DO JUDGES DEPLOY POLICY?

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Ernest Hemingway propagated his own mystique.

—Duncan Kennedy[1]

In *A Critique of Adjudication: Fin de Siècle* ("*Critique*"), Duncan Kennedy presents a fascinating theory about the distinctiveness of American legal (and especially judicial) discourse. Kennedy advances this theory not only by analyzing the history of American legal discourse, but also by performing a comparative analysis of contemporary American and Continental European (civil law) legal discourses. As a result of these analyses, Kennedy locates American/Civilian difference in the American "mutation," that is, the birth of a "viral" form of internal academic critique that led to a distinctively American discursive practice: "policy" argument.

This Article examines and critiques Kennedy's particular claim to American distinctiveness by analyzing his comparative description of American and Civilian legal discourse. This Article suggests that by deploying the term "policy" in the comparative context, Kennedy constructs sophisticated but stylized portraits of distinctively American judicial discourse and of its Continental European "other." This Article argues that Kennedy's negative portrayal of Civilian legality is motivated by his particular jurisprudential projects. This portrayal functions as an object lesson for his American audience, a lesson that effectively promotes: (1) the "viral strand" in American judicial discourse; (2) a similarly viral irrationalism in theory and in politics; and (3) a resulting politicization of the legal.

Part I briefly summarizes Kennedy's description of American and Continental European judicial discourses,[2] paying particular

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1 DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE 347 (1997) [hereinafter CRITIQUE].

2 For the sake of simplicity, the term "judicial discourse" is used generally to describe legal argumentation (1) by judges, (2) before judges, or (3) about judges. This Article will,

attention to how Kennedy distinguishes one from the other. This Part explains Kennedy's "mutation" theory, according to which American judicial discourse, in response to a "viral strain" of turn-of-the-century academic critique, has become a combination of deductive and policy arguments. Part I then relates Kennedy's claim of Continental difference, according to which Civilian judicial discourse—despite certain apparent similarities with its American counterpart—is nonetheless characterized by a commitment to deduction and by an absence of policy discourse. In short, Part I stresses how "policy" discourse emerges, in Kennedy's analysis, as the locus of American/Civilian difference.

Part II disputes Kennedy's difference analysis by questioning his definition and deployment of the term "policy" in the comparative context. In Kennedy's analysis, the term "policy" is deployed, and can be understood, in two different manners. On some occasions, it is deployed as a broadly descriptive or heuristic device, as per Kennedy's definition of policy argument as *any* nondeductive argument.[3] On other occasions, the term "policy" is used as a restrictive category, as per Kennedy's claim that American judicial discourse is "very different" from its Continental counterpart because, "however true it may be that a functionally equivalent, though unrationalized *practice* [of policy discourse] is pervasive [on the Continent] . . . policy is a *standard category* in everyday American lawyer-talk" and the judicial deployment of such policy reasoning is "universally recognized and accepted" in the United States.[4]

Part II challenges Kennedy's difference or mutation analysis by offering counterdescriptions of American and Continental European judicial discourses. If "policy" is actually deployed as a broad, descriptive term that encompasses *any* nondeductive argument—i.e., if the word "policy" need *not* be used in an argument for that argument to be considered one of "policy"—then American/Civilian difference collapses, as it is absolutely undeniable that Civilian judicial systems constantly deploy nondeductive arguments. In order to make this point, this Part briefly presents several of the judicial discourses that emerge in the French private law courts, the European Court of Justice ("ECJ"), and the German Constitutional Court. If, on the other hand, "policy" is deployed as a restrictive and explicit category—

however, also stress the importance of disentangling these three meanings and their respective contexts.

[3] *See* CRITIQUE, *supra* note 1, at 109 ("I use [the term 'policy'] in its broad sense, which includes all nondeductive factors.").

[4] *Id.* (emphases added).

i.e., if the word "policy" *must* be used in an argument in order for that argument to be considered one of "policy"—then American/Civilian difference collapses once again, as it is becoming increasingly obvious that it is no longer acceptable to deploy "policy" arguments, identified explicitly as such, in the American judicial context. In order to make this point, this Part therefore analyzes how the term "policy" has been deployed in the United States Supreme Court's decisions in the 1998 and 1999 terms.

Finally, Part III examines the stakes of Kennedy's comparative analysis. Given the plausibility of a comparative analysis that would stress either the similarities or the differences between American and Civilian judicial discourses, and given the many different ways in which one could plausibly seek to articulate those similarities or differences, this Part analyzes the advantages and disadvantages of constructing and deploying the deduction/policy dichotomy in the comparative context. Finally, this Part questions how and why this taxonomy might advance Kennedy's particular projects, while it might preempt others. Part IV presents conclusions.

I. KENNEDY'S COMPARATIVE DESCRIPTION

A. *American Judicial Discourse*

Kennedy's description of American judicial discourse establishes, and hinges on, the fundamental dichotomy between (1) a deductive form of judicial application of legal norms, and (2) everything else. Kennedy names this everything else "policy."[5] According to Kennedy's analysis, mainstream American judicial discourse consists of a hodgepodge of deductive reasoning and policy argumentation: "In American judicial opinions and in doctrinal writing, the most common [argumentative] mode is neither deduction nor policy but an intermediate mode, deductive argument supplemented or 'guided' by policy argument."[6]

Kennedy offers a fascinating, and ultimately extremely convincing, narrative of how American judicial discourse has arrived at this conglomerate form. According to this narrative, the foundational moment occurred at the beginning of the twentieth century, when a particular set of politically liberal American academic authors, fed up by consistently politically conservative judicial decisions, "began to argue that the problem was that there

5 CRITIQUE, *supra* note 1, at 109.
6 *Id.* at 104.

were no correct legal answers to . . . [the] questions [raised in those cases]. This was the moment of the American mutation, the 'birth of the virus.'"[7]

According to Kennedy's narrative, the history of twentieth-century American jurisprudence springs from this "viral" moment of crisis in interpretive faith. His book represents, in large measure, the tracing of American jurisprudence's attempts to wrestle with, digest, and/or defend itself against the implications of this viral loss of faith.

Critique therefore analyzes the "genealogy" of the "virus," that is, the imprint left, or effects caused, by the progression of its "internal critique" of American legal reasoning over the course of the twentieth century.[8] As Kennedy describes it, this viral strain of American critique, by explicitly and effectively disparaging the power of deductive reasoning, eventually imperiled such canonical distinctions as those between adjudication and legislation, and between law-application and lawmaking. In the end, the critique simply claimed that "there was no way to resolve particular gaps, conflicts, and ambiguities in the existing regime without resorting to 'policy' . . . ."[9] In this way, the viral American critique came to posit a third term, "policy," that was to mediate between the terms of the now unstable canonical distinctions. The viral strain's critique of the law-application/lawmaking and adjudication/legislation dichotomies therefore resulted in the distinctively American foregrounding of "policy"-oriented interpretation.

Functioning as the mediating American term/concept/category, "policy" has had to bear the inherent tensions of those dichotomies. On the one hand, policy offers the prospect of mediating the law-application/law-making, adjudication/legislation, and even the law/politics distinctions. In other words, policy emerges as the third term that might salvage the rule of law from the viral critique. In the face of the impossibility of purely deductive application of legal norms, "policy" might offer a way to avoid jumping to the viral conclusion that judges must necessarily be engaged in the ideological and political enactment of judicial legislation.[10] On the other hand, far from depoliticizing American judicial practice, policy discourse is understood to be deeply suspect. That is, policy is understood to represent a Trojan horse that permits the tacit introduction of ideology into judicial decision

7 *Id.* at 81.
8 *Id.* at 82-92.
9 *Id.* at 83.
10 *See id.* at 109-10.

making.[11] Policy discourse in the judicial realm therefore becomes the locus of high ideological stakes within the American legal system.

American judicial discourse therefore emerges, in Kennedy's analysis, as "a hybrid in which policy argument is included as a supplement to deductive reasoning in both liberal and conservative appellate opinions."[12] Constantly exposed to viral internal critique, American judicial discourse has acknowledged the limits of deduction by constructing and deploying "policy" arguments, arguments that are themselves open to further viral critique.[13]

B. *European Judicial Discourse*

Kennedy sharply distinguishes American judicial discourse from that of Continental European legal systems, describing the latter largely in opposition to their American counterpart. According to his description, European judicial discourse emerges as deeply committed to deduction and to the passive application of legislative rules.[14] Continental Europe is the land of extreme positivism and formalism,[15] in which serious, "viral" internal critique of deductive judicial reasoning has never been developed.[16]

Of course, Kennedy fully recognizes that Civilians believe that deductive application of legal rules can fail.[17] But he asserts that the European solution is for judges merely to resolve interpretive problems by constructing legal solutions thought to be "coherent" within the overall, codified legislative scheme.[18] Even "radical Continental thinkers" fear the transgressive potential of moving beyond coherence in order to promote "social evolution" or "progress."[19] Civilians, in short, do not even feel the need to resort to "policy" debate in the first place.[20]

It is at this point that one can begin to grasp how Kennedy distinguishes between American and European judicial discourse. Although he defines "policy" as all that is "nondeductive,"[21] and

11 *See id*. at 111.
12 *Id*. at 94.
13 *See id*. at 109-13.
14 *See id*. at 36-37, 102.
15 *See id*. at 278.
16 *See id*. at 95.
17 *See id*. at 36-37.
18 *See id*.
19 *Id*. at 37.
20 *See id*. at 83.
21 *See supra* note 3.

despite his apparent acknowledgment that Europeans routinely deploy nondeductive arguments,[22] Kennedy refuses to grant that Europeans truly engage in policy discourse. In the key passage of his comparative analysis, Kennedy states:

