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CAN LAW BE A SOURCE OF INSIGHT FOR OTHER ACADEMIC DISCIPLINES?

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ABSTRACT

Law has been a borrower but not a supplier. Law schools, in effect, have been located on one-way streets, with ideas flowing in but nothing going out. This essay is intended to begin a dialogue that could change the one-way streets between law schools and other university departments into two-way streets. I want to demonstrate that legal and jurisprudential studies can be a source of ideas for scholars in other fields. In particular, this essay argues that the legal concept of the burden of proof can illuminate disputes between theorists of modernism and postmodernism.

INTRODUCTION

Law has been a borrower but not a supplier. Law schools, in effect, are on one-way streets with ideas flowing in but nothing going out. As early as the 1920s and 1930s, American legal realists drew extensively from the empirical social sciences for guidance in legal scholarship. Then, in the 1970s, law professors started to commonly cite and rely upon scholarship from fields as diverse as economics, continental philosophy, and literary criticism.¹ But even now, when interdisciplinary work is all the rage across

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1. See STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM 108–15, 128–33 (2000) (discussing American legal realism and the interdisciplinary movements in legal scholarship from the 1970s).

the academy, non-law professors do not turn to legal scholarship as a source of information or inspiration. Mark Tushnet describes this as the “intellectual marginality of legal scholarship.”² Law professors have consistently borrowed ideas from other academic disciplines, but professors from philosophy, history, sociology, and other fields have not adopted insights from legal scholars. Similarly, Jack Balkin argues, “Although law seems to be an especially susceptible discipline for invasion, it does not appear to be very good at exporting its own concerns into other fields.”³

The purpose of this Article is to begin a dialogue that could change the one-way streets between law schools and other university departments into two-way streets. The Article seeks to demonstrate that legal and jurisprudential studies can be a potent source of ideas for scholars in other fields. For example, legal scholarship could provide valuable insights for philosophy, political theory, and literary criticism professors who are interested in deconstruction, a complex and often misunderstood concept. The many law professors who have written about or used deconstruction over the past few decades might have worthwhile ideas that should be shared with non-law professors. Indeed, the doctrine of *stare decisis*, which is central to legal practice, can be understood as a form of institutionalized deconstruction.⁴

Stare decisis requires a court to consider and follow previously decided cases (or precedents) that sufficiently resemble the instant or current case. As it is sometimes phrased, courts should treat like cases alike. *Stare decisis* thus institutionalizes conformity with the past, the following of tradition or history, because the old (the earlier cases or precedents) is to determine the outcome of the new (the instant case). But this practice also forces lawyers and judges to question whether earlier cases or precedents sufficiently resemble the instant case so as to be deemed controlling. For instance, is a case that questions the constitutionality of a publicly displayed crèche, standing alone, meaningfully different from an earlier case that also involved a publicly displayed crèche, but with other Christmas decorations? The answer is not self-evident. Because of this problematic quality of *stare decisis*, lawyers, judges, and legal scholars

2. Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205, 1205 (1981).

3. J.M. Balkin, *Interdisciplinarity as Colonization*, 53 WASH. & LEE L. REV. 949, 964 (1996).

4. For a description of deconstruction, in relation to philosophical hermeneutics and communication theory, see Stephen M. Feldman, *The Problem of Critique: Triangulating Habermas, Derrida, and Gadamer Within Metamodernism*, 4 CONTEMP. POL. THEORY 296 (2005). I briefly explain deconstruction *infra*, p.156.

often question the relevance of potential precedents. What, precisely, were the facts in the precedents or earlier cases? What were the underlying assumptions of those cases? What were the precise legal rules articulated in the earlier cases? What were the intended implications of those earlier decisions? Could not the earlier cases be understood in more than one fashion? In short, the doctrine of *stare decisis* leads lawyers, judges, and legal scholars to question the meaning of the earlier cases—to question, in effect, the claims of tradition. In this sense, the practice of *stare decisis* can be understood as an institutionalized form of deconstruction. Therefore, the many law professors who have studied and written about *stare decisis* might be able to provide insights to all sorts of deconstructionists, regardless of academic discipline.⁵

This Article, though, focuses on a broader intellectual problem: the conflict between the incommensurable paradigms of modernism and postmodernism. Specifically, this Article elucidates the confrontation between modernists and postmodernists by drawing upon the legal concept of the burden of proof. This Article suggests, in other words, that the concept of the burden of proof, drawn from law and legal scholarship, can help scholars in other disciplines clarify the tensions between modernism and postmodernism. Modernism and postmodernism cannot be harmonized, reconciled, or reduced to one overarching paradigm.⁶ However, modernists and postmodernists often perform similar tasks and use similar language. For instance, just as modernists do, some postmodernists talk about truth, knowledge, and reason. Ultimately, though, modernists and postmodernists each seem to live in “a different world.”⁷ Postmodernism, according to Nancey Murphy, represents a “radical break from the thought patterns of Enlightened modernity.”⁸

