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ESSAYS

An Arrow to the Heart: The Love and Death of Postmodern Legal Scholarship

*Stephen M. Feldman**

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[H]e whom love touches not walks in darkness.¹

In two recent articles, published respectively in the *Michigan* and *Texas Law Reviews*, Dennis W. Arrow aimed his bow and launched a feathered shaft at the heart of postmodern legal scholarship.² The point of his arrow, though, was surprisingly equivocal. Without doubt, he intended his arrow to be a weapon. He sought to attack and maybe even to kill postmodernism. Yet, an arrow fired at the heart can also have a very different meaning. If shot by Cu-

* Professor of Law and Associate Member of Political Science, University of Tulsa. I thank Richard Delgado, Doug Litowitz, Jay Mootz, Pierre Schlag, Mark Tushnet, and Marty Belsky for their helpful comments on earlier drafts. I also thank Dennis Arrow for his letter, which in its very style, reinforced my desire to publish this Essay.

1. PLATO, *The Symposium*, in PLATO, *THE REPUBLIC AND OTHER WORKS* 317, 341 (Benjamin Jowett trans., Anchor Books 1973).

2. Dennis W. Arrow, *Pomobabble: Postmodern Newspeak and Constitutional "Meaning" for the Uninitiated*, 96 MICH. L. REV. 461 (1997) [hereinafter Arrow, *Pomobabble*]; Dennis W. Arrow, "Rich," "Textured," and "Nuanced": Constitutional "Scholarship" and Constitutional Messianism at the Millennium, 78 TEX. L. REV. 149 (1999) [hereinafter Arrow, *Nuanced*]. Arrow wrote the second article largely in response to Ronald J. Krotoszynski, Jr., *Legal Scholarship at the Crossroads: On Farce, Tragedy, and Redemption*, 77 TEX. L. REV. 321 (1998), which criticized *Pomobabble*.

pid, the arrow signifies love.³ And indeed, I argue, Arrow's writing reveals a deep affinity with postmodern scholarship, regardless of his explicit purposes. His work can fairly be categorized as a manifestation of postmodernism, or perhaps more precisely, of either pseudo-postmodernism or just bad postmodernism.⁴

Arrow raises explicitly and implicitly the modernist criticisms that are most often leveled against postmodern legal scholars, though Arrow does so in an unusual fashion. If Arrow and the other critics were to be believed, postmodernists are muddle-headed thinkers who write indecipherable jargon-filled nonsense. Even worse, they are irresponsible nihilists who lack political convictions. If this characterization of postmodernism were accurate, however, why would anyone be a postmodernist? I wouldn't. Instead, I would do whatever I could to defeat postmodernism.

Yet I do consider myself to be a type of postmodernist.⁵ The criticisms of postmodernism are unpersuasive because the modernist depiction of postmodern legal thought is seriously inaccurate. It is little more than a caricature. The modernists, in other words, are imprecise and downright *wrong*. Now, some of the critics, including Arrow, might be smiling and thinking their response: "Aha! You can't even use the word 'wrong' without contradicting yourself because, after all, you're a postmodernist. And postmodernism repudiates concepts like truth and falsity, and rightness and wrongness. And precision? How can a postmodernist demand precision with a straight face?"

But this modernist response is precisely the problem. The typical modernist characterization of postmodernism—as rejecting all conceptions of rightness, goodness, and judgment—is wrong. And I use that word again purposefully to stress that concepts like truth and falsity, rightness and wrongness, and so forth, are en-

3. See EDITH HAMILTON, *MYTHOLOGY* 92-100 (1942) (retelling the story of Cupid).

4. For an explanation and description of postmodern legal thought, see STEPHEN M. FELDMAN, *AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE* 137-87 (2000) [hereinafter FELDMAN, *VOYAGE*].

5. See, e.g., Stephen M. Feldman, *Diagnosing Power: Postmodernism in Legal Scholarship and Judicial Practice (with an Emphasis on the Teague Rule Against New Rules in Habeas Corpus Cases)*, 88 NW. U. L. REV. 1046 (1994) [hereinafter Feldman, *Diagnosing*]; Stephen M. Feldman, *The Persistence of Power and the Struggle for Dialogic Standards in Postmodern Constitutional Jurisprudence: Michelman, Habermas, and Civic Republicanism*, 81 GEO. L.J. 2243 (1993) [hereinafter Feldman, *Persistence*]; Stephen M. Feldman, *Playing With the Pieces: Postmodernism in the Lawyer's Toolbox*, 85 VA. L. REV. 151 (1999) [hereinafter Feldman, *Playing*]; Stephen M. Feldman, *The Politics of Postmodern Jurisprudence*, 95 MICH. L. REV. 166 (1996) [hereinafter Feldman, *Politics*].

tirely consistent with postmodernism. Indeed, to me, postmodernism explains how we understand such concepts in the first place.

Part I of this Essay describes, as best as possible, Arrow's and related criticisms of postmodern legal scholarship.⁶ In most instances, when my goal is to critique another scholar's corpus, I begin by describing as accurately and fairly as possible that person's work.⁷ In Arrow's case, however, doing so is difficult. His first article to focus on postmodernism, *Pomobabble: Postmodern Newspeak and Constitutional "Meaning" for the Uninitiated*, is a relentless parodic satire of postmodern legal scholarship that stretches on for an incredible 230 pages. His second article, "*Rich, "Textured," and "Nuanced": Constitutional "Scholarship" and Constitutional Messianism at the Millennium*", is mostly a defense of the first piece rather than a sustained clarification or elaboration of his position. Thus, despite the page length of Arrow's *Pomobabble* piece, my summary of his position will be rather brief, though I supplement it by drawing on other critics of postmodern legal scholarship. Part II responds to the various criticisms of postmodern legal scholarship, and in the course of doing so, Part II sketches some key postmodern themes.⁸ Part III, the conclusion, explains Arrow's affinity for postmodernism. The pervasiveness of postmodern culture sometimes influences even modernist critics to manifest postmodern themes. Finally, Part III suggests a refinement of terms, dividing postmodernists into two groups, antimodernists and metamodernists.⁹

I. THE CRITIQUE OF POSTMODERN LEGAL SCHOLARSHIP

The nature of Arrow's *Pomobabble* article is immediately evident. The text does not even begin until the third page of the article and a total of only six lines of text appear within the first ten pages of the piece because the epigraphs and the initial footnotes are so exhaustingly long. When the reader finally reaches the text, it goes as follows:

I (the "subject") have (has) at various ("different") times ("moments") con(side)red (presup(posed)) writing (sharing "discourse" pertaining to) an article ("text") "de-

6. See discussion *infra* Part I.

7. See, e.g., Feldman, *Persistence*, *supra* note 5, at 169-73, 192-97 (criticizing Frank Michelman's civic republican constitutional jurisprudence); Feldman, *Playing*, *supra* note 5, at 164-69 (critiquing Pierre Schlag's work); Feldman, *Politics*, *supra* note 5, at 2246-58 (critiquing the works of both Dennis Patterson and J.M. Balkin).

8. See discussion *infra* Part II.

9. See discussion *infra* Part III.

fining" (destroying) pomo ("postmodernist" and "legal postmodernist") jargon ("signs") for the "uninitiated" (unhip dullards [sic]). I was afraid it wouldn't be very "good"—and that it might even be "good"—but took comfort from Richard Delgado's reassuring observation that Randall Kennedy's insistence on merit in legal scholarship was "potentially hostile to the idea of voice."¹⁰

Okay? Had enough? No? Well, don't worry; Arrow has just begun. He continues: "Had I 'cannily' composed such an article, it might have played something like an extended version of this . . ." ¹¹ Arrow then launches into his definitions of key postmodern terms, all of which are, of course, constructed for the maximum satiric effect, thus supposedly poking fun at postmodern legal scholars. The first term, for instance, is "absence of fault," which he defines as an "empirically verifiable real fact: except for 'T's', of course; see generally 'determinism,' 'essence,' 'victimology,' 'power paradigm.'" ¹² This and similar definitions constitute the bulk of the text, but the larger part of the article, by far, lies in the footnotes, which also parody postmodern writing. The footnotes have been aptly described as in a "stream-of-consciousness style . . . with a great many literary references."¹³ Here is one small example, lifted from footnote fourteen, which stretches in its entirety over three pages:

See also infra note 29 (quoting Oscar Wilde recommending deployment of visual art as haberdashery); Tolstoy, *supra* note 12, at 39 (discussing Charles Darwin's view that "[t]he origin of the art of music is the call of the males to the females"); *infra* note 67 (contemplating, inter alia, seduction); James Shreeve, *Music of the Hemispheres*, DISCOVER, Oct. 1996, at 90, 98 (same); *id.* at 99 ("Most people [are] . . . emotionally responsive to music throughout their lives . . . Herbert von Karajan once had a pulse meter attached while conducting Beethoven's Lenora Overture; his pulse rate peaked not in the passages during which he exerted the most physical effort but in those that emotionally moved him most."). *But cf.* H.T. Lowe-Porter, *Translator's Note* to Mann, *supra* note 2, at v ("[M]usic, and talk about it, uses an exact and international language."); Vincent Tomas, *Introduction* to Tolstoy, *supra* note 12, at vii, xiv ("Carroll C. Pratt and Suzanne K. Langer . . . agree with Tolstoy that music is a language of emotions, [but] make [the] sense of expression, rather than Tolstoy's notion of infection, fundamental in their theories of art.").¹⁴

If one tries to restate Arrow's critical point in more straightforward terms, he seems to be saying that the style or method of postmodern legal scholarship is ludicrous. Consider Arrow's use of footnotes. The greater part of the article is in the footnotes, yet Arrow fills them with largely unconnected and arbitrary references to

10. Arrow, *Pomobabble*, *supra* note 2, at 463-72 (footnotes omitted).

11. *Id.* at 473-74 (footnotes omitted).