> It is crucially important that to this day policy is a standard category in everyday American lawyer-talk. It is not just that all lawyers and judges at least sometimes do policy argument in the course of conventional legal practice. That they do it is a universally recognized and accepted fact. In this respect, the United States seems to be very different from . . . the Continent, however true it may be that a functionally equivalent, though unrationalized practice is pervasive there.[23]

In this passage, Kennedy offers his fundamental analytic twist: it is the very existence, universal recognition, and acceptance of the "standard category" known as "policy" that makes the difference between American and European judicial discourse. Civilians do not possess or deploy the concept or term "policy." In fact, as Kennedy correctly notes, it is unclear how the word "policy" should be translated into French in the first place.[24]

According to Kennedy's explanation, policy exists as a discursive response to the "viral strain" in American legal culture. This viral strain, however, is distinctively (and perhaps exclusively?) American. It is, after all, the "birth of the virus" that created "the American mutation."[25] Kennedy therefore tentatively states: "The next move seems never to have taken place in Europe, though . . . [my] impression may be wrong . . . . This move was to assert that there was no way to resolve particular gaps, conflicts and ambiguities in the existing [legal] regime without resorting to 'policy' . . . ."[26]

Having never had a "native movement of [viral] internal critique,"[27] that is, having never been properly exposed to the virus, not only do Civilian judges not truly engage in policy discourse, but Civilian academics have also maintained a naive belief in abstraction, deduction, and general coherence. European legal theory therefore emerges as blindly accepting of a dichotomy such as that between the "formal" (legal) and the "social," willing to assume (uncritically) that each side of the dichotomy actually represents a coherent category.[28] Even (and perhaps especially?)

22 *See* CRITIQUE, *supra* note 1, at 36-37, 92, 107, 109.
23 *Id.* at 109 (citations omitted).
24 *See id.*
25 *Id.* at 81.
26 *Id.* at 83.
27 *Id.* at 95.
28 *See id.* at 94-95.

the yeoman American attorney, infected with "the virus" and thus routinely arguing policy, senses the resulting American/Continental difference. Kennedy states: "As I've indicated several times already, your ordinary American lawyer is likely to find European solutions to classic legal problems blatantly formalist, in the sense of overestimating the power of deduction, and to find European legal culture in general formalist in the same sense."[29]

II. COUNTERDESCRIPTIONS

This Part takes a closer look at Civilian and American judicial discourse in order to examine and assess Kennedy's particular claim of American/Civilian difference. Can it really be the case that Civilian judicial systems, unlike their American counterpart, do not truly engage in policy discourse? In order to assess this particular claim of difference, we must first decide what we should take Kennedy to mean when he uses the term "policy." As a first step, let us use the definition that Kennedy himself proposes, namely, that "policy" be understood as a broad, descriptive term that encompasses any nondeductive argument; as Kennedy states: "I use ['policy'] here in its broad sense, which includes all nondeductive factors."[30] Can it really be the case, then, that Civilian judicial systems do not deploy nondeductive arguments?

A. *European Discourse*

1. Complexity

The law of Continental Europe is an extremely complex and varied object of analysis. The first objection to Kennedy's description of European judicial discourse must therefore be boringly technical: Kennedy tends to treat the civil law as if it were far more uniform or monolithic than it really is. However pedestrian an observation this may be—and however certain I may be that Kennedy would immediately agree with it[31]—it must nonetheless be stressed that European civil law varies enormously not only from one country to the next, but also within each country.

As any comparatist would immediately note, assimilating, for example, French with German judicial discourses under the rubric of "Continental" or "civil" law poses serious analytic problems.

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29 *Id.* at 107.

30 *Id.* at 109.

31 Kennedy does note, for example, that his analysis of Continental legal theory is "doubtless seriously distorted because [he is] much more familiar with Italian thinking than with that of any other European country." *Id.* at 92.

As a practical matter, it is difficult to tell what a decision from the French Cour de cassation[32] has in common with a decision from Germany's Federal Constitutional Court.[33] The first offers a stunningly deductive and impersonal discourse of mechanical application of civil code provisions, while the second clearly does not. Thus French Cour de cassation decisions are all structured according to the following syllogistic, single-sentence model: "The Court—Having Seen Article 1342 of the Civil Code; Whereas Plaintiff did X; Whereas Defendant did Y; Whereas the Appellate Court ruled Z; quashes the appeal."[34] On the other hand, the decisions of Germany's Federal Constitutional Court not only do not adopt such a form, but also permit, for example, signed dissents. One need only take a brief look at Justice Simon's dissent in the 1975 German abortion decision[35] to get a sense of the enormous discursive variety between different Continental judicial systems. Justice Simon supports her arguments, for example, in the following manner:

> [T]he legislature cannot be indifferent to the fact that illegal interruptions of pregnancy lead even today to injuries of health; and this is true not only in the case of abortions by "quacks" and "angel-makers," but also, to a greater extent, in the case of procedures undertaken by physicians because illegality discourages the full use of modern equipment and assistance of the required personnel or hinders the necessary follow-up treatment. Further, the commercial exploitation of women inclined to an abortion in Germany and in foreign countries and the social inequality connected with it appears as a drawback; better situated women can, especially by traveling to neighboring foreign countries, much more easily obtain an abortion by a physician than poorer or less clever ones . . . .[36]

Faced with such an example, one cannot help but begin to wonder if German judicial discourse has, in fact, significantly more in common with its American than with its French counterpart, and thus to feel uneasy with Kennedy's claim that Civilian judicial discourse does not contain policy discourse (understood to mean

32 The Cour de cassation is the highest court in the French private law judicial hierarchy.

33 The German Federal Constitutional Court is a separate German Court that performs, inter alia, abstract and concrete judicial review of legislation.

34 Mitchel de S.-O.-l'E. Lasser, *"Lit. Theory" Put to the Test: A Comparative Literary Analysis of American Judicial Tests and French Judicial Discourse*, 111 HARV. L. REV. 689, 746 (1998) [hereinafter Lasser, *"Lit. Theory"*].

35 *See Decision of February 25, 1975*, [1975] BVerfGE 1, *reprinted in* MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 96 (2d ed. 1994).

36 *Id.* at 112.

"any nondeductive factors"[37]). Given this state of affairs, it is quite debatable whether it makes sense to speak of "Continental" judicial discourse in the first place.

The next problem, deeply related to the first, concerns the enormous discursive variations *within* each of the national legal systems. Many, perhaps even most, Continental legal systems divide their judiciaries into several branches. In France, for example, the private law courts are separated entirely from the public/administrative law courts, which are themselves separated from the Constitutional Council.[38] Anyone familiar with the French legal system could not help but recognize the tremendous discursive variation between the decisions rendered by these three categories of tribunals (never mind the significant variation between the discourses within the hierarchy of either the private or the public law courts). Then, of course, there is the further complication that yet another layer of judicial discourses has been added to those already present within each of the national legal structures, namely, the discourses deployed at the level of the European Union ("EU").

In short, Continental judicial discourse is extremely complex and varied, and therefore calls for specific analysis and fine-grained study. This Part therefore suggests the basic outlines for the study of two sets of judicial discourses: those of the French Cour de cassation and of the ECJ.

2. The Propitious Example: The French Cour de cassation

No judicial system appears to lend more support to Kennedy's analysis of American/Continental difference than the French appellate private-law judicial system. In particular, it is hard to conceive of a more deductively formalist discourse than that of the decisions of the Cour de cassation. These decisions are composed, quite simply and explicitly, of single-sentence syllogisms.[39] Furthermore, as Kennedy notes, the French do not even have a word for "policy" in the first place.

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37 CRITIQUE, *supra* note 1, at 109.

38 This Article will not bother to address the conundrum of whether, according to classic Civilian definitions, the administrative and constitutional courts qualify as veritable judicial "courts." Given that the question is hotly debated in Europe, and given the undeniably important impact that the ECJ and the constitutional courts are having—both de facto and de jure—on Civilian legality, I therefore include ECJ and constitutional decisions in my analysis of contemporary Continental judicial discourse.

39 *See supra* note 34 and accompanying text.

As I have analyzed in detail elsewhere,[40] however, the interpretive practice of the Cour de cassation only *appears* to be purely deductive. There exists, within the French judicial system, a vibrant and well-hidden discursive sphere in which French *magistrats*[41] argue not so much in terms of textual deduction, but rather in terms of the advantages and disadvantages of adopting one interpretive decision over another. In this hidden or unofficial discursive sphere, French *magistrats* argue overtly in terms of, for example, equity,[42] legal adaptation to social needs,[43] and institutional competence.[44]

In an excellent example, Advocate General Charbonnier argues to the Cour de cassation that it should abandon its comparative negligence rule in favor of a strict liability rule in automobile accident cases.[45] Charbonnier offered a plethora of policy arguments, including social policy arguments ("social solidarity" should protect accident victims, regardless of their fault),[46] economic policy arguments (although total indemnification of victims will increase insurance costs, it will decrease national health care costs),[47] administrative policy arguments (the new rule would "disencumber and expedite" legal procedure),[48] and institutional policy arguments (judges possess the power to establish normative rules, and to adapt them in order to "facilitate the work of the legislature" and to keep up with the evolution of modern society).[49]

As soon as one considers the French civil judicial system's internal discourse, it therefore becomes apparent that French appellate judicial discourse is composed of a combination of textual deduction and policy hermeneutics. French judicial discourse constantly offers what Kennedy terms "the content of policy argument," namely, "argument about the desirability of a subrule . . . in terms of some set of social or legal institutional values," such as "utility, extralegal rights, or morality," "judicial

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

41 French judges and other quasi-judicial officers.

42 *See* Lasser, *Judicial (Self-)Portraits*, *supra* note 40, at 1384-86.