Our current bearing along the “modern/postmodern” divide sparks strongly divergent reactions that depend largely on which side of the divide one stands.⁹ Avowed modernists such as John Searle and Jürgen Habermas tend to view the possible crossing into postmodern lands as a crisis or threat. Thomas L. Pangle’s views typify this modernist perception of postmodernism: “I mean to sound an alarm at what I see to be the civic

5. See EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1948); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

6. A paradigm is a worldview, a set of presupposed beliefs that pervasively shapes one’s perceptions of and orientation toward the world.

7. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 111 (2d ed. 1970).

8. NANCEY C. MURPHY, ANGLO-AMERICAN POSTMODERNITY 1 (1997).

9. RICHARD J. BERNSTEIN, THE NEW CONSTELLATION: THE ETHICAL-POLITICAL HORIZONS OF MODERNITY/POSTMODERNITY 201 (1991).

irresponsibility, the spiritual deadliness, and the philosophic dogmatism of this increasingly dominant trend of thinking.”¹⁰ Meanwhile, postmodernists such as Richard Rorty and Jean-François Lyotard view the crossing as an opportunity of exhilarating potential. Steven Best and Douglas Kellner declare that the “postmodern turn” has produced “new challenges, excitement, and possibilities to develop new modes of thought and action.”¹¹

Over the last twenty years or so, many thinkers on both sides of the divide have devoted enormous energy to showing that one position is preferred and, ultimately, correct. As Best and Kellner observe, “there is significant cultural capital at stake in the postmodern turn and thus also interests, reputations, and concrete material investments.”¹² Nonetheless, the difficulty, as this Article shall argue, is that the varied arguments for and against modernism and postmodernism have somewhat repetitive rhetorical forms. Namely, this Article shall identify three forms of contention that both modernists and postmodernists use in the clash between the two paradigms. The first two forms or types, *arguments of repudiation* and *arguments of advocacy*, are unsurprising, at least in their general form. The third type, *allocating the burden of proof*, is more obscure but most telling.

An understanding of the legal concept of the burden of proof can illuminate the incommensurable paradigms of modernism and postmodernism. Most simply, in a judicial dispute between two parties that ends in equipoise, the party who bears the burden of proof loses. Modernists and postmodernists both attempt to use a similar mechanism in their disputes. Modernists claim that postmodernists bear the burden of proof, while postmodernists place the burden on modernists. Thus, when all else seems to fail, the allocation of the burden of proof can seem determinative—modernists and postmodernists each claim supremacy over the opposing paradigm, since the other side supposedly bears the burden. Ultimately, though, the consistent and repetitive use of the three forms of contention—repudiation arguments, advocacy arguments, and especially burden-of-proof arguments—suggests that neither modernists nor postmodernists can possibly win the conflict of paradigms in a decisive fashion, in the sense of proving that one or the other is necessarily right.

10. THOMAS L. PANGLE, *THE ENNOBLING OF DEMOCRACY: THE CHALLENGE OF THE POSTMODERN ERA* 5 (1992).

11. STEVEN BEST & DOUGLAS KELLNER, *THE POSTMODERN TURN* 281 (1997).

12. *Id.* at 253.

Modernism, as used in this Article, entails a commitment to a subject-object metaphysics that traces back to Descartes: the subject or self is separate from an objective world. In epistemology, then, modernists are foundationalists: knowledge requires the subject to somehow access a firm foundation or Archimedean point, typically the objective world. Modernists also commonly subscribe to a correspondence theory of truth and a referential theory of language.¹³ For instance, Searle maintains 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 true or false depending on whether they accurately represent how things are.”¹⁴

In contrast to modernism, postmodernism rejects subject-object metaphysics, epistemological foundationalism, and referential theories of language. Postmodernists tend to emphasize the operation and orientation of power, particularly in language. Hans-Georg Gadamer, for example, writes that “[t]he speaking of a language is a totality, a structure within which we have our place—a place which we have not chosen.”¹⁵ Even though they share some basic viewpoints, not all postmodernists are alike (and neither are all modernists, for that matter). To avoid the confusion that often swirls around discussions of postmodernism or postmodernity, this article distinguishes between two types of postmodern thinking: antimodernism and metamodernism.¹⁶

Antimodernism refers to an extreme; it encompasses a belief in radical relativism. To the antimodernist, appeals to reason are no more than rhetorical moves that assert the dominance of one’s own cultural standpoint. There is no way to adjudicate among competing claims of truth and knowledge. When it comes to textual interpretation, anything goes. Antimodernism is encountered most often, perhaps, in the deconstructive writings of some literary theorists. For instance, Harold Bloom writes that “[e]ither one can believe in a magical theory of all language . . . or else one must yield to a thoroughgoing linguistic nihilism.”¹⁷

