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Are Judges Street-Level Bureaucrats? Evidence from French and Canadian Family Courts

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Although judges were included in the street-level-bureaucracy (SLB) group by Lipsky (1980), sociolegal scholars have barely used this theoretical framework to study them. This article aims to specify their position with respect to SLB in order to bridge the gap between public administration and sociolegal research. Specifically, using a cross-national ethnography of judicial institutions, it compares family trial judges' practice on the ground in France and Canada. General conditions separate them from the core SLB group: encounters with clients are less direct; discretion is more legitimate. However, French judges are far closer to the SLB group than their Canadian counterparts regarding public encounters and case processing. As such, the accuracy of the SLB framework depends on professional and cultural patterns that combine differently in these two national contexts.

INTRODUCTION

Although sociolegal researchers first stated that trial judges should be considered as policy makers a long time ago (Mather 1991), the mainstream approach in the field of law, courts, and politics still focuses on higher courts such as constitutional or supreme courts. In addition, whether the approach is neoinstitutionalist (e.g., Cornell and Gillman 1999) or based on rational choice (e.g., Epstein, Landes, and Posner 2013), most studies aim to explain written decision making rather than analyzing day-to-day routines and encounters with parties, while "under-representing practice on the ground" (Fielding 2011, 97). In contrast,

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implementation studies offer an alternate framework for analyzing judicial policies, paying more attention to local and lower courts and to the various practices of legal professionals. In particular, the street-level-bureaucracy (SLB) approach has, during recent decades, been one of the main theoretical perspectives favoring a bottom-up view of public policies. A growing literature has developed in the field of public administration following Michael Lipsky's work (1980). Since then, street-level-bureaucracy theory (SLBT) focuses on the actions of public agents who directly interact with citizens, considering that policy "is actually made in the … daily encounters of street-level workers' with their clients" (Lipsky 1980, 12). It has argued that, because of their position "at the front lines of state-citizen interaction," SLBs have "inherent autonomy" when deciding how rules apply to situations in practice, and can therefore be considered as the "ultimate policy-makers" (Portillo and Rudes 2014, 322–23).

However, this approach has seldom been applied to the judiciary. In fact, since the publication of Lipsky's seminal book on street-level bureaucrats, the question of whether judges can be studied from an SLB standpoint has been treated with ambivalence. In several statements, Lipsky himself includes trial judges within the street-level bureaucracy, which he defines broadly as ranging from "low-level employees" (Lipsky 1980, 3) to lawyers and doctors. This comprehensive definition enables him to demonstrate that low and middle-level employees in contact with the public share common points with high-status professionals: they hold discretionary power in addition to implementing rules devised by their hierarchy. In return, Lipsky opened up another research path that has been followed by fewer scholars than the former: as well as SLB workers, lawyers, lower court judges, and other professionals have a front-line position with the public and meet numerous clients during the course of their work. Judges' face-to-face contacts with litigants during hearings in lower courts resemble public encounters between citizens and state agents such as social workers, teachers, or public officers. Observing these encounters is indeed crucial to understanding how judges use discretion in their work. This argument can then be applied by sociolegal researchers to question the nature of judicial discretion when it comes to judges' work, not only taking into account the written decision itself, but every stage of the case processing, including the oral phases. This is why our research designed a protocol (see below) that aimed to follow the judicial process from the observation of hearings to the analysis of judicial records. It specifically focused on family courts as a type of litigation that has been affecting an increasing number of people over the last decades and that is now central in the way citizens experience judicial policies on the ground. In this article, the SLB framework will therefore be used specifically to compare family justice actions at a micro level in two national contexts. On the basis of this cross-national ethnographic study of judicial institutions, trial judges' work in French and Canadian courts is to be analyzed.

THEORETICAL FRAMEWORK

Although the SLB framework has become a "confluence at the intersection of public administration, social welfare, criminal justice, socio-legal studies and public

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policy" (Maynard-Moody and Portillo, 2010, 263), few sociolegal scholars have used it in an explicit way to study judges' position. However, some pioneering work in that field shares common points with the SLB approach. Mileski's innovative paper on "courtroom encounters" is the key example: her study of a state criminal court in the United States led her to show similarities between judicial and bureaucratic work and to conclude that "the patterns of judicial demeanor may be very close to those for bureaucratic workers in other legal or even non-legal settings" (Mileski 1971, 525). Also studying criminal courts, Flemming, Nardulli, and Eisenstein recommended an analysis of judgecraft, defined as "how … judges … go about their tasks in the courtroom" (1992, 3). This approach has become more common over the last decade: according to Shapiro, "the political science field of law has been greatly expanded 'outward' to other nations than the United States … and 'downward' from the Supreme court to trial and intermediate appellate courts" (Shapiro, 2005, 287). Outside the US context, several recent pieces of research promote insights into "judgecraft" (Mack and Roach Anleu 2007; Moorhead and Cowan 2007). For instance, two recent books have used court observation to study English trial judges' work (Darbyshire 2011; Eekelaar and Maclean 2013). Although few of them use the SLB scheme, their research design and rationale come close to it, so that Cowan and Hitchings (2007, 379) can argue that "there is scope within sociolegal studies for better use of the work of Lipsky," while Tata (2007, 427) recommends "paying more serious attention to sentencing processing at street level."

However, the public administration literature has highlighted the fact that Lipsky's work "gives relatively little attention to those who most stridently claim to be professionals, such as doctors" (Hupe and Hill 2007, 282), as well as judges. Moreover, later SLB researches have largely ignored judges, some authors being reluctant to use Lipsky's inclusive category. Maynard-Moody, Musheno, and Palumbo (1990, 840), in particular, followed his scheme "except for judges," considering that they act as "administrators" (Eisenstein and Jacob 1977) rather than as "front-line staff." As a matter of fact, welfare workers are the most studied group in discussions of Lipsky's thesis on discretion (e.g., Evans 2010). In French sociology, for instance, the SLB framework has been used mainly to study low-level or intermediate civil servants (Cartier 2003; Siblot 2006; Spire 2008; Dubois 2010), but is never applied to professions with higher status, such as the judiciary.

Besides disciplinary boundaries, two major reasons may account for judges being understudied within this paradigm. Lipsky considered that "street-level bureaucrats have some claims to professional status, but they also have a bureaucratic status that requires compliance with superiors' directives" (Lipsky 1980, 19). The SLB framework originates in implementation studies as "the quintessential administrative task" (Wagenaar 2004, 649); street-level bureaucrats' commitment toward rule application is the starting point for these studies. Such a statement seems hard to apply to judges. First, the judiciary is regulated more as a profession (Parsons 1951; Freidson 1970) than in a hierarchic way, and is usually granted a high degree of autonomy: due to the principle of judicial independence, horizontal self-regulation takes precedence over external and vertical authority (Fiss 1983, 1444). Second, legal controversies about judicial discretion have led to recognition not only for judges' "delegated discretion," which they share with other officials, but

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also for their peculiar prerogative, "the discretion to change the law," that is, "the court's decision to overturn an existing legal rule or body of rules" (Galligan 1986, 40), which is especially marked in the common law tradition. Such differences should be kept in mind when it comes to studying trial judges' work, but it should not discourage use of the SLB framework. In reality, lower courts have far less leeway to change the law than higher courts, and trial judges are subject to appellate review. Finally, according to Galligan, "judicial discretion is not that there are special types of discretion that we may call judicial, but that the judges exercising discretion . . . are likely to have special attitudes towards their tasks" (1986, 637).

