



# Some Comments on Law & Post-Modernism: A Symposium Response to Professor Jennifer Wicke

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**SOME COMMENTS ON LAW AND  
POSTMODERNISM: A SYMPOSIUM  
RESPONSE TO PROFESSOR  
JENNIFER WICKE**

DAVID KENNEDY\*

Well, Professor Wicke, you bring us a number of very interesting ideas which are sometimes difficult to grasp. Your paper bears a very careful reading to understand all of the different dimensions of postmodernism you suggest might be relevant for lawyers and for legal academic work. I thought what I'd try to do over the next fifteen or twenty minutes is reflect a bit on what a lawyer might make of all these messages from another discipline. One way of thinking about this would be for us lawyers to ask ourselves whether we're with it or not, and that, in a way, will be the topic of my comment. Let me do this by positioning lawyers with respect to four broad strands of postmodernism that you identified and figure out how well we are coping.

First of all, as your paper suggests, we might think of postmodernism as a set of historical conditions or descriptions of our current cultural situation.<sup>1</sup> Seen this way, we might ask ourselves, "Well, is this true of law? Could this be a description of legal culture as well?" Sometimes lawyers pose this question by asking whether legal culture can deal with all these new cultural forms—given a relatively static modern or even pre-modern vision of law itself. Can we cope with new computer technologies and new communication technologies? Is our intellectual property regime up to it? For those—lawyers and others—who continue to think about law in this way, as somehow autonomous, insulated from, reacting to, or lagging behind cultural and political developments, your paper, by clarifying the sorts of cultural changes happening all around law, may be helpful in thinking about the challenges legal culture faces.

I take, however, that you are suggesting a completely different question—whether law itself is part of this new cultural scene. Might law's doctrinal materials, institutions, and methodologies themselves be described as postmodern? As I listened to the cultural elements

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1. Wicke, *Postmodern Identity and the Legal Subject*, 62 U. COLO. L. REV. 455, 457 (1991).

Berlin wall which, in its relationship to law, national cultures, and institutional machinery, is very reminiscent of the international legal modernism that has been around since the League of Nations.

On the other hand, other things, such as the European Community's 1992 program, seem not only to intensify an institutional or pragmatic modernism, but also to develop a form of politics and legal culture that breaks in some ways from the Weberian/Wilsonian idea of an administration of delegated powers or of modern mass party democracy. So, in legal culture, as I suspect elsewhere, we could locate elements that suggested both a repetitive continuity with the modernist era and a rotation or break towards alternative, perhaps postmodern forms.

Thirdly, Professor Wicke develops a set of attitudes about these postmodern cultural developments, attitudes that she associates with three major postmodern cultural analysts that she discusses: Jameson, Lyotard, Baudrillard. We might say that postmodernism is a way of dressing, behaving, acting, and talking as if you're a cultural studies person, like one of these three. In this view, postmodernism would be an academic or critical style exemplified by the "postmodernist." Like the "modernist," the postmodernist might be an intellectual (academic, journalistic), a culture producer (artist, architect, lawyer, etc.), or a social building block or pod, like the "organization man" of the Fifties. There would be a variety of different critical cultural attitudes and attributes and the question for lawyers would be, "Do we have any of these attitudes and can we wear any of these clothes?"

My sense is that the answer is a tentative yes. Let me start with Jameson, whom Professor Wicke associated with a rather depressed and nostalgic account of these recent cultural developments.<sup>3</sup> If I understood the picture, Jameson is sad no longer to live in the world of workable critical theories and paradigms. He misses instrumental and programmatic thought even as he has worked to undermine their authority. We certainly find this attitude in law all the time—among practitioners as well as academics. I myself am nostalgic for a more authentic way of being and a more authentic way of relating. Pragmatists, each with his or her own idiosyncratic solutions, yearn for the days of shared vision and program and lionize the academics of whatever era they associate with that sort of social self confidence.

We find this attitude in various forms of constitutional interpretive study as a nostalgia for an originating moment and as a despair that everything has become mixed up with everything else, or a yearning to return to the days when texts meant what they said and people

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3. *Id.* at 457-58.

did the jobs that they were supposed to do, rather than everybody moving over into everybody else's domain. We find a similar attitude on the left and in some forms of feminist thought, where there is a certain nostalgia for an authentic, different, other voice that could somehow break us out of the fragile, uncertain, or unsettlingly omnipresent media voice of male authority. On the whole, I think law is right up there with Jameson—no problem.

Now the other two, Lyotard and Baudrillard, are a little more troubling, and I would say that being confident that we're up to speed may be more difficult. Professor Wicke associates Lyotard with a kind of exuberant celebration of heterogeneity—we can go to Disney World one day and a fancy Shakespeare play the next—the thrill of the cutting edge or avant garde pushed beyond its modernist connections to cultural innovation to be enjoyed for its own sake.<sup>4</sup> In this vision, the postmodernist, rather than analyzing the cutting edge, or being a symptom of the cutting edge, is the cutting edge.

Speaking only for myself, I always like to feel that I am on the cutting edge, wherever I am. It is an attitude that comes and goes and seems associated with the loss of the stability of political cultural forms or forums—the final triumph of the personal as political. There are definitely people in law who have this attitude, and they're a lot of fun to be around. But it must be admitted that this is a relatively small and struggling strand of legal academic culture—it is alive and well here in Boulder, but maybe not everywhere.

And then, finally, Professor Wicke spoke briefly about Baudrillard<sup>5</sup> whom she also associates with a sense of a loss of authenticity, but in a more dramatic way: the word she used was "vertigo," suggesting a sense of quasi-panic at the increased rate of speed. And on that one, I would like to say that at least for a lot of my students, that is how they feel when their expectations about law and professionalization confront the law school experience and the job market in quick succession. Each generates a vertigo of self belief, knowledge, fantasy, and heroic imagination. Legal education and professionalization are, in this sense, postmodern experiences.

