenters' departure from the rest of the Court. In drawing the public-private action line, the dissenters would emphasize the *formal clarity* of the legislative action providing for the appointment of Gerard College's trustees, in preference to our reliance on the *practical certainty* in this case that public officials will control operation of the Association under its bylaws. Similarly, the dissenters stress the *express formality* of the special statute defining Amtrak's ties to the Government, in contrast to the *reality* in this case that the Association's organizers structured the Association's relationships to the officialdom of public education. But if *formalism* were the sine qua non of state action, the doctrine would vanish owing to the ease and inevitability of its evasion, and for just that reason *formalism* has never been controlling. For example, a criterion of state action like symbiosis (which the dissenters accept) looks not to form but to an *underlying reality*.[29]

And these anti-formalist insults are thrown around all the time![30]

For all of these anti-formalist critiques, it nonetheless it turns out, again for all intents and purposes without exception, that no recent Supreme Court opinion deploys the term "policy" in the judicial decision-making context except in order to condemn such policy-based interpretation as precisely what judges should *not* be doing![31] And once again, these anti-policy critiques emerge over and over again.[32]

American judicial argumentation is therefore placed in a terribly difficult position. On the one hand, the American judicial opinion publicly deploys a composite argumentative practice that aims to be at once textually stable and socially responsive,

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interpretation with contextual interpretation); Alexander v. Sandoval, 121 S.Ct. 1511, 1530 (2001) (Stevens, J., dissenting) ("The plain meaning of the text reveals Congress' intent to . . . .").

[29] Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 121 S.Ct. 924, 933, n. 4 (2001) (citation omitted) (emphasis added).

[30] *See, e.g.*, United States v. Williams, 115 S.Ct. 1611, 1617-18 (1995) (citations omitted) (emphasis added); Mitchell v. Helms, 120 S.Ct. 2530, 2545-46 (2000); Apprendi v. New Jersey, 120 S.Ct. 2348, 2389-91 (O'Connor, J., dissenting) (2000); United States v. Morrison, 120 S.Ct. 1740, 1768 (Souter, J., dissenting).

[31] I have in fact been able to find only one clear exception: Justice Rehnquist's dissent in *Crawford-El v. Britton*. See 118 S.Ct. 1584, 1600-01 (1998) (Rehnquist, J., dissenting) ("In crafting our qualified immunity doctrine, we have always considered the public policy implications of our decisions.").

[32] I have reported this analysis in detail elsewhere. *See* Mitchel Lasser, "Do Judges Deploy Policy, 22 Cardozo L. Rev. 863 (2001).

and thus offers American judicial decisions the possibility of satisfying the heavy burden of single-handedly controlling, justifying and ultimately legitimating American judicial decision-making as a whole. But on the other hand, the incorporation of both of these rather disparate discourses in one and the same place creates stresses and conflicts that have important argumentative and analytic effects.

Forced to coexist side-by-side, and thus perpetually exposed to the repeated and public denunciations of its discursive opponent – each of the discourses is relentlessly driven towards a more tempered, centrist or compromise version of itself. Perhaps not surprisingly, gone is the judicial syllogism; and gone is the frank discussion of equity and substantive justice. Equity? The Supreme Court decision cannot even mention policy. As a result, the formalism of American judicial discourse tends to be more hinted at than openly exhorted (through such semiotic means as the judicial test's form and rhetoric); and policy orientation emerges in more muted form as the judicial consideration of "purposes" and "effects."

As a result, American judicial discourse emerges as a very carefully constructed and all-inclusive hodgepodge of seemingly contradictory interpretive impulses, one that is deeply and publicly suspicious of each of its interpretive options and that therefore has no firm ground on which to place its flag. In this precarious interpretive position, American judicial discourse can only do its best: it waves in all directions, drawing semiotic strength from each of its disparate interpretive tendencies, but stops short of attempting to excise half of its discourse in order to declare itself finally to be on one or the other side of the various interpretive divides. Unwilling (and likely unable) to proclaim in good faith that it only engages in one or the other interpretive alternatives, American judicial discourse therefore plants itself publicly and resolutely in the middle,

doggedly straddling the interpretive divides with a complex but relatively muted or centrist form of composite judicial discourse.

Unlike the French system, therefore, whose democratic legitimacy lies in the inclusively republican institutional structures that motivate its bifurcation into radically distinct discursive spheres, the U.S. system generates its legitimacy primarily by inclusively public argumentative means. As a result, this American approach offers a powerful image of direct, unmediated and overt judicial debate and deliberation. American judges must refer to recognized legal norms; discuss, modulate, interpret and/or change them in recognized ways; apply them in an accepted manner to carefully presented facts; and thus arrive at judicial decisions whose long-term viability, weight and legitimacy depend in the first instance on such publicly discursive means. In other words, the legitimacy of a given judicial decision stands and falls in large measure on the logic and argumentation of the signed judgment.

The American judge is thus expected to engage in utterly transparent decision-making. This transparency offers numerous benefits. First, it serves an extremely important educational and deliberative role. Not only does it justify the decision for the parties at bar, but it also informs the court's primary observers – lower and appellate courts, other attorneys, etc. – of the state of the law and of the court's decision-making process. Furthermore, the court's long, discursive and heavily factually dependent style even offers a certain degree of accessibility to the general public, which can – albeit with some difficulty, of course – read, examine, and thus learn from and engage with the judge's decision.

The transparency of the American judicial decision also generates a good measure of public accountability on the part of the judge who wrote it. Every judicial decision – indeed every judicial opinion – is signed by a judge who delineates his

reasoning in extremely detailed factual and legal analysis. The American judge is open to individual scrutiny for his work-product. He explains his factual findings in detail; works through his legal reasoning rather thoroughly; and signs his decision. Every time he hands down a judgment, the judge is therefore personally exposed: his professional reputation is accordingly perpetually on the line, as his Opinion is constantly available to the scrutiny of the courts' many observers.[33]

The signed American judicial opinion therefore creates an environment and expectation of individual judicial responsibility for the judicial opinion and for its reasoning. As Judge Harry Edwards explains in the instructions he gives to his new clerks: "You must understand that your drafts will always be reworked by me. I am accountable for all written work that goes out in my name and so final drafts will reflect my personal imprint in both judgment and style."[34] Similarly, Owen Fiss makes a good deal of the pledge implicit in the American judge's personal signature.[35]

The American practice of publishing individually signed judicial opinions therefore generates individual judicial accountability and control by exposing the individual judge's work-product to public scrutiny and critique. Such critique can obviously come from appellate judicial decisions, from academic and/or professional quarters, and from the media or the public at large; but it can even come from other members of the judge's own court. Such intra-collegial critique, after all, lies at the heart of the practice of permitting and publishing judicial dissents and concurrences in the first place. Far from providing cover from critical fire, a judge's own colleagues represent a fertile source of further criticism. In short, the threat of individual critique

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[33] Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. Legal Educ. 518 (1986).

