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Comparative Law and Comparative Literature: A Project in Progress

Mitchel de S.-O.-l'E. Lasser
Cornell Law School, ml355@cornell.edu

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*Mitchel de S.-O.-l'E. Lasser**

The American judge is somehow expected to judge, really to judge. In France, the Code is supposed to have *already* judged.[1]

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* Associate Professor, University of Utah College of Law. Ph.D. (Comparative Literature), 1995, M.A. (French Literature), 1990, Yale University; J.D., 1989, Harvard Law School; B.A., 1986, Yale College. Special thanks to Bruce Ackerman, Andre-Jean Arnaud, Nathaniel Berman, Peter Brooks, Karen Engle, Geoffrey Hartman, David Kennedy, Duncan Kennedy, and Lee Teitelbaum.

1. Interview with Jean-François Lyotard, in New Haven, Conn. (Jan. 1992). Except where otherwise noted, all translations are by the author.

I. METHODOLOGICAL INTRODUCTION

This Article describes an extended project in progress. The project brings together three disciplines often regarded as relatively distinct: comparative law, literary theory, and jurisprudence. This Article, which is both reflective and descriptive, serves two purposes. First, it describes and examines the project's theoretical and methodological underpinnings. Second, it presents the results yielded by the project to date and suggests avenues of further inquiry and analysis.

Briefly stated, the project consists of an analysis of French and American judicial discourse. It begins by correcting skewed American accounts of how the French civil judicial system actually functions. Next, it analyzes a particular, and dominant, form of American judicial discourse: Supreme Court decisions that establish and apply so-called multipart or multiprong judicial tests. Finally, it constructs and deploys a "literary theory" methodology in order to analyze the complex significations produced by French and American judicial discourses, yielding results that implicate broader jurisprudential concerns.

The comparative, or foreign law component of the project possesses a rather traditional aspiration: it seeks to examine, describe, and analyze a particular facet of a single foreign system—the French civil judicial system—realistically and in depth. This aspiration is the result of a certain incredulity with regard to, and eventual nonacceptance of, the canonical American descriptive analyses of the French civil judicial system.

For almost thirty years, American comparative analyses of the French civil judicial system have been dominated by the towering figure of John Dawson, and to a lesser extent, by John Merryman. Several generations of American law students and academics have been introduced to comparative law generally—and to the French civil judicial system—via Dawson's *The Oracles of the Law*[2] and Merryman's *The Civil Law Tradition.*[3]

Dawson and Merryman paint similar portraits of the French civil judicial system. Simply put, these portraits are rather difficult

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2. JOHN P. DAWSON, THE ORACLES OF THE LAW (1968).

3. JOHN H. MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA (1969).

to believe. They present the French judicial system as the American system's formalist other. According to Dawson and Merryman, the French judicial system is dominated by a particularly formalist conception of the judicial role.[4]

This rigid French conception of adjudication requires that French judges do no more than mechanically apply the dictates of the legislature, as embodied in the provisions of the Civil Code.[5] This rigid conception of adjudication purportedly manifests itself in the stylized and hermetic form of French judicial decisions. According to Merryman, these remarkably brief decisions consist of no more than the prototypical judicial syllogism: The applicable Code provision constitutes the syllogism's major premise; the shockingly brief account of the facts represents the minor premise; and the result is logically, unproblematically, and almost mathematically generated by combining the two premises.[6] French decisions are impersonal and unsigned, possess no concurring or dissenting opinions, refer to no prior court decisions, and make no attempt to explain the reasoning that actually prompted the court's decision.[7]

To their credit, Dawson and Merryman do not believe that this formalist conception of adjudication, exemplified by the form of the French judicial decision, represents all there is to French judicial decision making. Each assumes that something is going on behind the scenes, behind the veil of the formal French judicial decision: French judges do approach cases with a certain pragmatic concern for realism, equity, and justice.[8] On the other hand, the dominant, rigid French conception of adjudication requires that French judges mask their pragmatism, forcing them to operate under the table.[9] This cuts French judges off from each other, preempting any reasoned and collective application of caselaw techniques. The result is a combination of frustratingly formalist decision making and closeted, individual, ad hoc, unprincipled, and unconstrained judicial pragmatism.[10]

Needless to say, the image of French adjudication offered by Dawson and Merryman leaves something to be desired. Can it real-

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4. *See* DAWSON, *supra* note 2, at 374–79; MERRYMAN, *supra* note 3, at 30.

5. *See* DAWSON, *supra* note 2, at 376, 392–93, 415; MERRYMAN, *supra* note 3, at 19, 30, 37–38, 40, 50.

6. *See* MERRYMAN, *supra* note 3, at 37–38.

7. *See id.* at 37–39.

8. *See* DAWSON, *supra* note 2, at 409–10 (explaining creative judicial lawmaking has occurred in France for over a century and a half); MERRYMAN, *supra* note 3, at 151 (same).

9. *See* DAWSON, *supra* note 2, at 409–10; MERRYMAN, *supra* note 3, at 151.

10. *See* DAWSON, *supra* note 2, at 375, 415–16, 431.

ly be the case that France—an advanced industrial Western democracy that comes complete with traffic accidents, investment banking, complex forms of insurance, and exploding Coke (or Orangina) bottles—functions as it does with a civil judiciary that wavers incomprehensibly between the application of mechanistic formalism and the unexplained, individual, and almost arbitrary exercise of underground judicial pragmatism? With all due respect to Dawson and Merryman, whose works continue to form the basis of American comparative conceptions of Civil Law legality, this caricature of the French legal system needs some correction.

This initial critique of Dawson and Merryman does not mean that their works do not open up suggestive avenues for research. In fact, their works offer moments of real insight, most notably when they suggest—however unmethodically—that something is going on behind the scenes of the French judicial system. The traditional component of my comparative project consists of following up on Dawson's and Merryman's undeveloped insight by digging below the French judicial system's public face in order to resolve the mystery of what lies beneath.

The issue then shifts to one of perspective. From what angle should one seek to depict the operation of a foreign legal system? Two answers have traditionally been suggested. The first, which is most convincingly put forward and practiced by Mirjan Damaška in his seminal *The Faces of Justice and State Authority*,[11] consists of describing legal systems as they "appear from the outside."[12] Several objections to this approach come immediately to mind. To begin with, if one were to analyze a foreign system from the angle of a veritable outsider, how would one determine where to look and what to examine in the foreign system? Furthermore, how could one hope to understand how the foreign object of examination functions in relation to other objects in the system, and what the relative importance of one such object might be as opposed to another? In the context of an American comparatist viewing the French legal system entirely from the outside, how would one determine that the official French judicial decision is worthy of analysis or of particular emphasis? How could one claim to be able to deduce the dominance on daily judicial practice of that decision's implicit portrait of the judicial role? As traditional American analyses of the French judicial system demonstrate, these outsider problems have led to

11. MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS (1986).

12. *Id.* at 14–15; *see also* Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411, 411–16 (1985).

caricatural results.

The second answer to the perspective question is to attempt to view the foreign system "from the inside." This approach is at least as, and likely more, promising than the former. If one of the goals of comparative analysis is to "understand" a foreign system, then one would have to assume that there would be great benefits to understanding how the foreign system understands itself (or how actors within the system understand that system to function).

This approach, which need not suggest that the insider's view is somehow ontologically more "correct" or "accurate" than the outsider's view,[13] does, however, present certain problems of its own. In particular, it is less than clear whether the comparatist can relate the foreign system's self-image to those in her own "home" system—in terms native and understandable to those in the home system—without actively distorting the foreign system's self-image. Furthermore, it would be hopelessly naive to suppose that the comparatist can unproblematically drop her cultural and professional baggage at the customs counter when she arrives at the airport of the foreign entity whose legal system she plans to "understand from the inside," or that she will drop that baggage when she strides into the comparative law section of a university library.[14]

The analyses of Dawson and Merryman opt more or less implicitly for this second, "insider's perspective." Both do so by adopting predominantly historical approaches, explaining the mindsets[15] and techniques of contemporary civil law systems by tracing them to their Roman origins and relating them to their specific national experiences.[16] Both, however, fall prey to the pitfalls described above: Dawson's and Merryman's descriptions of the French civil judicial system are too clearly motivated by a specific, post-Realist American jurisprudential tradition. In particular, their descriptions and analyses are too committed to Llewellyn's specifically American jurisprudential project of describing, appreciating, and promoting the "Grand Style" of judicial decision making.[17] This methodologi-

13. It is quite debatable whether what one thinks one sees in the mirror every morning is a more accurate depiction of oneself than what others see in us.

14. *See* Frankenberg, *supra* note 12, at 442–43.

15. Merryman refers to these mind-sets as "prevailing attitudes." MERRYMAN, *supra* note 3, at viii.

16. *See* DAWSON, *supra* note 2, at 263–373; MERRYMAN, *supra* note 3, at 7–14. Dawson produces an infinitely more detailed and nuanced analysis than does Merryman, who seeks to describe a single, monolithic "civil law tradition." *See* MERRYMAN, *supra* note 3, at vii–viii, 1.

17. *See* MERRYMAN, *supra* note 3, at 35, 64; DAWSON, *supra* note 2, at xiv. Note that many of Dawson's theoretical allusions are to Llewellyn. *See* DAWSON, *supra*

cal bias obviously detracts from their descriptions and analyses of the French judicial system. Their insider's perspective is compromised by their adherence to this Llewellynian tradition, a tradition which virtually assures that Dawson and Merryman will be not only deeply suspicious of, but actively hostile to, the patent and rigid formalism of official French judicial decisions.

This fundamental problem of seeking to describe a foreign system from the inside while bringing to bear the specific, and biased, methodology of a jurisprudential tradition native to one's home system taints the projects of Dawson and Merryman from the outset. Viewed in this light, it is hardly surprising that Dawson should end up describing the French judicial system as crippled by the predominance of its rigid and formalist conception of adjudication, "administered by the courts with a primitive caselaw technique."[18] Clearly, it is a specific, post-Realist and Llewellynian notion of adjudication that serves as the means by which Dawson describes and analyzes—and as the stick by which he eventually measures—what he imagines to be French judicial practice.

The key, then, to adopting the insider's perspective is to steer clear, to whatever extent possible, of the kinds of problems that so taint the descriptions and analyses offered by Dawson and Merryman. Doing so allows one to come closer to grasping how the "foreign" system understands itself to function. In the context of the French judicial system, such an approach allows one to follow up on Dawson's and Merryman's fundamental, if underdeveloped, insight—namely, that there is more to the French judicial system than can be seen by focusing exclusively on the official French judicial decision. One must go beyond the public face of the system, and try, insofar as possible, to "get inside the system's head."

This approach, even if it does not involve "going native"—a dubious project at the very least[19]—requires that one open up the field of investigation to the multiple voices that speak from within the foreign system. This process can begin in a law school library simply by turning to the foreign system's academic publications. In the context of French legal academics, a serious review of a good comparative law section of a law school library leads to results that, in the final analysis, ought not to be terribly surprising. French academics are hardly blind to the issues raised by Dawson and

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note 2, at xiv–xv, 455–56, 484.

18. DAWSON, *supra* note 2, at 415.

19. *See* Frankenberg, *supra* note 12, at 415–16 (describing virtually insurmountable difficulties in understanding foreign society without biased perception drawn from one's own "cultural baggage").

Merryman. Having lived with their judicial system infinitely longer and at distinctly closer quarters than have most comparatists, French academics have long since raised, and grappled with, the kinds of critiques offered by Dawson and Merryman.

If, then, ones takes the time to pay attention to another system's academic literature, and if one takes that literature as seriously as one should, several issues suddenly come into focus. In the French context, it becomes clear that the French legal and judicial systems are not monolithic and static objects of analysis. The French judicial system functions in the context of protracted internal debates conducted by judges and academics whose methodological leanings range from classical, Montesquieu-based political theory to post-Althusserian leftism.[20]

The consequences of this basic insight for the comparative analysis of the French judicial system are enormous. Suddenly, the object of study emerges as a contested and conflicted field of interactions between assorted social, political, economic, and legal actors and philosophies. Unless one is willing to posit a radical disjunction between theory and practice, it is only reasonable to assume that these debates—clearly occurring between assorted professors and judges in French academic literature—affect French judicial practice. If, then, the comparatist wishes to return his focus to French judicial practice per se, he had better seek to understand how the French judicial system mediates between, or at least accommodates, the French judicial system's own internal critiques.

Needless to say, the next step to "getting inside the system's head" involves gaining access to those who operate within the system—that is—meeting and spending time with judges, academics, attorneys, and the like. In the French context, taking this next step turns out to be invaluable, given the apparent impenetrability of the French judicial system's public and official output. The comparatist is now confronted not with duplicitous characters who operate in patent bad faith—as Dawson's and Merryman's descriptions of French judges might lead one to expect—but with a wide range of reasonable and committed legal actors who simultaneously make sense of, and critique, their legal and judicial systems.

Exposure to those within the system offers several important

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20. See, for example, the works published by the *"critique du droit"* movement, such as MAURICE BOURJOL ET AL., POUR UNE CRITIQUE DU DROIT: DU JURIDIQUE AU POLITIQUE (1978); MICHEL MIAILLE, L'ETAT DU DROIT: INTRODUCTION À UNE CRITIQUE DU DROIT CONSTITUTIONNEL (1978); GÉRAUD DE LA PRADELLE, L'HOMME JURIDIQUE: ESSAI CRITIQUE DE DROIT PRIVÉ (1979); and EVELYNE SERVERIN, DE LA JURISPRUDENCE EN DROIT PRIVÉ (1985).

opportunities. Obviously, the comparatist can gain a better understanding of how those within the system understand that system to work. Furthermore, she must deal with the fact that those within the system have varied and nuanced understandings of the operation of that system. In the French context, it soon becomes clear that judges who belong to the leftist *Syndicat de la Magistrature* understand and describe their legal system somewhat differently than do those judges who view themselves as defending the classic French Republican image of a neutral judiciary that bows to the wishes of the legislature.

