Three Papers on Four Boards

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Like Karen, I see this as an exciting trio of papers. I've been involved over the years with a few moments in legal academia when people tried to generate the sense that something new was happening, and this is another one. Novelty in American legal academia is, I think, much like cultural fashion in Italy as described by Umberto Ecco. He says there is an Italian pattern in which a foreign thinker is introduced by an ambitious local, embraced, and treated as unbelievably significant and relevant to all aspects of life. Books are translated, lots of commentaries are written. Then, there's the moment in which sober second thoughts set in. People begin to say, "Aristotle had said it all already." And then it's demonstrated that this person is ultimately a vacuous re-elaborator of things that we've always already known, and the situation is ripe for the next round.

I think there's a lot of that in American legal academic life, and a lot to Ecco's explanation. The late development, post-unification, of an Italian national intelligentsia leads to a persistent Italian sense of provinciality. I think a parallel analysis can be made of American legal academia (law schools are to the rest of the university as Italian intellectuals imagine themselves to be in relation to French, German, and English intellectuals) and of American intellectual life in general. Up-and-coming young scholars claim previously ignored Famous Dead Europeans as incredibly important. And it's risky, it's dangerous for anyone to claim that something is new, and it's particularly dangerous to claim to be new oneself. When I go to Italy, I'm terrified of the moment when a young Italian scholar might introduce me as representing a novelty of some kind, knowing that the best that I could ever get out of that would be a few seconds of fame and quite a bit of humiliation over the long term.

Nonetheless, I want to make a claim of novelty about these three papers.[1] What I think makes it possible to describe the publi-

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1. Marie-Claire Belleau, *The "Juristes Inquiets": Legal Classicism and Criticism in Early Twentieth-Century France*, 1997 UTAH L. REV. 379; Jorge L. Esquirol, *The*

cation of these papers together as an event in American legal intellectual life is that each manages to make a play on four boards simultaneously. In other words, the three papers are each of them interventions in no fewer than four running debates. The result of that is that their meaning in each debate is different and how to interpret each paper depends on which debate you're interpreting it as a part of.

The four debates that I'm talking about are: First, an American debate which might be called "What is France, anyway?" It is *not* a debate about Europe, and it's not a debate about the civil law. It has to do with the relationship between this country and France . . . the American intelligentsia and France . . . France as source . . . France as a threat . . . France the object of various investments . . . all in the specific context of legal thought.

Second, the three papers are interventions in the American legal theory debate. By which I mean the very long running debate . . . I think it's really a hundred years old, this debate in the United States . . . about the nature of judicial method, how it works, and particularly what its relation to ideology is, to the danger of the seeping into adjudication of the political. That's a debate which is distinctly American.

A third debate into which these papers are an intervention is what is sometimes called in the United States "the theory debate," in which theory is understood as a multidisciplinary enduring post-sixties development in which disciplines like literary theory are crucially involved as well as philosophy and anthropology and some other social scientific disciplines. The "theory debate" is autonomous from, distinct from the American *legal* theory debate. Although the following passage from Paul de Man is very difficult, and I'm not going to "read" it here, I think it's a good definition, and repays anxious puzzling:

> The advent of theory, the break that is now so often being deplored and that sets it aside from literary history and from literary criticism, occurs with the introduction of linguistic terminology in the metalanguage about literature. By linguistic terminology is meant a terminology that designates reference prior to designating the referent and takes into account, in the consideration of the world, the referential function of language or, to be somewhat more specific, that considers reference as a function of language and not necessarily as an intuition. . . . Contemporary literary theory comes into

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Fictions of Latin American Law (Part I), 1997 UTAH L. REV. 425; Mitchel de S.-O.-l'E. Lasser, *Comparative Law and Comparative Literature: A Project in Progress*, 1997 UTAH L. REV. 471.

its own in such events as the application of Saussurian linguistics to literary texts.[2]

The fourth debate is about how to understand the postcolonial situation, particularly its psychological, theoretical, consciousness, and affect dimensions. It's a debate that includes concepts like "hybridity."

What I'm going to do now is just expand each of these ideas very briefly. I'm going to run through the four discourses describing some ways in which the three papers can be understood as playing on all four boards at the same time. A part of me would like to spend all my time talking about the France debate. You get into that because there's some reason in your background, probably. France is the object of all these different kinds of investments, some of which Karen has already revealed for the speakers,[3] and I have some of those of my own.

The meaning of France, for a while in American legal thinking, was something like this: We sophisticated American legal thinkers have this great thing which is policy discourse, and the French don't have it. We good . . . they bad. They were the formalist Other. This was deeply satisfying for those of us invested in France, because it at once took them down more than a peg or two, and compensated for our general sense of ourselves as provincial and postcolonial in relation to a France identified at once with emotion, with the feminine (oo, la, la), and with intimidating but indispensable abstraction.

