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Phenomenology, Structuralism, Hermeneutics, and Legal Study: Applications of Contemporary Continental Thought to Legal Phenomena*

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The author examines the relevance of several contemporary movements in continental philosophy and social theory to the field of legal studies. In particular, the author examines phenomenology, structuralism, and hermeneutics—theories that have received widespread academic attention—and suggests some possible jurisprudential applications of each one. These applications, the author indicates, can instill a new vitality into American legal scholarship.

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Commentators have often criticized American legal scholarship for its isolation from the insights and methods of other academic disciplines.¹ Recently, legal scholars have begun to derive insights from work in other fields such as history,² economics,³ anthropology,⁴ and psychiatry,⁵ as well as from the analytical fields of logic,⁶ statistics,⁷ and mathematical theory.⁸ Although there has been some work drawing on Marxist⁹ and psychoanalytical perspectives,¹⁰ American legal study has remained geographically provincial, limiting itself to the consideration of those scholars working within the Anglo-American intellectual tradition. In the area of theory and criticism,¹¹ there has been some treatment of contemporary continental work. Nonetheless, American legal scholars have largely ignored the dynamic and rich reservoir of philosophical and social theory of contemporary Europe. The failure to elicit more from contemporary continental theory seems particularly unfortunate in view of its apparent and suggested legal applications. Indeed, some of the most insightful and dynamic work in philosophy and social theory was accomplished in Europe during the last twenty-five years.¹² This includes work in the continental theories of phenomenology,¹³ structuralism,¹⁴ and hermeneutics.¹⁵

1. See H. PACKER & T. EHRLICH, *NEW DIRECTIONS IN LEGAL EDUCATION* 61 (1972). The authors conclude: "[T]here is a need for the study of law which is not rigidly linked to professional study and which works closely with other academic disciplines."

2. See generally *LAW IN THE AMERICAN REVOLUTION AND THE REVOLUTION IN THE LAW* (H. Hartog ed. 1981) (collection of papers exploring the application of contemporary historiography to legal subject matter).

3. See, e.g., *THE ECONOMICS OF LEGAL RELATIONSHIPS* (H. Manne ed. 1975) (collection of articles applying microeconomic theory to a broad range of legal subjects).

4. See, e.g., *LAW IN CULTURE AND SOCIETY* (L. Nader ed. 1969) (case studies and comparative anthropological materials involving Western and other societies).

5. See, e.g., *READINGS IN LAW AND PSYCHIATRY* (R. Allen, E. Ferster & J. Rubin rev. ed. 1975). This book provides an extensive collection of theoretical and applied materials on law and psychiatry.

6. See, e.g., I. TAMMELLO, *MODERN LOGIC IN THE SERVICE OF LAW* (1978).

7. See, e.g., Zimring, *Games with Guns and Statistics*, 1968 *WIS. L. REV.* 1113.

8. See, e.g., Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 *HARV. L. REV.* 1329 (1971).

9. See, e.g., B. EDELMAN, *OWNERSHIP OF THE IMAGE: ELEMENTS FOR A MARXIST THEORY OF LAW* (1979).

10. See, e.g., A. EHRENZWEIG, *PSYCHOANALYTIC JURISPRUDENCE* (1979).

11. See R. UNGER, *KNOWLEDGE AND POLITICS* (1975); R. UNGER, *LAW IN MODERN SOCIETY* (1976).

12. See generally P. RICOEUR, *MAIN TRENDS IN PHILOSOPHY* (1979) (setting out those fields of philosophy in which research, publication, and discussion are most active).

13. See generally H. SPIEGELBERG, *THE PHENOMENOLOGICAL MOVEMENT* (2d ed. 1976) (includes a brief critique of major figures of the movement and extensive bibliographical material).

Phenomenology,¹⁶ structuralism,¹⁷ and hermeneutics¹⁸ are significant for a number of reasons. Each approach has received widespread attention in European academic circles.¹⁹ Each has strongly influenced a significant number of Anglo-American philosophers,²⁰ social theorists,²¹ literary critics,²² and social scientists.²³ Continental theorists have explicitly considered "legal" issues and suggested the jurisprudential implications of their analysis.²⁴ Legal applications of these methodologies already have been presented in various journals.²⁵ This article will briefly describe the methodologies

14. See generally *STRUCTURALISM* (D. Robey ed. 1973) (includes a series of papers that explore structuralism in a number of areas of study). Major figures of the movement are reviewed in E. KURZWEIL, *THE AGE OF STRUCTURALISM* (1980).

15. See generally J. BLEICHER, *CONTEMPORARY HERMENEUTICS* (1980) (examines the major figures of the methodology of hermeneutics). A useful general introduction to the hermeneutical methodology is R. PALMER, *HERMENEUTICS* (1969).

16. One commentator defined phenomenology as "a philosophical movement whose primary objective is the direct investigation and description of phenomena as consciously experienced, without theories about their causal explanation and as free as possible from unexamined preconceptions and presuppositions." H. SPIEGELBERG, *DOING PHENOMENOLOGY* 3 (1975).

17. Structuralism has been described as "a method whose primary intention is to permit the investigator to go beyond a pure description of what he perceives or experiences, in the direction of the quality of rationality which underlies the social phenomena with which he is concerned." M. LANE, *INTRODUCTION TO STRUCTURALISM* 31 (1960).

18. "[H]ermeneutics is the concern with speech and writing, and hence with the methodology of interpretation of texts." D. HOY, *THE CRITICAL CIRCLE: LITERATURE, HISTORY, AND PHILOSOPHICAL HERMENEUTICS* 1 (1978).

19. See, e.g., V. DESCOMBES, *MODERN FRENCH PHILOSOPHY* (1980).

20. See, e.g., N. CHOMSKY, *LANGUAGE AND MIND* (1968); D. IHDE, *HERMENEUTIC PHENOMENOLOGY* (1971); *PHENOMENOLOGY IN AMERICA* (J. Edie ed. 1967).

21. See, e.g., F. DALLMAYR, *BEYOND DOGMA AND DESPAIR: TOWARD A CRITICAL PHENOMENOLOGY OF POLITICS* (1981); M. GLUCKSMAN, *STRUCTURALIST ANALYSIS IN CONTEMPORARY SOCIAL THOUGHT* (1974); C. SUMNER, *READING IDEOLOGIES* (1979).

22. See, e.g., P. DE MAN, *ALLEGORIES OF READING* (1979); G. STRICKLAND, *STRUCTURALISM OR CRITICISM* (1981); D. WHITE, *HEIDEGGER AND THE LANGUAGE OF POETRY* (1978).

23. See, e.g., Z. BAUMAN, *HERMENEUTICS AND SOCIAL SCIENCE* (1978); F. KATZ, *STRUCTURALISM IN SOCIOLOGY* (1976); *PHENOMENOLOGY AND THE SOCIAL SCIENCES* (M. Natanson ed. 1973).

24. For example, Heidegger discussed responsibility, guilt, and punishment, and suggested insights gained by using the methodology of existential phenomenology. M. HEIDEGGER, *BEING AND TIME* 326-30 (J. Macquarrie & E. Robinson trans. 1962). Piaget suggested applying a structuralist analysis to the legal system in order to move beyond the identification of logical form to the identification of a general structure of norms. J. PIAGET, *MAIN TRENDS IN INTER-DISCIPLINARY RESEARCH* 31 (1973). Gadamer claimed that hermeneutics is indispensable to jurists' comprehension of precedent, and he distinguished this process from deciding a case by applying a rule or "filling a gap." H. GADAMER, *TRUTH AND METHOD* 290 (1975).

25. Three of these articles will be considered here: Morano, *A Phenomenology of Negligence*, 5 J. BRIT. SOC'Y FOR PHENOMENOLOGY 135 (1974); Hermann, *A Structuralist Approach to Legal Reasoning*, 48 S. CAL. L. REV. 1131 (1974); Michaels, *Against Formalism:*

of phenomenology, structuralism, and hermeneutics, identify the theories' central elements, and present a legal application of each. These applications will suggest their special contribution to particular fields of legal scholarship.

