

**A PRIMER ON LEFT LEGAL THEORY:
REALISM, MARXISM, CLS & PoMo**

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Abstract: Legal Realism, Critical Legal Studies (CLS), Postmodernism (PoMo), and Marxism are all intertwined, somehow. This article sees Marxist currents as the common thread throughout U.S. left legal theory. Marxism as an ideology never took off in the United States, outside of law schools. But there, Marxism seems to have overtly or covertly informed these three legal theories, resulting in what in Marxist terms are revisionist, deviationist, and sub-reformist lines. Whether one is in favour of or opposed to the extrapolations in the U.S. from some portions of Marxism into legal theory, it is worth examining Legal Realism, CLS and PoMo from the perspective of Marxism to see how these extrapolations in fact have played out, or how they may. This article concludes that Legal Realism did not “follow through” on its radical origins, that CLS stayed radical but never took state power, and that PoMo is too open textured to be at all useful as a tool to fight against oppression or exploitation.

A PRIMER ON LEFT LEGAL THEORY: REALISM, MARXISM, CLS & PoMo	64
Introduction	65
I. LEGAL REALISM	66
II. MARXIST LEGAL THEORY	70
1) Antinomianism	71
2) Socialist Legalism.....	71
3) Criminal Theory	72
III. CRITICAL LEGAL STUDIES	73
IV. POSTMODERNISM	75

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INTRODUCTION

In most of the world, including most of the first world, Marxism – or some variant thereof – is seen as the core left ideology. How does – or did – Marxism play out in U.S. legal theory? I argue that Marxism both influences and explains the limits of Legal Realism, Critical Legal Studies (CLS) and feminism. I omit a discussion of feminism in this article because I am not a woman and respect essentialism and have discussed the definite influence of Marxism on feminism in U.S. legal theory elsewhere.¹ Marxism clearly informed U.S. left legal theory, and it did so to a deeper extent than was admitted or acknowledged at the time by various proponents of the theories examined. The obscurantism was likely because Marxism is so antithetical to the free market liberal economic assumptions that were the basis of the U.S. revolution. Marxism in the U.S. remains a theory that dare not speak its name.

I. LEGAL REALISM

The origins of CLS are to be found in the American legal realist² movement of the 1930s.³ The underlying contradictions of American democracy were revealed by the worst economic crisis in American history. The reactionary jurisprudence of the U.S. Supreme Court led President Roosevelt to attempt to pack the Court. U.S. Supreme Court justices enjoy life tenure and cannot be

¹ See Eric Engle, *The Red Queen Meets the Cheshire Cat? Mackinnon Marx and the Mirror of Production*, 2 THE CRIT 1 (Fall 2009)
<http://www.thecritui.com/articles/Engle1.pdf>.

² THEODORE M. BENDITT, *LAW AS RULE AND PRINCIPLE: PROBLEMS OF LEGAL PHILOSOPHY 1* (Stanford University Press 1978) (“American legal realists maintain that judges do in fact make law. But against Bentham they maintain that judges should take a hand in making law, and against both Bentham and Blackstone they maintain that judges must be makers of law-and by ‘must’ is meant that judges necessarily make law, that this is intrinsic to the very process or activity of judging.”).

³ Joseph William Singer, *Legal Realism at Yale*, 76 CAL. L. REV. 465, 468-469 (1988) (“[L]egal realism as an approach to legal reasoning and education . . . [and] is a form of functionalism or instrumentalism. The original realists sought to understand legal rules in terms of their social consequences. . . . To better their understanding of how law functions in the real world, they attempted to unify law and the social sciences. . . . They believed that this knowledge would enable them to reform the legal system to achieve efficiency and social justice. . . .”).

removed from office.⁴ However, the U.S. Constitution is silent as to the number of justices that make up the panel.⁵ Since Roosevelt could not remove the justices whose constitutional interpretations were undermining the relief policies of the New Deal (a program to install a modest welfare state in America – social democracy), he attempted – unsuccessfully – to appoint many new justices.