43 *See id*. at 1382-84.

44 *See id*. at 1386-88.

45 Conclusions of Advocate General Charbonnier, Judgment of July 21, 1982, Cass. 2e civ., 1982 D.S. Jur. 449-53, *translated in* Lasser, *Judicial (Self-)Portraits*, *supra* note 40, at 1392-98 (citations omitted).

46 *Id*. at 450.

47 *See id*.

48 *Id*.

49 *Id*. at 449-50.

competence," or "administrability."[50] What Kennedy states in the American context—that judicial discourse is characterized by "deductive argument supplemented or 'guided' by policy argument,"[51]—therefore holds true in the French context as well.

Kennedy's definition of the distinctiveness of American judicial discourse thus collapses, even when it is deployed in the propitious comparative context of French private law. The pervasive discursive practice within each system is to offer "the *content* of policy argument," i.e., nondeductive arguments that can be *characterized* as "policy arguments."

3. The Difficult Example: The European Court of Justice

The discourse of the ECJ offers even less support for Kennedy's claim of policy-based American distinctiveness. Published in tandem, the ECJ decisions and accompanying "opinions" of the court's Advocates General clearly demonstrate that legal discourse at the EU level is utterly dominated by arguments over large-scale, substantive policy issues.

Perhaps the single most important defining characteristic of ECJ discourse, as published and readily available, is that it offers a multiplicity of views on every ECJ case. ECJ decisions, for example, are always published alongside the arguments (called "opinions") offered by one of the court's permanent *amici*, the Advocates General, and are often accompanied by the "Report" of one of the court's justices.[52] At a minimum, therefore, a published ECJ decision might offer some three different takes on every controversy at bar (the Court's, the Advocate General's, and the Report's). In fact, the published decision offers many more views than even this would suggest, for the primary purpose of the Report is to summarize the arguments of each of the parties to the case, including those arguments advanced by any and all member states and/or EU institutions that weighed in on the controversy. The Opinion of the Advocate General does the same, as it suggests its own solution to the controversy only after having presented and considered the positions taken by the assorted parties. Even the ECJ decision tends to canvass and respond to these assorted views.

50 CRITIQUE, *supra* note 1, at 99.

51 *Id.* at 104.

52 The Report is a sort of bench memorandum, written by one of the members of the ECJ, that summarizes the arguments submitted by the various parties to the case. This institution exists in France as well. *See* Lasser, *Judicial (Self-)Portraits*, *supra* note 40, at 1355-63.

It should not, of course, be surprising that so many arguments are presented and considered in ECJ cases. The arguments are, after all, presented by the governments of the member states and by the institutions of the EU, i.e., by entities demanding significant respect. That said, the sheer number of arguments presented constructs a peculiar discursive or argumentative context, in particular, one in which legal interpretation is deeply, persistently, and publicly controverted. This multifaceted interpretive controversy, laid out in detail for all to see, places the ECJ and its Advocates General in a position of having to explain and justify what now appear to be interpretive *choices*.

How then do the parties, the Advocates General, and the ECJ justify their interpretive choices? First and foremost, they do so by referring to the ECJ's case law. The opinions of the Advocates General, for example, *always* refer to the ECJ's jurisprudence,[53] typically cite some six to twelve ECJ decisions,[54] and tend to quote significant portions of these decisions.[55]

Once the opinions have referred to the court's case law, they often spend several pages doing just the "kind of internal critique and hopeful reconstruction of judicial opinions that," according to Kennedy, "is the bread and butter of American critical legalism," but that "Continentals don't do."[56] In an effort to sway the court, they perform very detailed, almost academic, historical reconstructions and analyses of the development of the court's case law over time. Advocate General Tesauro's opinion in *Brasserie du Pêcheur*[57] offers a good example. In subsection (a) of the opinion, entitled "The obligation on member states to make reparations for failures to fulfill obligations as affirmed in the court's case law: the *Francovich* judgment and its precursors,"[58] Tesauro argues:

> 15. The judgment in *Francovich*, which is bound to be the starting point for any discussion of state liability in damages for infringements of Community law, still constitutes the court's

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

54 *See, e.g.*, Cases C-46/93 and C-48/93, Brasserie du Pêcheur v. Germany, [1996] CEC (CCH) 295, 298-342 (1996); Case C-5/94, *Ex parte* Hedley Lomas, [1996] CEC (CCH) 979, 982-1016 (1996).

55 *See, e.g.*, Cases 143/88 and C-92/89, Zuckerfabrik Süderdithmarschen AG v. Hauptzollamt Itzehoe, [1992] 2 CEC (CCH) 468, 496 (1991); Cases C-6/90 and C-9/90, Francovich & Ors v. Italian Republic, [1993] 1 CEC (CCH) 604, 616 (1991).

56 CRITIQUE, *supra* note 1, at 94-95.

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

58 Brasserie du Pêcheur, [1996] CEC (CCH), at 306 (emphasis added).

> most precise response in this area. The case turned on . . . . Consequently, the court was asked . . . .
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> Although it found . . . the court held . . . .
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> 16. Turning to . . . the court first called to mind . . . .
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> More specifically, the court inferred . . . . First, it pointed out that . . . .
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> The court also stressed that the possibility of obtaining redress from the member state is . . . .
>
> Secondly, as it had already done in the judgment in *Humblet*, [the ECJ] derived and inferred . . . .
>
> . . . .
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> 18. It should not be overlooked that statements relating to the obligation to provide compensation for breaches of Community law of various kinds are to be found in the court's case law, if only incidentally, since the 1960s. I would refer in the first place to the judgment in *Humblet*, which I have already mentioned, where the court held in particular that if it: ". . . ."
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> . . . .
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> 20. The affirmation of the obligation . . . is even more direct and explicit in *Russo v. AIMA*, where the court held that: ". . . ."
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> 21. It is unquestionably clear from the above dicta, therefore that, ...
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> . . . .
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> However, the case law makes it clear that . . . .
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> 22. That case law seems to have been overtaken from this particular point of view by the judgment in *Francovich*, in which . . . .[59]

This passage demonstrates several of the *characteristic* features of Advocate General opinions: citation and quotation of several decisions, reference to the court's jurisprudence as "case law," and reference to that case law as "bound to be the starting point for any discussion" on the legal issue. In short, it constructs a detailed historical narrative of the court's case law. It thereby identifies, describes, and/or constructs "trends" or "tendencies" in the "development" of that case law in order to argue that the court should adopt a particular position in the present case.[60]

Finally, analysis reveals that EU legal discourse constantly explains and justifies its interpretive choices by referring to a relatively small set of substantive policy concerns. In particular, the parties (including the EU member states and institutions), the Advocates General, and the ECJ itself tend to approach, consider,

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[59] *Id.* at 306-08 (citations omitted). Advocate General Charbonnier's Conclusions referred to above engages in an extremely similar analytic practice. *See supra* notes 46-50 and accompanying text.

[60] *See, e.g.*, Hedley Lomas, [1996] CEC (CCH), at 992-94.

and resolve legal controversies not only in terms of the specific purposes that appear to underlie a specific piece of EU legislation, but also in terms of very broad and far-reaching "meta" purposes that are often claimed to sustain and motivate the EU legal order as a whole.

The discursive universe of the Advocates General (and of the ECJ) is characterized and defined by this nondeductive interpretive stance. The Advocates General constantly resolve legal controversies by analyzing them in terms of fundamental and recurring "meta" issues of legal policy, such as "the effectiveness" of Community law, EU "institutional balance," "legal certainty and uniformity," and the "legal protection" of Community rights. This interpretive method is patently purposive or policy oriented. The Advocates General argue that the ECJ has resolved (and/or should resolve) a given case in one way or another in order to advance these essential Community purposes or policies. In his *Brasserie du Pêcheur* opinion, for example, Advocate General Tesauro treats the ECJ's case law in just such a manner. He argues:

> 17. What was contemplated [by the ECJ], therefore, was the means made available in order to reinforce the effectiveness of Community provisions through the effectiveness of the judicial supervision of the legal interests created by those provisions and likewise in order not to leave member states' failures to fulfill obligations without—inter alia, tangible—consequences.
>
> Consequently it is precisely in the light of those objectives that the position of the individual has been used and given its proper importance. *The states' financial liability vis-à-vis individuals for loss or damage caused by legislative inaction has been created by the court in the final analysis as an instrument for securing protection for individuals and thereby also the proper implementation of Community law*.[61]

As this passage readily demonstrates, Advocate General Tesauro understands the ECJ to be establishing doctrines in order to achieve important EC "objectives," not because some provisions of the EC treaties, interpreted deductively, require such an interpretation; rather, the court's jurisprudence in this doctrinal area has been intentionally "created" for "instrumental" reasons, namely, to "secure" the objective of protecting individual interests. Furthermore, this objective appears to be instrumental as well. Securing the protection of individual interests "thereby" ensures an even grander policy objective, "the proper implementation of

61 Brasserie du Pêcheur, [1996] CEC (CCH), at 307 (emphasis added).

Community law."[62] According to this portrait, the ECJ *uses* its case law as a *means* to promote and secure particular policies. The interpretations of the European Community players are thus almost always oriented toward achieving some large-scale policy *end*. It is for this reason that the academic *doctrine* that surrounds the ECJ speaks incessantly of "teleological interpretation."[63]

In this context, it is once again very difficult to support Kennedy's claim that the presence of policy argument is what distinguishes American from Continental legal discourse. Whether publicly, as in the ECJ (or even the German Constitutional Court) context, or privately, as in the French Cour de cassation's internal context, Continental European judicial discourse perpetually engages in explicitly nondeductive arguments, arguments that, by Kennedy's own broad definition, therefore qualify as arguments of "policy."

