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Painting a Moving Train: Adding ‘Postmodern’ to the Taxonomy of the Law

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PAINTING A MOVING TRAIN: ADDING “POSTMODERN” TO THE TAXONOMY OF LAW

Adam G. Todd*

I. INTRODUCTION

In literature, the visual arts, architecture, and other disciplines, the word “postmodern” is applied as a label to certain products emerging from both the period and philosophical movements of the postmodern era. For example, in literary scholarship, there are references to “the postmodern novel”; in architecture, certain buildings are called “postmodern.” While such a designation in literature is rather commonplace, in law there appears to be no comparable use of the term postmodern as a label. Despite the growth of the “law and literature” movement, which examines the law as literature, laws are

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rarely identified as postmodern. 5 This article proposes that there are laws that fit the characteristics of postmodernism and can aptly be labeled postmodern. While the postmodern characteristics of these laws allow for a certain level of "regulation," the postmodern ontological uncertainty and indeterminate qualities of these laws make them inapposite. 6 Laws that carry such a label are ultimately undesirable in a legal system based on normative and positivist principles. 7 When the subject matter of the law is in a significant state of flux, however, a postmodern law can play a useful and transitory role in regulation. Once the subject becomes more stable, modern laws that are or at least aspire to be certain, clear, and normative can be implemented, supplanting the postmodern laws.

The term postmodernism elicits reactions ranging from adulation to anger from scholars and other members of the legal profession. 8 It is a rather cumbersome, abstruse, and affected term that has meant a broad range of things to many different people. 9 Postmodernism historically resisted and rejected the modernist act of creating a single definition. 10


6. See Bertens, supra note 1, at 64.

7. See, e.g., LOIS L. FULLER, THE MORALITY OF LAW 58 (rev. ed. 1977) (arguing that legal laws that create a high degree of uncertainty as applied to a specific situation should be declared void); John Gardner, The Legality of Law, 17 R. AND. JURIS 168, 160-81 (2004) ("Anyone who hasn't picked up that legal norms ought to be open, prospective, clear, etc. hasn't fully understood the genre."); See generally H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 591 (1958) (defining the positive principles against critics who claim that they do not resolve legal issues falling outside the settled meaning of the law), reprinted in ESSAYS IN JURISPRUDENCE AND PHILOSOPHY (1958).


modernism is particularly problematic in the legal context. Over the past decade, however, a general sense of agreement has developed about what is meant by the term postmodernism. This generalized consensus, particularly among legal scholars, now allows this term to function as a label in legal contexts, much like it is used in other disciplines.

The term applies to laws that have postmodern traits that make them uncertain, fragmented, and subject to multiple interpretations. The characterization of a certain law as postmodern has the paradoxical modernist effect of reducing—or “normalizing”—what is otherwise uncertain law. More practically, this labeling, which is a modernist act, creates a pragmatic, normative tool for bridging the postmodern and modern. A shared dialogue can emerge where the new form of postmodern law can be identified, appreciated, critiqued, and placed in a historical context. Further, the term postmodern can add to the taxonomy of law by helping practitioners and scholars categorize, define, and better understand the law.

The use of postmodern as a label also establishes that the concept of postmodernism is alive at a time when a surprising number of people call it dead or passé. The term postmodern and the theories associated with postmodernism are far too entrenched in the law’s lexicon and literature to appropriately call postmodernism “dead” in any way, and its continued power and ubiquity in writing, both in and outside of the legal environment, show that it cannot be deemed passé by any stretch of the imagination. Moreover, the descriptive power of the label postmodern and its apt characterization of certain laws demonstrate the continuing relevancy of the term and ideas connected to postmodernism.

11. See Emily L. Sherwin, Legal Taxonomy 16 (Cornell Law Sch., Research Paper No. 06-020, 2006), available at http://ssrn.com/abstract=925129. Sherwin discusses the importance of classifying laws in order to assist courts and to aid in the communication of legal ideas. Id. at 16-22. The inability to provide a single definition of postmodernism interferes with this concept. Id.


14. Id. at 1071 n.126.

15. Id. at 1064.

16. See Terry Eagleton, After Theory 24-25 (2004) (arguing that postmodern theory is no longer relevant); Katherine C. Sheehan, Caring for Deconstruction, 12 Yale J.L. & Feminism 85, 89 (2000) (citing Jeffrey T. Nealon, Double Reading: Postmodernism After Deconstruction 22 (1993)) (“It is not entirely clear why ... disapproving feminists bother to concern themselves with postmodernism or deconstruction at all, much less to attack them with the vehemence sometimes displayed. The fashion these days is to consider deconstruction, at least, a thing of the past ....”); Glen Scott Allen, Baptismal Eulogies: Reconstructing Deconstruction from the Ashes, Postmodern Culture, Jan. 1993, http://www.iath.virginia.edu/pmc/text-only/issue.193/review-7.193 (analyzing the demise of deconstructionism through analogy to a burial). See also Adam Todd, Neither Dead nor Dangerous: Postmodernism and the Teaching of Legal Writing, 58 Baylor L. Rev. 893, 944 (2006) (arguing that postmodernism has become commonplace in the legal academy and particularly in legal writing pedagogy).

17. Dibadj, supra note 10, at 379; Todd, supra note 16, at 895.

In this article, the label of postmodern is applied, as an example, to the United States–European Union Safe Harbor Agreement ("Safe Harbor Agreement") that relates to the European Union ("E.U.") Privacy Directive. By viewing the Safe Harbor Agreement as a postmodern law, the weaknesses of the law from a modernist perspective are highlighted, while from a postmodernist and pragmatic perspective, its strengths can be appreciated.

As a second example, this article applies the label to computer code that some scholars deem a form of law. Labeling the code postmodern highlights this "law's" ontological uncertainty and illusiveness under more traditional and modern definitions of law.

Postmodern laws are characterized by a paradox; the law is flexible and adaptable but simultaneously normative. This paradox makes a postmodern law valuable. In the postmodern era of technology and cyberspace, a postmodern law such as the Safe Harbor Agreement is likely to be a model for future legal regimes that can be flexible, dynamic, evolving, and multifaceted while still providing for the normative needs of regulation in the emerging global legal system. By being postmodern, a law is not nihilistic or illusive, but rather pragmatic. Postmodernism allows for there to be a law, and for this law to function in a system that, under the rigidity needed under modern formalism, would not be otherwise permitted. Identifying the label postmodern in this legal context and correctly applying it is useful as a conceptual tool and adds to the overall taxonomy of law.

Many scholars have lamented that judges for the most part do not read or heed what legal scholars write. Others claim that the legal profession does not


20. See infra Part V. See also LAWRENCE LESSIG, CODE: VERSION 2.0 at 5 (2006) (discussing how code "regulates cyberspace as it is").


22. See Safe Harbor Documents, supra note 19.


need "high-falutin" theory.\textsuperscript{25} To the contrary, postmodernism—at least as presented and used in this article—is of vital importance to judges and other practitioners of the law. While certainly those practicing law need clarity in rules, particularly when the state of an area of the law is in flux, the label of postmodern may be the exact guidance needed for the practicing attorney. In this context, postmodernism can be taken off the shelves of the pointy-headed professors and made part of the practicing bar.\textsuperscript{26}

II. THE EMERGING CONSENSUS OF THE DEFINITION OF POSTMODERNISM

Postmodernism is characterized by the idea that it is difficult, if not impossible, to come up with a clear definition for any term, including the term postmodernism.\textsuperscript{27} Even though ontological resistance makes postmodernism difficult to define, other than this one paradoxical characteristic, postmodernism is in fact a definable and substantive doctrine.\textsuperscript{28} Legal academics generally agree on how to define "postmodernism."\textsuperscript{29} Scholars now recognize that postmodernism is most often used in two ways, as a chronological period and as a philosophical attitude.\textsuperscript{30}

A. Chronological Definition of Postmodernism

The first definition is a description of the particular time period that followed the Modern Era.\textsuperscript{31} The Modern Era, which encompasses the Age of

\textsuperscript{25} FELDMAN, supra note 10, at 197.


\textsuperscript{27} This article, like most other articles addressing postmodernism, begins by defining the term. "Everyone begins the discussion of postmodernism by asking what the word could possibly mean." JOHN MCGOWAN, POSTMODERNISM AND ITS CRITICS, at ix (1991). Stephen Feldman specifically avoids defining postmodernism, stating: "A proffered definition for postmodernism would appear to reduce it to some fundamental core or essence, which would be too foundationalist, too essentialist—too modernist." See FELDMAN, supra note 10, at 38.

\textsuperscript{28} There is consistency in the definitions found in articles discussing postmodernism, particularly those written in the past few years. See FELDMAN, supra note 10, at 15-28; Dibadj, supra note 10, at 378; Stanford Encyclopedia of Philosophy, Postmodernism, http://plato.stanford.edu/entries/postmodernism/ (last visited Oct. 30, 2008).

\textsuperscript{29} FELDMAN, supra note 10, at 38.

\textsuperscript{30} See J.M. Balkin, What Is a Postmodern Constitutionalism?, 90 MICH. L. REV. 1966, 1967-69 (1992). See also James Boyle, Anachronism of the Moral Sentiments? Integrity, Postmodernism and Justice, 51 STAN. L. REV. 493, 497 (1999) ("[I]t seems useful to distinguish between postmodernism as a kind of arch cultural schtick and post-modernism as an earnest epistemology."); Michael Donaldson, Some Reservations about Law and Postmodernism, 40 AM. J. JURIS. 335, 336 (1995) (stating that postmodernism is best understood "as a description of a time period or age; ... as a methodology, a way of reading texts and interpreting history using a cluster of tools; ... and as something that looks very much like, and occasionally purports to be, a descriptive and analytical theory").

\textsuperscript{31} See Ihab Hassan, From Postmodernism to Postmodernity The Local/Global Context, 25 PHIL. & LITERATURE 1, 16 (2001) (pointing out that the term postmodern was used in a number of
Enlightenment, the Protestant Reformation, and the rise of industrialism (and the Industrial Age), is characterized as the period when people began relying less on tradition and religion and instead turned to science and rational secularism to order their lives. In the Modern Era, as people in Western Europe and other emerging areas adjusted to the rise of mercantilism, they moved away from agrarian life and experimented with inventive and non-traditional methods of expression.

