Postmodern Philosophy and Law

Douglas E. Litowitz
Contents

ACKNOWLEDGMENTS ix

Introduction: The Emergence of Postmodernism in Legal Studies 1

1. Understanding Postmodernism Generally 7
   Understanding Modernism and Postmodernism 7
   The Death of Grand Narratives (Reason, Truth, Self, God, Meaning) 10
   A Note on Postmodern Rhetorical Devices 17

2. The Orientation of Postmodern Legal Theory 20
   Internal and External Legal Theory 20
   Foundationalism and Antifoundationalism 34
   Positive and Negative Jurisprudence 38

3. Nietzsche's Theory of Law as a Critique of Natural Law Theory 42
   The Basics of Natural Law Theory 44
   First Critique: The Illusion of Natural Laws 46
   Second Critique: Natural Law as Linguistic Error 50
   Third Critique: The Genealogy of Law 52
   Does Nietzsche Offer a Positive Jurisprudence? 56
   Problems with a Nietzschean Positive Jurisprudence 61

4. Foucault on Law: Modernity as Negative Utopia 65
   The Classical Juridical View and Nietzsche's Critique 66
   Foucault on Law and Discipline 71
   Does Foucault Offer a Positive Jurisprudence? 80
   Foucault as Negative Utopian and Enlightenment Critic 86
5. Derrida: Borrowing (Illicitly?) from Plato and Kant  87
   Derrida on Law and Justice  91
   Platonic and Kantian Influences  98
   Problems with a Derridean Positive Jurisprudence  102
   Toward an Assessment  106

   Lyotard on Postmodern Law and Justice  110
   Problems with Lyotard's Account of Law and Justice  123
   The Lessons of Lyotard's Work  133

7. Rorty's Postmodern Antifoundationalism  134
   From Postmodernism to Antifoundationalism  134
   Rorty's Antifoundational Pragmatism (on Ethics/Politics/Law)  135
   What Would a Rortian Jurisprudence Look Like?  148
   What Is Objectionable About Rorty's Pragmatism?  150
   Why Rorty Stops Short of a Positive Jurisprudence  154

8. Conclusion: The Benefits and Drawbacks of Postmodern
   Legal Theory  156
   The Insights of Postmodern Legal Theory  156
   Two Big Problems: Externality and Lingering Foundationalism  166
   The Use of Postmodern Theory in Thinking the Other of the Law  176

NOTES 181

INDEX 221