

Power in Contemporary Legal Thought: Postmodernism versus Behavioral Biology

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“Power stands behind law. Without power, law would be unenforceable. Moreover, power helps define law. Therefore, a proper concept of power is important for a proper notion of law.

This paper will contrast views of power under postmodernism¹ and behavioral biology² and how these views affect law, government, and society. Part II will discuss power and postmodernism. It will examine the postmodern concept of power, then analyze offshoots of postmodernism, such as critical legal studies, feminism, and critical race studies in connection with power and law. Part III will present a theory of power and law based on behavioral biology. It will examine behavioral biology and power, contrast behavioral biology and postmodernism concerning power, and contrast notions of power under behavioral biology and offshoots of postmodernism. **This paper will conclude that postmodern notions of power are faulty and unworkable, while behavioral biology offers useful ideas on power.**” (p. 1)

“II. Power and Postmodernism

A. The Postmodern Concept of Power

Power under postmodernism derives from the notion that there is no absolute truth.³ Postmodernism rejects Enlightenment reason, and it denies universality, rather emphasizing difference.⁴ There are no metanarratives, just local truth (moral relativism), micronarratives, and micropolitics of power.⁵ Postmodernism is centerless; there is no reality, even in nature.⁶ Instead of reality, there is a flow of images, like an LSD trip.⁷ Because postmodernism has no center, it is alienating.⁸ **Human nature is not natural (biological); it is a social construct.⁹ There is an infinite plasticity of human nature, and anything is possible.¹⁰**

Because there is no absolute truth, knowledge is power.¹¹ Thus, those who control knowledge control power. Those in power define what is normal and abnormal, such as defining what is sane and insane or that homosexuality is abnormal, and, therefore, the powerful regulate behavior.¹² **Social construction is power: “these radical multiculturalists believe in particular that Western ideas and institutions are socially constructed to serve the interests of the powerful, especially straight, white men.”¹³** Postmodernists also think that “the apparent neutrality and political invisibility of techniques of power is what makes them so dangerous.”¹⁴ Thus, the “[p]ostmodern critique might be thought

of as a strategy for bringing to the surface the suppressed narratives and voices drowned out by univocal projections of master narratives.”¹⁵

Those in power control knowledge mainly through language and signs.¹⁶ All knowledge is textual; all language is fragmented.¹⁷ Postmodernists think that language does not reflect reality and that language is a social construct.¹⁸ “There is no natural link between the signifier and the signified, only a contingent cultural designation.”¹⁹ Language is a game: “understanding a rule system entails understanding the language game or form of life of which it is a part: rules function to explain the conventions commonly observed in playing the game. Breaking the rules is wrong only in the sense that, if you break enough rules consistently enough, you have ceased to play the old game and have invented a new one.”²⁰ Language constructs reality; reality is constructed by the linguist systems in our minds, with communities with different languages living in different worlds.²¹ Thus, “our minds grasp things not as they are ‘in themselves’ but only through concepts, signified by words” (discourse).²²” (pp. 1-2)

“Derrida developed the notion of deconstruction, which allows as many readings as there are texts.²³ As one writer has stated: **“Deconstruction is thus a form of criticism that attempts to defeat foundational claims of conceptual knowledge.”**²⁴ Postmodernists think Western thought is based on centers. Centers create binary opposites; they exclude.²⁵ Binary codes suppress radical change because one of the opposites is privileged; the other is marginalized.²⁶ Therefore, postmoderns want subversive readings of authoritarian texts.²⁷ Similarly, Barthes wrote that there is no author because the author’s intentions are expressed through signs that have a multitude of interpretations.²⁸ Thus, the reader is more important than the author.” (p. 3)

The postmodern idea of power also partially derives from the notion that there is no autonomous self.³² As Professor Schanck has declared: “The self is not and cannot be, an autonomous, self-generating entity; it is purely a social, cultural, historical, and linguistic creation.”³³ Modernism had a self, although that self was alienated.³⁴ For the postmoderns, the self has no center; it is fragmented.³⁵ Meaning is not created by the subject; reason is socially constructed.³⁶ Power and language makes individuals subjects.³⁷ **Individualism is a social construct that alienates us from community.³⁸ Finally, science can tell us nothing about the self.³⁹**