Metamodernism refers to a more moderate type of postmodernism.¹⁸ Metamodernists, such as Gadamer and Thomas Kuhn, explain how we use

13. MURPHY, *supra* note 8, at 2, 8, 18.

14. JOHN R. SEARLE, MIND, LANGUAGE AND SOCIETY 134 (1998).

15. Hans-Georg Gadamer, *The Beginning of Philosophy* 29 (Rod Coltman trans., 1998).

16. I introduced these terms in Stephen M. Feldman, *The Problem of Critique: Triangulating Habermas, Derrida, and Gadamer Within Metamodernism*, 4 CONTEMP. POL. THEORY 296 (2005).

17. Harold Bloom, *The Breaking of Form*, in *Deconstruction and Criticism* 1, 4 (1979).

18. Best and Kellner likewise distinguish between “extreme” and “reconstructive” postmodernists. Best & Kellner, *supra* note 11, at 257–58.

reason, have knowledge, and discuss truth without invoking the firm epistemological foundations or subject-object metaphysics of modernism. They emphasize that our being-in-the-world is hermeneutic: we are always and already interpreting. As such, our participation in communal traditions not only limits our perception and understanding but also enables such perception and understanding in the first place. Gadamer, in particular, emphasizes how our hermeneutic being-in-the-world empowers us. Tradition inculcates us with prejudices that open us to the possibility of understanding or interpretation. Without our prejudices, we would lack direction: “the historicity of our existence entails that prejudices, in the literal sense of the word, constitute the initial directedness of our whole ability to experience. Prejudices are biases of our openness to the world.”¹⁹

Many modernist commentators decry Jacques Derrida as the archetypal antimodernist, but he is better categorized as a metamodernist. Like Gadamer, Derrida explores the conditions of understanding. Indeed, Gadamer’s philosophical hermeneutics and Derrida’s deconstruction “should be understood as complementary postmodern philosophies, as mutually supportive descriptions of the hermeneutic situation.”²⁰ Derrida, though using different terminology, agrees with Gadamer that our being-in-the-world is hermeneutic and that both perception and understanding depend on our being situated in communal traditions. But whereas Gadamer emphasizes how the hermeneutic situation is empowering, Derrida instead stresses how it is disempowering. Derrida uncovers how textual understanding and interpretation always entail the denial of possible meanings and the suppression of alternative traditions. A dominant cultural tradition, which forcefully influences our perceptions and understanding, develops and maintains itself partly through duplicity and “irreducible violence.”²¹ Deconstruction aims, therefore, to reveal the marginalization of the downtrodden and forgotten—the Other.

Yet it is wrong to conclude that Derrida denies that we can understand the meaning of a text. On the contrary, Derrida maintains that any text or event has many potential meanings. To be sure, he is not concerned with deciding among these competing textual interpretations; rather, he is interested “in relations of force, in differences of force, in everything that allows, precisely, determinations [of meaning] in given situations to be

19. Hans-Georg Gadamer, *The Universality of the Hermeneutical Problem*, in CONTEMPORARY HERMENEUTICS 128, 133 (Josef Bleicher ed., 1980).

20. Stephen M. Feldman, *Made for Each Other: The Interdependence of Deconstruction and Philosophical Hermeneutics*, 26 PHIL. & SOC. CRITICISM 51, 52 (2000).

21. JACQUES DERRIDA, LIMITED INC 137, 150 (Samuel Weber trans., 1988).

stabilized.”²² Regardless, Derrida explicitly repudiates relativism as well as “complete freeplay or undecidability.”²³ He has “never accepted saying, or encouraging others to say, just anything at all.”²⁴ In short, despite how he is so often denigrated, Derrida is a metamodernist, not an antimodernist.

This Article is primarily focused on the relationship between modernism and metamodernism, rather than antimodernism. Nonetheless, since the article discusses a number of postmodern writers and modernists who attack postmodernism, none of whom use the term metamodernism, this Article will mostly use the term postmodernism to mean metamodernism.

Part I of this Article explains the three forms of contention that both modernists and postmodernists use in the conflicts between the paradigms of modernism and postmodernism. Part II analyzes the relationship between the competing but incommensurable paradigms, focusing in particular on the implications that flow from recognizing the three forms of contention. Part III concludes the article by explaining the potential of law as a source of ideas for other disciplines.

