# Book Review

# Revisiting the Question of French and American Difference

Mitchel de S.-O.-L'E. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy*. Oxford: Oxford University Press, 2004. Pp. 382. $99.00 (cloth).

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Mitchel de S.-O.-L'E. Lasser's *Judicial Deliberations* is an ambitious, important, and innovative book, which adds greatly to our understanding of particular legal systems, of the ways in which differing configurations of discourse and institutional practice promote core rule-of-law values, and of comparative methodology itself. Beautifully written and wide-ranging in scope, it is likely to become a classic in the field.

Lasser pursues three different, but interrelated goals, which I address, in turn, below. First, he describes judicial discourse in the French and American legal systems (as well as in the European Court of Justice (ECJ)) and does so in a way that significantly challenges and reworks the paradigm long established among American comparative-law scholars.

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Second, he argues that each system's judicial discourse (along with its ideological and institutional commitments) leads it to pursue (and follows from) its own distinctive solution to fundamental problems in democratic governance, including ensuring judicial accountability and promoting meaningful deliberation. Third, he reflects on the nature of comparative methodology and argues for the need to overcome comparatists' tendency to identify themselves as proponents of either similarity or difference.

Lasser's description of judicial discourse in the French and American legal systems, as well as in the ECJ, is the core of the book, providing the material that undergirds the remainder of the analysis. Drawing on basic tools of literary analysis, he undertakes a close reading of cases issued by the French *Cour de Cassation* (the supreme court for matters of private, civil litigation), the United States Supreme Court, and the ECJ. He then supplements this reading of cases from the *Cour de Cassation* and the U.S. Supreme Court with, respectively, cases from the French *Conseil d'État* (the supreme court for matters of public, administrative litigation) and the French *Conseil Constitutionnel* (an institution devoted primarily to ruling on the constitutionality of legislation), and with American lower court cases addressing routine contractual matters. Based on these close readings, he concludes that there is a common set of rhetorical structures that characterize the judicial opinions issued by the various courts within each legal system. In this sense, he persuasively argues, it is possible to speak of a French judicial discourse and of an American judicial discourse.

One of Lasser's major contributions is to deploy his reading of French and American judicial discourse to undermine and reconfigure the longstanding paradigm of French/American difference established in American comparative legal scholarship (as epitomized by the writings of, among others, John Dawson and John Merryman[1]). According to this traditional paradigm, French judicial discourse is formalist, aiming to constrain judicial power by establishing clear, predictable rules. In contrast, American judicial discourse is realist or pragmatic, recognizing the reality that the legislature cannot anticipate all legal (and factual) scenarios, and thus empowering judges to develop the law on a case-by-case, policy-oriented basis. French formalism was a product of the revolutionary reaction to the extraordinary power of the Old Regime *parlements* and their noble judges. Seeking to ensure legislative supremacy, the revolutionaries codified the law and provided that the judiciary was to apply this law, rather than create law itself. This narrow conception of judicial power is embodied in the style of the *Cour de Cassation*'s opinions. Single syllogistic sentences, issued in the name of the Court as a whole (rather than that of particular judges), these opinions

1. JOHN P. DAWSON, THE ORACLES OF THE LAW (1968); JOHN H. MERRYMAN, THE CIVIL LAW TRADITION (1969).

declare (with barely any consideration of the facts) that the holding necessarily follows from the applicable Code provision. Because this formalist notion that the Code contains within itself the solution to all legal problems is implausible, American comparatists have long argued that French judges must play a far greater role in shaping the law than the official discourse of French judicial opinions would imply. But because this more extensive judicial role is kept hidden, rather than revealed in the text of the judicial opinions themselves, these scholars have suggested that French judicial discourse must be dysfunctional. In their view, in other words, French judicial decision-making has a whiff of the arbitrary about it, since judges seem to decide cases without the constraint of having to respond to critics or having to conform their analysis to that of their own prior holdings.