While the President's attempts to "pack" the court (perfectly legal, although unorthodox) failed, his message did not. After the court-packing incident, the interpretations of the Court became markedly less hostile to the exercise of federal power, power first exercised in the name of ending the depression and then later in the name of fighting and winning the Second World War.

At the same time these judicial manoeuvres were going on – and in part because of them – a new school of thought known as Legal Realism arose in the United States.⁶ Legal Realism was the intellectual forbearer of Critical Legal Studies. The object of this paper is to discuss the relationship among Legal Realism, Marxism, Critical Legal Studies, and Postmodernism.

Legal Realism proposes a simple yet radical alternative view of legal interpretation. Recognizing: 1) the arbitrary⁷ character of judicial interpretation⁸ (which manipulates⁹ concepts and people

⁴ U.S. CONST., Art. III, § 1.

⁵ *See Id.*

⁶ BENDITT, *supra* note 2, at 2 ("The realists (or some of them, at any rate) maintain that by approaching the study of law from the direction of the judicial process, we can gain insights that will yield a view of law quite different from the picture presented or implied by such [natural law] writers as Blackstone and Bentham.").

⁷ *See* SINGER, *supra* note 3, at 469.

⁸ SINGER, *supra* note 3, at 470 ("First, [legal realists] argued that legal rules were often vague and therefore ambiguous. Since these rules often contained abstract and contestable concepts, such as 'reasonableness,' 'duress,' 'title,' or 'privity of estate,' they were subject to broad interpretation. Reasonable persons could disagree about what these concepts meant; thus judges could not apply them mechanically. Second, the realists argued that judges could not determine, in a nondiscretionary way, the holdings of decided cases. Any case could be read in at least two ways: it could be read broadly to establish a general rule applicable to a wide range of situations, or it could be read narrowly to apply only to the specific facts of the case. Third, the realists argued that, because of the indeterminacy of abstract concepts and the manipulability of precedent, it was almost always possible to appeal to competing and contradictory rules to decide any interesting contested case.").

in order to rationalize¹⁰ a result preinscribed in the judge's origins and class interests, 2) the multiplicity of possible interpretations, and 3) the Realpolitik of appointed tenured power, the Legal Realists argued that formalist¹¹ interpretations were in fact defective. According to realists, judges should balance¹² competing interests rather than rely on an impossible deduction from ambiguous, vague, and contradictory general principles.¹³

This shows the positivist influences on legal realism. Though legal realism is correctly seen as a "left" legal theory, seeking to criticize open-ended unbridled capitalism,¹⁴ it in fact can be linked to the thought of the conservative justice Oliver Holmes. Justice Holmes believed that law was nothing other than the power of the state to coerce behavior. And while Justice Holmes's thought was definitely conservative, his positivism represented a radical break in traditional judicial interpretation. For Justice Holmes, prior theories of interpretation, based on a natural law or natural justice theory of the eternal and unchanging nature of universal justice, were nonsense. Realism, one form of positivism, replaced natural justice (a moralistic theory that states that in order for all law to be valid and effective, it must be just) with natural law (the law of the jungle) as the dominant legal ideology in the United States.

⁹ SINGER, *supra* note 3, at 471 ("The realists' exposure of the judge as a human being who reasoned from the gut and manipulated legal rules to cover it up cast judicial subjectivity in a frightening light.").

¹⁰ SINGER, *supra* note 3, at 471.

¹¹ SINGER, *supra* note 3, at 501 ("Finally, the realists argued against formalistic, mechanical application of rigid rules regardless of their social consequences.").

¹² SINGER, *supra* note 3, at 502 ("In ruling on such 'burning questions,' the realists wanted judges to balance pragmatically competing interests in light of competing policies, principles, and values.").

¹³ SINGER, *supra* note 3, at 499-500 ("First, the realists argued that it is impossible to induce a unique set of legal rules from existing precedents. Llewellyn argued that it is always possible to generate both broad and narrow holdings from cases, and to construct competing lines of precedent on either side of every controversial issue of law. Felix Cohen further argued that every case was different from every other in some respect, and that judges had no alternative but to engage in ethical inquiry to determine those differences between the case at hand and the prior case that mattered.").