12. *Id.* at 475.

13. Krotoszynski, *supra* note 2, at 323.

14. Arrow, *Pomobabble*, *supra* note 2, at 474-75 n.14.

famous literary figures who have, at most, tenuous connections to law and jurisprudence. The footnotes, then, provide straightforward parody. Arrow is suggesting that the footnotes in postmodern legal scholarship resemble his notes. They are indecipherable references to fancy thinkers who shed little light on the law. They represent stylistic posturing by weak scholars with nothing to say.

In fact, his unceasing ridicule of postmodern style suggests that, in Arrow's opinion, postmodern writers use this style to hide an underlying vacuity. If one digs beneath the pomobabble verbalisms, then one finds . . . ? *Nothing*, or so Arrow would have us believe. Postmodern legal scholarship is all style—bad style at that—and no substance. Now, perhaps, we can see a more (albeit not very) subtle parodic point in Arrow's footnotes. He is demonstrating (or denigrating) postmodern scholarship not only with the content (or lack of content) in his footnotes but also with the construction of the notes vis-à-vis the text. Arrow is trying to demonstrate, in satiric fashion, a postmodern deconstructive reversal of a binary opposition.

Many postmodernists emphasize how concepts often seem to appear in binary oppositions or, in other words, opposed pairs. We can talk about objectivity versus subjectivity, rules versus standards, order versus chaos, and so forth. In these opposed pairs, postmodernists argue, one side often is privileged in relation to the other. In the legal realm, for instance, objectivity usually is privileged over subjectivity. A judge who is supposedly objective is deemed good, while a judge who is subjective is bad. Postmodern deconstructionists frequently attempt to demonstrate that the ordinary privileging within a binary opposition can be reversed. So, for instance, judicial subjectivity might be shown to be preferable to objectivity in some instances. The deconstructive point is not to reverse the privileging permanently, but rather, in part, to suggest the instability and contingency of the usual privileging.¹⁵

An opposition readily apparent in law review writing is text versus footnotes, with the text being privileged over the footnotes. The text not only literally resides above the footnotes on the page, but the text is supposed to be the focus of the reader's attention. The footnotes are only secondary, supporting the privileged text. Arrow, then, illustrates postmodern method or style by, in effect, deconstructing this privileging of text over footnotes. He does so by

15. See J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987) (explaining deconstruction as a method); see, e.g., J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613 (1990) (deconstructing a Supreme Court case).

reversing the normal ordering: he privileges the footnotes over the text. The reader's attention is supposed to focus primarily on the notes, with only occasional glances at the secondary text. Indeed, on many, if not most, of the pages in the article there is no text, only footnotes.¹⁶ So, perhaps, Arrow has another point to make about postmodern legal writing: the text itself is, like in Arrow's parody, empty of content. Not only are the footnotes pure style, but the text is not saying anything at all anyway. Postmodern scholarship, in both the text and the footnotes, is devoid of meaningful content.

Of course, when it comes to criticisms of postmodern scholarship, this point is not particularly original. Ronald Dworkin, for instance, maintains that postmodernists present their views as mere "subjective displays in which we need take nothing but a biographical interest."¹⁷ Brian Leiter denounces "postmodernists and deconstructionists" for their "sophomoric jargon."¹⁸ Robin West claims that "as a tool of analysis deconstruction has all the usefulness of an unhinged steering wheel in avoiding a collision with a wall."¹⁹ Indeed, many critics declare that postmodernism is even worse than useless: it might produce dire results. A common ploy is to maintain that postmodernism engenders political quiescence. Witness Catharine MacKinnon's alarmist pronouncement: "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."²⁰ Jay P. Moran worries, meanwhile, that "postmodern principles threaten to undermine the Western legal system."²¹ Finally, the coup de grâce for the modernist critics occurs with the pronouncement that postmodernism is already over. Gary Pavela, for one, has declared that "postmodernism as we used to know it is dead."²² Arrow, too, makes this rhetorical move, proclaiming that

16. See, e.g., Arrow, *Pomobabble*, *supra* note 2, at 509-38. Indeed, on one page, the line separating the non-existent text from the footnotes contains the question, "Is the text hegemonically privileged over the footnotes?" *Id.* at 470.

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

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

19. ROBIN WEST, *CARING FOR JUSTICE* 204 (1997).

20. Catharine A. MacKinnon, *Points Against Postmodernism*, 75 CHI.-KENT L. REV. 687, 710 (2000).

21. 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.F. 155, 159 (1997).

22. Gary Pavela, *Applying the Power of Association on Campus: A Model Code of Academic Integrity*, 24 J.C. & U.L. 97, 102 (1997).

"postmodernism has become an academic joke even before the dawn of the millennium."²³

II. CRITICIZING THE CRITICS OF POSTMODERN LEGAL SCHOLARSHIP

The most obvious problem with the various criticisms of postmodernism is the wild inconsistency. How can a theory or jurisprudential approach that is bereft of meaningful content undermine the Western legal system? How can a movement that is already over and done lead to political quiescence? In fact, why bother criticizing postmodernism if it is already a joke?

Even given this problem of logical inconsistency, a perhaps larger difficulty looms. Most critics of postmodernism share at least one trait in common: a willingness to categorize and denounce deconstruction and postmodernism while expending little effort to understand and analyze postmodern writings. In the 1980s, the label "liberal" was used as a political showstopper. If one's views were called liberal, they would immediately be dismissed, without further analysis. Many modernist writers want to do the same with the label "postmodern." As soon as somebody is called postmodern, then her writings can be categorically denounced as either nihilistic, relativistic, idealistic, useless, worse than useless, or all of the above.²⁴ We find scholars as eminent as Richard Posner precipitately attributing astoundingly absurd positions to postmodernists, such as the claim that "racism is a bad dream from which we may awake at any time."²⁵ In fact, the modernists' habit of heedlessly

23. Arrow, *Nuanced*, *supra* note 2, at 168. Moran writes: "At best, postmodern ideology has served as a sort of fetish to engage the creative energies of a relatively small group of scholars in the legal academy." Moran, *supra* note 21, at 157.

24. See, e.g., Arthur Austin, *The Postmodern Infiltration of Legal Scholarship*, 98 MICH. L. REV. 1504, 1527 (2000) (reviewing PAUL W. KAHN, *THE CULTURAL STUDY OF LAW* (1999) and JAMES BOYD WHITE, *FROM EXPECTATION TO EXPERIENCE* (1999)) (denouncing "postmodern pomobabble"); Robert F. Cochran, Jr., *Professionalism in the Postmodern Age: Its Death, Attempts at Resuscitation, and Alternate Sources of Virtue*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 305, 310 (2000) (labeling it nihilistic and useless, because postmodernists criticize without offering workable alternatives); MacKinnon, *supra* note 20, at 700-01 (idealism); Martha C. Nussbaum, *Skepticism About Practical Reason in Literature and the Law*, 107 HARV. L. REV. 714 (1994) (nihilism and relativism).

25. Richard A. Posner, *The Law of the Beholder*, NEW REPUBLIC, Oct. 16, 2000, at 49, 50 (reviewing ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000)). Occasionally, one does find a modernist critique of postmodernism that actually tries to focus on postmodern writings. See, e.g., DOUGLAS E. LITOWITZ, *POSTMODERN PHILOSOPHY AND LAW* (1997) (criticizing postmodernism from the perspective of analytic philosophy); Ian Crosby, Note, *Worlds in Stone: Gadamer, Heidegger, and Originalism*, 76 TEX. L. REV. 849 (1998) (criticizing the

denouncing postmodernism helps explain the inconsistency among their various criticisms. A modernist who denigrates postmodernism with inflammatory insults is unlikely to contemplate the underlying substance or logical implications of those insults.

