
Volume 27
Number 3 Summer 1993

pp.585-591

Summer 1993

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Recommended Citation

Lawrence Joseph, *Constitutional Conjuring*, 27 Val. U. L. Rev. 585 (1993).
Available at: <https://scholar.valpo.edu/vulr/vol27/iss3/2>

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Commentaries

CONSTITUTIONAL CONJURING

LAWRENCE JOSEPH*

I.

Professor Parker's strategy in *Here, The People Rule: A Constitutional Populist Manifesto*¹ is twofold. First, he presents competing readings of political sensibilities evoked by Thomas Mann's *Mario and the Magician*.² He then applies the readings to "assumptions about, imagination of, and attitudes toward, the political energy of ordinary people," probing, and arguing for, ways in which populist democracy ought to inform American constitutional law.³

Here, the People Rule is more than imaginative—it is compelling. In one sense, *Mario and the Magician* portrays a complex vision of populist politics. It is as arresting a place as any to unravel the impulses and conflicts inherent in constitutional democracy. Of course, constitutional values in the United States have always been rooted in political attitudes toward the people, and, certainly, the effect of democratic perspectives on constitutional argument and adjudication always has been, and still is, a central concern of constitutional jurisprudence. Yet, at the end of a century during which astonishing changes in the meaning of fundamental law have taken place, the constitutional realities of populist democracy have been obfuscated. Professor Parker brings them back into light.

In this small piece, copying Professor Parker's basic method, I sketch some of my own reactions to *Mario and the Magician*. I then note how my reading of the story relates to legal language, constitutional law, and democracy.

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1. Richard D. Parker, "Here, the People Rule": *A Constitutional Populist Manifesto*, 27 VAL. U. L. REV. 531 (1993).

2. THOMAS MANN, *Mario and the Magician*, in *STORIES OF THREE DECADES* 529 (H.T. Lowe-Porter trans., Alfred A. Knopf, Inc. 1936) (*Mario and the Magician* was originally published in German in 1929) [hereinafter *Mario and the Magician*].

3. Parker, *supra* note 1, at 532.

II.

Mario and the Magician's first impression on me concerned its narrator. I immediately felt that Mann was speaking through him—through a simple narrative technique. In the opening paragraph, the narrator tells how the story will end, with “the shocking business of Cippola, that dreadful being who seemed to incorporate . . . all the peculiar evilness of the situation as a whole.”⁴ By having him assert that Cippola is evil, Mann provides the narrator with an aura of moral integrity; you identify with him. But, as the narration proceeds, the perspective changes. You begin to see that the narrator is not a neutral character. You discover that he is consciously upper class, from northern Europe, on a late summer holiday to an Italian seacoast resort town with his wife and two young children. You're exposed to his political and moral attitudes by the way he responds to specific events. You realize that the events of the narrative are not as important as the narrator's perceptions and thoughts about certain episodes.

By the time you get to the central event, the magic show performed by the magician hypnotist Cippola (“[a] conjuror!”⁵), the story has become extremely intricate. On one level, we still identify with the narrator. We learn what is happening from him; we must use what he tells us as the primary basis for judging the story's events. Yet, on another level of response, we've come to see that the narrator is by no means objective. He is defined, rather, by his morality and politics, by an apparent sense of racial and class superiority. We've not only begun to question our reactions to him; we also have found ourselves engaged in an anterior inquiry: what does Mann have in mind? Does he, or doesn't he, identify with the narrator, and, if so, to what extent? The question requires an aesthetic response. The work demands a deeper explanation.

To find out Mann's aesthetic convictions during the post-World War I period, I went to one of his most interesting books, *Reflections of a Nonpolitical Man*.⁶ In the concluding chapter, “Irony and Radicalism,” Mann describes the necessity of irony in art: “Art, creative writing, [has] stopped being naive. . . . [It] is now no longer simply life, but also *criticism* of life, and indeed, a criticism far more shocking than that of pure intellect, as its methods are richer, more emotional, more varied”⁷ I then went to Frederic Prokosch's final

4. *Mario and the Magician*, *supra* note 2, at 529.

5. *Id.* at 539.

6. THOMAS MANN, REFLECTIONS OF A NONPOLITICAL MAN (Walter D. Morris trans., Frederick Ungar Pub. Co. 1983) (originally published in German in 1918) [hereinafter REFLECTIONS OF A NONPOLITICAL MAN].

7. *Id.* at 420 (emphasis in original).

book, his masterpiece *Voices: A Memoir*, in which he describes a conversation with Mann. Prokosch recalls Mann's voice speaking: "About this matter of ambiguity. It is like a mirror reflecting a mirror which reflects yet still another mirror."⁸ Applying Prokosch's metaphor to Mann's sense of critical irony, I came to see *Mario and the Magician's* underlying aesthetic like this: One mirror reflecting the world of the narrator; another, the author's attitude toward the narrator's world; still another reflecting the reader's reaction to the narrator's world and the author's attitude toward it—each of these reflected against each other, the endless refractions making the work of art. In its most elementary sense, *Mario and the Magician* demonstrates that narrative language contains critical attitudes toward the life about which it is speaking, and a critical attitude toward the narration itself.

