

# French and American Judicial Opinions

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## I. INTRODUCTION

Judicial opinions receive a lot of attention from American legal scholars. Nearly all the commentary, however, takes for granted that an opinion should be a discursive narrative, consisting of a candid and reasoned explanation of the court's holding. To American lawyers, judges, and mainstream scholars, the judicial opinion is a valuable legal institution in its own right. American

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jurists think that, independent of the result in the case, the opinion should be evaluated on its own terms, for it is more than a vehicle for expressing a ruling on the discrete dispute before the court. An opinion is an instrument for achieving systemic goals: providing guidance to lawyers and lower courts, persuading readers of the rightness of the decision, constraining arbitrary action on the part of judges, and legitimating their efforts. Americans think that a judge's failure to pursue or achieve these goals is ground for serious criticism of the judge's work, whatever the substantive merit of the court's rulings.

In this Article, I examine the foundations of American judicial form, in particular the proposition that powerful instrumental considerations support the issuance of reasoned opinions. This project proceeds from the belief that the form of judicial opinions deserves serious scholarly attention despite the broad consensus about its value, because it frames the terms of debate on every issue courts confront.<sup>1</sup> My analysis is built on the view that critical insights into the nature of one's own legal system can be gleaned only by "understand[ing] what [one's] system is *not*," a task that requires putting aside the internal perspective of a participant and adopting instead the detached pose of a student of legal systems.<sup>2</sup>

Accordingly, my methodology compares the mode of decisionmaking employed by American judges to the radically different approach taken by judges in France. This comparative analysis is designed to introduce the distinctively terse and syllogistic opinion form used in France, to illuminate commonly shared assumptions about our own system, and to call into question some normative propositions about judicial opinions that Americans take for granted. I argue that French judicial form provides a powerful counterexample to the American view that opinions should contain reasoned and candid explanations in the pursuit of instrumental ends. My analysis suggests that appraisal of judicial opinions should focus more on the formal and substantive merits of the legal doctrine that they expound, and less on the sufficiency and quality of the reasoning they contain.

The arguments offered here hardly compel the conclusion that the traditional understanding of American judicial opinions is unfounded. Comparisons with another legal culture can rarely prove anything about the nature of one's own institutions, for differences will often be explicable on several grounds.<sup>3</sup> My more modest aim is to sow doubt in the minds of

1. See BERNHARD GROSSFELD, *THE STRENGTH AND WEAKNESS OF COMPARATIVE LAW* 9 (1990) ("Often the thing that 'goes without saying,' that remains unspoken, never questioned, has a greater impact than what we call law.").

2. P.S. ATTYAH & ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW* 418 (1987).

3. See GROSSFELD, *supra* note 1, at 72 ("The dilemma is this: the more we try to catch the foreign law in all its individuality, as we must, the more we appreciate its cultural and societal context, the less

readers who might, absent their encounter with the French opinion, take the standard account of judicial opinions for granted. For example, the skepticism of legal reasoning reflected in legal realist and Critical Legal Studies scholarship, as well as in law-and-economics scholarship,<sup>4</sup> may seem more plausible to a reader who, upon learning that France gets along with "dysfunctional" opinions, for the first time takes a hard look at the necessity of reasoned decisionmaking and the extent to which American opinions actually serve the functions our legal culture ascribes to them.

Before making these arguments, it will be helpful to set forth in general terms how I believe comparisons with French practice can inform those arguments. Anyone who works within a culture necessarily adopts the widely held conventions of other participants in order to take part effectively in its activities. Accordingly, American lawyers, judges, and mainstream scholars prepare briefs, opinions, and doctrinal scholarship as though the reasoned American opinion is an indispensable institution. Yet, playing by the rules of the game differs from thinking that these rules are the only ones possible. By failing to examine one's own culture with critical distance from the culture's assumptions, one risks making grave error.<sup>5</sup> As we will see, Americans may cling to the reasoned opinion, because, living in a society where politically unaccountable judges play a prominent role in lawmaking, they need to believe that adjudication is something more than the naked exercise of power.<sup>6</sup> We may, accordingly, flee from even asking uncomfortable questions, such as whether reason is really as important as judges purport it to be and whether very many opinions actually meet their ideals.

Alternatively, we may merely be creatures of habit. Our customary perspective on fundamental legal institutions like judicial form is from the inside. We rarely think much about them, but take them for granted as structures within which the daily routine of judging, lawyering, and teaching unfolds.<sup>7</sup> Comparisons with other legal cultures enable us to step outside our system and glean insights into features of the legal landscape that are

possible it seems to compare it with others.").

4. See *infra* text accompanying notes 276 to 280.

5. See, e.g., ALFRED L. KROEBER, *ANTHROPOLOGY: CULTURE PATTERNS & PROCESSES* 60-64, 88-94 (Harcourt 1963) (1923) (describing how cultural beliefs are so deeply ingrained that they often preclude rational consideration of alternative courses of action that do not figure in that culture's basic set of assumptions).

6. Cf. H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 123-44 (1983) (arguing that, because of American practice of judicial review of legislation, Americans worry more than others about judicial self-aggrandizement and search for jurisprudential theories that identify appropriate judicial activism and illegitimate judicial activism); EDWARD A. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY* 172-73, 202-03 (1973); G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 282-83, 285-86 (1973) (hereinafter White, *Evolution*) (arguing that, faced with example of totalitarianism in Europe, American lawyers came to stress process values as they sought to show that American law was not merely naked exercise of power).

7. See PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* 65-66, 88-89 (1966) (discussing tendency to take social institutions for granted and to forget that they are actually made and maintained by human beings).

otherwise obscured by our familiarity with them. Confronted with something different, we may find that aspects of our world that we thought we understood now need to be reconsidered. Learning about the French opinion helps us to perceive that common understandings of the American opinion may be more problematic than we ordinarily suppose.

Part II of this Article discusses a group of widely held beliefs regarding American judicial form. It identifies reason and candor as the central features of the ideal American opinion and describes how those features serve the desirable ends of providing guidance, persuading other participants in the legal process, constraining judges from abusing their power, and legitimating judicial creativity.

Part III sketches the features of the standard French opinion. Especially in the highest courts, the French opinion is an uninformative syllogism of a few hundred words that purports to deduce the holding from a code or statutory provision. French opinions are neither reasoned nor candid and make no serious effort to realize the goals Americans consider important. Part III also suggests that the form of French opinions resulted from two historical influences. First, in the period before the French Revolution, French courts felt no compulsion to give reasons for their judgments, since their power derived from absolute monarchs who themselves had no obligation to justify their actions. Second, a tenet of the Revolution was that the legislature was the only legitimate lawmaker; as a result, courts after the Revolution strove to appear not to be making law, even when they were.

Parts IV and V reexamine the premises behind the American opinion in light of French practice. Part IV argues that the very survival over time of French form should lead us to question whether reason and candor are as important in judicial opinions as we may think. The supposed benefits of American form — in particular persuasion and legitimacy — may be largely illusory. In any event, it is difficult to identify functional differences between the two legal systems that would justify French form for France and American form for America. Either the French system is inferior for failing to pursue persuasion and legitimacy, or Americans overstate the importance of those goals.

Part V challenges the American conception of the judicial opinion as an instrument for achieving guidance, persuasion, legitimacy, and constraint. That conception may be based less on its merits than on our familiarity with it, our lack of knowledge of alternatives, and a tendency to confuse the very best judicial writing with the horde of ordinary opinions. Once we remove these blinders, we may conclude that American opinion form is as much an artifact of our history and culture as its French counterpart.

## II. FORM AND FUNCTION IN THE AMERICAN OPINION

When American lawyers evaluate judicial opinions, they ordinarily distinguish between two very different kinds of inquiries. On the one hand, they may focus on the substantive outcome of a case, asking whether the court announced a good rule, or correctly applied the rule to the facts, or simply reached the result that best serves justice, liberty, or social utility. Most American lawyers, however, evaluate opinions by another criterion as well. Quite separate from the merits, they maintain that the opinion handed down by the court deserves scrutiny, for it is more than a device for communicating the outcome of a case. In their view, a good opinion is a candid and rigorous exercise in legal reasoning.<sup>8</sup> The reasoned opinion is itself a judicial institution serving important social values, and we can evaluate it in terms of how well it realizes those values.

The consensus on this proposition is evident from the most common features of our practice. When lawyers and judges say that they agree with the outcome reached by the majority, but prefer the opinion written by a dissenting judge, they affirm awareness of this distinction between the merits and the opinion.<sup>9</sup> Similarly, efforts by concurring judges to compose a more persuasive document in support of a conclusion already agreed to, and criticism directed by lawyers and law professors at the reasoning rather than the outcome of a case<sup>10</sup> start from the premise that the opinion has value independent of the result. Lawyers learn this distinction early in their careers. Much of the discussion in law school classrooms is aimed not at the merits and demerits of the rules announced by courts, but at identifying strengths and weaknesses in the reasoning judges set forth to support those outcomes.

In elaborating these views throughout Part II, I do not intend to endorse them. On the contrary, I argue that the validity of this account of judicial opinions is open to question. I discuss them at length in order to set up a target for attack later in the discussion.

8. See, e.g., ROBERT E. KEETON, *JUDGING 1* (1990) ("[T]he quality of judging depends on commitment to method. Judicial choice, at its best, is reasoned choice, candidly explained."); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) (arguing that "reasoned response to reasoned argument is an essential aspect of [the judicial] process," and "candor is the sine qua non of all other restraints on abuse of judicial power").

Throughout this Article the term "legal reasoning" is used as a shorthand for the traditional techniques of judicial justification, such as relying upon or distinguishing prior cases, interpreting statutes, pursuing the general good, invoking widely held ethical principles, and striving to avoid arbitrary distinctions and achieve doctrinal coherence.

9. See, e.g., JAMES B. WHITE, *JUSTICE AS TRANSLATION* 175 (1990) [hereinafter WHITE, *JUSTICE AS TRANSLATION*].

10. See, e.g., Robert F. Nagel, *The Formalist Constitution*, 84 MICH. L. REV. 165, 190 (1985).

### A. Aims of the Reasoned Opinion

Scholarly commentary on the American opinion attempts to explain why it is important to write a reasoned justification of the outcome, and why the opinion should display candor by the court. What one finds in the literature on opinion writing is not a debate over competing models of the judicial opinion, but the presentation of an array of functions that opinions should serve. They include (1) providing guidance to participants in the legal process, (2) persuading their audience of judges, other officials, and citizens that the court has arrived at the proper answer, (3) constraining judicial arbitrariness, and (4) legitimating appropriate exercises in judicial creativity.<sup>11</sup> It is not enough that reasons be given afterwards, in law review articles and treatises. Judges must supply them. By their terms, the last two aims can only be served if the judges themselves give reasons. Moreover, judges alone provide authoritative guidance, and judges typically will be the most persuasive champions of their own views. Each of these functions requires some elaboration.

#### 1. Guidance

Opinions are forward-looking documents, composed to guide lawyers who must advise clients and judges who must adjudicate disputes. As Karl Llewellyn put it, "[T]he opinion has as one if not its major office to show how like cases are properly to be decided in the future."<sup>12</sup> A naked statement of the law, unaccompanied by reasons, provides little useful information to this group of readers, for it gives no indication of what the deciding court will consider to be a "like case." It could signify anything from a narrow decision based on the particular facts of the case at hand to a fundamental change in direction in the area of law under consideration. Lawyers and judges need to know the scope of the holding and the purposes behind it in order to determine whether and how it may bear on other, arguably analogous disputes, and whether it foreshadows expansion or retrenchment of existing principles. A full opinion gives lawyers and judges the nuance and texture they need in order to predict the future course of the law.<sup>13</sup>

11. This list may not exhaust the functions performed by opinions. For example, opinions serve to explain the decision to the parties, especially the loser. See, e.g., Lord Devlin, *Judges and Lawmakers*, 39 MOD. L. REV. 1, 3-4 (1976); Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 811 (1961). This aim may have independent significance, or it may be reduced to one or more of the goals discussed in the text. In any event, for purposes of comparing American and French opinions, the list of functions considered in the text seems sufficiently comprehensive to generate a useful analysis. As will become apparent in Part III, French opinions do not explain the outcome to the parties any more than they realize the aims discussed in the text.

12. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 26 (1960); see also Henry M. Hart, Jr., *Foreword: The Time Charts of the Justices*, 73 HARV. L. REV. 84, 96, 99 (1959) [hereinafter Hart, *Time Charts*]; Leflar, *supra* note 11, at 811.

13. See Hart, *Time Charts*, *supra* note 12, at 96, 99. Apart from giving directions to other

By providing an explanation, the reasoned opinion aids lawyers and lower court judges in their daily work. Lawyers who can predict how later cases will be decided can better steer their clients away from unnecessary and costly legal battles with potentially disastrous consequences.<sup>14</sup> When disputes do arise, lower courts can decide more of them correctly in the first instance and thus lighten the load of appellate courts and free them to direct their energies to new problems rather than constantly revisiting old ones.<sup>15</sup> In this way, opinions that provide effective guidance can facilitate social and commercial life by minimizing uncertainty about the content of legal rules.

#### 2. Persuasion

Judges address opinions not only to lower courts and lawyers seeking understanding and guidance, but also to other members of the panel, other judges of equal rank, higher courts, judges in other jurisdictions, legislative and executive officials, scholars, and the community at large. This audience is interested not solely in obtaining guidance for the future, but also in finding the best answers to legal questions. Accordingly, another aim of opinions, especially in novel and important cases, is to persuade some or all of these readers that the deciding court has reached the right result for the right reasons.<sup>16</sup> Judge Posner goes so far as to suggest that rhetorical power may be a more important attribute of judicial excellence than analytical power.<sup>17</sup>

Quite apart from persuading others of the rightness of the outcome, the task of composing an opinion obliges the judge who prepares it to think hard about the outcome and the rationale for the decision.<sup>18</sup> He may find that his

participants in the legal system, some opinions serve a purely pedagogical function. One of the talents that separates the greatest judges from the merely competent ones is the ability to reach beyond the particulars of the case before them, relate it to larger themes, and express the fundamental legal problems it presents in a memorable and striking way. In this way the judge reaches out to a broader audience of lawyers and even laypersons, offering guidance and understanding of the whole fabric of the law. See RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 55 (1990) [hereinafter POSNER, *REPUTATION*]. Judicial greatness is characterized by "[t]he power of vivid statement", which "lifts an opinion by a Cardozo, a Holmes, a Learned Hand out of the swarm of humdrum, often numbing, judicial opinions, rivets attention, crystallizes relevant concerns and considerations, provokes thought." *Id.* at 136.

14. See Leflar, *supra* note 11, at 811 (on importance of predictability); HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 132-33 (tentative ed. 1958) (on importance of self-application of law); H.L.A. HART, *THE CONCEPT OF LAW* 39 (1961) (suggesting that "principal functions of the law as a means of social control are . . . to be seen in the diverse ways in which law is used to control, to guide, and to plan life out of court").

15. See William J. Palmer, *Appellate Jurisprudence as Seen by a Trial Judge*, 49 A.B.A. J. 882, 883 (1963).

16. See LLEWELLYN, *supra* note 12, at 132; see also JOYCE J. GEORGE, *JUDICIAL OPINION WRITING HANDBOOK* 3, 29, 76 (2d ed. 1986); Geoffrey C. Hazard, Jr., *Rising Above Principle*, 135 U. PA. L. REV. 153, 189 (1986); Benjamin Kaplan, *Encounters with O. W. Holmes, Jr.*, 96 HARV. L. REV. 1828, 1849 (1983); Patricia M. Wald, *Some Thoughts on Judging as Gleaned from One Hundred Years of the Harvard Law Review and Other Great Books*, 100 HARV. L. REV. 887, 904-05 (1987).

17. POSNER, *REPUTATION*, *supra* note 13, at 136, 143.

18. See, e.g., Leflar, *supra* note 11, at 810; Roger J. Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 218 (1957).

intuitions about the proper disposition of the case, formed upon reading the briefs and hearing oral argument, were incorrect or insufficiently precise. The opinion "won't write" when it comes time to prepare a reasoned argument and find authority for the legal propositions on which he had planned to rely. Although this function of the opinion may be thought of as a disciplining one,<sup>19</sup> it seems equally apt to characterize it as an aspect of the persuasive function. It is the honest judge's effort to persuade himself of the rightness of his original intuition, one that he may ultimately discard in favor of an argument that he finds more convincing.

Some scholars maintain that opinions should be persuasive for a more fundamental reason. A recent book by James Boyd White provides a good illustration of this theme. White, a member of the law and literature movement, argues that opinions must be persuasive in order to serve democratic values. In his view, two central tasks of the judicial opinion are to show respect for the human beings affected by the rules and to encourage a kind of participatory democracy. Beginning with the distinction between results and reasons, White maintains that the sorts of justifications offered should count for at least as much in evaluating judicial performance as the rulings themselves.<sup>20</sup> In White's view, the key question to ask about an opinion is whether it is "an authoritarian text, one that demands simple and total obedience of its reader," or whether it "define[s] the reader as a person with a mind, with a heart — as a free agent — who in reading the text is encouraged to activate those capacities in certain ways."<sup>21</sup> For White, it is "essential to any legal system worthy of respect" that judicial opinions seek to persuade rather than demand obedience from their readers.<sup>22</sup> White's nightmare is a society in which people do not feel committed to any judicial pronouncement, because they had no role in making it. Without opinions containing persuasive reasons, we risk losing shared purpose and community involvement and fostering widespread cynicism about legal institutions, if not outright disrespect for the law.