¹⁴ SINGER, *supra* note 3, at 477 ("A major goal of the legal realists was to undermine laissez-faire ideology by attacking the idea of a self-regulating market system based on free contract, which operated largely outside state influence and control.").

Natural law theories have thus been eclipsed by amoral theories which are proposed as purely positivist and thus scientific; but those supposedly positivist theories are in fact only variants of Hobbes's theory of natural law – that the natural law is the law of the strongest.

Once the equivalence between natural *law* (the law of the jungle) and positivism¹⁵ is cognized, many of the blind alleys in legal theory which characterized Twentieth Century U.S. legal discourse¹⁶ are moved to their proper field—the debate between two naturalistic theories—natural law¹⁷ and natural justice,¹⁸ and the relationship between them. The correct view is Aristotle's: positivism (convention) and naturalism (universal law) are complementary, not dichotomous. Hobbes similarly argued that *lex naturalis*, the law of the jungle, and *jus naturalis*, natural justice, are complementary. Aristotle saw positivism and natural justice as complementary, not contradictory. For analytical purposes, positivism may try to separate law from morality, but a proper analysis reveals that positivism collapses into Hobbes's *lex naturalis* (the law of the jungle) or Aristotle's *nomos* (law arising out of convention as opposed to innate in nature). Positivism *versus* natural law is a false dichotomy.

Nonetheless, since contemporary legal discourse consistently uses the inaccurate term “positivism,” so will I. However, when I use the term *lex naturalis*, I am referring to the theory that law is effective because of force or the threat of force, whereas when I use the term “natural justice,” I am referring to the theory that law is effective only when just, i.e., the less just the law, the likelier it is

¹⁵ KARL OLIVECRONA, *LAW AS FACT* 7 (2d ed., London: Stevens and Sons 1971) (1962) (“The idea of a natural law derives from Antiquity, but the notion of positive law was developed during the Middle Ages. Exactly when this took place is not known.”).

¹⁶ Robert Post, *Postmodern Temptations*, 4 *YALE J.L. & HUMAN.* 391, 393 (1992) (reviewing FREDERIC JAMESON, *POSTMODERNISM, OR, THE CULTURAL LOGIC OF THE LATE CAPITALISM* (1991)) (Post-Modernism introduces the concept of “discourse” as a category of knowledge. “Synchronic analysis however, requires that experience be abstracted and flattened so as to fit into whatever system (or ‘discourse’ or ‘code’ or ‘structure’) is deemed relevant. The result is a second loss, that of ‘depth,’ which is everywhere ‘replaced by surface, or by multiple surfaces.’”).

¹⁷ See generally THOMAS HOBBS, *LEVIATHAN* (C.B. MacPherson ed., Penguin Books 1976) (1651) (describing natural law).

¹⁸ See generally MARCUS TULLIUS CICERO, *The Republic*, reprinted in *CICERO: THE REPUBLIC; THE LAWS* 1 (Jonathan Powell and Niall Rudd eds., Oxford Univ. Press 1998) (explaining Cicero's right reason in accord with nature, tending constantly toward the good).

to be disobeyed. Theories of natural justice propose that an essential characteristic of “law” is that it is just—that unjust laws are not laws at all (*lex mala, lex nulla*).

The Legal Realists perceived the authoritarian (positivist) nature of legal decisions: that judges impose law on litigants and future instances. From this (and from its relativist moral theory), Legal Realism proposed that the judicial decision is only a subjective expression of a judge’s preferences—that legal decisions are circular,¹⁹ tautological, and not an objective expression of “reality.”²⁰ Thus, to determine how judges make their decisions, rather than looking at law books²¹ in search of judicial deduction,²² the Legal Realist would suggest an examination of the class origins of the judge and the litigants. Per the critique, the inductive–deductive theory²³ inevitably collapses into the will theory, the idea that law is legislative fiat. I use the term “class” to refer to an arbitrary but objective classification of persons according to wealth, race, gender, sex, religion, and sexual orientation. Although “class” in English generally implicitly refers

¹⁹ See BENDITT, *supra* note 2, at 15.