B. *American Judicial Discourse*

Maybe the problem with the comparative counteranalysis just performed is that it deploys far too broad a definition of "policy." It cannot really be a great surprise that by using Kennedy's definition of policy—i.e., "any nondeductive factor"—one finds "policy" everywhere, even in the French Cour de cassation. Maybe the solution, then, would be to restrict the definition to cover only those policy arguments that explicitly identify themselves as such. For a judge to deploy policy discourse, it would therefore not be enough for her to refer to nondeductive arguments; she would have to support her arguments by making an explicit reference to "policy," whether it be to economic policy, social policy, institutional policy, or otherwise. The term or category "policy" would have to be used.

Kennedy's articulation of American/Civilian difference as the presence or absence of policy discourse might well be more promising if "policy" is understood in this limited or restricted manner. However, a threshold question emerges, one that might at first blush appear to be too obvious to be worth asking: do *American* appellate courts actually engage in such policy

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62 *Id.*

63 *E.g.*, JOXERRAMON BENGOETXEA, THE LEGAL REASONING OF THE EUROPEAN COURT OF JUSTICE: TOWARDS A EUROPEAN JURISPRUDENCE 250-58, 265 (1993); HJALTE RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE 36, 148, 151, 161, 168, 180, 286, 377, 380, 481, 484 (1986); Kenneth Lord, *Bootstrapping an Environmental Policy from an Economic Covenant: The Teleological Approach of the European Court of Justice*, 29 CORNELL INT'L L.J. 571 (1996); David Mazzarella, *The Integration of Aviation Law in the EC: Teleological Jurisprudence and the European Court of Justice*, 20 TRANSP. L.J. 353 (1992).

discourse? The answer to this question turns out to be fairly complex.

If one uses the broad definition of "policy," then Kennedy is quite correct to conclude that "[i]n American judicial opinions and in doctrinal writing, the most common [argumentative] mode is neither deduction nor policy but an intermediate mode, deductive argument supplemented or 'guided' by policy argument."[64] As I have described elsewhere, American judicial discourse is a conglomerate discourse that not only fuses together deductive and policy elements, but also engages in what appears to be a constant and perpetual cycle of give-and-take between them.[65]

United States Supreme Court decisions that establish and deploy "multipart" or "multiprong" judicial "tests" offer perhaps the clearest example of this double quality (deduction + policy) of American appellate judicial discourse. On the one hand, the form and discourse of these "test-method" decisions signify the interpretive necessity of grammatical/formalist textual application. These decisions are presented as the mechanically *deductive* application of judicial "tests," which are composed of two to four norms that are identified as numbered "parts" or "prongs" and that are stated in the categorical fashion of a statute.[66] On the other hand, the "prongs" of the "tests" are substantively oriented toward a hermeneutic analysis of the "purposes" and "effects" of the constitutional or statutory provision at issue. Test-method opinions therefore focus their analysis on the purposes or policies that the given constitutional or statutory provision is supposedly meant to promote. Test-method opinions therefore engage, inter alia, in protracted social, economic, and institutional policy debates.[67] United States Supreme Court judicial interpretation, as exemplified by test-method opinions, therefore emerges as a conglomerate approach that welds together the discourses of deductive grammar and policy hermeneutics.

That said, it is worth pausing a moment to consider how I am using the term "policy" in this context. In my description of American test-method opinions, I mean to say that the Supreme Court routinely deploys a series of arguments that can fairly be *described* as "policy" arguments (especially if, as does Kennedy, one defines "policy" argument broadly as all nondeductive arguments). Thus, for example, in *Complete Auto Transit, Inc. v.*

64 CRITIQUE, *supra* note 1, at 104.

65 *See* Lasser, *"Lit. Theory," supra* note 34, at 761-70.

66 *See id*. at 721.

67 *See id*. at 712, 715, 739.

Brady,[68] Justice Blackmun, writing for a unanimous Court, offers the following argument for overturning the rule established in one of the Court's precedents:

> There is no economic consequence that follows necessarily from the use of the particular words, "privilege of doing business," and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect. Simply put, the *Spector* rule does not address the problems with which the Commerce Clause is concerned. Accordingly, we now reject the rule of *Spector* . . . .[69]

I have no problem categorizing the Court's reasoning as deploying—or at least suggesting—several "policy" arguments, including an economic policy argument (it would be bad economic policy to maintain the *Spector* rule), an interpretive policy argument (it would be bad interpretive policy to apply the formalist *Spector* rule), and an institutional policy argument (it would be bad institutional policy for the Court to maintain the *Spector* rule instead of addressing "the problems with which the Commerce Clause is concerned"). It is important to note, however, that the Court never actually uses the term "policy" anywhere in the passage.[70] Instead, the Court is simply engaged in a discursive and interpretive practice that can be *broadly characterized* as "policy" argument; that is, the Court supports its position with arguments that are not tied deductively to the text being interpreted.

If, however, in an attempt to differentiate between American and Civilian judicial discourse, we restrict the definition of "policy," it becomes distinctly less clear that American judges deploy self-identified "policy" arguments. In other words, it is not at all certain, at the fin de siècle, that it is "universally recognized and accepted"[71] practice for American courts—and thus advocates—to support their arguments by making explicit reference to "policy."

In an attempt to get a sense of whether "policy"—now defined narrowly—really is a "standard category in everyday American lawyer-talk,"[72] and whether the judicial deployment of policy reasoning really is "universally recognized and accepted,"[73] it may be worth asking whether, for example, the United States Supreme Court actually deploys the term/category "policy" when

68 430 U.S. 274 (1977).
69 *Id.* at 288-89 (citations omitted).
70 *See id.*
71 CRITIQUE, *supra* note 1, at 109.
72 *Id.*
73 *Id.*

explaining the grounds for its interpretive decisions. The short answer is that at the fin de siècle, it does not.

A detailed search of all United States Supreme Court decisions from the 1998 and 1999 terms demonstrates that it is extraordinarily rare for the Justices to use the term/category "policy" in the way that Kennedy describes, that is, as a nondeductive argument deployed in support of an interpretive position. "Policy," it must be said, is a term that does surface over and over again in the Court's opinions. The great majority of the time, however, the term is used to mean an "insurance policy"; "company policy" (e.g., a company's sexual harassment policy); "administrative," "state," or "agency policy" (e.g., a police department's policy to allow members of the media to ride along with the police making arrests); or "federal" or "congressional policy" (e.g., "federal Indian policy").

The cases do offer a few other uses of the term. In many cases, for instance, the Court refers to the "policy" of a statute or act of Congress. It is therefore common to find references, for example, to "the purpose and policy of the ADA,"[74] or to "the two recognized policies underlying Chapter 11,"[75] or generally, to the "____ Act's policy of ____."[76] In such cases, however, the term "policy" is used merely as a close substitute for the term "purpose."[77] It is used to express the purpose supposedly served by the statute, not to express a nondeductive reason for interpreting the statute in one way or another.

The cases do evince a second, if quite infrequent, use of the term that corresponds more closely to Kennedy's notion of a nondeductive reason for an interpretive decision. In a small handful of cases, the Court makes it clear that a party had advanced a "policy" argument over the course of litigation. I was unable, however, to find a single instance in which the Court's explicit reference to such a policy argument was not followed by the Court's explicit *rejection* of the argument. Thus in one case the Court states:

> Although NASA's and NASA-OIG's narrow reading of the phrase "representative of the agency" is supported by the text of neither [of the statutes], they also present broader—but ultimately unpersuasive—arguments of policy to defeat the application of [the statutes] to OIG investigations.
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> . . . .

74 Sutton v. United Airlines Inc., 527 U.S. 471, 506 (1999).

75 Bank of Am. Nat'l. Trust & Sav. Ass'n v. 203 No. LaSalle St. P'ship, 526 U.S. 434, 453 (1999).

76 *E.g.*, El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 487 (1999).

77 *See id.*

> We must presume, however, that Congress took account of the policy concerns on both sides of the balance when it decided to enact the [statutes].[78]

Similarly, the Court argues in another decision:

> Finally, the Kawaauhaus maintain that, as a policy matter, malpractice judgments should be excepted from discharge, at least when the debtor acted recklessly or carried no malpractice insurance. Congress, of course, may so decide. But unless and until Congress makes such a decision, we must follow the current direction [the statute] provides.[79]

In yet another decision, the Court argues: "Moreover, . . . L'anza contends that its construction is supported by important policy considerations. . . . [W]hether or not we think it would be wise policy to provide statutory protection for such price discrimination is not a matter that is relevant to our duty to interpret the text of the Copyright Act."[80]

In each of these instances, the reference to policy therefore serves as a signal for the Court's refusal to consider the argument.[81] In the Court's estimation, it is simply inappropriate to ask the Court (as opposed to Congress) to rule on policy matters or on policy grounds.[82]

This notion of judicial role violation brings us to a third small set of cases that explicitly deploys the term/category "policy." In these infrequent instances, a Justice writing in a separate opinion (usually a dissent) uses the term to denounce a position (usually held by the majority decision) as wantonly violating judicial role constraints. Justice Thomas, who, with Justice Scalia, appears to use this line of critique more frequently than his colleagues, deploys it in his dissent in *Mitchell v. United States*.[83] He blames the majority for following a 1965 precedent, *Griffin v. California*,[84] which he criticizes in the following manner: "*Griffin* constitutionalizes a policy choice that a majority of the Court found desirable at the time . . . . This sort of undertaking is not an

78 Nat'l Aeronautics & Space Admin. v. Fed. Labor Relations Auth., 527 U.S. 229, 243, 245 (1999).

79 Kawaahau v. Geiger, 523 U.S. 57, 64 (1998).

80 Quality King Distrib., Inc. v. L'anza Research Int'l, Inc., 523 U.S. 135, 145, 153 (1998).

81 It would be interesting to examine whether the parties had actually used the term "policy," or whether it is the Court that labels an argument as one of "policy" in order to reject it out of hand. Such an analysis, unfortunately, lies beyond the scope of this Article.