### 3. Judicial Accountability

Judges are government officials wielding power over the lives and fortunes of citizens. Like anyone else exercising control over others, judges may overstep their bounds. Accidentally or on purpose, they may do unjustified harm to the persons affected by their actions. One role of the reasoned opinion is to constrain the potentially misguided or destructive exercise of judicial power, for arbitrary or merely incorrect decisions are less

19. See Ruth B. Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 139 (1990).

20. WHITE, *JUSTICE AS TRANSLATION*, *supra* note 9, at 95-96, 102; see also Leflar, *supra* note 11, at 812; Nagel, *supra* note 10, at 170-71.

21. WHITE, *JUSTICE AS TRANSLATION*, *supra* note 9, at 101.

22. *Id.*

likely to survive review by higher courts if the judge must expose his reasoning to scrutiny. Since most American judges are not required by statute to justify their actions in this way,<sup>23</sup> characterizing the opinion as a constraint may be technically inaccurate. Even so, this theme appears as often as any other in the commentary on opinion writing,<sup>24</sup> and the custom of writing opinions is sufficiently well entrenched that flagrant departures from it are rare.<sup>25</sup> The constraining role of opinions, like their persuasive function, is also served by the custom of writing concurring and dissenting opinions. The opportunity to write a dissent or offer an alternative ground for the outcome provides the minority on a court with an opportunity to administer a public rebuke to a wayward majority, and the threat of public exposure doubtlessly deters some judges from doing what they please when their preferences conflict with established law.<sup>26</sup>

### 4. Legitimacy

Judicial "legitimacy" presents a related but more subtle problem. The concern here is not to stop judges from departing from established law. Sometimes no rule speaks directly to the case at hand, or the legal materials point in more than one direction. Instead, the concern is how authority is divided between judges and other governmental institutions: when should judges go beyond the routine application of black-letter rules and exercise a creative role in making new law? Fundamental values are in conflict and must somehow be accommodated. On one side of the issue, democracy is a central political value. Accordingly, governmental decisions, like legislative and executive initiatives that are subject to citizen control at the ballot box, should be made through processes that permit and encourage broad participation on the part of citizens. At the same time, substantive considerations like fairness and efficiency in the development and application of law may be ill served if the judiciary waits for the legislature or executive to address a problem or passively accepts an old, ambiguous, or hasty solution by the other governmental branches.

23. See Max Radin, *The Requirement of Written Opinions*, 18 CALIF. L. REV. 486 (1930) (discussing California as an exception to this general rule). Note, however, that the Due Process Clause of the Fourteenth Amendment may require some tribunals to give reasons for their actions. *Cf. Matthews v. Eldridge*, 424 U.S. 319, 332-35 (1976) (discussing balancing test for determining procedural guarantees).

24. See, e.g., LLEWELLYN, *supra* note 12, at 26-27, 27 n.19; RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 132 (1990) [hereinafter POSNER, *PROBLEMS OF JURISPRUDENCE*]; Ginsburg, *supra* note 19, at 143; Shapiro, *supra* note 8, at 737; Wald, *supra* note 16, at 904.

25. The custom does not apply to cases regarded as routine by the judges who decide them. Many of these judgments are accompanied by cursory unpublished opinions normally available only to the parties. The practice is not without critics. See, e.g., Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 B.Y.U. L. REV. 3, 49-54.

26. See LLEWELLYN, *supra* note 12, at 27 & n.18.

As a result, courts and legal philosophers alike struggle with the conflict between majority rule and judicial activism.<sup>27</sup> The issue is whether and in what circumstances creative decisions by judges are a legitimate exercise of judicial power, given that political choices in a democracy are normally reserved for the legislature and executive. This problem is particularly critical to the present inquiry, because some scholars maintain that adjudication differs in *kind* from the activities of the other branches of government. These scholars solve the legitimacy problem by stressing the *process* judges employ in adjudication. The reasoned opinion plays a key role in justifying judicial creativity.<sup>28</sup>

In the 1950s, this proposition was a central tenet of the "Legal Process" school. Theorists like Lon Fuller, Henry Hart, and Herbert Wechsler focused on the role of reasons in distinguishing appropriate judicial creativity from inappropriate judicial usurpations of the legislative function.<sup>29</sup> For Legal Process theorists, the reasoned opinion helps to legitimate judicial creativity.<sup>30</sup> Some easy cases present no issues of basic principle and can be resolved merely by applying settled rules mechanically in a brief opinion. Most cases that reach appellate courts, however, require an extension of basic principles, an examination of the ruling's place within the existing fabric of the law, and a justification for the approach chosen. In this way judges demonstrate that they are not merely enacting their own views into law, but are operating within the narrowly circumscribed boundaries of the judicial function — a function that is different in kind from the work of the other branches — and therefore not usurping powers not delegated to them.

Ronald Dworkin offers another justification for the reasoned opinion. He argues that "integrity" is a distinct political virtue, alongside justice and fairness. Integrity requires government "to act in a principled and coherent manner toward all its citizens."<sup>31</sup> Accordingly, "judges must conceive the body of law they administer as a whole rather than as a set of discrete decisions that they are free to make or amend one by one."<sup>32</sup> They must avoid arbitrary distinctions between similar cases, and must search instead for "some coherent principle whose influence then extends to the natural limits of its authority."<sup>33</sup> A political society that pursues this ideal thereby "promotes its moral authority to assume and deploy a monopoly of coercive force."<sup>34</sup>

27. See HART, *supra* note 6, at 122-25.

28. See, e.g., WHITE, *supra* note 9, at 95-96.

29. See, e.g., Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365-71 (1978); HART & SACKS, *supra* note 14, at 158-68; Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, in PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 3, 21 (Herbert Wechsler ed. 1961); see also White, *Evolution*, *supra* note 6, at 285-91.

30. See, e.g., J. Harvie Wilkinson III, *The Role of Reason in the Rule of Law*, 56 U. CHI. L. REV. 779, 780, 792-98 (1989).

31. RONALD DWORIN, *LAW'S EMPIRE* 165 (1986).

32. *Id.* at 167.

33. *Id.* at 179.

34. *Id.* at 188.

Reasoned opinions help ensure the success of this enterprise, for "[i]ntegrity demands that the public standards of the community be both made and seen, so far as this is possible, to express a single, coherent scheme of justice and fairness in the right relation."<sup>35</sup> Without opinions that articulate the reasons underlying decisions, readers will have difficulty tracing any thread of principle running through them.<sup>36</sup> Nor is the problem merely one of appearances in a complex legal system with many judges, such as our own. Even if judges were to strive for coherence without writing opinions, the absence of reasoned argument would almost certainly produce a less integrated body of law than that produced by a judicial tradition in which judges must articulate their reasons and respond to criticisms.

### B. *A Note on the Importance of Candor*

Whether a given opinion achieves the goals of providing guidance, persuading readers, constraining arbitrariness, and legitimating judicial invention depends in part on the talent and dedication judges bring to their work. The measure of success, however, also has an ethical dimension, for judges must be honest with their readers.<sup>37</sup> Some American scholars maintain that key ends served by opinion writing cannot be achieved in the absence of candor. For example, from the perspective of guidance, a decision that gives false reasons is necessarily an unreliable guide to the future, because the real, but concealed, reasons and not the false ones will actually determine the resolution of later cases decided by the same judges.<sup>38</sup>

In the long run, it is often futile for a judge to try to use false reasons to persuade others to take his side. Someone might be tricked into accepting an argument that rests on false reasons, but the success of the deception may not endure. Anyone who pays attention to a court's work over time would recognize that the argument was not sincere if it is not applied consistently in similar situations. In addressing the public at large, candor is equally important, for only by being honest with people do judges treat them with respect,<sup>39</sup> and win respect in return. If a lie is found out, and some lies surely will be, the aim of achieving greater public acceptance of judicial decisions is irreparably harmed. Like most victims of deception, citizens who

35. *Id.* at 219.

36. Cf. Frederick Schauer, *The Jurisprudence of Reasons*, 85 MICH. L. REV. 847, 865-66 (1987) (book review) (describing Dworkin's approach as "a jurisprudence of reasons," since "it is the point and not the rule that constrains").

37. See Robert A. Leflar, *Honest Judicial Opinions*, 74 NW. U. L. REV. 721 (1979); Shapiro, *supra* note 8, at 731. While there is general agreement on the value of candor in judicial decisionmaking, and no one enthusiastically promotes judicial lying, some commentators do express reservations about the viability or wisdom of absolute fidelity to truth. See, e.g., Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990), and the sources cited at 297 n.2.

38. See Kathleen Waits, *Values, Intuitions, and Opinion Writing: The Judicial Process and State Court Jurisdiction*, 1983 U. ILL. L. REV. 917, 934.

39. See Shapiro, *supra* note 8, at 736.

trusted judges will feel betrayed, and will probably be less likely to trust a judge even when one offers an honest argument in the future.

Candor helps the opinion serve its function as a guarantee against the arbitrary or otherwise inappropriate exercise of judicial authority. If judges do not give the real reasons for their actions, it is harder to determine whether they are acting properly. One must first ascertain that the grounds offered are false, then uncover the true grounds. Neither of these inquiries is likely to yield a certain conclusion, and bad judges surely succeed sometimes in acting arbitrarily by hiding their true reasons. While the simple obligation to give reasons provides the critic with a starting point for evaluating a judge's work, an independent requirement of judicial candor can better control the exercise of judicial power.<sup>40</sup>

As for legitimacy, the judge's duty is to respect the central difference between adjudication on the one hand, and legislation or executive acts on the other. Since the judicial process differs from other governmental action by its commitment to reason, again the reasons given must be real ones. Otherwise, the exercise of giving reasons becomes a hollow formality, thus eliminating any substantive difference between adjudication and legislation. As David Shapiro points out, "[J]udges who regard themselves as free to distort or misstate the reasons for their actions can avoid the sanctions of criticism and condemnation that honest disclosure of their motivation may entail."<sup>41</sup>

### III. FRENCH OPINIONS

French opinions differ significantly from the American model, both in style and in structure. Rather than a reasoned and candid essay, an opinion in the highest courts is a terse and opaque summary of the outcome and the reasons for it. The differences are not merely stylistic. They reflect a fundamental difference in the way French and American judges conceive of the judicial decision. For many Americans, the opinion is a vehicle for setting forth the judges' views of the substantive considerations bearing on the outcomes of cases, as well as the interplay between policy concerns and such formal constraints as precedent and rules. French judges begin from a radically different premise. In their view, the role of the opinion is to apply settled law to the facts, or rather, to create the appearance that the court is merely applying law to fact. French judges treat application as a matter of mere deductive logic.<sup>42</sup>

40. See, e.g., Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 25 (1979).

41. Shapiro, *supra* note 8, at 737.

42. See PIERRE MIMIN, *LE STYLE DES JUGEMENTS* 288-89 (4th ed. 1978).

#### A. Characteristics of the French Opinion

For purposes of illustration, I first discuss the text of *Jand'heur v. Les Galeries Belfortaises*,<sup>43</sup> a famous case in French tort law from the highest French private law court, the Cour de Cassation. In it, the Court interpreted Article 1384 of the Civil Code<sup>44</sup> as imposing liability without fault upon an actor for injuries caused by an object under the actor's control.<sup>45</sup> Although the case is sixty years old, the court continues to follow the form used in that case.

THE COURT: — Deciding with all the chambers united; — On the issue raised by the [appeal]: — See paragraph 1 of article 1384 of the Civil Code; — Whereas the presumption of responsibility established by that article as to one who has under his guard an inanimate object that has caused harm to another can be rebutted only by proving an [unforeseen event], a *force majeure*, or a *cause étrangère* that cannot be imputed to him; as it does not suffice to prove that he did not commit any fault or that the cause of the harmful act has not been ascertained; — Whereas, on April 22, 1925, a truck belonging to the Compagnie Les Galeries Belfortaises knocked down and injured the minor Lise Jand'heur; as the challenged decision refused to apply the article cited above on the ground that an accident caused by an automobile in movement, under the impulsion and direction of an individual, does not constitute, so long as it has not been shown that the accident was due to a defect in the automobile, the act of an object that one has under his guard within the meaning of paragraph 1 of article 1384, and that, in consequence, the victim must, in order to obtain compensation for the injury, establish a fault imputable to the driver; — But whereas the law does not distinguish, for purposes of application of the presumption that it has established, whether the object that caused the harm was or was not put in motion by man; as it is not necessary that there be a defect in the object capable of causing the damage as article 1384 attaches the responsibility to the guard of the object, not to the object itself; — From which it follows that, in ruling as it did, the challenged decision reversed the legal burden of proof and violated the article of law cited above.

43. Judgment of Feb. 13, 1930, Cass. ch. réun., 1930 S. Jur. I 121, reprinted in 2 F.H. LAWSON & B.S. MARKESINIS, *TORTIOUS LIABILITY FOR UNINTENTIONAL HARM IN THE COMMON LAW AND THE CIVIL LAW* 271-72 (1982), and translated in ARTHUR T. VON MEHREN & JAMES R. GORDLEY, *THE CIVIL LAW SYSTEM* 631 (2d ed. 1977). Von Mehren and Gordley's book contains a large number of translated French (and German) opinions, as well as other materials bearing on the French (and German) legal systems. For more recent examples, consult any collection of French opinions from the Cour de Cassation or the Conseil d'État. See, e.g., HENRI CAPITANT, *LES GRANDS ARRÊTS DE LA JURISPRUDENCE CIVILE* (Alex Weill et al. eds., 8th ed. 1984); *LES GRANDS ARRÊTS DE LA JURISPRUDENCE ADMINISTRATIVE* (Marceau Long et al. eds., 8th ed. 1984).

44. From time to time during the course of this article, it will be useful to have at hand the following provisions of the French Civil Code on tortious responsibility:

Art. 1382: Any act of a person which causes damage to another makes him by whose fault the damage occurred liable to make reparation for the damage.

Art. 1383: Everyone is liable for the damage he causes not only by his acts, but also by his negligence or imprudence.

Art. 1384: A person is liable not only for the damage he causes by his own act, but also for that caused by the acts of persons for whom he is responsible or of things that he has under his care.

[Other parts of Article 1384 hold parents liable for damage caused by their children, employers liable for damage caused by their employees, and artisans liable for damage caused by their apprentices. Parents and artisans escape liability if they "can prove that they could not have prevented the act that gives rise to this liability."]

Art. 1385: The owner of an animal, or the person using it during the period of usage, is liable for the damage the animal has caused, whether it was under his guard or whether it had strayed or escaped. C. CIV. arts. 1382-85.

45. For earlier doctrinal developments, see generally VON MEHREN & GORDLEY, *supra* note 43, at 594-98.

— For these reasons, quash . . . [remand] before the Cour d'appel of Dijon.<sup>46</sup>

Quite unlike its common law counterpart, the French opinion must meet a host of formal requirements. As *Jand'heur* illustrates, the French judicial opinion style consists of strict deductive reasoning: the court applies abstract premises to the facts of the case at hand, arriving at a conclusion that the lower court erred (as here) or acted correctly.<sup>47</sup> In the highest courts, the major premise of the deductive argument is typically a general principle of law referenced to a provision of the Civil Code — Article 1384 in our example. The reader must consult the Code to learn that Article 1384 concerns liability for harm done by an object under the actor's control. The minor premise is the decision under review, in this case a ruling by the lower court that Article 1384 does not impose liability without fault for harm done by a vehicle under the defendant's control. The conclusion is the court's judgment on whether the decision is compatible with the Code. Here the court held that Article 1384 does indeed impose liability without fault for car accidents. *Jand'heur* was, in fact, a major step in the development of a general rule of strict liability for harms done by objects under the actor's control.<sup>48</sup>

Besides its strictly deductive form, the French opinion normally follows other formal requirements as well. The reasoning underlying the important decision in *Jand'heur* is radically compressed. This is in part a consequence of the rule that the decision must consist of a single sentence, with the court as its subject and the disposition of the appeal as its verb. In *Jand'heur*, the verb of the court's sentence is "quash" (the decision below). Had the court chosen to uphold the lower court, it would have used the verb "reject" (the appeal). Other common verbs include "condemn," "order," "declare," and "deny." A judge should pay close attention to the construction of this sentence, for "[a] judicial sentence must link sobriety, clarity, conciseness, elegance, to rigor, correctness, and dignity."<sup>49</sup> If a case requires the consideration of a number of separate issues, each governed by a different verb, the court may not be able to dispose of it in a single sentence without undue awkwardness. In that event, the court will separate the decision into two or more parts and compose a separate sentence for each issue.<sup>50</sup>

46. VON MEHREN & GORDLEY, *supra* note 43, at 631 (deletion in original).

47. See, e.g., FRANÇOIS-MICHEL SCHROEDER, *LE NOUVEAU STYLE JUDICIAIRE* 71 (1978); Jean-Louis Goutal, *Characteristics of Judicial Style in France, Britain and the U.S.A.*, 24 AM. J. COMP. L. 43, 45 (1976). This structure is modeled on the formula used by Roman praetors to hand down legal directives. See Tony Sauvel, *Histoire du jugement motivé*, 71 REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE EN FRANCE ET A L'ÉTRANGER 5, 7-8 (1955).

48. See generally Edward A. Tomlinson, *Tort Liability in France for the Acts of Things: A Study of Judicial Lawmaking*, 48 LA. L. REV. 1299 (1988).

49. PIERRE ESTOUP, *LES JUGEMENTS CIVILS* 15 (1988).

50. MIMIN, *supra* note 42, at 137. Elsewhere, Professor Mimin counsels, "It is necessary to assure the unity of each phrase by developing only one idea in it." *Id.* at 180.

Another consequence of these rules is that imperative, exclamatory, and interrogatory sentences are forbidden. See *id.* at 173, 192.