²⁰ BENDITT, *supra* note 2, at 4 (“[J]udges, far from being bound by rules, are free either to choose among rules where more than one applies—perhaps not arbitrarily, but by their own lights—or to decide cases on their own where there are no applicable rules at all.”).

²¹ See BENDITT, *supra* note 2, at 3 (“We can see here the kind of methodology employed by the realists. We are not to theorize about law by the exercise of *a priori* thinking that does not come to terms with the facts, and we are not to impose our preconceived ideas on the facts. We are instead to *see* what the facts are. If we want to know what legal reasoning is like, we must see how judges actually reason. What is it that we see when we look at the actual workings of the judicial process? What we see first of all, say the realists, is that rules of law do not play the kind of central role in legal reasoning that is claimed by the deductive model. For it is a notorious and noteworthy fact that different judges, employing their own reasoning processes, reach different results in similar cases and even in the very same case.”).

²² BENDITT, *supra* note 2, at 5 (“In the deductive model a judge first discerns the facts and then finds the applicable rule; and statements expressing the facts constitute the minor premise in legal reasoning. But this view of the role of facts is also wrong-headed. . . . The deductive model presupposes that the determination of the facts can be separated from the determination of what rules are to be applied to the facts. ‘*But these two parts of judging are usually not separated, but intertwined.* Generally it is only after a man makes up his mind, that he attempts, and then artificially, to separate these two operations.”).

²³ BENDITT, *supra* note 2, at 2 (“In this model the applicable rule of law is the major premise of a given piece of legal reasoning, the relevant facts of the case constitute the minor premise, and the conclusion (the decision that the judge is to make) is arrived at by a straightforward and airtight piece of deductive reasoning.”).

to economic class, I use the term “class” more broadly, partly because race is a proxy for class in the United States, and also because class based analysis must include gender to accurately assess oppression.

In addition to drawing on class-based analyses for legal reasoning, the Legal Realists²⁴ also introduced psychological analyses to legal reasoning. Rather than seeing the judicial decision as a logical, objective expression of truth, the legal decision was seen as a subjective rationalization of a structure of class relations. Because of this subjectivist strain of realist interpretation, the realist account of judicial decisions is often dismissed or mocked as presenting a “breakfast table theory”²⁵—that the judicial decision is so subjective as to be the consequence of the judge’s indigestion. However, while Legal Realism can be rightly criticized methodologically for substituting one arbitrary decisional method (balancing tests) for another (bright line decision-making), it cannot be dismissed out of hand because it was (and is) influential.

The class-based analyses used by Legal Realism parallel those of Marxism and recur later in Critical Legal Studies. However, since neither Legal Realism nor Critical Legal Studies have overtly declared themselves to be neo-Marxist, we shall analyse Marxism separately in the following section. This schema of analysis is justified by the geographical separation of Soviet Russia, though Legal Realism and Stalinism were in fact co-temporal.

In sum, while Legal Realism succeeded in pointing out the systemic contradictions which plague capitalism, it did not determine the correct sources of those contradictions and thus disappeared from roughly 1950 to 1970.

II. MARXIST LEGAL THEORY

Marxist legal theory is unfortunately largely ignored in American legal reasoning. This is hardly surprising, though disappointing.

²⁴ The best-known realist is Karl Llewellyn, though he had several contemporaries. Unfortunately, Llewellyn’s radicalism toned down in the post-war era, and his theories later became a mere affirmation of the American regime’s legitimacy.

²⁵ See Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 470 (1988).