Responding to these encouragements, this article aims to use the SLB approach to examine trial judges' work. For that purpose, it will link two questions that the literature sees as defining the main SLB characteristics: how trial judges encounter litigants and how they use discretion when processing cases. As most studies about SLBs, it will therefore focus on the use of discretion by judges in concrete cases (discretion-as-used) rather than on the legal grounds for their discretionary power (discretion-as-granted) (Hupe, Hill, and Buffat, 2015a, 17–18). It will also retain a comprehensive definition of this notion: judges use discretion when departing from a case treatment perceived as impersonal, for example, implemented in the same way whatever the judge and whoever the litigants.

RESEARCH DESIGN

Regarding the research design, three main decisions were made. First, this study focuses on trial family judges, who may settle child and spouse support payments, legal and physical custody of children, and the partition of family patrimony. Second, it follows the recent encouragement to develop cross-national studies in the SLB scholarship (Hupe, Hill, and Buffat, 2015b, 331–36), as it compares those judges in two national contexts, France and Canada. Third, it uses ethnography as a method for this comparison.

As in the fields of criminal law (e.g., Mileski 1971; Harris 2007) and of administrative hearings (Cowan and Hitchings 2007; Lens 2007), family judges process a vast number of clients—to that extent, they face heavy backlogs, as SLBs usually do. In the two countries studied, contrary to judges in appellate courts, trial family judges sit alone, and direct interactions with litigants are central features of their work, as they are for SLBs. They are also faced with clients from a large variety of social and economic backgrounds, as opposed to criminal courts. This makes the case of family courts all the more interesting to analyze how judges use discretion when processing cases.

Comparing two national contexts is, however, crucial to understand which conditions drive the judiciary closer or further from an SLB position toward citizens and case processing. Due to the rise of family dissolutions, the situation of family judges is made more challenging by pressure on public funds, which makes it hard to hear all applications to the courts and encourages out-of-court dispute resolutions. Besides these practical concerns, this trend toward "private ordering at the time of divorce" (Mnookin and Kornhauser 1979, 952) is justified by shifting norms

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regarding public intervention in private matters. In many countries, the involvement of judges is today perceived as potentially harmful to the resolution of family disputes and damaging to litigants' privacy. When discussing the nature of judicial discretion, it is interesting to note that judicial powers in family matters have been challenged for the last few decades (Jacob 1988; Eekelaar 1991; Théry 1993).

However, this "privatization" of marital dissolutions has not reached the same level, and does not take the same form, in all countries. To summarize, governments may decide to leave family issues to judges in all cases, while streamlining the proceedings to make them quicker and less intrusive. Or they can focus the judges' role on a smaller number of more complex, and more contentious, cases. Such considerations encourage an international comparison of judges' work.

To that purpose, this article compares two judicial systems in which the judge's role has been defined in different ways. It uses a case-oriented comparison, rather than a variable-oriented one (Della Porta 2008), in order to account for the effects of national patterns such as judicial organization and legal culture on professional practice, even with respect to small differences. Specifically, it considers French family justice as a civil law example that maintains judges as frontline actors in family dispute resolution, as compared to Quebec, the French-speaking province of Canada, whose legal tradition mixes civil law and common law influences (Tancelin 1980; Normand 2011), and in which judges tend to act as players of last resort.

Although institutional approaches of comparative law have nuanced the idea of a clear-cut opposition between "civil law" and "common law" traditions (e.g., Mattei and Pes 2010), variations have been pointed out between those two legal cultures as regards to judicial proceedings. On the one hand, judges in civil law countries such as France and Germany hold less procedural discretion to favor alternate conflict resolution and to discourage litigants to go to trial (Blankenburg 1999, 354); on the other, the implementation of guidelines in order to reduce judicial discretion is in the most advanced stage in common law countries, whether they regulate child support (Dewar 2000, 66) or juvenile offenses (Harris 2007).

Our own approach acknowledges the accuracy of analyzing individuals' practice within their institutional context. It shifts from the mainstream "macro" perspective in courts and politics scholarship (e.g., Jacob et al. 1996; Ginsburg and Kagan 2005) to a "micro" international comparison, which we consider as more accurate to finely capture judges' work. Indeed, this study is based on cross-national fieldwork in courthouses. This matches the ethnographic tradition in qualitative research (Atkinson et al. 2001), to the extent that it mainly relies on the observation of numerous hearings (about 260 hours)—nonparticipant and gathered by several researchers and students—complemented by interviews with about fifty professionals (especially judges who were observed during hearings), and the analysis of numerous judicial records (connected with the hearings observations). This combination of oral and written data has been designed to include the different stages of case processing and to follow family stories as well as professionals' work from the motion to the judgment, as Marcus (1995) recommends. To vary both the social characteristics of litigants and the type of court operations, the data were gathered in both urban and rural courthouses. Their names are not cited in this article and pseudonyms were assigned to the individuals who

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are quoted in order to protect their confidentiality while providing a realistic impression for readers (Table 1).

Due to this comparative perspective, our findings differ from other empirical studies of judges' work, which highlight variations in practice within a single judicial group (Conley and O'Barr 1998; Mack and Roach Anleu 2010). Instead, this study emphasizes national styles of judging rather than domestic differences. It may indeed remind one of Scheffer's ethnographic comparison of law-in-action (e.g., Scheffer 2008), which focuses on legal procedures in order to reach a thick comparison. However, whereas this scholar promotes an ethnography of legal discourse, our research is more interested in accounting for professional practice. More precisely, it compares French and Canadian family judges regarding both encounters and judicial discretion during case processing (Table 2).

First, due to differences in client processing, time constraints, involvement of middlemen, and solemnity, French family judges have a more frontline position with respect to the public than their Canadian counterparts. Whereas the first hear all cases filed in family courts, the latter only deal with a small part of them, supposedly the most disputed or complex, which are selected after a triaging process.

Second, regarding judicial discretion, French and Canadian judges do not use it in the same way. Canadian family judges are confident in their discretionary power, for example, their ability to make a difference in a few selected cases by writing innovative decisions, but they also seek to maintain an impersonal facade during hearings, saying little of what they think of litigants' requests and lifestyle in court. By contrast, French judges tend to acknowledge *de facto* situations: not only have they little means to implement a case-by-case treatment of disputes, but most of them are also wary of using discretion to decide in cases with high stakes. Finally, the most obvious form of discretion used by French judges consists of speaking up about litigants' disputes and lifestyle during the hearings.

TABLE 1.
Data

	France (2009–2010)	Québec (2011–2012)
Courthouses	4 *tribunaux de grande instance* (2 in the Parisian area, 2 outside)	3 districts of the Superior Court (two major cities and a rural area)
Interviews	20 judges (+ 4 clerks)	18 judges (+ 3 clerks + 2 administrators at the department of justice)
Observation of hearings	122 hours, i.e., 330 cases	140 hours, i.e., 130 cases
Judicial records	100	36
Number of students and researchers involved	16	7

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TABLE 2.
Family Trial Judges vis-à-vis SLB Characteristics

		France	Quebec
Judicial encounters	Client processing	Massive and homogeneous	Triaging and delegation between professionals
	Time constraint	Strong	Lighter
	Middlemen	Few	Many
	Solemnity	Little	Strong
Discretion and decision making	Vision of judicial discretion	Distrust, except for speaking up	Legitimacy
	Treatment of cases	Routine-like	Case by case
	Type of decisions	Acknowledging *de facto* situations	Innovative in selected cases

BACKGROUND INFORMATION

To account for such differences, two kinds of contextual patterns need to be highlighted (Table 3). First, although they are the only type of first-instance family judges within these two jurisdictions and share the same professional title, French and Canadian family trial judges have rather different professional status and the group they belong to is not monitored the same way. Most French judges entered the *École Nationale de la Magistrature* right after graduate school, before the age of thirty (Boigeol 1989); they have civil-servant-like careers, organized along a vertical

TABLE 3.
Contextual Patterns

		France	Quebec
Professional characteristics	Social status	Upper middle class	Upper class
	Group reference	Senior civil service	Bar
	Age mean and difference[a]	48 (from 27 to 55)	60 (from 48 to 73)
	Sex ratio	64%[b]	32%[c]
	Recruitment	Competitive exam	Appointed by the executive
Legal culture	Organization of courts	Quasi-bureaucratic	Great autonomy for judges and lawyers
	Type of hearing	Judge-led	Lawyer-led
	Case law	Underdeveloped	Highly developed

[a]Among the judges we observed during hearings in France and Quebec.