Arrow has characterized his *Pomobabble* article as a parody and satire.²⁶ Maybe so. But it is also mean-spirited. Arrow often slides across the line from parody to mockery. Like the other critics, he makes little effort to represent postmodernism accurately and to analyze it fairly from a critical standpoint. Whereas most critics, however, categorically denounce and expeditiously dismiss postmodernism, Arrow instead mocks postmodern scholarship by pretending to use a postmodern or pseudo-postmodern style that is so grotesque that it demands ridicule. He resembles the bully who teases the outcast on the playground by mocking her distinctive physical or personality traits, while all the time encouraging others to join in the "fun." Arrow, it seems, is the one who laughs at others because they sound or look different, without thinking that there might be some substance beneath the sounds and the looks. And Arrow wants others to join him in the mockery, to castigate postmodern scholarship for being "laughable." Arrow's technique is, to me, most distasteful. Ronald J. Krotoszynski was correct to denounce Arrow's arguments as *ad hominem*.²⁷

Yet, the danger remains that many readers will accept not only the common categorical denunciations but also Arrow's mockery of postmodernism. Without further examination of postmodern writing, readers might believe that postmodern legal scholarship is nihilistic and potentially dangerous nonsense, or the insipid gibberish that Arrow depicts. Thus, for the sake of scholarly precision and clarity, it is important to respond to the substance of criticisms made by Arrow and others.

For instance, the claim that postmodern legal scholars cannot be political advocates is so inaccurate as to be outrageous. Notice, first, that this claim—that postmodernism leads to political quiescence—intertwines with the argument that postmodernism is empty of content. If postmodernism is merely a matter of style, without substance, then there supposedly is no basis for taking a political stance. But contrary to this criticism, many postmodernists, especially deconstructionists, are overtly political. Indeed, one

Gadamerian critique of foundationalism). Outside of jurisprudence, a sustained examination of deconstructive postmodernism is in JOHN M. ELLIS, *AGAINST DECONSTRUCTION* (1989).

26. Arrow, *Nuanced*, *supra* note 2, at 153.

27. Krotoszynski, *supra* note 2, at 322.

could fairly characterize deconstruction as being primarily concerned with justice. By demonstrating the illegitimate privileging within binary oppositions, deconstructionists uncover the marginalized Other. That is, deconstructionists reveal that certain viewpoints, values, interests, individuals, and traditions are either ignored, denied, or oppressed in the name of the privileged. Jacques Derrida has gone so far as to declare that "[d]econstruction is justice."²⁸ Partly for that reason, many postmodern legal scholars have expressly addressed the problem of justice.²⁹

Thus, if one were to do little more than glance at the writings of postmodern critical race scholars, such as Richard Delgado and Ian F. Haney López, their political goal practically flashes in neon: they seek social justice for racial minorities.³⁰ In the debates over anti-hate speech regulations, for example, opponents of the regulations attempt to seize a dominant or privileged position by invoking the First Amendment. Their desire, as they so often stress, is to uphold the sanctity of freedom of speech. On the other side, proponents of the regulations, such as Delgado, attempt to deconstruct the dominant position as free speech absolutism. They maintain that this type of absolutism tends to ignore the interests and views of the hate-speech victims, who usually belong to societal minorities or outgroups.³¹

Once again, I can practically hear Arrow exclaiming, "What hogwash! What about the postmodern critique of normativeness? Doesn't that postmodern nonsense preclude any claims to justice or social change?" Well, to be sure, postmodern legal scholars, led by Pierre Schlag, have questioned the effectiveness of traditional normative legal scholarship, which still fills the pages of most law reviews and has done so for more than a century.³² When confronted

28. Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority,"* 11 CARDOZO L. REV. 919, 945 (1990).

29. See J.M. Balkin, *Transcendental Deconstruction, Transcendent Justice*, 92 MICH. L. REV. 1131 (1994); Feldman, *Politics*, *supra* note 5, at 192-201; Katherine C. Sheehan, *Caring for Deconstruction*, 12 YALE J.L. & FEMINISM 85, 128-41 (2000).

30. See Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258 (1992); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994).

31. For an illustration of these opposed positions, see the exchange between Steven G. Gey and Richard Delgado, published in the *University of Pennsylvania Law Review*. See Steven G. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193 (1996); Richard Delgado, *Are Hate-Speech Rules Constitutional Heresy? A Reply to Steven Gey*, 146 U. PA. L. REV. 865 (1998); Steven G. Gey, *Postmodern Censorship Revisited: A Reply to Richard Delgado*, 146 U. PA. L. REV. 1077 (1998).

32. See Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990).

with some specified legal or social problem, modernist authors usually respond by analyzing a series of cases, statutes, or both that seem relevant to the problem. Then the author typically concludes with a normative recommendation: she recommends that the Supreme Court adopt some new or modified doctrinal framework or that Congress enact or amend some statute that will supposedly resolve the problem. Indeed, to some modernists, such a normative recommendation is the sine qua non of "serious scholarship."³³

Postmodernists generally refrain from making such explicit proposals for social and legal change and thus repudiate this type of normative scholarship.³⁴ Most important, postmodernists argue that normative scholarship is misleadingly out-of-touch with social reality. Normative scholars write as if their recommendations can and will be anxiously read and quickly implemented by the Court or Congress, as if remedying the world's problems were that easy. But, of course, it is not. As many commentators have noted, for example, a growing gulf lies between the legal academy and the judiciary.³⁵ This chasm is not due merely to the fact that postmodern scholars refrain from making normative recommendations in their articles, since there are hundreds of normative articles still being published every year. If judges wanted input from the professoriate, there is no shortage of free advice being offered. But most judges, apparently, do not want it. They are not listening. Thus the overwhelming majority of normative articles are published stillborn: they not only fail to achieve their self-stated goal of directly influencing the development of the law, but they do not even get read by judges or legislators.

Although many postmodern legal scholars normally refrain from writing traditional normative articles, they are not politically apathetic. Rather, they often are politically motivated and write in the hope that their words might influence others. Yet they seek to

33. Austin, *supra* note 24, at 1507.

34. See, e.g., STEPHEN M. FELDMAN, PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE (1997) (offering a critical history of the separation of church and state that does not conclude by recommending any particular doctrinal change) [hereinafter FELDMAN, PLEASE DON'T WISH ME A MERRY CHRISTMAS].

35. See Michael D. McClintock, *The Declining Use of Legal Scholarship by Courts: An Empirical Study*, 51 OKLA. L. REV. 659 (1998); see also Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992) (emphasizing, from the perspective of a federal judge, a disjunction between law professors and judges); Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 871-72 (1991) (stating that judges do not listen to or care about legal scholarship). For examples of Supreme Court Justices denigrating the legal academy, see *Romer v. Evans*, 517 U.S. 620, 652-53 (1996) (Scalia, J., dissenting); *Seminole Tribe v. Florida*, 517 U.S. 44, 68-69 (1996) (Rehnquist, J., majority opinion).

intervene in legal and social problems, to struggle for legal and social transformation, through techniques other than the overt recommendation of change. After all, if such recommendations are inefficacious, why bother making them? Most postmodernists believe that a more effective scholarly approach is to uncover and disrupt any illegitimate assumptions or premises that tacitly undergird current social and legal arrangements. Schlag's efforts to change the practice of legal scholarship by ending (or reducing the volume of) normative legal scholarship is a good example of this type of postmodern writing. His method is to disrupt the assumption that law review authors and readers are "relatively autonomous selves,"³⁶ powerful centers of social power who can readily transform the world merely because they wish to do so.³⁷

To be sure, this type of postmodern deconstructive writing is not easily done, or at least not easily done well. The difficulty arises because our preexisting assumptions, which derive from our communal or cultural traditions, provide the springboard for communication with others. Our traditions and our concomitant assumptions open us to the possibility of meaning and understanding in the first place.³⁸ Put simply, we never communicate in a cultural void. We are always already situated in some cultural context, and that context is therefore necessarily the starting point for all communication, whether speaking, writing, listening, or reading. For this reason, then, any speech or writing that is aligned or consistent with our preexisting assumptions is likely to seem persuasive or sensible. Such speech or writing makes sense at least partly because it fits with our preconceived notions—our assumptions and premises. So when a postmodern deconstructionist attempts to disrupt those very assumptions and premises, she is struggling up river, fighting against the current. Any speech or writing that denies the accepted

36. See Pierre Schlag, *Fish v. Zapp: The Case of the Relatively Autonomous Self*, 76 GEO. L.J. 37 (1987).

37. See Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627 (1991).

38. Hans-Georg Gadamer, *The Universality of the Hermeneutical Problem* (David Linge trans.), in JOSEF BLEICHER, *CONTEMPORARY HERMENEUTICS* 128, 133 (1980). Gadamer writes:

This formulation certainly does not mean that we are enclosed within a wall of prejudices and only let through the narrow portals those things that can produce a pass saying, 'Nothing new will be said here.' Instead we welcome just that guest who promises something new to our curiosity. But how do we know the guest whom we admit is one who has something *new* to say to us? Is not our expectation and our readiness to hear the new also necessarily determined by the old that has already taken possession of us?