1. Antinomianism

The first principle of Marxist legal theory is a fundamental opposition to law. The law, for a Marxist, is a barbaric expression of state power and as such must be transformed. Proletarian dictatorship is thus intended as a temporary condition to enable the reform of the capitalist class and allow the state to evolve towards socialism (collective ownership of the means of production) and ultimately to disappear as it is gradually replaced by voluntary communism.²⁶

The teleological framework of historical materialism explains the limitations of Legal Realism. Legal Realism, in its own terms, cannot explain or predict the historical or future direction of society. Thus, when the second inter-imperialist world war ended, the Legal Realists failed to understand that the temporary peace and prosperity of the immediate post-war era was founded on the slaughter of the unemployed. Legal Realism failed to identify the historical dialectic that had created it, and thus Legal Realism disappeared as a theoretical movement in U.S. law.

2. Socialist Legalism

Socialist Legalism is the theory that, while laws are only temporary instruments intended to advance the state towards socialism, they must – for this very reason – be interpreted objectively. The rule of law in the Soviet state was always subject to the reasoning of dialectical materialism—that law operates within political constraints, and that law can and should be replaced, but can only be replaced as the state evolves toward communism. In order to avoid reactionary backlash, capitalist restoration, and a recurrence of imperialism, the conscious evolution of society away from the state and toward voluntary

²⁶ See generally KARL MARX, CAPITAL (Samuel Moore & Edward Aveling trans., Frederick Engels ed., Swan Sonnenschein & Co., Ltd. 1906).

communism must be structured by law. Thus contextualized, the Soviet state was based on socialist legalism—the formal (not substantive) rule of law. Marxism regards law and legal interpretation as objective historical phenomena, unlike Legal Realism.

3. Criminal Theory

Marxist theories of law seem most effective in the area of criminal law. Late capitalist regimes fail to provide coherent rationales for their criminal systems. Wavering between theories of deterrence, retribution, and occasionally prevention, capitalist systems of criminology at best toy with the idea of rehabilitation. Arbitrary and unequal sentencing conditions, racism, and violence characterize capitalist penal systems. Further, prisons offer dirt cheap exploitable labor. As a consequence, the American prison system is now the largest on the planet²⁷: prison is profitable for certain industries due to cheap labor. Who cares about labor standards for criminals? The prison industrial complex also provides jobs for construction, security, and production of police accessories—such as handcuffs. In other words, there is big money in repression.

Marxist penal theory has a different rationale. Rather than the exploitation and punishment of the criminal, the object of Marxist penal theory is to help the criminal understand their crime and its antisocial character.²⁸ Marxist penal theory correctly focuses on rehabilitation and reform, on the (re)education of the prisoner and their (re)socialisation.²⁹

²⁷ Roy Walmsley, *World Prison Population List*, INT'L CTR. FOR PRISON STUDIES 1-3 (8th ed. King's College, London), http://www.kcl.ac.uk/depsta/law/research/icps/downloads/w ppl-8th_41.pdf (last visited April 5, 2010).

²⁸ *See generally* KARL MARX & FREDERICH ENGELS, *THE HOLY FAMILY* (Univ. Press of the Pacific 2002) (1845).

²⁹ *See Id.*

III. CRITICAL LEGAL STUDIES

The Great Depression is one example of capitalism's failure. Business cyclicality led to mass unemployment, unrest, and ultimately another world war. One consequence of these upheavals was Legal Realism.

The Vietnam War is another example of capitalism's failure. Vietnam was another war for markets and resources resulting from business cyclicality—Vietnam produces oil and rubber. Iraq is a more recent example of oil war under imperialism. These crises illustrate a serious defect of capitalism: it encourages war for profit and wages war on the third world for resources and market-share. Just as the capitalist crisis of the 1930s gave rise to Legal Realism, so too the failed imperialist war in Vietnam gave rise to Critical Legal Studies. Where will the failing wars in Southwest Asia lead?

Critical Legal Studies (CLS) started where Legal Realism left off: rules are arbitrary and in fact are the imposition of the will of one class upon another class.³⁰ However, CLS is more strident in tone. While Legal Realism looks for symptoms of capitalist failures in the judicial system, Critical Legal Studies looks deeper, to the causes of those symptoms. In other words, CLS looks somewhat neo-Marxist.