Through internal exposure, the comparatist can also gain a better understanding of—and hopefully some access to—relatively hidden facets of the internal workings of the "foreign" system. In the French context, as it turns out, there is infinitely more to judicial decision making than the comparatist could coherently piece together if she were to limit her analysis to an outsider's view of the public and official product of the French legal system.

Finally, face to face exposure to—and extended discussions with–those within the foreign system *forces* the comparatist to try to gain a better understanding not only of how her interlocutors think, but also (and at least as important) of the presuppositions that she brings to the comparative table. The reason for this is quite simple. For example, conversing with French judges requires that one makes his or her questions and comments at least minimally comprehensible. This task turns out to be somewhat more difficult than one might imagine. It does not simply involve recalling and utilizing the appropriate French legal term to describe, say, "lower court judges." It also involves wrestling with the foreign legal terms for assorted legal concepts that may, or may not, exist—let alone coincide with—legal concepts from one's "home" system. It is in framing questions intelligible to the French judge, and in framing follow-up questions, that the comparatist becomes sensitized to the discourse of both the foreign and home systems. That discourse, as it exists in each system, manifests, constrains, and makes possible conversations and relations in that system.

In short, an attempt to "get inside the head" of other legal systems requires that the comparatist engage in a two-directional discursive analysis. She must acquire not only the language skills necessary to ask questions, but also the discursive skills and corresponding conceptual fluency needed to ask the kinds of questions that her foreign interlocutor will find pertinent, and to begin to grasp the interlocutor's responses.

At the same time, the comparatist must come to terms with the contingency and apparent necessity of her native legal discourse. If

the comparatist does not engage in this second form of discursive analysis, but rather insists on framing questions to French judges in the terms native, for example, to a particular, American, post-Llewellynian context, she is likely to get responses ranging from "What are you talking about?" to "Have you simply not grasped the fundamental requirements of our Republican form of government?" to "Do you take us French for total idiots?"[21]

In the spirit of performing this second form of discursive analysis, my comparative project turns back to the American judicial system in order to analyze a specific and distinctive form of contemporary American judicial discourse. The choice of the particular discourse to be examined is guided by concerns of both external and internal perspective. On the one hand, the decision is motivated by a Damaška-like choice to study a form of contemporary American judicial opinions that strikes the outside viewer as characteristic of the American judicial system. In this respect, the choice mirrors the decision to focus attention on the operation of French civil law: to the Common Law comparatist, the French civil judicial system represents the heart of the French legal system and, thus, one of the prototypes of Civil Law legal systems generally. Similarly, as conversations with French judges and academics demonstrate, United States Supreme Court opinion writing represents, at least to the outside viewer, the very heart of the American legal system and thus, in certain respects, a prototype of Common Law legal systems generally.

At the same time, the choice of the particular discourse to be examined is guided by concerns of internal perspective. In the context of American judicial discourse, the object of study must represent, if not *the* dominant mode of judicial discourse and legal argument, then at least one of the dominant modes. In other words, the particular discourse must recur frequently in judicial opinions and legal arguments, and be identifiable by, and recognizable to, those within the American legal system.

With these criteria in mind, my project examines American multipart or multiprong Supreme Court judicial tests in both constitutional and statutory contexts. These tests are immediately recognizable, recur constantly in American legal and judicial discourse, and have received explicit academic treatment.[22] Furthermore, as

21. I must confess to having gotten each of these responses at one point or another, especially early on in my research!

22. *See, e.g.*, ROBERT F. NAGEL, *The Formulaic Constitution* (discussing multipart tests in judicial opinions), *in* CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW 121, 121 (1989); Frederick Schauer, *Opinions as Rules*,

the discourse of judicial tests offers a particularly identifiable and representative form of American doctrinal analysis, it is possible to suggest that the analysis of this particular discourse can be extended to other, if less immediately recognizable, forms of American judicial discourses. That is, the analysis of the American judicial test offers the possibility, not yet exercised, of being generalized to cover other forms of American judicial discourse.

The comparative project therefore consists of performing an analysis of particular French and American modes of legal expression—an analysis that focuses on French civil judicial discourse and on American Supreme Court decisions that establish and apply multipart judicial tests. How should one go about analyzing and comparing these two discourses? If the comparatist is to steer clear of the kinds of problems that so plague the analyses offered by Dawson and Merryman, what methodology should be brought to bear? If an American, post-Realist methodology inscribes itself too clearly in a particular and parochial jurisprudential tradition, one can only assume that adopting a particular French legal methodology would lead to similarly loaded results.

My analysis therefore consciously adopts a different methodological approach, grounding its examinations in a methodology explicitly tied to literary "theory." Insofar as the project consists of a comparative analysis of legal texts and discourses, the deployment of literary theory would appear to offer a good match between methodology and the object of analysis. Furthermore, this choice is somewhat motivated by an attempt to avoid, insofar as possible, particularly parochial and loaded perspectives: contemporary literary theory is as foreign and familiar to French as it is to American jurisprudence.[23] Deploying this methodology requires one to come to terms with the discourses and corresponding mind-sets of both legal systems *in the terms and concepts native to each system*, and then translating these terms and concepts into a language of literary criticism that addresses itself specifically to discursive and textual issues.

This is not to say that literary theory represents neutral or objective methodological ground. It does not. Clearly, adopting and deploying this methodology focuses the comparative analysis on particular issues central to the interests and concerns of literary

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62 U. CHI. L. REV. 1455, 1455 (1995) (same).

23. In fact, modern and postmodern literary theory has been a particularly "cosmopolitan" discipline, practiced and popularized in literary centers and literature departments on both sides of the Atlantic. Furthermore, French and American legal academics have each dabbled in the discipline.

critics, thereby shifting to other grounds the particular biases inherent in all methodological perspectives. On the other hand, at least this shift in bias avoids the primary trap of adopting the methodological biases of one legal tradition when seeking to describe, examine, and analyze another. Furthermore, one can readily argue that adopting the biased perspectives of literary theory offers particular advantages when analyzing the discursive practices of the French and American judicial systems: literary theory, after all, addresses itself specifically to issues central to both systems, namely, to issues of interpretation and signification.

How, then, does my comparative project employ the methodology of contemporary literary theory? It does so first and foremost by adopting what may be termed a "fighting faith." This faith can be encapsulated by the claim that legal and judicial texts do more than simply offer substantive statements about legal doctrine and about the judicial role. In particular, every judicial text offers an image of its own production; and given that judicial texts are produced by judges, such texts offer images of the judicial role. These images may be thought of as portraits: they are representations of the judge and of the proper exercise of the judicial role.[24] Insofar as judicial texts offer representations of their judicial authors and of these authors' practices, these images may be thought of as self-portraits.

My comparative analysis rests, above all else, on taking these judicial self-portraits seriously. The literary methodology it employs is designed to describe and explain the process by which judicial texts produce judicial self-portraits. In the terms of contemporary literary theory, the project consists of a semiological analysis of judicial texts that seeks to study how judicial discourse comes to signify certain things about the judicial role. Insofar as the project is comparative, it describes and examines *what* French and American judicial texts signify about the proper exercise of the judicial role, and *how* these significations are produced.

The comparative semiological project begins with the observation that judicial texts employ different forms, discourses, and rhetorics to demonstrate—or signify—that they are engaged in different forms of reading. Judicial texts, after all, are always more or less explicitly involved in a process of reading other legal texts. In the terms and definitions offered by the works of Paul de Man, the form, discourse, and rhetoric of French and American judicial

24. *See* Mitchel de S.-O.-l'E. Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325, 1326 (1995).

texts signify that these texts are engaged in two forms of reading: the "grammatical"[25] and the "hermeneutic."[26]

The basic notion behind grammatical reading is that the vocabulary and syntax of a given text can and do, in and of themselves, generate the proper reading of that text. Grammatical reading is an interpretive ideology that posits the possibility that reading can consist of no more than the direct and unmediated application of the language of a text.

Hermeneutic—as opposed to grammatical—reading, is not oriented towards applying a text, but towards interpreting it. It "seeks to produce the meaning of a text by interpreting [that text] in terms of some historical, political, social, economic, religious, or other theory."[27] It is an interpretive ideology that posits that texts can only be understood in a mediated fashion by relating them to other texts. Thus, hermeneutic reading claims that the meaning of texts—be they literary (poems, novels, or judicial decisions), social (political or economic structures), or otherwise—can only be interpreted and understood by interpreting them in terms of, say, the Bible, Freud, *Kapital*, "policy," the author's purposes or intentions, or some other Ur-text.

The comparative semiological project therefore seeks to draw a link between the discourse (including the form and rhetoric) of judicial texts and the modes of reading (whether grammatical or hermeneutic) that the texts portray themselves as using. The description and explanation of this semiotic link, between modes of discourse and modes of reading, represents but the first step in the comparative project's semiological analysis.

The next step comes from the observation that judicial decisions do not merely portray themselves as reading other legal texts. They also present themselves—via their form, discourse, and rhetoric—as substituting themselves for the law in the present instance. In the terms of the linguist Roman Jakobson, they portray themselves as substituting for the prior legal text (be it, for example, a statute or a judicial precedent); and they justify that substitution on the grounds that they are either *paradigmatically* or *syntagmatically* linked to the prior text.[28] In other words, judicial

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25. *See* PAUL DE MAN, ALLEGORIES OF READING 3–19, 54–72 (1979) [hereinafter DE MAN, ALLEGORIES OF READING]; PAUL DE MAN, THE RESISTANCE TO THEORY 14–20 (1986) [hereinafter DE MAN, THE RESISTANCE TO THEORY].

26. *See* DE MAN, THE RESISTANCE TO THEORY, *supra* note 25, at 56–57.

27. Lasser, *supra* note 24, at 1328 n.5.

28. *See* ROMAN JAKOBSON, *Two Aspects of Language and Two Types of Aphasic Disturbances, in* LANGUAGE IN LITERATURE 95, 97–100 (Krystyna Pormorska & Ste-

decisions present themselves as either inherently similar to (paradigmatic link) or meaningfully related to (syntagmatic link) the prior legal text.

The comparative semiological project therefore seeks to describe and explain the link between judicial texts' modes of reading and their mode of substitution for prior law. But that is not all; for the modes of substitution also operate as signs. Furthermore, these signs are "overdetermined." That is, they represent meaningful claims about the values promoted by the particular judicial decision and by the judicial system generally. In order to explicate this final link in the French and American judicial texts' multilayered semiological chain, the analysis turns to a final literary methodology, that of Roland Barthes's analysis of myth.[29]

My comparative semiological project therefore utilizes models and methodologies drawn from contemporary literary theory in order to describe and analyze how judicial discourse—and discourses about judging—operate as complex systems of signification. The project possesses a comparative legal component: it compares how French and American judicial texts utilize different discourses; how these discourses signify different modes of reading and different modes of relating judicial decisions to prior legal texts; and what, in the final analysis, are the values signified in each judicial system.

At the same time, the project represents an intervention in "lit. theory" debates. On the most basic level, the project deploys lit. theory on texts not traditionally considered to be literary. This is hardly a novel maneuver; the same has been done to analyze, for example, the visual arts, architecture, and other popular and high cultural forms. In fact, there have been assorted attempts to use lit. theory in the analysis of law.[30] More importantly, the project makes claims about the relation between the different lit. theory models that it deploys in its analysis of French and American judicial discourse. In particular, the project works in the tradition of the so-called Yale School of Literary Theory, bringing to bear three theoretical models important to that school: those of Jakobson, Barthes, and de Man.

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phen Rudy eds., 1987).

29. *See* ROLAND BARTHES, MYTHOLOGIES 109–27 (Annette Lavers trans., Hill & Wang 1972).

30. *See, e.g.*, Duncan Kennedy, *A Semiotics of Legal Argument* (using semiotic theory to analyze legal arguments), *in* 3 LAW AND SEMIOTICS 167–92 (Roberta Kevelson ed., 3d ed., Penn. St. Univ. 1989); J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275, 275 (1989) (noting common textuality between legal writing and literary writing).

What the project does is to construct, in order to analyze French and American judicial discourse, a unitary theoretical grid composed of these three important theoretical models. As such, the project presents an implicit proposal to read the three models as engaged in handling very similar and deeply interrelated problematics. Needless to say, the particular unitary grid proposed hardly represents the only way to link the three theoretical models together. The project offers an interpretation of its three lit. theory sources, deploys this interpretation in the sphere of legal analysis of French and American judicial discourse, and offers an example of what such a unified theoretical approach might yield. It does not simply "apply" the theory models to judicial discourse.

At the same time, the project represents a somewhat different version of "Law and Literature" than those increasingly practiced in both the legal and literary disciplines. It is not, as is currently so popular in law schools and literature departments, a study along the lines of "Images of the Law in the Works of Balzac, Dickens, and Kafka." Nor is it, as is also quite prevalent, an analysis along the lines of "A Study of Narrative Structures in Witness Statements (or in judicial opinions' presentation of the facts)." Rather, the project seeks to deploy the methodology of lit. theory in the analysis of texts that are themselves explicitly concerned with issues of reading and interpretation: judicial decisions and legal texts about the judicial role.

The project, however, is not an "interdisciplinary" study, at least not in the traditional sense of a "Law & . . . " (or "Lit. & . . . ") work. Just as the project offers an implicit claim about the interrelated problematics of its three lit. theory models, it makes a claim about the interrelation of legal and literary problematics. It does not represent an effort to "apply" lit. theory to legal texts, especially not in the sense of discovering and analyzing distinctly literary problematics in legal texts, and doing so in the context of a legal discipline that has been or continues to be unaware of these problematics. Rather, it is an attempt to construct and deploy, in a comparative legal context, a theoretical grid that might focus and revitalize discursive and interpretive analyses of long-standing jurisprudential problematics about the judicial role. The "lit. theory" or methodological component of the project is therefore deeply rooted in, and in many respects indistinguishable from, traditional jurisprudential concerns.