Under France's new Code of Civil Procedure, courts have an obligation to "motivate," or explain, their decisions.<sup>51</sup> Accordingly, they incorporate the reasons for their holdings into the sentence by subordinate clauses beginning with "whereas," as in *Jand'heur*.<sup>52</sup> By limiting the opinion to a single carefully constructed sentence, French judges hope to avoid ambiguity. Although the elements of the court's reasoning may be hard to sort out on the first reading, rules of grammar assure that all of the clauses are linked into a coherent deductive argument. Everything in the sentence must be either part of the result or its justification. The French view this approach as preferable to a discursive essay setting down a string of sentences or paragraphs followed by a result that may depend on all or some of them.<sup>53</sup> The writer of such an essay, i.e., an American- or English-style opinion, may too easily avoid making the precise logical links that are essential to a well-crafted decision.<sup>54</sup>

Manuals on French opinion writing stress the importance of clarity,<sup>54</sup> which seems odd in light of the rule that the opinion be compressed into one highly complex sentence. Clarity might be better served by encouraging judges to employ a direct narrative style, to separate their thoughts into a number of sentences, and to elaborate on each, instead of cramming them all into "whereas" clauses. But this objection misses the point. However desirable clarity may be, in the hierarchy of opinion-writing virtues, the premier goal for French judges is that the decision take the form of a deductive argument. Given that requirement, and the danger of confusion that this style presents, judges must make the single sentence as lucid as possible.

The French preoccupation with eliminating unnecessary words from the opinion and with selecting precisely the right word for the occasion seems to be based largely on this concern. Pierre Mimin's manual on opinion writing, *Le Style des Jugements*, illustrates the French perspective. Professor Mimin states that the judge should strive for "an elementary nobility of language"<sup>55</sup> and "the maximum of density."<sup>56</sup> He rails against redundancy,<sup>57</sup> metaphors,<sup>58</sup> "provincialisms,"<sup>59</sup> "vulgar decorations,"<sup>60</sup> and any and all ambiguity,<sup>61</sup> imprecision,<sup>62</sup> or superfluity<sup>63</sup> in the use of words. By contrast,

51. NOUV. C. PR. CIV. art. 455.

52. See MIMIN, *supra* note 42, at 185-87. The Cour de Cassation uses the phrases *attendu que* and *que* ("that") for short, the latter after the first subordinate clause. Another high court, the Conseil d'État, adjudicates issues arising between the government and the citizen. It follows the same form, but uses the phrase *considérant que* to introduce subordinate clauses. Both of these terms are usually translated as "whereas." See VON MEHREN & GORDLEY, *supra* note 43.

53. See VON MEHREN & GORDLEY, *supra* note 43 at 87-88, 310; Marcel Waline, *La Motivation des Décisions de Justice*, in 2 MÉLANGES STRATIS ANDREATIS 545, 550-51 (1973).

54. See, e.g., ESTOUP, *supra* note 49, at 31; MIMIN, *supra* note 42, at 134, 137.

55. MIMIN, *supra* note 42, at 82.

56. *Id.* at 99.

57. *Id.* at 96, 99, 116.

58. *Id.* at 22.

59. *Id.* at 94-95.

60. *Id.* at 112.

61. *Id.* at 134.

the authors of American opinion-writing manuals satisfy themselves with a few bromides about writing style.<sup>64</sup> American judges give lip service, and occasionally real respect, to the rules of English composition, but no careful reader of their work would claim that the bulk of it is distinguished for its stylistic precision and elegance.<sup>65</sup>

From an American perspective, the most striking feature of *Jand'heur* may be the lack of any discussion of the substantive reasons behind the Cour de Cassation's move to strict liability.<sup>66</sup> A roughly analogous American decision is *Escola v. Coca Cola Bottling Co.*,<sup>67</sup> a California tort case in which Justice Traynor, in a concurring opinion, proposed a strict liability rule for defective products. *Escola* contains a trenchant account of the policy justifications for liability without fault. According to Justice Traynor, "[P]ublic policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market,"<sup>68</sup> and "where the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot."<sup>69</sup> Furthermore, "the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."<sup>70</sup> The opinion goes on to discuss other reasons, such as the justice of imposing liability on the manufacturer who is responsible for the dangerous product reaching the market, and the manufacturer's greater access to information about his products.<sup>71</sup>

No such policy analysis appears in the French opinion. The judge announces the general principles upon which the decision is based as though they were self-evident, and the opinion merely applies those principles to the case at hand: "[T]he language is of assertion, not of argument. But more than this, it is existential and descriptive, not normative and prescriptive."<sup>72</sup> One of the premises of the deductive argument may contain a few words that hint at the substantive foundations of the decision,<sup>73</sup> but full-blown policy

62. *Id.* at 113.

63. *Id.* at 99-100, 107-08.

64. George underscores the contrast between the approach taken by French and American attitudes: "When it comes to judicial writing style, each writer must develop his own best way to say what has to be said." GEORGE, *supra* note 16, at 7; see also B.E. WITKIN, *MANUAL ON APPELLATE COURT OPINIONS* 205-06 (1977).

65. See, e.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 107-09 (1985) [hereinafter POSNER, *FEDERAL COURTS*].

66. *Jand'heur* is only one of several cases in the development of Article 1384 as a principle of strict liability. The other cases are no more informative. Some of them are reprinted, along with other materials bearing on this theme, in VON MEHREN & GORDLEY, *supra* note 43, at 612-90.

67. 150 P.2d 436 (Cal. 1944).

68. *Id.* at 440.

69. *Id.*

70. *Id.* at 441.

71. *Id.* at 442-44.

72. Bernard Rudden, *Courts and Codes in England, France, and Soviet Russia*, 48 *TUL. L. REV.* 1010, 1023 (1974).

73. See *id.* at 1021 (citing Cour de Cassation's affirmance of rescuer's recovery because "the victim

arguments based on economic, social, or political considerations have no place in the opinion.<sup>74</sup> They are deemed "useless to the decision of the case."<sup>75</sup> Nor should the opinion contain citations to earlier cases or to scholarship,<sup>76</sup> rhetorical turns designed to persuade the reader of the rightness of the outcome,<sup>77</sup> or even general discussions of legal concepts.<sup>78</sup>

As a result, French opinions evidence nothing comparable to the detailed historical essays found in American opinions, like the habeas corpus survey in *Fay v. Noia*.<sup>79</sup> They contain no sweeping discussions of prior doctrine, like the U.S. Supreme Court's essay on the Equal Protection Clause in *San Antonio Independent School District v. Rodriguez*,<sup>80</sup> and no elaborate treatments of the policies underlying freedom of speech like the opinion in *New York Times v. Sullivan*.<sup>81</sup> Such disquisitions on legal concepts as Benjamin Cardozo's meditation on duty of care in *Palsgraf v. Long Island R.R.*<sup>82</sup> and Learned Hand's delineation of the negligence rule in *United States v. Carroll Towing Co.*<sup>83</sup> would be out of place in a French opinion.

American opinions may be written narrowly to decide only the case at hand, or broadly to influence or even transform a whole area of doctrine.<sup>84</sup> Unlike the American practice, virtually all French opinions focus narrowly on the issue at hand and no other.<sup>85</sup> Broad principles of law, like the interpretation of Article 1384 embodied in *Jand'heur*, typically are invoked as reasons for the decision, but never as part of the holding itself.<sup>86</sup> French judges are not permitted to rule on any issue not raised by the parties.<sup>87</sup> Digressions,<sup>88</sup> displays of indignation or enthusiasm,<sup>89</sup> "puerile reflections,"<sup>90</sup> indications of indecision or doubt,<sup>91</sup> pontification about the state of the law,<sup>92</sup> verbs

was obliged to compensate the damages sustained by one who lent assistance through benevolence"). Professor Rudden points out that a policy of encouraging rescue can be derived from the inclusion of the word "benevolence" in this phrase. *Id.* at 1022.

74. See, e.g., MIMIN, *supra* note 42, at 255-56; SCHROEDER, *supra* note 47, at 66.

75. MIMIN, *supra* note 42, at 255.

76. *Id.* at 274.

77. *Id.* at 192, 207.

78. *Id.* at 288.

79. 372 U.S. 391 (1963).

80. 411 U.S. 1 (1973).

81. 376 U.S. 254 (1964).

82. 162 N.E. 99 (N.Y. 1928).

83. 159 F.2d 169 (2d Cir. 1947).

84. *But see* *Ashwander v. TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) ("The Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. . . . The Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.")

85. See MIMIN, *supra* note 42, at 337; SCHROEDER, *supra* note 47, at 64-65.

86. MIMIN, *supra* note 42, at 337.

87. *Id.* at 397.

88. *Id.* at 222.

89. *Id.* at 247.

90. *Id.* at 208.

91. *Id.* at 264.

92. *Id.* at 20.

suggesting the exercise of judgment by the judge,<sup>93</sup> and expressions of sympathy<sup>94</sup> are all frowned upon.<sup>95</sup> The concern underlying these rules and practices seems to be to maintain the image of the judge as a technician who mechanically applies existing law to a factual situation, rather than as a social engineer who exercises judgment and lays down general rules of conduct.

French opinions contain no dissents or concurring opinions, and the author of the decision remains anonymous.<sup>96</sup> Anonymity and collegial decisionmaking are regarded as necessary safeguards of judicial independence and impartiality.<sup>97</sup> In addition, it is feared that allowing dissenting opinions would "weaken considerably the authority of the decision."<sup>98</sup>

Lower court opinions differ somewhat from those of the Cour de Cassation. Generally, civil juries do not exist in France, so judges in the lowest courts must evaluate the evidence and make findings of fact. The intermediate appellate courts review these findings *de novo*. As a result, the opinions of intermediate appellate courts often contain fairly extensive discussions of the evidence. The Cour de Cassation, by contrast, ordinarily does not rule on the facts.<sup>99</sup> Because its role in the legal system is to nullify incorrect rulings of law, ordinarily it examines the facts only to ascertain whether the lower court properly applied the law to the facts.<sup>100</sup> Consequently, the opinions of the Cour de Cassation contain only a sketchy account of the facts. Again, the brief reference in *Jand'heur* to the road accident at issue in that case is typical.

Opinions of the Cour de Cassation are shorter than those of lower courts in their treatment of the law as well as of the facts.<sup>101</sup> Lower courts must justify their rulings to the higher courts.<sup>102</sup> While limiting themselves to deductive arguments, lower courts often set forth elaborate chains of reasoning to show the reviewing court that they are right. The Cour de Cassation, in contrast, generally prefers to get right to the heart of the matter. It will characteristically "pose an axiom and immediately draw from it the required deduction."<sup>103</sup> It seems to view its role in the legal system as one of declaring results, and perceives no need to persuade anyone of their correctness. The contrast between French and American practice is striking:

93. *Id.* at 260.

94. *Id.* at 257.

95. By contrast, such displays of judicial emotion are commonplace in American opinions. See WITKIN, *supra* note 64, at 209-11.

96. See MIMIN, *supra* note 42, at 370; John Bell, *Principles and Methods of Judicial Selection in France*, 61 S. CAL. L. REV. 1757, 1763 (1988).

97. Bell, *supra* note 96, at 1776; Waline, *supra* note 53, at 551.

98. SCHROEDER, *supra* note 47, at 66.

99. *See id.* at 67.

100. MARIE-NOËLLE JOBARD-BACHELLIER & XAVIER BACHELLIER, *LA TECHNIQUE DE CASSATION* 60-63 (1989). The authors note that the Cour de Cassation exercises this power in certain cases and not others, according to "criteria that are not always easy to define." *Id.* at 63.

101. MIMIN, *supra* note 42, at 216-17.

102. *See* SCHROEDER, *supra* note 47, at 5.

103. MIMIN, *supra* note 42, at 217.

in America, courts of last resort, and notably the U.S. Supreme Court, routinely prepare far more elaborate opinions in support of their holdings than do lower courts.

#### B. Criticisms of the French Form

Judged by the American standards described in Part II, the French opinion falls short. This section discusses its weaknesses. It would be a mistake, however, to conclude from these weaknesses that unreasoned opinions produce serious adverse consequences for the legal system. Whether and how much reasoned opinions matter to the success of the legal system is a separate question. Satisfying American standards may be less vital than many American judges and theorists suppose. That issue is addressed in Part IV.

If the French Civil Code contained straightforward answers to the legal issues that make their way to the Cour de Cassation, French judicial form would be adequate to serve the needs of the legal system. The reader of an opinion would merely need to refer to the Code or some other relevant statute cited by the court for the information left out of the opinion. In fact, the reader's task is not so easy. Although the form and structure of French judicial opinions mask judicial invention, scholars and even some judges openly acknowledge the creative role of courts.<sup>104</sup> The French Code is no more comprehensive, free of ambiguity, or up-to-date than American statutes; it is often far less so. Judges make much of French law, and the text of the Code serves as no more than a starting point.<sup>105</sup>

*Jand'heur's* reading of Article 1384 as imposing a kind of strict liability — a highly improbable interpretation if the framers' intent is at all relevant<sup>106</sup> — is only one of many examples. Apart from the four Code provisions noted earlier,<sup>107</sup> virtually all of French tort law is based on judicial decisions and academic writing. Courts also have made significant contributions to the development of private law on unjust enrichment, specific performance of contractual obligations, and many other aspects of the law of

104. *See, e.g.,* S. BELIAD, *ESSAI SUR LE POUVOIR CRÉATEUR ET NORMATIF DU JUGE* (1974); Alain Bancaud, *Considérations sur une "pieuse hypocrisie": la forme des arrêts de la Cour de Cassation*, 7 DROIT ET SOCIÉTÉ 373, 383-84 (1987) (observing that judge imposes his order upon chaos of social life, while refusing to explain his reasons for doing so); *see also* Bell, *supra* note 96, at 1778 & n.45.

105. *See, e.g.,* JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 83 (2d ed. 1985); René David, *Supereminent Principles in French Law*, in *THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND IN MIXED JURISDICTIONS* 119-32 (Joseph Dainow ed., 1974) [hereinafter *JUDICIAL DECISIONS*]; André Tunc, *Methodology of the Civil Law in France*, 50 TUL. L. REV. 459, 465-66 (1976) [hereinafter *Tunc, Methodology*]; André Tunc, *Logique et Politique dans l'élaboration du droit, spécialement en matière de responsabilité civile*, in *MÉLANGES JEAN DABIN* 317-39 (1974) [hereinafter *Tunc, Logique et Politique*].

106. *See* ALAN WATSON, *FAILURES OF THE LEGAL IMAGINATION* 1-33 (1988).

107. *See supra* note 44.

contracts.<sup>108</sup> Indeed, "it would be hard to find a single article of the Civil Code to which there have not been added depths of meaning and major restrictions and extensions that could not have been foreseen in 1804."<sup>109</sup>

French public law is even more a product of judicial action. Relations between the citizen and the state, governed in the United States mainly by constitutional and statutory law, are governed in France primarily by subconstitutional administrative law. Most of this law is made by the Conseil d'État, a court that evolved out of the bureaucracy in the early nineteenth century.<sup>110</sup> This body of law began as and has largely remained a product of judicial invention, no more based on statute than is English or American common law.<sup>111</sup> Yet the decisions of the Conseil d'État are, if anything, less informative than those of the Cour de Cassation.

When a court goes beyond the mechanical application of a readily accessible text to engage in creative interpretation or sheer invention, all of the justifications discussed in Part II for reasoned opinions come into play. Full explanations provide guidance for lawyers, persuade other judges and citizens that the court is acting sensibly, guard against the danger that the court will act illegally, and justify judicial creativity against the charge of usurpation of legislative prerogatives. The problem is not that French law is overly formal in its jurisprudential premises. Rather, the problem is with French judicial style. French law is *not* as formal as the opinions would have us think. French courts do not even acknowledge their creative role, let alone give the reasoned opinions that a creative role entails.

French judicial form does not lack for critics of its inaccessibility, lack of candor, and absence of policy discussion.<sup>112</sup> The most prominent attack in French legal literature appears in an article by two distinguished French jurists, Adolphe Touffait and André Tunc.<sup>113</sup> They maintain that, because of the brevity and opacity of French decisions, the case law is rife with unexplained and seemingly arbitrary distinctions, outmoded principles, and impenetrable doctrinal thicket.<sup>114</sup> For example, French and foreign commentators agree that the Court's efforts to construct a principle of strict liability in tort under Article 1384, without writing reasoned opinions to set forth the relevant policy considerations and explain the Court's grounds for

108. See Tunc, *Methodology*, *supra* note 105, at 465; see also Renaud Bagueault de Puchesse, *The Warranty of Quality in Sale of Goods Under the Perspective of the American and French Law 132-33* (1989) (unpublished thesis on file with author) (noting that "the French law as regards the hidden defect warranty is primarily based on judicial precedents," as are rules on "warranty disclaimers, available remedies in case of breach of warranty and warranty beneficiaries").

109. JOHN P. DAWSON, *THE ORACLES OF THE LAW* 401 (1968).

110. See, e.g., L. NEVILLE BROWN & J. F. GARNER, *FRENCH ADMINISTRATIVE LAW* 28-31 (3d ed. 1983).

111. See David, *supra* note 105, at 120-21.

112. See, e.g., SCHROEDER, *supra* note 47, at 65.

113. Adolphe Touffait & André Tunc, *Pour une motivation plus explicite des décisions de justice et surtout celles de la cour de cassation*, 72 *REVUE TRIMESTRIELLE DU DROIT CIVILE* 487 (1974).

