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Postmodernism and You: Law

Gary Saalman, Contributor

Rodney King, a black man from Los Angeles was apprehended by police in 1992. During the course of a violent confrontation, police severely beat him with night sticks after stunning him with stun-guns. But a private camera recorded the beating for the entire nation to see. Months later, an all-white jury acquitted the officers involved, provoking a riot which burned hundreds of buildings, injuring and killing scores of people. African American citizens in Los Angeles and across the country were enraged at the confirmation of their worst suspicions--blacks cannot get justice from the white American justice system. Later, the officers were convicted by a federal court, but the doubts remained. What if there had been no camera running? Would anyone have taken Rodney King's word that he had been beaten? Or would he have been blamed for any violence during the arrest?

Incidents like this have highlighted questions about the fairness of law in America.

Our Present Legal System

Operating a legal system along the lines of traditional American legal doctrine requires that people be **rational beings** who understand reality. Traditional legal theorists believe legal processes can yield a **relatively fixed set of correct answers** to legal questions. They believe judges can and should remain **objective, neutral and disinterested** in their decision-making.

In recent years, however, postmodernism has risen to the forefront of legal theory. Postmodern theorists, also known as "anti-foundationalists" and "critical legal students," claim the law cannot have any foundation because there is **no foundation for objective knowledge of any kind**. They say we cannot objectively understand reality because all knowledge is contingent on social convention (especially language). Postmodernists discount

individuals' capability to reason and to discern truth. Instead, they demonstrate how **each social group focuses on certain tenets favorable to their particular group**.

Principles of law could never reflect universal truths, they argue, only allocations of power among social

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groups. **According to these scholars, it is senseless to talk about whether a law is right or wrong or moral or amoral. Law is whatever the most powerful cultural group in society makes it.**

Postmodernism's influence in the law raises fundamental challenges to the legal system. If law is not objective, if it does not embody values to which we all should adhere, then why should citizens be bound by it? **Is law merely a naked assertion of power by one group over another?**

Postmodernism's Prominence In Legal Theory

Although hard to measure, **most observers agree that postmodern theories of law are exerting a huge influence today in the courtroom and the legislature.**

According to Peter Schank, postmodernism "has emerged to become **as dominant in legal theory as any paradigm in the past.**" Another authority says, "Aspects of postmodern philosophy . . . have by now **thoroughly infiltrated academic legal analysis.**" Gary Minda claims, "**Postmoderns have redefined the benchmark** for evaluating the cogency of reasoning and the validity of the evidence."

The Critical Legal Studies Movement

Since the 1970's a group of professors have been organizing what became the critical legal studies movement. They argued that the law was biased in that it reflected the political ideology of a ruling class and protected their interests. The professors maintained that legal principles and rules, though designed to appear neutral, were in fact loaded in favor of the wealthier classes, as professor Kelman explains,

"If there is a single theme [in Critical Legal Studies], it is that **law is an instrument of social, economic, and political domination**, both in the sense of furthering the concrete interests of the dominators and in that of legitimating the existing order. This approach

emphasizes the ideological character of legal doctrine, and is therefore more concerned with its internal structure than the approach that focuses on latent social functions."

Organizers of the first Critical Legal Studies conference were repelled by the "traditionalist" or "formalist" approach to the law and legal studies. **They rejected the notion that neutral and nonpolitical legal reasoning could resolve most controversies.** Like other postmodernists, they believe that language means different things to different cultures, and that language shapes thinking. They argue that **reason is never fully reliable because it is never actually objective.** What masquerades as objective legal

reasoning is actually the reassertion of the rights of the privileged.

The Principles of Critical Legal Studies

While we do not have the space here to develop the areas fully as we do in *The Death of Truth*, we can at least name their primary principles:

- All Legal "Truths" are Mental Constructs Shaped by Social Convention
- The Law Seeks Wrongful Legitimization
- The Law is Full of Indeterminacy, Incoherence and Contradiction
- There Are No Foundational Principles

Later Postmodernism Legal Thinkers

The first generation critical legal theorists deconstructed traditional legal theory using principles of contradiction and indeterminacy. Now, second generation critical theorists focus on the way in which law defines and reproduces cultural values in society. Legal scholar, Gary Minda explains:

"Second generation Critical Legal Studies scholars seek to reveal how various legal categories are constructed by judges and legislatures from cultural and political contexts [i.e., biases] . . . Advancing a social-construction thesis, crits attempted to show how legal meaning about the world 'comes from within' the interpreting subject and is itself constituted by an external and social cultural environment."

Femme-Crits

Leslie Bender explains the thinking behind feminist critical legal theorists, or "Femme-Crits" as they are known in legal circles.

"Men have created and named a world in which **men have power over women**--physical power, political power, opportunity power, silencing power. We must learn how our social and political organizations have been **constructed by men in their own image** and explore how a world constructed by women and men for woman and men would be different . . . The primary task of feminist scholars is to awaken women and men to the insidious ways in which patriarchy distorts all of our lives . . . Unearthing each shard of patriarchy is especially difficult because of the powerful assumptions embedded in our language and logic. **Western culture teaches us that the patriarchal description of reality is not biased but neutral; that our knowledge and truths are not subjective. . . but objective, scientifically based, and**

universal . . ."

But the femme-crits will help us understand how all our western views are really just patriarchal theater.

Race-Crits

Angela Harris explains how the same postmodern ideas apply to race-oriented Critical Legal Students, or "race-crits," as Gary Minda calls them:

"For race crits, racism is not only a matter of individual prejudice and everyday practice, rather race is deeply imbedded in language, perceptions, and **perhaps even 'reason' itself**. In CRT's [Critical Race Theory's] 'postmodern narratives,' racism is an inescapable feature of western culture, and race is always already inscribed in the most innocent and neutral-seeming concepts. Even **ideas like 'truth' and 'justice' themselves are open to interrogations that reveal their complicity with power . . .**

Long ago, empowered actors and speakers enshrined their meanings, preferences, and views of the world into the common culture and language. Now, deliberation within that language, purporting always to be neutral and fair, **inexorably produces results that reflect their interests.**"

Remember, these are not a lunatic fringe at the margins of legal practice. They include department heads, and leading professors at law schools like Harvard Law! They are practicing lawyers and legal authorities, like Lani Guinier, who recently attracted attention when she was nominated to be the attorney general before withdrawing.

The Rest of the Story

Read *The Death of Truth* and learn:

- How postmodern theories are **already affecting legislation and court decisions** in one state after another.
- What the postmodern legal theorists are saying in their own words, and what they propose to do
- How **tolerance laws, diversity training, and behavior codes** in companies, institutions and state and federal legal codes reflect the success of postmodern theorists

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