While Sartre thought that the fact that truth was not absolute meant that each of us constructed our own realities,⁴⁰ postmodernists argue that people are constrained by the ideas presented to them by society.⁴¹ For instance, woman are defined by men.⁴² Going further, **some postmodernists believe that “everyday life is providing new modes of domination bureaucracies and consumer capitalism.”**⁴³” (pp. 3-4)

“Foucault, the most important postmodern writer on power, believed that power is a form of action on the action of others, and it is woven into all social institutions.⁴⁴ “Power is a purely structural action for which subjects are anonymous conduits or by-products.”⁴⁵ For Foucault,

power exists diffused in micropractices in social institutions, such as the family, the school, the hospital, and the asylum, and it disciplines individuals and legitimizes domination and control.⁴⁶ Technical experts define power because they control the discourse.⁴⁷ Psychiatrists define normalcy and madness, and Foucault viewed psychiatrists as the mental police.⁴⁸ Experts put individuals in their place in prison, schools, and everywhere.⁴⁹ In such institutions, there is minute control of activity through discipline, using such techniques as timetables and surveillance.⁵⁰ “Discipline makes individuals;” “the individual is now interpreted not only as a discursive construct, but as an effect of political technologies through which its very identity, desires, body, and ‘soul’ are shaped and constituted.”⁵¹ Hierarchies control the lower classes, law sets limits, and disciplinary power punishes and rewards.⁵² Such influence must be “undermined” and “demystified,” even if true, because “their harmfulness rests not on their epistemic status but on their ability to compel consent and exclude the ignorant.”⁵³

Under postmodernism, everything is political and ideological. Postmodernism has changed epistemic questions into political ones; social context is emphasized and epistemic context is usually ignored.⁵⁴ **What is important is interests—class, status, power, money.**⁵⁵

Postmodernists are often distrustful of popular sovereignty and democracy.⁵⁶ (p. 4)

“...That people can be mistaken about their own preferences weakens the assumptions behind democracy—that people are acting in their best interests.⁵⁸ **Postmoderns prefer decentered political units.**⁵⁹ **Postmoderns distrust hierarchy and believe that society should be organized horizontally,** like rat tunnels or the internet.⁶⁰ **They are also suspicious of capitalism and economic exchange,**⁶¹ **and they believe that individual rights are the alibi of power.**⁶² Some postmoderns would go as far as to reject everything in the interests of the downtrodden.⁶³ Postmodernism’s view of politics even affects history. “There is a current tendency, at least among academics, to regard history as a form of fiction that can or should be written differently by each nation or group.”⁶⁴

Postmodernism does not believe in progress, and it distrusts science because of the many atrocities of the twentieth century—science made gas chambers.⁶⁵ **Just like other elites, scientists are interested in money, power, and class interests.**⁶⁶ **For Foucault, science was grounded in humanistic assumptions, which were linked to operations of power.**⁶⁷ Postmodernists also posit that philosophy should not be based on science because “human science” is not science in the same way as the physical sciences.⁶⁸ Politics does not need a concept of human nature.⁶⁹ Some postmodernists also question why metaphysical theories held by millions should be ignored in favor of the ideas of a small group of politically-powerful scientists.⁷⁰ In a democracy, “the wrong answer ought to have as much

authority as the right one.”⁷¹ **Most importantly, postmoderns reject biological views of human nature on ideological grounds.**⁷²” (p. 5)

“B. Offshoots of Postmodernism and Power

Much of **critical legal studies (“CLS”), a jurisprudential manifestation of postmodernism**, concerns power. CLS is **mainly critical of existing power structures**, and it generally has not produced a coherent alternative of its own.

CLS believes that law is politics—that mainstream law masks underlying political and moral commitments by disconnecting knowledge and truth from politics, passion, and subjective desire.⁷⁴ CLS bases this notion on the fact that law is indeterminate. It claims that mainstream law masks this indeterminacy by false claims of determinacy, objectivity, formalism, and neutrality.⁷⁵ **As Owen Fiss has summarized: “Law is not what it seems—objective and capable of yielding right answers—but is simply politics in another guise.”**⁷⁶