Because capitalist economies are cyclical and have a natural rate of unemployment,³¹ an honest analysis will recognize that capitalism requires an industrial reserve army (Marx). Capitalism leads to war because of cyclical downturn and to guarantee cheap access to raw materials (Lenin) and markets. Capitalism also tends to ever larger concentrations of wealth in monopolies (Marx) because of economies of scale. Examples of monopoly capital include Rockefeller's Standard Oil and Microsoft. Unfortunately,

³⁰ See OLIVECRONA, *supra* note 15 at 9 for a description of the "will theory of law."

The notion of positive law presented no great problem. Grotius is very brief on this point. The *ius voluntarium* is so named because its origin is in the will of men or God. The *ius civile* stems from the will of the sovereign. It consists of the sovereign's prohibitions and precepts. Its duration is dependent on his will.

Pufendorf is more explicit. Every positive law is grounded on the authority of a superior. Human positive law consists of the commands of the sovereign. It is, indeed, nothing but his will, through which he prescribes how the subjects are to act.

³¹ See generally MILTON FRIEDMAN, *LA MONNAIE ET SES PIEGES* (Henri Bernard trans., 1993).

Adam Smith did not recognize or address cyclicity and monopoly, at least so far as I have read. While Smith's competition theory may work in small-scale, semi-feudal economies, it does not work in large-scale industrial economies.

This is not to denigrate Smith's genius in pointing out the increases in productivity that result from specialization, as well as the mutually advantageous character of trade. Capitalism was progress relative to feudalism – but is not the final state of history. Marx may have underestimated the power of technology to increase productivity and the ability of capitalist institutions to reform away the worst consequences of economic cyclicity since 1945. Perhaps liberalism will succeed in its effort to replace the state with civil society and even to introduce voluntary communism through open-source and charity. In all events, Marx was clear, that capitalism is progress relative to feudalism, but equally clearly believed that capitalism was not the end of history.³² Property regimes arise within a given mode of production and are transformed as one mode of production is replaced by another in the progressive movement of history toward increased prosperity through greater production and technical innovation. The end of history is the good life for *all* people.

CLS can only present a truly radical critique if it moves beyond mere trashing and presents positive agendas for change. Currently, most CLS discourse is negative: it opposes the existing system without proposing alternatives. These alternatives could be economic (e.g., interest-free banks—which are the norm in Islamic states) or political (e.g., electronic democracy). However, unless we consider the inherent problems of a for-profit, private enterprise economy, our critiques will be ineffective. In other words, just as the great prosperity of the 1950s (and McCarthyism) effectively silenced Legal Realism, so the great prosperity of the 1990s temporarily silenced CLS. The current economic crisis and wars for oil may well change that.

³² See generally KARL MARX & FREDERICH ENGLES, *THE COMMUNIST MANIFESTO* (Penguin Books 2002) (This translation first published in 1888, Samuel Moore trans.); see also KARL MARX, *CAPITAL* (Samuel Moore & Edward Aveling trans., Frederick Engels ed., Swan Sonnenschein & Co., Ltd. 1906).

IV. POSTMODERNISM

How are the questions of the machinations of radical American legal theory pertinent to Postmodernism? For Postmodernists, the problems of the identity and objectification of the legal subject are key legal questions.³³ Postmodernism uses deconstruction³⁴ – derived from the Frankfurt school – and post-structuralism to critique liberal law.³⁵ It abandons universalism and constructs individuated narratives in an admittedly vain attempt to capture an inherently ineffable reality.³⁶

³³ Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627, 1628 (1991) (“Sometimes it seems as if there is only one story in American legal thought and only one problem. The story is the story of formalism and the problem is the problem of the subject. The story of formalism is that it never deals with the problem of the subject. The problem of the subject is that it’s never part of the story.”).

³⁴ Stephen M. Feldman, *An Arrow To The Heart: The Love and Death of Postmodern Legal Scholarship*, 54 VAND. L. REV. 2351, 2359 (2001) (“[D]econstructionists reveal that certain viewpoints, values, interests, individuals, and traditions are either ignored, denied, or oppressed in the name of the privileged.”).

