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Postmodern Law – Introduction

Before exploring the topic of Postmodern law, it may be helpful to give the discussion an historical context. No one does this better than **Harold J. Berman, former professor of law at Harvard Law School**. Berman maintains that there is currently a major debate over our understanding of law. The West’s legal system is rooted in certain beliefs, he writes, including “the structural integrity of law, its ongoingness, its religious roots, [and] its transcendent qualities.”¹

However, Berman explains that today these foundational beliefs are rapidly disappearing, not only from the minds of philosophers, but from “the minds of lawmakers, judges, lawyers, law teachers... [and] from the consciousness of the vast majority of citizens....The law is becoming fragmented, more subjective, geared more to expediency and less to morality, concerned more with immediate consequences and less with consistency or continuity. Thus the historical soil of the Western legal tradition is being washed away in the twentieth century, and the tradition itself is threatened with collapse.”²

Declaring that the Western legal tradition is on the verge of collapse is a bold statement, but not too strong for the situation we are facing in the early years of the twenty-first century. Berman notes the historical background for this dramatic shift in ideology. In many ways, Western civilization has never recovered from the utter destruction and slaughter of World War I (1914–1918). That war, fought within the Western powers and traditions, cast grave doubts about the viability and desirability of Western traditions, as the most enlightened, best educated, most scientifically astute of all peoples proceeded to mow themselves down in frightening numbers. This led, Berman says, to a “loss of confidence in the West itself, as a civilization...and in the legal tradition which for nine centuries has helped to sustain it.”³

The current crisis in Western civilization has paved the way for a new approach to legal theory. This is where Postmodernism finds a foothold to enter the debate over the place and substance of law.

Postmodern Law – Rejection of Enlightenment Ideas

Postmodernists view the European Enlightenment as a white male undertaking that elevated reason and empirical data. It focused on objective knowledge of a real world, such as the scientific method for discovering objective facts about the universe, and the concept of justice in relation to law.

From a Postmodern law perspective, the source of knowledge and justice is at the root of the problem. Postmodernists insist that Western law, which grew out of Christianity and the Enlightenment, reflects white male bias. They attack “the concepts of reason and objective truth, condemning them as components of white male domination. They prefer the more subjective ‘ways of knowing’ supposedly favored by women and minorities, such as storytelling. As to the rule of law, it is an article of [Postmodern] faith that legal rules are indeterminate and serve only to disguise the law’s white male bias.”⁴ For this reason, **Postmodernists are intent on eliminating religious roots and transcendent qualities from Western law. They desire more fragmentation and subjectivity, and less objective morality than the Judeo-Christian tradition demands. In the end, they are intent on creating and using their own brand of social justice merely for left-wing political purposes.**

Postmodern Law – Critical Legal Studies

At the center of this assault on traditional Western law is the Critical Legal Studies movement. Critical Legal Studies (CLS) publishes “critiques of law focused on progressive—even radical—political change rather than on efficient government.”⁵ In fact, the CLS slogan is “critique is all there is.” Using Derrida’s deconstruction principle, they dissect a law to discover its subjective meaning, no matter what the law objectively states.

“While CLS and the newer movements share a left-leaning or progressive outlook, the new movements tend to have a narrower focus....[T]he new radicals concentrate on race and gender issues, and particularly on how the law creates or contributes to unequal power relations,”⁶ according to Farber and Sherry.



WHEN YOU DIE why should **GOD** let you into heaven

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The heart of the Postmodern law thesis is that "reality is socially constructed by the powerful in order to perpetuate their own hegemony [power over other people]. As one radical feminist puts it, 'Feminist analysis begins with the principle that objective reality is a myth.'"⁷ To amplify the focus on the legal inequalities imposed on women and minorities by those in power, CLS includes the core ideas of "the thought of French postmodernists such as Michel Foucault and Jacques Derrida. This meant extending the insight that law is socially constructed into an argument that everything is socially constructed."⁸ From Foucault, Postmodern legal radicals draw the assertion that what counts for objective knowledge "is a power relation, one category of people benefiting at the expense of another category of people."⁹ Foucault sees all relationships between people as power relationships. Universal standards of legal judgment, common to all, do not exist. Any claim to universal truth is merely a mask for gaining political power over women and minorities.