I. THE FORMS OF CONTENTION

One form of contention that both modernists and postmodernists use is the *argument of repudiation*, where a participant in one paradigm attempts to repudiate or controvert the other. Such arguments tend to be analytical and logical. John Ellis’s book, *Against Deconstruction*, is an exemplar of such an argument. It is one long series of repudiation arguments that attempt to show the imprecise reasoning in deconstructive writings, especially those of Derrida.

For example, Derrida argues that speech has been privileged, both traditionally and logically, over writing. Going back to Aristotle, Derrida shows that writing has been assumed to be derivative; it lives off of speech. Writing is the signifier that must represent a signified, which is the spoken word.²⁵ Speech is the privileged origin. Derrida then deconstructs this privileging by showing that speech also depends on writing; writing is, in some senses, the origin.

22. *Id.* at 148.

23. *Id.* at 115.

24. *Id.* at 145.

25. JACQUES DERRIDA, OF GRAMMATOLOGY 11–12, 30 (Gayatri Chakravorty Spivak trans., 1976).

Ellis, however, argues that Derrida's position is backwards, both historically and logically. As a historical matter, Ellis maintains that Western linguists have "always paid too much attention to the texts and manuscripts of written language," at the expense of the spoken word.²⁶ Ellis's logical critique stems from his (perhaps mistaken) reading of Derrida. According to Ellis, Derrida not only intended to demonstrate and to deconstruct the ordinary privileging of speech over writing but also aimed to reverse the privileging. "More important still," continues Ellis, "are the obvious logical problems involved in asserting that writing is prior to speech."²⁷ Human speech existed long before writing was invented, and some extant languages are spoken but not written, yet none are written but not spoken.

One common type of modernist repudiation argument revolves around a binary opposition. First, the modernist thinker identifies one or more "binary" oppositions—either/or types of arguments—which flow from subject-object metaphysics and thus typify modernist thought.²⁸ For instance, modernists often declare that *either* we have objective knowledge—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 automatons. Then the modernist thinker characterizes the postmodern position along the binary opposition. Finally, the postmodern position is rejected because it falls on the wrong side of the either/or.

Ronald Dworkin uses this type of repudiation argument in his attack on postmodernism. He insists that a true proposition must be *objectively* true, or it contains no truth at all. Thus, according to Dworkin, postmodernists must tacitly assume the objective truth of their own beliefs (particularly regarding the truth of the postmodern paradigm), or "they could only present their views as 'subjective' displays in which we need take nothing but a biographical interest."²⁹ 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

26. JOHN M. ELLIS, *AGAINST DECONSTRUCTION* 19 (1989).

27. *Id.* at 21.

28. CHRISTOPHER NORRIS, *WHAT'S WRONG WITH POSTMODERNISM* 74 (1990).

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

own commitment to modernist objectivity, to “have discovered out there . . . some external, objective, timeless, mind-independent world.”³⁰

John Searle presents an interesting twist on this type of repudiation critique of postmodernism. He builds on the standard modernist binary opposition between metaphysical realists and antirealists. Searle maintains that because postmodernists deny that truth and knowledge are grounded on an external reality, postmodernists must be antirealists or idealists, perhaps akin to George Berkeley. “[I]f there were external bodies,” Berkeley wrote, “it is impossible we should ever come to know it; and if there were not, we might have the very same reasons to think there were that we have now.”³¹ Searle then argues that postmodernists articulate such an antirealist position only because of “a kind of will to power.”³² That is, according to Searle, postmodernists reject the modernist metaphysics of an external realism (Searle’s preferred position) only so that they can believe themselves free from the constraints of reality and natural science. Of course, despite Searle’s argument, postmodernists never overtly claim to assert any kind of will to power, a distinctly modernist concept that emphasizes the Cartesian subject.

Postmodernists also use analytical and logical arguments of repudiation. The best deconstructive works, whether of Derrida or others, closely analyze modernist writings in order to disclose the previously obscure yet problematic assumptions underlying the texts. For instance, in jurisprudence, Pierre Schlag demonstrates how a whole host of modernist scholars assume that their readers are autonomous and independent selves who can readily choose to effectuate any desirable change in the law. Schlag explains:

Each and every social, legal, and political event is immediately represented as an event calling for a value-based choice. You are free to choose between this and that. But, of course, you are not free. You are not free because you are constantly required to reenact the motions of the prescribed, already organized configuration of the individual being as chooser. You have to, you already are constructed and channeled as a choosing being.³³

30. *Id.* at 87.

31. George Berkeley, *A Treatise Concerning the Principles of Human Knowledge*, in *THE ENGLISH PHILOSOPHERS FROM BACON TO MILL* 509, 529 (Edwin A. Burt ed., 1939).

32. Searle, *supra* note 14, at 19.

33. Pierre Schlag, *The Problem of the Subject*, 69 *TEX. L. REV.* 1627, 1700 (1991).

By problematizing such assumptions, deconstructive writers call into question the force or validity of the modernist texts.