This panic is accentuated by the dual experience of law as a postmodern cultural artifact and a modern or premodern island of practical reason and social organization. There is something Baudrillardian about the legal culture's efforts to "respond" to the increased pace of legal and social change, which is experienced as the feeling that a precedent-based system or an adjudicative common-law system

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4. *Id.* at 462-65.

5. *Id.* at 468-69.

just may not be up to coping with the communication, sexual, administrative, technological, transactional, and scientific revolutions all at once. The pace of television is simply too fast. I was interested in the way Professor Wicke drew attention to the fact that whatever happens in a courtroom that seems new or different is in the papers the next day and on "L.A. Law" the next week. This reflected back quality and the panic it induces in those who think of law as at least partially exempt from cultural developments has had an impact on the development of legal doctrines, which I think has been looked at too little. It might bear more study.

Now I come finally to the fourth and final aspect of postmodernism raised by Professor Wicke. This is the most delicate of the four and the place where Professor Wicke and I perhaps part company a little bit. In this image, postmodernism is neither a general description of our current cultural scene nor a set of critical attitudes, but rather a set of very particular academic critical insights, technologies, and beliefs.<sup>6</sup> Sometimes these are expressed rather dogmatically in the literature—you all know the litany—there is no center anymore, identity is an empty category, everything is textual, etc. In fact, a lot of the slogans of postmodern cultural thought are associated with relatively fine-tuned ways of analyzing text, doctrines, or social experiences.

As postmodernists of this fourth persuasion we would add some new tools to our traditional critical methods (consistency, contradiction, and so forth). For example, we might think of legal doctrines as speaking identities—of argument as character—looking carefully at the identity being put together by a set of legal doctrines, the voice speaking in a judicial opinion, the "we" when we say "we share a commitment to solving the health-care crisis" or whatever. It is true that many of these new critical maneuvers, developed in literary criticism and elsewhere, have begun to be found in legal scholarship and have made their way into law classrooms and into the work of lawyers. Sometimes they are helpful in the project of breaking down apparently fixed doctrines and getting some edge to argue that the matter could be decided some other way.

As long as they are not understood in too categorical a fashion, these new maneuvers could simply become helpful parts of the tool kit of normal legal science, a great deal of which works around the unsettling of stable doctrinal boundaries. But now this becomes delicate. The delicacy arises because I feel that Professor Wicke—certainly not alone in cultural studies—gets uneasy when lawyers adopt these techniques and their associated dogmatics. You often find a sense in so-

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6. *Id.* at 470-72.

phisticated postmodern cultural criticism that law is supposed to be something, must be, or should strive to be, or is unthinkable as other than something that we do not subject to these critical techniques.

From the side of culture we find law returned to its autonomy, its lag, its mired modern pragmatism. It is all right to postmodernize other areas or culture zones, but law is too associated with power or authority, or order, or whatever to feel comfortable once modernity is left behind. We can not think of a law, properly so called, which admits either the arbitrary or the evil—it must know which side is just, in its aspiration, if not its reality. So criticism is fine—we all want to improve things—but the full postmodernization of legal culture seems too troubling.

In Professor Wicke we hear a yearning for a law that might be oriented toward securing, as she puts it, “cultural justice,” however crude its ideas and distinctions. This comes out most clearly in her description of the Mashpee Indian case<sup>7</sup> and the gay marriage example.<sup>8</sup> Postmodern analysis may help us see things more clearly, but in the end, the ebullient heterogeneity celebrated by Lyotard does not mesh with the need to deploy a language of the legal subject—in other words, a language of rights and a language of cultural identity in securing cultural justice.

Perhaps too crudely put, I think the idea here is a division of labor in which the lawyers would be responsible for holding it all together against all odds while the culture people took it apart. I think that is a bad job, and I do not think we can do it. Not only that, I think it is too late. It is the lawyers, after all, who have come over to postmodernism, joined contemporary culture, only to encounter strange exhortations to keep the machinery of modernity well oiled. Perhaps a Jamesonian sense of the tragic is in order, but I just do not think law is like that. It does not have the qualities of fixity, order, meaning, or identity we might hope for. We lawyers have been in vertigo about the loss for some time, but so far no one has been able to put things back together.

Of course we certainly operate with ideas that sometimes seem very crude to a postmodernist—very simple ideas about what property is, what identity is, ideas about chronology and what came first and what came later, and so on, distinctions between fact and opinion, procedure and substance, public and private which seem little more than sound bites. Property, consent, ownership, jurisdiction, all these ideas seem rudimentary in many bits of legal culture—including both bits

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7. *Id.* at 465-66.

8. *Id.* at 467.

associated with cultural justice and bits associated with its justified denial. But legal culture, as we all know, only works because we are able to unsettle those crude ideas and reorganize them and work with them in a variety of different ways.

So if the challenge raised for lawyers by Professor Wicke's paper is that we should get hip to postmodernism as a compelling description of the contemporary social scene and a cool way to be, I guess my answer would be, "We're getting there; we're pretty hip; we're moving right along." This gets in the way, I think, of fully engaging the second challenge raised by the paper, which I found more difficult: the injunction not to get too hip, to keep the planets in order, the contracts enforceable, and the private private, while culture buzzes about. Since I think that we lawyers have been postmodern for a while and that law and other cultural forms are quite interconnected, I find it hard to continue to see rights, doctrines, and legal institutions, however reconstructed, as the linchpins or guarantors of social justice in a pre-postmodern era.