[34] Harry Edwards, *A Judge's View on Justice, Bureaucracy, and Legal Method*, 80 Mich. L. REV. 259, 266 (1981) (citing his own *Manual for Law Clerks*).

[35] Owen Fiss, *The Bureaucratization of the Judiciary*, 92 Yale L.J. 1442, 1443 (1983).

represents the American system's primary external mode of controlling the judge's interpretive and normative practice.

The cornerstone of American judicial control and legitimacy lies in interpretive justification by public, discursive means – rather than republican justification by educational, professional and institutional means. For all of the endless American theoretical squabbles, which are so vehement precisely because the caselaw stakes are so high, the only general consensus seems to be that American judicial interpretation consists of working in a medium that is composed of multiple legal texts, including a heavy dose of existing caselaw; that the task consists in large measure of producing judicial interpretations that demonstrate some form of coherence and/or consistency with past interpretations (in Dworkin's famous formulation, the "fit and justify" requirement); that this coherence/ consistency must have some textual basis (whether real, imagined, sincere or tactical)[36]; and that the resulting, public judicial interpretive work is then subject to external critique by all.

The American judicial opinion therefore carries a huge burden. It must now integrate – and thus negotiate the tensions between – its more formalizing and its more socializing discourses, do so in public, and do so in a document that can create caselaw. It is important to recognize, however, that this burden goes hand in hand with a remarkable concentration of power in American judicial discourse. After all, the burden is a direct function of the fact that the judicial decision is the only significant American means of judicial control, justification and legitimacy.

As a result, the judicial decision serves as the absolute center of attention in the American judicial system. Unlike the French system, which offers powerful alternative discourses – such as academic *doctrine* – that share in or diffuse the exercise of

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[36] For the judicial "candor" debate, *see, e.g.*, Scott Altman, *Beyond Candor*, 89 Mich. L.Rev. 296 (1990); Scott Idleman, *A Prudential Theory of Judicial Candor*, 73 Tex. L.Rev. 1307 (1995).

argumentative authority, the American system concentrates all in the hands of the judicial decision. American judicial argumentation possesses no truly competing discourse. The American court reporters – whether official or commercial – publish court decisions, and only court decisions. Academic commentary is banished overwhelmingly to the law reviews (and to some extent to independent treatises or monographs): it is kept away from the public dissemination of the courts' official pronouncements.

Given that the American judicial system so concentrates its legal authority in the discourse of the judicial opinion, and given that there exists no serious alternative discourse whose power can begin to rival that of the judicial opinion, American judicial argument must in some important sense be all things to all people. American judicial discourse therefore occupies and dominates the judicial argumentative field. Carrying both the authority to impose single-handedly its analytic and normative vision and the burden to justify and legitimate this exercise of judicial decision-making authority, American judicial discourse must cover all the bases itself.

As a result, the American judicial decision must do all in its power to demonstrate publicly that it is both comprehensive and beyond reproach. This is not to say that there cannot be substantive disagreements about how a given case, or even entire lines of cases, should be decided. Nor does it mean that there cannot be methodological disagreements about how case(s) should be resolved. But the American judicial decision must demonstrate that it has been receptive to the requirements of textual stability and social responsiveness, that it has been open to – and perhaps even internalized – potential critiques, and that it has in the end adopted a mode of analysis sufficiently comprehensive to justify the significant *legal* power that the decision brings to bear.

The legal status of the American judicial decision and the justificatory burden that the decision accordingly carries are therefore intimately linked. In a chicken-and-egg sort of way, it is impossible to distinguish which came first: the American decision's status or its burden to justify and legitimate the exercise of its significant legal power. Either way, that status and its concomitant burden – which is only heightened by the lack of significant alternative means of institutional justification – prove so onerous that American Supreme Court opinions appear to be unwilling to engage consistently and overtly in equity-oriented debates about fundamental fairness, substantive justice, and adaptation to changing social needs.

Of course, this American judicial reticence may make a certain degree of sense. It is one thing to admit to and enable such equity-based normative authority in the French context of a rigidly selected, trained and hierarchically controlled judiciary backed by a certain republican administrative legitimacy and hemmed in by the French doctrine of "the sources of the law." It is quite another thing altogether to admit to such equity-based decision-making in the context of untrained, politically selected and largely uncontrolled American judges who nonetheless dominate the judicial argumentative landscape and explicitly possess law-making power.

This justifiable reticence parallels the traditional American resistance to affording judges certain procedural powers that civilian judges often possess. Thus John Langbein cautions against granting American judges assorted "managerial" powers that German civil judges exercise effectively on a routine basis.[37] Judge Marvin Frankel and Professor Paul Frase make similar points in the context of adversarial and criminal law procedure.[38] In each of these cases, the governing notion remains the

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[37] *See* John Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L.Rev.823, 858-866 (1985)

[38] *See* Marvin Frankel, *The Search for Truth: An Umpireal View*, U. Penn. L.Rev. 1031, 1041-45 (1975) (describing as an "unpromising approach" the American trend towards deploying the judge "as

same: civilian judicial systems in general, and the French system in particular, tend to possess institutional controls that the American system does not.

Needless to say, the actual or comparative effectiveness of the American argumentative and the French institutional models, as a function of their ability both to generate judicial control and to foster democratic deliberation, remains open to debate. Does the American judicial system's refusal to discuss overtly politically sensitive questions of substantive equity actually remove such issues from, or merely sublimate those issues in, the American judicial system? Does the complex, technical and dominant American argumentative centrism actually control American judicial discourse and decision-making in a manner that vaguely parallels the institutional mechanisms of the French judicial system? Finally, is it a loss, from the point of democratic debate and deliberation, for the American judicial system to ostracize overtly substantive equity discussions from its judicial debates?

It is not my purpose or desire to resolve such questions here; and a serious analysis of such questions on the merits lies far beyond the scope of this article and even of my forthcoming book. The idea has been instead to demonstrate the American judicial system functions on the basis of an argumentative model of judicial legitimacy. Without the institutional structures that characterize the French judicial system, the American judiciary justifies and controls its particular decisions and its judicial decision-making authority in general by engaging in long, detailed, personal and public discussion about how and why it comes to its decisions. The American judicial system therefore offers a particularly inclusive image of public and thus readily accessible, public judicial debate and deliberation.

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trial director"); Richard Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 Cal. L. Rev. 539 (1990).