Furthermore, just as modernists often criticize postmodern positions by forcing them into ill-fitting modernist categories, postmodernists repudiate modernist arguments by understanding them in postmodern terms. Christopher Norris, for one, adeptly criticizes modernists for their consistent misinterpretations of postmodern thinkers. Norris himself accepts postmodernism and thus understands other postmodernists, such as Derrida, from a postmodern vantage. Consequently, Norris readily criticizes modernists for failing to do the same. For instance, Norris argues that Habermas mistakenly reads Derrida from a modernist perspective:

[Habermas] has misread Derrida's work, and done so moreover in a way that fits in all too readily with commonplace ideas about deconstruction as a species of latter-day Nietzschean irrationalism, one that rejects the whole legacy of post-Kantian enlightened thought. In short, Habermas goes along with the widely-held view that deconstruction is a matter of collapsing all genre-distinctions.³⁴

Likewise, through a close reading of Derrida's texts, Norris demonstrates that John Ellis's attack on deconstruction is based on a gross misinterpretation of Derrida. Because Ellis fails to read Derrida through the prism of postmodernist categories, Ellis attacks a weakened straw-man version of deconstruction. According to Norris, Ellis's arguments thus appear bereft of analytical rigor.³⁵

The second form of contention between the paradigms of modernism and postmodernism is the *argument of advocacy*, where a thinker advocates for—or affirmatively encourages the acceptance of—a given paradigm. Such arguments tend to be of a coherence or narrative type; they attempt to show that a particular paradigm hangs together, coheres, or makes sense only as a whole. On the modernist side, Searle's book, *Mind, Language, and Society*, consists largely of an argument of advocacy. Searle attempts to show that his preferred form of modernist metaphysics, external realism, not only eliminates traditional mind-body problems but also persuasively explains consciousness, intentionality, language, and institutional reality. For Searle, then, the virtue of the modernist paradigm is that it not only seems to correspond with our experiences but that it also fits together in a neat and understandable totality. "I want to explain,"

34. Norris, *supra* note 28, at 49.

35. *Id.* at 137–51.

Searle writes, “how certain essential parts of mind, language, and social reality work and how they form a coherent whole.”³⁶

On the postmodern side, thinkers from numerous disciplines articulate a broad advocacy argument. Best and Kellner, Lyotard, Murphy, Steven Connor, Zygmunt Bauman, Fredric Jameson, and many others attempt to show that practices from a variety of fields, ranging from art to philosophy, from anthropology to sociology, even from theology to science, all share certain commonalities that suggest a break from modernism. These authors try to demonstrate that these various practices fit together into a coherent whole, which they call postmodernism. “[T]here are,” according to Murphy, “new ways of understanding knowledge, language, and reality itself that are in various senses holistic and that together constitute a radical enough break with modern atomistic modes of thought to deserve to be called postmodern.”³⁷ To be sure, the coherence of postmodernism itself is, from a postmodern perspective, somewhat paradoxical, as Connor emphasizes:

What is striking is precisely the degree of consensus in postmodernist discourse that there is no longer any possibility of consensus, the authoritative announcements of the disappearance of final authority and the promotion and recirculation of a total and comprehensive narrative of a cultural condition in which totality is no longer thinkable.³⁸

Despite its paradoxical quality, postmodernism is, in short, a worldview that hangs together; it makes sense as a totality.

Gadamer and Kuhn present a narrower type of postmodern advocacy argument through which they attempt to show how specific practices make sense in accordance with a postmodern (or interpretive) conception of the world. Gadamer described how his conception of philosophical hermeneutics illuminates our interpretation of texts. He explains how textual understanding is possible only because we are imbued with prejudices that are derived from communal traditions. In a similar vein, Kuhn explains how science is possible. Individuals learn to do science within a particular scientific community by becoming enmeshed in the structures or practices of that community’s defining paradigm. The paradigm not only shapes the questions that scientists find interesting and worthy of research but also molds the scientists’ perceptions of data itself.