[b]The mean age of French family judges is based on the ages of the twenty-eight judges encountered during our study. The sex ratio is calculated by the French Department of Justice (Direction des communications).

[c]Direction des communications du ministère de la Justice du Quebec, Les juges du Quebec à nomination fédérale de 1849 à 2009, Gouvernement du Quebec, 2010.

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scale, moving more or less quickly from the bottom to the top of the hierarchy. Trial judges working on family cases have a low or intermediate position within the judiciary and do not belong to the elite of their professional group. By comparison, Quebec trial judges form a more homogeneous and elitist group, whose wages and social prestige are far higher. They are appointed by the federal Minister of Justice, usually in their late forties or their early fifties, after a first career as a successful lawyer. This appointment process leads to an opposite gender balance (32 percent in Quebec instead of 64 percent women in France) and a higher average age (sixty instead of forty-eight).

Second, France and Quebec do not have the same legal culture: as in other European continental countries, the civil law tradition is very important in France, which leads to a quasi-bureaucratic organization of courts, judge-led hearings, and less reliance on case law. On the contrary, although the Quebec province is a former French colony, the common law influence is substantial regarding procedures and hearings: these are adversarial (meaning lawyer-led) and judicially (rather than bureaucratically) controlled; they rely on case law a great deal. The combination of these professional and cultural patterns explains why French judges are finally closer to the SLB position than Canadian judges and exert judicial discretion in a different way.

FINDINGS AND DISCUSSION

Judicial Encounters: Frontline vs. Last Resort?

To compare judicial policies on the ground, we first analyze the position that family trial judges hold toward the public in France and Canada. A central aspect of the SLBs' work is indeed to find a way of processing numerous clients with limited or inadequate resources, "within the constraints of fairness and equity" (Lipsky 1980, 30). Criminal court judges have already been described as close to this definition: in Australia, for instance, they face the necessity of "getting through the list" of the numerous cases they are presented with (Mack and Roach Anleu 2007). They are therefore led to intervene more and more actively in hearings to speed up the judicial process (342). Such a trend has also been noticed in English and Welsh family courts, where judges spend almost a third of their time managing hearings (Eekelaar and Maclean 2013, 82). In both France and Canada, family litigation is likewise considered as a "mass" or a "volume" service. This brings trial judges close to this SLB model at first glance, especially since they hear cases individually, rather than collectively.

However, French and Quebec judges cannot be described as frontline to the same degree. The quantitative trend of marital dissolutions has much stronger consequences for judges in France than for judges in Quebec, due to a very different division of judicial work and a dissimilar ability to delegate conflict resolution to other professionals. Moreover, typical interactions in Quebec courtrooms lead to a greater material and symbolic distance between judges and litigants. When it comes to controlling the flow of new clients and keeping

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them at arm's length during the encounters, Canadian judges are further from the SLB model than French ones.

French Family Judges in a Frontline Position

In France, family judges have issued an increasing number of decisions during recent years (from 322,000 in 2004 to 380,000 in 2014).[1] Added to the fact that public funding of justice in France ranks in the lower range among European states (Commission for the Efficiency of Justice, Report on European Judicial Systems 2016), this explains the heavy caseload: in the four French courthouses studied, each judge deals annually with 885 new family cases. As a consequence, processing the cases quickly and efficiently is a central aspect of their work: the average length of the 330 hearings that we observed was as short as 18 minutes, and no hearing lasted more than one and one-half hours. This corresponds to Mileski's observation of US state criminal courts at the beginning of the 1970s: "one obvious way the Court can allay pressures from heavy caseloads is to handle the accused rapidly" (Mileski 1971, 479). The workload placed on French judges is also explained by the fact that they hear all the cases filed by litigants and delegate only a very limited part of family conflict resolution to other professionals. Family mediation is little developed (Bastard 2010), mediators being involved in only 3 percent of the 330 observed hearings. Since the 2004 divorce reform, there have been financial and time incentives for litigants to resort to a "mutual consent" procedure (which implies agreeing on all outcomes) to obtain a divorce, but the rise of this procedure[2] has led to little change in judges' jurisdiction: the possibility of entrusting other professionals—notaries or proto-notaries—with consensual divorces was discussed in 2007 but finally rejected (Guinchard 2008)[3]. Judges still meet every divorcing partner. Some of them blame litigants for their heavy caseload, suspecting them of resorting too often to the courts to resolve their family disputes. "It has become normal; . . . people go to the judge like they go to the doctor," as Pierre Terreau, a male judge in a medium-sized French city, said before a hearing during which he was supposed to deal with twelve cases.[4] However, the reasons why French people ask for judicial intervention are not always individual: in working-class families especially, family litigation is regularly required by welfare workers, which need court orders about child support to proceed with clients. Most of these "institutional" motions come from welfare agencies granting family allowances. In the courts, judges and clerks are well aware of the motives of the litigants: as Catherine Blanchard, an experienced female judge in her fifties, comments about a mother who files repeated motions to ask for child support from

1. Sous-direction de la statistique et des études, French department of justice: http://www.justice.gouv.fr/statistiques.html.

2. This led to an increase in consensual divorces (from 40 percent in 1996 to 55 percent today) (Belmokhtar 2012).

3. In October 2016, the French Parliament finally opened the way to "divorce without a judge" for couples who agree on a "mutual consent" procedure.

4. Hearing observed in February 2009 by C. Bessière and S. Noorolahian-Mohajes.

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her former husband,[5] the welfare agencies "put pressure on her every three months." It is commonsense for these judges to consider they have little control over the growing volume of litigants' demands, and that it has consequences for the outcome of their work. They testify to being overwhelmed with new cases and unable to treat their workload as they would like, causing dilemmas over the way they allocate time to clients. Pierre Terreau continues:[6] "You have to make people understand that others are waiting to be heard, and sometimes we get told off because we are late, but we are late because we gave more time to the previous people. So this litigation over money, it is time-consuming, and it prevents us from taking the time needed to write a good decision on fundamental questions."

With little delegation of their work with clients to other professionals, a lack of arguments to discourage litigants from resorting to family justice, and no authority over welfare agencies that contribute to workload pressure, they feel quite helpless when it comes to curbing the rise in the number of files opened. As they try to deal with mass litigation by speeding up the treatment of cases, they experience the imperfections of the judicial response to marital dissolutions and question the limits of their own work. French judges seem close to a frontline position, facing rather than controlling the consequences of this mass litigation.