Id.; see Stephen M. Feldman, *Made for Each Other: The Interdependence of Deconstruction and Philosophical Hermeneutics*, 26 PHIL. & SOC. CRITICISM 51, 54-57 (2000) (explaining Gadamer's philosophical hermeneutics).

cultural traditions or questions the preexisting assumptions is likely to seem unreasonable, confused, offensive, or even absurd, precisely because it does not fit our preconceived notions.³⁹

What about the other modernist criticisms of postmodern legal scholarship? Many of the modernists' favorite denunciatory labels for postmodern legal scholarship—nihilism, idealism, relativism, and so on—seem interrelated. Moreover, these dismissive categorizations are based on a serious misunderstanding. Contrary to modernist assertions, most postmodernists do not maintain that, when it comes to textual interpretation, for example, "anything goes."⁴⁰ Rather, postmodernists tend to explain how our positions—our situatedness or embeddedness—in communal or cultural traditions both enable *and* constrain communication. We never are free-floating subjects who arbitrarily assign meanings to texts. Instead, as already discussed, we are always situated within a cultural context that engenders certain assumptions and premises. Texts have meaning, values have substance, and justice has content, exactly because we participate in our cultural traditions. In other words, postmodern theory explains why we are not relegated to those modernist bugaboos: nihilism, idealism, and relativism.

Postmodernists, therefore, can and do talk about rightness, goodness, legitimacy, knowledge, and so forth.⁴¹ What most postmodernists repudiate, though, is the modernist claim to objectivity. Modernists insist that if we are to be able to talk of truth and knowledge, then our propositions must somehow correspond to some objective reality. It is the object in the real world that provides the foundation for truth and knowledge.⁴² Postmodernists respond,

39. As I have written elsewhere:

[T]o perform [postmodern] critical activity proves often to be a formidable challenge. It requires the writer somehow to disrupt the reader's basic and deep-seated assumptions—assumptions that typically emerge from a dominant culture and that have been inculcated and reinforced for much (or all) of the reader's life. This type of critical work, to be effective, often requires more imagination and originality than a straightforward prescription for change, which one would see in traditional theory.

Stephen M. Feldman, *How to Be Critical*, 76 CHI.-KENT L. REV. 893, 911 (2000).

40. JONATHAN CULLER, ON DECONSTRUCTION 110 (1982); Madeleine Plasencia, *Who's Afraid of Humpty Dumpty: Deconstructionist References in Judicial Opinions*, 21 SEATTLE U. L. REV. 215, 247 (1997).

41. See, e.g., DRUCILLA CORNELL, *THE PHILOSOPHY OF THE LIMIT* (1992) (discussing deconstruction and ethical relations); J.M. Balkin, *Transcendental Deconstruction, Transcendent Justice*, 92 MICH. L. REV. 1131 (1994) (discussing justice); Feldman, *Politics*, *supra* note 5, at 192-201 (discussing justice); Francis J. Mootz III, *Is the Rule of Law Possible in a Postmodern World?*, 68 WASH. L. REV. 249 (1993) (discussing the rule of law).

42. John Searle, for instance, writes that "there is a reality that exists totally independently of us, an observer-independent way that things are, and our statements about that reality are

however, with two general arguments. First, modernists have never successfully explained how we manage to bridge the gap between the modernist self or subject and that external objective world.⁴³ Second, postmodernists maintain that they have explained, as discussed above, how we actually have truth and knowledge. 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.⁴⁴

If my depiction of postmodernism is accurate, then why do so many modernists mischaracterize it? One reason is simple: some (though not all) modernists occasionally do slipshod scholarship. They might, for instance, present grossly misleading characterizations of other writers, or cite specific articles or authors for propositions that are difficult to justify—if one reads the cited article or author fairly and in context. This problem is reminiscent of the celebrated law review dispute between Roscoe Pound and Karl Llewellyn. In 1931, Pound wrote an article attacking Llewellyn and other American legal realists.⁴⁵ Llewellyn responded in an article demonstrating that Pound's characterization of the realists, point after point after point, was strikingly inaccurate.⁴⁶ Indeed, after reading Llewellyn's article, one is left with the impression that Pound at most had skimmed a few realist articles.⁴⁷ And of course,

true or false depending on whether they accurately represent how things are." JOHN R. SEARLE, *MIND, LANGUAGE, AND SOCIETY* 134 (1998).

43. See generally RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979) (discussing how modernist philosophers have struggled to explain how external reality is mirrored in the individual's consciousness).

44. Postmodernists are, in effect, indifferent to objective reality. Whereas modernists devote enormous time and energy to questions revolving around the existence of an external world and our knowledge of it, postmodernists generally disregard these questions. Postmodernists thus do not necessarily claim that an external world does not exist. Rather, they claim that to the extent that there is an external world, it is meaningful only through our hermeneutic being-in-the-world.

MacKinnon, therefore, misses the point when she writes: "The postmodern attack on universality also proves a bit too much. Inconveniently, the fact of death is a universal—approaching 100%. Whatever it means, however it is related to culturally and spiritually, whatever happens after it, it happens." MacKinnon, *supra* note 20, at 698. To suggest that death is some type of raw meaningless physical event in an external world is absurd. Death is obviously a meaningful event. Does death mean non-existence? Does it mean joinder with God? Does it mean ascension to heaven? One cannot speak or think of death without the concept having some sort of meaning. Postmodernists would be concerned with the social construction of these various meanings.

45. See Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931).

46. See Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

47. See NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 72-75 (1995) (discussing the Pound-Llewellyn exchange); N.E.H. HULL, *ROSCOE POUND AND KARL LLEWELLYN*:

Pound's superficial and imprecise understanding of realism had facilitated his attack. It is always easier to criticize a caricature rather than a reasonable depiction of one's opponent.

Like Pound vis-à-vis the realists, Arrow misrepresents the work of postmodernists for his own scholarly convenience. To choose one glaring example, Arrow repeatedly mischaracterizes my writing (which was of unusual importance, at least to this writer). Arrow describes me as a "one-trick pony," apparently because I have written several articles on the subject of postmodernism.⁴⁸ Well, indisputably, I have written numerous articles on postmodernism, particularly on its manifestation in legal scholarship and judicial practice.⁴⁹ Indeed, I am writing another one right now. But just as surely, I also have written extensively on other subjects, such as the separation of church and state and the history of American jurisprudence.⁵⁰ Arrow either was unaware of these other writings, because of inadequate research, or he ignored it so that he could intentionally mischaracterize my writing for his parodic purposes. Similarly, in his *Pomobabble* piece, Arrow repeatedly cites one of my articles, *Diagnosing Power: Postmodernism in Legal Scholarship and Judicial Practice*, for the proposition that "postmodernism denies the possibility of its own definition."⁵¹ I do not deny writing that phrase; in fact, I admit it. Nonetheless, and unfortunately for Arrow, in the context of *Diagnosing Power*, which was published in 1994, that proposition illustrated the postmodern concern for paradoxes.⁵² Much of the remainder of the article, in fact,

SEARCHING FOR AN AMERICAN JURISPRUDENCE (1997) (offering a book-length historical study of Pound and Llewellyn's relationship).

48. Specifically, Arrow writes: "So while some one-trick ponies (apparently oblivious to the fact that postmodernism has become an academic joke even before the dawn of the millennium) are likely to soldier on as if nothing has happened, others have searched for new sub-fields to politicize." Arrow, *Nuanced*, *supra* note 2, at 167-68 (citing Feldman, *Playing*, *supra* note 5).

49. See, e.g., *Persistence*, *supra* note 5; Feldman, *Playing*, *supra* note 5; Feldman, *Politics*, *supra* note 5; Feldman. Besides, my impression is that many scholars believe such specialization to be a virtue.

50. See, e.g., FELDMAN, VOYAGE, *supra* note 4 (tracing the history of American legal thought); STEPHEN M. FELDMAN, PLEASE DON'T WISH ME A MERRY CHRISTMAS, *supra* note 34 (tracing the history of the separation of church and state); Stephen M. Feldman, *Critical Questions in Law and Religion: An Introduction*, in LAW AND RELIGION: A CRITICAL ANTHOLOGY 1 (Stephen M. Feldman ed., 2000) (providing introductory essay to anthology on the separation of church and state); Stephen M. Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 VAND. L. REV. 1387 (1997) (focusing on nineteenth-century American legal thought).