By means of comparative analysis, Lasser insightfully demonstrates that this established account of French judicial discourse is mistaken—and, indeed, that it is mistaken because it assumes that all judicial discourse is, in certain respects, like American judicial discourse. The standard comparative account presumes, in line with American judicial practice, that the judicial opinion is the sole locus of judicial discourse. As Lasser shows, however, the French engage in a second kind of judicial discourse, which takes place largely outside the public view, between a number of elite institutional actors, including not only judges, but also Advocates General (AGs) and academics. Recognized as a kind of judge, the AG sits with the panel of judges deciding the case and, serving as a representative of the public interest, produces written *conclusions* advising the court on how to rule. In these *conclusions*, Lasser observes, the AGs employ a radically different discourse from that of the *Cour de Cassation*'s official, published opinions. Drafted in the first person singular, the AGs' *conclusions* focus primarily on questions of equity, or achieving substantive fairness in the particular case, and regularly deploy the impassioned, indignant, rhetoric of shock. And while the *conclusions* are rarely published, each judicial opinion is published with a case note, drafted by a leading academic, which (as Dawson also argued) serves to situate the opinion vis-à-vis the Court's established jurisprudence and longstanding academic commentary. Thus, Lasser claims, in sharp contrast to the established American paradigm, that French judicial discourse does not emerge in unconstrained isolation. French judges write their opinions only after engaging with the equity-oriented concerns of the AGs and after closely considering the views of academics. Accordingly, he concludes, the traditional portrait of French judicial discourse as formalist is mistaken, or at least, only partially correct. French judicial discourse is, instead, sharply bifurcated between a radical, public or external formalism, on the one hand, and a radical, internal pragmatism, on the other.

Having thus reworked the traditional portrait of French judicial discourse, Lasser turns his attention to the traditional portrait of American judicial discourse. The latter, he argues, is not—as the standard paradigm suggests—characterized by an extreme pragmatism or policy-orientation. While American judicial opinions, unlike their French counterparts, do concern themselves with matters of policy, they, unlike the *conclusions* of the French AGs, do not forthrightly embrace an equity-oriented language of indignant shock. Moreover, he observes, American judicial opinions utilize a number of analytical and rhetorical devices—notably, the multi-part test—designed to constrain judicial reasoning and to suggest a more standardized, formalized mode of analysis. From this perspective, concludes Lasser, the distinguishing feature of American judicial discourse is not its policy-oriented pragmatism, but instead, its commitment to embracing pragmatism and formalism to equal degrees and within the same judicial discourse. American judicial discourse is distinct, in other words, because it is unified, rather than bifurcated.

As concerns the ECJ, Lasser fills an important gap in the scholarly literature by providing a sustained analysis of its judicial discourse. He concludes that this discourse combines elements of both the French and American models. Like the *Cour de Cassation*, the ECJ employs a bifurcated mode of judicial discourse. Thus, its opinions are relatively short, drafted in the name of the Court as a whole, and offer relatively little analysis in support of the holding. Moreover, the ECJ relies significantly on AGs, who sit with the court and write opinions—in their own individual names—advising it on how to rule. In contrast, however, to the French approach, the opinions of the ECJ acknowledge the diverging arguments of the many parties to the action and engage in some forthright policy-oriented analysis. And because the opinions of the AGs are always published alongside those of the ECJ itself, the ongoing conversation between the court and its AGs is, unlike in France, open to public scrutiny. Lasser thus concludes that the ECJ is best understood as a kind of hybrid between the French and American models of judicial discourse—one characterized, in his terms, by a soft bifurcation between the formalist and pragmatic modes of discourse.

Lasser's description of judicial discourse—and his concomitant reworking of the traditional account of French/American difference— is, in itself, a very significant achievement. American comparatists, he shows, have focused on a (false) distinction between French formalism and American realism. Both legal systems, he suggests—and perhaps those of all modern democracies?—struggle with the need to balance formalism (or doctrinal clarity and predictability) with realism (or policy-oriented and equitable reasoning). The question is thus not whether a particular system is formalist or realist, but instead, how precisely it chooses to engage in both modes of analysis, and how these choices affect the way that each legal system addresses such core issues of democratic governance as

judicial accountability and the nature of deliberation.[2] Accordingly, Lasser's second goal is to explore how each legal system's judicial discourse leads it to pursue (and follows from) its own distinctive approach to these core issues.