On the other hand, publicly placing such a legitimation burden on American judicial opinions does tend to drive judicial debate into a safe and mild argumentative centrism that, for all of its laudably democratic accessibility, turns out, almost as a result, to be tremendously controlling. Unlike the French system, which offers powerful, competing, alternative discourses – such as academic *doctrine* – that not only share in and thus diffuse the exercise of judicial normative authority, but also offer significantly different analytic prisms, the American court reporters publish only court decisions. With academic commentary banished to the law reviews, the American judicial decision single-handedly occupies and dominates the American judicial landscape. It *rules* – and rules as *caselaw* – in a way that is quite shocking to the French legal mind. That said, at least this judicial discourse gets routinely published, which is more than can be said about the internal judicial discourse of the French judicial *magistrats*.

IV. The European court of Justice

The bifurcated French argumentative model is not just an anomalous or vestigial French jurisprudential curiosity. It is a fundamental characteristic of what is today probably the single most important Court in all of Western (and soon Eastern) Europe, namely, the European Court of Justice. The ECJ adopted a variant on the French model from its very inception. In every case, therefore, a Reporting Judge, an Advocate General and the ECJ itself produce more or less the same kinds of documents as do their French counterparts; and these documents bear a distinct family resemblance. Although they are distinctly longer than their typical Cour de cassation counterparts (they usually run in the three to four page range), the ECJ's decisions are still relatively short, deductive and magisterial judgments rendered in an unsigned and collegial manner

without concurrences or dissents. Similarly, the Advocates General's Opinions are relatively long, signed and personal documents that are more explicitly policy-oriented and socially responsive than the Court's decisions.

The European Union, however, puts a meaningful twist on the bifurcated, French-style model. This time, the model has been transposed into a very *un*-French, *trans*-national context of fractured political and legal assumptions. The European Union, after all, consists of fifteen different Member States, each with its own legal, political and cultural traditions and institutional structures. Needless to say, this evident *diversity* seriously undermines the normative and structural unity that constitutes the traditional core of the French system.

Without the control produced by the heavily unified French institutional and normative fields, the legitimating logic of the radical French bifurcation falters. The straight syllogism of the judicial decision now appears as overly formalistic and thus insufficiently transparent. Similarly, the internal deliberations of the elite judicial magistrates (such as the Advocates General) no longer appear to possess sufficiently common normative ground or institutional controls to support or justify a wide-open, fundamental fairness/ equity debate.

After all, ECJ judges are obviously not subject to the kind of elaborate, unified and hierarchical educational and professional selection, formation and oversight that are so important to the daily operation of the French legal system. To put it simply, the EU judicial system possesses no hierarchy to climb. Since 1989, the ECJ is of course accompanied by the Court of First Instance, which does function to some extent as an inferior jurisdiction subject to appellate review. But the CFI does not serve as the first step on an internal ladder of promotion to the ECJ. Membership on the ECJ is

determined externally, by a political appointment process governed by the Treaty and controlled by the Member States, not internally by promotion through the ranks.[39]

In short, although the ECJ maintains a good deal of the forms that typify the French judicial system, it demonstrates little of the institutional substance that motivates and sustains those forms in the French context. As a result, the burden to legitimate the ECJ's judicial decisions, the mechanism for producing underlying trust in those decisions, falls to a far greater extent on the shoulders of the Court's public judicial discourse. In a way that represents a major departure from the French model, the ECJ carries its legitimation burden largely by *argumentative*, rather than simply *institutional*, means.

Significantly reworking and tempering the radical French argumentative bifurcation, the ECJ therefore publishes *both* of its discourses – the ECJ decision and the Advocate General's Opinion – in every case. Needless to say, this dual publication practice produces a profound effect on the style of ECJ argumentation. It generates, to begin with, a distinctive European judicial cacophony: the Report, the AG's Opinion, and the Court's decision each summarize the arguments of all of the parties to the case. This means that in any important controversy, the arguments of some six to eight major players (most of which are EU institutions and/ or Member States – Nation States) are publicly on the table. The style of ECJ discourse is therefore permanently, thoroughly and publicly *controverted*.

The sheer number of arguments published in ECJ cases places the Court and its Advocates General in a difficult interpretive position. The interpretive voice of the AG

[39] *See* Treaty Article 223 (ex 167). At present, therefore, only two of the twenty-three current members of the ECJ (fifteen judges and eight Advocates General) have ever served as judges on the Court of First Instance.

– or even of the ECJ itself – represents but one voice among six or eight.[40] Furthermore, the Court and its Advocates General typically supplement the parties views with a significant dose of judicial – and in the latter case, academic – analysis. Both the ECJ and its AGs frame their arguments, above all else, in terms of the *jurisprudence* of the Court of Justice. This *jurisprudence*, which is overtly referred to as the Court's "case law," forms the very backbone of legal analysis and argumentation before the ECJ. The AG Opinions therefore *always* refer to the ECJ's caselaw,[41] typically citing some six to twelve prior decisions,[42] from which the AGs usually quote significant excerpts.[43]

Similarly, one of the practical functions of the AG Opinion consists precisely of canvassing and presenting *doctrinal* commentary on the issues raised by the case at bar. In almost all important ECJ cases, the Advocate General therefore explicitly refers to *doctrine*.[44] Such references can be more or less extensive and detailed. Quite often, the opinion will merely refer to a number of academic writings. The opinion of Advocate General Jacobs in *Van den Boogard v Laumen*, for example, cites some seven academic publications;[45] Advocate General Van Gerven's *Marleasing* opinion refers to the relatively high number of thirteen.[46] It is also quite common, however, for the opinions to quote from those *doctrinal* sources and to analyze them at length.[47]

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40 Dillenkofer & Ors v Federal Republic of Germany, [1997] CEC 35. Furthermore, these are only the typical figures. In Dillenkofer v Germany, for example, no less than eight parties presented arguments to the Court, thereby generating no less than ten different perspectives.

41 I have never found an Advocate General's opinion that does not refer to prior ECJ decisions.

42 *See, e.g.*, Brasserie du Pêcheur, [1996] CEC at 298-342; Hedley Lomas [1996] CEC at 982-1016.

43 *See, e.g.*, Zuckerfabrik Süderdithmarschen, [1992] 2 CEC at 496; Francovich [1993] 1 CEC at 616.

44 There are always exceptions to a rule. *See, e.g.*, the opinion of Advocate General Lenz in Fratelli Costanzo v. Comune di Milano [1991] 2 CEC 249.

45 Van den Boogard v Laumen (Case C-220/95), [1997] CEC 431 at 432-449.

46 *See* Marleasing, [1993] 1 CEC at 130-40.

