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BOOK REVIEW

A REVIEW OF “AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM”

STEPHEN M. FELDMAN, *AMERICAN LEGAL THOUGHT FROM
PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOID.*
OXFORD UNIVERSITY PRESS, 2000. 304 PP.

Reviewed by The Honorable Jerry L. Goodman*

Professor Stephen M. Feldman's newest book, *American Legal Thought from Premodernism to Postmodernism*, is a tour de force establishing him as an important scholar of jurisprudence.

Defying the postmodern mandate against the writing of grand narratives, or meta-histories, Professor Feldman's book is a sweeping confluence of history, politics, economics, sociology and literature as informed by the philosophical assumptions of the eras of intellectual history he designates as premodern, modern, and postmodern. American legal thought is then examined in almost psychoanalytic detail in the light of these periods.

While these eras have played out from the beginnings of man to the present day, Feldman lucidly identifies and explains the ideas that formed their content. The thematic glue holding his narrative together is the quest for the foundations of American jurisprudence and the relationship among those foundations and our shifting ideas of progress.

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In premodernism, God (or the gods) was the source of all knowledge and value. The presumed existence of universal and eternal principles and a cyclical view of time and history anchored the religion, politics and culture of this era. After Christianity became the state religion in the fourth century and St. Augustine wrote "*The City of God*" in the fifth, the idea of progress toward the fulfillment on earth of these divine and eternal principles completed the premodern way of thinking.

Protestantism ushered in Modernism. The split between the sacred and the secular widened. Luther and Calvin dared to posit the individual against the holy catholic. And, as modernism emerged from premodernism, individuals began to pursue their particular self-interest in the secular world with the view that material conditions might be endlessly improved by human ingenuity.

As the secular displaced the sacred and skepticism replaced certainty, the quest for the authoritative sources and foundations of human knowledge lead to the "isms" of this period, Descartes' rationalism, Locke's empiricism, and Kant's transcendentalism, all of which, according to Feldman, were responses to the central problem of modernity: What is knowledge? Where does it come from? And how do we know it? Before, God was the source of all knowledge, and divine revelation, as understood through the filter of reason, was the method. Now, "the identification of epistemological foundations became a (or perhaps the) central issue of the problem. The enormity and significance of this challenge cannot be overstated."¹

The response to the challenge was vigorous. But the answers were unsatisfactory, mostly consisting of various montages of clippings selected from rationalism, empiricism and transcendentalism. Moreover, two world wars in one century, coupled with the complete and total inhumanity of the Holocaust, cast serious suspicions on the value, indeed the plausibility, of human rationality as a foundation for anything.

These crises of modernism lead to the dawning of the postmodern. The quest for foundations becomes replaced by simply going where the technology and information explosion leads. We surf the television channels, click from hyperlink to hyperlink, all in nanoseconds. Who needs to examine foundations, when there is endless surface to explore? Everyday, technology introduces us to a multiplicity of cultures with the images strongly implying that cultural differences do not necessarily require valuation. Thus, universalism is replaced by pluralism. Philosophical problems are superseded by intellectual projects. Traditional academic disciplines, like television commercials, morph into new and different forms. Paradox becomes our thought form of choice. The anxiety and despair of late modernism are replaced by hyperactivity and attention deficit disorder. The quest for career advancement replaces one's interest in social progress.

Against this intellectual backdrop, the subject of jurisprudence moves to the

1. STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM 22 (2000).

center of the narrative as Feldman leads us through the developmental stages of American legal thought. And in every stage, the philosophical assumptions of the era in which that stage occurs, are reflected.

Premodern legal thought reflected unflinching faith in the fixed foundations of natural law albeit with different emphasis occurring in different stages. Feldman sees the first stage of premodern legal thought occurring from the founding of our country to the early nineteenth century. During this period the natural law postulates and inferences with respect to republicanism and the polis received particular emphasis as the country moved toward a unified social order while simultaneously avoiding the inevitable decline and decay of republics likewise implied in natural law. The second stage of premodern legal thought occurred from the 1820's until the civil war. During this period jurists sought to implement the concepts of natural law in society, culture and economy by using law as an instrument to aid and abet economic prosperity. As the civil war approached and slavery became the central political issue of the day, the credibility of natural law became evermore tested as natural law arguments were invoked by slave-owners and abolitionists alike. The invariable emotional pounding and propounding of such mutually exclusive arguments created considerable reasonable doubt about natural law as a theoretical foundation for jurisprudence.