51. Arrow, *Pomobabble*, *supra* note 2, at 470 n.10, 485 n.22, 510 n.29 (citing Feldman, *Diagnosing*, *supra* note 5, at 1048).

52. I wrote: "Postmodernism immediately presents a paradox. Postmodernism exists and even structures its own reproduction, yet postmodernism denies the possibility of its own defini-

focused on the elucidation of various postmodern themes, including the concern for paradoxes.⁵³ Thus, one point of *Diagnosing Power* was that, while postmodernism cannot be reduced to a simple concise definition, it nonetheless is animated by several themes that can be specified and explained. In other words, that article directly contradicts Arrow's *Pomobabble* view: postmodernism is not nonsensical gobbledygook. To the contrary, as with premodernism and modernism, postmodernism can be explained with detail and clarity.⁵⁴

Unsurprisingly, then, if one fairly reads postmodern legal writing to an appreciable extent, one discovers that Arrow's parody does not even remotely resemble most (if not all) of the scholarship. Postmodern authors such as J.M. Balkin, who has written extensively on postmodern culture and law,⁵⁵ or Francis J. Mootz, who has explored the implications of Hans-Georg Gadamer's philosophical hermeneutics for jurisprudence,⁵⁶ or Tracy Higgins, who has

tion. Indeed, this paradox illustrates one recurrent aspect or theme of postmodernism: the recognition, exploration, and even celebration of the existence of various paradoxes." Feldman, *Diagnosing*, *supra* note 5, at 1048.

53. See *id.* at 1074-1105.

54. I am, apparently, not the only person who believes that postmodernism can be explained and therefore understood clearly. In a recent review of my book on the history of American jurisprudence, including postmodern legal thought, a state judge concluded: "After reading this book, make no mistake, one knows what postmodernism is and what postmodern jurisprudence is all about." Jerry L. Goodman, *A Review of "American Legal Thought From Premodernism to Postmodernism,"* 36 TULSA L.J. 231, 234 (2000); see FELDMAN, VOYAGE, *supra* note 4, at 137-87 (explaining the emergence and themes of postmodern legal scholarship). For a brief yet clear summary of postmodernism, see Douglas Litowitz, *In Defense of Postmodernism*, 4 GREEN BAG 2d 39 (2000).

Arrow also criticizes one of my articles for citing ten of my "prior works on the subject [of postmodernism] 30 times in a 30-page essay." Arrow, *Nuanced*, *supra* note 2, at 168 n.102 (citing Feldman, *Playing*, *supra* note 5). I confess: I am guilty—if it is a crime to cite oneself rather than to repeat arguments at length that one has previously explained. Moreover, self-citation obviously is in part a marketing device intended primarily for student editors at elite law journals. In effect, I send a message to these editors stating that my manuscript submission should be seriously considered because I have published previously in elite journals. To those readers who might care, therefore, I admit that I care about which journal publishes my writing. For what it's worth, though, I do not believe that I am the only author, postmodern or modern, who commits the crime (or sin?) of self-citation. For example, Arrow himself, in his second article criticizing postmodernism, cites his own first article on the subject, *Pomobabble*, a remarkable 34 times! See Arrow, *Nuanced*, *supra* note 2 (citing Arrow, *Pomobabble*, *supra* note 2, throughout).

55. See J.M. Balkin, *What Is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966 (1992).

56. See Francis J. Mootz III, *The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas, and Ricoeur*, 68 B.U. L. REV. 523 (1988).

elaborated postmodern themes within a feminist context,⁵⁷ or Dennis Patterson, who has developed a postmodern Wittgensteinian approach to law,⁵⁸ are models of clarity, precision, and imagination that any legal scholar would do well to emulate. To be sure, I have disagreed with some of their positions,⁵⁹ but I would never claim that they had not presented them strongly and clearly. Even so, I do not mean to suggest that all postmodernists are good writers. Some are maddeningly muddled and obscure. But postmodernists do not have a monopoly on poor writing. A few modernists, I venture, would fall into this category as well.

Apart from careless scholarship, another causal factor helps explain why so many modernists inaccurately depict postmodernism. This cause might be characterized as more systemic and thus more difficult to overcome than merely bad scholarship. The problem is as follows: modernists tend to see the world from their modernist vantage. No surprise there, certainly, but it nonetheless engenders problems when modernists attempt to describe postmodernists. Why? Because modernists tend to portray postmodernists in modernist terms or categories, which the postmodernists tend to repudiate.⁶⁰

Whereas postmodernists often attempt to deconstruct binary oppositions, such as objectivity versus subjectivity, modernists tend to accept such opposed pairs.⁶¹ Thus, for example, modernists often declare that *either* we have objective knowledge—that is, knowledge grounded on some firm foundation—*or* we are relegated to free-floating subjectivism and relativism. Likewise, some modernists maintain that *either* we must be independent subjects with freedom of will *or* we must be no more than completely determined automata. Indeed, these types of binary oppositions, to a great degree, epitomize and animate the modernist world view. Consequently, when a modernist describes postmodernism, the modernist naturally tends to characterize the postmodern position in accordance with these binary oppositions. The modernist then seems to reject

57. See Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657 (1997); Tracy E. Higgins, "By Reason of Their Sex": *Feminist Theory, Postmodernism, and Justice*, 80 CORNELL L. REV. 1536 (1995).

58. See Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254 (1992).

59. See, e.g., Feldman, *Politics*, *supra* note 5, at 169-201 (criticizing the work of both Balkin and Patterson).

60. Of course, the same problem appears in reverse. That is, postmodernists tend to portray modernists in postmodern terms or categories, which the modernists tend to reject.

61. See CHRISTOPHER NORRIS, *WHAT'S WRONG WITH POSTMODERNISM* 74 (1990) (discussing a "kind of typecast binary thinking" in modernist thought).

justifiably the postmodern view because, of course, it appears to fall on the wrong side of the either/or.

Ronald Dworkin uses this precise type of argument to attack postmodernism. He insists that a true proposition must be *objectively* true, or it is no truth at all. Therefore, according to Dworkin, either postmodernists must tacitly assume the objective truth of their own beliefs (particularly regarding the truth of the postmodern world view), or they must offer their views as no more than "subjective displays."⁶² From Dworkin's modernist perspective, no sensible thinker would try to demonstrate the truth of her position—such as postmodernism—only to admit that it was merely a personal statement of subjective beliefs. Hence, postmodernists unwittingly manifest their own commitment to modernist objectivity, to "have discovered out there . . . some external, objective, timeless, mind-independent world."⁶³

The weakness with Dworkin's and related attacks on postmodernism is that they do not confront postmodernism on its own terms. As already discussed, postmodernists do not rely on binary oppositions. Instead, they seek to deconstruct the ordinary privileging between opposed pairs. At best, modernists criticize a caricature of postmodernism, drawn with a modernist pen, rather than the actual postmodern world view. Modernists must directly confront, for instance, Hans-Georg Gadamer and his jurisprudential followers, such as Mootz and William Eskridge, who present a philosophical hermeneutics that purportedly explains how we have truth and knowledge without accepting the modernist demand for objectivity.⁶⁴ To be sure, Gadamer's views have weaknesses, as Jürgen Habermas has demonstrated,⁶⁵ but to label all postmodernists as subjectivists or relativists, without serious analysis of postmodern positions, is far from persuasive.

62. Dworkin, *supra* note 17, at 88.

63. *Id.* at 87.

64. HANS-GEORG GADAMER, *TRUTH AND METHOD* (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 1989); see William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609 (1990) (relying on Gadamer to help explain statutory interpretation); Mootz, *supra* note 41 (explaining the rule of law from a Gadamerian approach); see also Stephen M. Feldman, *The New Metaphysics: The Interpretive Turn in Jurisprudence*, 76 IOWA L. REV. 661 (1991) (explaining constitutional interpretation from a Gadamerian perspective).

65. See Jürgen Habermas, *The Hermeneutic Claim to Universality*, in JOSEF BLEICHER, *CONTEMPORARY HERMENEUTICS* 181 (1980) (criticizing Gadamer).

III. CONCLUSION: LIVING AND LOVING THE POSTMODERN

So far, I have grouped Arrow with other modernist critics of postmodern legal thought, but he differs from the others in one important way. Namely, Arrow's style of critique is somewhat original. It is postmodern, or a parody of postmodernism, or at least Arrow thinks as much. So now, Arrow's hidden affection for postmodernism can be uncovered. Who could write a 230-page parody of a distinctive type of scholarship if he or she did not find something inherently fascinating about that scholarship? Indeed, would *Michigan Law Review* ever publish in the style of Arrow's *Pomobabble* article—an ostensible parody consisting primarily of nonsensical footnotes—if not for the significance and widespread acceptance of postmodern scholarship? The lifeblood of Arrow's article is postmodernism itself. Maybe he does not so much want to kill postmodernism as to revel in its style, in its playfulness, in its freedom—even if he does not truly understand it. If he were not so intent on cynically expressing his disdain for postmodernism, he might recognize and acknowledge his affection for it.