The concrete setting for their encounters with clients confirms this diagnosis. Only one of the four French courthouses where the research was conducted had a solemn courtroom. In two courthouses, hearings took place in the judge's office itself. In addition, unlike their US and Canadian counterparts, French judges do not wear gowns systematically. It would be an exaggeration to say that relations in French courtrooms are casual, but the setting of judicial encounters is obviously far from "severe appointments … dominated by a bench behind which a black-robed judge looks down to other courtroom participants, [which] convey the power of the system of laws over the individual" (Lipsky 1980, 117). Furthermore, few middlemen are involved: there is no usher, so that the court clerk is the only professional who assists the judge during hearings. Moreover, several clients are self-represented[7] so that judges have to teach them how to behave in court. Even when lawyers are present, it is still the judge, in compliance with civil law tradition (Ehrmann 1976, 90–92), who conducts the hearing, addressing litigants directly: the lawyers may plead, but they do not question clients themselves. As a result, encounters can sometimes go off-script, as in the following hearing involving a father with little self-control. It is the judge, with the help of his court clerk, who has to get the hearing back on track.

It is the sixth case scheduled in the morning session for Sophie Batement, a forty-four-year-old female judge who works in an urban courthouse.[8] Hearings take place in her office, where she sits behind a desk, beside the clerk, with the litigants and their lawyers sitting facing her. She is an hour late on the planned schedule.

5. Hearing observed in January 2010 by B. Faure and H. Steinmetz.

6. Interview in February 2009 by E. Biland and P. De Larminat.

7. There was no lawyer in eighty-three cases out of 330 observed. Although the attendance of a lawyer is compulsory for a divorce hearing, it is not when unmarried or already divorced couples come back for a new hearing. In half these cases, the two former partners are self-represented, according to our observations.

8. Hearing observed in March 2010 by H. Steinmetz and A. Surubaru.

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The female clerk calls the next clients, the unmarried parents of an eight-year-old girl. We hear, from the corridor, a tense discussion between the clerk and the father: sounding very annoyed, she warns him to "be polite." The father enters: he has no lawyer, unlike the mother, looks agitated, and announces aggressively, "I was called for 9, and I am heard at 10:30." The judge tries to make him sit, and starts the hearing by summarizing the case, but the man goes on mumbling. Keeping calm, the judge says: "Sir, although we are an hour late, and I am sorry about that, we will try to hear the case." The man goes on: "Do you think I enjoy getting shit like that," referring to the application for child-support, "I have always given her cash." He becomes threatening, makes big gestures, and gets very close to the judge's desk. The clerk warns him: "I am going to call the police if you continue." He answers: "Anyway, I am going to get fucked up." The judge tries to calm the situation, signaling to the clerk that she does not want her to call security, and finally manages to start the hearing.

This situation shows that when encountering clients, French judges tend to occupy a frontline situation. In the situation described, the court clerk, in charge of getting clients to court, is clearly the gatekeeper, as she gets physically close to litigants when escorting them from the corridor. Sophie Batement can also resort to security guards to keep litigants at distance if necessary, having under her desk an alarm device to call the police in dangerous situations. However, she plays an active role in calming the litigant, who has no lawyer, and trying to get him to cooperate in the processing of the case. These judges sometimes even encounter litigants totally alone, as observed in the court of a medium-sized French city where clerks do not attend all hearings, due to a lack of available staff. To sum up, French judges face a large number of cases at a quick pace, with little delegation of their work to other professionals to achieve conflict resolution, and judicial encounters are only partially framed by court decorum.

Quebec Family Judges as a Last Resort?

This description contrasts strongly with the part played by judges in Quebec as well as with the solemnity of family hearings in this jurisdiction. First, it is striking that the workload of Quebec judges has not increased along with the rate of marital dissolutions: although this rate is higher than in France, the overall number of judges' decisions in Quebec started to drop in the middle of the 1990s (from 60,000 to 40,000 in 2010).[9] On average, each judge of the Superior Court issues 170 decisions per year: even if family cases usually account for only half of their workload, the quantitative gap is substantial when compared to France. In fact, Quebec judges are not alone in dealing with this significant volume of litigation; they can rely on the work of several other professionals. Having the upper hand on the division of work,

9. Système d'information et de gestion, Direction générale des services de justice et des registres, Quebec Department of Justice. To compare the figures for France and Quebec, one must keep in mind that the population of Quebec is 8 million, compared to 65 million in France.

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they restrict their jurisdiction to selected cases and distance themselves from the frontline position.

First, since 1997, Quebec's Code of Civil Procedure makes it compulsory for parents who file an application to attend an information session on mediation, which may be followed by several meetings free of charge.[10] As a consequence, many separating couples never appear in front of a judge. As Gérard Boyer, a fifty-five-year-old male judge in a small Quebec community, puts it:[11] "It didn't work with the mediator; it didn't work with the lawyer, the conciliation process. And then they come to us—we are the last resort. We only get the files that couldn't be settled. Most cases get settled." Judges do not have to acknowledge most of the agreements settled out of court,[12] this work being under the jurisdiction of government lawyers, namely, proto-notaries. This corresponds to the tendency toward a "proliferation of subjudges"—that is, workers with an intermediate position between clerks and judges—already noted by Fiss in US federal courts (Fiss 1983, 1463). In other words, Quebec judges may rely on several other professionals to "take a heavy burden off" them (Lipsky 1980, 20).

As Darbyshire observed in English family courts (2011, 267–69), judges play an active role in this "triaging" process (Lipsky 1980, 130). In that respect, they take the "managerial stance" that Resnik (1982, 376–77) observed in US federal courts thirty years ago. Before trials on the merits, they may indeed encounter parties in order to make or to extend interim orders. Those simple hearings last from five minutes to three hours, according to our observations, and are not adversarial: litigants usually do not speak, but their lawyers make representations. In such cases, judges encourage separating couples to use opportunities for alternative conflict resolution as their case proceeds. In fact, before getting a hearing for a trial, litigants go through a long process[13] during which they are regularly encouraged to reach an agreement. Judges make litigants aware that a trial is costly in terms of both money and time, as Gabriel Forest, a forty-eight-year-old male judge, explains to divorced parents who want to challenge a previous decision on alimony for their three teenage daughters.[14] With the father, a truck-driver with a limited income, the judge makes it clear that he disapproves of the parents' persistent disagreement: "You have to try to talk to each other to avoid going to court. With your yearly income, you can't afford to go to court. I think it is a shame. You are lucky to have honest and efficient lawyers. There are many things you could have settled between the two of you, with a minimum of good will. Put your pride aside and talk to each other, or your legal bills are going to mount up."

10. Statutes of Québec 1997, c. 42.

11. Interview in June 2011 by E. Biland and C. Rainville.

12. Divorce agreements are the only ones approved by judges. Agreements between unmarried or already divorced people, as well as temporary provisions in divorce proceedings, are approved by proto-notaries.

13. According to the assistant of the senior associate chief justice, it can take up to two years to schedule a divorce trial on the merits in the courthouse of Montreal. In France, the average duration of family proceedings is about nine months (http://www.justice.gouv.fr/statistiques.html).

14. Hearing observed in June 2011 by E. Biland and C. Rainville.

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Indeed, over the last thirty years, as a consequence of incitements to seek agreement, the number of divorce trials on the merits scheduled in the Superior Court of Quebec has declined by 72 percent (from 6,800 in 1981 to 1,880 in 2011).[15] As a result, the time constraint is much less evident in Quebec courts than in French courts. Depending on the matters in dispute and the number of witnesses, lawyers can ask for as many hours of hearing as they think necessary, usually from a day to a week. Judges—especially the judge responsible for family litigation in each courthouse—examine their demands and decide to accept or to reduce them. During these unusual hearings on the merits, depending on the judge's perception of the case, he/she may speed up testimonies or slow them down in order to look at contentious issues in more depth. Unlike the French courts, this time regulation is less a matter of bureaucratic concern than a matter of bargaining between legal professionals, in respect to judges' precedence.