On this jurisprudential front, I hope that the proposed methodology will offer two advantages. First, it should steer clear of the basic flaw of most comparative legal work—namely, adopting the methodological biases of one legal tradition when seeking to de-

scribe, examine, and analyze another. Second, it might contribute to the eventual displacement, in the sphere of strictly American jurisprudential analysis, of a Llewellynian methodology that, from our current perspective, had already grown tired and stale by the time of the publication of *The Common Law Tradition*.[31]

Having now introduced the project's methodology, this Article proceeds as follows. Parts II, III, and IV summarize the results that the project has yielded to date; Part II presents French civil judicial discourse; Part III examines the discourse of American decisions that establish and apply multipart judicial tests; and Part IV brings the lit. theory methodologies explicitly to bear in the comparative analysis of the preceding two sections. Finally, Part V discusses what work remains to be done, and where the project might lead.

II. FRENCH CIVIL JUDICIAL DISCOURSE[32]

A. The Official Portrait

French civil judicial discourse offers several portraits of the judicial role. The first, which may be called the official portrait, is produced by legislative provisions about judging, by judicial interpretation of those legislative provisions, and by the very form of the French judicial decision. This official portrait, which is constituted by the public pronouncements of the French civil legal system, has been the focal point of traditional American comparative analyses, leading to severe misunderstandings of the French judicial system. It represents the system's public face and not, as we shall see, the totality of French judicial practice or of French understandings of the judicial role.

"A small core of fundamental rules," passed in the first fifteen years after the French Revolution, "forms the statutory basis of the official French portrait of the civil judge."[33] The first two, Articles 10 and 13 of the 1790 Law on Judicial Organization, establish and enforce a strict separation of powers: they proscribe judicial interference with the exercise of legislative and executive powers.[34] The

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31. KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960).

32. A detailed version of the ensuing analysis can be found in my article, *Judicial (Self-) Portraits. See* Lasser, *supra* note 24.

33. *Id.* at 1334.

34. Article 10 provides: "The courts may not directly or indirectly take any part in the exercise of the legislative power, nor prevent or suspend the execution of the decrees of the Legislative Branch . . . under pain of Forfeiture." Code de l'organisation judiciaire, tit. II, art. 10, Aug. 16–24, 1790. Article 13 provides: "Judicial functions are distinct and will always remain separate from the administrative [executive] functions. Judges may not, under pain of forfeiture, disturb, in any way

next two provisions, Articles 5 and 1351 of the French Civil Code, further define the judicial role. They proscribe the creation and application of judicial norms and require the individual treatment of cases.[35] In short, this core of rules denies the French judiciary any and all lawmaking or normative power.

Judicial interpretation of these legislative provisions constitutes the second element of the official French portrait of the judicial role. In interpreting these provisions, the *Cour de cassation* (the French Supreme Court in civil law matters) has established a series of rules about the normative power of French judicial decisions.[36] For example, French courts are forbidden to refer to past cases as the sole basis for their decisions,[37] or to "rule based on the mere application of principles posited in a previous case."[38] According to these cases, French judicial decisions possess no normative power whatever.

The form of the French civil judicial decision represents the final—and perhaps most important—element of the official portrait. All decisions of the *Cour de cassation*, for example, are composed of a single sentence structured in the following manner:

> The Court, Having seen [the legislative texts cited by the parties] . . .; Whereas . . .; Whereas . . .;
> For these reasons quashes [or rejects].[39]

The French judicial decision, in other words, takes the form of a single sentence syllogism: The given legislative provision constitutes the major premise, the facts constitute the minor premise, and "'the declaration of what the statutory law commands regarding the controversy'" forms the conclusion.[40] Descriptions of the facts and

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whatever, the operations of the administrative bodies." Code de l'organisation judiciaire, tit. II, art. 13, Aug. 16–24, 1790.

35. Article 5 provides: "It is forbidden for judges to make pronouncements [to rule] by means of general and regulatory provisions on the cases submitted to them." CODE CIVIL [C. CIV.] art. 5 (Fr.) Article 1351 provides: "The authority of the matter adjudged only relates to that which has been the object of the judgment. The petition must be same; it must be founded on the same cause; it must be between the same parties, and formulated by and against them in their same capacities." C. CIV. art. 1351 (Fr.).

36. Note the obvious contradiction: the *Cour de cassation* has established a series of normative rules about the French judiciary's lack of normative power.

37. *See* Judgment of Nov. 3, 1955, 1956 D. Jur. I at 557; Judgment of Feb. 27, 1991, Cass. soc., 1991 Bull. Civ. V, No. 102; Judgment of Mar. 27, 1991, Cass. civ., Bull. Civ. III, No. 101.

38. Lasser, *supra* note 24, at 1337–38. (citing Judgment of Feb. 4, 1970, Cass. crim., 1970 D. Jur. 333).

39. DAWSON, *supra* note 2, at 407.

40. SERVERIN, *supra* note 20, at 70 (quoting argument of Mr. Garat the elder at

of the procedural history of the case are limited to a couple of lines, and the length of an entire *Cour de cassation* decision routinely runs no more than a single typewritten page.

The French judicial decision, due to its very form, possesses a particularly univocal and impersonal quality. The court speaks collegially as a single unit, in the third person singular, in the name of "The Court": judicial decisions are unsigned, concurring and dissenting opinions are forbidden, and the first person judicial "I" does not exist. Furthermore, the "French judicial decision resists any discourse that might hamper its smooth grammatical flow": it is quite difficult, if not impossible, to address interpretive difficulties or to introduce supporting or countervailing policy analysis into a single-sentence syllogism.[41]

In short, the French judicial decision denies the possibility of supportive or alternative perspectives, approaches, or outcomes, including those that might be afforded by previous judicial decisions. It is the *loi* (legislation), and the *loi* alone, that speaks through the French judicial decision. The court and its constituent judges are but the mouths that voice the requirements of the *loi*: there is no room in the French judicial decision for the judge to intervene or mediate between the *loi* and its application. For all intents and purposes, the decision *is* but the *loi* in the present instance.

French civil judges, as portrayed by legislative provisions, by judicial interpretations of those provisions, and by the very form of the French judicial decision, thus emerge as passive agents of the statutory law. They appear to be no more than a "syllogism machines,"[42] no more than "the mouth that pronounces the words of the *loi*, inanimate beings who can moderate neither its force nor its vigor."[43] They merely apply legislative provisions, leading to required outcomes already determined by the statutory law.

B. The Unofficial Portrait

1. Academic Doctrine

The official French portrait of the civil judge represents but one—albeit the most accessible—conception of the judicial role currently operative in the French legal system. Traditional American

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the Assemblée Nationale) (citation omitted).

41. Lasser, *supra* note 24, at 1341.

42. *See* 1 JEAN CARBONNIER, DROIT CIVIL 18 (1967).

43. 1 CHARLES DE SECONDAT BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 163 (Anne M. Cohler et al. eds. & trans., 1989) (1748).

comparatists, such as Dawson and Merryman, have overestimated its predominance in the French legal system, leading to skewed accounts of French judicial practice. If one bears in mind, furthermore, the Llewellynian tradition in which Dawson and Merryman worked, one can readily understand their unflattering accounts of the French legal system: the public and official French portrait presents the civil judge as producing decisions solely by applying the Civil Code's formal grammar.

There exists, however, within the French legal system, a very different conception of the civil judge. This "unofficial" conception[44] is reflected in, and produced by, mainstream French academic theory (*doctrine*)[45] and the argumentation of judicial *magistrats*.[46] It emerges in a vibrant discursive sphere within the French legal system, a sphere in which French academics and *magistrats* operate on the assumption that the judicial role is quite different from that implicit in the official portrait.

Some of the sources of this unofficial portrait, such as French academic *doctrine*, are readily accessible to comparatists. Others, such as the internal arguments of French *magistrats* known as "advocates general" and "reporting judges," are not. Failure to take this unofficial portrait into account, however, leads to severe and caricatural misunderstandings, condemning traditional comparative analyses of the French civil legal system to failure.

Academic *doctrine*, the first source of the unofficial French portrait of the civil judge, has long since taken it for granted that the judicial role must be different than that implicit in the official portrait. For almost one hundred years, French academics have assumed that their legal Codes inevitably contain gaps, conflicts, and ambiguities due to drafting imperfections and to the evolution of society over time; that the official and perfectly formalist conception of passive adjudication on the basis of the unproblematic application of the Codes' grammar is therefore no longer quite tenable; and that French judges have therefore played a pivotal—though largely hid-

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44. Needless to say, French judges and academics have many nuanced conceptions of the civil judge. The composite "unofficial" portrait offered here represents a "greatest common denominator" conception of the civil judge, as understood by the French legal profession itself.

45. The French term "*doctrine*" traditionally refers to academic scholarship and legal commentary. It has been left untranslated (and is italicized) in order to distinguish it from the common-law notion of "judicial doctrine."

46. The term "*magistrat*" comprises all French judges, as well as the advocates general, who are attached to the civil courts and who present arguments in an amicus curiae capacity. *See infra* note 56 and accompanying text (discussing general duties of *magistrats*).

den—creative role in the establishment and development of legal norms.[47] Actually, the normative power of French judicial decisions has become so mundane that French *doctrine* simply refers to it as "the fact of *jurisprudence*."[48]

French *doctrine* has offered several theories to explain, guide, and justify the judicial exercise of creative normative power. As early as 1899, for example, François Gény proposed that the judge confronted with a legislative gap unfilled by custom should "forge" a rule "*as if he were acting as a legislator*,"[49] using "the ideal of justice or social utility" as his guiding light.[50] More recently, Jean Carbonnier has argued that "the judge is a man and not a syllogism machine"[51] and plays an important equity function in the French legal system.[52] Performance of this function requires the production of "the solution to a litigation, the appeasement of a conflict: to make peace rule between men is the supreme end of law."[53] André Tunc argues that the French judiciary, and especially the *Cour de cassation*, has played and must continue to play a leading role in the modernization of the law, in the law's adaptation to the evolving needs produced by "the complex and ever-changing movement of social life."[54] Performance of this role requires that the *Cour* base its decisions on the spirit of legislation, on existing *jurisprudence*, on the theories proposed by academic *doctrine*, and on the "social consequences" of "a decision in one direction or another."[55] Tunc believes that the *Cour* "must in effect examine not a case, but a [legal] problem raised on the occasion of a case."[56]

Each of these dominant French academic theories of adjudication marks a rather sharp break from the official portrait of the civil judge. Each conceives of the judicial role as purposive and goal oriented: the judge must promote social utility and justice, produce

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47. *See* Lasser, *supra* note 24, at 1344 (discussing mainstream French academic *doctrine*).

48. *See, e.g.*, SADOK BELAID, ESSAI SUR PROFESSOR LE POUVOIR CRÉATEUR ET NORMATIF DU JUGE 65–66 (1974) (stating French judges do create normative rules). The term "jurisprudence," depending on who uses the term, refers to past decisions, precedents, or judicial doctrine on a particular legal issue.

49. 1 CARBONNIER, *supra* note 42, at 33–34.

50. 2 FRANÇOIS GÉNY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF 223 (La. State Law Inst. trans., 2d ed. 1919).

51. 1 CARBONNIER, *supra* note 42, at 18.

52. *See* 1 *id.* at 33–34.

53. 1 *id.* at 34.

54. André Tunc, *La Cour de cassation en crise*, *in* 30 ARCHIVES DE PHILOSOPHIE DU DROIT 157, 159 (René Sève ed., 1985).

55. *Id.* at 159–60.

56. *Id.* at 160.

equity judgments that appease social conflicts, or modernize the law in order to adapt it to the needs of a changing society. The academic component of the unofficial portrait therefore depicts the French judge as engaged in policy-oriented, sociopolitical projects external to the grammar of the Codes, and promotes adjudication that decides cases by referring to these external projects. In short, mainstream French academic doctrine offers hermeneutic conceptions of adjudication.

It appears, at first blush, that French academic *doctrine* proposes an image of adjudication that simply cannot be squared with the official portrait of the civil judge. After all, to the extent that the French judge exercises a creative role in the establishment and development of legal norms, does she not violate the official requirement that French judges be no more than passive agents of the formal grammar of the Codes? Furthermore, to the extent that the French judge bases her decisions on policy considerations or sociopolitical theories external to the Code, is the grammar of the Codes not being supplanted? And finally, to the extent that the French judge is engaged in hermeneutic analysis, does this not imply the total collapse of the conception of the judge as engaged in the grammatical reading of the supreme legislature's commands?

On closer examination, however, one can observe how French academics have sought to resolve this apparent conflict between the official and the unofficial portraits, between grammatical and hermeneutic reading. First of all, mainstream French *doctrine* does not suggest that French judges should always employ hermeneutic approaches to adjudication, but rather that they should do so only when the grammar of the Code somehow fails, i.e., when a case demonstrates the existence of a gap, conflict, or ambiguity in the statutory law. Furthermore, French *doctrine* is constructed around a few basic concepts that mediate the tension between the official and unofficial portraits.

The first such mediating concept is "the sources of the law." The mere fact that French *doctrine* understands civil judges to be exercising normative power does not mean that it accepts the notion that these judges are engaged in lawmaking. According to the official conception, only the legislature—and perhaps custom—can create bona fide law. Judicial decisions that, for example, have to fill gaps in the Code are therefore regarded as mere "authorities," juridical entities that certainly exercise some persuasive force, but that simply do not qualify, by definition, as a formal source of Law. The concept of "the sources of the law" thus serves to explain the existence of judicial normative power while maintaining the official notion of legislative supremacy.