II. PHENOMENOLOGY

A. *A Description of Phenomenology*

Phenomenology was most fully developed by Edmund Husserl.²⁶ Husserl conceived of phenomenology as a type of *descriptive* psychology,²⁷ in contrast to an *empirical* psychology and its causal mode of explanation.²⁸ Phenomenology is an attempt to explain the mind's representations of phenomena. Phenomenologists claim that the "intentionality" of human consciousness colors these representations.²⁹ Intentionality is posited as an activity of human consciousness through which objects derive meaning. This "activity" is instantaneous and nonreflective. In language, consciousness determines the meaning of words;³⁰ in perception, it determines the patterns and meaning of what we see.³¹

One of the major functions of descriptive psychology is uncovering and articulating the fundamental laws of the various modes

The Autonomous Text in Legal and Literary Interpretation, 1 *POETICS TODAY* 23 (1974).

26. The published work of Husserl is quite extensive. For a bibliography that includes a listing of English translations, see D. STEWART & A. MICKUNAS, *EXPLORING PHENOMENOLOGY* 27-34 (1974). Husserl provided a basic introduction to his methodology in E. HUSSERL, *CARTESIAN MEDITATIONS: AN INTRODUCTION TO PHENOMENOLOGY* (D. Cairns trans. 1977) [hereinafter cited as E. HUSSERL, *CARTESIAN MEDITATIONS*], and in E. HUSSERL, *THE IDEA OF PHENOMENOLOGY* (S. Alston & G. Nakhnikian trans. 1973). Husserl's major works are E. HUSSERL, *IDEAS: GENERAL INTRODUCTION TO PURE PHENOMENOLOGY* (W. Gibson trans. 1931) and E. HUSSERL, *LOGICAL INVESTIGATIONS* (J. Findlay trans. 1970). Valuable commentaries are M. NATHANSON, *EDMUND HUSSERL* (1973); *PHENOMENOLOGY* (J. Kockelmans ed. 1967); and J. KOCKELMANS, *EDMUND HUSSERL'S PHENOMENOLOGICAL PSYCHOLOGY* (1978).

27. See, e.g., J. KOCKELMANS, *supra* note 26, at 87-97. Husserl did not seek "description" in the sense of representing static phenomena as a passive perceiver, but rather wished to describe phenomena's content and variation in consciousness. See, e.g., E. HUSSERL, *THE IDEA OF PHENOMENOLOGY*, *supra* note 26, at 5.

28. The rejection of empirical psychology as a basis for knowledge is derived from a judgment that the evidence of the world is subject to sensory error and illusion. Husserl observed, "Not only can a particular experienced thing suffer devaluation as an illusion of the senses; the whole unitarily surveyable nexus, experienced throughout a period of time, can prove to be an illusion, a coherent dream." E. HUSSERL, *CARTESIAN MEDITATIONS*, *supra* note 26, at 17.

29. See E. HUSSERL, *LOGICAL INVESTIGATIONS* 337-432 (J. Findlay trans. 1970); see also J. MOHANTY, *THE CONCEPT OF INTENTIONALITY* (1972).

30. See J. MOHANTY, *EDMUND HUSSERL'S THEORY OF MEANING* 54-76 (3d ed. 1976).

31. *Id.* at 24-53.

of experience.³² These laws are called eidetic laws, and phenomenologists have attempted to provide an account of them in such varied contexts as aesthetics, ethics, and logic.³³ Eidetic laws are not found in sensory perception; rather, they refer to the theoretic intuition of the phenomenon's essence.³⁴

The consideration of the phenomenon's essence followed from Husserl's objective of establishing a rigorous basis for science. He believed that science must have an absolutely firm starting point.³⁵ The focus is not on concrete objects that are merely factual or causal,³⁶ but rather on the essence or *eidos* of things.³⁷ The essence is that attribute which makes an object distinct from all others.

Husserl distinguished empirical science from eidetic science.³⁸ Phenomenology is methodologically a science of essences, or an *a priori* science.³⁹ These essences constitute the *phenomena* that comprise the basis of phenomenology. The term "phenomenon" is taken from a Greek term meaning "that which appears."⁴⁰ The es-

32. See E. HUSSERL, *CARTESIAN MEDITATIONS*, *supra* note 26, at 69-75.

33. See, e.g., S. BACHELARD, *A STUDY OF HUSSERL'S FORMAL AND TRANSCENDENTAL LOGIC* (1968); E. KÄELIN, *ART AND EXISTENCE: A PHENOMENOLOGICAL AESTHETICS* (1970); M. SCHELER, *FORMALISM IN ETHICS AND NON-FORMAL ETHICS OF VALUES* (1973).

34. According to Husserl,

If we restrict ourselves to the pure phenomenology of cognition, then we will be concerned with the *essence of cognition* as revealed in direct "seeing," i.e., with a demonstration of it which is carried out by way of "seeing" in the sphere of phenomenological reduction and self-giveness, and with an analytical distinction between the various sorts of phenomena which are embraced by the very broad term "cognition."

E. HUSSERL, *THE IDEA OF PHENOMENOLOGY*, *supra* note 26, at 43 (emphasis in original).

35. See generally E. HUSSERL, *THE CRISIS OF EUROPEAN SCIENCES AND TRANSCENDENTAL PHENOMENOLOGY* (1970).

36. "Natural being is a realm whose existential status [Seinsgeltung] is secondary; it continually presupposes the realm of transcendental being." E. HUSSERL, *CARTESIAN MEDITATIONS*, *supra* note 26, at 21.

37. Husserl argues that behind the experience of natural phenomena lies an essence that can be examined through the phenomenological method: "Thus, to each psychic lived process there corresponds through the device of phenomenological reduction a pure phenomena, which exhibits its intrinsic (imminent) essence (taken individually) as an absolute datum." E. HUSSERL, *THE IDEA OF PHENOMONOLOGY*, *supra* note 26, at 35. Phenomenology's purpose is clarifying experience by identifying the essence of phenomena of consciousness: "If . . . we . . . confine ourselves purely to the task of *clarifying the essence of cognition and of being an object of cognition*, then this . . . will be the first and principal part of phenomenology as a whole." *Id.* at 18 (emphasis in original).

38. See E. HUSSERL, *CARTESIAN MEDITATIONS*, *supra* note 26, at 11-14.

39. See E. HUSSERL, *THE IDEA OF PHENOMONOLOGY*, *supra* note 26, at 46.

40. *The Oxford English Dictionary* traces the term "phenomenon" to the Greek "phainomenon," meaning "to show, pass, to be seen, to appear," thus "appearing, apparent (to the senses or mind), hence things that appear, appearances, phenomena." 2 *THE OXFORD ENGLISH DICTIONARY* 77 (compact ed. 1971). Kant used the term to refer to the appearance

sences of Husserl's descriptive psychology are ideal objects, independent of accidental features of a particular consciousness.⁴¹ The word *phenomena* as used in phenomenology has a different meaning than that adopted by empiricism.⁴² Similarly, its meaning is contrary to the Greek meaning of the term since the meaning adopted by the phenomenologists refers to that which does not appear to the passive attitude.⁴³

The discovery of the *a priori* realm requires an appropriate method; it demands that one turn to the objects themselves.⁴⁴ Objects are not created by our thinking; they are given to us.⁴⁵ According to this theory, we learn of things in an immediate and direct way by neutral descriptions of their essences as they present themselves to us. For Husserl, this involved the eidetic intuition, which is an intellectual faculty of understanding.⁴⁶ Because the phenomena in consciousness are immediately given to us and are

of things, as distinguished from the "thing-in-itself," which, according to Kant, exists but is not accessible to human cognition. One must therefore distinguish Husserl's use of the term from Kant's meaning of particularized form. See I. KANT, *CRITIQUE OF PURE REASON* 256-71 (N. Smith trans. 1956).

41. Husserl states the meaning of the term "phenomena" for phenomenology in this way:

The phenomenology of cognition is the science of cognitive phenomena in two senses. On the one hand it has to do with cognitions as appearances, presentations, acts of consciousness in which this or that object is presented, is an object of consciousness, passively or actively. On the other hand, the phenomenology of cognition has to do with those objects as presenting themselves in this manner. The word "phenomenon" is ambiguous in virtue of the essential correlation between *appearance and that which appears*. Φαινόμενον (phenomenon) in its proper sense means that which appears, and yet it is by preference used for the appearing itself, for the subjective phenomenon

E. HUSSERL, *THE IDEA OF PHENOMENOLOGY*, *supra* note 26, at 11 (emphasis in original).

42. See E. HUSSERL, *CARTESIAN MEDITATIONS*, *supra* note 26, at 17-18.

43. *Id.* at 46.