Postmodernism followed the Modern Era. Unlike the Modern Era, when western societies adjusted to the use of machines in the home and workplaces, the postmodern period is characterized as the period when people are becoming accustomed with computers, easily accessible information, and high technology. People's disillusionment with the "promise" of modernism also marks this period. In the postmodern era, people look skeptically upon secularism and rationalism, and prefer to inform and structure their lives through religion and tradition. Consequently, products or laws coming out of this period might be considered or labeled postmodern. For example, laws such as the Religious Freedom Restoration Act, the Financial Services Modernization Act, and the Safe Harbor Agreement could be called "postmodern law" because they emerged during this particular era.
B. Philosophical Definition of Postmodernism

The second way "postmodernism" is defined—and is used in this article—is not in reference to an era, but rather as a referent to a philosophical movement or "attitude."42 That rejects or at least is deeply skeptical of the foundations of modernism.43 Postmodernism distrusts modernism's "attempts to create large scale, totalizing theories in order to explain social phenomena."44

Postmodernism posits itself in defiance of modernism. Modernism represents a time when reason and objective science supplanted tradition and authority.45 It is credited with the rise of mercantilism, industrialization, and the market system.46 Underlying these social movements was modernism's search for an "essential core or single truth."47 Modernism credits the autonomous and rational individual as responsible for finding the ultimate truth for all matters and creating meaning and order from the world.48 Postmodernism questions these modernist pursuits.

According to postmodernists, modernism is reductive, "centralized and monolithic in its mindset."49 Modernists espouse a "single master or meta

42. MINDA, supra note 4, at 224.
43. See Todd, supra note 16, at 898 n.29 ("Since postmodernism is essentially defined by its rejection of modernism, any discussion needs to begin with a clear understanding of the definition of modernism. Adding to the confusion is the fact that the term 'modernism' is also difficult to define."); see also Steven L. Winter, Comment, For What It's Worth, 26 LAW & SOCIETY REV. 789, 793 (1992) ("[W]hat postmodernism has to say on contemporary politics is that the subject—which is to say, the forces that shape us and constitute us as subjects—is the issue.").
44. MINDA, supra note 4, at 224 (quoting COSTAS DOUZINAS ET AL., POSTMODERN JURISPRUDENCE: THE LAW OF TEXT IN THE TEXTS OF LAW, at x (1991)).
45. See Todd, supra note 16, at 898-99. See also The Electronic Labyrinth, Defining Postmodernism, supra note 32 ("Modernism is here understood in art and architecture as the project of rejecting tradition in favour of going 'where no man has gone before' or better: to create forms for no other purpose than novelty.").
47. Todd, supra note 16, at 899. See also JEAN-FRANCOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE 78-79 (Geoff Bennington & Brian Massumi trans., 1984) (1979) (discussing how modern artists attempt "to present the fact that the unrepresentable exists"); Feldman, supra note 5, at 1048 (noting that modernists "attempt to reduce the meanings of texts to an essential core or single truth").
48. See FELDMAN, supra note 10, at 15-28; The Electronic Labyrinth, Defining Postmodernism, supra note 32.
49. Todd, supra note 16, at 899. See also Peter A. Alces & Cynthia V. Ward, Defending Truth, 78 TEX. L. REV. 493, 521-22 (1999) (reviewing DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW (1997)) (stating that postmodernists "deny the existence of a universal human nature consisting of shared characteristics (such as the capacity for rational deliberation) around which a progressive society can be organized; they also deny the existence of universally valid truths about the proper structure of law
"narratives of truth," and that truth is uncovered through "progress or development within a linear conception of history."

Postmodernism implies that modernism lacks the tools or ability to "grasp the world 'as it really is.'" Postmodernists deem modernism reductive and too limited in its approach to a world that is messy, fragmented, contradictory, and changing.

In resisting and challenging modernism, postmodernists reject a single definition of truth. The skepticism toward singular meaning applies to the definition of postmodernism as well. Those studying postmodernism identify this embedded paradox as emblematic of postmodernism. Postmodernism resists the possibility of its own definition while simultaneously incorporating this resistance into its own definition. This type of paradox characterizes and is celebrated by postmodernism, and distinguishes it from modernism.

This second definition of postmodernism as a philosophy or an attitude is connected to the first chronologically based definition, but the second captures the more radical and complex components of postmodernism. The second definition is consistent with the way most scholars recognize and define postmodernism.

Postmodernism in this more philosophical sense helps us understand the new patterns of social structures that are emanating in an era of high technology. It allows for a refined appreciation of the law and jurisprudential theory that are in a state of change.

and politics'); Postmodernism, http://www.jahsonic.com/PostModernism.html (last visited Oct. 30, 2008) (stating that "there is no truth, there are only versions of it").


52. MINDA, supra note 4, at 238.

53. Dibadj, supra note 10, at 378.

54. See Feldman, supra note 5, at 1048. See also TERRY EAGLETON, THE ILLUSIONS OF POSTMODERNISM, at vii (1996) ("Postmodernity is a style of thought which is suspicious of classical notions of truth, reason, identity and objectivity, of the idea of universal progress or emancipation, of single frameworks, grand narratives or ultimate grounds of explanation."); PAULINE MARIE ROSENAU, POST-MODERNISM AND THE SOCIAL SCIENCES 13 (1992) ("[P]ost-modernists share a skepticism about the possibility of truth, reason, and moral universals ....").

55. See Todd, supra note 16, at 899 (citing FELDMAN, supra note 10, at 38 (specifically avoiding defining postmodernism); Jennifer Wicke, Postmodern Identity and the Legal Subject, 62 U. COLO. L. REV. 455, 456 (1991) (discussing the difficulty of defining postmodernism)).

56. See Wicke, supra note 55, at 456; FELDMAN, supra note 10, at 38.

57. See Feldman, supra note 5, at 1048 ("[P]ostmodernism denies the possibility of its own definition.").

58. See id.

59. FELDMAN, supra note 10, at 8-9.

60. Id.

61. See Todd, supra note 16, at 901 (citing Balkin, supra note 30, at 1968 ("Postmodernism is a cultural phenomenon that has already happened and that we are only becoming aware of now."); Donaldson, supra note 30, at 344; Feldman, supra note 8, at 2370 ("Postmodern culture, in other
1. Postmodernism’s Philosophical Impact

Postmodernism as a philosophical movement has profoundly affected academic disciplines ranging from architecture to theology. In addition, postmodernism and the theories evolving from this "attitude" have significantly affected the way members of the legal profession look at the law and legal texts. Unfortunately, postmodernism, particularly in legal circles, has also been denigrated, mocked, and deemed irrelevant at the very time it has become a standard part of the academy.

Despite the derision directed at postmodernism and its resistance to definition, the act of describing postmodernism as a label with a single definition can bridge the divide between postmodern theory and the normative needs of the legal profession. Such a bridge is particularly useful in the postmodern age, when rapidly changing technologies and social change exceed the normative limitations of the law, necessitating a more fluid and flexible paradigm.

Some scholars who attack postmodernism blame postmodernism for the decline in modernist and normative viewpoints of the law in the contemporary legal academy. To the contrary, Gary Minda aptly points out that postmodern-
ism is not responsible; instead, "[p]ostmodernists merely point out that a crisis and fragmentation exist. Postmodernism ... invites us to see the fluidity of law; it is not a theory, but a practice which defines itself in relation to modernist aspirations and practices."71

2. Pragmatic Versus Nihilistic Postmodernism

Scholars divide postmodernism into two camps.72 Gary Minda labeled these camps as the ironists and the pragmatics.73 Stephen Feldman characterized them as the antimodernists74 and the metamodernists.75 The ironists, or antimodernists, completely reject the modernist idea that law might be made coherent by a single, comprehensive legal theory.76 The chief problem with the positions of the ironists is that their form of nihilism renders the beneficial normative functions that are essential to a meaningful legal system as futile, and hence legal scholarship and the legal system itself becomes meaningless.77 Such a position is nothing more than "a recipe for inaction."78

In contrast, the pragmatics, or metamodernists, use the tools of postmodernism in moderation to advance their scholarship.79 In this more moderate form, postmodernism can be a liberating construction that allows for dialogue and action between the rigidity and reductiveness of modernism and the fluidity and instability of postmodernism.80 Postmodernism does not demand nihilism, nor does it require a rejection of the ethical and moral foundations of modernism.81 Instead, postmodernism opens possibilities impermissible under modernism. It provides flexibility and removes the modernist condition of privileging one position over another.

71. MINDA, supra note 4, at 261 n.12.
72. See id. at 229-32.
73. See id. One might also be able to characterize them as the nihilists and the practicalists.
75. See Todd, supra note 16, at 907 & n.81.
76. See MINDA, supra note 4, at 77.
77. See 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.J. 155, 159 (1997) ("[I]f carried to an extreme, postmodern principles threaten to undermine the Western legal system in such a way that return will become unattainable."); Todd, supra note 16, at 907 n.79 (citing Donaldson, supra note 30, at 344-45) ("What postmodernism does is deprive us of the ability to determine what right and wrong are, and once this is done, law is without meaning or purpose.").
78. MINDA, supra note 4, at 244 (citing Joel F. Handler, Postmodernism, Protest, and the New Social Movement, 26 LAW & SOC'Y REV. 697 (1992)).
79. See Todd, supra note 16, at 907.
80. Id.
81. See id.
This article defines postmodernism in the spirit of the pragmatists. A pragmatic definition of postmodernism is preferable to an ironic definition for two reasons. First, a pragmatic approach to postmodernism is consistent with postmodernism's embrace of a multiplicity of viewpoints. The ironist's fierce insistence on a complete rejection of modernism creates a dichotomy between the values of modernism and the skepticism of postmodernism, disallowing the two to exist simultaneously. To be truly postmodern is to question the central premise of postmodernism itself. Postmodernism should allow for the "promise of modernism" while simultaneously questioning modernism. The ironist does not allow for such a multiplicity, and instead requires a dichotomous choice of either being modernist or postmodernist, but not both.

The ironists who espouse a total rejection of modernism are themselves paradoxically engaging in modernist dualism. A complete rejection of modernism is antithetical to the postmodernist license for multiplicity. Modernism is not supplanted by postmodernism, but is instead supplemented by it. Postmodernism is flexible enough to incorporate the values of modern and traditional norms, particularly as needed by the law. At the same time, postmodernism can acknowledge the uncertainty, fluidity, and illusiveness of regulatory norms found in the high technology age. Being committed to the "Enlightenment" idea of progress and seeking normative law is not inconsistent with postmodernism, but is subsumed within the polymorphism of postmodernism.