36. Searle, *supra* note 14, at 8.

37. Murphy, *supra* note 8, at 19.

38. STEVEN CONNOR, *POSTMODERNIST CULTURE* 9 (2d ed. 1989).

The modernist depiction of scientists who access brute objective data does not literally make sense, according to Kuhn. An objective external world could not possibly ground science, because such a world would necessarily be meaningless. A paradigm is a prerequisite to meaning; learning and participating in a scientific paradigm engenders a meaningful world for a scientist.³⁹ “I am not suggesting,” Kuhn says, “that there is a reality which science fails to get at. My point is, rather, that no *sense* can be made of the notion of a reality as it has ordinarily functioned in the philosophy of science.”⁴⁰ From Kuhn’s standpoint, the idea of a paradigm makes scientific practice possible. Without paradigms, the world does not hold together in a meaningful fashion.⁴¹

The third form of contention between the paradigms of modernism and postmodernism is the *allocation of the burden of proof*. The burden of proof (sometimes called the burden of persuasion or the risk of nonpersuasion) is a legal term of art. In civil trials, the plaintiff and defendant each present evidence in an effort to prove facts that show that it is correct or deserves to win. One side must win and one side must lose, which remains true even when the evidence is in equipoise—that is, in the case where a preponderance of evidence does not suggest that either side is correct. The allocation of the burden of proof decides such a case. Quite simply, the party, either the plaintiff or the defendant, who bears the burden of proof loses in cases of equipoise. To be clear, the party who bears the burden of proof loses, not because of some compelling reason, but only because she did not carry the burden by persuading the trier of fact (a judge or jury) that she was correct.⁴² In the book, *Civil Procedure*, Fleming James and Geoffrey C. Hazard assert that a need to allocate the burden of proof “seems to be inseparable from any system wherein issues of fact are to be decided on any rational basis by human beings.”⁴³ The same is true in the confrontation between the modern and postmodern paradigms.

Modernists and postmodernists alike allocate the burden of proof to reinforce their own contentions. Modernists, of course, allocate the burden to the postmodernists while postmodernists allocate it to modernists. In a confrontation between incompatible and incommensurable paradigms, the

39. Kuhn, *supra* note 7, at 43–51.

40. PAUL K. FEYERABEND, *AGAINST METHOD* 272 (3d ed. 1993) (emphasis added).

41. For an interesting recent critique of Kuhn’s *Structure of Scientific Revolutions*, see STEVE FULLER, *THOMAS KUHN: A PHILOSOPHICAL HISTORY FOR OUR TIMES* (2000).

42. FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., *CIVIL PROCEDURE* §§ 7.5–7.9 (2d ed. 1977).

43. *Id.* § 7.6, at 242.

allocation of the burden of proof is of enormous significance. Both modernists and postmodernists present repudiation and advocacy arguments, but neither side has arguments that are so philosophically compelling that masses of their opponents will be persuaded to switch sides. Indeed, the arguments on both sides are so similar in form that hardly anyone is likely to be convinced to change positions. In such a stalemate, the allocation of the burden of proof to one's opponent can be an effective rhetorical move. Even if modernists do not have any overwhelming arguments of repudiation or advocacy, they will appear to win the confrontation if they place the burden of proof on the postmodernists—who also lack any overwhelming arguments. Likewise, postmodernists can appear to win if they allocate the burden of proof to the modernists.

In law, a variety of factors might justify allocating the burden of proof to either the plaintiff or the defendant. These factors—“reasons of convenience, fairness, and policy”⁴⁴—do not, however, transfer meaningfully into the philosophical battle between paradigms. In fact, modernists and postmodernists often allocate the burden of proof implicitly or tacitly. In these instances, they do not affirmatively present an argument for allocating the burden. Rather, they merely assume that the other side bears the burden, which is thoroughly predictable. If one is a modernist, then one sees and understands the world through the modernist paradigm. Postmodernism will look odd, confusing, irrational, and so forth. It would take a herculean argument to convince or force a modernist to switch sides. But no less could be said about a postmodernist.

However, some modernists and postmodernists do explicitly argue to allocate the burden of proof to the other side. On behalf of the modernists, Searle defends certain “default positions” or “taken-for-granted presuppositions” about the world.⁴⁵ These presuppositions form a “[b]ackground” for our thought and language.⁴⁶ In particular, according to Searle, modernist metaphysics provides the default position or presuppositions: a real world independent of us exists and is intelligible so that truth is based on correspondence to that world. To say that modernist metaphysics is the default position, as Searle does, is equivalent to saying that postmodernists bear the burden of proof. Unless postmodernists can convince us otherwise, Searle suggests, we should remain in our default position and accept our taken-for-granted modernist presuppositions. But

44. *Id.* § 7.9, at 256.