³⁵ Alan Hunt, *The Big Fear: Law Confronts Postmodernism*, 35 MCGILL L. J. 507, 509 (1990) (“I will generally employ the label post-modernism and treat it as subsuming poststructuralism and deconstruction: poststructuralism identifies the ground-clearing theoretical critique of both Marxist structuralism and linguistic structuralism while deconstruction names the method employed in opening up ‘the text,’ whether legal judgment, news story or novel, to reveal what it contains and what it blocks or excludes. But the label postmodernism, even if it does not define the project, at least has the merit of projecting something of its flavour.”).

³⁶ *Id.* (“[T]he radical self-conception of postmodernism arises from its claim that we must break with the kind of ‘big’ questions which have traditionally motivated the intellectual projects of the previous epoch. It is not so much that modernism arrived at the wrong answers, but that its questions were unanswerable; they have been too broad, too abstract, riddled with a distinctive mix of naive humanism, an unwarranted faith in science and an over-optimistic view of the capacity of language to capture and share knowledge.”).

Postmodernism is widely criticized³⁷ – by both the left³⁸ and the right – for being ill-considered,³⁹ subjectivist,⁴⁰ and sophomoric⁴¹ jargon⁴²—in short, for being “an academic joke.”⁴³ Postmodernism invites such criticism because it rejects the correspondence theory of truth and instead argues for an intersubjective model wherein truth is socially constructed by consent.⁴⁴ The intersubjective view of truth is incorrect; if we all agree that the earth is flat, it nevertheless remains a sphere.

Postmodernism proposes a world where all values are arbitrary,⁴⁵ where meaning is relativized and contingent,⁴⁶ and thus where there is no objective morality. In so far as these ideas

³⁷ See Jay P. Moran, *Postmodernism's Misguided Place in Legal Scholarship: Chaos Theory, Deconstruction, and Some Insights from Thomas Pynchon's Fiction*, 6 S. CAL. INTERDISC. L.J. 155, 159 (1997).

³⁸ Catharine MacKinnon, *Points Against Postmodernism*, 75 CHI-KENT L. REV. 687, 710 (2000) (“I do know this: we cannot have this postmodernism and still have a meaningful practice of women’s human rights, far less a women’s movement.”).

³⁹ Feldman, *supra* note 34, at 54 (“Modernists legal writers . . . criticize postmodern legal scholars for being muddle-headed nihilistic thinkers who write indecipherable jargon-filled nonsense and lack political convictions.”).

⁴⁰ See Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87, 88 (1996).

⁴¹ Brian Leiter, *Books in Review*, A.B.A. DIVISION FOR PUB. EDUC. FOCUS ON L. STUD., Fall 1998, at 14.

⁴² *Id.*

⁴³ Dennis W. Arrow, “Rich,” “Textured,” and “Nuanced”: *Constitutional “Scholarship” and Constitutional Messianism at the Millennium*, 78 TEX. L. REV. 149, 168 (1999).

⁴⁴ Feldman, *supra* note 34 at 2363 (“Truth and knowledge exist not because of correspondence with objective reality, but rather because we exist within communal and cultural traditions that enable us to communicate with each other.”).

⁴⁵ Peter Murphy, *Postmodern Perspectives and Justice*, in POSTMODERNISM AND LAW 4 (Dennis Patterson ed., 1994) (“Postmodernism assumes that different logics or paradigms, that is, different systems of discourse with their distinctive value axioms, can co-exist in the same social *space*. It is this, above all, that distinguishes postmodernism from enlightenment modernism. The enlightenment modernist speaks of knowledge (in the singular) rather than discourses (in the plural). The Enlightenment view rests on temporal rather than spatial metaphors. That is to say, the Enlightenment view sees knowledge as a succession of paradigms through time. One system of knowledge succeeds another in a progressive, developmental sequence. This is the march of reason in history—from feudalism, to capitalism, to socialism or industrialism, or as Comte had it, from theology to metaphysics to positivism—with each developmental stage progressively more rational.”).