The second reason in favor of a pragmatic approach to postmodernism is that the pragmatic approach is useful to the legal profession while the ironic approach is not. Postmodern jurisprudence recognizes that the postmodern antiessentialist, deconstructive activity must stop in order "to talk, to communicate, to write, etc." Neopragmatists, like Richard Rorty and Richard A. Posner,
reject modernism's foundational claims for the law, but recognize the normative needs of society and the value of using the law to resolve problems. Postmodernism, when used pragmatically, provides tools for dealing with the problems arising in the postmodern era. Posner argues that the true test of any legal analytic is whether it "works" instrumentally in maximizing human goals and aspirations. Postmodernist laws or labeling laws postmodern can "get the job done" better than any other method for uncertain areas of the law. When subjects of the law are in flux and difficult to regulate through regular normative means, postmodernism can be a useful tool for creating regulation where none would be possible otherwise. Thus, postmodern awareness can act as a tool to achieve normative human purposes.

Some claim that this neopragmatic postmodernism (or neopragmatism) is not truly postmodernism but only "a close cousin." Some scholars argue that neopragmatism is not postmodernism because neopragmatists work to "reveal[] instrumental, empirical, and epidemiological solutions for the problem at hand." Neopragmatist scholar Pierre Schlag argues that the instrumentalism of such a neopragmatic argument is merely a modernist attempt to discover a foundation for legal analysis. But, as mentioned earlier, such antimodernist arguments fall into a modernist trap that denies postmodernism's utility in a legal context and is ultimately not useful in jurisprudence. Postmodernism should not be seen as a total rejection of all of modernism but rather skepticism, or

94. Rorty relies on "the ideas of Wittgenstein, Dewey, and Heidegger," and argues that investigations of law, like investigations of knowledge or morality, are reflections of our beliefs and social practices. See MINDA, supra note 4, at 229 (citing JOHN MCGOWAN, POSTMODERNISM AND ITS CRITICS 192 (1991); Schanck, supra note 10, at 2515). Rorty argues that law and interpretation of law is grounded in the social and historical and thus any search for truth and knowledge are culturally conditioned. See id. See generally RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1980).


96. MINDA, supra note 4, at 234 (citing RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 454-69 (1990)).

97. POSNER, supra note 96, at 460.

98. Id. at 465-66.

99. Another neopragmatist, Richard Posner, makes a similar point when emphasizing the search for normative "truth" requires "the continual testing and retesting of accepted 'truths,' the constant kicking over of sacred cows—in short, a commitment to robust and freewheeling inquiry with no intellectual quarter asked or given." Id. at 466.

100. MINDA, supra note 4, at 229.

101. Id. (citing Margaret J. Radin & Frank Michelman, Pragmatism and Poststructuralist Critical Legal Practice, 139 U. Pa. L. Rev. 1019, 1031-32 (1991)). See also id. at 236 (citing Pierre Schlag, The Problem of the Subject, 69 Tex. L. Rev. 1627, 1721 (1991)) ("[I]t is possible to reach principled decisions even though there are no right answers.").

102. Id. at 236 (citing Schlag, supra note 101, at 1721).

103. Stephen Feldman called this type of argument "postmodern policing" where one postmodernist criticizes another postmodernist for, in effect, not being postmodern enough. FELDMAN, supra note 10, at 163.
questioning, of modernism. Rejection implies a dichotomy that is inconsistent with postmodernism.\footnote{104}

Using the label of postmodern advances the normative purpose of revealing solutions to problems of the postmodern era when modernism often appears to be failing.\footnote{105} Postmodernists recognize that language is socially and culturally constructed and therefore inept at allowing for truly objective decisions based solely on reason.\footnote{106} Objectivity is instead achieved through “agreement or consensus about different interpretive practices.”\footnote{107} When there is consensus, modern law is appropriate.\footnote{108} When a consensus is otherwise impossible, postmodernism and the label postmodern may be useful to provide one.\footnote{109}

Stephen Feldman makes this same point when he uses the term “postmodern normativeness,” which he states, “does not lead necessarily to modernist-style recommendations for doctrinal or statutory change but nonetheless accentuates the potential for self-reflexive participation in the constant construction and reconstruction of our contingent and therefore transformable culture.”\footnote{110} But, in particular circumstances, “postmodern normativeness” can proscribe doctrinal or statutory change.\footnote{111} When the subject matter of the law itself is in flux, postmodernism provides a different form of normative doctrinal or statutory regime.\footnote{112}

Some may argue that the pragmatic postmodernism identified by Minda and espoused by this article is no different from legal realism.\footnote{113} Indeed, postmodernism came out of the legal realist movement and a number of legal realists are also postmodernists.\footnote{114} The crucial distinction between legal realism and postmodernism is that, as a general proposition, legal realism adheres to central modernist aspirations of seeking singular truths or narratives for the law.\footnote{115} Conversely, postmodernism is continually skeptical of such an enterprise. Legal realists recognize indeterminacy in the law,\footnote{116} but rather than celebrate and
embrace such indeterminacy, realists lament and seek to create a determinacy or certainty through alternative theories or explanations.\textsuperscript{117} For example, using the realist tradition, law and economics theorists claim that economic theory can best explain or provide consistency to the law that may be indeterminate under traditional formalism.\textsuperscript{118} This article, building on the realist tradition but consistent with postmodernism, embraces and celebrates the indeterminacy of a postmodern law and the benefits that can be reaped from recognizing postmodernism in certain contexts.

III. THE PROMISE AND PARADOX OF USING POSTMODERN AS A LABEL

A. Why a Postmodern Label Works

The act of creating a label—like the act of defining a word as scholars writing about postmodernism are quick to point out—is anti-postmodern.\textsuperscript{119} The very idea of a label is reductionist, unitary, and squarely modern.\textsuperscript{120} Because there is now consensus about the definition of postmodernism, an identification of its characteristics, and an appreciation of its value, products that possess its characteristics can be labeled postmodern.\textsuperscript{121} To be classified as postmodern, these products need not stem from the postmodern era, but instead must have “certain characteristics that connect them to the underlying philosophy of postmodernism.”\textsuperscript{122} Those who argue that the act of labeling is too modernist fall into the same modernist traps as those who claim postmodernism cannot be defined.\textsuperscript{123}

\textsuperscript{117} Suzanna Sherry, Democracy and the Death of Knowledge, 75 U. Cin. L. Rev. 1053, 1062 (2007).
\textsuperscript{119} See Todd, supra note 16, at 902 (citing Feldman, supra note 5, at 1046-48). See also After Postmodernism, http://www.focusing.org/apm.htm (last visited Oct. 30, 2008) (“What postmodernism teaches is not new. Heraclitus said, ‘You cannot step into the same river twice’ and his student added, ‘not even once, since there is no same river.’ The ancient Enstics showed the unreliability of logic alone.”).
\textsuperscript{121} See Balkin, supra note 30, at 1969.
\textsuperscript{122} Todd, supra note 16, at 900. See also id. at 900 n.41 (“Other disciplines have used the term ‘postmodern’ to label a movement or style within their discipline.”) (citations omitted).
\textsuperscript{123} See supra text accompanying notes 54-62.
Arguing that labeling in the context of taxonomy is inconsistent with postmodernism is a position, in itself, reductive, unitary, and modernist in its duality. This form of "postmodern policing" creates a dichotomy between modernism and postmodernism that is inconsistent with postmodern thought. Denying postmodernism from incorporating modernist tropes such as labeling is asserting that an act is either postmodern or modern, and cannot be both.

In this instance, the act of labeling something postmodern can be both modern and postmodern at the same time. Allowing modernism and postmodernism to "coexist" is a pragmatic approach to postmodernism that prevents postmodernism from being nihilistic and useless in a legal context. Through the use of labeling, postmodernism can be a constructive tool for appreciating and critiquing laws that come out of, and contain, postmodern characteristics. Identifying a law that possesses these postmodern traits serves to highlight the strengths and weaknesses of the labeled law. The law's fragmentation, inconsistency, and flux are identifiable traits that demonstrate the law's boundaries and limitations, particularly in contrast to modernist laws and rules. As such, the act of labeling is a positivist exercise.

The label can act as a taxonomy based on positivist principles that guide future practitioners and scholars to understand and improve the law and can create a common language for scholars and practitioners. Additionally, labeling laws postmodern is particularly useful in areas of the law subject to frequent change. Likewise, comparative law, which deals with harmonizing laws from different legal systems, is benefited by postmodern laws.

1. Taxonomy and Creating a Common Language

As a taxonomical exercise, labeling a law provides guidance for predicting the outcomes of adjudication and contributes to knowledge of and discourse about the law. Classification is supposed to "contribute to [the] consistency of judicial decisions, ensure that like cases are treated alike, add to the stability of law, and impose constraint on judges." Taxonomy assists judges and practitioners about the boundaries of a given law, quietly guiding but not...
directing the law.134 While “[t]axonomy is not an end in itself,” labeling enriches our understanding of law and legal regime.135 Further, taxonomy allows those in the legal profession to share a common language, communicate with each other more efficiently, and create jargon.136 As stated by one English scholar, “Better understanding of law depends upon a sound taxonomy of the law.”137 The addition of postmodern to the taxonomy of the law creates a shared language to promote communication and legal analysis in an age of high technology and globalism.

Other critics of labeling laws as postmodern often derisively refer to the term as “jargon.”139 Recently, however, scholars have recognized the usefulness of jargon. For example, Gary Minda discusses how in Law Turning Outward, Martha Minow stated that “new interdisciplinary movements in law make it increasingly difficult for members of the profession to speak together or to speak to members of other disciplines.... Minow called for a new ‘comprehensible discourse’ that would allow legal academics to engage in a public debate about their differences in methodology and outlook.”140 Similarly, Terrill Pollman argues that jargon is healthy and necessary for the development of professional discourse.141

The label postmodern can likewise serve as a unifying device, part of a “comprehensible discourse”142 that allows members of the legal profession, both in and outside the academy, to speak to each other and to people in other professions (particularly those who also are using the concepts of post-
modernism). This label can allow for cross talk between jurisprudential thinkers and different academic disciplines.  