But why would Arrow have such a latent affinity for postmodernism when he overtly dislikes it? One possible explanation for this paradox is the pervasive effect of postmodern culture itself.⁶⁶ Postmodernism, as a term, has multiple meanings. It sometimes refers to a theory (or theories) that encompasses a set of philosophical ideas or themes, such as the rejection of objective foundations for knowledge.⁶⁷ Yet, postmodernism also sometimes refers to a cultural trend or movement that closely interrelates with postmodern theory but nonetheless can be comprehended separately from the philosophical themes.⁶⁸

66. See generally the following sources with helpful discussions of postmodernism: ZYGMUNT BAUMAN, *INTIMATIONS OF POSTMODERNITY* (1992); STEVEN BEST & DOUGLAS KELLNER, *POSTMODERN THEORY* (1991); STEVEN CONNOR, *POSTMODERNIST CULTURE* (1989); NANCY FRASER, *UNRULY PRACTICES: POWER, DISCOURSE, AND GENDER IN CONTEMPORARY SOCIAL THEORY* (1989); DAVID HARVEY, *THE CONDITION OF POSTMODERNITY* (1989); FREDRIC JAMESON, *POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM* (1991); BARBARA KRUGER, *REMOTE CONTROL: POWER, CULTURES, AND THE WORLD OF APPEARANCES* (1993); JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* (Geoff Bennington & Brian Massumi trans., 1984); NORRIS, *supra* note 61; Litowitz, *supra* note 54.

67. See, e.g., BEST & KELLNER, *supra* note 66 (focusing on postmodern theory); FELDMAN, *VOYAGE*, *supra* note 4, at 38-45 (specifying eight postmodern themes).

68. Connor distinguishes the culture of postmodernism from the social, economic, and political arrangements of postmodernity. See CONNOR, *supra* note 66, at 27. Douglas Litowitz describes postmodernism at three levels: art, culture, and philosophy. Litowitz, *supra* note 54, at 41-42.

What is postmodern culture? As many scholars have noted, and I am sure to the chagrin of Arrow, there is no one simple definition.⁶⁹ Some commentators emphasize the fragmentation of society. Zygmunt Bauman argues that postmodernism is "the permanent and irreducible pluralism of cultures, communal traditions, ideologies, 'forms of life' or 'language games' [T]he problem of the postmodern world is not how to globalize superior culture, but how to secure communication and mutual understanding between cultures."⁷⁰ Fredric Jameson, meanwhile, ties postmodern culture to the capitalist economy. "[A]esthetic production today has become integrated into commodity production generally: the frantic economic urgency of producing fresh waves of ever more novel-seeming goods (from clothing to airplanes), at ever greater rates of turnover, now assigns an increasingly essential structural function and position to aesthetic innovation and experimentation."⁷¹ Information and knowledge are produced and spread at dizzying speeds through television, satellite beamings, and computer technology. Consequently, postmodernism "is characterized by the overabundance of meanings, coupled with (or made all the more salient by) the scarcity of adjudicating authorities."⁷² Often, knowledge seems to have no deeper roots, no firmer foundations, than the images flashing across your computer monitor as you surf the web, leaping from hyperlink to hyperlink over your broadband.⁷³

69. Fredric Jameson writes:

[T]he concept [of postmodernism] is not merely contested, it is also internally conflicted and contradictory. I will argue that, for good or ill, we cannot *not* use it. But my argument should also be taken to imply that every time it is used, we are under the obligation to rehearse those inner contradictions and to stage those representational inconsistencies and dilemmas; we have to work all that through every time around. Postmodernism is not something we can settle once and for all and then use with a clear conscience.

JAMESON, *supra* note 66, at xxii.

Barbara Kruger suggests different ways to describe postmodernism:

To some [postmodernism is] an excuse to pile together oodles of wild and crazy decor, to others it's another example of the weakening of standards and values, to others a transgressive resistance to the sureness of categories, to others a handy way to describe a particular house, dress, car, artist, dessert, or pet, and to others it's simply already *over*.

KRUGER, *supra* note 66, at 3.

70. BAUMAN, *supra* note 66, at 102.

71. JAMESON, *supra* note 66, at 4-5.

72. BAUMAN, *supra* note 66, at 31.

73. The legal scholar, James Boyle, offers another definition of postmodern culture:

The cultural form, which I shall refer to as "pomo," is built on kitsch quotation and the flight from ponderous sincerity, on the juxtaposition of contradictory styles and modes so that each impliedly mocks the other without any assistance from the "speaker," on the use of tension and internal inconsistency to make a point. Pomo celebrates the co-optation of '50s soap operas as markers for forms of sexuality sternly denied during the '50s. It glorifies the parodic personality

Regardless of the nebulous character of postmodern culture, most postmodernists would agree with Jameson's observation that "we are *within* the culture of postmodernism to the point where its facile repudiation is as impossible as any equally facile celebration of it is complacent and corrupt."⁷⁴ If so, then even modernist legal scholars, including Arrow, are living within postmodern culture, whether they like it or not. Moreover, according to Jameson, culture has expanded "throughout the social realm, to the point at which everything in our social life—from economic value and state power to practices and to the very structure of the psyche itself—can be said to have become 'cultural.'"⁷⁵ Postmodern culture, in other words, permeates all aspects of our lives, including the writing of theory. As already mentioned, therefore, postmodern culture and theory are interrelated. More specifically, the culture seems to engender the theorizing. For instance, the pluralism of cultures has spurred postmodern theorists to recognize that ostensibly settled truths often reflect the tacit acceptance of a dominant cultural standpoint. But when alternative cultures or subcultures are recognized, then alternative truths start to emerge. Postmodern theorists thus stress the theme of antifoundationalism: that truth and knowledge are not grounded on an objective foundation.⁷⁶

Because of the pervasiveness of postmodern culture, postmodern themes or theoretical insights have surfaced in the most unexpected places: namely, in modernist legal writing and even in the politically conservative opinions of Supreme Court Justices.⁷⁷ Among modernist legal scholars, Cass Sunstein has explicitly condemned "postmodern nonsense,"⁷⁸ yet he readily uses postmodern

and the sardonic aside, or the incongruity between the three-piece suit and the eyebrow ring. Above all, pomo is the world of irony, irony, irony.

James Boyle, *Anachronism of the Moral Sentiments? Integrity, Postmodernism, and Justice*, 51 STAN. L. REV. 493, 497-98 (1999).

74. JAMESON, *supra* note 66, at 62.

75. *Id.* at 48; see CONNOR, *supra* note 66, at 44-51 (stating that culture, social practices, and their discussion in theory often merge together or conjoin).

76. FELDMAN, VOYAGE, *supra* note 4, at 38-39.

77. See Stephen M. Feldman, *The Supreme Court in a Postmodern World: A Flying Elephant*, 84 MINN. L. REV. 673 (2000) (arguing that various postmodern themes have appeared in Supreme Court opinions). For a more extensive discussion of the social and cultural factors that contributed to the emergence of postmodern legal thought, see FELDMAN, VOYAGE, *supra* note 4, at 137-62.

78. In a book review, Sunstein declares that, from one perspective, the book's author is "at risk of speaking postmodern nonsense." Cass R. Sunstein, *More Is Less*, NEW REPUBLIC, May 18, 1998, at 32, 36 (reviewing JAMES SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* (1998)). To Sunstein, apparently, postmodernism

insights in the course of his modernist constitutional arguments. In criticizing the interpretive claims of originalists such as Robert Bork,⁷⁹ Sunstein writes: "There is simply no such thing as preinterpretive meaning, or meaning without resort to interpretive principles."⁸⁰ Sunstein, like an inspired postmodernist, explains that interpretation is "inevitably situated," never resting on "external foundations."⁸¹

Unsurprisingly, then, postmodern culture appears to have also infused Arrow's writing with postmodern or pseudo-postmodern themes. For instance, as already discussed, we find Arrow deconstructing the normal privileging of text over footnotes. Arrow also seems to subscribe to the postmodern critique of normativeness. He seeks to transform legal scholarship—to eradicate postmodern themes—yet he ironically writes as a postmodernist, refusing to conclude with an overt recommendation for change.⁸² Furthermore, Arrow's extensive citation of nonlegal sources in his footnotes resonates with the postmodern tendency to question and defy commonly accepted boundaries, including those dividing academic disciplines. Postmodern legal scholars often cite nonlegal sources and generally do interdisciplinary work because they find the constraints of the traditional discipline of law too confining and artificial. Perhaps, postmodernists suggest, insights from history, philosophy, political science, or other disciplines can be fruitfully imported into legal thought.⁸³

Of course, Arrow does not actually consider the worthiness of interdisciplinary legal studies, so his citations offer only grotesque mockeries of true postmodern efforts to glean insights from other disciplines. Arrow's parodic dismissal of interdisciplinary postmodern scholarship, coupled with his pronouncement that postmodernism is already a joke within the legal academy, is truly remarkable. Only three years before Arrow declared postmodernism a joke,

equates with nonsense. The book's author, Sunstein suggests, could not have intended any such postmodern meaning: after all, who would want to speak nonsense?