45. Searle, *supra* note 14, at 9–10.

46. *Id.* at 10.

why should we accept these presuppositions as the default? Searle answers with history: “It is unlikely that the default positions would have survived the rough and tumble of human history for centuries, and sometimes even millennia, if they were as false as [some] philosophers make them out to be.”⁴⁷ Searle acknowledges that “not all default positions are true,” but in general, “the default positions are more likely to be right than their alternatives.”⁴⁸

The difficulty for Searle and other modernists is that postmodernists can just as easily construct a historical argument going in the opposite direction. Rorty and Richard J. Bernstein articulate this type of contention. Modernists have had nearly four centuries, since the time of Descartes, to fulfill their self-imposed goal of establishing some firm foundation for knowledge and truth. Unfortunately, they have failed to do so. We are still waiting, Rorty and Bernstein argue, for a modernist to prove convincingly the independent existence of an intelligible external world. This historical argument, of course, does not disprove modernism; it is not an argument of repudiation. Rather, it is an argument for allocating the burden of proof. That is, Rorty and Bernstein suggest that modernists have had ample opportunity—nearly 400 years worth—to prove their position, yet they have failed to do so.⁴⁹ After such an extended period of failure, perhaps we should start assuming that the presuppositions of modernist metaphysics are wrong. We should, in other words, shift the burden of proof to the modernists, thus making postmodernism our default position.

II. MODERNISM AND POSTMODERNISM RELATED

The repetitive forms of contention shared by modernists and postmodernists suggest a basic, though important, point about the relationship between the two paradigms: modernists will be modernists, and postmodernists will be postmodernists. The discussion of repudiation arguments shows that each side interprets texts in accordance with its own presuppositions and categories. When the modernist, in effect, translates the postmodernist’s ideas into modernist terms, the ideas very well might seem weak and imprecise. They lose their bite, even their sense, in the translation from one paradigm to the other. Similarly, when a postmodernist reads modernist texts from a postmodern standpoint, the

47. *Id.* at 11.

48. *Id.*

49. RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979); RICHARD J. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM* (1983).

modernist texts will likely appear hopelessly obtuse and simplistic. Therefore, one may readily criticize the other for sloppy thinking.

When we turn to arguments of advocacy, the incommensurability of the two paradigms is similarly manifested. Each side advocates for its paradigm by attempting to show that various parts of its position make sense, cohere, or hang together. As Kuhn comments about scientific paradigms, “[e]ach group uses its own paradigm to argue in that paradigm’s defense.”⁵⁰ Such an argument for a particular paradigm, Kuhn adds, “cannot be made logically or even probabilistically compelling for those who refuse to step into the circle.”⁵¹ In short, modernists find modernist views appealing, while postmodernists find postmodernist arguments appealing.

This basic point regarding the incommensurability of modernism and postmodernism also surfaces when we examine arguments for allocating the burden of proof. Because the burden of proof is always allocated to one side, modernists and postmodernists never will starve to death like Buridian’s ass, who was paralyzed into indecision and, hence starvation, when faced with two equally appealing stacks of hay.⁵² Thinkers on both sides of the divide invariably will be able to decide between modernism and postmodernism, although only because of the burden of proof rather than for some compelling philosophical reason. Modernists and postmodernists can always decide between the paradigms, because they already are modernists or postmodernists when they start the argument. In a different sense, though, modernists and postmodernists do not truly *decide* at all. No active decision is necessary; they already stand on one side of the divide or the other. They just stay put.

Because the paradigms are incommensurable, even when modernists and postmodernists appear to discuss the same fundamental concepts, such as knowledge, truth, and reason, they give the concepts significantly different meanings and connotations. Thus, while participants in the competing but incommensurable paradigms might appear to talk to each other, often they just do not seem to connect. They fail to communicate well. Kuhn observes that scientists working in opposed paradigms “will inevitably talk through each other when debating the relative merits of their respective paradigms.”⁵³ Moreover, participants in incommensurable paradigms frequently do not even want to talk about the same issues; they

50. Kuhn, *supra* note 7, at 94.

51. *Id.*

52. THE OXFORD COMPANION TO PHILOSOPHY 63 (Ted Honderich ed., 2d ed. 2005).

53. Kuhn, *supra* note 7, at 109.

“disagree about what is a problem and what a solution.”⁵⁴ Modernist philosophers tend to dwell anxiously on the existence or non-existence of firm foundations. After all, from the modernist perspective, if we do not have firm foundations, we are doomed to relativism and nihilism. Postmodernists will discuss these issues, but they do not consider them to be particularly important. Postmodernists would generally prefer to move on to other issues, such as the orientation of power in society. For that reason, a postmodernist is more likely to write a history (or genealogy) that criticizes the development of certain social arrangements or institutions, such as the prison system, than to present an abstract, philosophical argument that explains how to ground a perfectly just society.⁵⁵

To be sure, then, modernists will be modernists, and postmodernists will be postmodernists. It is tempting to say that never the twain shall meet, but such a glib conclusion would be imprecise. Although the modernist and postmodernist paradigms are incommensurable, they do overlap to a degree. As already mentioned, at least at a superficial level, modernists and postmodernists, particularly metamodernists, often use similar terms, such as knowledge, truth, and reason. More importantly, the overlap extends beyond the mere homophonic sound of certain terms. For instance, repudiation arguments tend to be analytical or logical. Close analysis and logic are methods most often associated with modernist philosophy. Yet, as discussed, postmodernists also construct analytical and logical arguments of repudiation. Likewise, advocacy arguments tend to rely on coherence and narrative, methods most often associated with postmodernism. Yet modernists also rely on coherence and narrative advocacy arguments. In short, neither is above using the other’s favorite argumentative tools.