44. Husserl asserted: "[T]he idea of science and philosophy involves an *order of cognition, proceeding from intrinsically earlier to intrinsically later cognitions*; ultimately, then, a *beginning and a line of advance* that are not to be chosen arbitrarily but have their basis 'in the nature of things themselves.'" *Id.* at 12 (emphasis in original).

45. Husserl argued that "genuine science, must neither make or go on accepting any judgment as scientific *that I have not derived from evidence*, from 'experiences' in which the affairs and affair-complexes in question are present to me as *they themselves*.'" *Id.* at 13 (emphasis in original).

46. Husserl identified the intimate relation with the phenomenological method and the faculty of eidetic intuition in this manner:

[I]f we think of a *phenomenology* developed as an intuitively *apriori* science *purely according to the eidetic method*, all its eidetic researches are nothing else but *uncoverings of the all-embracing eidos, transcendental ego as such*, which comprises all pure possibility-variants of my *de facto* ego and this ego itself *qua possibility*.

Id. at 71 (emphasis in original).

then described, they can be spoken of with absolute certainty.⁴⁷ The truths derived from the phenomenological method, then, are self-evident and not subject to contradiction. Therefore, eidetic intuition provides a firm starting point for inquiry.

An eidetic intuition requires a special method. One must abandon the natural passive attitude to adopt an eidetic attitude.⁴⁸ According to Husserl's methodology, this involves two steps: the "eidetic reduction"⁴⁹ and the "phenomenological reduction."⁵⁰ First, one has to eliminate all existential judgments; one must "bracket" the world and abstract from existence.⁵¹ Only the objects of pure or transcendental consciousness remain after the world is "bracketed."⁵² These then are subject to scrutiny through an examination of the intentionality of pure consciousness in the "phenomenological reduction."⁵³

B. *The Application of the Phenomenological Method to Legal Phenomena*

Wolfgang Friedman suggested⁵⁴ that a basic objective of the legal phenomenologist is overcoming the Kantian antinomy be-

47. See *id.* at 16.

48. Husserl argues that establishing a firm grounding of knowledge requires not only suspending acceptance of the method of the empirical sciences, but suspending belief in the natural world itself:

[D]enyng acceptance to all the sciences given us beforehand, treating them as, for us, inadmissible prejudices, is not enough. Their universal basis, the experienced world, must also be deprived of its naive acceptance. The being of the world, by reason of the evidence of natural experience, must no longer be for us an obvious matter of fact; it too must be for us, henceforth, only an acceptance-phenomenon.

Id. at 18.

49. See E. HUSSERL, *IDEAS: GENERAL INTRODUCTION TO PURE PHENOMENOLOGY* 61-75 (W. Gibson trans. 1931).

50. *Id.* at 27-32.

51. See E. HUSSERL, *CARTESIAN MEDITATIONS*, *supra* note 26, at 26. This "bracketing" of the question of the existence of the world is referred to as the phenomenological epoch and involves setting aside the accidental or existential features of experienced phenomena. See also E. HUSSERL, *IDEAS: GENERAL INTRODUCTION TO PURE PHENOMENOLOGY*, *supra* note 49, at 27-32. See generally Schmitt, *Husserl's Transcendental—Phenomenological Reduction*, 20 *PHIL. & PHENOMENOLOGICAL RESEARCH* 238 (1959-1960).

52. See E. HUSSERL, *CARTESIAN MEDITATIONS*, *supra* note 26, at 25-26.

53. *Id.* at 33-37. See generally Kockelmans, *Intentional and Constitutive Analyses*, in *PHENOMENOLOGY* 137 (J. Kockelmans ed. 1967).

54. Friedman, *Phenomenology and Legal Science*, in 2 *PHENOMENOLOGY AND THE SOCIAL SCIENCES* 343 (M. Natanson ed. 1973). This collection includes two other important papers on phenomenology: Amselek, *The Phenomenological Description of Law*, and Franklin, *The Mandarinism of Phenomenological Philosophy of Law*.

tween the individual and the world.⁵⁵ For the legal scholar, the phenomenological method means investigating particular legal phenomena; distilling the general essences of legal doctrines, concepts, and institutions and their relations; and interpreting the meaning of legal phenomena themselves.⁵⁶

Donald Morano provided an interesting and illustrative example of the phenomenological method in an article examining liability for negligence.⁵⁷ Morano used the standard definition of negligence: "culpable inadvertence."⁵⁸ He began by identifying "three salient and crucial dilemmas"⁵⁹ in determining liability for negligent conduct: (1) If the negligent person's liability is founded purely on inadvertence, then how can the content or nature of negligence be determined, since the negligent person was not aware of the neglect;⁶⁰ (2) If liability ordinarily requires a culpable mental state, how can a person be legally responsible without having thought of the legally proscribed act;⁶¹ and (3) Why should the negligent party suffer moral condemnation if he lacks the requisite culpability? According to Morano, the last two dilemmas are inter-related. Even though a negligent person effects harm through inad-

55. Friedman, *supra* note 54, at 344.

56. *Id.*

57. Morano, *supra* note 25.

58. *Id.* at 136. The definition of negligence as "culpable inadvertence" is not an idiosyncratic characterization. It reflects a mainstream understanding of the concept.

The fourth kind of culpability is negligence. It is distinguished from acting purposely, knowingly or recklessly in that it does not involve a state of awareness. It is the case where the actor creates inadvertently a risk of which he ought to be aware, considering its nature and the purpose of his conduct and the care that would be exercised by a reasonable person in his situation.

MODEL PENAL CODE 126 (Tent. Draft No. 4, 1955).

59. Morano, *supra* note 25, at 136.

60. *Id.* The significance of this dilemma is particularly acute for a phenomenologist, who seeks to examine the content of consciousness. Similarly, Glanville Williams maintains, "Although negligence has occasionally been treated as a form of *mens rea*, there seems to be every argument against this view. (1) Negligence is not by definition a state of mind, except in the negative feature of intention . . ." G. WILLIAMS, CRIMINAL LAW § 36, at 102-03 (2d ed. 1961) (footnotes omitted).

61. Morano, *supra* note 25, at 136-38; see also J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 114 (2d ed. 1960). Hall argues that negligence lacks *mens rea* and voluntary causing of injury, which are prerequisites of criminal culpability:

[N]egligence implies inadvertence, i.e., that the defendant was completely unaware of the dangerousness of his behavior although actually it was unreasonably increasing the risk of the occurrence of an injury. . . . If state of mind denotes an active process, inadvertence is excluded. . . . Since conduct implies an end that is sought or hazarded, it is evident that a homicide or a battery is not voluntarily effected by negligent behavior.

Id.

vertence, he is nevertheless regarded as responsible and remiss for failing to take due care.⁶² An appraisal of a negligent person as immoral, however, seems to fly in the face of the unambiguous moral tradition of the West, which holds an individual guilty only if he has acted intentionally or with a culpable mental state.

Ultimately, viewing negligence as inadvertence leads to a radical distinction between intentionally causing harm and causing harm through an *inadvertent* disregarding of risk.⁶³ This radical break leads to an inherent contradiction in such terms as "willful" and "wanton" negligence.⁶⁴ An understanding of negligence enriched by a phenomenological analysis permits one to avoid this radical dichotomy and apparent contradiction.

To resolve the dilemmas posed by a consideration of negligence as culpable inadvertence, Morano proposes a phenomenological analysis of negligence. According to Morano, a phenomenology of negligence would intuit the invariant structure of negligence; that is, determine the *meaning* of negligence for consciousness.⁶⁵ Morano begins by noting that consciousness cannot focus on everything at once and that every inclusion is, simultaneously, the exclusion of all that is not included.⁶⁶ This understanding of attention provides a negative definition of inattentiveness or

62. Morano, *supra* note 25, at 138; see also J. HALL, *supra* note 60. Hall maintains that "[t]he relevant ethical principle expressed in terms of *mens rea*, that penal liability should be limited to the voluntary (intentional or reckless) commission of harms forbidden by penal law, represents not only the perennial view of moral culpability, but the plain man's morality." *Id.* at 133-34.