2. Usefulness in Particular Areas of the Law

Postmodernism’s “license for flexibility and multiplicity” is particularly important in a discipline that is often rigid and inflexible. Postmodernism allows “multiple positions and interpretations to exist simultaneously.” It also “removes the necessity of privileging one position over another.” Identifying and labeling this process in the law returns a certain form of normalization and “certainty,” at least certainty about uncertainty, into the law. The label is particularly useful in areas of the law that are connected to advanced technologies where there are “unknown unknowns,” where legal rights are vague, and where our understanding of the implications of law and regulation are in flux.

Further, the postmodern label can be particularly useful in the taxonomy of comparative law. Identifying laws as postmodern is an important tool for the comparative lawyer because postmodern theory recognizes the cultural distinctiveness or relativity of any particular law. Comparative law scholars argue that comparative law requires an internal and situational understanding of a legal system. Taken to its extreme, such an argument suggests that comparative law is futile because a particular law of one country can never be properly

143. See Minow, supra note 140, at 95.
144. See MINDA, supra note 4, at 252 (noting there is too little cross-talk between the new movements and the more traditional jurisprudential thinkers).
146. Id.
147. Id.
148. Id. at 946.
150. It is in this way that postmodernism most directly conflicts with legal realism. Legal realism—while recognizing the indeterminacy, change and flux of the law—laments such a state in the law and seeks determinacy through alternative explanations of the law. See MINDA, supra note 4, at 27. Postmodernism, in contrast, embraces or even celebrates such indeterminacy. See id. at 225.
understood by those outside of its system.\textsuperscript{154} “It highlights ... one of the important insights of the post-modern critique: the cultural distinctiveness and internal coherence of any system of legal rules, modes of reasoning, institutions, and social practices.”\textsuperscript{155}

From this postmodern view, some comparative law scholars have despaired the impossibility of transplanting and harmonizing laws between legal systems.\textsuperscript{156} They attribute this possibility to barriers caused by the cultural uniqueness and the social and historical context of a nation’s law.\textsuperscript{157} Other, more pragmatic comparativists emphasize that a “comparative lawyer who is aware of the cultural, social, economic and ideological ties of the law knows sufficient [sic] to be able to practice comparative law responsibly.”\textsuperscript{158}

A postmodern law may offer a tool to provide harmonization or transplantation in a comparative context, which would not otherwise exist under modernist paradigms. A law that possesses postmodern attributes would allow for the adoption of a foreign legal regime or law that would not otherwise be recognized from a modernist perspective. Postmodernism permits for its reception because the received law might serve a very different purpose and be perceived in a very different context by the receiving legal system. A postmodern law, in such contexts, aids in the harmonization process. Indeed, some continental scholars look to postmodernism as a source for creating a unified E.U. Constitution.\textsuperscript{159} By being a postmodern law, such an E.U. Constitution could exist as a legal regime and could simultaneously be interpreted and perceived in different ways by the constituent countries.\textsuperscript{160}

\textsuperscript{154} See Ainsworth, supra note 153, at 19-20.
\textsuperscript{155} Francesca Bignami, European Versus American Liberty: A Comparative Privacy Analysis of Antiterrorism Datamining, 48 B.C. L. REV. 609, 691 (2007).
\textsuperscript{156} ESIN ÖROÇO, THE ENIGMA OF COMPARATIVE LAW: VARIATIONS ON A THEME FOR THE TWENTY-FIRST CENTURY 37-38 (2004). See also Bignami, supra note 155, at 691 (“Even if foreign law appears to work better, it will never have the same effect in the different social and cultural terrain of home.”) (citing Pierre Legrand, The Impossibility of ‘Legal Transplants,’ 4 MAASTRICHT J. EUR. & COMP. L. 111, 117 (1997)).
\textsuperscript{157} ÖROÇO, supra note 156. See also Bignami, supra note 155, at 691 (citing Legrand, supra note 156).
\textsuperscript{158} van Erp, supra note 151, § 4.3. van Erp further notes:

The extent of the awareness that can be expected of comparative lawyers and that must be reflected in their research depends among other things on whether the legal systems that are to be compared are closely related to one another or, on the contrary, belong to markedly different cultures. In the latter case comparative lawyers should have a deeper awareness of cultural differences than in the former case.

\textit{Id.} See also Vivian Grosswald Curran, Re-Membering Law in the Internationalizing World, 34 HOFSTRA L. REV. 93, 93 (2005) (addressing how differences between common and civil law “produce different understandings of legal standards allegedly shared across legal cultures”).
\textsuperscript{159} See, e.g., Glendening, supra note 69, at 10.
B. Potential Problems with Labeling Laws Postmodern

Despite its potential for more modernist and positivist law, the postmodern label should provoke unease. It seems counterintuitive that the label of postmodern can in fact serve a guiding and positivist function since postmodernism is supposed to defy boundaries and eschew constraints. Indeed, the label of postmodern creates problems for taxonomy. Postmodernism is a convergence of disparate components and a rejection of the dichotomous categorizations found in modernist approaches to thinking of law. The postmodern label also complicates categories such as those proposed by scholar Ugo Mattei. He proposes a taxonomy dividing laws into three categories: (1) professional laws, (2) political laws, and (3) traditional laws. A “postmodern law” would complicate or work against such categorization because it could manifest characteristics of all three categories. The label of postmodern, however, is not designed to supplant other schemes of taxonomy, but instead (and consistently with postmodern philosophy) to supplement these schemes with additional ways of examining and explaining the law.

Another challenge of the label is that the idea of a postmodern law is inconsistent with modern conceptions of “law.” In The Morality of Law, Lon Fuller argues that law is subject to an internal morality consisting of eight principles: (1) there must be extant rules promulgated; (2) the rules must be made public; (3) the rules must be prospective in effect; (4) the rules must be understandable; (5) the rules must be consistent; (6) the rules must not regulate conduct beyond the powers of the affected parties; (7) the rules must not be

because it obscures who is responsible for what.”). See also Ulrike Guérot, Europe Could Become the First “Post-Modern” Superpower, EUROPEAN AFFAIRS, Fall 2004, http://europeanaffairs.org/current_issue/2004_fall/2004_fall_36.php4 (“The Union’s amorphous nature is not only one of its essential features, but also a useful survival strategy. The moment you try to define its characteristics and its final aims, you place it in jeopardy, because there is no agreement among Europe’s governments and citizens on what its future, or even its present, shape should be.”); Ugo Mattei & Anna di Robilant, The Art and Science of Critical Scholarship: Postmodernism and International Style in the Legal Architecture of Europe, 75 Tul. L. Rev. 1053, 1057 (2001) (“Postmodernism is a trendy term in legal literature. The metaphor of Europe as an entity to be built, and of legal scholarship as a ‘building’ or a ‘city planning’ exercise, evokes an analogy between the work of a legal scholar and that of an architect.”); Andrew Moravcsik, Despotism In Brussels? Misreading the European Union, FOREIGN AFFAIRS, May/June 2001, http://www.foreignaffairs.org/20010501fareviewessay4772/andrew-moravcsik/despotism-in-brussels-misreading-the-european-union.html (noting that the trend in the development of the European Union is not towards “centralization but consolidation and voluntary adherence to looser ‘concentric circles’ of commitment”).

162. See id.
163. See Mattei, supra note 137, at 16.
164. Id. at 19.
165. See Todd, supra note 16, at 907.
changed so frequently that they cannot be relied upon; and (8) the rules must be administered consistent with their language. 167

According to Fuller, “[a] total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all.” 168 A postmodern law challenges Fuller’s eight principles because while utterly failing to meet such principles, the law does not necessarily result in “a bad system of law.” 169 Postmodern law may fail under modernist notions and under modernist principles such as those espoused by Fuller, but postmodern law may not be considered law at all. Viewing such a “law” as postmodern, one can identify, appreciate, and critique its utility. Thus, a computer code identified as “postmodern law” can be understood as a law inconsistent with modernist notions of law, but still a form of law useful in the postmodern era.

The postmodern label does not connote approbation or disapproval of any law so labeled. 170 Consistent with postmodernism’s political agnosticism and the positivist agenda, identifying a law as postmodern is politically neutral and merely descriptive. 171 It highlights both the strengths and weaknesses of laws coming out of the postmodern era. 172 The label allows us to highlight the disintegration and fragmentation of modern culture; it is reflective of the postmodern condition of the global economy and accompanying legal regime.

Such a state, however, is at odds with the ultimate normative needs of the law. As such, this article asserts that a postmodern law is only useful in a normative and positivist sense, when the actual subject of the law is itself in a state of flux or is ontologically uncertain. The two examples posited in this article, the Safe Harbor Agreement and computer code, currently regulate an area in a state of uncertainty, redefinition, and change. Once these postmodern characteristics begin to diminish from the subject of these laws, the label postmodern becomes less needed and less apt.

IV. CHARACTERISTICS OF POSTMODERN LAW

In the past ten years, legal scholars have recognized the value of postmodern theory and some have associated the term postmodern with particular laws. 173

167. Id. Fuller argues that law depends on an “inner morality” for its legitimacy. More recent scholars have criticized Fuller’s theory. See ROY L. BROOKS, STRUCTURES OF JUDICIAL DECISION-MAKING FROM LEGAL FORMALISM TO CRITICAL THEORY 165-66 (2002) (discussing Fuller’s criticism of legal positivism and dismissing his criticism as failing to address positivism’s “central message that law is a system of rules with a certain pedigree; to wit, state-enacted rules held to be legitimate by their enforcers”).