In addition, judicial encounters are far more ceremonious than in France, and Quebec judges are able to keep clients at arm's length far more easily. "Decorum," as it is called, clearly assigns places to each category of actors: the judge sits opposite the door, the clerk in front of the judge, each litigant and his or her lawyer sitting on each side of the court professionals. Originating in the fifteenth-century English court architecture (Mulcahy 2011), this layout organizes the isolation between society—litigants, lawyers, and other witnesses—and the judicial institution—judges, clerks, proto-notaries, and ushers. Court professionals work in dedicated parts of the building and get to the courtroom using their own corridor, and judges hardly ever go through the public parts of the courthouse. This isolation is made possible by the presence of other professionals in courtrooms: in addition to court clerks, judges are assisted by ushers, who bring water, paper, or pencils as needed. Ushers also ensure that the solemnity of the situation is not challenged, for instance, by preventing litigants and witnesses from talking or chewing gum. When it is necessary to "teach the client role" (Lipsky 1980, 61), lawyers, rather than judges, play the major part: although it is possible to go to family court without a lawyer, in practice, this situation is rare. Indeed, the legal culture of common law countries, and especially the adversary procedure, requires a passive role from judges and grants a more active one to lawyers (Resnik 1982). Although judges consider that this "sphinx" tradition has evolved with the necessity of "managing" cases more actively, and although some of them are more proactive than others during hearings, they address litigants less directly than French judges do. When litigants testify, court rules in the adversary procedure emphasize distance, and frame interactions with the judge in a rigid way: having to stand in front of the judge and the clerk for the whole testimony (while, in France, everybody remains seated), and abiding by several imperative requirements such as looking at the judge and not referring to lawyer/client discussion.

The beginning of this divorce hearing[16] makes it clear that it is the lawyers who have primary responsibility for socializing their clients with respect to court

15. Système d'information et de gestion, Direction générale des services de justice et des registres, Quebec Department of Justice.

16. Hearing observed in March 2011 by E. Biland and A. Fillod-Chabaud.

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rules. A female lawyer advises her client, a working-class employee in her forties, to leave her coat and winter boots in the visitor area. The woman stands in front of the clerk, who makes her swear under oath (she gives, as usual, her first name, last name, age, and address). Before asking her first question, her lawyer tells her to remain standing. "You shall speak directly to the Judge," she adds. By reminding litigants of court rules, various professionals make them aware of the judge's precedence with little intervention from the judge himself or herself, thanks to the cooperation of lawyers, clerks, and ushers.

Such a division of labor requires that litigants are represented by lawyers, although, according to law professionals, the trend toward self-representation is growing before the Superior Court: both litigants were represented in a little more than half (55 percent) of the 130 observed hearings. However, self-representation concerns mainly nonadversarial short hearings; during adversarial long hearings, which judges still consider as the core of their job, most litigants have lawyers, due to the practical demands of due process. Another evolution should be acknowledged regarding the role of the judiciary in family courts. Since the 2000s, litigants may ask for settlement conferences, in which judges do not act as decision makers but as facilitators, who play a more active part in front of litigants. To this respect, these conferences have some common ground with problem-solving courts, which are more and more used in the US criminal justice system (Berman and Feinblatt 2005). Nevertheless, they have not dramatically changed judges' work. First, the latter get involved in settlement conferences on a voluntary basis, whereas seating in adversarial hearings is still mandatory for everyone. Second, litigants must be represented in settlement conferences. In other words, even if judges' overlooking position is challenged by different trends in the judicial process, it is far more vivid in the Quebec family courts than in the French ones.

Judicial Discretion: Ready-to-Wear vs. Haute Couture?

It comes as no surprise that the frontline position of French family judges compared to Canadian ones has an effect on their way of exercising judicial discretion. Regarding this second dimension of SLB behavior, Quebec judges have more leeway to implement a case-by-case treatment of family affairs than do their French counterparts, and they value this room for maneuver. During her interview, Andrée Pinard-Garon, an experienced female judge in her sixties, chose to emphasize her ability to personalize decision making: "I like to call family law my '*haute couture* law' because it is adjusted to meet the needs of each family and the reality of each family. . . . So that's why it's my tailor-made work: the legal principles are the same for everyone, but they are applied taking into account the circumstances of each case."[17] In France, Pierre Terreau used an opposite metaphor to describe the standardization of family conflict resolution in France: for him, divorce hearings can be compared to "Chinese ready-to-wear. There are two sizes: acceptance of the

17. Interview in July 2011 by E. Biland and C. Rainville.

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principle of divorce by both parties or refusal by one of them."[18] Such opposite metaphors may refer to differences in career paths (Pinard-Garron has been a judge for thirteen years, whereas Terreau entered the family court a year prior to the interview), tied in with gendered patterns in role perception (Hunter 2008; Bessière and Mille 2014).

Without denying such inner differences within each judiciary, our data show that these metaphors also reveal national variations: presented with fewer cases and specializing in major family disputes, Quebec judges look in more depth at a small number of selected cases than French judges. As the last resort in family litigation, they tend to implement case-by-case treatment, while French trial judges, confronted with the whole mass of family litigation, seem to make more routine decisions. However, a deeper look at their work puts paid to the idea that French family judges hold no discretion at all. In fact, rather than opposing powerless French judges against powerful Quebec ones, we conclude they have two very different ways of exerting judicial discretion in family litigation. French judges recall the way Portillo and Rudes (2014, 324) describe SLBs: they have discretion to "mold" the encounters with clients, and especially to speak up to them, while Canadian judges use their granted discretion to decide. According to our hypothesis, this can be largely accounted for by the structure of the judiciary and by the differences in legal culture between the two countries.

In France: Little Discretion to Decide, a Wider Power to Speak Up

Among the factors that enable street-level bureaucrats to use discretion, Lipsky noticed their "relative autonomy from organizational authority" (1980, 16). However, he pointed out the "assault" of accountability (159) following the 1970s fiscal crisis, which pressed SLBs to meet productivity targets. Due to the constitutional principle of independence that defines the judiciary, judges seem to be less accountable for such quantitative goals than casual public administrations. Contrary to other court officials, they are not hired by departments of justice; their responsibilities are rather managed within the judiciary, meaning by their colleagues. Besides, the traditional values of the judiciary, such as the importance placed on slowness (Commaille 2000), seem to go against the imposition of productivity targets. But the very characteristics of the French judiciary, and especially its hierarchical structure (see above), seem to limit the lower court judges' ability to control their work patterns; in fact, it enables higher-level judges to control their careers and to impose work norms on them. This is made all the more effective by the fact that in France, judicial independence is less acknowledged than in common law countries (Roussel 2003). In practical terms, courts are "quasi-bureaucratic organizations" (Jacob et al. 1996, 7): the Department of Justice relies on the chief justices to implement national objectives and to report information on judges' activity. Indeed, quantitative goals in terms of the number of files closed have been implemented in the criminal courts since the 1990s and researchers have noted an increase in judicial pace (Bastard and Mouhanna 2007; Christin 2008; Vauchez 2008). In family

18. Interview in February 2009 by E. Biland and P. De Larminat.

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courts, targets focus on the number of judgments issued yearly by judges and delays between the filing of an application and the closing of a case.