82 *See* Brogan v. United States, 522 U.S. 398, 408 (1998) ("Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so . . . .").

83 526 U.S. 314 (1999).

84 380 U.S. 609 (1965).

exercise in constitutional interpretation but an act of judicial willfulness that has no logical stopping point."[85] In a dissent to a certiorari denial, Thomas levels a similar charge against the decision rendered by a Sixth Circuit panel: "As with its void-for-vagueness holding, the [Sixth Circuit] panel majority's quarrel with the wishes of the Ohio Legislature on this score appears to be grounded in abortion policy, not constitutional law."[86] In his *Calderon v. Thompson*[87] dissent, Justice Souter exclaims: "Whatever policy the Court is pursuing, it is not the policy of [the congressional Act]."[88] Finally, Justice Scalia, in his *Minnesota v. Carter*[89] concurrence, offers the following line of argument:

> I am not sure of the answer to those policy questions. But I am sure that the answer is not remotely contained in the Constitution, which means that it is left—as *many*, indeed *most*, important questions are left—to the judgment of state and federal legislators. We go beyond our proper role as judges in a democratic society when we restrict the people's power to govern themselves over the full range of policy choices that the Constitution has left available to them.[90]

In each of these examples, the disgruntled Justice explicitly disparages the judicial entry into the field of "policy" as a per se violation of the judicial role.

"Policy," in short, is a term/category that is extremely rarely used by United States Supreme Court Justices at the fin de siècle. Furthermore, on those rare occasions when it is deployed according to Kennedy's meaning (a nondeductive reason for a decision), "policy" functions more or less as a *dirty word*. According to the Court's own discourse, "policy" argument emerges as precisely what judges should *not* be doing. It is almost always explicitly associated with congressional or legislative prerogatives, i.e., with the "political." In the current state of Supreme Court discourse, if a Justice associates the word "policy" with judges or courts, it is almost invariably in order to condemn the association.[91]

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85 *Mitchell*, 526 U.S. at 343 (Thomas, J., dissenting).

86 Voinovich v. Women's Med. Prof'l Corp., 523 U.S. 1036, 1039 (1998) (Thomas, J., dissenting).

87 523 U.S. 538 (1998).

88 *Id.* at 573 (Souter, J., dissenting).

89 325 U.S. 83 (1998).

90 *Id.* at 98-99 (Scalia, J., concurring).

91 I would like to stress that this analysis does not claim that policy, narrowly defined, has never been an important element in American appellate judicial discourse. In this regard, it may be worth noting that in the 1998-99 period, the Supreme Court did briefly quote from two earlier Court decisions (from 1981 and 1989) that explicitly deployed

In fact, after this exhaustive search of two years' worth of United States Supreme Court discourse at the fin de siècle, I could only find one clear example of a Justice using the term/category "policy" as if it were a legitimate basis for deciding a legal issue. In his dissent in *Crawford-El v. Britton*,[92] Chief Justice Rehnquist addresses the issue of whether immunity should be extended to a corrections officer in a particular context. He writes:

> Every time a privilege is created or an immunity extended, it is understood that some meritorious claims will be dismissed that otherwise would have been heard. Courts and legislatures craft these immunities because it is thought that the societal benefit they confer outweighs whatever cost they create in terms of unremedied meritorious claims. In crafting our qualified immunity doctrine, we have always considered the public policy implications of our decisions . . . .
>
> . . . .
>
> The policy arguments thus point strongly in favor of extending immunity in the manner I suggest.[93]

This passage finally offers us an example of a Supreme Court Justice actually arguing for a result on the basis of "policy." Unlike the prior examples that rejected, out of hand, the consideration of policy, this passage embraces it, even going so far as to place "courts and legislatures" on the same normative plane: Both weigh "social benefits," "consider . . . public policy implications," and "craft immunities" accordingly.[94] This passage, however, represents but an extremely rare example of explicit policy discourse in fin de siècle Supreme Court decisions, and a rather insignificant example at that. It is after all, but a single short passage from a dissenting opinion.

"policy" arguments. *See* Cunningham v. Hamilton County, Ohio, 527 U.S. 198, 203-04 (1999). The Court states:

> In addition, the rule is in accordance with the sensible policy of avoiding the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment.

Id. (quoting Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981)). *See also* Richardson v. United States, 526 U.S. 813, 820 (1999) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." (quoting Gomez v. United States, 490 U.S. 858, 864 (1989))). It may well be the case, in fact, that policy argument once played a more important role in American appellate discourse. The refusal to use the term "policy" openly may therefore represent a contemporary, conservative backlash against earlier, purportedly "activist," liberal decision making. Such a historical analysis unfortunately lies beyond the scope of this Article.

92 523 U.S. 574 (1998).

93 *Id*. at 606, 609 (Rehnquist, C.J., dissenting).

94 *Id*. at 606.

On the whole, then, it is simply "a legal 'blunder'" to make explicit arguments of "policy" in current United States Supreme Court discourse, whether or not they are phrased "in explicitly distributive, or explicitly religious, or explicitly 'partisan' terms."[95] The narrowing of the definition of "policy" to cover only those arguments that explicitly identify themselves as policy arguments therefore leads to the surprising conclusion that, at this particular moment in time, the Supreme Court simply does not argue explicitly in terms of policy.

Of course, the Court constantly engages in arguments that can be broadly and appropriately *characterized* as "policy arguments." It routinely deploys all of the types of policy arguments that Kennedy so brilliantly describes, maps, and analyzes, for example, in *A Semiotics of Legal Argument*[96] and *Freedom and Constraint in Adjudication*.[97] The Court therefore regularly argues on the basis of what Kennedy calls "the content of policy argument," that is, "argument about the desirability of a subrule in terms of some set of social or legal institutional values," such as "utility, extralegal rights, or morality," or "judicial competence," "administrability," and "federalism."[98] But then again, if we are willing to use this broad definition of "policy," Civilian judges routinely argue in this fashion as well.

III. WHAT IS THE DIFFERENCE?

Given the counterdescriptions of American, French, and ECJ legal discourses briefly offered above, what "really" distinguishes the American discourse from the other two? The difference cannot simply be that American judicial discourse consists of "deduction 'guided' by policy,"[99] whereas Continental discourse does not deploy—and may not even possess—"policy" discourse at all. If "policy" is defined broadly, and thus used as a merely descriptive term for nondeductive arguments, then American, German, French, and ECJ legal discourses are *all* composed of some conglomerate of deductive and policy elements. As I have stated elsewhere, for example, "French and American judicial discourses therefore reveal themselves to be historically and culturally contingent variations on the same basic combination of

95 CRITIQUE, *supra* note 1, at 110.

96 Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75 (1991).

97 Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986).

98 CRITIQUE, *supra note* 1, at 99.

99 *Id.* at 104.

formalist [deductive] and hermeneutic [policy-oriented] reading."[100]

If, on the other hand, "policy" is defined narrowly, and thus only covers those arguments that support interpretive decisions by referring explicitly to "policy" (of whatever kind), then, at this particular historical moment, even American appellate decisions do not deploy such policy discourse. In short, American judicial discourse does not overtly deploy the term "policy" and Continental judicial discourses constantly deploy substantive policy arguments.

Are we to conclude, then, that American and Continental judicial discourses are fundamentally similar? This question of similarity versus difference is an impossibly difficult and even intractable question, one that is currently all the rage in comparative law circles.[101] Rather than delve too deeply into these sectarian disciplinary debates, suffice it to say that the comparatist can readily and legitimately choose to stress either similarity or difference, or both. At the very least, she picks and defines *what* to compare (and thus constructs in part the objects of her analysis) and decides *how* she is going to compare them (and thus constructs a methodology that contributes to the construction of the objects of her analysis).[102]

Any comparative description focusing on elements of what is being described, treats such elements as significant, characteristic or meaningful for some reason or another, and does so at the expense of other facets of the described object. This set of analytic decisions is neither "correct" nor "incorrect," but merely more or less useful for the sake of advancing a particular comparative project. The comparative question therefore becomes: Why, given all of the interesting, insightful, and entirely legitimate ways that one can analyze, describe, and compare, would one want to analyze, describe, and compare these particular objects in this particular way?

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100 Lasser, *"Lit. Theory," supra* note 34, at 739.

101 *See, e.g.*, Mitchel de S.-O.-l'E. Lasser, *A Matter of (Non-)Understanding*, *reprinted in* COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS, A CONFERENCE AT THE MILLENIUM (Pierre Legrand & Roderick Munday eds.) (forthcoming 2001); Pierre Legrand, *Codification and the Politics of Exclusion: A Challenge for Comparativists*, 31 U.C. DAVIS L. REV. 799 (1993); Pierre Legrand, *Structuring European Community Law: How Tacit Knowledge Matters*, 21 HASTINGS INT'L & COMP. L. REV. 871 (1998); Ugo Mattei, *The Issue of European Civil Codification and Legal Scholarship: Biases, Strategies and Developments*, 21 HASTINGS INT'L & COMP. L. REV. 883 (1998).