47 *See, e.g.*, Opinion of AG Léger in Hedley Lomas, [1996] CEC at 991, quoting Grévisse and Bonichot, "Les incidence du droit communautaire sur l'organisation et l'exercice de la fonction juridictionnelle dans les États membres," in MÉLANGES BOULOUIS (1991) 297; Opinion of AG Van

As a result, the ECJ's simultaneous publication practice constructs a peculiar discursive or argumentative context, one in which legal interpretation is deeply, persistently and publicly controverted. This multi-faceted interpretive controversy, laid out in detail for all to see, places the Court and the Advocates General in the position of having to explain and justify what now appear to be significant interpretive *choices* rather than straightforward textual deductions.

The Court's simultaneous publication practice also produces a significant effect on the styles and types of arguments and reasoning that are deployed in each sphere. Now that they are published side by side, neither discourse takes as pure a stylistic form as does its French counterpart. The ECJ approach, in other words, *softens* the discursive bifurcation between the Court and the AGs to a significant extent.

The Court therefore does not produce the pure, single-sentence textual syllogisms of the French Cour de cassation. That said, the ECJ composes markedly magisterial decisions.[48] This magisterial quality begins of course with the collegial style in which the decisions are rendered: the Court speaks in an impersonal, unsigned and institutional third person singular, constantly referring to itself as "the court" or as "the Court of Justice." Without signatures or even disclosure of votes, ECJ decisions thus emerge explicitly as the work of the Court as a monolithic institution.

The ECJ's magisterially institutional voice is further stressed by the authoritative tone with which the Court expresses itself in its decisions. Whatever interpretive conflict a case may reveal, the Court boldly steps in to resolve the controversy with almost imperial confidence. The Court speaks as if the case admits of

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Gerven in Marleasing, [1993] 1 CEC at 137; Opinion of AG Van Gerven in Chernobyl, [1991] 2 CEC at 445.

[48] *See* John Barceló, *Precedent in European Community Law*, in INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 407, 411 (D. NEIL MACCORMICK AND ROBERT SUMMERS ed. 1997). For a detailed analysis of such "magisterial" judicial styles, *see* Robert Summers and Michele Taruffo, *Interpretation and Comparative Analysis*, in INTERPRETING STATUTES – A COMPARATIVE STUDY 496-502 (D. NEIL MACCORMICK and ROBERT SUMMERS ed. 1991).

only one correct answer. Thus, although the Court summarizes the arguments of all the parties, it then proceeds to reject those with which it disagrees in remarkably authoritative and coldly superior terms. As the Court magisterially repeats over and over again with respect to contrary arguments: "That argument cannot be accepted."[49] In a recent and routine example selected among hundreds, the Court states:

> 31. Abbey National, however, submits that . . . .
> 32. That argument cannot be accepted. First, it is clear from Article 17(2) of the Sixth Directive that . . . . Second, in any event, ...
> 33. Abbey National's argument that . . . must also be rejected. . . .
> 34. It follows that. . . .[50]

The Court can be quite forcefully dismissive of contrary viewpoints.

The force and style of the Court's expression therefore leave the distinct impression that only one decision was possible, that deductive logic simply required that the ECJ decide the case as it did.[51] The ECJ fosters this image of magisterially self-assured and deductive decision-making by deploying a series of characteristic argumentative tics. Thus, for example, when it answers questions addressed to it by Member State courts, the ECJ routinely wraps up its analysis by responding that "the reply must (therefore) be . . . ."[52] Similarly, the ECJ's decisions are utterly overrun by the use of the expression "it follows." The repeated use of this phrase obviously fosters the impression that the Court is engaged in a deeply logical and even deductive enterprise in which governing propositions – be they drawn from the Treaties, EU

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[49] *See, e.g.*, Société financière d'investissements SPRL (SFI) v Belgian State, Case C-85/97, 1998 CELEX LEXIS 6640, at 18 (1998); Covita AVE v Elliniko Dimosio (Greek State), Case C-370/96, 1998 CELEX LEXIS 6617, at 17 (1998); Georg Bruner v Hauptzollamt Hamburg-Jonas, Case C-290/97, 1998 ECJ CELEX LEXIS 6018, at 13 (1998); Brasserie du Pêcheur, [1996] CEC at 346-47.

[50] Abbey National plc v Commissioners of Customs & Excise, Case C-408/98, 2001 ECJ CELEX LEXIS 336, at 16-18 (2001).

[51] *See, e.g.*, Angelo Ferlini v Centre hospitalier de Luxembourg, Case C-411/98, 2000 ECJ CELEX LEXIS 3076, at *19 (2000).

[52] *See, e.g.*, Maria Nelleke Gerda van den Akker and others v Stichting Shell Pensioenfonds, Case C-28/93, 1994 ECJ CELEX LEXIS 5789, at *15 (1994); Florian Vorderbruggen v Hauptzollamt Bielefeld, Case C-374/96, at *20 (1998) ("In the light of the foregoing, the reply must be that consideration of the question referred has not revealed . . ."); Finanzamt Bergisch Gladbach v Werner Skripalle, Case C-63/96, 1997 ECJ CELEX LEXIS 10891, at *17 (1997) ("Consequently, the reply must be that an authorization by the Council to introduce a special measure . . . is not covered by. . . .").

legislation, ECJ case-law, or other "considerations" – lead inexorably to the Court's conclusions.[53] In short, although the ECJ significantly tones down the single-sentence syllogisms of the French Cour de cassation, it nonetheless maintains a notably magisterial and deductive tone.

In parallel fashion, although the Advocates General do not offer the incredibly open-ended French equity arguments about substantive justice, they do still argue in a patently subjective and insecure first person singular style. They therefore emerge as individual voices who must respond at length to contrary arguments, and do so in a highly personalized, relativized and even insecure fashion. Their arguments are thus constantly peppered with phrases that call attention to the perspective-laden and insecure status of their authors.

The Advocates General therefore regularly use such expressions as "it seems to me," "I think," "I consider that," and "in my view," which hardly instill a sense of deductive interpretive necessity. As AG Tesauro writes in a typical example, "I would add only that it does not seem to me possible to exclude out of hand that . . . ."[54] Similarly, Advocate General Gulmann argues, "But it seems to me doubtful in any case whether it is possible to deduce from the provision in question a duty for the Member States to prohibit. . . ."[55] AG Fennelly stutters: "The national court is, I think, correct in its identification of the purpose underlying . . . Article 9(2)(c) . . . of the Directive."[56] AG Colomer explains in a mild-mannered fashion: "I must say that I consider this

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53 *See, e.g.*, Portuguese Republic v Commission of the European Communities, Case C-365/99, 2001 ECJ CELEX LEXIS 1151, at *13-23 (2001); H. Jippes, Afdeling Groningen van de Nederlandse Vereniging tot Bescherming van Dieren v Minister van Landbouw, Natuurbeheer en Visserij, Case C-189/01, 2001 ECJ CELEX LEXIS 1204, at *59-60 (2001); B.S.M. Geraets-Smits and H.T.M. Peerbooms v Stichting Ziekenfonds VGZ and Stichting CZ Groep Zorgverzekeringen, Case C-157/99, 2001 ECJ CELEX LEXIS 1147, at *38-43 (1999).