During interviews, French family judges repeatedly referred to the pressure put on them by their hierarchy, and tend to consider it as the worst aspect of their job. Due to time pressure, there was almost always no break during the half-day hearings that we observed. In front of litigants, they may explain, as Lipsky noticed (1980, 63), that they cannot be expected to provide in-depth treatment for the case. Before the beginning of a hearing, Anne-Cécile Martigue, a recently appointed female judge in her late twenties, describes how this pressure affects her work and her attitude toward litigants: "With fifteen to eighteen cases scheduled in each half-day hearing, I know when it starts but never when it will end. Sometimes I take no break between the morning and the afternoon sessions. . . . We are supposed to hear a case every fifteen minutes. It is too short. Summing up twenty years together in three minutes is difficult. People have the impression that we do not listen to them. It is difficult but I have to keep track of time and set limits. We have to explain them that it is neither the place nor the moment. We are no psychiatrists."[19] As a matter a fact, when a judge devotes more time than usual to one or two sensitive cases in the same hearing, it causes a disruption of the whole court schedule. For example, the court clerk Béatrice Morin comments negatively on the habits of a former judge:[20] "She was very nice, but the morning hearing lasted until 3.30 pm. It was tiring because we had no time to do anything else. And for the lawyers it is annoying, because they can't schedule anything in the afternoon, they were tired of it . . . and for the litigants too, you are required to be there at 10 am and finally you are heard at 3 pm."

The quantitative goals assigned to French judges contribute to the routine treatment of cases. Most of their work is devoted to the quick processing of cases that they consider unworthy, especially the determination of child support, the most frequent dispute they have to arbitrate.[21] Pierre Terreau sums it up with a degree of dissatisfaction, "rather than the *Civil Code*, the hand-calculator is the judge's tool," while Caroline Placido, his female colleague, explains: "To be a family judge is not a legally complex job, it is ultimately about money."[22] In other words, child support disputes are often considered as "dirty work" (Hughes 1951) by those judges, meaning that they are tedious and unrewarding. This is not only because this task requires few legal technicalities. It is also due to litigants' economic status. Since many low-income parents go to court to settle such disputes, the amounts at stake (seldom more than 100 euros) seem of little significance to these upper-middle-class professionals. Moreover, the rush to hear and rule on child support applications usually leads them to set alimony for children within the amounts offered by each parent. Moreover, because of the need to speed up proceedings,

19. Hearing observed in April 2009 by E. Biland and H. Steinmetz.

20. Interview in March 2010 by S. Nouiri-Mangold.

21. Among the 256 cases we observed involving children (excluding "mutual consent" proceedings), a disagreement about child support was involved in 55 percent, much more frequently than disagreements on access rights (37 percent), physical custody (20 percent), or legal custody (9 percent).

22. Hearing observed in February 2009 by A. Fillod-Chabaud and H. Steinmetz.

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judges seldom use their right to reject agreements,[23] even if they may be fragile or unfair. During consensual divorce hearings, which are on average eight minutes long, they clearly have a rubber-stamping attitude, as Lipsky termed it (1980, 129). When it comes to making a decision, several studies have already noticed the strong influence of the *de facto* situation (Théry 1993, 271; Cardia-Vonèche, Liziard, and Bastard 1996). In particular, decisions on child custody differ little from one judge to another (Le Collectif Onze 2013, 157–59) because judges usually trust parents' demands: since mothers ask for child physical custody much more often than fathers, they are generally granted sole custody.[24]

Along with time pressures, the legal culture increases the tendency of French judges to exert little discretion when it comes to decision making. In France, judicial discretion is often seen as a threat of arbitrary decision making. As Michel Troper (2007) points out, the civil law tradition denies the judiciary any form of government power and officially restricts its jurisdiction to law enforcement. Besides, the codification process, which is key in this legal culture, has been justified by the will to create "rules for all possible cases, so that there will be no more room for discretion or for interpretation" (8–9). Such statements are reflected in the judges' own view of their prerogatives. Several of them expressed a feeling that family law is insufficiently accurate, possibly leading to arbitrary decisions. For example, in the matter of spousal support, French trial judges are uncertain of their ability to render a fair decision. Jean Brunetti, a fifty-year-old male judge in charge of the family chamber in a large urban courthouse, expresses his concerns about the fact that there is "no rule" when it comes to this specific field of litigation and that it is not possible, based on the Civil Code, to make homogeneous decisions:[25] "legislators have washed their hands of it, so it is not possible to find a mathematic rule." He complains that "the law enables the judge to do whatever he wants." Since case law is less developed in this civil law country, and collegiality is also less frequent, French judges feel a bit lonely with the hard choices they have to make. Overall, they seem less assured than their Canadian counterparts about their ability and legitimacy to make proper individual decisions.

However, French judges are not powerless: due to the inquisitorial system that characterizes the civil law tradition, they lead the hearings. Although the intensity of their interventions varies from one to another, with some of them remaining more silent and neutral and others intervening more frequently, they have overall more latitude to control the debates than their Canadian counterparts. For example, during "conciliation" hearings, which is the first procedural step for all disputed divorces, they strongly encourage the spouses to sign the document by which they relinquish any possibility of a fault procedure, and cut short the litigants when they try to talk about the circumstances of the

23. Among the fifty-two "mutual consent" divorce cases that we observed in court, the judge turned down only one agreement.

24. In custody orders rendered in 2012, 71 percent gave the mother sole physical custody, 12 percent gave the father sole physical custody, and 17 percent granted shared physical custody (Guillonneau and Moreau 2013).

25. Hearing observed in March 2010 by H. Steinmetz.

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separation. By contrast, in custody disputes, family judges try to extend the hearing slightly (to one and one-half hours at most), as well as their deliberation. In a minority of situations, they may order an investigation by a social worker or psychologist[26] in order to obtain more information and to have more time to decide—though such referrals are limited by objectives on processing times. A few of them, mostly female judges, who also have a longer experience in family court and value this litigation more than their colleagues, use more proactively during the hearing when they deem a case worthy. For example, during a custody hearing, Catherine Blanchard, a fifty-five-year-old female judge sitting for twelve years in a family court, spent half an hour questioning the mother about her precarious housing situation, expressing repeatedly her doubts about the children's future living conditions.[27] As she got no satisfactory answer, she finally decided to postpone the closing of the case, issued an interim custody order, and scheduled a further hearing so as to "keep a hand on the file." Such a break from routine practice remains, however, bounded by the quantitative goals imposed on French judges, as Catherine Blanchard underlined herself: "This is judicial counter-productivity. The hearing lasted an hour and the case is not closed. If the President of the Court had seen that, he would be quite dissatisfied." As a consequence, even hearings during which custody is at stake are far shorter than trials observed in Canada: they last half an hour on average, with judges cutting short litigants, and even lawyers, when they take too long to present their arguments.

However, since they play an active part in conducting hearings, they have more freedom to express their point of view during judicial encounters. As Lipsky (1980, 99–104) showed, SLBs differ from Max Weber's depiction of bureaucrats (1978, 975), as "sine ira ac studio" (without scorn and bias): their routine practice is not free from discretion and stereotypes. As a matter of fact, some (usually) male judges, who are uncomfortable with private and emotional issues, try hard to maintain a neutral façade during hearings: they stick to procedural requirements so as to hear as little as possible about litigants' personal stories during encounters. However, this "sanitized approach" (as Pierre Terreau terms it) is not shared by the whole judiciary.