Stanley Fish, professor of Law and English, argues, "the name of the game has always been politics."¹⁰ One example of the Postmodern focus on politics over objective knowledge has been provided by Susan Estrich, Professor of Law and Political Science at the University of Southern California Law School and a syndicated columnist who has worked with many liberal politicians and appeared on numerous television talk shows. Estrich was asked why she supported Anita Hill when Hill charged Clarence Thomas (during his confirmation hearings for the Supreme Court) with sexual harassment but opposed Paula Jones when she made sexual harassment allegations against President Clinton. Ms. Estrich replied, "You believe in principle; I believe in politics."¹¹

Estrich, like Marx, Nietzsche, and Foucault, sees law simply as a tool for political power. According to Marx, "Political power, properly so called, is merely the organized power of one class for oppressing another."¹² Estrich implies that she uses the law in any way necessary to get what she wants. Thus, the law is no longer a God-ordained, objective standard by which to judge behavior and maintain an ordered society, but a weapon to beat political opponents into submission to a point of view.

Postmodern Law – Conclusion

Even if all knowledge were socially constructed, the matter of truth would remain important. Brawley's story was false—not just in one community but in all communities—because truth is universal. If law is not based on objective truth, we can only look forward to authoritarianism and totalitarianism. Justice and truth must go hand in hand.

Trial lawyer Gary Saalman predicts the results of a Postmodern law focus on racial, gender, and cultural politics becoming an integral part of the legal system: "Postmodern legal theory trickles down to breed cynicism toward all government and the entire criminal justice system. This, then, is the real issue. No one questions the fact that law requires interpretation, or that judges or juries may have acted unfairly, sometimes based on race or gender bias. The question is this: How do we view such unfairness? Do we accept that all people must inevitably be unfair and subjective, as postmodernists claim? Or do we recognize such unfairness as the evil it is and resist it? When we accept what postmodernism preaches, we lose all basis for calling the system to fairness. We instead challenge minority populations to pursue power so they can take their turn."¹³

Learn More!

Notes:

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¹ Quoted in Daniel A. Farber and Suzanna Sherry, *Beyond All Reason: The Radical Assault on Truth in American Law* (Oxford, UK: Oxford University Press, 1997), 39.

² *Ibid.*, 40.

³ *Ibid.*, 21.

⁴ *Ibid.*, 5.

⁵ *Ibid.*, 19.

⁶ *Ibid.*, 21.

⁷ *Ibid.*, 23.

⁸ *Ibid.*, 22.

⁹ *Ibid.*, 24.

¹⁰ Quoted in Dennis McCallum, ed., *The Death of Truth* (Minneapolis, MN: Bethany House, 1996), 170. See Stanley Fish, *There's No Such Thing As Free Speech: And It's a Good Thing, Too* (Oxford, UK: Oxford University Press, 1993).

¹¹ Susan Estrich in an online letter to Stuart Taylor Jr., <http://www.slate.com/id/3628/entry/23734/>.

¹² Karl Marx and Friedrich Engels, *The Communist Manifesto* (New York, NY: Pocket Books, 1964), 95.

¹³ McCallum, 175.

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WHAT DO YOU THINK? - We have all **sinned** and deserve God's judgment. **God**, the Father, sent His only Son to satisfy that judgment for those who believe in Him. **Jesus**, the creator and eternal Son of God, who lived a sinless life, loves us so much that He **died** for our sins, taking the punishment that we deserve, was **buried**, and **rose from the dead** according to the **Bible**. If you truly believe and trust this in your heart, receiving Jesus alone as your **Savior**, declaring, "**Jesus is Lord**," you will be saved from **judgment** and spend eternity with God in heaven.

What is your response?

Yes, today I am deciding to follow Jesus

Yes, I am already a follower of Jesus

I still have questions