54 Opinion of Advocate General Tesauro in The Queen v Ministry of Agriculture, Fisheries and Food, Case C-165/95, 1997 ECJ CELEX LEXIS 7327, 31-32.

55 Opinion of Advocate General Gulmann in Lucien Ortscheit GmbH v Eurim-Pharm Arzneimittel, Case C-320/93, 1994 ECJ CELEX LEXIS 3449, 19.

argument less likely to succeed than the previous ones, given . . ."[57] AG Elmer gently explains: "That proviso can, in my view, be assumed only to have the purpose of exempting the special cases of . . ."[58] Such personal and hesitant arguments recur ad nauseam, thereby calling quite a bit of attention to the personal nature of decision-making in the ECJ context.[59]

Through the recurrent use of such argumentative ticks as "in my view," "it seems to me," "I consider that," "I think," etc., the style of the AG Opinions only underlines the plurality of views implicit in the sheer number of arguments routinely presented in ECJ controversies. Given this evident plurality, one can only assume that the judicial solution is not likely to be a simple matter of impersonal and mechanical application of legal norms. In the embattled and controverted arena of ECJ interpretation, in other words, choices clearly have to be made and personal perspective matters.

As can readily be seen, the ECJ therefore clearly maintains the bifurcated form of the French judicial system, even if it has softened the bifurcation by doing away with the single-sentence judicial syllogism and by publishing its AG Opinions and official decisions side by side. How, then, does the ECJ mediate between its two "softened" discursive styles?

It does so by adopting a particular argumentative and conceptual framework, one that is often referred to as the Court's "teleological" interpretive approach. What is

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56 Opinion of Advocate General Fennelly in Jurgen Dudda v Finanzgericht Bergisch Gladbach, Case C- 327/94, 1996 ECJ CELEX LEXIS 5896, 30.

57 Opinion of Advocate General Ruiz-Jarabo Colomer in Germany v Commission, Case C-263/95, 1997 ECJ CELEX LEXIS 7345, 25.

58 Opinion of Advocate General Elmer in Astir A.E. v Elliniko Dimosio, Case C-109/95, 1996 ECJ CELEX LEXIS 6111, 19.

59 *See, e.g.*, Opinion of Advocate General La Pergola in Commission v Germany, Case C-102/96, 1998 ECJ CELEX LEXIS 6589, 28 ("On the other hand, it does not seem to me that, in this case, the protection of consumer health has been jeopardised in any way."); Opinion of Advocate General Jacobs in Karlheinz Fischer v Finanzamt Donaueschingen, Case C- 283/95, 1997 ECJ CELEX LEXIS 7352, 17

most remarkable about this teleological approach, however, is not really its purposive interpretive stance, so much as what *kinds* of purposes or ends it seeks to promote. Although the Advocates General routinely focus on what might be termed "micro" purposes – that is, the purposes underlying the specific Treaty provision or piece of legislation at issue (i.e., the provision's "*effet utile*") –,[60] such "micro" teleological reasoning may well constitute the least interesting and significant facet of the AG's interpretive practice. Furthermore, it is fairly unusual for the Court's mode of reasoning to be overtly couched in the crudely substantive terms of generating the ultimate political and/or social integration of the EU's Member States.

Faced with the multiple and conflicting arguments of the various and important parties to the case, the ECJ and its AGs turn instead to what might be termed "meta" purposes, that is, to the purposes, values or policies underlying not so much the particular piece of legislation at issue, but those underlying the EU and its legal structure *as a whole*.[61] The Advocates General tend, in other words, to increase the level and generality of the purposes and policies at issue, rather than limit their analyses to the "micro" purposes at issue in the particular instance. Instead of discussing, for example, how the purpose of the legislative or Treaty provision in question is to promote the humane slaughter of livestock, or to stop Member States from increasing customs duties on imports and exports, the analysis rapidly gets ratcheted up to deal not

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("It seems to me that, for the purpose of applying the principle of fiscal neutrality in cases such as the present, VAT must be considered in isolation.").

60 *See, e.g.*, Opinion of Advocate General Léger in Commissioners of Customs and Excise v T.P. Madgett, R.M. Baldwin and The Howden Court Hotel, Joined cases C-308/96 and C-94/97, 1998 ECJ CELEX LEXIS 6341, 11 ("The purpose of the provision makes it possible to identify an interpretation which is in line with the harmonisation required by the Sixth Directive"); Opinion of Advocate General Cosmas in Abruzzi Gas v Amministrazione Tributaria di Milano, Case C-152/97, 1998 ECJ CELEX LEXIS 6400, 29 ("The application of this regime to cases of that kind would be contrary to the purpose of the provision in question, which is to promote . . ."); Opinion of Advocate General La Pergola in Joined cases Societe Louis Dreyfus v Commission and Glencore Grain v Commission, Cases C-403/96 P and C-404/96 P, 1997 ECJ CELEX LEXIS 6781, 71-72 ("As I have pointed out. . ., the purpose of the provision is to prevent the Community institutions from . . .").

61 Such "meta" purposes therefore correspond fairly closely to "general legal values." *See* Robert Summers, *How Law is Formal and How it Matters*, 82 Cornell L.Rev. 1165 (1997).

with explicitly substantive political questions, such as EU integration per se, but with of a relatively small number of fundamental and recurring "meta" issues of systemic EU legal policy, such as ensuring "the effectiveness" of Community law,[62] promoting "legal certainty and uniformity,"[63] and securing the Community's "system" of "legal protection" of individual Community rights.[64]

In this utterly pervasive mode of argument, the ECJ and the Advocates General focus primarily on advancing the purposes or values that should motivate the European

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62 *See, e.g.*, Commission of the European Communities v Ireland, Case C-354/99. [2001] ECR I-7657 ("41 The Commission considers that the absence . . . calls in question the effectiveness of the comprehensive system of protection offered under the amended Act . . . . Even where a directive does not provide for any specific penalty or fine for non-compliance with the specific obligations it imposes, the Member States nevertheless have a general duty under Article 5 of the Treaty to take all measures necessary to guarantee the application and effectiveness of Community law."); Flemmer v Council of the European Union, Case C-81/99, Oct 09, 2001, [2001] ECR I-7211 ("57 Accordingly, the answer to the second question must be that . . . the contracts . . . are governed by the rules of national law, provided that their application does not prejudice the scope and effectiveness of Community law."); Gervais Larsy v Institut national d'assurances sociales pour travailleurs independants (INASTI), 28 June 2001, [2001] ECR I-5063 ("51 Suffice it to observe in that regard that the Court has held that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law.")