Some other male judges express their unease toward family issues by speaking up harshly during the hearings, for example, making it very clear to parents that they strongly disapprove of their lifestyle and their decisions concerning their children. Etienne Paletot, a male judge who dislikes family litigation, speaks to the parents of a toddler:[28] "It is amazing to have a baby and then to separate within a few months! . . . You separated four months after buying a house together: you could not be more inconsistent!" On the other hand, some female judges who value family courts adopt a pedagogical and interventionist style that is inspired by their previous function in youth courts: they take the time to explain the legal process to

26. A social inquiry was ordered in 14 percent of the 256 cases involving children (excluding "mutual consent" proceedings) that we observed in courts.

27. Hearing observed in December 2009 by M. Ducruet and H. Steinmetz.

28. Hearing observed in February 2009 by S. Gollac and R. Salem.

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the litigants; they care about practical details; they seek concrete solutions—but they also have a moralizing attitude toward litigants. During the interview, Sophie Batement explains that she "likes contact with people, [she] likes people, [she] feels that [she] can help. . . . [She] thinks [she] can help and advance the family situation in the right direction."[29] But during the hearing preceding the interview, she has tough words for a Malian father of eight who lives on welfare and just had a ninth child through an extramarital relationship, stating in front of him that "when you cannot find a job and already have eight kids, you do not have another one." Paletot's provocative tone and Batement's interventionist style are not alike: they correspond to quite different careers, expectations, and representations. Paletot taught law in court clerks' school till he entered the judiciary in his late forties. There, he has developed a taste for "pure law" rather than for contact with litigants. He feels quite dissatisfied with his current situation and wants to leave the family court "at all costs." In contrast, Batement entered the judiciary at a young age with the will to become a juvenile judge. She wishes to stay in the same function in the years to come, although this may be detrimental to her career advancement.

To that extent, these judges demonstrate the heterogeneity of their professional group. But their freedom to depart from a neutral attitude toward litigants reveals that there is some judicial discretion in French family courts, which place the emphasis on words rather than on decisions.

In Quebec: Confidence in the Discretion to Decide Behind a Neutral Facade

Due to the peer-group structure and the high social prestige of the Canadian judiciary, the activity of judges of the Superior Court is not monitored in the same way. It is no coincidence that, unlike France, no data are produced by Quebec's Department of Justice on the time that elapses between the filing of an application and the closing of a case: the departmental officials underline that judges are not willing to transmit such statistics, so as to protect their independence. Of course, the judges' autonomy is not total when it comes to their working rhythm: the Code of Civil Procedure imposes specific time limits for deliberations; the annual allocation of court time is decided by the chief justice and his/her assistants; and lawyers play a prominent role in the scheduling process. However, these experienced former lawyers have, overall, more resources to deal with practical regulations than young French magistrates trying hard to learn their job. For instance, they enjoy more discretion in the timing of the hearing: they decide when it begins and ends, and also lunchtime and other breaks, so that litigants and lawyers often wait for them in the courtroom. In setting their annual schedules, they can express their wishes about the courthouses they will sit in and the kind of litigation they wish to hear.

The egalitarian structure of the Superior Court of Quebec contributes to judges' autonomy. Collective work, well developed through training sessions or peer-to-peer discussions, plays an important part in socializing new appointees, but does not affect judicial independence. Marc Lachance, aged fifty and a former

29. Interview in March 2010 by H. Steinmetz and A. Surubaru.

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commercial lawyer, has been a judge for five years. He points out:[30] "Collegiality is interesting because we can share our views, we can give opinions to colleagues who ask us what we think of this or that issue, but the decision is up to them. The decision is theirs, and that's the beauty of it." In Canada, this constitutional right of independence becomes of key significance in judicial practice (Morton 2002). Quebec trial judges publicly express their commitment to it[31] as a way to protect the regulation of the justice system by the judiciary itself. On an individual basis, independence is also acknowledged. The only real control over judges' work is exercised by the appellate courts. Case law tends to set some standards—for example, for joint physical custody[32] and children with special needs[33]—which correspond to Galligan's description of "open-textured" rules (1986, 45): they frame judges' liberty but they legitimize their ability to apply them in a particular case.[34]

Although these judges have broad decisional discretion they do not use it in all cases: the "completely individualized treatment" of litigants is not commonplace, as Portillo and Rudes (2014, 324) note about SLBs. A large part of their work is indeed devoted to routinized tasks. Calling the roll, postponing hearings, and even approving divorce agreements hardly involve an in-depth analysis of cases nor the use of decisional freedom: "In most cases, I am able to sign the draft convention, without making any change," says Albert Savard,[35] a male judge in his sixties who was appointed twelve years earlier. Moreover, after short hearings, judges are very likely to take their decision on the bench, in front of litigants and lawyers, without further deliberation.[36] The subject of disputes also matters: due to the child support guidelines that have been implemented since 1997, most child support payments are calculated by lawyers or mediators instead of by judges. The latter use their discretion to deviate from guidelines on this issue for only 4 percent of child support orders.[37]

Indeed, their core competence is to select certain cases as more worthy than others—cases in which this routinized treatment would not occur and in which they can make a legitimate difference. This selection is based on the stage of the judicial process (for interim orders, *de facto* situation is important), on the matter at issue, and, implicitly, on litigants' social status. As in France, custody and major economic disputes—almost always involving wealthy litigants—are more valued than child support conflicts. All judges agree that those disputes are currently the most important and need careful attention. First, custody disputes result in long hearings: the average length among our observations is about three hours, with

30. Interview in May 2011 by E. Biland, A. Fillod-Chabaud, and C. Rainville.

31. For example, in 2011, the Chief Justice of the Quebec Superior Court wrote an opinion piece in a respected newspaper to promote it (Rolland 2011).

32. Droit de la famille – 073502, 2007 QCCS 6601.

33. Droit de la famille - 3228, 1999 CanLII 13173 (QC CA).

34. For custody: L.(T.) c. L.A.P., 2002 CanLII 41252 (QC CA).

35. Interview in May 2011 by A. Fillod-Chabaud and C. Rainville.

36. In seventy-one out of the ninety-five observed cases (75 percent) that lasted less than three hours, judges made their decision on the bench.

37. According to a Department of Justice randomized database of 1,052 child support orders that were rendered in 2008 (Biland, Gollac, and Schütz 2014).

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great variation depending on whether litigants are heard for an interim order or on the merits. Judges study carefully parental skills and child lifestyles; they are likely to hear child professionals and, sometimes, children themselves. They are reluctant to rush into a decision on such cases because they involve a "noble" but imprecise principle—the "best interest of the child"—and usually lead litigants to express strong emotions: one should not take an order on the bench "when we spent the whole day trying to avoid that both sides kill each other," Gabriel Forest explains.[38] Second, patrimony disputes may lead to even longer hearings than custody ones (about six hours on average, with greater variation depending on the amount of the assets) and they always require much paperwork from judges because they involve technical matters—spouse support, for instance, requires "to make complex calculations, to check incomes and to work on the file," Gérard Boyer said—and because rich litigants are more likely to appeal. In any case, in these two kinds of litigation, Quebec judges will spend much more time on hearing litigants and drafting decisions than their French counterparts do.