63. See G. WILLIAMS, *supra* note 60, at 103.

Mens rea is a general requirement for crime at common law; but negligence is not usually sufficient. In other words, negligence is not the kind of *mens rea* that characterizes the ordinary run of crimes. This is because the justification for punishing thoughtlessness is not so strong as the justification for punishing foresight.

Id.

64. See J. HALL, *supra* note 61, at 124 for one perspective on this supposed contradiction:

The opinions run in terms of wanton and wilful negligence, gross negligence, and more illuminating yet, that degree of negligence that is more than the negligence required to impose tort liability. The apex of this infelicity is wilful, wanton negligence, which suggests a triple contradiction—negligence implying inadvertence; wilful, intention; and wanton, recklessness.

65. Morano, *supra* note 25, at 135. Morano is in fact applying the phenomenological method as developed by Husserl. See E. HUSSERL, *THE IDEA OF PHENOMENOLOGY*, *supra* note 26, at 56, where Husserl explains that "the universal is constituted in the consciousness of universality which is built up from perception and imagination. The content of intuition, in the sense of a particular essence, is constituted in either imagination or perception indifferently, while abstracting from existential claims."

66. Morano, *supra* note 25, at 139.

inadvertence. Inattention, then, is essentially an omission. But not all inattentiveness is negligent. Although negligence is to be understood as an omission, it also presupposes a duty of attentiveness. Negligence, then, is either a failure to take due care in an activity one is performing, or a failure to perform an activity that one has a duty to perform.⁶⁷

From a phenomenological point of view, the definition of negligence as "culpable inadvertence" results from an overly narrow view of human activity. The narrow view examines the inattentiveness of the agent to a danger at hand during an isolated moment, in which his failure results in harm. In contrast, phenomenologists consider human action on an ongoing basis and in a broader time perspective.⁶⁸ In a car accident in which a driver hits a pedestrian in a crosswalk, the driver's inattention at the time of the collision does not cause the accident; it is caused by the driver's preoccupation with other concerns. Understood in this context, the driver's activity involves attention to "other" concerns and a consequent increase in the risk of driving.

A second insight gained by a phenomenological consideration of human consciousness is that perceptive attention is not an all-or-nothing proposition.⁶⁹ Attention is not simply a matter of either having or not having a specific concern in one's consciousness. Rather, active awareness simultaneously involves holding various complexes or modalities. These include perception, concepts, memory, feelings, imagination, and anticipation. Complexes and modalities appear in various gradations of sharpness and centrality for an individual at any particular moment. Thus, one has only a marginal awareness of many of the objects that exist in one's consciousness.⁷⁰ Accordingly, it would be unusual to be totally oblivious to an object of concern for which one is being charged with negligence. When this negligence continues over time, and a person consistently fails to be attentive to this concern, one may say that the individual is reckless, or perhaps even "willfully negligent," because the general disregard for the proper object of concern involves a chosen orientation. Within this account, negligence and recklessness exist on a continuum, rather than as separate categories. Moreover, the term "willful negligence" loses its apparent contradictory quality.

67. *Id.*

68. *Id.* at 140.

69. *Id.* at 140-42.

70. *Id.* at 141.

Morano's phenomenological analysis of negligence significantly adds to one's understanding of the concept. It avoids the dilemmas and contradictions posed by a traditional characterization of negligence. Negligence is understood as culpable conduct because it reveals a failure to sufficiently attend to important features of a situation. It is seen as both related to, and distinguishable from, fully intentional action: negligence involves a probability of adverse consequences, rather than the substantial certainty that accompanies intentional action. Phenomenologically, negligence is a culpable misdirection of inattention. It is viewed as an individual's semiconscious choice to ignore certain due concerns.

This consideration of negligence indicates a principal objective of the phenomenological approach to law: the clarification of legal values and postulates, and identification of their ultimate philosophical foundations. Phenomenology's approach identifies the essence of legal principles and institutions in a way that is neither positivistic nor based on natural law. It is not positivistic because it does not confine the ordering and interpretation of a legal system to matters posited by legal authority or empirical data.⁷¹ Similarly, the phenomenological method avoids analysis rooted in a natural law theory⁷² of an immutable order by examining the immanent properties of legal principles and precepts in consciousness of the phenomena. By locating these phenomena in the human consciousness, the phenomenological method seeks to clarify their nature *in consciousness* to determine "their" essences. Such an approach seeks to eliminate the apparent contradictions in empirical analyses of legal phenomena.

III. STRUCTURALISM

A. *A Description of Structuralism*

Traditional accounts of legal reasoning emphasize the evolutionary and functional significance of individual judicial decisions. This approach involves case-by-case doctrinal developments in which solutions are found for new problems raised by litigants who are attempting to limit or expand a particular line of decisions. Judicial opinions are viewed as enunciating general principles; later decisions reflect efforts to "fill the gaps" of a doctrinal rule and to extend the rule to new areas. This method of legal analysis

71. See generally S. SHUMAN, *LEGAL POSITIVISM* (1963).

72. See generally A. D'ENTREVES, *NATURAL LAW* (2d ed. 1970).

stems from a perception of judicial decision-making as an institutional process for weighing and balancing the interests of litigants and thereby providing a resolution of conflicting values or interests.⁷³ Within this traditional view, legal opinions are representations of conscious and rational expressions and choices of legal principle. Accordingly, they provide a conceptual framework for resolving future conflicts.

Traditional accounts of legal reasoning fail to establish an unconscious foundation for the development and evolution of legal doctrine. A structuralist approach addresses this failure by identifying the underlying foundations in human consciousness for the development and evolution of legal doctrine. Structuralism is a systematic attempt to uncover deep universal mental structures as they manifest themselves in social and cultural phenomena.⁷⁴ The nature of structure and the theory of innate cognitive structures first found expression in the field of linguistics, and subsequently in such diverse fields as psychology, anthropology, and literary criticism.⁷⁵

To illustrate the nature of structuralist theory, this discussion will concentrate on the work of Claude Levi-Strauss.⁷⁶ Levi-Strauss

73. See G. GOTTLIEB, *THE LOGIC OF CHOICE* (1968):

Since World War II in particular, the [United States Supreme] Court has been dominated by a philosophy of adjudication founded upon the weighing of competing values. This philosophy contemplates the role of the Court in constitutional issues as the exercise of the choice between competing claims and interests and this choice is deemed to rest upon the exercise of practical judgment based upon the factual particularities of each case rather than upon the guidance of rule or principle.

Id. at 133-35 (footnotes omitted).

74. See, e.g., Mepham, *The Structuralist Sciences and Philosophy*, in *STRUCTURALISM: AN INTRODUCTION* 104 (D. Robey ed. 1973). The author describes the basic feature of Levi-Strauss's structuralist methodology in the following terms: "The most general point he makes is that the forms of social life consist of systems of behavior that represent the projection, on the level of conscious and socialized thought, of universal laws which regulate unconscious activities of the mind." *Id.* at 107.

75. For a recent study in this area, see N. CHOMSKY, *THE LOGICAL STRUCTURE OF LINGUISTIC THEORY* (1975). See also J. CULLER, *STRUCTURALIST POETICS* (1975); C. LEVI-STRAUSS, *STRUCTURAL ANTHROPOLOGY* (1963); J. PIAGET, *THE PRINCIPLES OF GENETIC EPISTEMOLOGY* (W. Mays trans. 1972).