III.

It is not surprising, then, that Mann refers to *Mario and the Magician* as "a tale with political . . . implications."⁹ In Europe during the 1920s, the pressures of political events palpably existed; a criticism of life would have to include a criticism of politics. Mann's political expressions in *Mario and the Magician* are as complex as the narrative itself. The story delineates three political spheres. The first is class: the narrator consistently sets himself and his family against the "mob" of lower class Italians. Mixed in with class is race. The narrator describes himself as "northern"; the Italians are described as physically and racially distinct. Third, folded into class and race is culture. Two of the three important episodes in the story involve cultural judgments. The first is a wealthy patron's reaction to the narrator's coughing child at the hotel in which the narrator and his family are staying. Ultimately, the narrator must move his family to another pensione. The incident, he says pejoratively, is a result of social "Byzantinism."¹⁰ The second incident also involves one of his children, his little girl, who removes her bathing suit on the beach to rinse it out. The narrator is brought before a town official and fined. The event is an example of an "illness," "the presence of a national ideal," the "emotionalism of the sense-loving" south's "morality and discipline."¹¹

Then there are the politics of the magician episode. The narrator takes his family to a magic show performed in a theater located in the "proletariat" part of the town. The magician, Cippola, is a hunchbacked hypnotist who dresses like a dandy. He exudes a "self-satisfied air." He carries a claw-handled riding whip. His eloquence enraptures the local crowd. He patriotically espouses the

8. FREDERIC PROKOSCH, *VOICES: A MEMOIR* 13 (1983).

9. THOMAS MANN, *STORIES OF THREE DECADES* at viii (H.T. Lowe-Porter trans., 1936).

10. *Mario and the Magician*, *supra* note 2, at 532.

11. *Id.* at 535-36.

Italian ideal. He declares that "people and leader" are "comprehended in one another." He hypnotizes person after person, culminating in the final scene with Mario, a waiter the narrator and his family know from one of the hotels, whom Cippola greets with the fascist salute. The magician speaks to Mario about a woman with whom he is in love, drawing a kiss from him in her name. The crowd laughs and applauds. The kiss breaks the trance. Mario, distraught with the awareness of what has happened, pulls a gun and shoots Cippola. Cippola falls; "indescribable" commotion ensues. The narrator and his wife exit with their children. The tale ends: "Yes, we assured them, that was the end. And end of horror, a fatal end. And yet, a liberation—for I could not, and I cannot, but find it so!"¹²

Clearly embodying the story's earlier political critique, the episode is riddled with implications of class, race, and culture. Cippola, of course, represents Italy's fascistic corporate state. But (my source, again, is *Reflections of a Nonpolitical Man*) he also represents something else. Toward the conclusion of "Irony and Radicalism," Mann suddenly enters into a diatribe against Italy's most famous writer during the World War, Gabriele d'Annunzio:

But where can I find words to show the degree of incomprehension, amazement, disgust, and *scorn* I feel in the face of a Latin poet-politician and warmonger such as Gabriele d'Annunzio? Is such a rhetorical demagogue ever alone at all? Is he always "on stage?" Does he know no loneliness, no self-doubt, no worry and anguish about his soul and his work, no irony toward fame, no shame at being "adored?" And in his country they took the vain, delirious artistic fool *seriously*, at least for a while! . . . Was that only possible in a country that has remained childlike, in a country in which all political-democratic political philosophy still does not prevent criticism and skepticism in that grander style from being lacking, in a country, therefore, that has had no experience of a critique of reason and of morality, but least of all a critique of the artistic nature?¹³

"D'Annunzio," he continues, "the ambitious word-reveler . . . to whom Latin character and nationalism form just a means of effect and enthusiasm. . . . The artist as a panegyrist of war"; D'Annunzio "the politicized [a]esthete, the poetic seducer of the people, the blasphemer of the people, the libertine of rhetorical enthusiasm"¹⁴

12. *Id.* at 567.

13. REFLECTIONS OF A NONPOLITICAL MAN, *supra* note 6, at 425-26 (emphasis in original).

14. *Id.* at 426.

Mann's invective against the Italian people aside,¹⁵ the similarities between Cippola and D'Annunzio are evident. Mann, in *Mario and the Magician*, is also criticizing the non-ironic "libertine of rhetorical enthusiasm" in the political sphere, who, to him, is the equivalent of the magician, hypnotist, conjuror.

IV.

Mann, by 1918, felt that language could no longer simply describe life in an unmediated, neutral, transparent manner. Language has irony. Language includes a criticism of life, and of language itself.

Today, over seventy years later, most legal theorists agree that legal language does not simply mirror already existent, objective, formalized law. Legal language is not unmediated, transparent, or neutral. Like all language, it embodies a criticism of what it is speaking about, including political realities such as class, race, and culture.