63 *See, e.g.*, The Queen v Commissioners of Customs & Excise, ex parte Faroe Seafood Co. Ltd, Foroya Fiskasola L/F, Case C- 153/94, 14 May 1996, [1996] ECR I-2465 ("80 . . . As a result, it will be possible for the uniformity of Community law to be ensured by the Court of Justice through the preliminary ruling procedure."); The Institute of the Motor Industry v Commissioners of Customs and Excise, 12 November 1998, [1998] ECR I-7053 ("16 It is settled case-law that . . . . Such an approach would be incompatible with the requirement of the uniform application of Community law."); Commission of the European Communities v Italy Case C-49/00, 15 November 2001, [2001] ECR I-8575 ("22 It is particularly important, in order to satisfy the requirement of legal certainty, that individuals should have the benefit of a clear and precise legal situation enabling them to ascertain the full extent of their rights and duties and, where appropriate, to rely on them before the national courts (Case C-236/95 Commission v Greece [1996] ECR I-4459, paragraph 13)."); Commission v Italy, Case C-159/99, 17 May 2001, [2001] ECR I-4007 (32 . . . the provisions of directives must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty).

64 *See also, e.g.*, Area Cova SA v Council, Case C-301/99, 1 February 2001, [2001] ECR I-1005 ("45 Finally, in the third part of the plea Area Cova and others dispute the effectiveness of a system of judicial protection requiring individuals first to choose a domestic remedy, coupled with the possibility of a reference for a preliminary ruling as to validity, in order to challenge the application of a Community regulation."); Opinion of Advocate General Cosmas in ED Srl v Italo Fenocchio, Case C-412/97, 1999 ECJ CELEX LEXIS 5913, 33 ("Procedural discrimination . . . is incompatible . . ., specifically, with the structure of the system of legal protection under Community law. . ."); Opinion of Advocate General La Pergola in Bundesverband der Bilanzbuchhalter e.V. v Commission, Case C-107/95 P, 1996 ECJ CELEX LEXIS 9039, 8 ("It could certainly be stated that there is a lacuna in the system of judicial protection in that it does not enable individuals to bring an action for judicial review of decisions whereby the Commission decides not to initiate the procedure for failure to fulfil obligations."); Opinion of Advocate General Léger in Hedley Lomas, [1996] CEC at 991 ("As early as 1981, in its judgment in Rewe-

Union's entire legal system. The ECJ's decisional vocabulary is therefore directed towards satisfying the *systemic* requirements for the establishment of a proper and functioning European *legal order*.

This meta-teleological style of reasoning is typical of AG Opinions. Explicitly insecure in the face of the multiple and conflicting arguments advanced by numerous and important parties to the case, the Advocates General motivate their interpretive positions with increasingly fundamental, systemic, meta-teleological policy arguments, which they then state in characteristically personal (and often rather alarmist) style. Over and over, the AGs seem to argue: "In my view, to adopt the contrary position would be to imperil the effectiveness – and thus the very functioning and existence – of the Community legal order as a whole."

The Court itself adopts the same basic approach, but in a far more magisterial tone. As it declares, for example, in Brasserie du Pêcheur v. Germany:

> 18. The German, Irish and Netherlands governments contend that . . . .
> 19. That argument cannot be accepted.
> 20. The court has consistently held that the right of individuals to rely on the directly effective provisions of the treaty before nationals courts is only a minimum guarantee . . . . The purpose of that right is to ensure that provisions of Community law prevail over national provisions . . . . [T]he full effectiveness of Community law would be impaired if individuals were unable to obtain redress...
> . . .
> 31. In view of the foregoing considerations, the court held in Francovich that the principle of state liability . . . is inherent in the system of the treaty.
> 32. It follows that the principle holds good whatever be the organ of state whose act or omission was responsible for the breach [of Community law].
> 33. In addition, in view of the fundamental requirement of the Community legal order that Community law be uniformly applied, the obligation to make good damage caused to individuals by breaches of Community law cannot depend on domestic rules as to the division of powers between constitutional authorities.[65]

As can readily be seen, the ECJ resorts, in the end, to a fundamentally similar interpretive and argumentative approach as its AGs', but in a condensed, axiomatic,

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Handelsgesellschaft Nord, the Court referred to a 'system of legal protection' making it possible to ensure the effectiveness of Community law.")

[65] Brasserie du Pêcheur v Germany, Cases C-46/93 and C-48/93, [1996] CEC (CCH) 295, 346-47.

deductive, and authoritative style. This public display of methodological convergence thus marks a significant departure from the radical French discursive bifurcation.

In many respects, this shift in the European Court of Justice's approach to debate, deliberation and justification represents the French model forced to confront a serious fragmentation of its *demos*. So much has been written so well – especially by Joseph Weiler – on the problematically complex and disjointed European *demos*,[66] that there is no reason to rehash the analysis again here. Suffice it to say that the French model of judicial legitimation functions on the basis of a representative institutional structure that establishes a republican correspondence between the French citizenry, the French State, and thus the French judicial apparatus (complete with its judicial, academic and professional components). If, as I suggested fleetingly above,[67] this representative republican link has been stretched a little thin by the increasingly overt fragmentation of the French citizenry, this representative link snaps – or more precisely, has never really been formed – in the multi-national European context.

Without an equivalent for the representative French structural mechanisms – that is, without some version of the unified and meritocratic French education, selection, training, and oversight processes –, and thus lacking much of the fundamental French *institutional* structure, the ECJ therefore adds to the French model a far more *argumentative* mode of judicial justification and legitimation. This conglomerate approach salvages much of value from the French system. The ECJ judgment thus remains an unsigned, magisterial, collegial and heavily deductive judicial decision, which hampers the Court's ability to become normatively dominant: the judgment may be too uninformative to serve effectively as the only focal point of future legal analysis, never mind to appropriate the status of "law." This opacity opens the door for, and

66 *See* JOSEPH WEILER, THE CONSTITUTION OF EUROPE (1999).