114. *Id.* at 496-99.

decision, has resulted in a chaotic body of law.<sup>115</sup> One French scholar calls the whole enterprise "an immense waste of intelligence and of time."<sup>116</sup>

John Dawson is equally critical of French form. Bringing the perspective of a common law scholar to his analysis of the French opinion, Professor Dawson stresses the breadth of the terse *motifs* set forth as justifications for French decisions and the sketchiness with which the Cour de Cassation treats the facts:

Propositions of law are drafted with utmost care and precision but they hang suspended in space, for no effort is made to reconcile them with very different propositions asserted in other, nearly related cases or to explain why they would not apply if the facts of the case were somewhat different.<sup>117</sup>

Because the Court makes no effort to reconcile the sweeping language of its *motifs* with arguably conflicting propositions applied in other cases, lower courts are left with nothing to rely on except the Court's bare holdings in their search for guidance on how the high court will decide future cases.<sup>118</sup>

The absence of factual development in the Court's opinions means that lower courts lack the means to test the scope of the reasons offered in one case by debating their applicability to different facts. As a result, the opportunity to achieve legitimacy through reasoned decisionmaking is lost.<sup>119</sup> French judges appear to be powerless technicians mechanically applying the law. In reality, at least in the highest French courts, the judges' failure to undertake a serious effort to provide reasoned justifications for their decisions gives them much greater power to exercise unfettered discretion than American judges possess.<sup>120</sup>

The root of the problem is the lack of honesty in French opinions. French disregard for judicial frankness diverges sharply from the American view that candor is at the very least an important criterion for judging judicial performance, and perhaps even an essential requisite of the judicial function in all but exceptional cases.<sup>121</sup> French manuals on opinion writing disparage

115. For example, whether a given fact pattern is governed by Article 1384 or by some other body of law is often quite difficult to determine. In one case a customer at a supermarket picked up a bottle and was injured when it exploded before she reached the check-out counter. Arguably, the bottle was under the store's control and Article 1384 should have governed. Yet the Court of Cassation rejected the application of Article 1384 with one phrase: "The liability of [the defendant] to the victim could only be contractual." See Rudden, *supra* note 72, at 1022.

Similarly, in spite of the strict liability rule of *Jand'heur*, defendants may prevail by showing that unforeseeable conditions played a major role in bringing about the harm. If the defendant driver could not foresee rocks on the roadway, he would not be liable when his wheel throws up a rock that shatters the plaintiff's windshield. See VON MEHREN & GORDLEY, *supra* note 43, at 646-47. If a road suddenly and unforeseeably becomes icy, the defendant is not liable for harm done by his car in a skid. *Id.* at 650. Whatever the merits of these decisions, they are hard to square with the principle of strict liability.

116. Touffait & Tunc, *supra* note 113, at 496 (quoting Carbonnier, 4 *DROIT CIVIL* no. 109 (7th ed. 1972)).

117. DAWSON, *supra* note 109, at 414.

118. *Id.* at 408-10.

119. *Id.* at 412-13.

120. *Id.* at 411-12, 415.

121. Shapiro, *supra* note 8.

efforts to state the real grounds of decision behind the syllogistic façade of the French opinion. Professor Schroeder considers it more important that the law seem firm and secure than that courts be candid.<sup>122</sup> He recognizes that answers to most legal issues cannot be deduced from the Code or other texts,<sup>123</sup> yet insists that judges leave the social, economic, and political determinants of decisions out of their opinions. Schroeder explains that judges' education does not prepare them for that kind of discussion, and that open debate of these matters would politicize decisionmaking and make case resolution more difficult.<sup>124</sup> He claims, without citation, that the French style "occasions more admiration than disdain on the part of foreign observers, be they Anglo-Saxon or Germanic."<sup>125</sup>

Professor Mimin is an even more enthusiastic defender of the French form, despite its sometime dishonesty. At every turn in his long list of rules for opinion writing, he denigrates candor in favor of maintaining appearances.<sup>126</sup> For example, policy arguments figure prominently in the adjudication of French tort cases.<sup>127</sup> Yet Mimin insists that one should never set forth the policy considerations behind a decision.<sup>128</sup> Nor should a judge use the term "hereafter" when applying a new rule, for the implication is that the rule used to be otherwise (as indeed it was).<sup>129</sup> It is inappropriate to express doubt or indecision,<sup>130</sup> or to use a verb that would lead the reader to think that a judge is exercising judgment,<sup>131</sup> or to include anything "favorable to the antithesis."<sup>132</sup> A judge may use reasons found in scholarship or case law, but must not acknowledge their provenance<sup>133</sup> or admit that the holdings of the cases differ from the text of the Code.<sup>134</sup> His examples of overly lengthy opinions are not always illustrations of redundancy and verbosity. Often they are cases in which the judge has given the reader more useful information regarding the facts, reasoning, and disposition than Mimin thinks strictly necessary.<sup>135</sup>

Adolphe Touffait, André Tunc, and John Dawson call for reform of the French opinion. They prefer the American model. My goal is rather different. In detailing the ways in which the French opinion falls short of American

122. SCHROEDER, *supra* note 47, at 121-22.

123. *Id.* at 85.

124. *Id.* at 66. Admitting that judges resort to such considerations, he asks, rhetorically, "But would there be any advantage in explaining oneself openly in this regard?" *Id.*

125. *Id.* at 67.

126. MIMIN, *supra* note 42, at 246.

127. See 2 LAWSON & MARKESINIS, *supra* note 43, at 45, 50-51, 54, 60-61, 63, 68-69, 153, 156.

128. MIMIN, *supra* note 42, at 255-56.

129. *Id.* at 220-21.

130. *Id.* at 264.

131. *Id.* at 260. He uses as an example the verb *estimer*.

132. *Id.* at 222.

133. *Id.* at 274. Mimin declares that cases do not establish principles of law, but continues, "At least, that is a phenomenon that one does not proclaim." *Id.*

134. *Id.* at 275.

135. See *id.* at 185-86, 330.

ideals, my aim is not to criticize French practice. On the contrary, I belabor the inadequacies of French form only to build a foundation for casting doubt upon the American standards by which it is judged. In Part IV, I will argue that the French legal system gets along well enough despite these terse opinions, thereby raising the question of whether American opinion-writing ideals are as important as many Americans suppose. Before undertaking that project, however, it will be useful to examine the history of French judicial form, in an effort to understand why French judges write such seemingly curious opinions.

### C. Understanding the French Opinion

It seems fair, if somewhat harsh, to characterize French judicial form as a dysfunctional and deceptive façade, behind which judges exercise a creative role without offering genuinely reasoned explanations. French opinions give little guidance and speak with the voice of command rather than persuasion. Because of the judges' lack of candor, the opinion cannot serve as a constraint on judicial power, and the absence of reasoning in the opinions means that judicial invention cannot even begin to meet the charge of illegitimacy. How did this state of affairs come about, and how can it persist? Why is there no rebellion against the perverse features of French judicial form?

One reason is the need for efficiency in managing litigation. Because the Cour de Cassation has little power to decline to hear a dispute presented to it, it must rule on an enormous number of cases.<sup>136</sup> Given this workload, the burden of preparing reasoned opinions in every case would be overwhelming. This response, however, is hardly satisfactory, since one could remedy the administrative problems by according the highest courts discretion to deny review of cases deemed insufficiently important, increasing the number of judges, or giving judges more assistants to help them handle the work. Full opinions could be reserved for the most important cases, as they increasingly are in the United States. In short, something more fundamental than a heavy docket accounts for the persistence of the French opinion form.

This section argues that the structure of the French opinion is shaped by two powerful events in French political history: the absolute monarchy and the Revolution of 1789. If this conclusion is valid, it prompts us to reconsider the American opinion as well. Part V will suggest that American judicial form may be better understood as a product of our political culture and history, than as an instrument for realizing the goals described in Part II.

136. See Tunc, *Methodology*, *supra* note 105, at 467 (noting that in mid-1970s the court, which consists of over a hundred judges divided into several chambers, ruled on over six thousand civil cases a year).

1. *The Revolution and the Judges*

Whether America had a true revolution is an issue debated by historians.<sup>137</sup> But no one disputes the revolutionary character of the events of 1789-94 in France. The French people turned their society and government upside down in a fierce struggle, vandalized churches, expropriated property, abolished ancient privileges, and chased thousands of supporters of the old regime out of the country or sent them to the guillotine. To understand French judicial form, one must recognize that the judges were on the losing side of this upheaval. The events of those years left a deep and abiding imprint not only on judges' approach to their work, but also on popular attitudes toward judges and their role in government.

Before the Revolution, a group of high courts in France, the *parlements*, exercised both judicial and legislative functions, subject to supervision by the crown.<sup>138</sup> France developed no viable representative institutions comparable to the elected English Parliament. In this void, the quasi-legislative, quasi-judicial *parlements* increasingly viewed themselves as the defenders of the rights of the French against royal aggrandizement. They did not, however, concern themselves much with the rights of peasants and workers. In the late eighteenth century, as France faced a mounting fiscal crisis, the rights that the *parlements* deemed worthy of protection were the privileges of the nobility under the old regime,<sup>139</sup> and the intrusions they fought were efforts by the king and his ministers to find resources with which to stave off national bankruptcy.<sup>140</sup>

When the monarchy collapsed, the *parlements* were abolished. Some of the *parlementaires* were executed and others fled the country. Judicial prestige sank to a low point from which it has never fully recovered. The men who assumed power during the Revolution held a highly positivistic theory of law in which the legislature played the dominant role of lawmaker.<sup>141</sup> They proclaimed that the sovereign power of the state resided in the legislature,<sup>142</sup> and that the role of courts was merely to carry out the legislature's directions. Maximilien Robespierre, one of the revolutionary leaders, declared: "The word *jurisprudence* [meaning case law] of the courts . . . must be effaced from our language."<sup>143</sup>

137. For a recent argument that the War for Independence was indeed a revolution, see GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* (1992).

138. See FR. OLIVIER-MARTIN, *HISTOIRE DU DROIT FRANCAIS* 538-45 (1951).

139. These privileges included, for example, immunities from taxation, seigniorial rights to collect fees from local peasants, and the exclusive access to high positions in the military. See PIERRE GOUBERT, *THE ANCIEN RÉGIME: FRENCH SOCIETY 1600-1750*, at 162-65 (Steve Cox trans., 1973).

140. See VON MEHREN & GORDLEY, *supra* note 43, at 341-42 (citing MARCEL WALINE, *TRAITÉ ÉLÉMENTAIRE DE DROIT ADMINISTRATIF* 44-45 (6th ed. 1951)).

141. See SCHROEDER, *supra* note 47, at 85.

142. MERRYMAN, *supra* note 99, at 22; VON MEHREN & GORDLEY, *supra* note 43, at 248 (citing J. LAFERRIÈRE, *MANUEL DE DROIT CONSTITUTIONNEL* 311-12 (2d ed. 1947)).

143. DAWSON, *supra* note 109, at 426.

The revolutionary government kept judges on a short leash. Before the Revolution, judicial opinions typically did not contain any reasons at all. The new government insisted on reasons in order to ensure that judges did not stray from the established law. It forbade judges from issuing general rules, barred any judicial review of legislation, and instructed judges to "have recourse to the legislative body whenever they think it necessary, either to interpret a law or to make a new one."<sup>144</sup> Judges were elected by popular vote for short terms, and were forbidden to interfere with the administration of government.<sup>145</sup>

The revolutionary leaders were reluctant to establish an appellate court, for fear that it might become a center of political opposition to the regime. However, the practical difficulties of keeping the lower courts in line without some reviewing body were too great, so they established a "tribunal of cassation." This body was not permitted to rule on the merits, but only to "quash" (casser) erroneous decisions of lower courts and remand the case to a different lower court for reconsideration. This feature of French procedure endures to this day.<sup>146</sup> Each year the tribunal sent representatives before the legislature to present a summary of its actions and "the text of the law that led to cassation."<sup>147</sup> The law was codified in 1804 partly to curb judicial power by assuring that judges had a text to apply rather than authority to make law on their own.<sup>148</sup>

Working under these conditions, French courts quite naturally took pains to avoid giving the impression that they exercised any kind of creative role. The austere, syllogistic opinion form, which originated in this period, represented the judges' effort to fend off any suggestion of judicial departure from legislative texts and established law.<sup>149</sup> The impact of the events of the 1790s persisted in France, for the Revolution was not a transitory phenomenon. Although French government went through many phases before a stable republic finally was formed in the 1870s, revolutionary attitudes toward the

144. Décret sur l'organisation judiciaire of 16-24 August 1790, tit. II, art. 12, *quoted in* VON MEHREN & GORDLEY, *supra* note 43, at 217.

145. DAWSON, *supra* note 109, at 376. The lesson has not been forgotten. Mimin's manual on opinion writing includes warnings against criticizing the administration or the sovereign. See MIMIN, *supra* note 42, at 236, 239.

146. See MERRYMAN, *supra* note 105, at 40; VON MEHREN & GORDLEY, *supra* note 43, at 104-08.

147. Const. of 1791, tit. III, ch. V, art. 22, *reprinted in* LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789, at 61 (Jacques Godechot ed., 1951); *see also* DAWSON, *supra* note 109, at 378.

148. See Shael (Herman), *From Philosophers to Legislators, and Legislators to Gods: The French Civil Code as Secular Scripture*, 1984 U. ILL. L. REV. 597, 597-98 (noting conscious decision to diminish judiciary's power because revolutionary judges had become allies of nobility).

149. See DAWSON, *supra* note 109, at 380; *see also* EVELYNE SERVERIN, *DE LA JURISPRUDENCE EN DROIT PRIVÉ* 71-73 (1985); Paul E. Geller, *Staffing the Judiciary and "Tastes" in Justice*, 61 S. CAL. L. REV. 1849, 1859-60 (1988).

role of judges endured.<sup>150</sup> For many years French scholars insisted that judges only apply the law and never make it.<sup>151</sup>

Whatever the validity of this stance in 1793 or 1804, it quickly became untenable. French courts, like courts everywhere, confronted issues that could not be resolved by mere reference to a text. They also faced a changing society that rendered old answers obsolete. Whether they wanted to or not, judges had to take on a creative role.<sup>152</sup> However, their training and collective memory, the popular attitude toward them, and the force of habit led judges to retain the terse, opaque, syllogistic opinion form dating from a time when the guillotine was a real threat to a judge who stepped out of line.

## 2. *The Legacy of French Absolutism*

Although some scholars account for the French opinion solely as a response to Revolutionary ideas about the role of courts,<sup>153</sup> earlier developments in French political history also contributed to the form of the modern French opinion. Before the Revolution, French opinions were even less illuminating. They included no justifications at all, but consisted solely of a recitation of the parties' arguments and a conclusion.<sup>154</sup> On the level of legal theory, the changes wrought by the Revolution were profound, replacing a freewheeling judiciary with a closely cabined one. In terms of the actual practice of courts, the Revolution did nothing more than add a few clauses to the traditional opinion.

Long ago, French kings and their lawyers devised the theory that the crown was an absolute ruler as a part of their persistent campaign to exercise ever greater authority against such competitors as the Pope, the Holy Roman Emperor, and the nobles. The monarchy proclaimed that, within France, the French king was himself the heir to the authority of the Roman Emperors. This proposition justified denial of the authority of the Pope and the Emperor, as well as refusal to respect feudal laws and customs. Royal lawyers maintained that French kings, like the emperors, received their power from God and were responsible only to God, not to the Pope or the Emperor, and certainly not to any of their subjects.<sup>155</sup>

Although this theory lacked universal acceptance even in its heyday,<sup>156</sup> it nonetheless forms a distinctive part of French political culture that influenced events long after the collapse of the monarchy. For example, the authoritarian notion that the ruler cannot be questioned by anyone may,

150. See John H. Merryman, *How Others Do It: The French and German Judiciaries*, 61 S. CAL. L. REV. 1865, 1865 (1988).

151. See DAWSON, *supra* note 109, at 392.

152. See Merryman, *supra* note 150, at 1873-74.

153. See, e.g., DAWSON, *supra* note 109, at 380; Goutal, *supra* note 47, at 60.

154. See Sauvel, *supra* note 47, at 6.

155. *Id.* at 24; see also OLIVIER-MARTIN, *supra* note 138, at 329-30, 335-36.

156. See DAVID PARKER, *THE MAKING OF FRENCH ABSOLUTISM* 136 (1983).

ironically, help to explain the revolutionary view of legislative supremacy. Napoleon could hardly have made himself emperor in a society where authoritarianism had no currency. Both the reactionary restoration of the monarchy after Napoleon's defeat and Louis Napoleon's 1852 coup d'état overthrowing another republican government reflect the deep-rooted French vulnerability to authoritarian rule. More recently, the willingness of many French to accept the Pétain regime in World War II resonates with this same authoritarian theme.<sup>157</sup>

This political mindset helps explain the form of French opinions. The *parlements* themselves were outgrowths of the king's court.<sup>158</sup> Beginning with the *parlement* of Paris, they derived their authority from the king himself and claimed the same status accorded other royal officers. The French kings employed them, especially the *parlement* of Paris, as part of their struggle against the array of competitors confronting them. Professor Dawson points out that it was sometimes "more convenient for the French crown if some contests that were charged with politics but conducted under judicial forms could be settled without public discussion of the grounds for decision."<sup>159</sup> Perhaps for this reason, a 1344 ordinance forbade judges of the *parlement* from disclosing the reasons for decisions.<sup>160</sup> More important for the long term, the *parlement's* historical roots in the king's court enabled it to assert successfully that it exercised the king's authority and had no more obligation to justify itself than he did.<sup>161</sup> Proceeding from this premise, it asserted the view that it could decide cases, "not being tied to any rule," subject only to the king's superior authority, and adhered to this position until the Revolution.<sup>162</sup>

Viewed from the perspective of eight hundred years of French political history, the French high court's response to Revolution-era notions of legislative supremacy takes on a somewhat different character. It resembles less a craven submission to the popular will than a subtle and somewhat cynical stratagem to maintain and expand judicial power. Since the Revolution, the court has exercised broad power to make law, unconstrained even by the duty to give real reasons, under cover of a positivistic legal theory that

157. See ROBERT O. PAXTON, *VICHY FRANCE* 30-32 (1972); ALEXIS DE TOQUEVILLE, *THE OLD RÉGIME AND THE FRENCH REVOLUTION* 7-9 (Stuart Gilbert trans., 1955); THEODORE ZELDIN, *FRANCE 1848-1945: POLITICS AND ANGER* 29-63 (1979) (discussing persistence of monarchical politics in nineteenth-century France), 140-205 (discussing Bonapartism in nineteenth-century French politics).