168. FULLER, supra note 166, at 39.

169. See id.

170. See Todd, supra note 16, at 945.

171. Id.

172. See id.

173. J.M. Balkin refers to “postmodern constitutionalism” but does so not as a label for law per se but in the context of constitutional jurisprudence. Balkin, supra note 30, at 1966.
The term has not, other than in a few instances noted below, been used as a label, despite the ubiquity of such a use in other disciplines. 174

Jonathan Simon uses the term when he briefly refers to certain criminal laws such as the federal Racketeer Influenced and Corrupt Organization Act ("RICO") and felony firearm restrictions. 175 Simon uses the term postmodern law more as a heuristic to analyze legal reasoning in American criminal law, rather than as a label for particular laws. 176 He points to the fragmentation and privatization of criminal law in the postmodern era in his elucidation of how he now teaches the development of criminal law. 177

In her scholarship, Barbara Stark also uses the term postmodern to describe her proposal for an alternative form of marriage, or "Marriage Proposals," which she labels "postmodern marriage law." 178 Such law, if adopted, would deserve the postmodern label because it "explicitly contemplates varied, changing, contextualized forms of marriage, [which] may in fact be more compatible with contingent, problematic, but nevertheless enduring human love, than the reified abstraction we now call 'marriage.'" 179 Professor Stark suggests a marriage law that "clearly set[s] out the parties' respective rights and responsibilities during marriage as well as at divorce." 180 She contemplates a variety of marriages emanating from interest groups and proliferating through the Internet, such as "'Green Marriage' (in which the parties would commit to recycling, paying extra for "green power" and Sierra Club Outing vacations) [and] 'International Marriage' (addressing the specific legal problems faced by partners of different nationalities, or with families in different countries)." 181

Stark uses the label postmodern as a device to expose and critique the current unitary, "one-size-fits-all" marriage law. 182 Her proposal for a multi-tiered and more flexible marriage law is aptly labeled postmodern in the same way a building can be called postmodern for its architectural style. While Professor Stark's proposal for a postmodern marriage is unlikely to be adopted in the near future, Stark's use of the term postmodern in relation to her marriage proposals demonstrates the value of the term. 183

174. See Jonathan Simon, Teaching Criminal Law in an Era of Governing through Crime, 48 ST. LOUIS L.J. 1313, 1331 (2004); Barbara Stark, Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law, 89 CAL. L. REV. 1479, 1482 (2001). A number of other scholars, such as Jack Balkin, use the term in the context of jurisprudential theory and speak of a "Postmodern Constitutionalism" or how the American Constitution is postmodern in its characterization as a "living document." See Balkin, supra note 30, at 1967-69. But these writings about postmodernism do not use the term as a label, as this article proposes.

175. Simon, supra note 174, at 1331.

176. See id.

177. Id. at 1333-34.

178. Stark, supra note 174, at 1479.

179. Id. at 1482.

180. Id. at 1526.

181. Id.

182. Id. at 1545.

183. Id. at 1511 ("By looking at marriage law from a postmodern perspective ... we discern that it actually serves multiple functions. For some couples, marriage may well serve as a refuge from a
Finally, Ugo Mattei and Anna di Robilant make a direct parallel of the way the term postmodern is used in architecture by applying the term, primarily metaphorically, to the law and the “building” of “legal Europe.” Postmodernism, according to Mattei and di Robilant, provides promise for the comparative lawyer in the development of a European Civil Code. Postmodernism provides “the attitude of respect for diversity and multiplicity, aiming at fragmentation and hybridization, suggest[ing] new grounds, a new philosophy, and new contents for the code that are better able to consider the new ‘Geist.’”

Mattei and di Robilant’s use of the label is more prescriptive and theoretical rather than descriptive of a current law. Their connection between the use of the term in other disciplines—particularly architecture—and its promise in the law captures the value and promise of the postmodern label as applied to law, particularly in the comparative and international context.

Unlike these earlier legal scholars, this article proposes a more formal taxonomical use of the term postmodern, using the characteristics identified by scholars of postmodernism both in and outside of the legal academy. The consensus of the definition of postmodernism coalesces around themes or general characteristics that describe the term. Stephen Feldman names eight “themes” of postmodernism found in American jurisprudence that provide a definition for postmodernism for those in the legal academy. He characterizes postmodernism as: (1) anti-foundationalist and anti-essentialist; (2) challenging certainty, edifices, and boundaries; (3) involving paradoxes; (4) concerned

\[\text{cold postmodern world. But for others, marriage serves very different purposes, often changing over time.}^{184}\]

185. Id. at 1090.
186. Id. at 1089.
187. Id.
189. Feldman, supra note 10, at 38-44.
190. Id. at 38.
191. Id. at 39. Postmodernism recognizes that social structures are not rigid or fixed. A postmodern law takes into account the “contingency and plasticity of social structures. Structures are not stable but are constantly being negotiated, constructed and reconstructed in everyday relations between actors and entities.” Id. at 173. Laws with these attributes are subject to label. See William L.F. Feldstiner & Austin Sera, Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions, 77 CORNELL L. REV. 1447, 1448-49 (1992); Susan S. Silbey, Making a Place for Cultural Analysis of Law, 17 LAW & SOC. INQUIRY 39, 41-42 (1992).
192. Feldman, supra note 10, at 39-40. Consistent with postmodernists penchant to question postmodernism itself, scholars of postmodernism also identify these paradoxical characteristics: (1) it is anti-theory which is essentially a theory; (2) it stresses the irrational but instruments of reason a [sic] freely employed within the movement; (3) it [sic] emphasis on the marginal is an evaluative emphasis; (4) it stresses intertextuality but often treats texts in isolation (e.g.,
with power, especially linguistic and discursive power;193 (5) emphasizing "social construction of the self" (as opposed to an independent or autonomous self);194 (6) "self-reflexive or self-referential;"195 (7) ironic;196 and (8) politically ambivalent (and even neoconservative).197 Other scholars studying postmodernism identify these additional characteristics: "(1) celebrating fragmentation, uncertainty and chaos; (2) connection to everyday consumerism and consumer transactions; and (3) utilizing and intertwining high-technology and the Internet with things low-tech and primitive."198

The wide scope of these characteristics reflects the vagueness of postmodernism. Despite the underlying vagueness associated with postmodernism, there is also consensus that the core of postmodernism is defined by ontological uncertainty, fragmentation, and rejection of master narratives.199

When searching for these characteristics in various laws, it is apparent that most laws aspire to be, and indeed are, thoroughly modernist. From municipal ordinances regulating behavior in a local park200 to the Americans with Disabilities Act,201 most laws are intended to be consistent, rational, and fair.202 But even modern laws may have some postmodern characteristics while retaining their modern character. They might be fragmentary, decentralized, uncertain, or allow a multiplicity of interpretations, but their core regulatory function

deconstruction vs. internet intertextuality); (5) by rejecting modern criteria for assessing theory, it cannot argue there are no valid criteria for judging.

Todd, supra note 16, at 908 n.90 (citing PAULINE MARIE ROSENAU, POST-MODERNISM AND THE SOCIAL SCIENCES: INSIGHTS, INROADS, AND INTRUSIONS (1991)).

194. Id. at 41.
195. Id. at 42.
196. Id. at 43.
197. See id. at 43-44.
199. Lyotard, supra note 47, at xxiv-xxv ("I define postmodern as incredulity toward metanarratives.").
demonstrate modernist principles and make them not postmodern laws. The postmodern label more appropriately applies when the law rejects a "master narrative" and embraces paradox, is grounded or rooted in daily life, and is connected to the Internet, cyberspace, or other forms of high technology.

The Telephone Consumer Protection Act of 1991 ("TCPA") is an example of a law that contains some postmodern characteristics, but is sufficiently modern in its scope that the label is not appropriate. In its first postmodern characteristic, the TCPA, ironically and rather paradoxically, requires Americans to give up some privacy (their phone numbers and email addresses) in order to gain another form of privacy (freedom from certain types of telemarketing calls). While the TCPA is a federal law, plaintiffs must bring actions to enforce it in state court, another characteristically postmodern paradox. Last, the TCPA initially had a rather large loophole in that it did not apply to calls originating from outside of the United States, thus permitting telemarketing calls from call centers in places like India, but shutting down United States call centers. This loophole was closed in the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003.

Despite these rather postmodern traits, the TCPA is thoroughly modern and not postmodern in its general coherency and fixed nature. The law has clear boundaries and clearly normative functions that are not subject to much ambiguity or flux. Those who enacted and subsequently interpreted it appear...
to agree about the meaning of its terms.\textsuperscript{211} Furthermore, while the law may be subject to change from constitutional challenge or opposition from telemarketing interest groups, these are not changes built into the law itself.\textsuperscript{212}

Other laws can similarly use postmodernism as a tool to analyze and critique the law,\textsuperscript{213} but simply being subject to a postmodern critique does not make a law postmodern. As discussed below, the subject of the law itself needs to be in flux or illusive for the label to be apt and useful.

\section*{V. Applying the Label to Laws Coming Out of High Technology}

Two examples of laws that can be labeled postmodern involve subject matter arising out of computers, the Internet, and Internet-related technology. The first example is the "law" or code that controls the programs found in computers and Internet web sites.\textsuperscript{214} The second is the Safe Harbor Agreement regulating data privacy between the U.S. and the E.U.\textsuperscript{215}

The term postmodern highlights two different characteristics about these two areas of the law. The law or code creating and regulating the way computer users interact in virtual domains such as Second Life\textsuperscript{216} and LamdaMOO\textsuperscript{217} fit the characteristics of a postmodern law due to their ontological uncertainty, flux, connection to high technology, consumerism, and social construction of themselves.\textsuperscript{218} But the postmodern nature of these codes questions whether they can be deemed law at all.

\begin{itemize}
\item \textsuperscript{211} See, e.g., Moser v. Fed. Commc'n Comm'n, 46 F.3d 970, 975 (9th Cir. 1995), cert. denied, 515 U.S. 1161 (1995); Destination Ventures Ltd. v. Fed. Commc'n Comm'n, 46 F.3d 54, 57 (9th Cir. 1995) (finding the restrictions in the TCPA were constitutional).
\item \textsuperscript{212} The Registry has withstood constitutional challenge. See Mainstream Mktg. Servs., Inc. v. Fed. Trade Comm'n, 358 F.3d 1228, 1250-51 (10th Cir. 2003.), cert denied, 543 U.S. 812 (2004). See also Nat'l Coalition of Prayer, Inc. v. Carter, 455 F.3d 783 (7th Cir. 2006) (holding that "the state's interest in protecting residents' right not to endure unwanted speech in their own homes outweighs any First Amendment interests").
\item \textsuperscript{213} See, e.g., Margaret Chon, Postmodern "Progress": Reconsidering the Copyright and Patent Power, 43 DePaul L. Rev. 97, 100-01 (1993).
\item \textsuperscript{214} See infra notes Part V.A.
\item \textsuperscript{218} See Mnookin, supra note 217.
\end{itemize}
In contrast, the Safe Harbor Agreement is clearly a law in the more traditional sense; it is codified in the Federal Register and acknowledged as a law by the legal community. But its postmodern characteristics highlight serious problems about this law as a means of regulation and enforcement of social norms. The subject matter of the Safe Harbor Agreement, data privacy, changes rapidly due to new technologies and changing attitudes concerning privacy. The postmodern label seems particularly apt since there is not a perfected, complete, formed, or even coherent subject to be regulated by the law. In addition, those enacting the regulations and those subject to the regulations have such disparate interpretations of the law that similar ontological concerns can be raised about the effectiveness and even the existence of this regulation as a form of law.