Once again, Searle’s *Mind, Language, and Society* provides a striking example. Searle aims to defend external realism, a type of modernist metaphysics: “I think that the universe exists quite independently of our minds and that . . . we can come to comprehend its nature.”⁵⁶ At one point, though, Searle acknowledges that external realism cannot “be justified on

54. *Id.*

55. Compare MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* (Alan Sheridan trans., 1977) with JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

56. Searle, *supra* note 14, at 4.

its own.”⁵⁷ Indeed, he does “not believe it makes any sense to ask for a justification” of external realism.⁵⁸ Searle elaborates:

External realism is not a claim about the existence of this or that object, but rather a presupposition of the way we understand such claims. . . . This does not mean that realism is an unprovable theory; rather, it means that realism is not a theory at all but the framework within which it is possible to have theories.⁵⁹

Although Searle certainly never admits as much, his characterization of external realism sounds remarkably like the description of a paradigm, a set of presupposed beliefs that pervasively shapes one’s perceptions of and orientation toward the world. According to Searle, but for external realism, discussions of the physical world would be “unintelligible.”⁶⁰ External realism is the prerequisite or “framework that is necessary for it to be even possible to hold opinions or theories about such things as planetary movements.”⁶¹ The problem for Searle is that, even though he is advocating for a modernist metaphysics, the *paradigm* is a prototypical postmodern concept that Searle himself criticizes.⁶² In other words, Searle presents an implicitly postmodern description of and argument for external realism as a paradigm.

Hence, even though modernism and postmodernism are incommensurable paradigms, they share the use of certain tools and perspectives. In fact, while modernists and postmodernists typically talk past each other, they still can carry on a conversation. Modernists and postmodernists share enough across the border of the modern/postmodern divide that they can and do communicate, albeit often poorly. Moreover, the modern/postmodern border is not completely closed. The border is permeable. For example, it is likely that many postmodernists began their careers on the modernist side and then switched, though probably at a relatively early age such as during their undergraduate years. Although movement between sides is possible, it is more likely that modernists will remain modernists, and postmodernists will remain postmodernists. Individuals on each side of the divide do try to convince the other to switch sides though. Most often, of course, they do so in a futile manner,

57. *Id.* at 31.

58. *Id.*

59. *Id.* at 32.

60. *Id.*

61. *Id.*

62. *Id.* at 3–4, 24, 33.

because modernists tend to use modernist arguments and postmodernists tend to use postmodern arguments. Thus, arguments to switch will seem most persuasive to those already on the same side as the proponent. Movement between sides may be possible, but, ultimately, it is unlikely and rare.

CONCLUSION

The discipline of law has long been a borrower but not a supplier of ideas. Law professors frequently adopt insights from their university colleagues in other departments, but those non-law school colleagues rarely borrow from legal scholarship. This article suggested how this process might become more reciprocal. Its primary purpose, in other words, has been to demonstrate the potential of law as a source of ideas for other disciplines.

Specifically, the article has argued that the burden of proof illuminates the confrontation between modernists and postmodernists. For both modernists and postmodernists alike, when their arguments of repudiation and advocacy fail to prove conclusively the superiority of their respective positions, they rely on the burden of proof to win the day. Because modernism and postmodernism are incommensurable paradigms, the confrontation between them is likely to end in a stalemate with the allocation of the burden of proof then appearing to be determinative. Since each side place the burden of proof on the other, the allocation of the burden of proof tends to do no more than reconfirm the correctness of one's own already-established position.

The burden of proof is just one among many legal concepts that can help elucidate solutions to problems within other disciplines. Especially in this time of avid cross-disciplinary pollination, law no longer should be ignored or marginalized on university campuses. There is more reason now, than ever before, for non-law professors to look to legal scholarship for potential ideas. As J.M. Balkin observes: "Law has become a sort of meeting ground for academic ideas and trends. And because it has become an interdisciplinary crossroads—affected and infected by so many different influences—law has become, as perhaps never before in American history, one of the most absorbing intellectual subjects."⁶³ For this reason, legal scholarship can become a centralized source of inspiration and insight for interdisciplinary scholars of any stripe. Non-law

63. Balkin, *supra* note 3, at 970.

professors should recognize legal scholars, or at least some of them, as interdisciplinary experts, well-versed in the problems that arise and the strategies that work when integrating a variety of disciplinary views.