The concepts of "legal adaptation or modernization" and "equity" operate as similar mediating devices. The judicial exercise of neither function necessarily or explicitly threatens the formal grammar of the Code. To the extent that the judge adapts and modernizes the law by engaging in policy hermeneutics, it is only the *interpretation*–and not the formal wording–of a Code provision that has changed. Similarly, to the extent that the judge must sometimes exercise an equity function that calls for her to produce hermeneutic readings with due regard to the "social reality" that exists "outside" of the statutory law, this hardly means that statutory law in general, or the particular provision of statutory law at issue, or even the grammatical application of statutory law, should always be discarded. To the contrary, it only implies that on some marginal occasions that equity will itself correct, the law should be interpreted in a different manner. The rest of the time, it can be inferred that the grammatical application of the formal law is totally justified.

French academic *doctrine* therefore promotes a compromise between the official portrait of the civil judge and the critiques that academics have leveled at that portrait. It has constructed theories of adjudication that mediate the tension between the official and unofficial portraits, between grammatical application and hermeneutic interpretation of the *loi*.

2. *The Internal Discourse of the French* Magistrat

French academic *doctrine* therefore advances significant critiques of the official portrait of the civil judge, but then promotes theories of adjudication that simultaneously call for the judicial deployment of policy hermeneutics and yet minimize the implications of this mode of adjudication. Unless one is willing to posit a radical disjunction between theory and practice, it is only reasonable to assume that these academic debates reflect and inform French judicial practice. Where and how, then, does the French judicial system accommodate its own internal critiques? It does so in an internal discursive sphere in which French *magistrats* present arguments to their brethren about how the cases before them should be decided.

In order to gain some understanding of this internal French discursive sphere that American comparatists have traditionally ignored, two significant institutional players in the French judicial system must be presented. These players are the advocates general and the reporting judges.

The advocates general are a corps of *magistrats*, known as the *ministère public*, that argues, in every major French civil court, "on

behalf of the public welfare, society's interest, and the proper application of the law."[57] In civil trials, an advocate general, who sits on the high bench with the members of the court, presents her arguments, in a document known as her *conclusions*,[58] after the litigating parties have argued their respective positions. The reporting judge is the member of the court assigned to review the lower court records, to formulate and research the legal issues, and to suggest to the rest of the court how the case should be resolved.[59] The document in which he sets out his findings and proposed resolution is known as his *rapport*.[60]

The advocate general and reporting judge play major roles within the French civil judicial system, especially as one moves up the court hierarchy. At the *Cour de cassation*, for instance, a *conclusions* and a *rapport* are produced in every litigated case. Furthermore, the advocate general and reporting judge wield enormous influence on the decisions produced by the French courts. Nonetheless, *conclusions* and *rapports* are so inaccessible that they can realistically be regarded as "hidden" documents: the *Recueil Dalloz*, the French equivalent of the West Reports, publishes—in radically edited form—a mere four to six *conclusions* and one or two *rapports* per year, despite the fact that the civil chambers of the *Cour de cassation* handle over 18,000 cases annually.[61]

The value of *conclusions* and *rapports* to the comparatist should be quite obvious. They represent the French legal system's internal judicial discourse: they consist of arguments that French *magistrats* present to each other in an effort to determine the appropriate resolution of litigated controversies. As such, they reflect the French judicial system's institutional self-understanding. An examination of these documents is therefore essential to grasping how French *magistrats* themselves understand the judicial role.

Of what, then, do *Cour de cassation conclusions* and *rapports* consist? They are, in opposition to official French judicial decisions, relatively extensive documents that can often run some fifty pages

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

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

59. The courts' judges will all serve periodically as the reporting judge: the position rotates among the courts' members from case to case.

60. *See* Lasser, *supra* note 24, at 1357.

61. In 1992, for example, the *Cour*'s civil chambers handled some 18,049 cases. *See* 1992 RAPPORT DE LA COUR DE CASSATION app. tbl.A.1 (1993) [hereinafter ANN. REP.]. The *Cour de cassation*, which is divided by subject matter into six chambers, is composed of approximately 100 justices. *See* PERROT, *supra* note 57, at 206–07.

in length.[62] They typically open with a one to three page presentation of the case's facts and procedural history, which routinely quotes the lower court rulings at length. They then proceed to the *magistrat*'s legal analysis, which typically consists of an examination of relevant French legislative statutes such as Civil Code provisions, judicial precedents, and academic publications. Finally, they offer some closing remarks that propose a judicial solution to the controversy.

The closing remarks of the advocate general's *conclusions* differ from those of the reporting judge's *rapport*. The *conclusions* tends to take a clear-cut position on whether the appeal should be sustained or denied. The *rapport*, on the other hand, tends to conclude in a more open-ended fashion, leaving it to the reporting judge's brethren to decide the case on the basis of the assorted facets of the case analyzed in the *rapport*.[63]

The reporting judge also prepares a remarkable set of documents that he appends to his *rapport*. These documents are the *projets d'arrêt*, drafts of judicial decisions. Each draft is simply a typical example of an official French judicial decision, but the reporting judge produces at least two of them for every important case the *Cour* handles, each leading to results diametrically opposed to the other.[64] One draft is a model for a decision that would quash the lower court decision; the other for a decision that would sustain it.[65] Each is as formal, grammatical, and syllogistic as the one eventually rendered as the court's official decision; and each leads to plausible but different results based on plausible but different readings of the Code's provisions. These *projets d'arrêt*, which remain strictly hidden in the courts' closed archives, represent the written manifestation of the courts' interpretive uncertainty. They indicate that there is much more to the French judiciary's interpretive practice than its official decisions would lead one to believe.

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62. The few examples published annually in the *Recueil Dalloz* are edited down to a mere two to five pages.

63. The reporting judge, like the other member of the court, takes part in the deliberations and votes on the outcome.

64. It is not unusual for the reporting judge to produce more than two drafts for a given case. M. Le Premier Président Raymond Exertier of the *Court d'appel de Toulouse* explained to me that his court had once produced seven *projets d'arrêt* for a single case. *See* Interview with Raymond Exertier, Premier Président of the *Cour d'appel de Toulouse*, in Toulouse France (Mar. 30, 1994).

65. *See, e.g.*, unpublished *rapport* (on file with author) ("[D]epending on whether it accepts or not [this] principle, [the *Cour*] will orient itself toward the rejection of the appeal or *cassation*. It is in this spirit that the two *projets* have been composed . . . .").

How, then, do French judges perceive, construct, and resolve legal controversies within their hidden and unofficial discursive sphere of the *conclusions* and *rapports*? They tend to frame their legal analysis according to a relatively small number of typical models. The first consists of overtly framing the case as evincing a gap in the statutory law. The *conclusions* or *rapport* is then presented as merely the construction of a legal solution to the legislative insufficiency.[66]

The second recurrent analytical model consists of debating how a legislative provision should be interpreted or applied. The debate then shifts to an analysis of the suggestions offered by academic *doctrine* and by past judicial decisions. The standard *conclusions* or *rapport* pays very close attention to academic publications, typically citing at least a dozen articles, summarizing and often quoting them at length, and routinely presenting them as divided into opposing and conflicting camps.[67] The attention thus granted to academic *doctrine* serves an important function in the construction of the *magistrat*'s analysis: it frames the discussion in such a manner as to permit the court to consider *how* and *why* a particular Code provision should be interpreted in a given fashion. Framed in such terms, the question thrusts the court into hermeneutic analysis of the legal problem.

Finally, the examination and analysis of past judicial decisions constitutes the core of a *conclusions* or *rapport*: the advocate general or reporting judges *always* cites, quotes, and analyzes its own and/or other courts' *jurisprudence*. These past cases are portrayed as possessing significant normative force: they are often presented as constituting part of existing "positive law";[68] or as having "settled" a jurisprudential issue once and for all;[69] or as forming the basis of a particular court's normative legal "requirements."[70] In this internal judicial debate, *jurisprudence* is presented as having "evolved" over time under the conscious control of the courts:[71] the

66. *See* Lasser, *supra* note 24, at 1373–74 (discussing effect of "legislative gap" on *magistrats*' decision-making process).

67. *See id.* at 1374–76 (discussing effect of "academic *doctrine*" on *magistrats*' decision-making process).

68. *See, e.g.*, *Conclusions* of Advocate General Mourier, Judgment of July 12, 1991, Bull. No. 5, at 7, *in* 1992 ANN. REP., *supra* note 61, at 111.

69. *See, e.g.*, *Rapport* of Justice Massip, Judgment of Dec. 13, 1989, Cass. civ. 1re, 1990 D.S. Jur. 469, 470.

70. *See, e.g.*, *Rapport* of Justice Combaldieu, Judgment of Jan. 20, 1966, Cass. crim., 1966 D.S. Jur. 184.

71. *See, e.g.*, *Conclusions* of Advocate General Mourier, Judgment of July 12, 1991, Bull. No. 5, at 7, *in* ANN. REP., *supra* note 61, at 109–11.

central issue therefore consists of whether to apply, maintain, modify, or overturn that *jurisprudence*.

Given that French *magistrats* tend, in their internal discourse, to frame legal problems in the typical ways outlined above, how do they justify the creation of a normative judicial solution? Their *rapports* and *conclusions* adopt a handful of argumentative modes that lead to the production of particular types of judicial analyses.

The first argumentative mode consists quite simply of good, old-fashioned formalist or grammatical exegesis of codified legislative texts. The assumption still remains, as in mainstream French *doctrine*, that grammatical application of legislative provisions will solve most legal controversies, and that hermeneutics only comes into play when grammatical application fails to resolve the case at bar.[72]

When, however, grammatical application of statutory law is not perceived—for one reason or another—as appropriately resolving a legal controversy, French *magistrats* tend to adopt argumentative modes that are closely related to the concerns of mainstream academic *doctrine*. On these frequently recurring occasions, the French *magistrat* turns explicitly to the notions of legal adaptation, equity, and institutional competence.

As we have already seen, the consideration of adaptation and equity issues necessarily thrusts the *magistrat* into hermeneutic analysis. It requires, in order to produce meaningful judicial decisions in a changing society, that she interpret the statutory law on the basis of some theory of the social function of law and of the French judge. A concern with questions of institutional competence leads the French *magistrat* in the same direction.[73] *Conclusions* and *rapports*, in their analysis of whether to establish a new judicial norm, frequently address the issue of the allocation of powers between the legislative and judicial branches: the *magistrat* must analyze the relative benefits of adopting a judicial, as opposed to a legislative, solution. Here too the *magistrat* engages in hermeneutic analysis, this time basing her legal interpretations on determinations of institutional policy.

As can readily be seen, the French *magistrat* does far more than passively apply the grammar of the Code to litigated fact scenarios, as suggested by the official portrait. In the largely hidden sphere of unofficial French judicial discourse, she focuses her analy-

72. *See* Lasser, *supra* note 24, at 1381–82 (discussing *magistrats'* justifications of normative judicial solutions).

73. *See id.* at 1386–88 (discussing institutional competence of French judiciary).

ses and decisions on factors largely external to the grammar of the Code, producing judicial norms and solutions based on hermeneutic determinations of policy directives.

In the unofficial discursive sphere, the French judge is intercalated between the Code and the judicial decision. She is a person who exercises agency along with her normative power, and who is therefore responsible for her policy-based interpretive decisions. This modified judicial status manifests itself in the very style of the *conclusions* and *rapports*. Suddenly, the judge expresses herself in a relatively familiar and personal manner, speaking in the first person singular.[74]

This hidden and empowered French judicial "I," however, is simultaneously relativized in relation to her peers. Her interpretations can no longer be unproblematically presented as the required grammatical reading of fundamentally self-applying Code provisions. Her interpretations are now "hers"; they are but opinions that possess no particular authority that distinguishes them from those of her judicial or academic peers. In her *rapports*, her language becomes tentative, littered with such insecure phrases as "it appears to me," or "it seems to me," or "[t]hat is why I believe, as for me, that . . . ."[75] She must justify her interpretations and her normative creations, and she must defend them against the critiques of others; *rapports* and *conclusions* are therefore intensely preoccupied with the academic reception of judicial decisions.[76]

In the unofficial discursive sphere, this empowered yet relativized judicial status impacts upon the status of even the *Cour de cassation*. French legal commentary has begun to use the term "the *doctrine* of the *Cour*,"[77] a term that demonstrates the complicated French perception of the *Cour*. On the one hand, the expression recognizes the significant normative power of the *Cour*'s decisions: the *Cour* creates "judicial doctrine," despite the injunctions of the official portrait. On the other hand, the expression implies the relativized status of the *Cour*'s output: the *Cour* produces *doctrine*, a term traditionally associated with subjective academic opinion.

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74. *See id.* at 1388–89 (discussing personalization of unofficial French judicial discourse).

75. *See, e.g.*, *Rapport* of Justice Sargos, Judgment of Oct. 8, 1986, Cass. civ. 1re, 1986 D.S. Jur. 573, 574; *Rapport* of Combaldieu, *supra* note 70, at 186.

76. *See, e.g.*, *Rapport* of Combaldieu, *supra* note 70, at 186 (referring to "the scathing arrows that a good portion of academic scholarship shoots at [the *Cour*'s] *jurisprudence*").

77. *See, e.g.*, Andre Perdriau, *La portée doctrinale des arrêts civils de la Cour de cassation* [*The Doctrinal Impact of the* Cour de cassation's *Civil Judgments*], *in* 1990 ANN. REP., *supra* note 61, at 59.