A. Code and Virtual Reality as Sources of Postmodern Law

“A code as law” is from the postmodern era, but arguably cannot be subject to the label of a postmodern law because it is not technically “law.” Lawrence Lessig, who set forth the notion of “a code as law,” stated that computer code is not law, but may regulate conduct in much the same way that legal codes do. While a code as law is a medium through which law can be made, computer code is merely instructions given to a computer. This code, however, can set the parameters of what a computer program or Internet site might allow the user to do. It acts as normative rules governing the behavior of Internet and computer users. “The nature and values of cyberspace hinge on the coding decisions of programmers, which means that the decisions made by big companies like

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222. Id.
223. Id.
225. Id. at 682. See also Cindy A. Cohn & James Grimmelmann, Seven Ways in Which Code Equals Law (and One in Which It Does Not), in CODE: THE LANGUAGE OF OUR TIME 20, 20 (Gerfried Stocker & Christine Schöpf eds., 2003) (stating that “computer code is nothing more or less than legal code transplanted to the electronic realm”).
226. Lessig cleverly refers to “East Coast Code” being code or law written by lawmakers in Washington, D.C. to be executed by the government and “West Coast Code” being code or “law” written in Silicon Valley, California to be executed by computers and their users. Lawrence Lessig, The Architecture of Innovation, 51 DUKE L.J. 1783, 1798 (2002).
227. See Orin Kerr, The Problem of Perspective in Internet Law, 91 GEO. L.J. 357, 372 (2003) (“Saying that the power of code is akin to the power of law is simply too loose a use of the word “law” to be helpful. If code is law to an Internet user, then a sports referee’s calls are law to an athlete, and Steven Spielberg’s decisions about how to shoot a movie are law to a movie viewer.”).
America Online and Microsoft have the force of law in cyberspace.\textsuperscript{228} Thus, many scholars—even Lessig himself—see code in certain contexts as, indeed, law.\textsuperscript{229}

This ontological uncertainty and illusiveness as "law" indicates that computer code, particularly when behaving as law, deserves the label of "postmodern law."\textsuperscript{230} The codes regulating Internet sites that host virtual reality and role-playing games provide examples of how code is a postmodern law. Online games and virtual worlds have laws that are embedded within the code of the virtual world.\textsuperscript{231} For example, some games are designed so the characters can only exhibit certain attributes and cannot appear naked\textsuperscript{232} or as a child character.\textsuperscript{233} Other games and worlds are less restricted in their code and allow the user/player a wide range of freedom in the way he or she acts, dresses, or treats others in the virtual world.\textsuperscript{234} The world constructed in the Internet virtual reality role-playing game called Second Life is popular because of the freedom offered to the users in creating characters, or "avatars," and establishing relationships with other characters.\textsuperscript{235} But the Internet creates questions about what rules of behavior or "law" govern the virtual world. Some of the behavior taking place in this online virtual reality spills over and leads to disputes and lawsuits in both the real world and the world of the role-playing game.\textsuperscript{236} In addition, the code of the game is altered to enforce normative behavior both in the game and in the real world.\textsuperscript{237} As the nature of the law within the virtual

\textsuperscript{228} Id. at 369.

\textsuperscript{229} Gregory Lastowka & Dan Hunter, \textit{The Laws of the Virtual Worlds}, 92 CAL. L. REV. 1, 11 (2004). \textit{See also} Wu, \textit{supra} note 224, at 682 (proposing that computer code should be used "as an alternative to lobbying campaigns, tax avoidance, or any other approach that a group might use to seek legal advantage").


\textsuperscript{231} Id.

\textsuperscript{232} See Tecmo, Inc. v. Greiling, No. 05 Civ. 0394 (N.D. Ill. 2005). The manufacturer of the "Ninja Gaiden" and "Dead or Alive" video game series filed suit against a group of hackers who are accused of distributing software code to change the appearance of the games' characters, including making them appear naked. \textit{Id.}

\textsuperscript{233} For example, in the online role-playing game Kingdoms of Caernarfon, no role playing (avatar) of children is permitted. \textit{See} Kingdoms of Caernarfon, http://www.creativitychat.com/rooms/kingdom.html (last visited Oct. 30, 2008).

\textsuperscript{234} \textit{See} Second Life, \textit{supra} note 216. Second Life is an online virtual world designed and run by Linden Research, Inc. It is another example of a multi-player role-playing game.

\textsuperscript{235} \textit{See} Posting of Tateru Nino to Second Life Insider, \textit{supra} note 230.


\textsuperscript{237} \textit{See} Posting of Tateru Nino to Second Life Insider, \textit{supra} note 230.
world of a place like Second Life emerges among its players and developers, the law is ripe for the label "postmodern."\(^{238}\)

Another virtual reality web game, LambdaMOO, is also made up of code containing forms of "postmodern law."\(^{239}\) LambdaMOO's designers voluntarily relinquished control over regulation of the game and instead implemented a formal petition system through which users can petition for a change in the structure of LambdaMOO.\(^{240}\) "Once a petition gets enough signatures, it goes up for a vote by all users, and the results are then published. Once new rules [are] approved, the game's wizards (as its designers [are] called) implement[,] them using code."\(^{241}\) For example, users have petitioned for and instituted forms of "property rights," regulated character names, and banned bulk e-mails.\(^{242}\) Users have even petitioned to remove the petition system.\(^{243}\) The laws created in this virtual world have modernist characteristics; they strive to regulate the virtual world using democratic paradigms familiar to its users.\(^{244}\) The code that underlies these virtual laws, however, is truly "postmodern."\(^{245}\) Like a constitution, the code allows for the petition process and the emergent modernist laws to take form in this virtual reality.\(^{246}\) The code acts as the true regulator and has the ultimate authority in this virtual space.\(^{247}\)

Some have argued that law arising from Internet technologies—often referred to as cyberlaw—"offers nothing new" and is "old wine in new bottles."\(^{248}\) This sentiment is correct concerning most of the law found emanating from the Internet.\(^{249}\) Courts have used traditional doctrines from criminal,
contract, tort, and property laws to resolve disputes resulting from the Internet. But many scholars recognize that current laws have their limitations in the context of the Internet and that new paradigms must be developed that go beyond the “law” found in traditional modernist statutes and common law decisions.

Postmodern law provides promise for this broader and more sweeping Internet regulation. For example, the difficulties in combating cybercrimes call for new and innovative approaches to law as new technologies emerge allowing cybercriminals to elude existing regulation. Combating crime over the Internet will require not a single, modernist set of laws emanating from Washington, but a multi-faceted, multi-pronged conglomeration of forces involving enacted law, common law, markets, lobbying, and customs. Postmodern law adapts to the complexity involved in regulation and allows for the possibility that public law might have detrimental or unintended effects on other realms of regulation.

The more ontologically-uncertain, high-technology, fragmented, illusive law found in computer code is one part of the new protocols emerging to provide order, social regulation, regularity, and dispute resolution in the postmodern era. Unless it can incorporate flexibility and adaptability, a single monolithic regulatory scheme like that found in the E.U.’s Data Privacy Directive may well be inadequate and misguided as the way of regulating cyberspace. A postmodern mix is needed. A combination of traditional law (such as statutes and common law doctrines), self-regulation, contracting principles, code writing, and social and consumer pressure, is the basis of law for the Internet for the near


251. See, e.g., Lastowka & Hunter, supra note 229, at 62; James Grimmelmann, Note, Regulation by Software, 114 YALE L.J. 1719, 1743 (2005). Grimmelmann specifically notes: “[D]ecisions about the technical future of the Internet are important questions of social policy, because these decisions will have the force of law even as they defy many of our assumptions about law.” Grimmelmann, supra, at 1721.

252. See O’Neill, supra note 248, at 240-41. See also Hardy, supra note 250, at 1000-02 (presenting an example of how defamation law can become difficult to resolve in situations involving Internet postings); David R. Johnson & David G. Post, And How Shall the Net Be Governed?: A Meditation on the Relative Virtues of Decentralized, Emergent Law, in COORDINATING THE INTERNET 62, 62 (Brian Kahin & James H. Keller eds., 1997) (suggesting a “decentralized process that does not closely resemble [the systems] we have used in the past to pass laws and enforce behavioral norms”); Aron Mefford, Note, Lex Informatica: Foundations of Law on the Internet, 5 IND. J. GLOBAL LEGAL STUD. 21, 237 (1997) (discussing how “the mere extension of the physical world laws and government jurisdiction to Cyberspace will ultimately prove ineffective”); Brent Wible, Note, A Site Where Hackers Are Welcome: Using Hack-In Contests to Shape Preferences and Deter Computer Crime, 112 YALE L.J. 1577, 1622-23 (2003) (proposing the use of non-legal tools to deter crime on the Internet).


future, or at least as long as this high-technology law remains connected to
technologies and social dynamics that are in flux, like a moving train.

Since computer hardware and software and the Internet are changing at such
a dizzying speed, any law that is in fact created by code is in a state of flux,
indeterminate, and uncertain. Ontological uncertainty raises the question as to
whether code can be considered “law” at all. But when deemed a form of law,
the label postmodern is appropriate.

B. Safe Harbor Agreement

The Safe Harbor Agreement,255 which regulates data privacy, also deserves
the label postmodern. The Safe Harbor Agreement challenges a modernist label
because it is not strictly rational, orderly, or capable of a single definition or
explanation.256 It has postmodern traits, such as being fragmented, paradoxical,
and intertwined with high technology and mass consumerism.257 It is particularly
suited for the label because it is a law relating to high technologies and may be
interpreted and implemented by very different legal systems with divergent legal
traditions relating to the regulation of privacy.258 These traits highlight the
ultimate problem with the Safe Harbor Agreement: its uncertain and illusive
nature makes it inappposite for purposes of regulating conduct and providing
certainty in relationships.