That didn't mean that American thinkers about France thought that the French decided the cases according to the *Code Civil*. The American interpretation of French formalism was that it was a mask for manipulation. I'm talking about Dawson, basically, who had a big influence on my own thinking about France, and also on my own thinking about law in general. Dawson gives the French very, very little credit either for self-consciousness or for sophistication, but he doesn't think for a minute that social and economic things don't influence French judges. It's obvious to him that they do. He sees them as primitive, a long way from the kind of consciousness that we, as American postrealists, have achieved. He offers a complacent understanding of our superiority to the French.

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2. PAUL DE MAN, *The Resistance to Theory*, *in* THE RESISTANCE TO THEORY 1, 8 (1986).

3. *See* Karen Engle, *Comparative Law as Exposing the Foreign System's Internal Critique: An Introduction*, 1997 UTAH L. REV. 359.

The impact of the three papers taken together, I think, is sort of dramatic for that picture. The papers show that the French are much more like us, according to our picture of ourselves, than at first appears. Worse, the papers suggest a Watsonian massive borrowing, not now at the level of law, but at the level of legal theory. So that there's an experience of the exposure of plagiarism. It's a little like the exposure of Coleridge's plagiarisms from German idealism, which was a scandal for people who loved and adored Coleridge.

It wasn't actually plagiarism. The American sociological jurisprudes footnoted the French over and over again. But in the construction of the postrealist legal process policy-oriented tradition, these sources were suppressed because they didn't fit the historical and political project, which was to establish the continuity of New Deal (and post–New Deal) American policy analysis with early nineteenth-century American legal thought, with the so-called Formative Era.

The basic thesis was that the New Deal was a return to pre–Civil War American legal thought, which was pragmatic, and that formalism was a late nineteenth-century right-wing aberration. So, the French origins play a much smaller role in the reconstruction of who we are than the return to the great period of the 1820s and 30s and 40s of the reception of other laws and the creation of American law. The three papers show that, that view to the contrary notwithstanding, the Holmes-Pound-Cardozo critique of formalism has French origins, that the French use policy analysis all the time, and that the French contribution to comparative law is based on, rather than antagonistic to, what we think of as typically American antiformalist attitudes.

These papers offer a kind of compensation for the revelation that the French are just like us, that everything we think, it turns out once again, in yet another area of life, we borrowed from them. The emotional compensation is that what the papers do is to bring to bear on French legal consciousness the mechanisms of French critical theory, which, in France itself have been largely rejected, marginalized, mocked, or simply abstractly canonized in large funerals. So that one of the pleasures of these papers, for me, as an American, is to participate in an idiosyncratically American critique of French legal consciousness using French techniques against the French.

This brings us to the legal theory debate. One of the things that's represented by the papers is a moment in the American debate about adjudication. They're a moment in the string of events that began with the American sociological jurisprudes, continued

with the realists, and got revived and further extended in critical legal studies, before it became a pale shadow.

This is a debate between uppity elite non-mainstreamers and elite mainstreamers. In sociological jurisprudence, legal realism and critical legal studies, a constant process, the non-mainstreamers extend and deepen the critique of mainstream understandings of adjudication by getting at the denied political element. And in the most recent round, the thing to be critiqued was legal process policy visions of how to make American legality work and how to legitimate it.

These papers do not present themselves as part of that debate. Nonetheless they are part of it. First, they interestingly just presuppose that there is a well-developed American critique of American adjudication, and use it to interrogate French thinking. Comparativists often seem unsure about how to justify their enterprise. For me the interest of comparative law (of these papers) comes from a combination of the thrill of the exotic with the desire to try out specific "crittish" theories, whose development is tied to the peculiarities of our national system, in new contexts, hoping to be able to improve the theories by finding out what about them travels and what doesn't.

Second, the papers contribute to the legal theory debate by further developing the postmodern critical techniques that sometimes supplement and sometimes displace those of the sociological jurisprudes, the realists, and the early crits. The papers represent the flowering of postmodern technique inside the long-running critical project. So, they're an advance, from the point of view of the critique of mainstream ideas of legality. And that brings me to the theory debate, because it's easy to see that where these new tools come from is from the theory debate. This is clearest in Lasser's paper,[4] with its fascinating deployment of literary categories like the grammatical, the rhetorical, the hermeneutic, the syntagmatic.