CLS demonstrates the illegitimacy of law by exposing paired contradictions (such as rules/standards, individualism/communitarianism, public/private), which lead to opposite results in a case and which are similar to Derrida’s binary opposites.⁷⁷ Mainstream law then privileges one of these contradictions through legal rhetoric, usually reflecting the right-wing order.⁷⁸ **CLS’s goal is to resuscitate the unprivileged position by recharacterizing a situation (e.g., by not characterizing it as a property problem) or by reversing hierarchies, which allows transformative, counter-hegemonic thought.**⁷⁹ Professor Kellman has averred: **“the spirit of the antirights, antilegalists approach is to abandon known distorting categories, to leap ahead, not fully aware how one will reconstruct the world; that is surely a move to transformation.”**⁸⁰” (p.6)

“...CLS...employs...a technique...cal[led]...“trashing,”...which it employs to deconstruct complexity and imprecision of legal texts.⁸¹ Professor Kellman has defined trashing as: “Take specific arguments very seriously in their own terms; discover they are actually foolish ([tragic]-comic); and then look for some (external observer’s) order (not the germ of truth) in the internally contradictory, incoherent chaos we’ve exposed.”⁸²

CLS employs trashing to expose illegitimate power and unjust hierarchies, which are social constructs.⁸³ Mark Kellman has argued: “From my vantage point, which is the view of ‘micropractices,’ the primary thrust of the CLS enterprise at an academic level should be to explore, in a very concrete, particular setting, the vital general point that status hierarchies are founded, at least in a significant part, on sham distinctions.”⁸⁴ (pp. 6-7)

“...**CLS adherents also think that law does not deal with social problems.**⁸⁸ They feel that legal doctrine created a system of signs.⁸⁹ They believe that mainstream law uses ideology, legitimization, and mystification to justify the state’s power.⁹⁰ Legal doctrine is contingent, not inevitable.⁹¹

CLS adherent, Peter Gabel, views **rights as alienating: “If we now turn our attention to the nature of rights themselves, we can see how they represent the field of social interaction in the service of legalizing its alienated appearances.”**⁹² (pp. 7-8)

“Similarly, Duncan Kennedy has asserted that: “Rights discourse is internally inconsistent, vacuous or circular. Legal thought can generate equally plausible rights justifications for almost any result.”⁹³ He also thinks that rights discourse impedes radical alternatives, such as “decentralized democratic worker control of factories.”⁹⁴

Later CLS writings often focused on identity issues.⁹⁵ They argued that “legal categories were constructed by judges and legislatures from their understanding of the universal subject as white, male, and middle-class.”⁹⁶ (p. 8)

“...Critical race theory (“CRT”) grew out of a reaction to the notion that “white” was the standard for equality: If blacks could achieve the same rights as whites, they would be equal.¹¹⁷ Like many feminists, **CRT scholars attacked the supposed neutrality of the American legal system, rejecting the notion of “colorblindness,” and they believed that judicial decision-making resulted from power imbalances.**¹¹⁸ While some conservative black scholars thought that colorblindness had been achieved and that individuals should be judged on universal merit, CRT scholars believed that this supposed neutrality favors the white majority.¹¹⁹

Instead, **CRT scholars advocated race consciousness, arguing that racial identity is both skin color and cultural—that black communities are different from white ones.**¹²⁰ **Similar to postmodernism generally, they thought that law constructed knowledge about race.**¹²¹ **Rather, law needs standards that reflect the intellectual diversity of different communities.**¹²² CRT also felt that minority scholars had been excluded from the academy—that blacks had a unique viewpoint on discrimination and oppression.¹²³ Consequently, like many feminists, CRT adopted narrative to tell their personal stories.¹²⁴ CRT scholars also use deconstruction to expose how traditional legal categories subordinates blacks as inferior.¹²⁵ They examine racial discourse to show how it controls racial identity.¹²⁶ They conclude that “discrimination stems from the way that racial identity is defined in terms of the privileged relation to the difference of others.”¹²⁷

An important issue for CRT scholars is speech, particularly hate speech.” (p. 10)

“They have adopted an instrumental approach to freedom of speech, which includes a rhetorical shift towards victims.¹²⁸ They view “expression as a speech act of a performative nature. . . , and they believe that “particular types of speech can be harmful to minorities.”¹²⁹ They think that the government should protect from minorities from “the emotional distress provoked by hate speech[, which] includes offence, uncertainty, discomfort and loss of dignity.”¹³⁰ If it doesn’t, it hasn’t provided proper security to their citizens.”¹³¹” (pp. 10-11)