As concerns judicial accountability, Lasser distinguishes between a French institutional approach and an American discursive one. French judges, he observes, are the product of an educational system that makes university training available to all citizens and then gradually culls the ranks through a rigorous examination process designed to ensure the triumph of merit. Trained in a state-funded school for judges, which serves to instill common norms of service, French judges (including AGs) spend their entire careers within a civil-service bureaucracy, in which promotion is lockstep and based on careful review by superiors. Accordingly, French judges are constantly subject to bureaucratic discipline and control, and (at least in theory) are chosen from the citizens at large and promoted through a rigorously meritocratic process. As a result of this institutional framework, argues Lasser, the French place great faith in this elite group of judges. And it is precisely because of this faith, he concludes, that the French can tolerate—and, indeed, due to their commitment to legislative supremacy, embrace—a bifurcated discourse, in which the judicial opinion itself is quite cryptic, while normative discussion is relegated to an internal, unpublished sphere.

In sharp contrast to their French counterparts, American judges receive no specialized education, and both their initial appointment to a judgeship and subsequent promotion are based largely on political determinations. Lacking institutional methods for ensuring judicial accountability, the American legal system relies instead, argues Lasser, on discursive means of control. It is the fact that American judges must provide reasons for their holdings and that they must individually sign published opinions that serves as a check on the arbitrary exercise of power. But precisely because the United States lacks bureaucratic methods for producing and controlling judges—and because, unlike France, it treats judicial opinions as a form of law—it is driven to embrace a unitary judicial discourse as a means of ensuring judicial accountability. Americans, in other words, do not trust their judges to conceal their policy-based reasoning. But because American judicial opinions are deemed to be law, judges experience significant pressure to make their opinions appear as such. As a result of this dynamic, American judicial discourse is unified, tempering policy-

2. Lasser's discussion of the ECJ complements this important rethinking of the standard comparative paradigm by confirming his argument that all judicial discourse tends to incorporate both formalist and realist components, and that the interesting (and significant) question is therefore how these components are structured and deployed in any given legal system to promote core rule-of-law values.

oriented concerns with references to tests, rules, and other formalist language.[3]

In thus describing how each legal system's judicial discourse leads it to embrace (and follows from) a different model of judicial accountability, Lasser persuasively demonstrates that there is a complex—indeed, circular—interrelationship between a system's mode of judicial discourse and its underlying ideological and institutional commitments. This is an important contribution. It suggests that there is a great deal that we can learn about a legal system by paying serious attention—of the kind a literary scholar would—to the rhetorical structures of its judicial discourse. By studying judicial discourse in this way, and then examining the interrelationship between a legal system's discourse, ideologies, and institutions, the comparatist can gain access to a system's internal logic—to the way, in other words, that those operating within the system understand it. Gaining access to this internal logic is perhaps the primary goal of the comparatist, and one that is incredibly difficult to achieve. Thus, for example, the established American comparative law scholarship seems at times to suggest that the French judiciary is simply in denial about—or even worse, seeks to misrepresent—the fact that it undertakes law-making. But as Lasser quite rightly suggests, the notion that the entire French legal system somehow operates in bad faith is implausible. By analyzing France's bifurcated judicial discourse, Lasser provides access to the system's internal logic, making it possible to understand, in a way that previous scholarship has not, how it is that the French conceive of law, its relationship to judging and academic commentary, and the problem of judicial accountability.

While there is much to be gained from Lasser's intentionally circular account of the interrelationship between a legal system's judicial discourse and its ideological and institutional commitments, there are important questions that this approach necessarily obscures. In particular, there is an air of timelessness to his account, likely inherent in the methodological choice to emphasize the structure of judicial discourse. This is not to suggest that Lasser should be faulted for failing to explore historical developments—an undertaking that would be massive and that would take him far beyond the scope of his project. But it is important to recognize that there is a coherence to his descriptions of the French, American, and European legal systems that follows, in part, from the self-consciously circular nature of his methodology. This methodology (and the coherent descriptions that its produces) illuminate some very important similarities and differences both among the legal systems that he analyzes, and among

3. According to Lasser, the ECJ follows an eclectic approach to judicial control, combining elements of both the French institutional and American discursive models. In particular, the ECJ's mode of discourse seeks to promote judicial accountability by adapting what is essentially a French model of judicial discourse to the far more controverted and unstable legal and political environment of the European Union.

their respective approaches to democratic government. At the same time, to give but one example, the reader is left wondering how an analysis of judicial accountability in the United States might differ from Lasser's if it were based on more historical particularities. If (as I suspect) the widespread use of multi-part tests is a fairly recent development, then what preceded it? More importantly, have methods of ensuring judicial accountability varied over the centuries in accordance with such developments as the nineteenth-century shift by many states to electing rather than appointing judges, the gradual decline in the role of the jury, the twentieth-century explosion in legislation, and the rise of a positivist view of judicial law-making (as embodied in *Erie v. Tompkins*[4])?