The Safe Harbor Agreement came out of the E.U.’s sweeping and
comprehensive data privacy legislation instituting strict measures to protect

255. Issuance of Safe Harbor Principles and Transmission to European Commission:
Procedures and Start Data for Safe Harbor List, 65 Fed. Reg. 56,534 (Sept. 19, 2000); Issuance of
Safe Harbor Principles and Transmission to European Commission, 65 Fed. Reg. 45,666 (July 24,
2000). See also Safe Harbor Documents, supra note 19 (providing access to the documents that
“constitute the ‘safe harbor’ privacy framework that the Department of Commerce has negotiated
with the European Commission”).

256. See Todd, supra note 16, at 897-98.

257. Id. at 915 (“In this post-modern era, the real world is fragmented, uncertain, diverse,
rapidly changing, imbued with complex high-technology and archaic tradition, secular rationalism
and religious fundamentalism, paradox, irony and mass consumerism.”).

258. For a general discussion and criticism of the Safe Harbor Agreement, see Barbara
Crutchfield et al., U.S. Multinational Employers: Navigating Through the “Safe Harbor”
also JAN DHONT, MARIA VERÓNICA PEREZ ASINARI, & YVES POULLET, SAFE HARBOUR DECISION
IMPLEMENTATION STUDY 110-11 (2004) (discussing the agencies and groups needed in order for the
justice_home/fsj/privacy/docs/studies/safe-harbour-2004_en.pdf; Gregory Shaffer, Globalization
and Social Protection: The Impact of E.U. and International Rules in the Ratcheting Up of U.S.
become tougher due to pressure from the E.U.); David A. Castor, Note, Treading Water in the Data
Privacy Age: An Analysis of Safe Harbor’s First Year, 12 IND. INT’L & COMP. L. REV. 265, 289-90
(2002) (stating that many critics of the Safe Harbor Agreement believe that the United States has
“lost a piece of its ultimate sovereignty by compromising with the Safe Harbor principles”); David
Raj Nijhawan, Note, The Emperor Has No Clothes: A Critique of Applying the European Union
discussing the effect of the Safe Harbor Agreement on First Amendment rights).
The U.S. Privacy Directive limited data collection only for specified, explicit, and legitimate purposes (indiscriminate data collection was forbidden). This legal regime is in stark contrast to the U.S.'s approach to protecting data privacy. The United States has a mishmash of fragmentary data protection laws that do not have any overall coherence. Under U.S. law, only certain discrete areas provide for detailed protection. For example, the Health Insurance Portability and Accountability Act (HIPAA) provides privacy protection for medical data; the Financial Services Modernization Act purports to protect individual privacy, but in fact grants the financial industry the ability to collect vast amounts of personal data; and video renters have their videotape choices (but not their DVD choices) protected under the Video Privacy Protection Act. Outside of these discrete areas, much of U.S. data protection is subject to self-regulation. Online data collection, in particular, remains unregulated, affording little privacy to users.

The differences between the two approaches to protecting data privacy created problems for American companies doing business in the E.U. because they had to develop different, stricter guidelines for E.U. customers. Also, the creators of the E.U. directive recognized that the directive could be circumvented if E.U. businesses simply sent data to be stored and processed in a country with lax privacy laws. The E.U. Directive thus forbid the transmission of data to any country with inadequate privacy protections. The U.S. fell into this category. To shield U.S. companies from penalties under the E.U. Directive,

260. Id.
261. See Bignami, supra note 155, at 619-22.
263. Id. at 736-37.
268. Many computer experts have said essentially there is no data privacy in the United States: "You have zero privacy. Get over it." A. Michael Froomkin, The Death of Privacy?, 52 Stan. L. Rev. 1461, 1462 (2000) (quoting Scott McNealy, CEO, Sun Microsystems, Inc.).
269. Farrell, supra note 23, at 293.
270. Id. at 289.
271. Id.
the United States and the European Union entered into the Safe Harbor Agreement, which intended to bridge their different approaches.

The different approaches to data privacy result from very different perspectives of the United States and the European Union on privacy in general. The European perspective on privacy focuses on dignity, while the American perspective is more focused on liberty. The European Union views data privacy as an issue of public concern while the United States approaches it as a personal issue. The Safe Harbor Agreement is designed to bridge these conflicting and seemingly irreconcilable approaches to regulation of data privacy. The Safe Harbor Agreement did not require legislative change. Instead, it allowed the United States to claim that it was maintaining its principles of self-regulation, and it allowed the European Union to claim that it upheld its privacy principles. The flexibility and ambiguity arising from the Safe Harbor Agreement’s postmodern characteristics allows these conflicting approaches to co-exist in a single law. Thus, by being postmodern, the Safe Harbor Agreement can function as a law in a context where its modernist equivalent would fail.

The Safe Harbor Agreement is a voluntary program administered by the Department of Commerce and “enforced” by the Federal Trade Commission (“FTC”). Under the Safe Harbor Agreement, companies “self certify” through a process available on the U.S. Department of Commerce website. Certification commits the company to adhere to the agreement’s data privacy principles. These principles are:

273. For an interesting account of the negotiations between U.S. and E.U. officials, see SPINELLO, supra note 272, at 277.
274. The Safe Harbor Agreement “allowed the United States to claim publicly that its basic policy stance of protecting privacy through self-regulation was unchanged, while allowing the European Union to help dictate the terms of regulation.” Farrell, supra note 23, at 292.
278. Id. at 292.
279. Id.
280. Id. at 292-93.
282. Id.
(1) The company "must provide clear and conspicuous notice to individuals" regarding the purpose of any data collected and used, as well as regarding complaint mechanisms available.284

(2) Individuals may choose to opt out if the collected data will be used for a purpose that is different from its original purpose, or if data will be transferred to third parties.285 Alternatively, individuals may choose to opt in if the data being collected is sensitive, such as if it relates to race, religion, or ethnicity.286

(3) The company may transfer personal data to third parties only if they comply with the principles of notice and choice.287

(4) Individuals must be permitted access to collected information.288

(5) The company must maintain the security of the personal data by exercising reasonable precaution.289

(6) The company must maintain the integrity of data, ensuring that it is relevant to the purpose for which it was collected, accurate, and current.290

(7) The company must provide mechanisms to enforce the Safe Harbor principles. It must give data subjects a forum for filing complaints and establish a dispute resolution procedure to respond to consumers' grievances.291

There is an indefinite grace period for United States signatory companies to implement these principles.292 Companies have been rather slow at certifying themselves under the Safe Harbor Agreement.293 In the first few years, only a few hundred companies certified.294 In 2007, over 1,000 companies had certified, but only 918 kept their certification current.295 A European Commission study found that of the companies certified, many were not in compliance with the Agreement's principles.296 For example, some companies did not comply because privacy policies were not accessible or clear.297 Also,

284. Assey, Jr. & Eleftheriou, supra note 283, at 151.
285. Id.
286. Id.
287. Id. at 151-52.
288. Id. at 151.
289. Id. at 152.
290. Id.
291. Id. at 152-53. See also Safe Harbor Overview, supra note 281 (listing the seven principles).
292. See Safe Harbor Overview, supra note 281 (stating no time period in which the companies must comply with the principles).
293. See Jörg Rehder & Erika C. Collins, The Legal Transfer of Employment-Related Data to Outside the European Union: Is It Even Still Possible?, 39 INT'L LAW. 129, 150 (2005) (noting that the European Union is unhappy with the low number of companies that have certified).
295. Id.
296. Id.
297. Id. at 114 ("The privacy policies of companies have been severely criticized due to their inaccessibility and lack of clarity. Companies' representations that they had instituted privacy programs were generally found to be dubious, unsupported, and inconsistent with the Safe Harbor privacy program definition.").
some found that the principle of requiring mechanisms for enforcement was particularly wanting.\footnote{Id. at 115 (citing DHONT, ASINARI, & POUILLET, supra note 258, at 13 ("[T]he reviewers were critical of the alternate dispute resolution mechanism adopted by U.S. companies on the grounds of inadequacy, lack of procedural transparency, and sanctioning regimes.")).}


The FTC is the agency that enforces federal privacy law under the Safe Harbor Agreement.\footnote{See Issuance of Safe Harbor Principles and Transmission to European Commission: Procedures and Start Data for Safe Harbor List, 65 Fed. Reg. 56,534 (Sept. 19, 2000); Issuance of Safe Harbor Principles and Transmission to European Commission, 65 Fed. Reg. 45,666 (July 24, 2000).} It has not effectively or actively enforced the privacy law.\footnote{See Peek, supra note 276, at 155, 157 ("FTC enforcement actions are few and far between, lack effectiveness, and serve little deterrent effect. . . . FTC privacy enforcement actions generally result in little more than a symbolic penalty.").} The FTC's ability to bring an action against a company for a data privacy violation comes from its authority to prosecute unfair and deceptive practices.\footnote{See 15 U.S.C. § 45(a)(1)-(2) (2006).} Ironically, a company that has a privacy policy, or that certifies under the Safe Harbor Agreement, is subject to FTC enforcement action, whereas a company without certification or a policy would not be.\footnote{See id.} Failing to comply with a stated
privacy policy can be considered unfair or deceptive trade practices and can be enforceable by the FTC under 15 U.S.C. § 45(a)(1)-(2).  

The FTC’s rather weak enforcement ability is illustrated by the consent decree that the FTC entered into with Gateway Learning Corp., the company that sells products under the “Hooked on Phonics” brand name. The FTC brought a complaint against Gateway because its original privacy policy did not allow sharing of personally identifiable consumer information without explicit consent. Gateway subsequently violated this policy by renting its customers’ information to third parties. In the consent decree, Gateway admitted to no wrongdoing and promised not to violate its privacy policy. Gateway also agreed to give the Treasury the $4608 it earned from renting consumers’ information. Gateway did not compensate its customers. Instead, Gateway altered its policy to allow for less individual data privacy in the future.

Consistent with its multiplicity of interpretations, commentators hold widely divergent opinions of the Safe Harbor Agreement’s effectiveness as a regulatory mechanism for protecting privacy. Some commentators see it as a great advance in the protection of privacy because it provides a coherent strategy for creating a data privacy regime on a global scale. This is particularly important in the United States, where such regulation is needed. Others see it as a sham, a


310. Id.

311. Id.

312. Id.

313. Id.

314. Id.


316. See Perez, supra note 315.
failure, ineffective, unenforced, as well as unenforceable. The postmodern label creates the possibility of simultaneous success and failure or, at a minimum, an acknowledgment that success and failure are subjective and relative judgments depending on the actor's viewpoint.