67 *See supra* note 21.

perhaps even creates the need for, the emergence of alternative – and often specialized – discourses that can explain, engage and perhaps even challenge the reasoning and authority of the judicial decision itself. It is therefore perhaps no accident that the ECJ decision is always published alongside the corresponding Opinion of the Court's Advocate General: the French model of cryptic decision-writing appears to work hand in hand with the simultaneous publication of a longer, more detailed and more explicitly substantive argument that breaks the argumentative monopoly of the Court decision.

At the same time, the ECJ can be understood to improve significantly on the French model. The ECJ judgment, for example, expands quite a bit on the meager explanations offered by the French Cour de cassation decision. The ECJ and its AGs consistently refer to the Court's past judicial decisions, which are cited by name and analyzed and applied with evident care. The ECJ therefore offers far more in the way of reasoned, justified and above all transparently public judicial decision-making. It presents, for example, significantly more in the way factual, procedural and interpretive explanation, including synopses of – and responses to – the arguments of each of the parties to the case at bar. As a result, the ECJ decision displays a heterogeneity of views that has little to do with the radically monolithic quality of the French Cour de cassation decision.

This explosion of evidently conflicting perspectives also results in the public elaboration of an improved decisional grammar for the explanation and justification of the ECJ's judgments. Instead of adopting either a syllogistic or an equity-based form of justification, the ECJ and its AGs negotiate their interpretive tasks by elaborating and deploying a complex meta-teleological framework that is directed towards satisfying the systemic requirements for the establishment of a proper and functioning legal order. The ECJ and its Advocates General then deploy this framework publicly, thereby

eschewing the French model of protected elite debate in favor of an approach that opens their decisions to public scrutiny and critique.

That said, it is all too easy to overstate the supposed improvements made by the European Court of Justice on the bifurcated French discursive model. In important respects, the problems with the French model largely remain. As Joseph Weiler explains, the ECJ's collegial decisions continue to be written in a "cryptic, Cartesian style. . . whose pretense of logical legal reasoning and inevitability of results is not conducive to a good conversation with national courts."[68] In fact, despite their abandonment of the single-sentence syllogism, ECJ decisions continue to be unsigned, univocal, magisterial and largely deductive documents that reveal decidedly less than they might: distressingly often, the Court's shorthand reference to, and axiomatic application of, such systemic policies as "the effectiveness" of Community law, "legal certainty and uniformity," and/or the "legal protection" of Community rights tend to leave much – and at times, virtually everything – unsaid. One need only look at the ECJ's repeated, contradictory, largely unexplained, and yet utterly determinative references to "the system of the Treaty" and to "institutional balance" in such major cases as *Comitology*[69] and *Chernobyl*[70] to find the limits of the ECJ's explanations! To a degree that is hard to square with the massively important issues at hand, ECJ decisions thus often remain remarkably uninformative and hence discursively unaccountable.[71]

At the same time, the benefits of the bifurcated French republican model are lost to a significant extent. The problem, of course, is that the ECJ generates such cryptic

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68 Joseph Weiler, "The Judicial Après Nice," in THE EUROPEAN COURT OF JUSTICE 215 (Gráinne de Búrca and J.H.H. Weiler, eds.) (Oxford: Oxford University Press, 2001) 225 (citations omitted); *see also* John Barceló, *supra* note 48, at 434-35.

69 *Comitologie*, Case 302/87, [1988] ECR 5615 (1988), para. 20.

70 *Chernobyl*, Case 70/88, [1990] ECR 2041 (1990), paras. 21-26.

71 This is to say nothing about the fact that the ECJ often serves as court of first and last resort in EU legal matters.

decisions despite the fact that it does not possess the corresponding institutional structures to control, justify and legitimate them. To make matters worse, the ECJ has significantly compromised the benefits of the traditional French discursive bifurcation by implementing modifications that may be ill suited to the French model. Thus, for example, although the ECJ maintains the French institution of the Advocate General who advises the Court on how its should decide the case at bar, the ECJ also robs that institution of a good deal of its analytic bite by removing the seclusion that the French bifurcation affords to the internal discourse of its high-ranking French judicial magistrates.

Now that it is published in every case, the AG Opinion thus drops its equity argumentation altogether, just as the literature on "sunshine laws" might suggest it would. Unlike their French counterparts, the ECJ's AGs therefore do not typically wring their hands over the "shocking" results produced by the application of existing law, and rarely if ever argue in terms of fundamental, substantive fairness. In essence, the publicity produced by the Court's publication practice squelches the equity-based argumentative function that is enabled and promoted by the French discursive bifurcation, thereby removing much of the *raison d'être* for such a republican institutional structure.

Instead, the ECJ's AG Opinions take over the explanatory role traditionally played by the French *doctrinal notes*. That is, the AG Opinion becomes the longer and signed document that accompanies the ECJ's relatively cryptic and unsigned decision. This substitution of the AG Opinion for the *doctrinal note* once again maintains a good deal of the forms that characterize the bifurcated French model, but simultaneously modifies them in a way that significantly alters – and perhaps well compromises – the function they serve in the French system. The French dual publication practice

introduces and incorporates the somewhat external, non-judicial, specialized and often critical voice of academic *doctrine*. This expert external voice is precisely what is lost in the ECJ variant: the ECJ decision is instead accompanied by the argument of yet another judicial *magistrat*, the Advocate General. The ECJ's published debate therefore remains entirely inside the judicial family. In the French version, by contrast, the academic critiques the actual judicial decision, and thus has the last word. In the ECJ version, however, the Court gets the last say: having considered the argument of one of its brethren (the Advocate General), the Court then ends that round of discussion by handing down its decision.

In the ECJ context, the members of the Court therefore hold almost all of the argumentative cards. This loss of diversity of published perspectives demonstrates and produces a concomitant rise in the importance of judicial discourse in the EU legal context. As the only published forms of argument, the relatively similar judicial discourses of the ECJ and of its Advocates General rise to a position of argumentative dominance. It should therefore come as no surprise that the normative power of the ECJ decisions now borders on that of *caselaw* – as US jurists understand that term. As a result, the Court's "case-law," identified explicitly as such, constitutes probably the single most important focal point in ECJ argumentation. Needless to say, this *caselaw* treatment of judicial *jurisprudence* defeats the primary purpose of the French discursive bifurcation: capping and diluting the authority of judicial decisions.

Finally, it is worth noting that the elevated authority of the ECJ's decisions emerges, perhaps not entirely coincidentally, in a published argumentative context in which the academic voices of the *doctrinal notes* are no longer to be found and in which the patently subjective, equity-based arguments over fundamental fairness have all but disappeared. Now that the previously internal French judicial arguments are

systematically brought into the open in the form of published Opinions of the ECJ's Advocates General, the judicial discourse of both the Court and its AGs move towards a safer and more homogeneous argumentative middle ground. Now that it bears much of the legitimating burden that the French system places on its republican institutional structures, ECJ argumentation instead establishes a meta-teleological form of argumentation that it deploys in a rigorous and recurrent fashion in much of its decision-making.