⁴⁶ *Id.* at 4–5 (“Meaning arises from the relative positions of the fragments in the constellation.”).

were proposed by David Hume,⁴⁷ Saussure,⁴⁸ Nietzsche,⁴⁹ Willard Quine,⁵⁰ and Gödel,⁵¹ they are in fact expressions of epistemological puzzles, which have plagued modernity since the Eighteenth Century.

Postmodernism can, however, distinguish itself from modernity in that the modernistic discourse since the Industrial Revolution centers on productivity, a universal grand narrative of “progress,” and replication,⁵² a narrative Postmodernism rejects.

Marxism, in contrast, is a theory of modernity.⁵³ Marxist theory is not morally “neutral” or relativist, and correctly focuses on progress as a valid goal because three-quarters of the planet is ill-housed and ill-fed.

Postmodernism does however offer the opportunity of proposing radical critiques of late capitalism. “[M]any postmodernists, especially deconstructionists, are overtly political.”⁵⁴ Postmodernism appears to offer grounds for radical critique. However, that appearance is mostly a mirage.

Specifically:

Postmodernism gives a voice to the ordinarily voiceless!

⁴⁷ David Hume believes that morality is simply a matter of personal taste.

⁴⁸ Saussure proposed the arbitrary character of the sign.

⁴⁹ See generally Friedrich Nietzsche, *On Truth and Lies in a Non-moral Sense*, reprinted in 10 THE NIETZSCHE READER (Keith Ansell Pearson & Duncan Large eds., Blackwell Publishing 2006) (Nietzsche believes that truth may not exist and is all too often merely fabricated.).

⁵⁰ Willard Quine proposed that language is indeterminate, for every term is defined by some other term which I would describe as global circularity.

⁵¹ Gödel believes some true theorems cannot be proven, while some false theorems cannot be disproven—though there are theorems which are both true and demonstrable or false and refutable.

⁵² POST, *supra* note 16, at 392 (Postmodernism rejects universal narratives, especially Manichean ones. “[P]remonitions of the future, catastrophic or redemptive, have been replaced by senses of the end of this or that.”).

⁵³ POST, *supra* note 16, at 394 (“Marxism inhabits a millenarian temporality, oriented toward a future of progressive political achievement and fulfillment. Jameson is therefore unsympathetic to postmodernism’s repudiation of time; he views it with considerable suspicion as ‘the sequel, continuation, and fulfillment of the old fifties ‘end of ideology’ episode.”).

⁵⁴ Feldman, *supra* note 34 at 2358.

However, PoMo does not listen to that voice, because all opinions are valid, and because there are no universal values. Everyone has a voice—and it is meaningless.⁵⁵

Postmodernism places all existing thought structures in question!

By the rejection of moral principles and objectivity—which deprive the voiceless of real impact.⁵⁶

In short: Postmodern thought permits one to pose questions, but does not enable anyone to find answers. Postmodernism does not and cannot lead to a powerful critique of the systemic causes of tragedies such as the Great Depression and the Vietnam War due to individualism, subjectivism, and relativism.

Postmodernism's best hope then is to be a window for critical discourse which rejects the moral spinelessness which characterizes Hume and his heirs. The error of imperialist thought constructs is not moralism, but the wrong moralism. Should anyone wish to debate the existence of universal moral principles, let them ask themselves how they would react at the violent death of a loved one—say, in the interest of some multinational cartel's board of directors. If seduction and subversion are postmodern tactics then Marxists should (Oh my! Normative discourse!) co-opt these tactics by calling into question the moral emptiness which characterizes relativistic discourse.

Marx even had a term for such emptiness and spiritual rape: he called it *alienation*.

⁵⁵ POST, *supra* note 16, at 394 (“Schizophrenic nominalism is most evident in the writings of postmodern academics.”).

⁵⁶ POST, *supra* note 16, at 395 (“[P]ostmodernism's evisceration of nature and its tendency toward schizophrenic nominalism”).