3. Conclusions

The foregoing analysis of French judicial discourse, which takes into account the unofficial discursive sphere of the *conclusions* and *rapports*, suggests conclusions quite different than those offered by traditional American comparative analyses of the French civil legal system. First, it is simply incorrect to presume that the official portrait's rigidly formalist conception of adjudication dominates the French civil legal system; for there exists, within the system, a vibrant institutional discursive sphere in which French academics and judicial *magistrats* seek to produce coherent, policy-based judicial responses to contemporary legal problems. In this sphere, *magistrats* downplay the formal wording of the statutory law, emphasizing instead legal adaptation, institutional competence, equity, and other explicitly policy-oriented issues.

This is not to say, however, that the unofficial portrait, any more than the official one, is "what is really going on" in the French civil legal system. The modes of analysis offered by both portraits are *simultaneously* operative, each apparently dominant within its own sphere. The second conclusion, then, is that French judicial discourse has simply bifurcated. The official French judicial decision, whose very form resists the overt introduction of hermeneutic analysis, therefore maintains its grammatical discourse; and hermeneutic discourse surfaces elsewhere, in the *conclusions*, *rapports*, and *doctrine*. This bifurcation represents the French legal system's mediation between the traditional French distrust of the judiciary and the post-Gény, twentieth-century impulse towards socially responsive judicial hermeneutics.

The third conclusion is that this discursive split, which permits the maintenance of the official portrait's insistence on grammar, has resulted in a particularly strong sensitivity to that grammar's perceived failures. Thus, in the unofficial discursive sphere, French *magistrats* are extremely candid about perceived gaps, conflicts, or ambiguities in the Code, and are particularly aware of turning to sources external to the Code in order to "construct a solution." As the *magistrat* does not understand these "external" sources to carry any particular authority, she deploys them in a way that she recognizes to be highly personal and intensely debatable. She is therefore less than confident in the ability of policy hermeneutics to generate required interpretive solutions.

The fourth conclusion is that the French legal system has managed to build a conceptual framework that encompasses and mediates between both sides of the system's bifurcated discourse. It has

done so by constructing a few basic mediating concepts that facilitate, rationalize, and justify the coexistence of its official and unofficial portraits of the judicial role. These fundamental mediating concepts, such as the sources of the law, legal adaptation, and equity, surface as the primary concerns of mainstream French academic *doctrine* and of unofficial French judicial discourse. Each concept calls for the judicial deployment of hermeneutic decision making while salvaging, insofar as possible, the official portrait of the judicial application of the grammar of the codified law.

The point is *not* that the French civil judicial system maintains two contradictory modes of reading (the grammatical and the hermeneutic) reflected in two distinct discursive spheres (the official and the unofficial). Rather, the fifth and final conclusion is that while the French judicial system maintains two distinct modes of reading, the two are completely interdependent, perpetually leaking into each other and at no point pure.

Traces of policy hermeneutics surface constantly in the apparently pure, grammatical discourse of the official French judicial decision. They are, however, severely encoded and thus difficult for the outsider to recognize. They tend to manifest themselves as little snippets of judicial norms, or as slight modifications of the precise wording of the Code provisions paraphrased by the court. These fleeting linguistic moments, perhaps the most important in any official French judicial decision, operate as signs; they represent the trace of an entire unofficial discursive sphere in which French judges interpret on the basis of elaborate policy hermeneutics. The grammar of the official decision therefore depends on the hermeneutics of the unofficial discourse.

Similarly, traces of grammatical reading emerge incessantly in the unofficial French discursive sphere. On the most basic level, the judicial deployment of hermeneutic analysis depends on the initial perception of a failure of the Code's grammar, i.e., on the perception of a statutory gap, conflict, or ambiguity. But grammar resurfaces in yet another, and more interesting, fashion.

After the perceived failure of formalist grammar, French unofficial judicial discourse does not remain purely hermeneutic. Quite the opposite: the turn to hermeneutics tends to precipitate the production of formal judicial norms that will be deployed with the rhetoric of formal application. It is the production of formal judicial norms, which is explicitly forbidden by the official portrait, that permits the return of formal grammar in the French judicial system. These judicial norms, just as the formal statutory provisions they have displaced, will then be read both grammatically and hermeneutically, leading to the modification or overturning of *jurispru-*

dence on the basis, once again, of assorted policy or equity concerns.

In the French civil judicial system, grammar and hermeneutics have proven to be utterly interdependent. As I have said elsewhere:

> The cycle of the French civil judicial system can be summed up in the following sequence: (i) formal grammar of the statutory law; (ii) the perceived breakdown of the statutory law's formal grammar; (iii) the turn to policy hermeneutics in order to fix the breakdown; (iv) the return of grammar as formal judicial norms; (v) the perceived breakdown of the formal grammar of the judicial norms; and (vi) the turn to policy hermeneutics in order to fix the breakdown, and so on. Grammar is salvaged and reproduced by hermeneutics, which itself exists because of the perceived failure of grammar.
>
> . . . .
>
> The French judicial system has apparently found that it cannot simply choose between formalism and hermeneutics. Both modes of reading are always available, but each relies on, implicates, and resorts to the other.[78]

III. AMERICAN JUDICIAL DISCOURSE[79]

Unlike French judicial discourse, which has bifurcated into two relatively distinct spheres (the official and the unofficial) in an attempt to segregate, insofar as possible, its two modes of discourse (the grammatical and the hermeneutic), American judicial discourse tends to integrate its modes of discourse in one and the same space: the American judicial opinion. The ubiquitous judicial "test" offers a particularly clear and recognizable example of this characteristic discursive and interpretive integration.[80]

My analysis focuses on the particular variant of judicial tests that comes in multiple parts or prongs. The analysis therefore examines four lines of Supreme Court decisions that establish and apply multipart or multiprong judicial tests: the line of Commerce Clause cases stemming from *Complete Auto Transit, Inc. v. Brady*;[81] the line of "collateral order" cases stemming from the Court's interpretation of 28 U.S.C. § 1291 in *Cohen v. Beneficial Industrial Loan Corp.*;[82] the line of ineffective assistance of counsel cases stemming from the Court's Sixth Amendment analysis in

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78. Lasser, *supra* note 24, at 1409–10.

79. A detailed version of the analyses offered in Parts III and IV can be found in my forthcoming article, *Lit. Theory Put to the Test*, 111 HARV. L. REV. (forthcoming 1998).

80. The reasons for focusing on the American judicial test are discussed above. *See supra* text accompanying note 22.

81. 430 U.S. 274 (1977).

82. 337 U.S. 541 (1949).

Strickland v. Washington;[83] and finally, the line of First Amendment obscenity cases stemming from *Memoirs of a Woman of Pleasure v. Massachusetts*[84] and *Miller v. California*.[85]

Judicial tests are part of a distinctive mode of judicial discourse and analysis that I shall call the "Test Method." The judicial deployment of the Test Method, that is, the judicial establishment and application of judicial tests, produces particular discursive and interpretive effects. Most notably, the operation of the Test Method results in the displacement of apparently controlling, nonjudicial, primary legal texts, such as federal statutes and constitutional clauses. This displacement represents a transition from nonjudicial to judicial text, for it leads to the establishment of specific judicial language as the controlling legal text.

My analysis of the Test Method examines how and why the initial displacement of previously controlling, nonjudicial text takes place, how that displacement is maintained, and what form of judicial discourse then ensues. This examination then leads to a comparative analysis of French and American judicial discourse.

A. The Initial Displacement

As an analysis of Supreme Court Test Method decisions readily demonstrates, the establishment of a judicial test is inevitably preceded by a particular mode of discourse. This discursive foreshadowing of the impending displacement of the controlling nonjudicial text comes in two closely related forms that I shall call "purposive discourse" and "effects orientation."

Purposive discourse and effects orientation represent no more than the Court's decision to focus its interpretive analysis on the supposed purposes and effects of the previously controlling, primary legal text. They are, however, extremely effective discursive devices that function as a means to displace that primary text. When the Court, for example, centers its analysis on the purposes and effects of the Commerce Clause, two operations immediately occur. First, the Court no longer focuses on the specific language of the Clause, as its interpretive attention is now turned primarily on that Clause's supposed purposes and effects. Second, the Court must attribute these purposes and effects to the Clause, and it must do so in its own words; the Commerce Clause, after all, says nothing about its purposes or intended effects.[86]

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83. 466 U.S. 668 (1984).
84. 383 U.S. 413 (1966) (plurality opinion).
85. 413 U.S. 15 (1973).
86. My analysis does not interest itself in, or make any claims about, the ap-

The shift to purposive discourse and effect orientation represents more than just the displacement of the primary text in favor of judicial text. It also marks a transition from a grammatical to a hermeneutic mode of reading. This interpretive shift is immediately apparent. Instead of focusing on the grammar of the primary text, the Court seeks to derive the meaning of that text by interpreting it in terms of something else: its purposes and effects. Furthermore, this shift tends to be stressed overtly in the Court's decision; the initial displacing decision, and often the ensuing line of decisions in the same doctrinal area, tend to critique—quite vehemently, in fact—the "literalist" or "formalist" approach which had previously been deployed.[87]

The displacement of the primary, nonjudicial text, when combined with the shift to the hermeneutic of purposes and effects, clears the analytic ground for the establishment of new, controlling and judicially enunciated criteria, i.e., for the enunciation of a judicial test. This test, which will now govern the doctrinal area, adopts—as the substantive criteria of its prongs—the hermeneutic of purposes and effects. The *Lemon* three-prong Establishment Clause test, for example, 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.'"[88]

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propriateness or accuracy of the attribution of particular purposes or effects to particular constitutional clauses or legislative provisions.

87. *See, e.g.*, Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977) (noting Court would now adopt approach which would "consider[] not the formal language of the tax statute but rather its practical effect"); *id.* at 281 (stating Court "has moved toward a standard of permissibility of state taxation based upon its actual effect rather than its legal terminology"); *id.* at 288–89 ("There is no economic consequence that follows necessarily from the use of the particular words, 'privilege of doing business,' and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect. Simply put, the *Spector* rule does not address the problems with which the Commerce Clause is concerned. Accordingly, we now reject the rule of *Spector Motor Service, Inc. v. O'Connor* . . . ."); Commonwealth Edison Co. v. Montana, 453 U.S. 609, 616 (1981) ("We conclude that the same 'practical analysis' should apply in reviewing Commerce Clause challenges to state severance taxes. In the first place, there is no real distinction—in terms of economic effects—between severance taxes and other types of state taxes that have been subjected to Commerce Clause scrutiny. . . . [The] effect [on interstate commerce] is the proper focus of Commerce Clause inquiry.").

88. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (emphasis added) (citation omitted).

B. The Continued Operation of the Test Method

The operation of the Test Method therefore displaces the previously controlling primary text with a judicial test that carries within the language of its prongs a hermeneutic of purposes and effects. This process assures the transmission, from case to case within a given doctrinal area, of a hermeneutic judicial approach. In order for this process to operate smoothly, however, the Test Method adopts an interesting discursive tactic.

Once the initial displacement of the previously controlling primary text has taken place, the judicial test becomes the focus of all ensuing cases in the doctrinal area. The ensuing cases open, and often end, with a statement of the controlling test.[89] The judicial analysis consists of an evaluation of whether the test, and not the primary text, has been "satisfied." The apparently controlling statute or constitutional clause, now thoroughly displaced, often goes unquoted and even unmentioned.[90] It is the test that now rules the doctrinal area; it is the new "authority figure" within the field.

The authoritative status of the controlling judicial test affects the very structure of Test Method decisions. These decisions now track the prongs of the judicial test, analyzing the criteria in turn and in order.[91] The use of the test as the decisions' structural matrix not only stresses the test's authority, but also signifies something else.

The structure of the Test Method opinion, it must be noted, goes hand in hand with a particular mode of discourse. This eminently recognizable discourse consists of labeling the test as a "test" that must be "applied"; calling its numbered and statute-like criteria "parts" or "prongs"; identifying the test as "ruling" or "governing" a doctrinal area; and questioning, for example, whether "_____ statute satisfies _____ prong of _____ test." Furthermore, the test—unlike the previously controlling primary text—is not only

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89. *See, e.g.*, *Commonwealth Edison*, 453 U.S. at 617, 629 (stating *Complete Auto Transit* four-part test); Memoirs of a Woman of Pleasure v. Massachusetts, 383 U.S. 413, 418 (1966) (plurality opinion) (articulating elements necessary to show obscenity); Abney v. United States, 431 U.S. 651, 663 (1977) (stating rule of finality can only be circumvented by claims meeting *Cohen* collateral-order exception); Hill v. Lockhart, 474 U.S. 52, 60 (1985) (holding two-part standard for ineffective assistance of counsel claims applies to guilty plea challenges).

90. *See, e.g.*, Pope v. Illinois, 481 U.S. 497, 498 (1987) (using *Miller* test for obscenity without quoting language of First Amendment); Darden v. Wainwright, 477 U.S. 168, 184, 187 (1986) (applying *Strickland* ineffective assistance of counsel test without referring to language of Sixth Amendment).

91. *See, e.g.*, Goldberg v. Sweet, 488 U.S. 252, 259–61, 264–67 (1987) (tracing development of *Complete Auto* Commerce Clause test).

used to structure the decision quite formally, but is placed in a position of analytic prominence and even tends to be quoted.

The structure and discourse of the Test Method decision serve to indicate that the Court is faithfully adhering to the language of the test. They operate to signify textual necessity, i.e., that the test's linguistic requirements are being applied with mathematical or mechanical precision, yielding required readings. In short, the discourse and formal structure of the Test Method decision signify that the Court is engaged in a *grammatical* mode of reading.

And yet, on a substantive level, the test's prongs are oriented towards a hermeneutic of purposes and effects.[92] It is precisely this admixture of grammar and hermeneutics which best defines the Test Method. The typical Test Method line of decisions first rejects a formalist approach to the previously controlling primary text, then displaces that text in favor of a judicial test oriented towards a hermeneutic of purposes and effects. The decisions then return to formalism by adopting a structure and discourse that suggests the formalist production of judicial decisions on the basis of the test's own grammar.