102 *See* William Alford, *On the Limits of "Grand Theory" in Comparative Law*, 61 WASH. L. REV. 945 (1986); Gunter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411, 434-40 (1985).

My sense is that Kennedy's comparative analysis is the latest in an extremely distinguished line of American comparative analyses whose guiding purpose is not merely comparison for comparison's sake (if such a thing can even be said to exist), but rather comparison as a means of identifying and describing what is peculiar or special about the American common-law system, precisely in order to stress some facet of American law that the comparatist wishes to promote or defend, whether at home or abroad, or both. As Kennedy states:

> This chapter has two goals: first, to contribute to the comparative law enterprise of distinguishing what I will call "American critical legalism," an odd combination of utter faith and utter distrust in law, from Western European attitudes; second, to explain the difference by identifying the "viral" strain of ideology-critique in American legal thought, the strain whose relation to the "body" of thought is the theme of this . . . book.[103]

This tactically reflexive American comparative tradition began most notably with Roscoe Pound, whose comparative legal history promoted a vision of legal progress designed to defend against possible American relapses into mechanical jurisprudence.[104] The tradition then continued with John Dawson, whose *Oracles of the Law* offered a comparative ode to the American common-law system that promoted Llewellyn's vision of the Grand Style of American judicial decision making.[105]

This American comparative tradition is now taken up by Duncan Kennedy, whose primary project is to foster the "viral strand" in American judicial discourse. As Kennedy explicitly states: "This book is an attempt to develop and extend this [viral] American form of internal critique."[106]

Kennedy promotes this project by advancing traditionalist and nationalist claims. First, argues Kennedy, the viral strand of internal critique is old and time-honored. It dates back, impressively and conveniently enough, one hundred years, to "the turn of the century."[107] Its "genealogy," furthermore, is not merely respectable, but positively noble. The progenitors are none other

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103 CRITIQUE, *supra* note 1, at 73.

104 *See* Mitchel de S.-O.-l'E. Lasser, *Synthetic Readings of Pound's Jurisprudence*, *reprinted in* THE MASTERS OF COMPARATIVE LAW (Annelise Riles ed.) (forthcoming 2001) [hereinafter Lasser, *Pound's Jurisprudence*]; ROSCOE POUND, JURISPRUDENCE (1959).

105 *See* JOHN DAWSON, THE ORACLES OF THE LAW (1968); KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960).

106 CRITIQUE, *supra* note 1, at 82.

107 *Id.* at 81.

than "Holmes, Wesley Hohfeld, Henry Terry, Arthur Corbin, Walter Wheeler Cook, Felix Cohen, Robert Hale, and Llewellyn."[108]

Second, the viral strand of internal critique, as the above list of ancients suggests, is distinctively American. The "birth of the virus" one hundred years ago constitutes precisely "the moment of the *American* mutation."[109] It is in this context of the rehabilitation and normalization of American critical jurisprudence that Kennedy's comparative analysis comes into play. It is no accident that Kennedy immediately follows his American "Summary genealogy" section[110] with his explicitly comparative section, "The Continent versus the United States."[111] The comparative description of the Continent as rigidly formalist, or at least rigidly rationalist, promotes Kennedy's underlying argument: "Foster the viral," he almost explicitly argues, "for it is the Grand American Tradition."[112] "Don't be European: They look almost pre-Realist."[113]

Needless to say, this argument—that Europeans represent the perils of prerealist thinking—is hardly novel. Kennedy himself notes: "The history of American legal thought has been written overwhelmingly by realists and . . . their mainstream successors, who have had a passionate commitment to the ideas that there was a misguided Formalist Period and that European legal thought in general is prerealist."[114] But Kennedy moves the argument to a new level of sophistication. Dawson had already made a great advance by sustaining the argument while recognizing that, for example, French judicial decision making was not as formalist as it appeared to be. Dawson argued that despite the formalist appearance of French judicial decisions, "the results reached in particular cases usually become intelligible when matched with the results of other cases . . . . [O]ne usually discovers continuity in patterns of action, realism, and practicality in the solutions

108 *Id.* at 82.

109 *Id.* at 81 (emphasis added).

110 *Id.* at 82.

111 *Id.* at 92.

112 *Id.* at 81-82.

113 *Id.* at 107-08. Note that Kennedy demonstrates that he is aware of comparative work that challenges this "vulgar" image of "formalist" European legal thought; but it is quite unclear whether, in the end, he does not in fact subscribe to the image nonetheless. *See id.* For example, see his argument about how Continentals "haven't developed the particular practices and techniques, transmitted from generation to generation through the case method and the Socratic classroom, that define American legal culture." *Id.* at 95. The passage is all but identical to Dawson's critique of French judicial method. *See* DAWSON, *supra* note 105, at 415-16, 431.

114 CRITIQUE, *supra* note 1, at 108.

reached."[115] According to Dawson, the problem therefore was not that French judges actually *were* formalists, but that they had to *appear* to be formalists, which was bad enough; merely "keeping up appearances" preempted the adoption of the sincere, American grand style of "effective case-law technique."[116]

Kennedy's major contribution to this traditional line of American comparative analysis is that he starts from the premise that, to the advanced American observer, American and Continental legal cultures can actually appear to be remarkably *similar*. He therefore begins the section entitled "The Continent versus the United States" as follows: "Continental legal theory is uncannily 'other' for an American, perhaps because just about everything in our legal culture is present in theirs, often translated word for word, but nothing seems to have the same meaning."[117] This passage offers two very important twists on the traditional American comparative argument. First, it starts from a premise of apparent similarity, rather than one of apparent difference. Kennedy's comparative analysis therefore assumes that his readership is either up-to-date on current comparative work, or intimately familiar with Continental legality. That is, he assumes that his readers are sufficiently familiar with Continental legal systems that they are not misled by the immediately apparent differences between Continental and American legality. His task, then, is to reformulate American/Continental difference in the context of the apparent similarity of the legal cultures.

Second, Kennedy's analysis shifts the discussion from one about judicial method to one of legal theory. In other words, Kennedy's project to foster the "viral strand" in American judicial discourse spills into the theoretical and political realms. His comparative analysis therefore seeks to promote a second project, deeply related to the first, namely, to foster irrationalism in theory and in politics. Kennedy states: "An important strand, a defining strand in the mpm [modernist-postmodernist] project, is a particular attitude toward rightness . . . . This is the attitude that the demand for agreement and commitment on the basis of representations with the pretension to objectivity is an enemy."[118] In Kennedy's description of objectivist and rationalist theorists, Europeans once again play a central role. In particular, Kennedy distinguishes his version of critical legal studies ("cls") from two sets of academics. First, he responds to the critiques of "the

115 DAWSON, *supra* note 105, at 409-10.

116 *Id.* at 415.

117 CRITIQUE, *supra* note 1, at 92.

118 *Id.* at 341.

Amherst seminar, which loosely grouped left 'law and society' people, left legal anthropologists, and sociologists working in the European critical tradition."[119] Then he distinguishes his own "irrationalist" cls subgroup from the rationalist cls "systematizers." This latter group once again reveals itself to be profoundly European. Its models ranged from "neo-Marxism, Weber's theory of law in capitalism, Parsonian structural/functionalism, and Habermas's theory of communicative action."[120] Both groups, the Amherst "law and society" types and the rationalist cls systematizers, demonstrate the perils of European association: They believe in objective, rationalist definitions and distinctions. Apparently, the former actually believed in the "books/action" distinction,[121] the latter in "stages" in the development of the legal system.[122] In both cases, to be associated with the European is to be objectivist and rationalist.

It should hardly come as a surprise, therefore, that although, "there is a Continental critical tradition in legal theory,"[123] that such a tradition turns out to fetishize an objectivist distinction, namely, that between the "formal" and the "social."[124] Nor should it be surprising that American critical jurisprudes have, on the other hand, periodically presented "a deep challenge to the possibility and even the desirability of the kind of coherence that the Continentals still take for granted *within* the formal and *within* the social."[125] In Kennedy's analysis, therefore, continental Europeans represent the objectivist/rationalist tradition, even within the critical genre. One can only conclude, as with the "viral," that to be properly American, one must take Kennedy's "irrationalist" turn.

The third of Kennedy's projects—deeply related to the first two—is to politicize legal consciousness. As Kennedy states, "my thesis is that some part of judicial law making in adjudication is best described as ideological choice carried on in a discourse with a strong convention denying choice, and carried on by actors many of whom are in bad faith."[126] Having stated this thesis, Kennedy immediately turns to Europe for support. On the one hand, he notes that in Europe, "the Judge is a far less potent figure than in

119 *Id.* at 266.
120 *Id.* at 281.
121 *Id.* at 267.
122 *Id.* at 281.
123 *Id.* at 92.
124 *Id.* at 93.
125 *Id.* at 95.
126 *Id.* at 4.

the United States."[127] "On the other, the subordination of the judge seems to function to sustain rather than undermine the power of an hypostasized image of the law."[128] Europeans, he argues, are even more mystified about the ideological nature of judging than are Americans. Why? Kennedy suggests the following, overtly consequentialist explanation: "Subversive doctrine has progressed less far [in Europe], and perhaps as a consequence the subordinated judge can function in politics as a criminal prosecutor with a kind of mystified authority that is hard to imagine here."[129] Kennedy therefore deploys comparative analysis once again to offer a negative lesson or cautionary tale for his American audience. Rather than adopting a position reminiscent of misguided and mystified Europeans, his readers should adopt American subversive doctrine, become conscious of judging as a site of ideological choice and struggle, and thus politicize the legal.