The subject matter of data privacy regulated by the Safe Harbor Agreement fits the characteristics of postmodernism as well. Postmodernism rejects the concept of the autonomous lone or sole individual and instead emphasizes a social construction of the self. Under the postmodern definition of "self," data privacy is intimately connected to the construction of the self. What one buys, browses, and writes about through the Internet are manifestations of a person's being. The data collected about a person is arguably a reflection of the essence of that person.

In addition, the term privacy itself has postmodern traits because it suffers from an "embarrassment of meanings." Privacy has been deemed a chameleon-like word, and concepts relating to privacy, particularly in American jurisprudence, are fluid and fragmented. Indeed, the United States grounds its approach to privacy in the concept of the "reasonable expectation of privacy." Expectations, however, are not static and are highly contextual.

Besides the subject matter, the Safe Harbor Agreement is intimately connected to high technology and the computer age. The concern for data privacy emanates from the ease of collection and proliferation of data that can be

318. One of the main purposes of the Safe Harbor Agreement was to prevent a showdown at the World Trade Organization; challenging the E.U. privacy directive as a restraint on trade—the trade in data. On this front the Agreement has been successful. This issue has not erupted into a trade war. See Council Directive 95/46, pmbl. ¶¶ 56, 59, art. 25, 1995 O.J. (L 281) 36-37, 45 (EC).
319. See text accompanying supra notes 54-62.
320. See text accompanying supra note 194-98.
322. Id.
325. Id. Daniel Solove profers a taxonomy of privacy, categorizing and compartmentalizing the wrongs or torts relating to American concepts of privacy. Id. Interestingly, as Solove attempts to perform the modernist act of categorizing, he recognizes that privacy law is "fragmented and inconsistent." Id. at 562. See also Ann Bartow, Response, A Feeling of Unease about Privacy, 155 U. Pa. L. Rev. Pennumbra 52, 53 (2006) (responding to Daniel J. Solove's A Taxonomy of Privacy) ("As Solove expressly observes, privacy law is 'fragmented and inconsistent,' and it is unlikely to smoothly merge into a coherent whole even with Solove's best efforts at taxonomy construction.").
stored, processed, and retrieved by computer and through the Internet.\textsuperscript{328} Much of this data collection is for the purpose of tracking consumer preferences, targeting products, and marketing to individuals.\textsuperscript{329}

The Safe Harbor Agreement also has regulatory content that is available only through the Internet.\textsuperscript{330} American companies seeking to avail themselves of the protections of the law must visit the U.S. Department of Commerce website.\textsuperscript{331} At that site, a company can find the latest mechanisms for registering and the current data protection guidelines.\textsuperscript{332} The law goes outside of the text found in the Federal Register and is contingent on the ephemeral text on the Internet.\textsuperscript{333}

The postmodern character of the Safe Harbor Agreement reflects the fact that there is no clear consensus about how to regulate data privacy. The United States approach is arguably inefficient in that it does not provide for certainty and motivates inconsistent regimes of possible over-regulation in some sectors due to fear of lawsuit and under-regulation in other sectors where fear of suit is minimal.\textsuperscript{334} A criticism of the E.U. Directive is that it is myopic.\textsuperscript{335} Some commentators argue that it was drafted with the mainframe computer in mind and does not reflect—and in fact hinders—the more advanced technologies found in the age of personal computers and the Internet.\textsuperscript{336}

The most generally accepted approach to protecting data privacy, at least as is the approach of most industrialized countries, is through comprehensive statutory regulation.\textsuperscript{337} In academic circles, and in the United States in particular,

\textsuperscript{328} Id. at 65-66.
\textsuperscript{329} Id. at 66-67.
\textsuperscript{332} See id.
\textsuperscript{333} See id.
\textsuperscript{334} See Olena Dmytrenko & Cara D. Cutler, Does Ukraine Need a Comprehensive Statute to 'Control' Private Data Controllers?, 5 WASH. U. GLOBAL STUD. L. REV. 31, 64 (2006).
\textsuperscript{335} PETER P. SWIRE & ROBERT E. LITAN, NONE OF YOUR BUSINESS: WORLD DATA FLOWS, ELECTRONIC COMMERCE, AND THE EUROPEAN PRIVACY DIRECTIVE 50-51 (Brookings Institution Press, 1998).
\textsuperscript{336} Id. at 56; Edward C. Harris, Personal Data Privacy Tradeoffs and How a Swedish Church Lady, Austrian Public Radio Employees, and Transatlantic Air Carriers Show that Europe Does Not Have the Answers, 22 AM. U. INT'L L. REV. 745, 775-76 (2007). See also Michael A. Turner & Peter A. Johnson, Privacy Rights and Policy Wrongs: How Data Restrictions Can Impair Information-Led Development in Emerging Markets (Ctr. on Global Info. Econ., Chapel Hill, N.C.), 2003, at 4 (stating that if certain nations were "to adopt a national privacy law comparable to the E.U. directive, the net effect on trade and investment stemming from business process outsourcing by foreign MNCs is likely to be negative"), available at http://www.infopolicy.org/pdf/ild.pdf.
there is no such consensus. Some scholars call for enhancement of tort doctrine to better regulate abuses of data privacy. Others look to contract law and the private market to regulate data privacy. Some eschew traditional legal regulation of privacy altogether and claim that “code” or technological innovation will ultimately “protect” privacy as needed by society. For example, one pair of scholars argues that developing countries may profit from using a less regulated or self-regulated approach to securing data privacy, at least in the short-term, in order to develop their economies through the free flow of information.

Harmonizing the approaches to safeguarding data privacy taken by the United States and the European Union could eliminate the postmodern characteristics of the Safe Harbor Agreement. The demand is growing for a more comprehensive regime securing data privacy in the United States. More modernist approaches, as offered by the E.U. Data Privacy Directive or the

338. See, e.g., LESSIG, supra note 224, at 3 ("[T]he invisible hand of cyberspace is building an architecture ... that makes possible highly efficient regulation."); Dmytrenko & Cutler, supra note 334, at 56 ("American data protection law largely evolved in the absence of statutory language."); Jerry Kang, Information Privacy in Cyberspace Transactions, 50 STAN. L. REV. 1193, 1251 (1998) (stating that law and economics should regulate the protection of data privacy); Sarah Ludington, Reining in the Data Traders: A Tort for the Misuse of Personal Information, 66 MD. L. REV. 140, 146 (2006) (suggesting use of common-law tort actions to resolve issues surrounding data privacy); Richard S. Murphy, Property Rights in Personal Information: An Economic Defense of Privacy, 84 GEO. L.J. 2381, 2393 (1996) (assigning property rights “to personal information to the party who uncovers the information, rather than to the party whom the information concerns”); Pamela Samuel, Privacy as Intellectual Property?, 52 STAN. L. REV. 1125, 1131 (2000) (stating that people should have property rights in their personal data).

339. See Ludington, supra note 338, at 146.

340. See LESSIG, supra note 224, at 3; Murphy, supra note 338, at 2393. But see Samuel, supra note 338, at 1131 (stating that the property rights in personal information should belong to the party who finds the information).

341. See Kang, supra note 338, at 1251.

342. LESSIG, supra note 224, at 143. See also Todd M. Wesche, Reading Your Every Keystroke: Protecting Employee E-Mail Privacy, 1 J. HIGH TECH. L. 101, 116-18 (2002) (discussing Lessig’s proposal to use computer code to combat privacy issues).

343. Dmytrenko & Cutler, supra note 334, at 56 (citing CHRISTOPHER KUNER, EUROPEAN DATA PRIVACY LAW AND ONLINE BUSINESS 124 (2003)). See also DHONT, ASINARI, & POULLET, supra note 258, at 85 ("The free flow of data after adherence was identified by the lawyers as one of the main advantages of [the Safe Harbor Agreement].").

proposed Personal Data Privacy and Security Act of 2007, would move both the Safe Harbor Agreement and U.S. data privacy law away from its postmodern character. The benefits to a more modernist approach to regulating data privacy is that a modernist approach allows for control over an area of the law that currently has no coherent regulation. Allowing the conflicting and flexible postmodern approach to continue may close the opportunity to gain control and understanding over data privacy.

The postmodern characteristics of the Safe Harbor Agreement are, arguably, the reasons for its current success and, simultaneously, its disappointments. The fragmented and illusive character of data privacy law in the United States can make a law such as the Safe Harbor Agreement one form of law or legal regime to regulate privacy in the post-industrial age. Its postmodern characteristics make it suited to the rapidly changing technologies that affect privacy protection at a time when no other forms of law find acceptance among the variety of communities subject to regulation.

VI. CONCLUSION: POSTMODERNISM AS A WAY “TO PAINT A MOVING TRAIN”

One government official described negotiations between the United States and the European Union over data privacy as “trying to paint a moving train.” The law developed by the U.S. and E.U. data privacy agreement accomplishes this apparently unachievable project because it is postmodern. A postmodern law can perform certain normative functions that an otherwise modern law cannot. By being flexible, fragmented, and connected to high technology, it becomes a

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347. See Farrell, supra note 23, at 279-80. See also Henry H. Perritt, Jr., The Internet Is Changing the Public International Legal System, 88 KY. L.J. 885, 893-94 (2000) (discussing how the Internet will allow for legal relationships to strengthen on a transnational level).

law that, while rife with paradox and irony, performs a function, bridges the modern and postmodern, and is apt for the postmodern era.

The label postmodern is also a fitting and useful label for law emanating from high technology and the Internet that is inapposite under modernist notions of law. Computer code fits the characteristics of such a law because it regulates conduct within the high technology found in computers. But code also maintains the characteristics of postmodernism in its illusive and ephemeral quality.

In the same way a product like a law emanating from modern times mirrors the broader culture of the modern era, a postmodern law reflects our postmodern era. Postmodernism helps us understand the patterns of thought that are emerging in this technological era. Using postmodern as a label advances this understanding of the law and jurisprudential theory. Trying to create a modern or normative law in an area subject to rapid technological or other change can be like trying to “paint a moving train.” Using postmodern as a label can achieve this seemingly impossible task.