While Lasser's discussion of judicial accountability is very instructive, the most interesting and important implications of his analysis of judicial discourse concern the problem of democratic deliberation. Lasser rejects the view—associated both with Mirjan Damaška's pathbreaking comparative work[5] and with recent political science literature on technocracy—that decision-making by elite bureaucrats lends itself to formalism. According to this established literature, bureaucracies by their very nature seek to control their members and thus to routinize—and hence formalize—the administration of justice. Lasser's analysis of French and American judicial discourse, and of the nature of the deliberation that they each foster, leads him to conclude, however, that quite the opposite is true.

In France, he argues, judicial deliberation occurs mainly within the judicial bureaucracy—in private conversations among judges and AGs—and thus outside public view. Contrary to what the established literature would suggest, however, the discourse employed by the French AGs is anything but formalist, appealing instead to a highly personal and impassioned language of equity. That French elites would thus embrace such an anti-formalist stance within their own internal discourse is consistent, Lasser argues, with recent studies concerning American sunshine laws. According to these studies, sunshine laws—designed to promote public accountability by opening administrative-agency decision-making to public view—have had the unintended effect of undermining meaningful, frank discussion, by leading bureaucrats to focus more on how their words will be received than on engaging in productive discussion. Likewise, Lasser claims, because of the public nature of American judicial deliberation, its discourse is centrist, depoliticized, and technocratic. Seeking to balance equity- or policy-oriented concerns with a significant degree of formalism (as embodied first and foremost in the

4. Erie R. R. Co. v. Tompkins, 304 U.S. 64 (1938).

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

multi-part test), American judicial opinions tend to eschew direct confrontation with questions of justice.[6]

Lasser's use of comparative analysis to suggest that public deliberation may not always be desirable is both provocative and important. The longstanding comparative literature distinguishing between French formalism and American realism has made it all too easy to rejoice in American strengths without taking appropriate stock of concomitant weaknesses. Having recognized that each legal system contains elements of both formalism and realism, Lasser challenges Americans' conception of their judicial discourse as deeply anti-formalist and attentive to matters of policy and fairness. In so doing, he implicitly calls for American judges (as well as legal scholars and policy-makers) to pay greater attention to matters of equity—to embrace, in his words, "patently justice-oriented questions" (345).

But while Lasser's challenge to longstanding assumptions about the relationship between publicity and deliberation—and the critique of American justice that this implies—is quite compelling, it is based on a number of assumptions that he does not make explicit and whose validity is not beyond question. First, he clearly believes that there is great value in judicial deliberation that engages fully and openly with questions of equity. The implication of his argument seems to be that the French system, because it permits such equity-oriented deliberation (within an internal, non-public sphere), is more likely to achieve substantive justice (however defined) than the American system. There is an intuitive logic to this argument. After all, if a system never permits frank talk about equity, then how can it ever achieve it? But as Lasser himself recognizes, American judicial opinions are a hybrid form, which includes a substantial pragmatic (or policy-oriented) component. Although American judges tend to avoid the overtly impassioned language of shock employed by French AGs, what evidence is there that they are in fact less attentive to matters of equity? Perhaps French and American judges deploy different language but actually engage in the same kind of equity-oriented analysis—seeking to achieve justice in the specific case and to promote broad policy goals. Put differently, is there actually a difference in outcomes between French and American judicial decisions—one that can be traced to the different discourses that they employ?