In summary, Kennedy's comparative analysis functions as a complex game of comparative cultural politics. His comparative analysis of Continental judicial discourse is geared not so much to explain Continental legal thought as to offer a description of American/Continental difference. This extremely sophisticated description not only portrays Continental legal thought in a rather consistently negative light, but does so in order to present as characteristically American precisely those traits that Kennedy seeks to promote: (1) the "viral strand" in American judicial discourse; (2) a similarly viral irrationalism in theory and in politics; and (3) a resulting politicization of the legal. Above all else, therefore, Kennedy's comparative analysis fosters a cultural pride, bond, and identification between his American readers and American critical theory. As he openly states: "This book is an attempt to develop and extend this American form of internal critique."[130]

Personally, I have grown increasingly uncomfortable with the kind of comparative analysis that Duncan performs in *Critique*. While his comparison quite brilliantly rehabilitates and normalizes the critical tradition within American jurisprudence, it does so, I think, at the price of partaking in, and perhaps even contributing to, a certain American legal chauvinism. Although the American portraits and critiques of Continental legality have become ever more sophisticated and nuanced over the course of the twentieth

127 *Id.*
128 *Id.* at 4-5.
129 *Id.* at 5.
130 *Id.* at 82.

century, the fundamental point often remains very much the same: American legality is superior to, or more advanced than, its Continental counterparts because the former is pragmatic and realist, while the latter are formalist and prerealist.[131] This type of analysis, for all of the deserved eminence of its practitioners (e.g., Pound, Dawson, and Kennedy), and for all of the tactical reasons for its deployment (i.e., to promote the practitioners' own, often particularly attractive, visions of what the American common-law tradition *should* be), simply strikes me as vaguely unpalatable, and I don't think that my discomfort is just a matter of Gallic pride.

Not only is this continuing chauvinism distressing in and of itself, but it also depends on the construction and deployment of a highly problematic comparative analytic framework, one that in many respects stacks the deck irremediably in favor of American perspectives. In the case of *Critique*, the methodological or analytic problems come from Duncan's deployment of the term "policy" in the comparative context. The first, and ultimately less interesting, problem surfaces from the fact that the term has multiple meanings even within the American legal context. Not only can it be used to refer, for example, to any "nondeductive" argument deployed by an interpreter of a legal text, but also to a specific purpose or goal supposedly envisioned or targeted by the drafter of that text, or to juridical arguments considered to be neither truly legal nor entirely political. In other words, it is less than clear that "policy" means the same thing when it is used to describe the following three sentences: (1) "This statute should be interpreted in the following manner because such an interpretation fosters economic efficiency"; (2) "The policy of the statute is (or Congress' policy in passing the statute was) to increase citizen access to the courts"; or (3) "The defendant should be held liable for the damage because, as between two innocents . . . ."

131 Kennedy offers an explicit version of this American superiority argument in the "European Introduction" to his *Semiotics of Legal Argument* article. *See* Duncan Kennedy, *A Semiotics of Legal Argument*, *in* 3 COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW, bk. 2, 309, 317-24 (1994). In that piece, which foreshadows a number of his comparative analyses, Kennedy argues that although "European lawyers in casual discussion of legal issues use exactly the same [policy] argument-bites as do Americans. . . . Europeans do not recognize the bites . . . because they are unfamiliar with the analysis of policy argument as a practice." *Id.* at 318. Because Europeans lack such "self-consciousness," Kennedy suggests a stunning "alternative theory, that European legal culture is simply undeveloped by contrast with the American." *Id.* at 324. Kennedy's "European Introduction" does, however, possess a significant advantage over the comparative analysis offered by C*ritique*: in the former piece it is clear that he is referring to a lack of juristic metadiscussion or metatheory about policy argumentation. *See id.* at 319-24.

The second, more interesting and probably more important problem comes from deploying the parochial terms and categories of one legal system in order to describe and analyze another. The deployment of the term "policy" is a case in point. As Duncan correctly notes, "it is still an issue how the word 'policy' should be translated [into French] when it is used in legal texts."[132] There is, quite simply, no French word for "policy."

If an American comparatist nonetheless insists on using the term when performing a Franco-American analysis, she has several options. She could use an extremely broad definition of "policy," one that, for example, does not require the use of the actual word "policy" and that covers "any nondeductive factor." This approach, as we have seen, has limited descriptive power. Its categories are so enormous that it simply collapses American/French difference.

The comparatist could also use a very limited definition, that is, one that requires the actual use of the term/category "policy." Given that this word does not exist in French, this approach arrives summarily at the circular and tautological conclusion of American/French difference. But this conclusion also has limited descriptive power. It is open to the critique that other French words or concepts may effectively substitute for, or play a functionally similar role as, "policy."[133] Furthermore, even if such were not the case, the comparatist would still have to demonstrate that the lack of the term "policy" or of an equivalent is in some way significant or meaningful. If nothing else, this demonstration would require a clear showing that the term, narrowly defined, plays an important role in the American system.

I would argue, however, that it would probably be more promising for the comparatist not to use the term "policy" at all, or at the very least, not to use it as a foundational term in the comparative analysis. It is for this reason that I have tended to substitute "lit. theory" terms for the American jurisprudential terms "formalist deduction" and "policy."[134] At least in this way, the analytic terms are not parochial to either of the compared legal systems.

I would like to suggest, however, that even this move to literary terminology—that is, to using the terms "grammatical reading" and "hermeneutic reading" instead of "formalist deduction" and "policy orientation"—has not been enough. The

132 CRITIQUE, *supra* note 1, at 109.

133 This is not to suggest that a "functionally similar" term would not be meaningfully different nonetheless.

134 *See* Lasser, *"Lit. Theory," supra* note 34.

resulting categories are still far too large to have much in the way of descriptive power. The next step in serious comparative analysis should therefore be to refine the descriptions.

Although it is obviously far beyond the scope of this Article to describe and analyze American, French, and ECJ judicial discourses in detail, I would like to suggest, however briefly, what might now be the most fruitful avenue for comparative analysis. In particular, I would like to propose that comparatists focus on the relationships between different *subtypes* of judicial discourses and the discursive *contexts* in which they emerge.

Comparative discursive analysis must take into account the discursive context in which different judicial arguments are deployed. Although I argued above that American, French, and ECJ judicial discourses all consist of a hodgepodge of deductive and nondeductive elements, there can be no denying that the nondeductive elements, for example, manifest themselves quite differently from one system to another. The nondeductive discourse of American test-method decisions is deployed in the extremely public and visible discursive context of, for example, published Supreme Court decisions. In the French civil judicial system, on the other hand, overtly nondeductive discourse only surfaces in the hidden or unofficial discursive sphere internal to the French judicial system, in which judicial *magistrats* argue among themselves about how to resolve the cases at bar.

Comparative discursive analysis should therefore seek to relate specific judicial discourses to specific judicial contexts. In particular, the discursive analysis should bear in mind the audience of a particular type of judicial argument, and the degree and kind of publicity such an argument typically receives. French Cour de cassation argument, for example, occurs in two very different discursive contexts. In the public discursive context of its judicial decisions, the Cour deploys a discourse that is as explicitly deductive as one might imagine. Arguing among themselves and hidden from public view, however, members of the Cour nonetheless deploy a stunningly open-ended and fluid form of nondeductive "equity" discourse.

Unlike this bifurcated French judicial discourse, American judicial argument offers an integrated discourse that offers neither the extreme, syllogistic deduction of public French judicial decisions, nor the remarkably open-ended quality of the hidden French nondeductive, "equity" discourse. Finally, ECJ discourse, which is composed of the same three documents as the French—official decision, Report of the Reporting Judge, and Opinion of the Advocate General—*but which publishes all three*, produces, as

does American judicial discourse, far more uniform and middle-of-the-road types of argument. As a result, the styles of the judicial decisions and of the Advocates General opinions resemble each other far more closely in the ECJ context than they do in the French judicial context.

Comparative discursive analysis should therefore seek to analyze the relationship of discursive context to specific subtypes of judicial discourses. It is not enough to note that French, American, and ECJ judges deploy discourses of deduction and of policy. Rather, the analysis must be refined to the point of identifying, for example, what *kinds* of nondeductive discourse each system produces, and in what contexts such discourses are deployed. For example, is there a relationship between French "equity" discourse, which explicitly refers to notions of substantive justice, and the fact that such a free-wheeling discourse occurs in a hidden discursive sphere in which the audience is composed only of other *magistrats*? Can one imagine the deployment of such a discourse in a more public context? Is it surprising that when the same types of documents that deploy such a discourse in the French context (i.e., the Reporting Judges' Reports and the Advocates General's Opinions) are produced in the ECJ context, the open-ended "equity" discourse disappears? In the ECJ context, after all, these same documents are published alongside the ECJ's decisions. As public documents, the Advocates General Opinions instead deploy, for example, a plethora of institutional and administrability "policy" arguments ("the effectiveness" of Community law, EU "institutional balance," "legal certainty and uniformity," and the "legal protection" of Community rights) that are far more recognizable to the student of American judicial discourse.

Finally, comparative discursive analysis should consider how a particular judicial discourse, deployed in a particular context, seeks to enlist the support of its audience. The ECJ, for example, operates in a discursive context in which the addressees of its prescriptive judgments are, to a significant extent, sovereign member states. In such a context, the ECJ can hardly rule by fiat; the member states cannot be expected simply to take orders from the court. The ECJ therefore takes great pains not only to recognize and address the member states' arguments, but also to explain the reasons for its prescriptive judgments. The court does not simply address the States in the *second* person: "You must do . . . ." The court instead offers an explanation, a description of the state of affairs that leads to the court's decision. The court therefore offers a *third* person description of the state of the law

and of the relevant factual world: "The law is . . . . The facts are . . . . The interest in EU institutional balance is . . . ." This third person, referential description seeks to motivate the member states to accept being placed in the position of the addressee. That is, the third-person description seeks to explain and justify why the member state should accept being addressed in the second person; why it should accept the court's prescription. The court, in short, must enlist the support of the member states for its decisions.