76. A more complete account of structuralist theory requires examination of the work of Noam Chomsky and Jean Piaget. The principal works of Claude Levi-Strauss are: *THE ELEMENTARY STRUCTURES OF KINSHIP* (1969); *FROM HONEY TO ASHES* (1973); *MYTH AND MEANING* (1978); *THE NAKED MAN* (1981); *THE ORIGIN OF TABLE MANNERS* (1978); *THE SAVAGE MIND* (1966); *THE SCOPE OF ANTHROPOLOGY* (1977); *1 STRUCTURAL ANTHROPOLOGY* (1963); *2 STRUCTURAL ANTHROPOLOGY* (1976); *TOTEMISM* (1962); *TRISTES TROPICQUES* (1974). The following works are valuable commentaries: C. BADCOCK, *LEVI-STRAUSS: STRUCTURALISM AND SOCIOLOGICAL THEORY* (1975); A. JENKINS, *THE SOCIAL THEORY OF CLAUDE LEVI-STRAUSS*

has made the search for the fundamental properties of human thought the focus of his work.⁷⁷ His basic objective is uncovering the universal, basic structure of human thought,⁷⁸ which is deep below the surface but is manifested in myth, language, cooking, table manners, and the general structures of social life. This basic structure, which is termed "deep structure," will identify cross-cultural similarities.⁷⁹

The anthropology of Claude Levi-Strauss grew out of the supposition that "the theories and methods of structural linguistics are directly or indirectly applicable to the analysis of all aspects of human culture, in so far as all of these, like language, may be interpreted as systems of signs."⁸⁰ According to Levi-Strauss, all social activities and expression are types of communication that are structured by the unconscious mechanism of the mind, which operates according to laws corresponding to the grammar of a language.⁸¹ Through consideration of linguistic analysis and a study of

(1979); E. LEACH, CLAUDE LEVI-STRAUSS (rev. ed. 1974); O. PAZ, CLAUDE LEVI-STRAUSS: AN INTRODUCTION (1970); T. SHALVEY, CLAUDE LEVI-STRAUSS: SOCIAL PSYCHOTHERAPY AND THE COLLECTIVE UNCONSCIOUS (1979).

77. See C. LEVI-STRAUSS, MYTH AND MEANING 16 (1978):

What I tried to show in *Totemism* and in *The Savage Mind*, for instance, is that these people whom we usually consider as completely subservient to the need of not starving, of continuing able just to subsist in very harsh material conditions, are perfectly capable of disinterested thinking; that is, they are moved by a need or desire to understand the world around them, its nature and their society. On the other hand, to achieve that end, they proceed by intellectual means, exactly as a philosopher, or even to some extent a scientist, can and would do.

78. See C. LEVI-STRAUSS, STRUCTURAL ANTHROPOLOGY (C. Jacobson & B. Schoepf trans. 1963). In this study Levi-Strauss described the process of identifying deep structures as one involving a sophisticated analysis directed at the objective of breaking through surface appearances. To the extent that basic structural elements seem apparent, one must be aware that these elements may mask more fundamental aspects of structure. Levi-Strauss observed that "structural analysis is confronted with a strange paradox well known to the linguist, that is: the more obvious structural organization is, the more difficult it becomes to reach it because of the inaccurate conscious models lying across the path which leads to it." *Id.* at 281.

79. See generally C. LEVI-STRAUSS, 1-4 INTRODUCTION TO A SCIENCE OF MYTHOLOGY (J. & D. Weightman trans. 1969-1981).

80. *Introduction to STRUCTURALISM: AN INTRODUCTION* 2 (D. Robey ed. 1973).

81. See C. LEVI-STRAUSS, MYTH AND MEANING 19 (1978): "It is probably one of the many conclusions of anthropological research that notwithstanding the cultural differences between the several parts of mankind, the human mind is everywhere one and the same and that it has the same capacities." See also R. DEGEORGE & F. DEGEORGE, THE STRUCTURAL FROM MARX TO LEVI-STRAUSS (1972):

Structural linguistics provides the methodological model which Levi-Strauss has adapted to his anthropological analysis. He treats cooking, music, art, modes of dress, table manners, and other forms of social activity as if each were a lan-

social structure, Levi-Strauss arrives at a general structural model.

A structure consists of a model that must conform to four basic requirements:

First, the structure exhibits the characteristics of a system. It is made up of several elements, none of which can undergo a change without effecting changes in all the other elements.

Second, for any given model there should be a possibility of ordering a series of transformations resulting in a group of models of the same type.

Third, the above properties make it possible to predict how the model will react if one or more of its elements are submitted to certain modifications.

Finally, the model should be constituted so as to make immediately intelligible all the observed facts.⁸²

The critical step in constructing a structuralist model is identifying the deep structures or the elements that provide a basis for transformation into the complex surface phenomena under consideration. It is in the deep structures of the unconscious that one finds the basic foundation of human thought: the process of categorization and organization.

Levi-Strauss summarized this core aspect of the structuralist method in the following manner:

If, as we believe to be the case, the unconscious activity of the mind consists in imposing forms upon content, and if these forms are fundamentally the same for all minds—ancient and modern, primitive and civilized (as the study of the symbolic function, expressed in language, so strikingly indicates)—it is necessary and sufficient to grasp the unconscious structure underlying each institution and each custom, in order to obtain a principle of interpretation valid for other institutions and other customs, provided of course that the analysis is carried far enough.⁸³

Levi-Strauss employed this structuralist method in ethnographic and anthropological investigations.⁸⁴ After examining the myths of

guage, since each is a model of social expression. Like language, each is a type of communication, a form of expression, and a system of behavior which is structured by unconscious laws. The structure of each corresponds to the grammar of language.

Id. at xxiv-xxv.

82. C. LEVI-STRAUSS, *STRUCTURAL ANTHROPOLOGY*, *supra* note 78, at 279-80.

83. C. LEVI-STRAUSS, *MYTH AND MEANING*, *supra* note 81, at 21.

84. See C. LEVI-STRAUSS, *THE ORIGIN OF TABLE MANNERS* (1978); C. LEVI-STRAUSS, *THE NAKED MAN* (1981).

the tribal peoples of South America, Levi-Strauss concluded that there was a logical similarity between the polarities of cooking, sound, and human self-consciousness.⁸⁵ To understand the significance of the transformation of raw food into cooked food, one must understand this transformation as a manifestation of a deep structure of the relation between nature and culture. This relation of raw/cooked is to fresh/putrid in the case of food as silence is to noise and as the deep structure of culture is to nature.⁸⁶ This deep structure in the human mind operates on the objects and sensory characteristics of surface phenomena such as food and sound, as well as on the forms of social organization and communication.

B. *A Structuralist Analysis of the Development of Legal Doctrine*

A structuralist account of legal reasoning should manifest the characteristics of the methods developed by Levi-Strauss. In place of the evolutionary or developmental account of legal reasoning, deep structures and rules of transformation would provide an organic account of the development of legal doctrine. Structural analysis posits an unconscious but cognitive foundation which, through transformational operations, provides the surface structures of legal phenomena.

To illustrate the structuralist methodology as applied to legal theory, I will briefly report on an earlier work of mine that was published under the title, *A Structuralist Approach to Legal Reasoning*.⁸⁷ In this article, I examined the contrast between the traditional account of legal reasoning and a structuralist account by reference to the law of electronic surveillance,⁸⁸ monopolies,⁸⁹ and products liability.⁹⁰ The present discussion will be limited to an analysis of products liability. The power of the structuralist approach is revealed by the extent to which it can identify a basic deep structure underlying apparently disparate areas of law.⁹¹ For purposes of this discussion, however, it will suffice to report on one substantive area of doctrinal development.

This discussion focuses on the application of traditional legal

85. C. LEVI-STRAUSS, *THE RAW AND THE COOKED* (J. & D. Weightman trans. 1969).

86. *Id.* at 1-2; see also Leach, *Brain-Twister*, N.Y. Rev. Books, Oct. 12, 1967, at 6, 8, 10.

87. 48 S. CAL. L. REV. 1131 (1975).

88. *Id.* at 1161-68, 1185-87.

89. *Id.* at 1168-72, 1183-85.

90. *Id.* at 1172-79, 1182-83.

91. *Id.* at 1187-92.

analysis to the theory of products liability developed by the New York courts. *Thomas v. Winchester*,⁹² decided in 1852, was an early departure from the common-law rule that usually denied recovery for personal injuries if there was no privity of contract between the purchaser and the manufacturer of a product. The case involved the purchase by Thomas of a bottle of medication that was mislabeled "extract of dandelion," a mild medicine; it was in fact extract of belladonna, a vegetable poison. A small quantity of the medicine was administered to Mrs. Thomas, producing very alarming effects. The court acknowledged that in a normal contract case, lack of privity would have prevented the injured wife from recovering damages.⁹³ The court, however, considered the nature of the drug business and the character of the product being produced, and created a special duty on the part of the manufacturer-seller to users of its product. The mislabeling of a poisonous drug was held to naturally and almost inevitably result in serious harm or death to the person who used it.⁹⁴ The "inherently dangerous" nature of the product established a new standard of liability.⁹⁵

In *Loop v. Litchfield*,⁹⁶ the New York Court of Appeals attempted to clarify and restrict its earlier decision. In *Loop*, a defectively manufactured flywheel was sold to a purchaser who was informed of its defects. After five years of use, a neighbor took possession of the wheel and was killed when it came apart. The court distinguished *Thomas v. Winchester* and advanced a theory that conditioned liability on the "imminently dangerous" nature of the object in question. The court concluded that in the sale of a mislabeled poison, "[t]he injury . . . was a natural result of the act," but in the case of a defective flywheel, "[t]he bursting of the wheel and the injury to human life was not the natural result or the expected

92. 6 N.Y. 397 (1852).