We should regard the papers as an intervention in the theory debate, as well as an appropriation of its vocabulary, even if as provincials we have to wonder, first, whether any player in it is likely to do the work necessary to understand how we could be participants, and second, whether the debate won't surely be over and "theory" as dead as CLS before we have figured out how to address it.

I see these papers as posing a challenge for people who believe that distinctions like that between the "grammatical" and the "rhe-

4. Lasser, *supra* note 1.

torical" or the "hermeneutic," as developed in literary theory, and particularly in postmodern theory, really are . . . let's say, clear, sharp, and well defined enough so that we can apply them without reworking them and, yes, improving them on the basis of our own legal critical work. These papers, I think, challenge the theory debate to come to grips with the discursive and recursive richness of legal theory. They make me wonder whether a lot of the ideas of, for example, Jakobson, Barthes, and de Man might be rendered clearer, more intelligible, and more useful, if they got a dose of direct metonymic exposure to . . . syntagmatic stringing along in sequence with . . . our sturdy, yeoman-like, lawyerly discussions of adjudication over the last hundred years.

I'm suggesting an attitude for our enterprise of appropriating the "theory debate" for our own purposes, with fantasies, no doubt, but surely without hopes of being feted all the way down the Champs Elysees. Ironically, this attitude is just the one de Man, right before the paragraph I quoted above, suggests for literary theorists in relation to philosophers:

> The invocation of prestigious philosophical names does not intimate that the present-day development of literary theory is a by-product of larger philosophical speculations. In some rare cases, a direct link may exist between philosophy and literary theory. More frequently, however, contemporary literary theory is a relatively autonomous version of questions that also surface, in a different context, in philosophy, though not necessarily in a clearer and more rigorous form. Philosophy, in England as well as on the Continent, is less freed from traditional patterns than it sometimes pretends to believe . . . . Literary theory may now have become a legitimate concern of philosophy but it cannot be assimilated to it, either factually or theoretically. It contains a necessary pragmatic moment that certainly weakens it as theory but that adds a subversive element of unpredictability and makes it something of a wild card in the serious game of the theoretical disciplines.[5]

The postcolonial dimension of these papers is complicated. There's the metaphorical French imperium over us American provincials. That's one dimension of it. There's the fact that there's a concrete French imperium in Quebec. There's French cultural imperialism in Latin America. An important aspect of the spiritual, as opposed to the political, French empire was the imagery of French culture as something that would supersede Hispanic culture in Latin America. So, all over the place, we have our exposure to the power of French imperial ideas.

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5. DE MAN, *supra* note 2, at 8.

All three of the papers are helpful in trying to figure out what it might mean to be a postcolonial subject of these different types of French imperium. The papers are not about the civil law. The way the French think about civil law doesn't jibe well with the way German and Italian scholars think about it, and doesn't jibe well, either, with the way non-French civilians construct the difference between American common law and civil law. The papers are *not* an intervention in that debate.

I think the postcolonial question they raise is: In what way do we, as postcolonials, and provincials, and marginals, incorporate into ourselves the dominant culture's construction of itself in relation to us, whether the construction is backed by diffuse hegemony, by physical violence, or by the local consulate's distribution of scholarships for study in the metropole? And what is it to decolonize oneself without hope of escaping post-coloniality? Of course I'm not saying *at all* that this question gets posed in the same way for me as an American ruling class person as it does for Marie-Claire as a Quebecoise, etc.

Is it our destiny to represent the revolt of the soft against the hard, the human against the mechanical, and in the process to turn, say, French formalism through critique into something more flexible that can serve our ends? But maybe we should understand ourselves as having constructed the hegemonic ideas as bad parodies of themselves? For example, have we chosen versions of theory in the theory debate which give the continental postmodern philosophical currents a kind of grammatical rigidity, which leaves us in the role of applying them? Is there an analogy between that tendency and a possible tendency in Quebec legal culture to construct French law, in opposition to English-speaking Canadian law, as a particular kind of icon, at the same time rendering it something far more mechanical than it might have been in France? What about René David's interpretation of Latin American jurists as heroes of legality as much because of as in spite of their hopelessly naive and dogmatic natural law tendencies, their "failure" to assimilate the ultra-nuanced and flexible kind of analysis he himself favored? This is the range of questions.

As hybridized American or hybridized in general authors, we can never know with any great security whether in a particular case we are producing rigidified versions of hegemonic ideas, reprojecting them as oppressors, or successfully managing them to incorporate them into whatever identities we may have ourselves.

I think the three papers together play on all four boards at the same time. Each one will have a different meaning in each debate, but I think this will be remembered as . . . I think this issue of the

Utah Law Review will be sold as a book, dozens and dozens of copies of it.