158. DAWSON, *supra* note 109, at 273-74; OLIVIER-MARTIN, *supra* note 138, at 537-41.

159. DAWSON, *supra* note 109, at 287. Early in the history of the *parlements*, they gave reasons for their decisions, mainly in order to "conserve the memory of the solutions adopted." Sauvel, *supra* note 47, at 18. For reasons discussed in the text, the practice ceased in the fourteenth century and was not revived until the Revolution.

160. See DAWSON, *supra* note 109, at 287 & n.36.

161. See J. Hilaire & C. Bloch, *Connaissance des Décisions de Justice et Origine de la Jurisprudence*, in *JUDICIAL RECORDS, LAW REPORTS, AND THE GROWTH OF CASE LAW* 47, 59 (John H. Baker ed., 1989).

162. Sauvel, *supra* note 47, at 24.

even its own members sometimes admit is false. It seems to view itself as the heir to the prerogatives of the *parlement* of Paris, standing above the citizens on whose rights and duties it rules, answerable to no one.<sup>163</sup>

The form of French judgments may be entirely a product of the Revolution, its impact on popular attitudes, and the trauma it produced among French judges. Yet the persistence of the syllogistic opinion for two hundred years, through vast political and social changes, suggests that something more deeply rooted than Robespierre's positivism is at work. The authoritarian theme in French political life, reaching back to the royal absolutism of the Bourbon monarchs<sup>164</sup> and reinforced by the Revolution and its aftermath, seems to play a central role in French judges' unwillingness to part with the traditional French opinion style. As Professor Mimin puts it, giving a more thorough and candid account of the reasons for decisions would be "*sans prestige*."<sup>165</sup>

#### IV. THE UNCERTAIN VALUE OF THE REASONED OPINION

French judicial form, however grave its faults may be, provides a useful counterpoint from which to examine the American conception of the judicial opinion. Parts IV and V of this Article use the foregoing study of French judicial form as a tool to explore two widely held beliefs among Americans: (1) that the goals of teaching, persuading, constraining, and legitimating are essential to the vitality of the legal system; and (2) that the American opinion is an indispensable instrument for achieving those aims.<sup>166</sup>

Part II sketched the outlines of the American reasoned opinion as a discursive, candid essay containing inductive as well as deductive reasoning, policy arguments as well as discussions of precedents and statutes. The American opinion attempts to furnish guidance to people who use the law, to persuade others that courts have reached the best solutions, and to legitimate and constrain judicial action. The underlying assumption is that without opinions serving these functions the legal system would operate poorly.

163. This elitist attitude is even more characteristic of the Conseil d'État, the high court formed in the early nineteenth century to rule on disputes arising between individuals and the state. The French distinguish sharply between private law and *droit administratif*, rules directed at the government. Over the years, the Conseil d'État made a body of administrative law, with little statutory material, yet its opinions are, if anything, less informative than those of the Cour de Cassation. See Bancaud, *supra* note 104, at 377.

164. See PARKER, *supra* note 156, at 120-26.

165. MIMIN, *supra* note 42, at 185.

166. The discussion here, as in Part II, takes an instrumental view of American judicial form. Opinion writing may be justified in non-instrumental terms, on the ground that the parties are entitled to an explanation. See *supra* note 11. If so, then French form fails to provide an adequate explanation in any case where something more than deductive reasoning is required to resolve the issues. So do many American opinions, however. See *infra* part V.A (on gap between ideals and reality in American opinion writing).

Beneath the desire for a healthy legal system lies a more basic concern. Without reasoned opinions, it is feared, American legal institutions would lose their effectiveness and ultimately harm the larger society. Lawyers might be hampered in advising their clients on how to plan their activities so as to stay within the law. Citizens might have less respect for judicial decisions if judges were simply to hand down authoritarian pronouncements. Unconstrained judges might take arbitrary and vindictive actions against innocent citizens. Judges could lose all sense of the proper limits of their creative role and usurp legislative prerogatives. Legislatures might then cabin judges so severely that they could not maintain a body of living law.

The empirical premise of this argument cannot easily be tested within the American legal system. No jurisdiction is likely to abandon the reasoned opinion for curiosity's sake, especially since the predicted consequences are so dire. Fortunately, comparative analysis furnishes an alternative to such a risky experiment. This alternative is imperfect, because in a good experiment everything except the variable under scrutiny is held constant, and no two societies are alike. Still, while important differences exist between France and the United States, they are not so great as to preclude our learning from the French experience. By demonstrating that a radically different approach to writing judicial opinions can thrive in a liberal democracy similar to our own, the French opinion provides a formidable counterexample to the American view that reasoned opinions are crucial to the proper functioning of the legal system as a means of preserving liberty and promoting the general welfare.

#### A. The French Counterexample

French opinions are uninformative, authoritarian, and deceptive. French form respects none of the values American opinions are designed to serve. This disparity between the typical French opinion and the American model is worthy of attention, because American theorists regard the reasoned opinion as crucial to the success of the whole legal system. If the aims of the reasoned opinion were prosaic or parochial, the difference between the two systems would be no more remarkable than the divergences between the laws of New York and California. Not much turns, for example, on whether a given legal system employs comparative or contributory negligence, whether or not newspapers are strictly liable for defamation, whether judges are elected or appointed, or even, perhaps, whether rights are contained in a written constitution or in the common law and statutes. The various approaches to such matters have their merits, and there is plenty of room for broad variations among healthy legal systems.

Judicial reasoning, however, is quite another matter. American theorists like Lon Fuller and Henry Hart claimed that the reasoned opinion is critical

to the legitimacy of the development of law by judges.<sup>167</sup> Ronald Dworkin thinks that "integrity," which requires reasoned decisionmaking, is a crucial judicial virtue.<sup>168</sup> James Boyd White holds that a legal system in which decisions are arrived at through authoritarian dictates rather than efforts to persuade is not "worthy of respect."<sup>169</sup> With this in mind, one of three conclusions seems possible: (a) the French legal system is inferior to the American system because of the failure of French judges to employ reasoned opinions; (b) differences between the French and American systems account for the relatively greater importance of guidance, persuasion, legitimacy, and constraint as goals of the American opinion; or (c) these goals are not as important as American theorists proclaim them to be. We need not necessarily settle on one of these explanations to the exclusion of the others. I argue that the first is implausible, while the second and the third each account for part of the gap between American ideals and French practice.

I reject the hypotheses that the French legal system is inferior to our own and that the form of French judgments produces unfortunate consequences. The ensuing paragraphs consider three criteria by which a legal system, or aspects of a system, might be evaluated: their impact on the larger society; the esteem in which various aspects of the system, such as judicial form, are held by citizens and lawyers who work and live within them; and the substantive law the system generates. Under each of these tests, the French system seems to stand up well in comparison with our own.<sup>170</sup>

### 1. The Larger Society

One way to evaluate the merits of a legal system is to look for problems in the larger society that may reflect defects in its legal institutions. For example, virtually everyone would condemn legal regimes that do not recognize basic human liberties or that fail to achieve an adequate level of economic prosperity, such as those of Nazi Germany or the former Soviet Union. Judged against such a standard, however, neither the modern French system as a whole nor its syllogistic opinion in particular fares at all badly. Despite centuries of cursory judicial opinions, France is a stable, mature, and vibrant nation whose residents enjoy a high degree of personal liberty and economic well-being. These observations may seem too obvious to require mention, yet they bear on a central theme of this article. Since the gap between French and American opinions is not matched by corresponding

167. See *supra* text accompanying notes 29 to 30.

168. See *supra* text accompanying notes 31 to 35.

169. WHITE, JUSTICE AS TRANSLATION, *supra* note 9, at 101; see also *supra* text accompanying notes 20 to 22.

170. No doubt one may advance other plausible standards for evaluating the worth of a legal system. My intuition is that the French system will compare reasonably well with our own under any sensible set of criteria.

differences in the economic or political life of the two countries, critics of French form cannot take its inferiority for granted, but must offer more specific reasons for their criticism. One might argue that the French system is a priori inferior because of its uninformative judicial opinions, without regard to any manifest failures in the larger society. Unless the accusation can be backed up with concrete examples of social dysfunction, however, the argument seems unpersuasive; it is like arguing that a baseball team with inexperienced or aging players is a poor one, even though it wins as often as its supposedly superior competitors.<sup>171</sup>

### 2. The Views of Participants in the System

A second measure of the success of a legal system is the degree of respect it earns from those who live and work within the system. If the charge of inferiority were true, one would expect to see signs of dissatisfaction with the system on the part of lawyers and citizens. French citizens are not uncritical of their legal system, but neither are Americans entirely satisfied with their own.<sup>172</sup> Unhappiness with the French legal system, as with the American, is grounded in the costs and delays of litigation and irritation with lawyers. However, no stronger connection exists between French frustration with courts and mistrust of lawyers on the one hand, and the particular features of French judicial form on the other, than exists between popular dislike of lawyers and courts in America and the form of American opinions.

French lawyers, who must use opinions in advising clients, grumble about the absence of reasons in French opinions, but their complaints seem no more severe than those of American lawyers who dislike the multiplicity of reasons in American opinions and the ambiguity that results. In her role as an advocate, the French lawyer manages to use the terse opinions in her *dossier* despite the absence of reasons, simply by ascribing to the court the reasons that support her client's position and rationalizing or minimizing the importance of cases that do not fit her thesis.<sup>173</sup> Is her solution very different from that of the American lawyer who invents a theory to explain away judicial language that does not support her cause? Many American lawyers would admit that, apart from the guidance they may provide, the reasons in

171. Notice, however, that if the parties are *entitled* to an explanation as a matter of right, the absence of bad consequences does not save the French opinion from condemnation for failure to provide them with one. See *supra* notes 11 & 166.

172. See, e.g., Tan Thi Thanh Trai Le, *The French Legal Profession: A Prisoner of Its Glorious Past?*, 15 *Cornell Int'l L. J.* 63, 63 (1982) (reporting that 1978 survey showed that less than five percent of French held positive view of the *avocat*).

173. Cf. CHRISTIAN ATLAS, *ÉPISTEMOLOGIE JURIDIQUE* 134-35 (1984) ("[If a lawyer] wants to win the case, he must not content himself with enumerating references, nor even citing the principal extracts of decisions. In particular, he must analyze the contrary decisions to show either that their reasoning is irrelevant to the case at hand, or that their reasoning leads to results much less satisfying, much less just, than those produced by the decisions favorable to his cause.")

opinions serve largely as a sort of stockpile of weapons to be deployed as the occasion requires. In their absence, however, lawyers would surely find other forms of weaponry, as they do in France.

In the past thirty years, some objections to the French opinion form have arisen, and have received the attention of French judges. One concern voiced was that opinions should be more comprehensible to lawyers, and especially litigants. Such complaints focused on the lower tiers of the system, where the opinion contains an elaborate discussion of the facts. As a result of these complaints, the *exorde*, which sets forth the facts and claims of the parties, is now written in narrative form in many lower courts.<sup>174</sup> However, French lawyers opposed a proposal to extend the narrative form to the more important part of the opinion — the *motifs* setting forth the reasons for the result — for fear that the reasoning would become insufficiently rigorous if the syllogism were abandoned.<sup>175</sup> Despite Touffait and Tunc's proposal for more sweeping changes,<sup>176</sup> the reform movement never influenced the three highest courts, the Cour de Cassation, the Conseil d'État, and the Conseil Constitutionnel.<sup>177</sup>

### 3. The Substantive Law Generated By the System

Third, legal systems might be evaluated in terms of the content of the substantive law they produce. While French and American law differ considerably at the conceptual level, there is often a notable convergence of practical result.<sup>178</sup> Where differences exist, Americans who study the French system frequently conclude that it works at least as well as our own.<sup>179</sup>

The French case law system sometimes produces a body of doctrine that is incoherent and unworkable, as illustrated by the rule of strict liability articulated in *Jand'heur*. French courts have never arrived at a satisfactory

174. See ESTOUP, *supra* note 49, at 13-14; SCHROEDER, *supra* note 47, at 27.

175. See SCHROEDER, *supra* note 47, at 53-55.

176. See *supra* text accompanying notes 113 to 116.

177. See, e.g., SCHROEDER, *supra* note 47, at 63-64 (arguing that French judges, unlike Anglo-American judges, merely apply the law to the facts); see also Tunc, *Methodology*, *supra* note 105, at 467 ("Unfortunately, the suggestion has thus far met more skepticism or opposition than enthusiasm.")

178. See, e.g., 1 LAWSON & MARKESINIS, *supra* note 43, at 180; Bagnenault de Puchesse, *supra* note 108, at 133-34; Edward A. Tomlinson, *Performance Obligations of the Aggrieved Contractant: The French Experience*, 12 LOY. L.A. INT'L. & COMP. L.J. 139, 141, 213-15 (1989).

179. See, e.g., Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 542 (1990) (arguing that French criminal processes are better than our own in important ways); Burt Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363, 377-410 (1982) (arguing that French judiciary effectively employs separation of powers review to enforce substantive values); Vernon V. Palmer, *A Comparative Study (From a Common Law Perspective) of the French Action for Wrongful Interference with Contract*, 40 AM. J. COMP. L. 297, 302 (1992); Arthur T. von Mehren, *Civil-Law Analogues to Consideration: An Exercise in Comparative Analysis*, 72 HARV. L. REV. 1009, 1074-78 (1959) (arguing that French and German law techniques for determining when a promise is enforceable are preferable to common law concept of consideration); cf. BROWN & GARNER, *supra* note 110, at 172-81 (evaluating French administrative law and finding it not inferior to English law).

delineation of the circumstances in which this rule should apply. As noted earlier, Touffait and Tunc argue that the form of the French opinion is at least partly to blame for the failure.<sup>180</sup> Perhaps reasoned opinions would have resulted in a more satisfactory doctrine.

Yet American courts also have struggled with the concept of liability without fault in tort. No one would argue that American products liability law is particularly coherent.<sup>181</sup> An equally plausible explanation for problems in the judicial development of Article 1384 of the French Civil Code would focus not on the form of the French opinion but rather on the inherent difficulty of organizing a liability scheme around the concept of strict liability.<sup>182</sup> More generally, the strict liability example suggests that American lawyers are in a poor position to argue that reasoned opinions necessarily lead to more coherent bodies of law. As anyone familiar with American law can attest, despite the regime of reasoned opinions, products liability is only one of many areas in which incoherence is an endemic problem.

### B. Is the Comparison Apt?

If it is true that France has not suffered unduly from the form of its judicial opinions, then either the American system is more dependent upon guidance, persuasion, constraint, and legitimacy in judicial opinions than is the French system, or else those goals do not deserve the fundamental status American theorists accord them. Unlike Americans, the French do not require that the guidance function be carried out within judicial opinions themselves. French lawyers have found other means of learning what the law is and what judicial decisions signify. After the lawyers have submitted their arguments in a case, it is turned over to an officer called a *conseiller-rapporteur*, who prepares a report analyzing the issues in the case.<sup>183</sup> In many cases a government officer called an *avocat-generale* prepares a memorandum containing a balanced analysis of the issues, including considerations of economic and social policy, and a proposed resolution of the case. This document roughly resembles an amicus brief by the Solicitor General in

180. See *supra* text accompanying notes 113 to 116.

181. Indeed, in recent years courts have begun to move away from strict liability in many areas of products law. See James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study in Legal Change*, 37 U.C.L.A. L. REV. 479, 480 (1990) (identifying "a significant turn in the direction of judicial decisionmaking away from extending the boundaries of products liability and toward placing significant limitations on plaintiffs' rights to recover in tort for product-related injuries").

182. See, e.g., POSNER, *PROBLEMS OF JURISPRUDENCE*, *supra* note 24, at 323-28; Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963, 977-1005 (1981); Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHL-KENT L. REV. 407, 416-29 (1987).

183. See DAWSON, *supra* note 109, at 321-23, 402-03. For the *rapporteur's* memorandum (in French) in *Jand'heur*, see 2 LAWSON & MARKESINIS, *supra* note 43, at 252-71. An English translation of part of it may be found in VON MEHREN & GORDLEY, *supra* note 43, at 629-31.

American practice. It often illuminates the court's decision, even when the result is contrary to the recommendation.<sup>184</sup>

After an important case is decided, a law professor, lawyer, or even a judge always writes an analysis, similar to an American case comment, describing the doctrinal background and implications of the holding.<sup>185</sup> Sometimes these articles even serve as surrogates for concurring or dissenting opinions, revealing hidden tensions on the Court.<sup>186</sup> Apart from case notes, French law professors spend much more of their professional lives writing about judicial developments than do American professors at prominent law schools.<sup>187</sup> The treatise remains a highly reputable form of scholarship in France, providing a means for lawyers to learn about case law developments in their larger context. The educational function served by discursive American opinions is thus accomplished in France by means entirely outside the opinion-writing process.