The longest hearing that we observed is interesting for understanding the conditions and consequences of judicial discretion in Quebec. This divorce trial involved a ruined former banker and his stay-at-home wife who agreed about child custody rights before the hearing but kept arguing about financial issues (child support, spousal support, and the sharing of the family patrimony). Scheduled six years after the first divorce motion, it lasted five days:[39] two were dedicated to four financial experts' testimonies; the three others to the spouses' testimonies. A female judge in her early sixties who is in charge of the biggest family court, Madeleine Lagacé explained to the sociologists that she had much interest in this case, "which is very well prepared by lawyers, since there is a great bit of money."[40] She took a lot of notes during the hearing, which she read again at home at night. She expected her judgment to be "long and complex" and was prepared to "refine her wordings, rewrite shorter sentences and move some paragraphs." In fact, she worked more than ten days on it, including some time during the holiday season, and finally signed it a month and a half after the hearing (whereas she could have waited for six months according to the Code of Civil Procedure). Sixty-six pages long, this divorce order was radical: it enjoined the family to leave the European capital where they had been living for seven years to return to Quebec, where the cost of living is more affordable and adequate for that family's loss of fortune. Neither spouse had considered such a possibility in their applications, and they both appealed against the judgment. Although they are not the most frequent, wealthy litigants' cases draw much attention from the judiciary. Since they are an escape from routine work, they allow wide discretion in terms of decision making, although it can be challenged.

To some extent, Quebec trial judges appear similar to US judges, who are "likely to render novel decisions" (Jacob et al. 1996, 391) and to reverse *de facto*

38. Interview in July 2011 by E. Biland and C. Rainville.

39. Observed in November and December 2011 by E. Biland, A. Fillod-Chabaud, C. Rainville, and G. Schütz.

40. Interview in November 2011 by A. Fillod-Chabaud and G. Schütz.

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situations. However, like their US counterparts, they tend to preserve a more neutral and impartial façade than French judges during the hearings. First, what they say is never as confrontational as it can be in France. Since the common law legal culture values their formally passive role, a more interventionist posture could undercut their legitimacy (Mack and Roach Anleu 2007, 358). Although judges agree that they should intervene, especially to manage time, they still value self-restraint in front of litigants and lawyers as a way of showing their impartiality: "it is an adversarial process; we should not be the main players. That would surely be a mistake," Marc Lachance explains. Moreover, when they cut off cross-examination, they address the lawyers more often than the litigants. If lawyers are young and inexperienced or if their examination is perceived as aggressive and disrespectful, judges are likely to stop the examination and remind them of the expected behavior. Due to judges' seniority, these interventions regularly reveal an age-based domination over other actors, which recalls the traditional "father figure" embodied by common law judges (Ehrmann 1976, 91). In the following hearing,[41] involving the African parents of two children, the father's lawyer is a young black man who has been practicing for only two years. His colleague is a white woman in her fifties who is a renowned family lawyer. As he cross-examines the mother, he makes an ironic comment on her attitude toward her partner ("you seek Mr.'s help just when it suits you!"), to which his colleague briefly objects. Paul Émond, a fifty-eight-year-old male judge supports her in a long remark: "You are right, these comments are inappropriate and do not contribute to the serenity of the dialogue. . . . In this positive spirit, I invite you to talk in a positive and constructive manner." Since these comments are made by legal professionals to other legal professionals, and since they are meant to restore courtroom protocol, they are not as direct as those made by French judges to litigants.

Judges' remarks to clients tend to come at the end of the hearing when they are about to leave the courtroom. The working-class parents of two toddlers have being arguing about custody for more than one hour while they were supposed to agree on an interim order. After scheduling the hearing on the merits, Andrée Pinard-Garon looks the parents in the eye and warns them:[42] "What I want to tell you, sir and madam, is that whatever the reason for your separation, the bickering, the misunderstandings, the unkind words, you will always be the parents of M. and A. [the children's names]. Nobody else can be their parents. Sir will always be M. and A's dad and Madam will always be their mom. Nobody can replace dad, no one can replace mom. I ask you to show respect to one another, especially in the presence of the children." Such sanctimonious statements are not as usual as in French courtrooms, and judges seem to choose their words carefully in front of litigants: they may use their seniority to be moralizing, but they are never provocative as some French trial judges can be. As a whole, judicial discretion, although it is thought to be broader than administrative discretion, is not so obvious for judges. It depends on practical concerns, which may boost or constrain its exercise. It is also influenced by professional status and by collective representations, which are deeply

41. Observed in September 2011 by C. Rainville and G. Schütz.
42. Hearing observed in June 2011 by E. Biland and C. Rainville.

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rooted in the legal culture. Such contextual patterns may encourage or discourage judges to use judicial discretion, either during encounters or when rendering a decision.

CONCLUSION

To demonstrate that the study of justice in action benefits from integrating some public administration schemes in its analytical toolbox, this article has focused on the "street-level bureaucracy" framework in order to assess its accuracy to analyze trial judges' work. The comparison of two judicial systems offered a way to define suitable criteria for measuring their distance from the SLB model.

General conditions tend to single out the judiciary from casual street-level bureaucrats, such as social workers, teachers, and police officers. As far as their position toward clients is concerned, judge/litigant encounters are marked by some kind of distance. Judges can rely on other professionals—lawyers, court officials, social workers, and psychologists—as middlemen and women. They also belong to a professional group endowed with a higher status and more decision-making power than most bureaucrats.

However, the comparison between French and Quebec family judges shows that several factors can drive the judiciary closer to or further from the SLB model, with respect to the nature of their encounters with clients and of judicial discretion. When studying trial judges confronted with a mass of litigation such as family disputes, we conclude that the division of labor among law professionals and public institutions is crucial to understanding the position of the judiciary: they act as frontline SLBs in France, dealing with all litigants under strong time constraints, or, in Quebec, are considered as a last resort for dealing with the most complex and contentious cases. To account for such variations, these two in-depth case studies suggest that dissimilarities in the national legal cultures (which are reflected, e.g., in the organizational patterns of the courts) are closely entangled with differences in professional characteristics (including socioeconomic status and sex ratio). French judges, who are quasi-civil servants, direct hearings with little help from other professionals and have to ensure the clients' compliance, whereas their Canadian counterparts, whose social status is much higher, play a growing but less active management role during encounters, relying on lawyers and court officials to do so instead.

Even if, in such a mass of litigation, family trial judges share a common concern for dealing with numerous demands, we conclude that they do not resolve the usual dilemma between standardized shallow practice and case-by-case decision making in the same way. Regarding family law implementation on the ground, this international comparison shows that it is even more standardized in Canada than in France for most child support disputes, while Canadian magistrates are more likely to apply an individualized treatment than are French ones to custody litigation and to major economic disputes. To that extent, our study confirms Galligan's proposition (1986): this comparison between these two judiciaries does not tend to clearly distinguish judicial discretion from its

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administrative counterpart. Even in Quebec where it is more legitimate than in France, discretion is not used to decide in each and every case. Nevertheless, judges' attitudes and uses of judicial discretion vary a great deal from one context to another, depending on group status, practical concerns, and legal culture. As a result, regarding decision making, the boundary is more between judiciaries than between judicial and administrative actors. In France, there is obviously a trivialization of judicial institutions, which are driven by new public management concerns—a trend that is less marked in Quebec. In this context, French judges tend to use discretion in a way familiar to most SLBs: conducting the hearing and directly addressing clients with less self-restraint, they mold the interaction, calling litigants out when they observe lifestyle discrepancies with their norms. In other words, whereas the two jurisdictions have much in common, regarding their family law on the books, litigants' experience of the judicial system varies much from one another. This confirms that the judicial process, along with bureaucratic power (Dubois 2010), is also a matter of social domination, although going through different channels according to national contexts. To go further with the international comparison of judicial institutions on the ground, a possible path would be contrasting how social and gendered status of both legal professionals and their clients affect judicial processes depending on the national context.

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