79. See ROBERT BORK, *THE TEMPTING OF AMERICA* 3-5 (1990).

80. CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 8 (1993).

81. *Id.* at 115. Sunstein adds: "The meaning of any text, including the Constitution, is inevitably and always a function of interpretive principles, and these are inevitably and always a product of substantive commitments." *Id.* at 8.

82. Toward the end of Arrow's second article, he does offer, in his words, "a modest proposal." Arrow, *Nuanced*, *supra* note 2, at 169-70. Yet, his proposal is just further mockery. He proposes that whenever a professor publishes a constitutional law article, the new article be accompanied by a special footnote that would rate the professor's previous articles on a "Messianism Exponent," showing how radical or reactionary those articles had been.

83. See FELDMAN, *VOYAGE*, *supra* note 4, at 166-68 (discussing the breakdown of disciplinary boundaries).

Balkin wrote: "[I]nterdisciplinary scholarship seems to be all the rage. Interdisciplinary scholarship is now an expected part of a serious scholar's work at most of the elite law schools in this country."⁸⁴ Did interdisciplinary postmodern scholarship go from being the rage to a joke in three short years? Not likely. The steady flow of interesting interdisciplinary scholarship, both before and after Arrow's articles were published, supports Balkin's rather than Arrow's viewpoint.⁸⁵

Moreover, for what it's worth, interdisciplinary legal scholarship is not unique to the postmodern era. As is commonly known, many American legal realists, drawing extensively on the empirical social sciences, engaged in interdisciplinary scholarship during the 1930s.⁸⁶ Although perhaps less commonly known, the earliest American legal scholars, such as James Wilson and Nathaniel Chipman, also freely did interdisciplinary work.⁸⁷ Wilson's lectures from the 1790s on constitutional law, for example, "ranged widely in their observations and theories on human nature, morality, history, government, law, and more."⁸⁸ David Hoffman's *Course of Le-*

84. J.M. Balkin, *Interdisciplinarity as Colonization*, 53 WASH. & LEE L. REV. 949, 950 (1996). Balkin continued by explaining that interdisciplinary scholarship was creating divisions among faculty at nonelite schools. *Id.* at 951. In 1992, Peter C. Schanck observed: "Notwithstanding its vilification in the popular media, postmodern theory has been accepted almost unanimously by legal theorists in the past decade." Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2512-13 (1992).

85. See, e.g., Boyle, *supra* note 73; Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130 (2000); López, *supra* note 30.

86. See, e.g., William O. Douglas & J. Howard Marshall, *A Factual Study of Bankruptcy Administration and Some Suggestions*, 32 COLUM. L. REV. 25 (1932); Underhill Moore & Gilbert Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts—III. The Connecticut Studies*, 40 YALE L.J. 752 (1931). Compare JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 20, 211 (1995) (discussing the empirical work of realists but arguing that the movement had largely ended by 1939), with LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960, at 145-87 (1986) (arguing that realism remained important after World War II).

Even Henry Hart, Jr., and Albert Sacks included a lengthy excerpt on legal hermeneutics from the nineteenth-century German writer, Francis Lieber, in their course materials from the 1950s on the legal process. HENRY HART, JR. & ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1114-15 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). I thank Jay Mootz for bringing to my attention this example of interdisciplinary work in the legal process writing.

87. See NATHANIEL CHIPMAN, PRINCIPLES OF GOVERNMENT: A TREATISE ON FREE INSTITUTIONS (Burlington, Vt., Edward Smith 1833); NATHANIEL CHIPMAN, SKETCHES OF THE PRINCIPLES OF GOVERNMENT (Rutland, Vt., J. Lyon 1793); JAMES WILSON, THE WORKS OF JAMES WILSON (Robert Green McCloskey ed., Harvard Univ. Press 1967) (1804).

88. FELDMAN, VOYAGE, *supra* note 4, at 5; see MARK DAVID HALL, THE POLITICAL AND LEGAL PHILOSOPHY OF JAMES WILSON, 1742-1798, at 68-69 (1997) (explaining how James Wilson was influenced by David Hume and Adam Smith).

gal Study, a self-help guide to studying law from the early 1800s, recommended that students read sources as diverse as Aristotle, Francis Bacon, Jeremy Bentham, and the Bible.⁸⁹ A narrower approach to legal scholarship, solely focused on ostensibly pure law without interdisciplinary considerations, arose during the latter nineteenth century partly because of the professionalization of the legal academic. To justify the place of law schools in the emergent research universities of that time, law professors needed to engage in supposedly scientific research in a distinctive discipline—namely, *the law*.⁹⁰ If legal research were little more than a type of history, philosophy, or some other discipline, then law schools would have no place in the universities. Lawyers could instead be trained through apprenticeships or in craft-oriented and independent law schools, and law could be studied from a scholarly perspective in the appropriate discipline, whether history, philosophy, or whatever. From a postmodern standpoint, today's modernist scholars who rage against interdisciplinary scholarship largely attempt to police the borders of the legal discipline that developed as much for purposes of professionalization as for scholarly or intellectual insight.⁹¹

Finally, in a spirit of communal good will and comity, I suggest a refinement of terminology for both modernists and postmodernists alike. My primary purpose, though, is to forestall the type of precipitative denunciations of postmodernism that so regularly issue from modernists. In light of their fondness for normative recommendations, I am confident that modernists will give my suggestion the attention it deserves, and, accordingly, they will soon be invoking my terminology (and citing this Essay).

In particular, I propose that postmodern *theory* be divided into two types: antimodernism and metamodernism.⁹² As between these two types, antimodernism is the more extreme; it encom-

89. See DAVID HOFFMAN, *A COURSE OF LEGAL STUDY ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY* (Baltimore, Joseph Neal, 2d ed. 1836); DAVID HOFFMAN, *A COURSE OF LEGAL STUDY: RESPECTFULLY ADDRESSED TO THE STUDENTS OF LAW IN THE UNITED STATES* (1817).

90. See FELDMAN, *VOYAGE*, *supra* note 4, at 92-93 (discussing the development of university-based law schools in the latter nineteenth century); WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* 14-28, 79-109 (1994) (focusing on the development of Harvard Law School in the latter nineteenth century).

91. I do not mean to suggest that disciplinary boundaries do not have any value. I agree that specialization sometimes yields greater insight into intellectual problems. But just as surely, disciplinary boundaries and specialization can also sometimes generate obstacles to insight, such as parochialism and the creation of professional jargon.

92. Cf. STEVEN BEST AND DOUGLAS KELLNER, *THE POSTMODERN TURN* 258 (1997) (distinguishing between "extreme" and "reconstructive" postmodernists).

passes a belief in radical relativism. Appeals to reason are, according to antimodernists, no more than rhetorical moves that assert the dominance of one's own cultural standpoint. There is no way to adjudicate among competing claims to truth and knowledge. When it comes to textual interpretation, anything goes. Perhaps, then, the deconstructive writings of some literary theorists can be fairly characterized as antimodern. Harold Bloom, for instance, writes that "[e]ither one can believe in a magical theory of all language . . . or else one must yield to a thoroughgoing linguistic nihilism."⁹³ Regardless of who might or might not fall within antimodernism, as defined, it unequivocally encompasses the manifestations of postmodernism that most often provoke the ire of so many modernist critics.⁹⁴

Metamodernism, meanwhile, is the more moderate type of postmodernism. Like modernists, metamodernists might explain, for example, how we use reason, have knowledge, and discuss truth. Metamodernists, however, explain these concepts without invoking the firm objective epistemological foundations of modernist metaphysics. Metamodernists tend to emphasize our situatedness: we are always situated in a communal or cultural context. And it is our situatedness—our participation in communal traditions—that enables us to perceive and understand in the first place, while simultaneously limiting our perception and understanding.⁹⁵ A metamodernist, therefore, would never suggest that anything goes, because we always are necessarily constrained, since we always are situated.⁹⁶

93. Harold Bloom, *The Breaking of Form*, in DECONSTRUCTION AND CRITICISM 1, 4 (1979).

94. Among continental thinkers, Jean-François Lyotard might be regarded as an antimodernist, as he "resolutely champions a plurality of discourses and positions against unifying theory." BEST & KELLNER, *supra* note 66, at 147. Yet, Lyotard expressly focuses on the problematic nature of justice in the postmodern condition. While he does not reach any definitive conclusion on the definition of justice, he does reject the idea that justice is "merely unanimous convention." JEAN-FRANÇOIS LYOTARD & JEAN-LOUP THÉBAUD, JUST GAMING 81 (Wlad Godzich trans., 1985). Moreover, contrary to antimodernism, he asserts that "it is neither unthinkable nor absurd to think that one can have relative certainty in matters of truth." *Id.* at 99.