The asserted moral or legal obligation to give reasons rests on the perceived danger of judicial arbitrariness, abuse, or overreaching. This concern is quite general across all legal systems (except perhaps those of totalitarian states) and is at least as important a value in France as it is in America. The need to keep judges in line is most critical with regard to lower court judges, who may act as petty tyrants in the absence of oversight. Here also, the French seem to succeed tolerably well, despite the absence of reasoned opinions. Other features of the legal system, in particular the judicial selection process and its emphasis on strictly professional qualifications rather than political litmus tests, probably provide adequate safeguards against judicial abuse of power in France,<sup>188</sup> just as the report of the *avocat-generale* and doctrinal scholarship serve as a sort of surrogate for the guidance function of opinions.

When the focus shifts from guidance and constraint to the persuasive and legitimating role of opinions, the gap between American and French practice is far harder to explain as merely a difference in the means employed toward achieving the same end. Persuasion and legitimacy are not aims that may be fully realized in the absence of reasoned opinions. Law professors and others may offer persuasive justifications for results reached by courts, criticize decisions they regard as unwise, and show how novel outcomes are consistent

184. VON MEHREN & GORDLEY, *supra* note 43, at 145; JOBARD-BACHELLIER & BACHELLIER, *supra* note 100, at 41.

185. See DAWSON, *supra* note 109, at 398-99; Touffait & Tunc, *supra* note 113, at 489. These casenotes are published in collections of French cases. See, e.g., CAPITANT, *supra* note 43.

Although French opinions are rather opaque, even the newspapers sometimes offer interpretative analyses of them. See, e.g., Jacques de Saint-Victor, *Grèves: la Cour de Cassation Précise le Pouvoir des Juges*, LE FIGARO, July 2, 1992, at 35 (discussing new case law on strikes that *chambre social* of Cour de Cassation has begun to establish gradually since 1988).

186. See, e.g., Touffait & Tunc, *supra* note 113, at 495-96.

187. For a discussion of the work of French law professors, see Tunc, *Methodology*, *supra* note *supra* note 105, at 468-72.

188. See Bell, *supra* note 96, at 1778; Geller, *supra* note 149, at 1861.

with or compelled by existing principles.<sup>189</sup> While their work is useful to the effective functioning of the system, American theorists do not regard it as a satisfactory substitute for explanations from the judges themselves. The persuasive and legitimating aims of the reasoned opinion require that the decisionmakers *themselves* offer good reasons when they wield governmental power. James Boyd White insists, for example, that in order to deserve respect, judges must offer convincing justifications for their holdings, not hand down authoritarian decrees.<sup>190</sup> Similarly, legitimacy is a problem because judges sometimes act inventively. Theorists like Lon Fuller and Ronald Dworkin view it as a responsibility of the court to demonstrate in its opinion that such creativity is not based on personal preference but is bounded by reason.<sup>191</sup>

Are the French and American systems sufficiently different that the goals of persuasion and legitimacy take on less importance in France than in America? Although three differences between the French and American systems suggest that they may be, I believe these differences to be insufficient to explain the radical variation in approaches to opinion writing in the two systems.

### 1. Formal and Substantive Reasoning

One characteristic of the French system that may explain its lesser emphasis upon persuasion and legitimacy is its focus upon "formal" reasoning. In other words, French judges stress the importance of following existing rules, while American adjudication emphasizes the choice and implementation of substantive values and policy.<sup>192</sup> Thus, the argument runs, it is less important that opinions explain results in France, since the result often turns on an established rule that can be applied in a straightforward way to the facts.<sup>193</sup> In America, where rules are few and substantive concerns dominate

189. See ATIAS, *supra* note 173, at 57, 59, 83-86, 127.

190. See *supra* text accompanying notes 20 to 22.

191. See *supra* text accompanying notes 29 to 36.

192. For example, in torts cases a judge may instruct the jury to weigh the costs and benefits of untaken precautions, or to decide whether the defendant was blameworthy. Alternatively, she may tell the jurors that the violation of a statute amounts to negligence as a matter of law. The former instructions call for substantive inquiries by the jury. The latter compels an outcome if a statutory violation is found, without regard to any moral, utilitarian, or other substantive inquiry.

For a general discussion of this distinction, see ATYIAH & SUMMERS, *supra* note 2, at 5-31. To summarize, "[a] substantive reason may be defined as a moral, economic, political, institutional, or other social consideration." *Id.* at 5. "Formal reasons are different in that they frequently do not bring substantive reasons directly into play. . . . A rule, for instance, may incorporate substantive reasons and yet operate as an independent reason for action even when the substantive reasons do not apply, or even when those reasons may point to a contrary conclusion." *Id.* at 7; see also Robert S. Summers, *Judge Richard Posner's Jurisprudence*, 89 MICH. L. REV. 1302 (1991) (book review).

193. See FREDERICK SCHAUER, *PLAYING BY THE RULES* 112-18 (1991) (arguing that a rule is itself justification for action, quite independent of reasons behind it); see also ATYIAH & SUMMERS, *supra* note 2, at 7; Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 537 (1988).

judicial decisionmaking, this alternative is less often available. It is therefore more often crucial that the judge *explain the outcome*, since our predilection for substantive reasoning precludes the alternative of simply relying upon a rule.<sup>194</sup>

Since American adjudication is so substantive in its orientation,<sup>195</sup> this argument for a difference between the two systems is not entirely without force. One would be hard-pressed to find any other legal system where persuasion and legitimacy are quite so necessary as they are in the United States. The problem with the argument is that, despite the formal façade of the French opinion, French law is not particularly formal.<sup>196</sup> While it is more rule-oriented than our system, the notion that French judges merely deduce results from the Civil Code is a wildly inaccurate caricature of their actual practice.<sup>197</sup> As noted earlier, judicial invention is a routine feature of the French system, and the Code is heavily glossed by judicial decisions. In fact, French administrative law, which governs relations between the citizen and the state, is not based on a code but is made out of whole cloth by the judges of the Conseil d'État, much like any area of Anglo-American common law.<sup>198</sup>

Although French courts do not avow substantive considerations, they routinely take them into account in reaching their decisions.<sup>199</sup> When the Code yields an answer they do not like, they often find a way around it.<sup>200</sup> In order to achieve the results they desire, they resort to "a somewhat forced interpretation of legislative texts,"<sup>201</sup> and employ such "supereminent principles" as "fraud spoils everything," "abuse of right," and "unjust enrichment,"<sup>202</sup> even when the effect of doing so is to supersede legisla-

194. Cf. Robert S. Summers & Michele Taruffo, *Interpretation and Comparative Analysis, in INTERPRETING STATUTES: A COMPARATIVE STUDY* 461, 502-06 (D. Neil MacCormick & Robert S. Summers eds., 1991) [hereinafter *INTERPRETING STATUTES*] (explaining differences in French and American judicial form largely as implications of contrast between French positivism and American instrumentalism).

195. See generally ATIYAH & SUMMERS, *supra* note 2.

196. One eminent French scholar argues against rigid formal restraints thus:

The law is not an end in itself; it serves the conception that we have of our social life and of justice. An attachment to formalism must not lead us to sacrifice the means to the end. The strictness of the law must be relaxed if its strict application violates what we believe justice requires. The appeal to general legal principles by the administrative courts and the use of concepts such as equity, public order, and good morals by the regular courts are required by our very conception of law. The use of these general principles and broad concepts is based in itself on an awareness that positive law is not an end in itself and is not sufficient to accomplish the final goal of the legal system — justice."

David, *supra* note 105, at 132.

197. See, e.g., DAWSON, *supra* note 109, at 400-01; 2 LAWSON & MARKESINIS, *supra* note 43, at 43-67; Bancaud, *supra* note 104, at 373; Tunc, *Logique et Politique*, *supra* note 105, at 317-39.

198. See *supra* text accompanying notes 110 to 111.

199. See, e.g., SCHROEDER, *supra* note 47, at 85-124. For some examples, mainly from tort law, see 2 LAWSON & MARKESINIS, *supra* note 43, at 45, 50-51, 54, 60-61, 63, 68-69, 153, 156.

200. See Michel Troper et al., *Statutory Interpretation in France*, in *INTERPRETING STATUTES*, *supra* note 194, at 171-73, 189-90.

201. David, *supra* note 105, at 120; see also Troper et al., *supra* note 200, at 177-78.

202. See David, *supra* note 105, at 121-26.

tion.<sup>203</sup> In addition, French judges have at their disposal a number of open-ended code provisions that give them broad discretion to pursue their notions of good policy.<sup>204</sup> André Tunc, a scholar of French, English, and American law, suggests that French law may be more formal in its treatment of precedent than American law but less so than English law.<sup>205</sup> The French practice of deciding cases on narrow grounds helps French courts maintain flexibility to decide future cases, without constraint from prior decisions.<sup>206</sup> Consequently, while American adjudication may be more substantive than French, this difference alone does not seem sharp enough to justify the wide gap between French and American opinion-writing styles.

## 2. The Role of Courts in Society

The second difference concerns the role of courts in society. American courts are far more prominent in addressing the pressing needs of society than are French courts. American courts strike down legislation on constitutional grounds,<sup>207</sup> hear sweeping challenges to government practices, order the reform of school systems,<sup>208</sup> prisons,<sup>209</sup> and other institutions,<sup>210</sup> and manage the implementation of broad decrees.<sup>211</sup> This sort of "public law" litigation has been virtually unknown in France since the Revolution. Ordinary

203. *Id.* at 132.

204. *Id.* at 120, 122, 123-24, 127-28.

205. See Tunc, *Methodology*, *supra* note 105, at 465 (suggesting that in most fields of law, authority of a precedent of Court of Cassation is less than that of an English precedent and greater than that of an American precedent). F.H. Lawson, a distinguished English comparativist, evidently shared Tunc's view. See F.H. Lawson, *Comparative Judicial Style*, 25 AM. J. COMP. L. 364, 370 (1977). On the Anglo-American comparison, see also ATIYAH & SUMMERS, *supra* note 2, at 118-27 (arguing that precedent carries more weight in English courts than in American courts).

Professor Nicholas attributes the looser French approach to precedent to the French view that judicial decisions have no official status as law. BARRY NICHOLAS, *FRENCH LAW OF CONTRACT* 14-15 (1982); see Jean Carbonnier, *Autorities in Civil Law: France*, in *JUDICIAL DECISIONS*, *supra* note 105, at 91, 95-97. However, in America, where judicial decisions do have official status as law, attitudes toward precedent are even more relaxed than in France. The differences between the three systems are better captured in terms of the varying weight each gives to formal and substantive values in legal reasoning. See ATIYAH & SUMMERS, *supra*, at 429 ("Legal systems may be compared in terms of their relative reliance on formal reasoning . . .").

206. See 2 LAWSON & MARKESINIS, *supra* note 43, at 183; Bancaud, *supra* note 104, at 376 (noting that Cour de Cassation is criticized not only "for unveiling nothing of its real motivations" and "being mistaken on the nature of the social rapport that the law had to translate," but also for "taking decisions dictated by the circumstances of each affair and not by a generalizable vision").

207. E.g., *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (striking down section of federal Bankruptcy Reform Act of 1978).

208. E.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (ordering busing to achieve racial integration of public schools).

209. E.g., *United States v. Michigan*, 940 F.2d 143 (6th Cir. 1991) (ordering state to reform its prisons).

210. E.g., *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd sub nom. Wyatt v. Aderholdt*, 503 F.2d 1305 (5th Cir. 1974) (ordering reform of mental hospitals).

211. E.g., *Allee v. Medrano*, 416 U.S. 802 (1974) (enjoining police harassment in a wide-ranging decree); see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

French courts cannot even consider the constitutional validity of legislation. Only the Conseil Constitutionnel, a quasi-judicial body formed after World War II, can entertain such challenges.<sup>212</sup> Perhaps it is more important to give a reasoned explanation for judicial actions in a system like our own, where courts take on a large role in overseeing other parts of the government and reforming large institutions, than it is in France, where the judicial role is more limited.<sup>213</sup>

The more significance given a decision, the more important it is to justify it with a reasoned opinion so as to win its acceptance by those affected by the ruling.<sup>214</sup> When a case touches the interests of many people, public acceptance is all the more critical. Surely constitutional litigation falls into this category.<sup>215</sup> Two problems make this explanation for the difference between French and American practice less persuasive. First, French judges do not recognize a distinction between constitutional and ordinary litigation that would require different opinion models for each. The Conseil Constitutionnel follows the traditional deductive opinion form.<sup>216</sup> Second, American partisans of the persuasive opinion do not limit their concern to constitutional or other "systemic" litigation. They argue instead that persuasion and legitimacy are needed across the board, and their view is reflected in the ordinary practices of American courts. American opinions on common law and statutory topics, no less than on constitutional issues, are framed as reasoned efforts to persuade.

### 3. *Civil Law and Common Law*

A third difference between the two systems must be addressed because of its prominence, though it seems to have little bearing on the issue of judicial form. This is the distinction between common law countries, whose traditions come from England, and civil law countries, whose legal institutions originated in Rome.<sup>217</sup> These differences are "especially marked in the general structure of the systems, in the classifications and rules of what is traditionally private law, having to do with persons, property, succession, and

212. The organization, composition, history, and jurisdiction of this tribunal are discussed in James E. Beardsley, *Constitutional Review in France*, 1975 SUP. CT. REV. 189; James E. Beardsley, *The Constitutional Council and Constitutional Liberties in France*, 20 AM. J. COMP. L. 431 (1972).

213. See Summers & Taruffo, *supra* note 194, at 503-04.

214. Cf. Frederick Schauer, *Judging in a Corner of the Law*, 61 S. CAL. L. REV. 1717, 1717-19 (1988) (contrasting America, and its emphasis on appellate opinions and constitutional adjudication, with other jurisprudential cultures where these are less important).

215. See Nagel, *supra* note 10, at 170-71.

216. For a collection of decisions by this tribunal, see LOUIS FAVOREU & LOIC PHILIP, *LES GRANDES DÉCISIONS DU CONSEIL CONSTITUTIONNEL* (5th ed. 1989). In recent years, constitutional decisions, while retaining their traditional deductive structure, have grown longer.

217. See ALAN WATSON, *THE MAKING OF THE CIVIL LAW* 3-4 (1981).

obligations, and in the law of procedure and rules of evidence."<sup>218</sup> The formal structure of French decisions can itself be traced to Roman law.<sup>219</sup>

Even so, an effort to maintain that French form is an ineluctable product of the civil law tradition would fall short, if only because many important civil law jurisdictions, including Germany and Italy, reject French form.<sup>220</sup> More important, even if all civil law countries followed the French model, the distinction between civil law and common law could hardly account for the divergence between French and American opinions. An adequate explanation must focus on the functions served by American opinions and show that those functions are not important in France or are otherwise met. Yet the role of judges in ordinary litigation does not differ significantly in France and America.<sup>221</sup> Whatever their force, the arguments for the reasoned opinion as a means for providing guidance, persuading others, and constraining and legitimating judicial action, draw their strength from the vital role of courts in a complex legal system. The conceptual differences between civil and common law systems are irrelevant to these goals.

Comparative analysis enables us to entertain ideas that otherwise may seem absurd.<sup>222</sup> Although differences between the American and French systems may account for some of the gaps between French practice and American ideals in opinion writing, they cannot completely explain that gap. Given this, it seems that either Americans err in supposing that persuasion and legitimacy are essential goals in common law and statutory contexts, or else

218. *Id.* at 1.

219. See *supra* note 47.

220. See RENÉ DAVID & JOHN E.C. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 142 (3d ed. 1985) (reporting that French form, or something like it, "is followed in Belgium, Luxembourg, the Netherlands, Spain, Portugal and the Nordic countries with the exception of Sweden . . . [but not in] Germany, Greece, Italy, Switzerland and Sweden." See also FOLKE SCHMIDT, *THE RATIO DECIDENDI: A COMPARATIVE STUDY OF A FRENCH, A GERMAN AND AN AMERICAN SUPREME COURT DECISION* (1965); J. GILLIS WETTER, *THE STYLES OF APPELLATE JUDICIAL OPINIONS: A CASE STUDY IN COMPARATIVE LAW* (1960). German judicial form is more structured than the Anglo-American style, but less so than the French. For a discussion of the differences between Anglo-American and German judicial form, see B. MARKESINIS, *THE GERMAN LAW OF TORTS* 6-10 (2d ed. 1990); B. Markesinis, *Conceptualism, Pragmatism and Courage: A Common Lawyer Looks at Some Judgments of the German Federal Court*, 34 AM. J. COMP. L. 349, 349-54 (1986); see also John P. Dawson, Book Review, 49 U. CHI. L. REV. 595, 599-600 (1982).

221. See MERRYMAN, *supra* note 105, at 80-84; I KONRAD ZWEIFERT & HEIN KÖTZ, *EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG [AN INTRODUCTION TO COMPARATIVE LAW]* 278-80 (2d ed. 1987) (concluding that "there are . . . grounds for believing that although the Common Law and the Civil Law started off from opposite positions, they are gradually moving closer together even in their legal methods and techniques"); Summers & Taruffo, *supra* note 194, at 508 (concluding comparative study of statutory interpretation with observation that "much of what we believe we have found does not justify the traditional emphasis on this distinction [between civil law and common law systems], as applied to the subject of statutory interpretation"). One important difference is the use of juries in civil litigation in the United States. This is not a civil law/common law distinction, as the jury has also been largely abolished in many common law jurisdictions outside the United States. See, e.g., ATIYAH & SUMMERS, *supra* note 2, at 169-70. If anything, this difference suggests a greater need for accountability on the part of French judges, since they have more power than American judges.