The Test Method thus emerges as quite supple and complex. It simultaneously suggests a meaningful hermeneutic of purposes and effects, and grammatical textual stability. It offers the prospect of interpretive stability without the perceived dangers of formalism.

C. The Problem of Perpetual Slippage

An examination of Test Method cases demonstrates, however, that the method produces little in the way of interpretive stability. This failure emerges first at the grammatical level. Unlike a statute or constitutional clause, the language of which the Court cannot literally modify, a judicial test is open to perpetual judicial revision. In fact, the language of the tests reveals itself to be constantly, if rather surreptitiously, changing: adjectives and adverbs are quietly added or subtracted, phrases are slightly altered from case to case, and the like.[93] The Test Method's claim to grammatical stability is therefore severely weakened: Test Method decisions do not even respect the grammar of their own established tests.

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92. *See, e.g., supra* text accompanying note 88 (discussing *Lemon* Establishment Clause test).

93. *Compare, e.g.*, Cohen v. Beneficial Loan Corp., 337 U.S. 541, 546 (1949) (stating collateral order test requires that order to be reviewed must involve a right "separable from . . . rights asserted in the action") *with* Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978) (applying *Cohen* test and stating order must involve "an issue completely separate from the merits of the action").

This actual grammatical instability is further compounded by the close link between the Test Method and purposive discourse. Not only is purposive discourse transmitted from case to case within the very prongs of the typical judicial test, but so are the displacing tendencies of that discourse. The effects of this transmission can be observed in two ways. First, as the Court modifies, or consistently stresses, one or more of the purposes that it has attributed to the primary text, the language of the test routinely changes to include the new version of the Court-attributed purpose.[94]

The second, and more dramatic, effect consists of the tendency of Test Method cases to produce "secondary tests." These new tests, apparently subsidiary to the primary judicial tests, are sometimes presented as "required showings" needed to satisfy the prongs of the primary test. This leads to a commonly recurring structure in Test Method decisions: "To satisfy the _____ test, the party must show [primary test]. This requires showing [secondary test]."[95] At other times, the secondary tests are presented as distinct, if subsidiary, tests whose determination resolves an issue posed by a particular prong of the primary test. Thus, in *Goldberg v. Sweet*, for example, the Court approaches the second or "apportionment" prong of its *Complete Auto* interstate commerce test as follows:

> [W]e determine whether a tax is fairly apportioned by examining whether it is internally and externally consistent. . . .
>
> . . . [T]he internal consistency test focuses on [whether the tax is] structured so that if every State were to impose an identical tax, no multiple taxation would result.
>
> . . . .
>
> The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed.[96]

As this classic example indicates, the Test Method is not a one-shot deal in which a test is permanently established to interpret a primary, nonjudicial text. Instead, the test generates further, secondary tests.

It is against this backdrop of the shifting grammar of the primary tests and of the phenomenon of the secondary test that the

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94. Note, for example, the *Coopers & Lybrand* Court's addition to the *Cohen* test of the requirement that the order to be reviewed "be effectively unreviewable on appeal from final judgment." *Coopers & Lybrand*, 437 U.S. at 468.

95. *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 687–88 (1984) ("In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances.").

96. *Goldberg*, 488 U.S. at 261–62.

operation of the Test Method reveals itself to be a double-edged sword. On the one hand, it can be regarded as a terrific success. The method is self-perpetuating insofar as it is carried from case to case via the purpose and effect orientation of the test's own prongs. As the test serves as the authority figure in Test Method lines of cases, the method is itself transported and reproduced from case to case. As such, the test operates continuously over time, reproducing its own mode of hermeneutic analysis in later cases.

Furthermore, even the self-displacing tendencies of the Test Method's purpose and effect hermeneutics can be regarded as actually strengthening the method's position. Although the language of the established tests, as we have seen, comes to be displaced by different tests and by secondary tests, the previously controlling, nonjudicial text is hardly rendered any more central to the Court's analysis. To the contrary, that primary text is only further removed by the production of yet another layer of judicial text that intercalates itself between the Court's analysis and the primary text. The Court's analysis now focuses on the purpose and effect hermeneutics built into the assorted levels of judicial text, while the primary text is shunted ever farther out of the analytic picture. And yet, for all of the Test Method's changing and self-displacing tendencies, the method operates under the guise of the grammatical application of formally established judicial norms, i.e., the tests. These tests continue to be presented as the authority figures in their respective doctrinal spheres. The Court cites and quotes them as "ruling" or "governing" the doctrinal area, "applies" them as such, and even constructs its opinions on the basis of their grammatical structures, regardless of how much the language of the tests has actually changed. Even when, for example, the Court quotes and applies the language of *Coopers & Lybrand* rewriting the *Cohen* collateral order test, it does so under the name of the *Cohen* test.[97] It is the authoritative *status* of the established test that permits the Court to present the Test Method as an admixture of grammatical and hermeneutic reading, and that then permits the transposition of the method's hermeneutics from case to case.

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97. *See* Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 498 (1989) (holding denial of motion to dismiss based on contractual forum selection clause not immediately appealable under *Cohen* test); Mitchell v. Forsyth, 472 U.S. 511, 527 (1985) (holding denial of U.S. Attorney General's qualified immunity appealable under *Cohen* test); Richardson v. United States, 468 U.S. 317, 320–22 (1984) (finding double jeopardy claim appealable under *Cohen* test); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374–76 (1981) (holding order denying motion to disqualify counsel not appealable under *Cohen* test).

It must be recognized, however, that this altering character of the Test Method also represents the failure of the method's pretensions to grammatical interpretive stability. While it is certainly true that the method is extremely effective in transmitting its composite interpretive method from case to case, this hardly implies that much interpretive stability has actually been produced. While Test Method cases implicitly claim that they are generating legally required solutions with test-like precision, these same cases do not even offer, as we have seen, stable judicial tests; in fact, there are almost as many versions of a given test as there are "applications" of it.

The problem lies with the displacing tendencies of the Test Method's hermeneutics of purposes and effects. These hermeneutics and their tendencies—which are precisely what enabled the initial displacement of the previously controlling, nonjudicial, primary text by a formal judicial test—are transmitted within the very prongs of each judicial test, and do not simply disappear because the controlling text is now judicial in origin. When it then comes time to interpret the ruling test, these hermeneutics are still available, and the Court cannot simply resort to the formalist mode of reading that it had itself discredited in its initial, displacing decision. The result is the perpetual production of more layers of judicial text, which manifests itself as the displacement of the Court's own primary judicial test by new versions of that test and by secondary tests.

Needless to say, this displacing tendency of purposive hermeneutics can theoretically continue *ad infinitum*. There exists no logical end to the extent to which the Court can seek to produce the purpose of the test, or the effect of the secondary test, or the effect of the purpose, and the like. Purposive hermeneutics can apparently generate endless layers of judicial interpretation. It is in response to this problem that the richness of the Test Method is revealed; for the Test Method has a solution.

The Test Method's solution to the problem of endless interpretation lies in the formal structure of the test itself (categorical, numbered prongs, etc.), in the relative respect that the Court shows to the grammar of the test,[98] and in the rhetoric of application that permeates Test Method decisions. These characteristic attributes operate as a sign. In particular, they operate as a sign of grammati-

98. The extent of this respect is obviously limited given the Court's willingness to play with the language of its own tests. Nonetheless, the Court does at least quote—however (in)accurately—the language of the tests and does follow the tests' structure in its opinions. This is more than can be said with respect to the Court's treatment of the previously controlling, nonjudicial texts.

cal reading. Thus Test Method decisions, for all the interpretive modifications produced by their hermeneutics of purposes and effects, convey the comforting notion that the Court has found the interpretive stability that good old formalist or grammatical reading used to signify. The formal structure and rhetoric of the Test Method opinion therefore function as a discursive device that counterbalances the apparent instability and displacement produced by purposive hermeneutics' production of endless layers of judicial interpretation.

The Test Method, in short, operates simultaneously on two interpretive fronts. It represents a conglomerate interpretive method that fuses together formalist grammar and purposive hermeneutics. It is a rich and complex mode of opinion writing which seeks to signify interpretive stability without the perceived dangers of formalism, and purpose and effect orientation without the perceived dangers of hermeneutics.

IV. "LIT. THEORY" IN LEGAL ACTION

As the foregoing analysis demonstrates, both the French and the American judicial systems maintain two modes of discourse, each of which is associated with a particular mode of reading. The French system bifurcates its discourses into two distinct spheres: the official and the unofficial. This approach permits the formal discourse of grammatical reading to dominate in the sphere of the official French judicial decision, and the policy/equity discourse of hermeneutic reading to dominate in the unofficial sphere of the *conclusions* and the *rapports*. The American system, on the other hand, takes a somewhat different tack, particularly visible in Test Method decisions: it rather explicitly combines the two modes of discourse and of reading in one and the same space, that of the American judicial opinion.

This patent difference between the French and American approaches, i.e., bifurcating as opposed to combining discourses, should not, however, overshadow the more fundamental similarity: both systems, viewed in their totality, function on the basis of the simultaneous operation of the discourses associated with formalist grammar and policy hermeneutics. In fact, close examination of *either* the official or the unofficial French discursive spheres reveals that both modes of discourse and of reading are simultaneously operative. As we have seen, traces of each discourse can be found even in the sphere apparently dominated by the other.

The basic convergence of the French and American practices manifests itself in the similar operation of their hermeneutics. Both

Test Method decisions and the unofficial arguments of the French *magistrat* displace the formal language of the apparently controlling constitutional clause, legislative statute, or Code provision, and engage instead in protracted policy discussions based on social, economic, or institutional considerations external to the grammar of the apparently controlling, primary text. Having thus displaced that primary text, the French and American judges each proceed to establish iterable norms of their own, whether they are called "judicial tests" or "rules of *jurisprudence*."

Similarly, the French and American convergence emerges in the operation of their discourses of formal grammar. Test Method opinions and official French judicial decisions each present themselves as passive, mechanical, and almost mathematical applications of the generative matrix of the controlling (and numbered) test prongs or Code provisions. The control supplied by those texts apparently generates not only the required judicial result, but even the very structure of the judicial decision. Thus, the Test Method decision invariably tracks the prongs of the governing test, and the official French judicial decision always takes the form of a syllogism.

In contrast to the conclusions provided by previous comparative analyses, it appears therefore that the discourses of the French and American judicial systems are historically and culturally contingent variations on the same basic combination of formalist and hermeneutic reading. This is not to say that important differences do not exist between the discursive and interpretive practices of the French and American judiciaries; but the differences are certainly not those suggested by analyses—such as Dawson's or Merryman's—that fail to take adequately into account entire facets, for example, of the French judicial system.

Even when focusing on the similarities between French and American judges' discursive and interpretive practices, however, certain differences do immediately stand out. Perhaps the most notable example, and the one that I will examine in this Part, should rule out the possible conclusion that the discursive and interpretive practices of French and American judges are simply the same. Although it is absolutely true that both judicial systems put both formalist and hermeneutic modes of reading into play, each system stresses one of the two modes in its dominant discourse. Thus, the official discourse of the French system clearly stresses and valorizes formal reading based on grammatical application, relegating its hermeneutics, insofar as possible, to the unofficial discursive sphere. As we have seen in Test Method decisions, however, American judicial discourse openly and consistently attacks

such formalist or "literal" reading, stressing and valorizing instead hermeneutic reading based on the policy logic. In order to analyze this fundamental difference between French and American judicial discourse, let us now turn explicitly to the methodologies offered by "lit. theory."

A. The Judicial Decision as Paradigmatic or Syntagmatic

Roman Jakobson's linguistic studies represent the first "lit. theory" methodology that I bring to bear on the comparative analysis of French and American judicial discourse. Jakobsonian linguistics can be used effectively as a means of describing how the French and American judicial systems go about relating their judicial decisions to the law (be it, for example, a Code provision or a constitutional clause) which apparently governs the case.

Jakobson states that speech consists of two basic modes of verbal arrangement.[99] The construction of a sentence offers the most straightforward example. In order to construct a sentence, the speaker (or writer) must first select particular words (and not other, similar words) from some code of available words and substitute those words into the sentence.[100] The speaker must then combine the selected words, thereby providing context for each word, in order to construct a more complex linguistic unit (i.e., the sentence).[101]

The construction of a sentence thus requires two linguistic operations. The first is a paradigmatic operation. It involves selecting among similar words and substituting the selected one into the sentence.[102] The relation between the selected word and those not chosen is one of such inherent similarity that it is not even explained in the sentence itself. The second operation is syntagmatic. It involves the construction of a context by placing the selected words in a sequence (the syntax) with other words, thereby creating the sentence.[103] The relation between the sequenced words is not one of similarity, but of mere contiguity; that is, the relation between the words is contextual. They appear next to each other in the sentence itself. The words in a sentence are thus internally related to the code of available words, and externally related to the other words in the context of the sentence.[104]

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99. *See* JAKOBSON, *supra* note 28, at 97–98.
100. *See id.* at 98–99.
101. *See id.*
102. *See id.* at 99.
103. *See id.* at 98–99.
104. *See id.* at 100–01.

In any normal language use, both modes of linguistic relation (the paradigmatic and the syntagmatic) are simultaneously operative. Jakobson notes, however, that "under the influence of a cultural pattern, personality, and verbal style, preference is given to one of the two [modes] over the other."[105] A competition constantly exists between the two modes of relation, and although both are operative, one of them tends to be prioritized.