Modern legal thought was presented with its central question: "With what shall we replace natural law as the foundation of our jurisprudence?" The leading rationalist of his time, Christopher Langdell, found the answer in abstract reasoning and logic. The legal realists followed, sinking their piers in the empirical studies. In the third substage of modern jurisprudence, Feldman sees the legal-process movement as embodying the tenets of transcendentalism with its thinkers looking for the preconditions of legal process.

All of the foregoing was extant and competing when the Warren Court, by its judicial activism, simply unbolted from whatever foundations were thought to exist. As a result, American jurisprudence toppled into crisis. "At this point, facing the apparent indeterminacy of all theories, some constitutional scholars, such as Thomas C. Grey and Paul Brest, swung around and took a different tack. They began to argue that the initial distinction between interpretivism and noninterpretivism may have been misleading. . . Perhaps, the argument continued, constitutional adjudication-indeed, all other adjudication as well-is *always* a matter of interpretation. And if adjudication is always an interpretive enterprise, then the most promising path for constitutional and other legal theorists was to investigate the process of interpretation itself."²

Once legal theorists began to take this 'interpretive turn' in the 1980's they began to seek ideas and inspiration extensively from writers outside the legal academy.³ Under the influence of thinkers such as Stanley Fish, Thomas Kuhn,

2. *Id.* at 150.

3. *See Id.* at 152.

Richard Rorty, Hans-Georg Gadamer, critical legal studies, critical race theory, law and literature, feminists, and gay and lesbian studies were explored and mined for relevant insights. Common themes appeared in all: a rejection of foundationalism, a defiance of intellectual boundaries, the value of paradox, a commitment to irony and self-reflexive study, a focus on power, an emphasis on the social construction of the self, the ambiguity of politics and a resulting ambivalence. From the coalescence of these themes and their application to legal subjects, postmodern jurisprudence emerged and will probably serve as the paradigm for subsequent legal thought.

What are the book's strengths and weaknesses?

First, the strengths. It is a well written history of American legal thought. The origins and principles of every school of jurisprudence are examined and explained within the historical context of each. The book is clear, concise and well written which enables it to cover a broad expanse of jurisprudential territory. Next, it excels in its descriptions of the characteristics of the postmodern era and the tenets of postmodernism. For example, Feldman's view of one of the central postmodern themes, that of interpretation, taken through the lens of Jacques Derrida's ideas of deconstruction and Hans-George Gadamer's philosophical hermeneutics, brings substantial clarity to the topic. Further, his elucidation of the themes and projects of postmodernism, the reflection of these ideas from the subconscious of contemporary society, and their infusion into contemporary culture creates new insights for most students of popular culture. Finally, Feldman's book is a major contributor to the solution of one of postmodernism's severest criticisms, namely that it cannot be defined. After reading this book, make no mistake, one knows what postmodernism is and what postmodern jurisprudence is all about.

Now the weakness. History unfolds like a graph with all its ups and downs and irregularity, never quite as linear as the popular time line would lead us to believe. Periods overlap. Jurisprudential schools co-exist, ascend, decline and revive. Indeed, we live in the "neo" age, neo-conservatism, neo-liberalism, neo-orthodoxy, and the list goes on. Thus, the division of the history of jurisprudence into premodern, modern, and postmodern eras leaves the reader with the uneasy feeling that the classification scheme is a little too neat and orderly, that the material has been forcefully patted into these molds in order to make postmodern explanations of it work. But, to his credit, Feldman forewarns us of this problem early on when he points out that his stages and substages are merely "heuristic devices."⁴

One concluding postscript after reading this book: The University of Tulsa College of Law family should be proud of the fact that in their midst is Professor Stephen Feldman, a first-rate scholar who has written an important book.

4. *Id.* at 3.