This recognition has not come easy. Nor is it by any means universal. The reasons for denying it are complex. One explanation is the expectation (among non-lawyers too) that the adjudicative process ultimately relies on ascertainable objectivity. The social stakes involved in legal decision-making—war-making; the recognition of rights; wealth distribution; incarceration; criminal penalty by death—are awfully high. Society has profound trouble admitting that at its very foundation, in its language, law embodies political beliefs. But (as Mann's vision of narrative language reminds us) the language of law is a language of narration. It demands political perspectives and preferences. In its most elementary sense, law is a language of political critique.¹⁶

American jurisprudence this century has been absorbed by questions of judicial (especially constitutional) interpretation. It isn't difficult to see why. In the United States, ultimate determinations of legal power are made by the judiciary. The paramount political determination in American law is "judicial review"—whether or not a court ought to defer its power to the state's executive or the state's legislature. Since the language of judicial determination, like all narrative language, expresses political choices (no matter a judge's purported judicial philosophy), we have no choice but to look at the adjudicative system, from its bottom to its apex, as engaged in the attempt to express pluralistic,

15. I am tempted, but will resist the temptation, to explore the relationship between the invective and Mann's attitude toward the narrator in *Mario and the Magician*.

16. I elaborate on these and other observations about language and constitutional jurisprudence, from different perspectives, in Lawrence Joseph, *Theories of Poetry, Theories of Law*, 46 VAND. L. REV. (forthcoming October 1993).

subjective politics. As David Kairys put it forthrightly a decade ago: "Rather, with very few exceptions, the pleas for judicial restraint and activism, sometimes unintentionally or unconsciously, mask a political direction and are wholly dependent on social and political contexts."¹⁷

V.

For me, Mann's transposition of the repulsion he feels toward D'Annunzio, the politicized aesthete, into Cippola, the magician, captures a vital insight. Mann knows the magician's political power is aesthetic and epistemological. The magician creates knowledge. Aware of the people's desire for knowledge, he hypnotizes them into seeing his "truths," and he uses violence to make certain that they do. Does the magician believe he knows the truth? We are never really certain. But, whether or not he is aware of his duplicity, the effect is the same. The ways in which he characterizes "truth" make him a conjuror.

The power of a judge is also aesthetic and epistemological. In the United States judges create legal knowledge. How many judges realize this? I don't know. Nor do I know how deeply the knowledge of this power might affect them personally, or the extent to which they might react to it in institutional contexts. *Mario and the Magician* shows us that judges who believe they know (or know how to find) objective, neutral interpretive truth, with no sense at all of the critical side of their own language, are self-absorbed conjurors—out of touch with reality. So, too, those judges who speak in objective, non-critical language, aware that they are engaged in a political process, are (literally) hypocrites, conjurors of another sort. *Mario and the Magician* also shows that the social effect of constitutional conjuring is, at first, hypnotic. When the people begin to suspect word-revelry, false libertine rhetoric, a blasphemy of the truth, the constitutional conjuror continues his or her power by employing violence (Mann's metaphor: the violence of the whip). But, when the conjuror's seductive or violently reactive power fails—when the people become aware of the blasphemy perpetrated on them by the magician—the people respond violently. The conjuror's power is destroyed.

VI.

Professor Parker's *Manifesto*—read through the prism of *Mario and the Magician*—reminds us, finally, that those who possess the power of constitutional interpretation hold real power. Constitutional interpretation is constitutional conjuring unless those who appreciate the nature of their power

17. David Kairys, *Introduction to THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 1, 4 (David Kairys ed., 1982).

bring into play a knowledge of reality different than their own. Those who possess the power of the law commit violence against law itself if they do not, in language, allow for the voices of the people. Rather than take the people's voices into account, those with this power can, of course, do as the narrator in *Mario and the Magician* eventually does—exit the ultimately violent scene. Or, instead, they can confront, and expose, the nature of their power by bringing into legal narration the class, racial, and cultural realities of those who have no power or no other real political way to be heard.

Why, in the context of most of today's constitutional jurisprudence, does this conclusion sound experimental, if not radical? Because—in the midst of the hierarchial structure of our political economy, which, at its summit, possesses the power of legal meaning—it is. But, then, so is democracy radically experimental. It always has been, and is today, as much as ever. It is radical to ask, no matter the risk, how we, the people, how our power, may be truly heard in the body politic. Professor Parker remembers, rightfully, Holmes' declaration from 1919, a year after Thomas Mann wrote about irony and radicalism, that the Constitution is “an experiment, as all life is an experiment.”¹⁸ Remember, too, a different democratic vista, Walt Whitman's, written also in the aftermath of war:

In short, and to sum up, America, betaking herself to formative action, (as it is about time for more solid achievement, and less windy promise,) must, for her purposes, cease to recognize a theory of character grown of feudal aristocracies, or form'd by merely literary standards, or from any ultramarine, full-dress formulas of culture, polish, caste, &c., and must sternly promulgate her own new standard, yet old enough, and accepting the old, the perennial elements, and combining them into groups, unities, appropriate to the modern, the democratic . . . and to the practical occasions and needs of our own cities, and of the agricultural regions. Ever the most precious in the common.¹⁹

18. *Abrams v. United States*, 250 U.S. 616, 630 (1919).

19. WALT WHITMAN, *Democratic Vistas*, in WALT WHITMAN: POETRY AND PROSE 969 (1982).