Official French civil judicial discourse, on the other hand, does not seek to produce the same type of justification. The Cour de cassation, for example, offers no significant public explanation of its decisions. Instead, the decisions simply refer to a code provision, cited by number. The Cour's decisions therefore seek to portray themselves as mere conduits for the transmission of the code's commands.[135] Given that the code represents the will of the people, however, the addressee of a decision of the Cour is in the position of having become the addressee of her own prescription. The French judicial decision therefore justifies itself by moving the second-person addressee into the position of the first-person addressor. It is not insignificant, therefore, that when, behind closed doors, the French judge must enlist the support of her brethren, she adopts a very different form of justificatory language.

I am arguing, in short, for a far more precise form of comparative discursive analysis than American comparatists (including myself) have tended to perform in the past. This precision should offer several advantages. First, it should produce a far richer and more fine-grained description of the objects of comparative analysis. Instead of limiting the analysis to a gross distinction between "deduction" and "policy," or between "grammatical" application and "hermeneutic" interpretation, the analysis can focus on the myriad subarguments ("equity," "economic efficiency," "institutional competence," "legal modernization," etc.) and the contexts in which they are deployed. Second, this precision should help to combat the tendency to apply automatically to "foreign" legal systems the terms, concepts, and categories specific to one's own. The more one must delve into the contextualized discursive universe of a "foreign" system, the more sensitive one becomes with respect to how unrepresentative and ultimately unsatisfactory such parochial "translations" really are. In short, I am arguing for a comparative technique that induces the comparatist to make his analysis as consistently difficult for

135 *See* Lasser, *Judicial (Self-)Portraits*, *supra* note 40, at 1343.

himself as possible. The comparatist should resist projecting comfortable categories and concepts "abroad," and resist deploying them uncritically "at home."

CONCLUSION

As should be quite obvious by now, my problems with Kennedy's analysis are clearly parochial in their own right. My parochialism simply happens to be "disciplinary." That is, it is the petty and yet necessary objection of a comparatist to the tactical deployment of comparative analysis for domestic jurisprudential ends.

My objection, however, is *not* to the tactical deployment of comparative analysis. Comparative analysis is probably always deployed for some purpose, whether it be, for example, to "advance knowledge or understanding," or "to harmonize law," or "to improve the national legal system." Kennedy's analysis falls squarely under the first and last of these time-honored and eminently respectable categories. My objection therefore cannot simply be to his deployment of comparative analysis for domestic ends.

My objection, rather, is to the comfortably peripheral status of Kennedy's comparative analysis relative to his greater "viral" project. Although the description he offers of Continental legality in fact marks a significant advance within the American comparative reflexive tradition of Pound and Dawson, his description suffers from being too closely tied to that tradition, and from being pressed explicitly into the service of the "viral" project. In the end, one cannot help but feel that Duncan's comparative analysis represents but a convenient vehicle for the promotion of his notion of the "American mutation." In his analysis—as in Dawson's and in much of Pound's[136]—the Continent emerges above all else as a fine negative example. In some important respect, further complexification of the portrait of the Continent would only detract from the negative example and thus weaken the reflexive argument.

I would like to argue that focusing on, or prioritizing, comparative analysis offers at least one great advantage over Duncan's approach: it tends to problematize the terms, categories, and methods of analysis. This advantage comes immediately into use in the comparative context. It forces the comparatist to recognize the vagueness and parochialism of, for example, the

136 Pound's analysis is somewhat more equivocal. *See* Lasser, *Pound's Jurisprudence*, *supra* note 104.

term/category "policy," thereby inducing more precise and refined analysis of (a) the subgenres of foreign legal discourses, and (b) the contexts in which they are deployed. It offers, in short, a thicker description of the foreign legal system.

The advantage does not end there. This problematization of "policy" suggests that one ought to call into question the other half of the deduction/policy distinction. This analysis, which for space considerations was not and will not be performed here, is nonetheless worth identifying. It is less than clear that the notions of "deduction," or "formalism," or even "application" can be appropriately used to describe what Continental judges are supposed to be doing, even in the emblematic French Cour de cassation context.

Although the form of the official French decision is overtly syllogistic, I am increasingly convinced that this does not mean that the French judge is either seen to be, or expected to be, a passive or mechanical applicator of the code. Rather, it may well be that in the French context, the notions of "application" or "deduction" *include* what Americans jurists might think of as "nondeductive" or "policy" elements. Thus even Portalis, when he presented the draft of the French Civil Code (of which he was the primary author), announced explicitly that "it is the role of the [codified] legislation to fix, in broad outline, the general maxims of the law," but that "it is up to the judge and the jurisconsults, penetrated by the general spirit of the law, to direct its application."[137]

It may in fact be the case that in France, there is no real expectation that the civil judge should be engaged in the mechanical or grammatical application of the code, at least not in any way that American jurists would think of as formalist "deduction." In fact, every time I find myself at a conference with French judges, they invariably praise the "flexibility" of code-based interpretation![138] The primary source of American misunderstanding of the French civil judicial system may simply be that, in France, there has been little traditional expectation that

137 Portalis, *Discours Préliminaire, Prononcé le 24 Thermidor an VIII* (1799), *Lors de la Présentation du Projet Arrêté par la Commission du Gouvernement*, *reprinted in* OTTO KAHN-FREUND ET AL., A SOURCE-BOOK ON FRENCH LAW 91, 93 (2d ed. 1979).

138 Although it may appear paradoxical to the common-law jurist, French academics have long praised the flexibility or "suppleness" of their codified legal system. *See, e.g.*, CHARLES SZLADITZ & CLAIRE GERMAIN, GUIDE TO FOREIGN LEGAL MATERIALS: FRENCH 85 n.26 (1985); Jean Boulanger, *Notations sur le Pouvoir Créateur de la Jurisprudence Civile*, 59 R. TRIM. D. CIV. 417 (1961), *cited in* Lasser, *Judicial (Self-) Portraits*, *supra* note 40, at 1405 n.294; Adhémar Esmein, *La Jurisprudence et la Doctrine*, 1 R. TRIM. D. CIV. 5, 12 (1902), *cited in* Lasser, *Judicial (Self-)Portraits*, *supra* note 40, at 1405 n.294.

the judge should give a serious—let alone binding—*public explanation* of his decisions.[139] Faced with written judicial decisions that may represent little more than *formalities*, American jurists have thus tended to project onto the French what it would mean for American judges to write such judicial decisions.[140] The resulting American deployment of the term "deduction" or "formalism" may therefore be no more than an inapposite projection onto Continental judicial systems generally, and onto the French legal system in particular.[141] Comparative awareness can therefore help to problematize the deployment of such parochial terms, concepts, and categories as "deduction" or "policy" in foreign contexts, thereby yielding richer and far more finely grained comparative analyses.

This comparative vantage point, complete with the perspective shifts that it can induce, should not, however, be left behind as the comparatist turns her attention back to her "home system." The great advantage of comparative analysis is that it can provoke, for example, the American comparatist to confront and reconsider the full range of significations that accompany such terms as "policy," "formalism," or "deduction" in the American legal context. It can induce the comparatist to historicize such terms and the conceptual apparatuses that they reflect and construct. What did and do such terms mean, to whom, and when? How, when, and where were they deployed? This Article's reflexive query about whether contemporary American appellate courts actually deploy the term "policy" (narrowly defined) represents just such a question, and it yielded results that ought to be taken into account before describing "policy-based" American judicial discourse. In short, comparative analysis is a device that often provokes a more comprehensive and detailed analysis than might otherwise be performed.

One of the most stunning of Kennedy's attributes is his ability to generate such analyses without the significant help provided by a rigorously comparative approach. *Critique* actually offers a brief history of the terms "policy"[142] and "formalism,"[143] and defines at least two different kinds of "deduction."[144] Given that his analysis starts from this fabulous baseline, I cannot help but imagine what it might yield if it were more tenaciously comparative, if, for

139 *See* DAWSON, *supra* note 105, at 406-15.

140 I certainly do not mean to suggest that these "formalities" are not in fact terribly important or deeply meaningful.

141 Of course, this projection is deeply meaningful in its own right.

142 CRITIQUE, *supra* note 1, at 108-09.

143 *Id.* at 105-07.

144 *Id.* at 101-04.

example, Kennedy did not take for granted (a) that American courts actually deploy policy argument in a way that Continental courts do not, or (b) that what appear to be "deductive" forms of argument mean the same thing in continental Europe as they do in the United States.

Kennedy's questions, only slightly modified, would strike at something even more basic and central. For example, what does it say about a legal culture that it uses a single term such as "policy" to express several different meanings, whereas another legal culture, which apparently has no such overarching term, divides the concept into multiple subparts, such as "equity" or "legal adaptation"? What does it mean that one legal culture divides the notion of "deduction" from that of nondeductive "policy," while the other does not make such a clear distinction because it assumes that the two are inherently intertwined?

These impossibly difficult yet terrifically suggestive questions are but a hairbreadth away from those directly posed and addressed in Duncan's analysis. In the end, what a fabulously rich book *Critique* turns out to be! Even when it addresses issues obliquely and in passing—as, in all fairness, is the case with its brief comparative moments—it not only offers important and novel analysis, but also triggers the most difficult and exciting analytic possibilities.