222. Cf. BERGER & LUCKMANN, *supra* note 7, at 108 (observing that "an alternative symbolic universe poses a threat because its very existence demonstrates empirically that one's own universe is less than inevitable").

the French system is illegitimate and unworthy of its citizens' respect. Since the French system seems to survive well enough and to enjoy as much respect from the French people as Americans accord our legal institutions, we should take seriously the possibility that the American preoccupation with persuasion and legitimacy is misplaced. The French comparison teaches us that a legal system can function adequately without caring much about either of these supposedly fundamental goals.

#### V. QUESTIONING THE INSTRUMENTAL MODEL

Part II demonstrated that Americans conceive of the judicial opinion in instrumental terms. They consider guidance, persuasion, constraint, and legitimacy to be indispensable functions of an opinion and evaluate opinions in terms of their success in achieving these ends. Part III contrasted this instrumental view with that prevailing in France, where written opinions seem little concerned with such matters. Part IV questioned the necessity of persuasion and legitimacy for a viable legal system, but accepted the premise that the American opinion is an instrument well suited to achieving these instrumental goals.

This Part returns to that premise. Whatever the normative value of guidance, persuasion, constraint, and legitimacy, it may be inaccurate to describe most American opinions as genuine efforts to pursue them. The instrumental view of American opinions may not adequately describe reality. A more satisfactory account of the American approach to judicial opinion crafting is that this form is, in large measure, a manifestation of our legal history and culture, just as the style of French opinions is a product of the peculiarities of French legal and political history.

The argument against the instrumental model rests on two premises drawn from our study of French form. First, if I am right to doubt the indispensable character of the reasoned opinion, then one of the pillars of the instrumental view collapses. If a legal system can get along well enough without reasoned opinions, as France seems to do, then it becomes much more difficult to insist that we would necessarily face disaster without our present instrumental form.

Second, becoming familiar with the French opinion may alter, in subtle but significant ways, our perception of the very nature of judicial opinions. As long as lawyers, judges, and academics operate within the received wisdom of conventional legal practice, they will seldom have occasion to question the instrumental interpretation of the American opinion.<sup>223</sup> As a

223. The issue is raised in our legal literature only by scholars who come to legal issues from the perspective of another discipline, like the free market economists, who claim that the real reasons for decisions are not to be found in opinions but in the demands of economic efficiency, *see, e.g.*, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 21 (3d ed. 1986), or a variety of scholarly traditions on the left, such as the Marxist view that legal rules reflect the "hegemony" of the established order, *see, e.g.*, Edward Greer, *Antonio Gramsci and "Legal Hegemony,"* in *THE POLITICS OF LAW* 304-09 (D. Kairys ed.,

result, it is all too easy to confuse the familiar with the necessary and to assume that the instrumental conception of opinions is an inevitable one, since it has no competitors within our practice. Yet the alternative illustrated by the French opinion shows that the instrumental view is not the only plausible one. The French opinion cannot be explained in instrumental terms, since it fails to fulfill or even to pursue the aims we expect opinions to achieve.

Encountering French form broadens our perspective and enables us to conceive of opinions as something other than instruments. The example it offers permits us to question whether the instrumental model is the most appropriate one for American practice, though it hardly compels us to change our minds. If the American attachment to the reasoned opinion is based on a careful judgment that opinions should serve as instruments of guidance, persuasion, constraint, and legitimacy, then the persistence of a thriving alternative in France may do little to shake our view of what an opinion is and what it should contain. However, to the extent that our view is merely the product of constant exposure to a particular form of opinion that claims to achieve such goals, then encountering a different way of doing things should encourage us to take a hard look at the validity of the instrumental model.

#### A. *The Gap Between Ideal Opinions and Typical Opinions*

Once we strip the instrumental model of the false necessity our internal perspective attributes to it, it becomes apparent that this model does not, in fact, describe most American judicial opinions. American ideas about the nature of judicial opinions are based, at least in part, on a confusion between the best opinions (as measured by the instrumental model) and the majority. The very finest opinions, by judges like Brandeis, Cardozo, Friendly, Harlan, Holmes, Jackson, and Traynor, to name some of the more outstanding examples, do provide guidance and teaching, offer persuasive rhetoric, and present carefully reasoned arguments that demonstrate more or less successfully that the author of the opinion is applying the law and not merely doing as he pleases.

Many American opinions fall far short of the standard these judges set. They are too poorly crafted to persuade doubters or provide much guidance to lawyers and lower courts. "Too many of our judicial opinions contain unexamined assumptions, conventional and perhaps shallow pieties, and confident assertions bottomed on prejudice and folklore."<sup>224</sup> The reasoning, and any persuasive force it may have, gets lost in a sea of citations, technical jargon, and euphemisms.<sup>225</sup> If French opinions give too few reasons,

1982). *See also* Robert W. Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57 (1984).

224. POSNER, *PROBLEMS OF JURISPRUDENCE*, *supra* note 24, at 97.

225. POSNER, *FEDERAL COURTS*, *supra* note 65, at 108; *see also* Nagel, *supra* note 10, at 192-95.

American opinions often give too many. They provide little guidance because the court leaves unclear just which reasons are crucial to the outcome.<sup>226</sup>

As for the role of reasons in conferring legitimacy on judicial actions, opinions often conceal, rather than explain and justify, new developments in the law.<sup>227</sup> For example, many courts employ the technique of reasoning by analogy, which may divert attention from the policy choices that ought to govern the decision of whether to treat a new problem under an established rubric.<sup>228</sup> Other judges ostensibly rely on precedent, but this is a dubious source of justification because prior case law frequently turns out to be equivocal and contradictory.<sup>229</sup> The lack of candor found in many opinions exacerbates all of these problems.<sup>230</sup>

For all the faults of the American opinion, the obligation to give reasons may still constrain lower court judges from arbitrary actions in some cases. As one scholar notes, however, "most judicial decisions in courts of first instance in the United States are not written, and there is no attempt at justifying them in a systematic and public way."<sup>231</sup> Safeguards against abuse of their power must come, as in France, through careful judicial selection and oversight by higher courts.

The problems persist over time and across a wide range of judicial philosophies. The U.S. Supreme Court furnishes a convenient illustration.<sup>232</sup> In the 1950s and 1960s, critics assailed the Warren Court not only for its substantive rulings, but also for failures of craftsmanship.<sup>233</sup> Nor are such problems linked solely to liberal activism. In the 1930s, commentators challenged not only the merits of decisions by the conservative Court striking down New Deal legislation, but also the competence of its opinions.<sup>234</sup> More

226. POSNER, *FEDERAL COURTS*, *supra* note 65, at 231-32; *see also* Abner J. Mikva, *For Whom Judges Write*, 61 S. CAL. L. REV. 1357, 1367 (1988).

227. *See* POSNER, *PROBLEMS OF JURISPRUDENCE*, *supra* note 24, at 92-93. *See generally* LON L. FULLER, *LEGAL FICTIONS* (1967).

228. *See* POSNER, *PROBLEMS OF JURISPRUDENCE*, *supra* note 24, at 93.

229. *Id.* at 94.

230. *See* POSNER, *FEDERAL COURTS*, *supra* note 65, at 107-09, 205; *see also* Alan M. Dershowitz & John H. Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1199 (1971); Louis M. Seidman, *Ambivalence and Accountability*, 61 S. CAL. L. REV. 1571, 1574 (1988). The problem of lack of candor is not limited to unscrupulous judges. It may be endemic to the process of opinion writing. *See* LEWELLYN, *supra* note 12, at 56 ("Only by happenstance will an opinion accurately report the process of deciding.")

231. Ruth Gavison, *The Good Judge*, 61 S. CAL. L. REV. 1617, 1624 (1988); *see also* Judith Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405 (1987).

232. *See* Herbert Hovenkamp, *The Supreme Court as Constitutional Interpreter: Chronology Without History*, 90 MICH. L. REV. 1384, 1386 (1992) (reviewing DAVID CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986* (1990)).

233. *See, e.g.*, Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 3 (1957); Hart, *Time Charts*, *supra* note 12 at 100-24 (1959); Philip B. Kurland, *Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government"*, 78 HARV. L. REV. 143, 145 (1964); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959).

234. *See, e.g.*, Charles S. Collier, *Judicial Bootstraps and the General Welfare Clause*, 4 GEO. WASH. L. REV. 211 (1936); *see also* White, *Evolution*, *supra* note 6, at 283-84.

recently, critics have charged that the Court under Chief Justices Burger and Rehnquist has displayed a lack of candor<sup>235</sup> and disrespect for precedent.<sup>236</sup> It has made arbitrary distinctions,<sup>237</sup> and has handed down ad hoc, unprincipled decisions.<sup>238</sup> The current Court's dismantling of the federal habeas corpus remedy for state prisoners is as fine an example of unrestrained judicial activism and lack of candor as anything the Warren Court ever did.<sup>239</sup>

For Touffait and Tunc, the American style of judicial opinion is far superior, because it provides better guidance, permits informed criticism of decisions, ensures greater participation in the legal process, facilitates the effort to focus upon social reality in reaching decisions, and ultimately produces better substantive results.<sup>240</sup> If they are right, French form is so uninformative that virtually any move to a more fully explanatory opinion would be an improvement. Even so, Touffait and Tunc, as well as other admirers of American form, would do well to recognize the gap between the ideal opinion and the far less appealing reality. Many, if not most, American opinions, even those of the U.S. Supreme Court, do not achieve the goals to which American judges ostensibly aspire. If the instrumental conception of the American opinion is not entirely false, neither is it an accurate depiction of most judicial output.

Even though the goals served by opinions are often betrayed in practice, Americans hold to the instrumental model, never considering that the model itself may be descriptively deficient. Perhaps Americans' allegiance to it is strictly normative, and explicable wholly in terms of devotion to the values that opinions are said to serve. It seems likely, however, that one reason for our fidelity to the instrumental model is the absence from our discourse of any alternative. So long as the instrumental model is the only one available, our tendency will be to characterize the many gaps between the ideal and the reality merely as regrettable failures. Becoming familiar with the radically different French opinion enables an American to entertain the possibility that the problem may lie in his attachment to the instrumental model as a necessary description of the judicial opinion. However desirable the reasoned opinion might be as a normative goal, if American judges depart from it often

235. *See, e.g.*, Dershowitz & Ely, *supra* note 230, at 1199; Henry P. Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405, 424 (1977); Shapiro, *supra* note 8, at 741-42; Geoffrey R. Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 169.

236. *See* Earl M. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467; Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 742-43 (1988) (citing *Garcia v. SAMTA*, 469 U.S. 528 (1985), as proof that Rehnquist Court has little respect for its own precedent).

237. *See* Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1441 (1987); Dershowitz & Ely, *supra* note 230, at 1199.

238. *See* Gene R. Nichol, Jr., *An Activism of Ambivalence*, 98 HARV. L. REV. 315, 326-27 (1984) (book review).

239. *See, e.g.*, Kathleen Patchel, *The New Habeas*, 42 HASTINGS L. J. 939, 1028-46 (1991).

240. Touffait & Tunc, *supra* note 113, at 502-04.

and seriously enough, we might do well to consider different approaches more in keeping with what judges actually do.

### B. *Legal Culture and Judicial Form*

Aside from the gap between the ideal American opinion and those that are most often written, the close resemblance between American and British judicial form also casts doubt on the explanatory power of the instrumental model. The need for opinions to advance the goals of persuasion and legitimacy is weaker in Britain than in America, because British law is more rule oriented and precedent bound, and therefore less freewheeling and substantive in its focus than our own.<sup>241</sup> One observer familiar with all three systems, for example, maintains that British law is actually more rule oriented than French law.<sup>242</sup> To the extent that the importance of reason in the American opinion turns on the special role of courts in American society as agents of social reform and checks on the other branches of government, those grounds are as absent in Britain as they are in France. Yet reasoning is at least as prominent in the British opinion as in the American.<sup>243</sup> Here, then, is another reason to suspect that functional considerations are not the sole — and perhaps not even the most important — explanatory factors behind the reasoned opinion.

If French form is a product of French legal and political history,<sup>244</sup> we should consider the possibility that the more reasoned Anglo-American opinion can be explained in similar terms: as a cultural artifact rather than as an instrument necessary for the pursuit of vital normative goals. The historical themes that contributed to the nature of French opinions can be contrasted to parallel developments in the Anglo-American legal and political tradition. Other cultural differences may also play a part in accounting for the divergences between French and American form.

#### 1. *The Judge in Anglo-American Legal History*

In the seventeenth century, English kings, no less than the French Bourbons, asserted a divine right of absolute rule.<sup>245</sup> England differed from France, however, in that the English Parliament was a comparatively

241. See generally ATTYAH & SUMMERS, *supra* note 2.

242. See Tunc, *Methodology*, *supra* note 105, at 465.

243. For accounts of British judicial style, see Rudden, *supra* note 72, at 1013-21 (noting that English style "accepts the need to meet and rebut argument . . . [and] is candid as to the options open"); Goutal, *supra* note 47, at 46-51 (noting that "the English opinion . . . is a discursive process, incidentally integrating various forms of reasoning").

244. See *supra* part III.C.

245. See generally JOHN H. MILLER, *BOURBON AND STUART: KINGS AND KINGSHIP IN FRANCE AND ENGLAND IN THE SEVENTEENTH CENTURY* (1987).

representative body, although only property owners could vote or serve in it.<sup>246</sup> While the French *parlements* sought to share the king's absolutist mantle, English judges took a radically different stance. In the power struggle between the king and Parliament, the common law courts repudiated the crown's absolutist claims. They asserted that the king himself was subject to the common law and that the common law drew its authority from reason rather than from naked governmental power.<sup>247</sup> Eventually, Parliament and the common law judges and lawyers prevailed.<sup>248</sup>

Eighteenth century American lawyers, in their struggle with the English king and Parliament for political control in the American colonies, viewed themselves as the successors of Sir Edward Coke and other seventeenth-century English lawyers and judges. The Americans felt themselves to be standing up for the rights of Englishmen won a century earlier by Parliament and the English courts.<sup>249</sup> They, too, relied on their understanding of the common law as a source for their claims, and conceived of government as being subject to the law rather than above it. Significantly, this applied to judges as well as parliamentarians and kings. Thus, the position taken by the *parlement* of Paris, that judges could wield power as they pleased without justifying their actions, was alien to the American conception of government from the very beginning.

English and American judges, like their French counterparts, experienced radical changes in government. Unlike the French *parlementaires*, however, English and American judges were on the winning side of their nations' great political conflagrations. Unlike French judges, they were admired as bulwarks

246. The political structures of the two countries began to grow apart much earlier. Because England was a smaller country, because the barons (after the Conquest) were few in number and owed their positions to the king, and because the ruling class was a small group of foreigners allied against a hostile populace, that ruling class early on conceived of England as a country and themselves as "the community of the entire country." By contrast, French kings tried to assert dominion over a vast territory whose nobles had little in common and owed the king nothing. In these circumstances English nobles gravitated toward participation in the government of the nation while French nobles resisted it. French kings had to assert absolute power in order to rule at all. It was easier for English kings to rule effectively without making claims to absolute power. The historical roots of the divergence between French and English political structure are summarized in CHARLES T. WOOD, *JOAN OF ARC AND RICHARD III*, at 3-9 (1988).

Professor Wood does not challenge these views, but he does complain that they "reflect neither the concerns that most animated medieval people nor the context within which they viewed their world." *Id.* at 9. In the ensuing essays that make up the body of his book, he stresses varying attitudes toward the nature of kingship in the two countries, and traces many of these differences to the extraordinary ability of French kings reliably to produce male heirs from 987 to 1498, with just one gap of twelve years (1316-28). For this reason, he argues, it was comparatively easy for French kings to justify their status in religious terms and to avoid sharing governmental power with anyone outside the royal family. By contrast, English kings often had no such claim to genealogical legitimacy. Circumstances forced them to seek approval and participation from Parliament and others in times of crisis. See *id.* at 22-28, 43, 114, 119-24, 145-46.

247. See SIR EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND*, 97b (Garland Publishing 1979) (1628) (maintaining that "reason is the life of the law, nay the common law itself is nothing else but reason").

248. See MICHAEL LANDON, *THE TRIUMPH OF THE LAWYERS* 25 (1970).

249. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 9-13 (1969).

of liberty against the danger of authoritarian government,<sup>250</sup> and, unlike French judges, they felt no need to be self-effacing and hide their law-creating functions. Anglo-American history celebrates Coke's assertion of the supremacy of the common law over the power of Parliament and the Crown,<sup>251</sup> the development of habeas corpus as a remedy for abuses of executive power,<sup>252</sup> the trial of John Peter Zenger as a precedent for freedom of speech,<sup>253</sup> and the American notion of a written constitution to be enforced by lawyers and judges against the government as a guarantee of liberty.<sup>254</sup> While judicial invention has sometimes given rise to criticism in America, our judges never suffered the trauma of executions, the replacement of one set of judicial institutions by another, or the requirement that judges give an annual accounting of their actions before the legislature.

Perhaps the American opinion is as much a product of these features of our history and culture as it is a means genuinely required to achieve goals like persuasion and legitimacy. Unlike the *parlementaires*, American judges would never have thought to hand down rulings in hard cases without explanations. They lacked a conceptual foundation, such as the divine right of kings, that would have permitted them to assert such a power. At the same time, American judges never faced the need to hide their creative acts from a hostile and suspicious populace. The English practice of reporting the reasons for judicial decisions took root as early as the thirteenth century as a means of instructing lawyers and law students.<sup>255</sup> Strengthened rather than weakened by revolution, English and American judges remained free to act as they always had, writing more elaborate reasoned opinions as society grew more complex. In contrast to French judges, judges in the Anglo-American tradition had no special incentive to avoid candor.