93. *Id.* at 407-08. The court noted: "If, in labeling a poisonous drug with the name of a harmless medicine, for public market, no duty was violated by the defendant, excepting that which he owed to [the retailer], his immediate vendee in virtue of his contract of sale, this action cannot be maintained." The court cited *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842), as authority for the bar to recovery on a contract by a plaintiff who lacked privity.

94. 6 N.Y. at 409.

95. *Id.* at 410. The court concluded, "The defendant's duty arose out of the nature of his business and the danger to others incident to its mismanagement. Nothing but mischief like that which actually happened could have been expected from sending the poison falsely labeled into the market; and the defendant is justly responsible for the probable consequence of the act."

96. 42 N.Y. 351 (1870).

consequence of the manufacture and sale of the wheel."⁹⁷

A major shift in the theory of manufacturer-seller's liability for dangerous products occurred in *Devlin v. Smith*.⁹⁸ Smith, a defendant, entered into a contract with Stevenson, his codefendant, for the construction of a scaffold for the use of Smith's employee, the plaintiff. Smith's employee was injured when the scaffold collapsed; however, the court held that Smith was not liable under a restricted rule of employer's liability. But as the party responsible for the negligent construction of the scaffold, Stevenson was held liable to the injured workman because he constructed a scaffold that would be imminently dangerous to the user if negligently constructed. Thus, the common-law rule was extended to provide liability for the negligent manufacture of a product that becomes dangerous because it was defectively produced. The court limited liability with a narrow rule of foreseeability. Accordingly, liability to third parties could arise if a defect rendered a product imminently dangerous and serious personal injury was a natural and probable consequence of its use.⁹⁹

In *MacPherson v. Buick Motor Co.*,¹⁰⁰ the New York Court of Appeals extended manufacturers' product liability to include all injuries resulting from negligent manufacture. In *MacPherson* the plaintiff sued for injuries sustained in an accident caused by a de-

97. *Id.* at 359-60. The court reasoned:

The appellants . . . seek to bring their case within [*Thomas v. Winchester*], by asserting that the fly wheel in question was a dangerous instrument. Poison is a dangerous subject. Gunpowder is the same. A torpedo is a dangerous instrument, as is a spring gun, a loaded rifle or the like. These are instruments and articles in their nature calculated to do injury to mankind, and generally intended to accomplish that purpose. They are essentially, and in their elements, instruments of danger. Not so, however, an iron wheel, a few feet in diameter and a few inches in thickness, although one part may be weaker than another.

Id. at 358-59.

98. 89 N.Y. 470 (1882).

99. *Id.* at 477. The court noted that ordinarily liability of a manufacturer for defects of a product would be limited by privity. Here the court held, however, that the defendant was liable. The court reasoned:

[N]otwithstanding this rule, liability to third parties has been held to exist when the defect is such as to render the article in itself imminently dangerous, and serious injury to any person using it is a natural and probable consequence of its use. As where a dealer in drugs carelessly labeled a deadly poison as a harmless medicine, it was held that he was liable not merely to the person to whom he sold it, but to the person who ultimately used it, though it passed through many hands. This liability was held to rest, not upon any contract or direct privity between him and the party injured, but upon the duty which the law imposes on every one to avoid acts in their nature dangerous to the lives of others.

Id.

100. 217 N.Y. 382, 111 N.E. 1050 (1916).

fective wheel placed by the defendant-manufacturer on an automobile that had been sold to, and then resold by, a retailer. One of the Buick Motor Company's suppliers had actually manufactured the wheel. Evidence showed that the defects in the wheel could have been discovered by an inspection, which the manufacturer had failed to make. In holding for the plaintiff, the court relied on *Thomas v. Winchester*, which it read as providing a basis for liability turning not on the inherent, natural dangerousness of the product, but on the duty of a manufacturer to provide a safe product to those foreseeably affected by the product.¹⁰¹ The effect of *MacPherson* was to shift the analysis of product liability from an examination of the nature of the product to the duty of a manufacturer not to be negligent in a manner that might foreseeably injure persons who can be expected to use, or be exposed to, the product.¹⁰²

In a structural analysis of the development of legal doctrine, one begins with the premise that the significance of each opinion lies not in its surface formulations, but in the unconscious deep structures guiding the decision. Hints of these deep structures can be found both in the language of the decisions and in the terms in which the doctrinal postulates are cast. The focus of a structural analysis of legal doctrine is to discover and formulate the deep structures and rules of transformation that operate in judicial decision-making. To illustrate a structuralist methodology, it will be necessary to reexamine the doctrinal development of products lia-

101. *Id.* at 385, 111 N.E. at 1051. Judge Cardozo, writing for the majority, reformulated *Thomas v. Winchester*:

The foundations of this branch of law, at least in this state, were laid in *Thomas v. Winchester*. A poison was falsely labeled. The sale was made to a druggist, who in turn sold to a customer. The customer recovered damages from the seller who affixed the label. "The defendant's negligence," it was said, "put human life in imminent danger." A poison falsely labeled is likely to injure anyone who gets it. Because the danger is to be foreseen, there is a duty to avoid the injury.

Id.

102. *Id.* at 389, 111 N.E. at 1053. The court stated its holding in terms of foreseeable injury to persons foreseeably affected by the product:

We hold, then, that the principle of *Thomas v. Winchester* is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.

Id.

bility in the New York Court of Appeals.

In its original formulation, the doctrine of products liability limited the manufacturer's liability to cases in which products were inherently dangerous and negligence in their manufacture led to injury.¹⁰³ This formulation offers a surface structural opposition between the person injured by use of a product and the immanently dangerous product negligently manufactured. This surface opposition can be viewed as a reflection of a deep fundamental opposition which characterizes human existence: the dichotomy between self and environment.¹⁰⁴

A variation of this conceptual opposition occurred when the New York Court of Appeals, in *Devlin v. Smith*,¹⁰⁵ broadened its rule of liability. The court began to focus on the danger to other persons resulting from negligent manufacture, rather than the inherently dangerous nature of the product. This shift in focus resulted in the mediation of the deep structural element of environment:¹⁰⁶ the natural condition of the product has been transformed by negligence into a dangerous, unnatural product. This variation can be thought of as a second aspect of environment, the human-created environment.

In *MacPherson v. Buick Motor Co.*, the court abandoned its inquiry into the nature of the product and created a duty on the

103. The opinion in *Thomas v. Winchester* explicitly refers to the "nature" of the product and the "imminent danger" created by its negligent preparation. The court noted, "The death or great bodily harm of some person was the natural and almost inevitable consequence of the sale of belladonna by means of the false label." 6 N.Y. 397, 409 (1852). The defendant's negligent false labeling "put human life in *imminent danger*." *Id.* at 410 (emphasis added).

104. This fundamental opposition of self and environment is central in psychoanalytic theory. As one commentator noted: "[T]he infant's original interest in its environment is as a possible source of gratification. The parts of the psyche which have to do with exploiting the environment gradually develop into what we call the ego." C. BRENNER, AN ELEMENTARY TEXTBOOK OF PSYCHOANALYSIS 41 (1973). See generally M. MERLEAU-PONTY, *The Child's Relations with Others*, in *THE PRIMACY OF PERCEPTION* 96-155 (J. Edie ed. 1964). Merleau-Ponty has made much of the child's need to organize its experience by developing dichotomies of self from world and self from others. The child's perception is said to involve a "profound operation whereby the child organizes his experience of external events—an operation which thus is properly neither logical nor a predicative activity." *Id.* at 98.