Of particular note, despite his many critics, Derrida would be miscast as an antimodernist. For instance, he rejects the possibility of "complete freeplay or undecidability." JACQUES DERRIDA, LIMITED INC. 115 (Samuel Weber trans., 1988). Plus, he has "never accepted saying, or encouraging others to say, just anything at all, nor have I argued for indeterminacy as such." *Id.* at 145.

95. See GADAMER, *supra* note 64, at 265-492 (explaining philosophical hermeneutics).

96. My division of postmodernism into antimodernism and metamodernism somewhat echoes a long-running debate over progressive critical writing. Some authors believe that such writing can be as clear as any other type of writing, while others insist that such writing must be obscure exactly because it challenges the assumptions that underlie the dominant culture, including the language. See James Miller, *Is Bad Writing Necessary?* George Orwell, Theodor

Understanding the differences between alternative interpretations of Thomas Kuhn's philosophy of science can help clarify the distinction between metamodernism and antimodernism. Kuhn argued that, according to a traditional view of science, scientific practice is objective, mechanistic, and progresses in a linear fashion: scientists supposedly progress in their knowledge of nature as they develop theories based on the neutral observation of brute objective data. Kuhn repudiated this traditional view. He argued that scientists instead understand or interpret the world in accordance with or through a paradigm. The scientific community's paradigm shapes the questions that scientists find interesting and appropriate for research, and even more important, the paradigm shapes the scientists' perceptions of data. Kuhn, therefore, suggested that science might progress by becoming more complex and specialized as it moves from one paradigm to another, but contrary to the traditional view, science does not necessarily move closer and closer to some objective truth.⁹⁷

Kuhn's argument is subject to two strongly opposed readings. According to one interpretation of Kuhn, he is an antimodernist. His repudiation of the traditional view of science and his focus on scientific paradigms renders true science impossible. Science becomes, at most, a culturally relativistic practice, and at worst, a practice in which anything goes. According to a second interpretation, however, Kuhn is a metamodernist. He explains exactly how science is possible, even though we cannot meaningfully access any type of brute data. When a scientist participates in a communal paradigm, she is, in a sense, equipped with tools that enable her to practice science. She knows what questions are interesting, how to search for data, how to present findings, and so forth.

To me, the better interpretation of Kuhn is the second, or metamodernist, one. Moreover, the same metamodernist approach ought to be applied to law and jurisprudence. I would, in fact, disagree just as strongly with an antimodernist legal scholar as I would with a modernist scholar on most issues. The only problem—and it is an important one—is that I have a hard time identifying *any* antimodern legal scholar. As I already stated, perhaps some literary deconstructionists are antimodern, but who, among legal scholars, is a nihilist who believes that anything goes? Most of the

Adorno, and the Politics of Language, LINGUA FRANCA, Dec.-Jan. 2000, at 33. Perhaps, as a very rough approximation, it would be possible to fit antimodernists into the obscure camp and metamodernists into the clear camp.

97. See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

postmodern legal scholars that I have mentioned in this Essay are unequivocally metamodern rather than antimodern. Writers such as Mootz or Patterson dwell more on the constraints than the freedoms of legal interpretation. To be sure, if one pulls isolated phrases out of context, different writers might be cast in an antimodernist light. But if one fairly reads Mootz, Patterson, and others, they believe in truth, knowledge, merit, reason, and so forth.

Well, what about Stanley Fish? Isn't he an antimodernist? Maybe the early Fish, the literary critic who proclaimed himself to be a reader response theorist, might have been an antimodernist.⁹⁸ But the later Fish, who has written extensively on law and jurisprudence, consistently stresses the constraints imposed on readers. Those constraints arise because we belong to and participate in interpretive communities, which provide us with "a way of thinking, a form of life, [that] shares us, and implicates us in a world of already-in-place objects, purposes, goals, procedures, values, and so on . . ."⁹⁹ Reading is never a matter of anything goes, according to Fish. The "independent and freely interpreting reader"¹⁰⁰ is unimaginable because "already-in-place interpretive constructs are a condition of consciousness."¹⁰¹

How about Richard Delgado? After all, Arrow cites him for maintaining that "merit in legal scholarship was 'potentially hostile to the idea of voice.'"¹⁰² Delgado, here, definitely overstates his position so that his words, taken out of context, suggest an antimodernist stance: that we cannot legitimately compare the merits of various scholarly positions. Yet, if one examines the context of Delgado's statement, his meaning seems less extreme. His point is that the criteria used to judge merit are often culturally specific values that are mislabeled or disguised as objective universals.¹⁰³ Thus, according to Delgado, if we are to evaluate the merits of scholarship, we need to develop and apply relevant standards—and to do so cautiously. We need to ask: "Are the standards or criteria appropriate to this particular context?" Indeed, any reader who ex-

98. On reader response theory and Fish's transitions, see JONATHAN CULLER, ON DECONSTRUCTION 64-78 (1982).

99. STANLEY FISH, *Is There a Text in This Class?*, in IS THERE A TEXT IN THIS CLASS? 303, 303-04 (1980).

100. Stanley Fish, *Working on the Chain Gang: Interpretation in the Law and in Literary Criticism*, in THE POLITICS OF INTERPRETATION 271, 281-82 (W. Mitchell ed., 1983).

101. Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773, 1795 (1987).

102. Arrow, *Pomobabble*, *supra* note 2, at 472 (quoting Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 100 (1990)).

103. See Delgado, *supra* note 102, at 100-02.

amines the corpus of Delgado's writing could never reasonably conclude that he is a nihilist lacking convictions, believing that all positions are equally good (or bad). To the contrary, throughout his career, Delgado has taken strong and controversial scholarly positions and has explained them adroitly. His frequent law review exchanges with other writers demonstrate his belief that scholarly positions can be criticized and defended based on reasoned grounds.¹⁰⁴ To Delgado, then, we can discuss merit. We just need to realize that merit is not based on objective or universal criteria but rather "is a group-defined term."¹⁰⁵

Well, then, where are all the antimodernists? Hey, how about Dennis Arrow? More than any other legal scholar, he seems willing to adopt scholarly positions without giving or explaining his reasons. His *Pomobabble* article, more than any other piece, suggests that anything goes when it comes to law review publishing—or at least that anything can be accepted for publication, even at *Michigan Law Review*. More than anyone else, Arrow seems intent on forcing his cultural world view on others through mockery and bullying tactics rather than through persuasion. But ultimately, even Arrow cannot fairly be categorized as an antimodern legal scholar. He is not a nihilist. He certainly has particular values that he seeks to uphold in legal scholarship. After all, that is the point of his attack on postmodern writing, however ill conceived that attack might be.

Finally, regardless of modernist rantings and denunciations, postmodern legal scholarship will continue, whether it goes by the name of metamodernism, postmodernism, or something else. The reason, once again, is culture. Douglas Litowitz suggests that postmodern culture "is the result of two forces that have coalesced in the last twenty years: (i) the interconnection of diverse cultures via the media (e.g., television, video, and the Internet), and (ii) the move toward a fast, information-driven, global economy."¹⁰⁶ These forces, quite obviously, are beyond the ready control of law professors, whether they be modernists or postmodernists. The long and short of it, then, is that postmodern culture is not going away anytime soon. Postmodern culture, therefore, will continue to infuse legal scholarship, producing postmodern theory. So, to some degree,

104. See, e.g., Richard Delgado, *Mindset and Metaphor*, 103 HARV. L. REV. 1872 (1990) (responding to Randall Kennedy); Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665 (1993) (responding to Daniel Farber and Suzanna Sherry).

105. Delgado, *supra* note 102, at 102.

106. Litowitz, *supra* note 54, at 43.

the attacks of the modernist critics on postmodernism are beside the point. Postmodern or, more precisely, metamodern legal scholarship lives, even as horrified yet fascinated modernist scholars, like Arrow, declare its death.¹⁰⁷

107. Cf. David Gray Carlson, *Duellism in Modern American Jurisprudence*, 99 COLUM. L. REV. 1908, 1953-54 (1999) (reviewing PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* (1998) and PIERRE SCHLAG, *LAYING DOWN THE LAW: MYSTICISM, FETISHISM, AND THE AMERICAN LEGAL MIND* (1996)) (ruminating about the future of postmodern legal scholarship).