What does this linguistic methodology have to offer to the comparative analysis of judicial discourses? It is my contention that it effectively describes how French and American judicial decisions present their relation to the law that apparently governs the case. The official French judicial decision, for example, presents itself primarily as paradigmatically related to the *loi*. The decision, it appears, is merely the selection of a Code provision, and the substitution of the judicial decision for that Code provision on the occasion of a triggering fact scenario. The relation between the decision and the *loi* is one of inherent similarity, as suggested by the very form of the syllogism, and by the univocal and impersonal style of the decision itself. No explanation of the similarity or of the substitution is either given or required: The judicial decision *is* but the *loi* in the present instance. If external context—such as prior judicial decisions, or social, economic, or institutional policy considerations—were needed, then the relation between the decision and the *loi* would not be one of internal and inherent similarity. Furthermore, judicial decisions might then be adding something to the *loi*, thus gathering independent, authoritative, and precedential normative force of their own.

The American judicial decision, on the other hand, presents itself primarily as contiguously related to the law that apparently governs the case. It emerges as the syntagmatic construction of a link between the legal norm and external policy issues related, but not analogous, to that norm. The decision represents the policy contextualization of the legal norm. As the American decision must forge these contextual links, it is not only significantly longer than its official French counterpart, but it also acquires normative force of its own. The American judicial decision becomes part of the context for the sequence of ensuing judicial decisions. The decision slips into an omnipresent syntax of past and future judicial decisions.

Despite the priority that French decisions appear to give to their paradigmatic relation to the *loi* and that American decisions appear to give to their syntagmatic relation to the law, my analysis

105. *Id.* at 110.

of French and American judicial discourse has clearly shown that these priorities are but, in many respects, skin-deep. In the unofficial French discursive sphere of the *rapports* and *conclusions*, for example, the *magistrat* engages in just the kind of factual, policy, and precedential contextualization that appears to characterize the syntagmatic American decision. Furthermore, traces of this contextualization even emerge, although in encoded form, in the body of official French decisions.[106]

Similarly, American Test Method decisions, as we have seen, often present themselves as the mere paradigmatic substitution for, or playing out of, the selected judicial test. French and American judicial discourse thus merely appear to give priority to one or the other mode of relating the judicial decision to the law. This appearance is nonetheless important, as the next section will begin to demonstrate.

B. The Judicial Decision as Myth

The type of relation we have just analyzed—the relation between the judicial decision and the law on which that decision is apparently based—represents but one of the relations operative in both the French and American judicial systems. This relation must therefore be itself related to the second relation that we have analyzed in the French and American contexts: the relation between particular modes of discourse and particular modes of reading. As the analysis now involves two sets or tiers of relations, I propose that we turn to the methodology offered by Roland Barthes's work on contemporary myth.

In *Mythologies*, Barthes states that myth is a particular type of message, one that is definable not by its content, but by its form.[107] Barthes begins by reminding the reader that all semiological systems are composed of three basic elements: the signifier (e.g., offering roses), the signified (e.g., affection), and the sign (e.g., the offering of affection-laden roses).[108]

What distinguishes myth as a particular kind of semiological system is that it is two-tiered. In order to stick with the floral theme, allow me to update one of Barthes's examples.[109] A few years ago, during the Chinese standoff in Tienanmen Square, nu-

106. *See supra* Part II (discussing French judicial discourse).

107. BARTHES, *supra* note 29, at 109.

108. *See id.* at 114.

109. Barthes's example consisted of the analysis of a colonial era Paris-Match cover which depicted a young African man dressed in a French military uniform, raising his eyes towards and saluting the French flag. *See id.* at 116.

merous magazine covers depicted photographs of young Chinese student protesters placing flowers into the barrels of Chinese army guns or tanks. Barthes, I feel confident in asserting, would have analyzed such images as contemporary myths. A first, "linguistic," semiological system is constructed in which the sign, as above, consists of offering affection-laden (or peace-laden) roses, this time by the Chinese student protester. This sign, however, is not the be-all and end-all of the magazine images; it serves as the launching pad for, or foundation of, a second, "mythic," semiological system which is constructed upon the first. What is signified in this second system is something rather different: the timeless and natural yearning of man to live in peace and be free of oppression.

The key to myth, according to Barthes, is the way in which it makes use of the first semiological system's sign (in this case, the Chinese student protester offering the flowers). This sign, which is full and rich with historical meaning in its own right, is reduced to a mere signifier in the second, mythic system.[110] Its meaning is gutted, tamed, or at least bracketed in the mythic system, and the sign is made to operate as a mere vessel for the transmission of the mythic meaning (in this case, man's natural and eternal yearning for peace and freedom).[111] Furthermore, the myth uses the dehistoricized sign as a certain form of proof for what is actually a historically contingent value system (in this case, the mythic claim about human nature). The historically contingent and value-laden mythic claim is thereby passed off as natural, essential, and eternal. As Barthes states, "We reach here the very principle of myth: it transforms history into nature."[112]

Barthes's methodology for the analysis of contemporary myth turns out to be quite useful in the analysis of the French and American judicial systems. In particular, it helps to parcel out the complex, signifying links that are constructed in each system.

The French and American judicial systems each establish a first, linguistic, relation between particular modes of discourse and particular modes of reading. This linguistic relation functions as a semiological system: The modes of discourse constitute the signifiers; the modes of reading constitute the signifieds; and the decisions themselves, as the concrete manifestation of the correlation between the modes of discourse and of reading, emerge as the sign.

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110. *See id.* at 118.
111. *See id.*
112. *Id.* at 129.

In both systems, the discourse of the judicial application of the law signifies grammatical/formalist reading. Thus, the French discourse of the passive judicial syllogism, and the American discourse of the rigid application of the judicial test's numbered prongs, are each associated with grammatical/formalist reading. The Code and the test are presented as the direct, self-applying, generative matrix for the decision. The decision itself emerges as the mere playing-out of the requirements of the governing Code provision or test.

In both systems, furthermore, the discourses of social, economic, or institutional policy, of purposes and effects, or of equity signify hermeneutic reading. The unofficial French discourse of equity or of legal adaptation, and the American discourse of purposes and effects, are each associated with a rejection of formalist reading. The decision itself emerges as the product of meaningful judicial interpretation performed on the basis of factors external to the letter of the law.

The French and American judicial systems therefore construct similar, signifying links between particular modes of discourse and particular modes of reading. These links represent, however, but the first of two semiological systems; for the judicial decisions themselves, which function as the signs produced by the first system, are reduced to mere signifiers in a second system. In this mythic system, the decisions are made to signify paradigmatic or syntagmatic modes of relating judicial decisions to the apparently controlling law.

In this second, semiological system, operative in both the French and American contexts, paradigmatic relation is associated with grammatical/formalist judicial decisions, and syntagmatic relation is associated with hermeneutic ones. Thus official French decisions, which present themselves as engaged primarily in formalist reading, also present themselves as predominantly paradigmatically related to the *loi*. To the extent that American Test Method decisions present themselves as formal applications of the grammar of the governing test, they too present themselves as paradigmatically related to the test. In each case, the decision portrays itself as a clean selection of, substitute for, and manifestation of, the law in the present instance. On the other hand, to the extent that American Test Method decisions (and unofficial French judicial arguments) appear as hermeneutic interpretations, they emerge as syntagmatically related to the governing law: they present themselves as constituted by combining that law with a sequence of contextualizing judicial decisions.

At this point in the analysis, it must be recognized that in this second, semiological system, the terms "paradigmatic" and

"syntagmatic" do not simply operate in a neutral, descriptive fashion. The terms signify something important. For example, the official French decision substitutes paradigmatically for the *loi* because it is inherently similar to that *loi*; the link between the decision and the *loi* is one of internal necessity and is therefore inherently stable. The American judicial decision, on the other hand, presents itself as predominantly syntagmatic because it combines the law with other external, yet contextually related elements.

In short, the portrayals of French and American judicial decisions as paradigmatic or syntagmatic constitute *ontological* claims about the nature of the relation between judicial decisions and the apparently governing law. These ontological claims, which operate in the second, mythic, semiological systems, then combine with the first semiological system, producing the final mythic signification. Thus, paradigmatic selection and substitution combine with the discourse of the French syllogism or with the discourse of the application of the ruling test, yielding the mythic signification that adjudication is but the stable production of the law's required solutions. The syntagmatic construction of judicial decisions, on the other hand, combines with the discourses of equity, policy, or purposes and effects. That is, it combines with discourses that point towards a universe that exists "outside" the letter of the law, in the realm of the social. This syntagmatic combination therefore produces its own mythic signification, namely that adjudication is socially responsive.

The French and American judicial systems each produce, therefore, complex elisions in which the definitional characteristics of paradigmatic or syntagmatic relation (internal vs. external, similarity vs. contiguity) come to signify particular, valorized attributes of adjudication (inherently stable vs. socially responsive). They do so by constructing similar chains of signifying links, which run from (1) modes of discourse, to (2) modes of reading, to (3) judicial decisions, to (4) the relation of those decisions to the apparently governing law, to (5) valorized attributes of adjudication. These chains function on the basis of a bipolar association of terms, operative in both judicial systems:

Discourse of Application v.	Discourse of Purposes, Effects, Equity, etc.
grammar	(policy) logic
formalism	hermeneutics
generative matrix	constructed meaning

direct/unmediated	mediated/referential
paradigmatic	syntagmatic
internal relation	external relation
selection/substitution	combination/contexture
similarity/analogy	contiguity/relevance
inherent stability	social responsiveness

In both judicial systems, the discourse of grammar is associated with formalist reading, which is associated with the paradigmatic relation of the law to the judicial decision. The discourse of policy, purposes and effects, and equity is associated with hermeneutic reading, which is associated with the syntagmatic relation of the judicial decision to the law.

It is essential to note, however, that these chains of association are deeply historically contingent. There is absolutely nothing that would prevent one from objecting to the particular alignment of terms produced by the French and American judicial systems and charted above. For example, there is something distressing about the way in which grammar ends up aligned with paradigmatic substitution, and in which hermeneutics ends up aligned with syntagmatic substitution. Doesn't grammar consist precisely of the rules of syntax, that is, the rules governing combination? And doesn't, for example, Biblical or Marxist or Freudian hermeneutics consist precisely of a mode of interpretation in which some Ur-text (be it the *New Testament*, *Kapital*, or *The Interpretation of Dreams*) is paradigmatically substituted for the text (be it literary or otherwise) that is being read?

The answer to these questions is quite simply, yes. And that is the whole point: The chains of signifying links constructed by the French and American judicial systems are historically contingent, not factually or theoretically required. But the mythic process of signification operative in both judicial systems denies this contingency. The mythic process consists precisely of making the two sets of contingently aligned terms signify particular, natural, inherent, and eternal *values* of adjudication. As Barthes states:

> In fact, what allows the reader to consume myth innocently is that he does not see it as a semiological system but as an inductive one. Where there is only an equivalence, he sees a kind of causal process: the signifier and the signified have, in his eyes, a natural relationship. This confusion can be expressed otherwise: any semio-

> logical system is a system of values; [but] the myth-consumer takes the signification for a system of facts: myth is read as a factual system, whereas it is but a semiological system.[113]

Thus, for example, in the French judicial system, the paradigmatic form of the official judicial decision combines with the grammatical and syllogistic discourse of formalist reading in order to signify that adjudication is naturally, eternally, and inherently stable; whereas, for example, in the American system, the syntagmatic form of the judicial decision is combined with the policy discourse of hermeneutic reading in order to signify that adjudication is naturally, eternally, and inherently socially responsive.

On the other hand, a judicial system that would flip the alignment of terms would be no more factually or theoretically "correct," as it would be open to the critique that the opposite alignment of terms (namely, the one actually offered by the French and American judicial systems) is equally tenable. The reasons underlying this paradox need to be explained; they lie in the relation of the paradigmatic to the syntagmatic, of formalism to hermeneutics, and of metaphor to metonymy.

C. The Judicial Decision as Trope

The key to our analysis is the simple fact that the judicial decision, whether French or American, always replaces, or stands in for, the law in the present instance. This substitution, in some sense implicit in the very word "judge,"[114] should by now be patently obvious: the judicial decision, however it may present itself, is composed of words that differ from those of the apparently controlling Code provision, constitutional clause, or legislative statute. The advent of one text (the judicial decision) marks the disappearance of the other (the apparently controlling law).

This replacement, operative in at least the French and American judicial systems, must be justified by establishing a relation between the judicial decision and the law for which it stands in the particular instance. The justifications offered, as we have seen, consist of two ontological claims, namely, that the decision is either inherently similar and internally related, or contextually relevant and externally related, to the controlling law. That is, the French and American judicial systems justify their decisions' replacement of the law by transforming the *definitional* characteristics of paradigmatic or syntagmatic relation into *ontological* justifications.

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113. *Id.* at 131.

114. Latin: "*Jus*" "*Dicere*": he who speaks the law.

The fundamental paradox is that the French and American judicial systems, which each stress one ontological justification over the other, have apparently found that they cannot function without the other justification, and therefore use both. This paradox can be stated either in terms of modes of relating judicial decisions to the law, or in terms of modes of reading, or, finally, in rhetorical terms.

The French judicial system, for example, which stresses paradigmatic relation, has long since come to recognize that this supposedly inherent, internal, or necessary relation of its decisions to the Code needs to be justified. The syllogistic form and discourse of the official French decision merely asserts the conclusory claim that the decision is inherently similar to the *loi*. But what is it that makes a decision inherently similar to the *loi*, and why should a given decision be considered to be so related to a given Code provision? Furthermore, what does "inherently similar" mean, anyway? The official French judicial decision never attempts to answer such questions, for to do so would require constructing a justificatory sentence (or sequences of sentences) that would explain the criteria, *external to the letter of the loi*, that were used to determine the nature of the relationship. In short, the paradigmatic substitution of the decision for the *loi* can only be determined and justified by syntagmatic means.