105. 89 N.Y. 470, 478 (1882); see *supra* text accompanying notes 98-99. The court suggested that it was not the nature of the product but the nature of the defect that gave rise to liability. The court observed: "Any defect or negligence in [the scaffold's] construction, which should cause it to give way, would naturally result in these men being precipitated from that great height." *Id.*

106. Environment gives rise to a mediate opposition of natural environment and unnatural or fabricated environment, an opposition of organic and inorganic and ultimately an opposition of natural and social environment.

part of the manufacturer to avoid foreseeable harm resulting from negligent manufacture.¹⁰⁷ The fundamental opposition of self and environment, which includes the previously discussed second aspect, was further transformed into an opposition of individual (foreseeable user of the product) and other (manufacturer whose negligence resulted in foreseeable injuries). The opposition of natural environment and unnatural environment was transformed into an opposition of material world of the manufacturer and social world, which is characterized by the establishment of rights and duties.

In these product liability cases, one observes a shift in major doctrinal premises from a reliance on the nature of the product to a consideration of the foreseeability of injury within a social context. This reflects a transformation of the deep structural opposition of self and environment to a second deep structural opposition of individual and others. This transformation is manifested in the surface structure of the present doctrine of a duty of the manufacturer to any foreseeable person affected by the product for the foreseeable consequences of the manufacturer's negligence.

The opening of legal discourse to a new methodology that avoids the formalistic and idealistic aspects of traditional analysis is perhaps the most important contribution that structuralism can make to an enriched legal scholarship. This approach provides an underlying explanation for the shifts in doctrinal analysis that is rooted in the nature of human thought itself. The opening of legal discourse to examination and criticism from an extrinsic point of view will now be taken up by the discussion of a third area of contemporary continental thought: hermeneutics.

IV. HERMENEUTICS

A. *A Description of Hermeneutics*

A hermeneutical approach to the study of law focuses on the language of law and the problem of meaning, rather than on the

107. 217 N.Y. 382, 111 N.E. 1050 (1916). The court explicitly rejected the argument that liability turned on the nature of the product: "The defendant argues that things imminently dangerous to life are poisons, explosives, deadly weapons—things whose normal function it is to injure or destroy. But whatever the rule in *Thomas v. Winchester* may once have been it has no longer that restricted meaning." *Id.* at 387, 111 N.E. at 1052. In its place, the court adopted a rule which turns on a duty of vigilance following from the foreseeability of injury resulting from the use of a defectively manufactured product. The court stated: "In such circumstances, the presence of a known danger, attendant upon a known use, makes *vigilance a duty.*" *Id.* at 390, 111 N.E. at 1053 (emphasis added).

elucidation of concepts or ideas that have dominated American legal philosophy.¹⁰⁸ This focus emphasizes the constitutive nature of language in judicial decision-making and statutory interpretation. Its concern, therefore, is with the active, rather than passively descriptive, function of language.¹⁰⁹

The significance of a hermeneutical approach to the study of law may be seen by comparing it with H.L.A. Hart's approach.¹¹⁰ Hart stated his position on legal language in the following terms:

If we are to communicate with each other at all, and if, as in the most elementary form of law, we are to express our intentions that a certain type of behavior be regulated by rules, then the general words we use . . . must have some standard instance in which no doubts are felt about its application. There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out.¹¹¹

Hart's theory of language has far-ranging implications for legal decision-making:

[I]nstead of saying that the recurrence of penumbral questions shows us that legal rules are essentially incomplete . . . we shall say that the social policies which guide the judges' choice are in a sense there for them to discover; the judges are only "drawing

108. See M. ABRAMS, *A GLOSSARY OF LITERARY TERMS* (4th ed. 1981):

In the narrow sense, to *interpret* a work . . . is to clarify the meaning of its language by means of analysis, paraphrase, and commentary Since the nineteenth century, however, "*hermeneutics*" has come to designate the general theory of interpretation; that is, a formulation of the procedures and principles involved in getting at the meaning of all written texts, including legal, expository, and literary, as well as biblical *texts*.

Id. at 84 (emphasis added). For a relatively standard approach to contemporary jurisprudential interpretation, see Curtis, *A Better Theory of Legal Interpretation*, 3 *VAND. L. REV.* 407 (1950).

109. See, e.g., M. SHAPIRO, *LANGUAGE AND POLITICAL UNDERSTANDING: THE POLITICS OF DISCURSIVE PRACTICES* 86-87 (1981):

[T]he traditional distinction between normative and nonnormative (empirical) discourse is based on unsupportable theories of meaning. Objectivist approaches to normative discourse fail . . . because of their exclusive focus on the referral function of utterances and because of their oversimplified notion of what it means for a term or expression to refer to something. As Wittgenstein and Austin, among others, have shown, the relationship between speech and phenomenon is complex. The positions on normative discourse discussed thus far break down because words—ethical terms and expressions among others—cannot be understood outside of the rhetorical context in which they are used.

110. See Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593 (1958).

111. *Id.* at 607.

out" of the rule what, if it is properly understood, is "latent" within it.¹¹²

Language, in Hart's view, communicates both an objective meaning and an implicit meaning. Rules of law, which are necessarily expressed in terms of language, have implicit meaning that the judge must draw out.

Hart's description of judicial activity depends upon a theory of language in which there is some *fixed* meaning, with both central and peripheral clarities. This meaning is independent of the contextual use of language and the use of concepts. The jurist need only draw out that which is already given. To a large extent, this is an idealistic position: The jurist's interpretation is a constitutive reproduction of what is already given. Lon Fuller challenged this view by questioning whether it was helpful to distinguish between core and penumbral meanings of a word or concept.¹¹³ Contemporary hermeneutics goes further in its challenge; it questions the existence of any *ultimately* objective or discoverable meaning.¹¹⁴ The jurisprudential implications are great. According to this view, the judge must act in every case like a legislator, giving meaning to language through the act of interpretation. The judge must act *creatively* to transform the relationship between legal rule and legal fact. Because there are no given principles of law to be found, it is mere myth-making to posit that judges are only drawing out a rule that is latent within the factual setting.

Hermeneutics, a term derived from the Greek, is defined as "related to explaining," with "explaining" understood as clarifying or rendering clear the unclear.¹¹⁵ It is derived from the name of the

112. *Id.* at 612.

113. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 647 (1958).

114. See, e.g., Derrida, *Living On*, in DECONSTRUCTION AND CRITICISM 75 (1979). Derrida suggests the impossibility of translation and proposes the alternative of providing a reading of a text:

"[I]n other words" does not put the same thing into other words, does not clarify an ambiguous expression, does not function like an "i.e." It amasses the powers of indecision and adds to the foregoing utterance its capacity for skidding. Under the pretext of commenting upon a terribly indeterminate, shifting statement, a statement difficult to pin down [*arrêter*], it gives a reading or version that is all the less satisfactory, controllable, unequivocal, for being more "powerful" than what it comments upon or translates. The supposed "commentary" of the "i.e." or "in other words" has furnished only a textual supplement that calls in turn for an overdetermining "in other words," and so on and so forth.

Id. at 75; see also J. DERRIDA, OF GRAMMATOLOGY (1976).

115. See R. PALMER, HERMENEUTICS 13 (1969).

ancient Greek god Hermes, who was the Olympians' messenger.¹¹⁶

Hermeneutics first arose in theology.¹¹⁷ The practice of Biblical exegesis generated questions about whether Scriptures were to be taken literally or metaphorically; that is, whether they were self-explanatory or required authoritative elucidation.¹¹⁸ In the nineteenth century, German philosophers such as Schleiermacher¹¹⁹ and Dilthey¹²⁰ placed hermeneutics in a wider context when they attempted to develop systematic principles and methods for understanding expression in general. The method's range of application was further expanded in this century by existentialist philosophers such as Heidegger¹²¹ and Gadamer.¹²² Important work on theories of interpretation has more recently been accomplished by Ricoeur,¹²³ Derrida,¹²⁴ Foucault,¹²⁵ and Althusser.¹²⁶

116. *Id.*

117. See P. RICOEUR, *INTERPRETATION THEORY: DISCOURSE AND THE SURPLUS OF MEANING* 22 (1976). Robert Culley presents a contemporary application of interpretative theory to biblical texts. See R. CULLEY, *STUDIES IN THE STRUCTURE OF HEBREW NARRATIVE* (1976).