A second question raised by Lasser's analysis is the extent to which the differing degrees of attention paid by French and American judicial discourse to equity-oriented concerns is, in fact, caused by (or necessarily correlated with) the degree to which judicial deliberation takes place in public. Lasser clearly demonstrates that France's equity-oriented judicial discourse occurs in a non-public arena and that the United States' more

6. As concerns the ECJ's judicial discourse and the nature of the deliberation to which it lends itself, Lasser asserts that, since the ECJ combines elements of both the French and American models, it suffers to some degree from the failings of each.

centrist, depoliticized judicial discourse occurs in public. There is, however, a long French tradition of equity-oriented, sentimental legal reasoning dating back to the Old Regime, some of which was deployed at the time in published judicial opinions or case reports.[7] Perhaps, then, French AGs engage in an overt discourse of equity, not so much because they operate within a sheltered, non-public realm, but because such equity-oriented talk—including the impassioned language of shock—is a particularly French way of talking. Indeed, such impassioned discourse seems to characterize various aspects of French life ranging from political protests to the kinds of (standardized) purple prose employed at the conclusion of (formal) business letters.[8] Would American judges freed from the constraints of public discourse really engage in such overt, equity-oriented talk? Since American appellate judges rule in panels, they do, in fact, undertake some amount of private, oral deliberation. (Indeed, it is worth asking whether the distinction that Lasser draws between non-public deliberation in France and public deliberation in the United States may be a bit too sharp.) Unfortunately, the private, oral deliberation that American judges undertake is so private, that it is difficult to know how much of it occurs, let alone its content. Suffice it to say, however, that it is far from obvious that equity-oriented language features prominently in this internal, American judicial discourse.

This brings us to Lasser's third and final goal, which is to reflect on the nature of comparative methodology—and, in particular, to challenge the current tendency of comparatists to emphasize either similarity or difference at the expense of the other. As Lasser persuasively argues, whether comparatists find similarity or difference is determined largely by the objects that they choose to compare. Thus, for example, whether French judicial discourse is deemed exclusively formalist (and thus, different from American judicial discourse) hinges a great deal on whether the comparatist examines only formal judicial opinions or also the internal discourse of the AGs and the published academic commentary. Given that similarity and difference are not qualities that inhere in the world, but instead emerge as a result of scholars' analytical choices, Lasser suggests that comparatists be more self-conscious about the choices they make.

7. DAVID A. BELL, LAWYERS AND CITIZENS: THE MAKING OF A POLITICAL ELITE IN OLD REGIME FRANCE (1994); SARAH MAZA, PRIVATE LIVES AND PUBLIC AFFAIRS: THE CAUSES CÉLÈBRES OF PREREVOLUTIONARY FRANCE (1993); Amalia D. Kessler, *Enforcing Virtue: Social Norms and Self-Interest in an Eighteenth-Century Merchant Court*, 22 LAW & HIST. REV. 71, 98-101 (2004); James Q. Whitman, *From Cause Célèbre to Revolution*, 7 YALE J. L. & HUMAN. 457, 467-70 (1995). It is arguable, of course, that because the Old Regime was a monarchy, rather than a democracy, judges of that era did not operate under the same pressures as modern-day French judges to court public opinion. But this argument is not, in my view, persuasive. Whatever the form of government, governmental institutions—including judicial ones—tend to seek some degree of public legitimacy as a means of ensuring the efficacious exercise of power.

8. Indeed, the impassioned, but standardized nature of French business correspondence raises the interesting possibility that the language of shock employed by French AGs is itself a customary rhetorical tick, so expected and routinized as to lack the kind of case-specific force that, at face value, it would seem to convey.

Moreover, he proposes that comparative law ought to be understood as a "bipolar endeavor" through which readings of similarity and difference constantly subvert, but also thereby inform, one another (164).

Lasser's critique of the current state of comparative law scholarship—and, in particular, the divide between similarity-oriented and difference-oriented comparatists—is very well-taken. Such debates grow old quite quickly, since as Lasser quite rightly observes, it is all a matter of perspective. Accordingly, the real question is how to select the appropriate framework for comparative analysis. As Lasser notes, much of the current scholarship is motivated by the debate over European unification and, in particular, over the proposed drafting of a European civil code. Not surprisingly, scholars in favor of codification tend to detect pan-European similarities, while those against it tend to detect differences. Although it is, of course, impossible for scholars undertaking comparative scholarship entirely to set aside their political and social agendas, the Weberian ideal of a value-neutral, comparative social science nonetheless seems to remain the one most likely to produce productive and meaningful knowledge. Given how politicized comparative scholarship has (long been and) become, Lasser's destabilizing approach—his call to shift back and forth between frameworks that suggest similarity and those that suggest difference—may be one of the most effective ways to pursue this Weberian ideal, without abandoning (as so many have) the Weberian commitment to the study of culture.