This meta-teleological form of argumentation – which comes in more impersonally condensed (ECJ decision) and more sociably extended (AG Opinion) variants – shifts the analysis from a discussion over patently substantive and political issues to seemingly technical ones over the proper design attributes of the EU legal order. Of course, this particularly systemic focus of attention makes perfect sense in the ECJ context. The European Union is obviously a fledgling legal and political order, one that undoubtedly needs to work out the fundamental institutional and even "constitutional" structures of its legal and political orders.

That said, what so often renders ECJ debate unrewarding is *not* the fact that it frequently addresses complex issues of system-building, but that it so often appears to gut these issues of their patently far-reaching and highly charged political stakes. In short, the frustratingly vague and shorthand form of the ECJ's meta-teleological reasoning leaves much to be desired. It is neither particularly informative nor particularly satisfying for the Court or its Advocate General to state yet again – in slightly longer or slightly shorter form – that "legal certainty and uniformity" and/ or "the effectiveness" of Community law requires one outcome or another.

Such a coded, shorthand reference to underlying systemic values does little more than to signify that the Court and its AGs have each dutifully considered each of the

arguments of each of the parties, and that they have decided the case with due regard for the systemic policy considerations briefly identified in their respective documents. But having waved at the parties and at the arguments in this shorthand manner, neither the ECJ nor even the Advocate General actively addresses the identified issues in sufficient depth to permit straightforward understanding or confrontation.

Another way to state this idea is to recognize that although the ECJ has clearly militated in the direction of an argumentative mode of generating judicial legitimacy, thereby significantly altering the historical and intellectual presuppositions of the bifurcated French discursive form, the ECJ has still not gone far enough by American judicial standards: its short and deductive collegial decisions are insufficient for the purposes of generating either personal judicial responsibility or an appropriately discursive basis for judicial legitimacy. In certain respects, therefore, the ECJ can legitimately be understood as a kind of *in-between* judicial model: it carries all of the possibilities and problems of the French and American models, but it does not quite go far enough in either direction to solve the problems or to take advantage of the possibilities of either.

V. Conclusion

In short, the ECJ's meta-teleological argumentation demonstrates a number of fundamental and interrelated tensions. On the one hand, the European Court of Justice and its Advocates General rationalize their interpretive positions by reference to broadly systemic meta-purposes, that is, by reference to the purposes, values or policies that should motivate the EU *legal system*, if it is to be a proper *legal order*. This generates a heavily recurring dose of references to such "meta," systemic or institutional issues as the "effectiveness" of Community law, "the need for legal certainty and uniformity," or

the importance of the Community's "system of individual legal protection." The ECJ's interpretive technique is therefore oriented primarily towards developing a proper legal order, namely, one that would be sufficiently certain, uniform and effective.

The problem, however, is that the Court and its AGs engage in this systemic project in a very peculiar discursive context. In particular, they operate through a bifurcated discursive form that reflects, constitutes, and is a historical descendant of, a specific judicial model: the French. But this bifurcated French model's legitimacy rests on, and is embedded in, a very particular notion and manifestation of the State. As we have seen, after all, the French State combines 1) unusually centralized, hierarchical and State-centered institutional structures (i.e., structures that demonstrate – or at least appear to demonstrate – an unusually high degree of certainty, uniformity and effectiveness) with 2) a particularly monolithic, republican and meritocratic State ideology. In other words, the bifurcated form of French judicial argumentation takes for granted – rightly and wrongly – precisely the kind of normative and structural unity that the European Union patently lacks and that the ECJ's meta-teleological, systemic policy considerations seem designed to address. The ECJ therefore engages in its systemic project in a bifurcated discursive form whose method of generating judicial legitimacy hinges on precisely what the EU cannot bring to bear: normative, institutional, structural and cultural unity.

At this point, the ECJ and its AGs resort to – or at least adopt – a decidedly more argumentative model of judicial justification, despite the fact that they continue to operate through the bifurcated French discursive form. Their resulting mode of meta-teleological discourse undoubtedly and effectively conveys that the ECJ and its AGs are deeply aware of the important systemic policy considerations in play in the controversies before them. That said, the telegraphic, deductive and collegially

impersonal form of the ECJ's discourse promotes the sense that the Court nonetheless plows forward without appropriately acknowledging either the full depth of its interpretive dilemmas or the sweeping effects of its decisions. In other words, although the ECJ adopts a decidedly more argumentative approach than the traditional French prototype, it does so without sufficient discursive controls or personal accountability to generate the appropriate degree of interpretive trust or judicial legitimacy. Too often, the Court's meta-teleological argumentation instead resembles shorthand slogans that do little more than cut debate short with a false sense of necessity.

In the end, therefore, the European Court of Justice finds itself in a most difficult position. On the one hand, it functions through a bifurcated discursive form whose underlying and legitimating French institutional structure the ECJ cannot begin to match. On the other hand, it adopts a more argumentative approach whose highly personal and discursive American mode of legitimation the ECJ also cannot begin to reproduce.

Operating under these terrible constraints, one can only marvel at the extent to which the ECJ has nonetheless managed to function as effectively and as authoritatively as it has. The European Court of Justice has forged a distinctive mode of judicial argument, one whose force and legitimacy may well lie not only in its semiotic allusions to its elite republican French foundations, and not only in its gestures towards a more American mode of democratically argumentative discussion, but also, and quite simply, in its shorthand acknowledgment of the dizzyingly complex and controverted institutional and systemic dilemmas that are routinely placed before it.

In a strange way, the very complexity of the ECJ's cases, the very controversy that surrounds them, the very power of the Court's interlocutors, and the stunningly high stakes routinely involved all combine to *empower* the ECJ, which stands fragile

and alone at the center of the European maelstrom. In a remarkable inversion, the ECJ has managed to make a strength out of the very precariousness of its position. Gesturing in shorthand fashion at the systemic considerations at play in its decisions, the ECJ simultaneously acknowledges its powerful interlocutors and cautions both them and the national courts that it so often addresses in its most important decisions: "Beware!," the Court seems so often to be saying, "We are at the very point of the fulcrum, and we can therefore feel the precariousness of the situation. We have been carefully building a delicately balanced structure that does its best to take all of the difficult and often opposing considerations into account. But if you push slightly too hard, if you resist slightly too much, in fact, if you ask a few too many questions and force us to be slightly too explicit in our responses, you will bring the entire house down!"