Needless to say, however, the construction of such a syntagmatic justificatory sentence within the space of the official French judicial decision would undermine the very claims to paradigmatic relation made by that decision's form and discourse. The result is simple: French judicial discourse bifurcates. By doing so, the official decision maintains its paradigmatic form and its implicit ontological claim about its inherent similarity to the *loi*. At the same time, the determination and justification of the decision occurs elsewhere, in particular, in the unofficial discursive sphere of the *rapports* and *conclusions*.

The paradox and its solution can be stated in terms of modes of reading. The French judicial system has apparently found that its formalist application of the *loi* must be determined and justified hermeneutically. In other words, the decision to apply a Code provision in one way or another can only be justified by referring to criteria external to the letter of the Code, that is, by referring to social and economic policy considerations, *jurisprudence*, equity, and the like.

In rhetorical terms, the French judicial system has apparently found that its metaphors are metonymic. The official French decision presents itself as a straightforward substitution for the *loi* based on the decision's inherent similarity to the *loi* in the present

instance. That is, the official French decision presents itself as a metaphor for the *loi*. But this claim is subverted by the unofficial French discursive sphere, in which the French *magistrat* determines and justifies, on the basis of metonymic associations constructed between the *loi* and elements contiguously related to it (such as policy, equity, or other considerations), why the relation between the *loi* and the decision should be deemed sufficiently close to be considered metaphoric.

The American judicial system, on the other hand, has apparently faced the same paradox, only coming from the opposite direction. The American judicial decision, unlike the official French decision, but in a manner surprisingly similar to French unofficial discourse, stresses its replacement of the law primarily on the basis of considerations contiguously and contextually related to the law. The American decision, in short, stresses its syntagmatic, hermeneutic, and metonymic relation to the law. The problem, as it plays out in the American system, lies in the continual tendency, observed in Test Method decisions, for American judicial discourse to displace the apparently controlling legal text.

Stated in Jakobsonian terms, the Supreme Court has apparently found that its construction of a syntagmatic line of Test Method decisions requires an initial term on which to construct the ensuing line. Given the initial displacement of the previously controlling constitutional clause or statutory provision, where is the ensuing, contextualizing, syntagmatic judicial sequence to begin? An initial paradigm is required. The Test Method solution is simple: A judicial test is established and maintained as the authority figure in the doctrinal field. This test then serves as the paradigm which begins each ensuing decision.

The problem and its solution can be stated in terms of modes of reading. Hermeneutics requires a formal code or starting point with which to begin reading. In the Test Method context, this results in the double formalization of hermeneutics. First, the ruling judicial test is established as the formal starting point of the ensuing hermeneutic analysis. Second, the particular hermeneutic to be employed—in Test Method decisions, the hermeneutic of purposes and effects—is codified in the very prongs of the test, ensuring its reproduction is later cases. This explains the tenacity with which Test Method decisions maintain the ruling test as the ruling authority figure, even when the language of that test is actually changed: the Test Method requires a formal code in order to begin and perpetuate its hermeneutics.

This process can finally be described in rhetorical terms. The American judicial system has found that its apparently metonymic

decisions are largely metaphoric. The relation between Test Method decisions and the apparently governing law is not only based on the policy associations constructed between them, but also on their inherent similarity. Thus the judicial test, as the ruling authority figure, is simply selected and applied as if it were the law. Test Method decisions open with a statement of the test, not with a statement, for example, of the apparently governing constitutional clause. As far as the Court is concerned, the judicial test *is* the law. As such, the test operates as a straightforward metaphor for the law.

In short, French and American judicial decisions function as rhetorical structures that replace the apparently governing law. Depending on whether the decision is French or American, it presents itself as either a metaphor or a metonym for the law, thereby justifying the replacement on the grounds that the decision is either inherently and internally similar, or contiguously and contextually related, to the law.

As the analysis of French and American judicial practice has demonstrated, however, each mode of tropological replacement depends on and resorts to the other. French and American judicial decisions thus reveal themselves to be rhetorical structures that fluctuate incessantly between paradigmatic/metaphoric and syntagmatic/metonymic substitution. The two modes of tropological replacement actually appear to be functionally inseparable.

The French and the American judicial systems therefore present their decisions as both metaphoric and metonymic. This permits each system, despite its apparent valorization of one mode of substitution over the other, to convey two mythic significations simultaneously. When the valorized mode of substitution is paradigmatic/metaphoric, the decision signifies inherently stable adjudication. When it is syntagmatic/metonymic, the decision signifies socially responsive adjudication. As both modes of tropological replacement are operative in both judicial systems, albeit in historically and culturally contingent ways (bifurcated French, as opposed to integrated American, judicial discourse), both significations are simultaneously produced in each.

The French and American judicial systems, by aligning (1) particular modes of discourse, with (2) particular modes of reading, with (3) particular modes of relating judicial decisions to the law, have each managed to signify that their adjudication is both inherently stable and socially responsive. These mythic significations, which become apparent as soon as one analyzes each judicial system in its totality, are produced by transforming the *definitional characteristics* of certain linguistic arrangements into a set of *val-*

ues—values which are then "naturally" projected onto the "outside" or "real world" operation of French and American adjudication.

V. CONCLUSION: WHERE DOES THE PROJECT GO FROM HERE?

Having now presented the analysis and conclusions yielded so far by my comparative project, where is the project to go from here? Perhaps the best way to begin answering this question is to recap the underlying structure of the project in its current state, thus revealing the work yet to be done.

The project, as it now stands, has sought primarily to correct the traditional American comparative analyses of the French judicial system. This required, first, correcting the skewed depiction of the French system as the American system's formalist other. This necessitated uncovering, describing, and analyzing what prior comparative descriptions had failed to take seriously into account, namely, the existence of an unofficial discursive sphere, within the French judicial system, in which the dominant mode of discourse and of reading proved to be precisely what was said to be lacking: socially responsive hermeneutics.

The flip side of this first step involved correcting the skewed descriptions, implicit in the traditional comparative work of Dawson and Merryman, of the American judicial system. This necessitated stressing and taking seriously the persistent formalism that continues to operate within the American system. The example given, Test Method decisions, was chosen largely for this purpose, although I might be prepared to generalize from this specific and identifiable example to American judicial discourse as a whole. Any American law professor who has ever posed—ironically or not—the question to her class, "What is the rule of this case?" would likely be prepared to do the same.

The project has therefore consisted of collapsing the common law/civil law distinction as it has been traditionally used in the American/French context. This required stressing the deep similarities between the two systems. Both deploy the rigid application of existing legal norms (including judicial ones); and both deploy policy analysis (of assorted kinds). They just do so in historically and culturally contingent ways (bifurcated French vs. integrated American judicial discourse).

In order to advance the analysis, the project brought to bear a combination of "lit. theory" methodologies. This was done not only to break away from the loaded post-Llewellynian terminology that has unfortunately continued to dominate American comparative work, but also to construct a methodology that could fruitfully ad-

dress issues that are, after all, largely interpretive and linguistic.

Furthermore, this methodology was borrowed, constructed, and deployed in order to suggest an underlying linguistic explanation for why the French and American judicial systems both use, simultaneously, both modes of discourse, reading and relating judicial decisions to the law. The answer proposed amounts to the claim that the two modes are functionally inseparable and perhaps ontologically indistinguishable—at least as they manifest themselves in the French and American judicial systems.

This solution then begged another question, namely, "How do the two systems signify what they do in the first place?" This question required an analysis and explanation of how both systems, despite and because of the mutual interdependence of the two modes, have managed, via a mythic process, to produce similar, value-laden significations from contingent linguistic arrangements.

The project has therefore challenged the traditional comparative distinctions by constructing and deploying a literary methodology in the context of results yielded by basic legal research. This mission hopefully accomplished (or at least suggested), we need to recognize and deal with the basic limitations of the methodology as constructed and deployed.

The fundamental limitation of the methodology is that it is, for all its intimidating terminology, a fairly blunt instrument. It makes, for example, the basic and extremely important distinction between formalism and hermeneutics. It does not, however, differentiate between the significant variations that exist within each of the two modes of reading.

A simple, "nonlegal" example should demonstrate the point. Traditional Biblical and Marxist interpretations are both hermeneutic modes of reading. In each case, a given text (whether "literary" or "social") is given meaning by interpreting it in terms of a second, Ur-text (e.g., the *New Testament* or *Kapital*). But that is not to say that because both readings are hermeneutic, they are therefore the same.

The same holds true for the analysis of French and American judicial practice. When a French judge, faced with a legal case, engages in equity analysis, and an American judge, faced with a similar case, engages in economic policy analysis, both judges are engaged in hermeneutic modes of reading. The presentation of such similarities is quite important, especially given the current state of comparative analysis: it is simply not true that the American judicial system deploys social hermeneutics, while the French system does not. That said, the particular hermeneutics deployed are clearly not the same. If nothing else, the French version appears to be

quite open-ended and vague, while the American version appears to be quite precise and well defined (especially in its law and economics variant). In the next stage of my comparative project, I will describe, explore, stress, and analyze such differences.

This initial example suggests an emerging paradox: the American judicial system, whose discourse of formal or grammatical application is less pronounced than the French, tends to deploy more rigid types of hermeneutics. The French system, on the other hand, whose official judicial decisions are so rigidly structured by the formal grammar of the syllogism, tends to deploy, in its unofficial discursive sphere, much more fluid and open-ended hermeneutics (such as "equity").

This paradox, which emerges from French and American judicial interpretive practice, will need to be explored in terms of the distinction between bifurcated and integrated judicial discourse. French judicial *magistrats*, after all, function in a very different institutional context than do American judges. Not only does the official French portrait require the extremely rigid formalism of the syllogism, but the hermeneutics of the unofficial discursive sphere are truly internal, essentially hidden and shielded from public view. French *magistrats* have the luxury of an institutionalized internal discursive sphere in which they have the freedom, within the limits of professional constraints, to argue and consider whatever they see fit. This promotes the production of two very different discourses within the same judicial system.

American judges, on the other hand, do not really possess such an institutionalized, alternative discursive sphere hidden from the public. Of course, there is certainly much that goes on behind the scenes of the American judicial decision; but in my experience, there is surprisingly little difference between the discourse of, for example, bench memos and that of published judicial decisions. The characteristically integrated style of American judicial discourse appears to permeate and dominate rather uniformly throughout the system.

It appears as if the very rigidity of the official French formalism forced not only the creation of the unofficial, and necessarily hidden judicial discursive sphere, but also, as if to counterbalance that very formalism, the production of a particularly open-ended, equity-oriented judicial practice within that unofficial sphere.

It appears, furthermore, as if the nonexistence of such formal rigidity within the American system not only did not require the creation of such an alternative and hidden judicial discourse, thereby preempting its possible development, but also left the entire system with a certain latent anxiety about the need for interpretive

stability. The result has been the production of a sort of truncated and rigid version of hermeneutics that may well have emerged in the French system had its judiciary not been working under the liberating constraints of the official formalism and of the hidden, unofficial discursive sphere. This would tend to explain the American tendency towards a certain formalization of hermeneutics, visible, for example, in Test Method decisions. It would also tend to explain the allure, relatively unfelt in the French judicial system, of such "scientific" methodologies as law and economics.

These issues, which obviously need further development, point to another fundamental problematic. Even if one were—in a postmodern, Lyotardian sense[115]—theoretically in favor of an open-ended, rule-free, or equitable form of adjudication oriented towards substantive justice, the French model may well give reason to pause. If, as the French model may suggest, the price to pay for such adjudication involves not only a rigid official formalism, but also the creation of an institutionalized, unofficial judicial discursive sphere in which career magistrates are hidden entirely from public view as they determine and dispense justice, one may want to consider certain basic questions of jurisprudential and political theory. What, after all, is the practical import and effectiveness of the rule of law in such a system? And what about basic issues of public access to, consideration of, and input in the discussion and determination of legal problems?

Such questions are extremely complex and difficult; and to approach them constructively will require far more subtlety and understanding than American comparative analyses have heretofore possessed. For these questions, as traditionally posed, considered, and answered, reveal themselves to be largely—as I hope the foregoing analysis has suggested—trick questions. It would be a mistake, in the comparative context, to unthinkingly adopt, for example, the knee-jerk and loaded position suggested by post-Holmesian and Llewellynian American Realism that "the law is what the judge says it is." Furthermore, it would be a fundamental error—and, by the way, a total misunderstanding of the foregoing analysis—to begin addressing these questions by adopting the reductionist position that the modes of discourse, reading, and adjudication practiced in the unofficial French discursive sphere represent "what is *really* going on" in the French judicial system. The whole point is that, at least in the French and American judicial systems, the formalist

115. *See* JEAN-FRANÇOIS LYOTARD & JEAN-LOUP THÉBAUD, AU JUSTE (1979); JEAN-FRANÇOIS LYOTARD, LE DIFFÉREND (1983).

and the hermeneutic modes do not, and perhaps cannot, exist independently of one another.

This is not to suggest, on the other hand, that we unthinkingly adopt the relatively facile perspectives offered, for example, by the contemporary French version of the doctrine of "the sources of the law," which can be read to assert boldly (1) the law is what the legislature says it is; (2) judicial decisions, however normatively authoritative they may be in practice, are therefore mere interpretations of that law; and (3) what goes on in the unofficial judicial discursive sphere is therefore without legal importance.

The questions, rather, may end up somewhat flipped. If, for example, as the foregoing analysis suggests, the formalist and hermeneutic modes do not exist independently of one another; and if the price to be paid for publicity is the integration of the two modes into a rigidly formalized mode of hermeneutics exemplified by American Test Method decisions; and if such an integrated discourse offers neither the promised interpretive stability nor the open-ended, socially responsive hermeneutics offered by the internal French discursive sphere, then what is the status of the rule of law or of public participation is such a judicial system?

And then, of course, there's "culture". . . .