## 2. Divergent Perceptions of the Relation Between the Citizen and the State

These features of French and Anglo-American legal history are important not only for their own sake, but also because they contribute to differences in the way French and American citizens perceive government and their relation to it. Government may be viewed either as an entity standing apart from and

250. See MERRYMAN, *supra* note 105, at 16.

251. See CATHERINE BOWEN, *THE LION AND THE THRONE* 305, 315 (1957).

252. See DANIEL J. MEADOR, *HABEAS CORPUS AND MAGNA CARTA* 38-55 (1966).

253. See *FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON* (Leonard W. Levy ed., 1966).

254. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *THE FEDERALIST* No. 78 (Alexander Hamilton).

255. See John H. Baker, *Records, Reports and the Origins of Case-Law in England*, in *JUDICIAL RECORDS, LAW REPORTS, AND THE GROWTH OF CASE LAW* 18-19 (John H. Baker ed., 1989). The earliest reporting of English decisions was in unofficial reports. Over time, these reports evolved from student manuals into "repositories of doctrine." See DAWSON, *supra* note 109, at 63. From these beginnings the judges gradually developed a theory of precedent. See *id.* at 50-99. Officially authorized reports did not begin in England until the nineteenth century. *Id.* at 88.

above the people, or else as a cooperative enterprise among the citizenry in which everyone is encouraged to participate.<sup>256</sup> The French, with an authoritarian history that includes centuries of royal absolutism and two nineteenth-century emperors, seem drawn to the former view.<sup>257</sup> By contrast, Americans have always believed ardently in popular sovereignty.<sup>258</sup> This difference may have contributed to the gulf between French and American judicial opinions.

In their actual operation, the governments of France and the United States may be less different than their political cultures might suggest. After the abolition of the *parlements*, few constraints on governmental power remained in France.<sup>259</sup> Contemporary French government, however, is not markedly more authoritarian than our own. Since the early years of the Third Republic, which began in 1873, the French administrative law courts have developed significant restraints on the exercise of governmental power in France.<sup>260</sup> Conversely, modern American government little resembles the democratic ideal of eighteenth-century Americans. For better or worse, as American society has become more complex and government has been asked to take on more tasks, it has become ever more centralized, bureaucratized, and remote.

Popular perceptions of government, however, remain significantly different in France and in the United States. Viewing government in more authoritarian terms, the French do not usually demand or expect real explanations from officials in the way Americans commonly do, whether these officials be legislators, administrators, or judges. So it is that, apart from a few academics,<sup>261</sup> French citizens and lawyers generally accept the opaque French opinion with few complaints.<sup>262</sup> In fact, the French form is "considered all the more perfect for its concise and concentrated style, so that only experienced jurists are able to understand and admire it."<sup>263</sup>

Most Americans would probably find French form insulting. Although few Americans actually read judicial opinions, they would regard it as

256. Cf. MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 16-46 (1986). Damaška distinguishes between Continental and Anglo-American procedural systems by stressing, among other things, the greater role of hierarchy in Continental systems, see *id.* at 19, in contrast to the Anglo-American ideal of "a wide distribution of authority among roughly equal lay officials," *id.* at 25.

257. See LAURENT COHEN-TANUGI, *LE DROIT SANS L'ÉTAT* 5-15 (1985) (contrasting French *dirigisme* with American *autorégulation*); Bell, *supra* note 96, at 1780, 1792-93; Louis Henkin, *Revolutions and Constitutions*, 49 *LA. L. REV.* 1023, 1032 (1989). The Revolution did not alter this tendency, and may, in fact, have reinforced it. See *supra* note 157 and accompanying text.

258. See, e.g., ALEXIS DE TOQUEVILLE, *DEMOCRACY IN AMERICA* 58-60 (J.P. Mayer ed., 1969); WOOD, *supra* note 249, at 344-89, esp. 388-89; Henkin, *supra* note 257, at 1032.

259. See VON MEHREN & GORDLEY, *supra* note 43, at 342-43.

260. See BROWN & GARNER, *supra* note 110, at 3.

261. See, e.g., Touffait & Tunc, *supra* note 113; cf. Jean Deprez, *A Propos du Rapport Annuel de la Cour de Cassation*, 77 *REVUE TRIMESTRIELLE DU DROIT CIVIL* 503, 532 & n.58 (1978) (arguing that inability to discuss substantive foundations for decisions prevents judges themselves from fully participating in government policymaking).

262. See *supra* text accompanying notes 172 to 173.

263. DAVID & BRIERLEY, *supra* note 220, at 142.

arrogant and undemocratic for a judge to conceal his reasons behind a formal façade. In order to respect these American sensibilities, opinions must be addressed not just to a professional elite, but to a larger audience of interested citizens. Whether or not most opinions actually are reasoned or persuasive is considered less important than the principle that they should be. Americans prefer a legal system that maintains the *image* of judges who offer reasons to persuade citizens of the rectitude of judicial decisions over one in which those decisions are presented to the public as edicts from on high.

### 3. Individualism and Competition

Individuals in America often pursue their own notions of success and self-fulfillment in isolation from broader concerns of society as a whole.<sup>264</sup> Brought up in an economy that celebrates the free market and the competitive struggle, ambitious Americans learn early in life that self-promotion is virtually indispensable to success. This American penchant for individualism and competition may have some bearing on the form of American opinions.<sup>265</sup> Americans tend to see success as the proof of merit, and feel that judges on high courts should be selected, by and large, from among lawyers with successful careers behind them. These men and women could not have attained their current status without a taste for competition, and one should not expect them to give up competing for power, status, and influence in the judicial stage of their careers. Richard Posner condemns the federal judiciary for writing "self-indulgent displays performed with little concern for the interests and needs of the audience for the opinions."<sup>266</sup> One explanation for this tendency is that many judges, successful lawyers that they are, enjoy contests in which they can establish and promote their private reputations through aggressiveness and flair.

By contrast, France is a more hierarchical, structured society. For judges in France, succeeding on examinations is more important than competing in the marketplace as a path to success. Except for a few specialized courts, French judges enter the profession right out of law school. They attend a school for judges, become civil servants, and work their way up through the judicial ranks.<sup>267</sup> Trained as bureaucrats rather than as individuals competing

264. See, e.g., ROBERT N. BELLAH ET AL., *HABITS OF THE HEART* 27-28, 32-33, 84, 142 *passim* (1985) (discussing individualism in American life).

265. Cf. MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 114-25 (1987) (importance Americans attach to individualism helps explain differences between American and European law on abortion and divorce).

266. POSNER, *FEDERAL COURTS*, *supra* note 65, at 230; see also POSNER, *REPUTATION*, *supra* note 13, at 147-48 ("The temptation is to make a judicial opinion an exercise in self-advertisement and self-aggrandisement, and is enhanced by the eminence that has accrued to judges (such as Cardozo) who write highly individualistic opinions.")

267. See Bell, *supra* note 96, at 1758-61 (noting somewhat different career path of administrative judges).

for clients or tenure, they are perceived as professionals with secure prestige and access to special knowledge.<sup>268</sup> Most of them are not especially interested in self-promotion. French judges are not ciphers who merely apply existing law to the facts; as noted earlier, French judges do engage in lawmaking and policy formulation,<sup>269</sup> if somewhat less often than do American judges. The difference is that French judges do so anonymously.<sup>270</sup> Whatever its historical origins, French judicial form, with its narrow focus upon the case at hand, its deductive form, and its refusal to acknowledge a role for policy analysis, perfectly suits French judges' predilections for bureaucracy.<sup>271</sup>

The American tendency to write reasoned opinions is not entirely a product of judicial ego, nor does it wholly lack advantages. Giving American judges an especially prominent role in the debate over difficult issues and substantial leeway to introduce substantive and policy concerns into their opinions, for example, engenders a body of commentary that would never have existed were U.S. opinions more spartan.

It would be too much to claim that the cultural factors elaborated in the preceding paragraphs wholly explain the American opinion.<sup>272</sup> In emphasizing the divergent historical backgrounds of French and American opinions, I do not mean to endorse a crude cultural determinism in which everything is explained by historical events and the imprint they leave on the attitudes of participants in the legal system. My point is merely that the instrumental view of American opinions should not be embraced simply because we are aware of no other. Furthermore, the cultural account does not necessarily displace the instrumental view; they are not mutually exclusive explanations. Instead, the two may complement each other. A full understanding of the origins of American opinion form, as well as of many of our current practices, may lie partly in the aspects of our history and culture discussed in the preceding

268. *Id.* at 1772-73.

269. See *supra* text accompanying notes 104 to 111 and 196 to 206.

270. Perhaps French judges' anonymity and bureaucratic orientation contribute to their less active role as lawmakers. See VON MEHREN & GORDLEY, *supra* note 43, at 1145-50. It remains true that French judges exercise a creative role that may be more pronounced than that of English judges, who nevertheless employ the reasoned opinion. See Tunc, *Methodology*, *supra* note 105. So it seems that judicial training and outlook bear not only on the scope of judicial invention but also, and quite independently, on the form of opinions.

271. See HENRY EHRLMANN, *COMPARATIVE LEGAL CULTURES* 108, 122 (1976).

272. Some authors have suggested additional differences between the French and American legal cultures. For example, the two cultures may have different tastes in argumentative strategies. One may infer from their willingness to overlook its faults that many French lawyers prefer deductive reasoning to other forms of argument. See SCHROEDER, *supra* note 47, at 54 (suggesting that lawyers opposed abandoning the syllogistic opinion because they feared "a loose and diffuse drafting of the judgment, the writer letting his pen run, and the judgment stretching out and scattering itself in proportion to its author's prolixity"). Americans, on the other hand, have a predilection for displays of rhetoric. See POSNER, *PROBLEMS OF JURISPRUDENCE*, *supra* note 24, at 149 (stressing importance in our legal culture of "persuasion by rhetoric rather than by the coolest forms of reasoned exposition").

paragraphs. Many opinions doubtless serve with some success the ends of guidance, persuasion, constraint, and legitimacy.

## VI. CONCLUSION

[Y]ou see, on this earth, there is one thing which is terrible, and that is that everyone has their own good reasons.<sup>273</sup>

Working within a legal and cultural tradition, it is often hard to conceive how anyone could do without the well-entrenched institutions we see around us. The root of this problem is the human tendency to suppose that the features of the social world as it is are "natural and inevitable," and that they "must be" the way they are.<sup>274</sup> Stepping outside our system to compare French and American opinions is a useful exercise, because it helps us to see aspects of judicial form that we might otherwise have overlooked. If nothing else, the comparison demonstrates that the candid and reasoned opinion, which Americans take for granted, is not the universal or the inevitable choice. Judicial form is not a fixed part of the landscape, but a legal institution whose merits can be debated like those of any other. If the reasoned opinion seems best to us, that judgment may rest as much on an assessment of its familiarity as on its intrinsic merits. The evident success of the French legal system in providing for the needs of a complex modern society without candid, reasoned opinions indicates that the reasoned opinion may not be so essential to the success of our legal system as we had presumed. The supposedly critical functions it serves — guidance, persuasion, constraint, and legitimacy — may be achieved well enough in other ways. The comparison casts doubt on whether the American opinion is in fact best understood solely as an effort to achieve those goals. Various features of our history and legal culture may explain our practice better than the instrumental interpretation alone.

The evidence presented here that the French legal system manages to do without genuinely reasoned opinions sheds light on the perennial debate among American theorists over the importance of "process values." Every judge who writes opinions, and every observer who assesses judicial performance, employs a complex set of criteria that values craft and rhetoric that produce well-reasoned opinions as well as the inherent wisdom of the court's resolution of the merits. In addition to these substantive and process values, however, these criteria must include a judgment as to the *relative* importance of legal reasoning as opposed to substantive outcomes. Even if few Americans would deny that legal reasoning is worthwhile or that judges

273. JEAN RENOIR, *RULES OF THE GAME* 53 (John McGrath & Maureen Teitelbaum trans., 1970) (1939).

274. Robert W. Gordon, *New Developments in Legal Theory*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 281, 288 (David Kairys ed., 1982) [hereinafter *PROGRESSIVE CRITIQUE*].

should take pains to set forth their reasoning in opinions, there is room for disagreement over how much weight legal reasoning should receive relative to the substantive merit of the outcome.

By prompting second thoughts regarding the importance of preparing reasoned opinions, I hope to contribute to the ongoing debate between partisans of process values, on the one hand, and skeptics associated with such movements as pragmatism, legal realism, Critical Legal Studies, and law and economics on the other. These rival camps disagree over the relative value of legal reasoning and substantive outcomes in judicial decisionmaking. Adherence to the traditional norms of legal reasoning — deciding cases according to precedent, identifying and implementing the statutory purpose, and insisting upon principled decisionmaking — may sometimes require a court to sacrifice a worthwhile substantive or institutional goal, such as making the law more just or efficient, or shielding the court from political attacks.<sup>275</sup> When conflicts arise between process and results, which should prevail?

Early in this century legal realists questioned the objectivity and the value of legal reasoning,<sup>276</sup> and their attack has been endorsed in recent years by members of the Critical Legal Studies movement.<sup>277</sup> Law-and-economics scholars sometimes claim that the reasoning in opinions obscures the real, economic rationale for outcomes.<sup>278</sup> Pragmatists like Judge Richard Posner argue that the reasoning in judicial opinions is often unimpressive,<sup>279</sup> and that more attention should be paid to policy analysis aimed at achieving sensible results.<sup>280</sup> While these critics hold diverse views about the substantive agenda courts should pursue, they share a skeptical attitude toward process values in general — and toward the traditional judicial opinion in particular.

275. An American analogue to the Cour de Cassation's determination to deny its creative role by writing syllogistic opinions is the U.S. Supreme Court's use of a variety of unprincipled devices to avoid politically sensitive or otherwise awkward decisions on the merits. Compare ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 111-98 (1962) (describing and defending practice) with Gerald Gunther, *The Subtle Vices of the "Passive Virtues"*, 64 COLUM. L. REV. 1 (1964) (criticizing Bickel's thesis).

276. See, e.g., JEROME FRANK, *LAW AND THE MODERN MIND* (1930); Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929); see also Moses Lasky, *Observing Appellate Opinions from Below the Bench*, 49 CAL. L. REV. 831, 839 (1961) (voicing skepticism as to whether reasons given in opinions are real reasons for decisions).

277. See, e.g., Clare Dalton, Book Review, 6 HARV. WOMEN'S L.J. 229, 231-48 (1983); David Kairys, *Legal Reasoning*, in *PROGRESSIVE CRITIQUE*, supra note 274, at 11-17; Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981); Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEG. EDUC. 518 (1986); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

278. See, e.g., Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEG. STUD. 51 (1977).

279. See supra text accompanying notes 224 to 230.

280. See POSNER, *PROBLEMS OF JURISPRUDENCE*, supra note 24, at 130-48.

By contrast, some champions of the candid and reasoned opinion do not merely claim that preparing such opinions is a worthwhile endeavor. They often go further, insisting that reasoned explication is a fundamental aim of the legal order that cannot be compromised without risking disaster. Lon Fuller, for example, thought that adjudication simply could not take place in the absence of reasoned argument.<sup>281</sup> James Boyd White thinks that "it is essential to any legal system worthy of respect that it invite the use of mind and judgment in its readers."<sup>282</sup> David Shapiro feels that judicial candor may be compromised only in the extreme case where honesty would conflict with an important moral obligation.<sup>283</sup> Ronald Dworkin believes that coherence, or "integrity" in his terminology, is a "distinct political virtue" entitled to the same weight as justice and fairness.<sup>284</sup> Charles Fried fears that "respect for the rule of law has been somewhat abraded by a generation or more of skepticism about the discipline and definiteness of law."<sup>285</sup> The implication of all of these views is that it may be necessary to sacrifice worthy substantive or institutional goals in order to serve the overriding value of reasoned decisionmaking.

The existence of a less reasoned French alternative casts a shadow on such ambitious claims for reasoned opinions, for it suggests that outcomes rather than process may be what count most in evaluating the merits of a legal system. Granting that there is *some* independent value in providing the real reasons for results reached, the French courts' not writing reasoned opinions suggests nevertheless that it is wrong to treat legal reasoning as a consideration that must be respected no matter what the cost in lost opportunities to realize worthwhile substantive goals. The aridity of the French opinion seems to reflect less attention on the part of French than American judges to such features of legal reasoning as identifying relevant precedents, implementing statutory purpose, and avoiding arbitrary distinctions. The French experience thus suggests that ruin is not the inevitable consequence of judges' failure to accord overriding weight to the values served by reasoned opinions.<sup>286</sup> Americans like White, Fuller, Dworkin, Fried, and Shapiro, who think that the candid and reasoned opinion has substantial independent value apart from the outcome it achieves, may be mistaken. Perhaps reason in opinion writing, ought to count only as one of many values, to be considered along with the

281. See Fuller, *supra* note 29, at 365-71.

282. WHITE, *supra* note 9, at 101; see also *id.* at 91-92, 158.

283. See Shapiro, *supra* note 8, at 738, 749-50.

284. See DWORKIN, *supra* note 31, at 166; see also Schauer, *supra* note 36, at 855 (describing Dworkin's project).

285. Charles Fried, *Sonnet LXV and the "Black Ink" of the Framers' Intention*, 100 HARV. L. REV. 751, 751 (1987).

286. On the other hand, if this assumption is wrong, and French judges actually *do* pay as much attention as American judges to the values of legal reasoning, even though they do not write reasoned opinions, then it would seem hard to justify the time and effort that goes into preparing American opinions. In this event, perhaps judges would do better to spend their time catching up with the backlog of cases than writing painstaking analyses of precedent and principle.

whole array of substantive and institutional concerns that may be furthered by writing an unreasoned opinion.