118. P. RICOEUR, *supra* note 117 at 22.

119. See, e.g., F. SCHLEIERMACHER, *HERMENEUTIK UND KRITIK* (1838).

120. See, e.g., W. DILTHEY, *MEANING IN HISTORY* (H. Rickman ed. 1961). For critical commentary, see H. HODGES, *THE PHILOSOPHY OF WILHELM DILTHEY* (1952); T. PLANTINGA, *HISTORICAL UNDERSTANDING IN THE THOUGHT OF WILHELM DILTHEY* (1980); H. RICKMAN, *WILHELM DILTHEY: PIONEER OF THE HUMAN STUDIES* (1979).

121. See, e.g., M. HEIDEGGER, *BEING AND TIME* (J. Macquarrie & E. Robinson trans. 1962). For a collection of useful papers on Heidegger's approach to hermeneutics, see MARTIN HEIDEGGER AND THE QUESTION OF LITERATURE: TOWARD A POSTMODERN LITERARY HERMENEUTICS (W. Spanos ed. 1979).

122. See, e.g., H. GADAMER, *PHILOSOPHICAL HERMENEUTICS* (1976); H. GADAMER, *TRUTH AND METHOD* (1975).

123. Paul Ricoeur began his interpretative activity in scriptural hermeneutics and extended his concern with symbolic systems of interest to social studies. See P. RICOEUR, *HERMENEUTICS AND THE HUMAN SCIENCES* (1981); P. RICOEUR, *HISTORY AND TRUTH* (1965); P. RICOEUR, *INTERPRETATION THEORY* (1976); P. RICOEUR, *THE CONFLICT OF INTERPRETATIONS: ESSAYS IN HERMENEUTICS* (1974); see also C. REAGAN, *STUDIES IN THE PHILOSOPHY OF PAUL RICOEUR* (1979).

124. Jacques Derrida, best known for his work on the critical activity of deconstruction, focuses on the activities of speaking and reading. See J. DERRIDA, *DISSEMINATION* (1981); J. DERRIDA, *OF GRAMMATOLOGY* (1976); J. DERRIDA, *POSITIONS* (1981); J. DERRIDA, *SPEECH AND PHENOMENA* (1973); J. DERRIDA, *WRITING AND DIFFERENCE* (1978).

125. Michel Foucault is now associated with the view that there are important social and political dimensions implicit in the form of discourse. See M. FOUCAULT, *POWER/KNOWLEDGE* (1980); M. FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE AND THE DISCOURSE ON LANGUAGE* (1972); Foucault, *The Order of Discourse*, in *UNTYING THE TEXT* 48 (R. Young ed. 1981).

126. Louis Althusser is perhaps best known for his development of an interpretive approach to the work of Karl Marx. He denied the alleged radical break in Marx's early and later theoretical writings. See L. ALTHUSSER, *FOR MARX* (1969); L. ALTHUSSER, *POLITICS AND HISTORY: MONTESQUIEU, ROUSSEAU, HEGEL AND MARX* (1972); L. ALTHUSSER & E. BALIBAR,

Hermeneutics is primarily understood as the systematic and methodological interpretation of texts.¹²⁷ This methodology has been extended to interpreting any form of communication, and ultimately, to elucidating the meaning of anything that is thought to have meaning.¹²⁸ Accordingly, this methodology is of use to philosophers,¹²⁹ literary critics,¹³⁰ theologians,¹³¹ and, of course, legal scholars and jurists.¹³²

One assumption of modern hermeneutics is that a complete interpretation of anything thought to have meaning is impossible.¹³³ Every interpretation reflects a standpoint. The interpreter's conclusions, therefore, depend on what he wishes to know; an interpretation is a reflection of the questions that one asks.¹³⁴ In looking at any "given text," it is obvious that a psychiatrist, literary critic, and social historian would each look at and perceive its different aspects. Nevertheless, it is also clear that each interpreter must first arrive at some understanding of the words of the text before he can develop his own interpretation. Such an understanding is arrived at through the reader's tacit agreement with the ex-

READING CAPITAL (1970).

127. See, e.g., R. PALMER, *HERMENEUTICS* (1969). Palmer observed that some commentators have maintained that "hermeneutics can and should serve as a foundational and preliminary discipline for all literary interpretation." *Id.* at 4.

128. See, e.g., J. BLEICHER, *CONTEMPORARY HERMENEUTICS* (1980). The author noted the broader application of hermeneutical methodology: "Hermeneutics is consequently engaged in two tasks: one, the ascertaining of the exact meaning-content of a word, sentence, text, etc.; two, the discovery of the instructions contained in symbolic forms." *Id.* at 11.

129. See, e.g., H. GADAMER, *DIALOGUE AND DIALECTIC: EIGHT HERMENEUTICAL STUDIES ON PLATO* (1980).

130. See, e.g., E. HIRSCH, *VALIDITY IN INTERPRETATION* (1967).

131. See, e.g., R. POLZIN, *BIBLICAL STRUCTURALISM: METHOD AND SUBJECTIVITY IN THE STUDY OF ANCIENT TEXTS* (1977).

132. See, e.g., Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980).

133. See P. JUHL, *INTERPRETATION: AN ESSAY IN THE PHILOSOPHY OF LITERARY CRITICISM* (1980).

134. See *id.* Juhl notes:

One might argue that what a literary work means depends on the reader's purpose. . . . This is not, of course, to say that any interpretation of a literary work is correct provided only that it answers a reader's purpose or interest. A further condition is that the interpretation is linguistically possible—that it does not violate the relevant linguistic rules. Thus, on this view, to say that literary work has meaning *m* is to say (a) that *m* is one of the readings in accord with the relevant rules of the language (at the time the work was written) and (b) that *m* answers the purpose or interest of a reader. It is obvious that, on this theory, there will be a fairly large number of equally correct interpretations of any given . . . work.

Id. at 4 (footnotes omitted).

pression of the text. This explains interpretive diversity.

The subject of a hermeneutical investigation is a particular text or expression.¹³⁵ Hermeneutics deals with single entities rather than general classes, and with particular relationships rather than laws. Its concern is with the place of parts within a whole or constituents in a system, rather than with uniformities.¹³⁶ Those engaged in contemporary hermeneutics are concerned with spoken¹³⁷ and written¹³⁸ expression. Their concern is with the acts of reading and writing and of listening and speaking.¹³⁹

Hermeneutics concentrates on a particularized understanding of the object of its activity. At its most fundamental level, contemporary hermeneutics is committed to demonstrating the basic importance of language, not as a single factor in the human world, but as constitutive of human society and permeating all human relationships.

The complexity of hermeneutic methodology reflects the various levels of significance present in any given text.¹⁴⁰ On one level, the words are related to each other and appear in a pattern. Here, interpretation focuses on the mode of expression. Another level presents the issue of reference; this requires one to determine the relationship between the words and the image or concept (meant to be) conveyed. This is the problem of the author's intent.¹⁴¹ Of course, what is conveyed may be the result of feigning or contrivance. One may use extrinsic material to help determine the author's intent; this means going beyond the text. The results of such an exercise will always be tentative at best.

Contemporary hermeneutics is not satisfied with a surface in-

135. See R. PALMER, *supra* note 115, at 37. Palmer observed that:

Carrying the implications of this broader scope of hermeneutics (as systems of interpretation both implicit and explicit) into a definition of hermeneutics applying to both the biblical and nonbiblical literature, the perimeter of nonbiblical hermeneutics becomes so historically vast as to be unmanageable. . . . The implicit interpretive system in every commentary on a text (legal, literary, religious) . . . would have to be included.

Id.

136. See generally P. RICOEUR, *The Model of the Text: Meaningful Action Considered as a Text*, in HERMENEUTICS AND THE HUMAN SCIENCES 197 (J. Thompson trans. 1981).

137. See generally J. DERRIDA, *SPEECH AND PHENOMENA* (1973).

138. See generally T. TODOROV, *THE POETICS OF PROSE* (1977); Ferguson, *Reading Heidegger: Paul de Man and Jacques Derrida*, in MARTIN HEIDEGGER AND THE QUESTION OF LITERATURE 253 (W. Spanos ed. 1979).

139. See, e.g., W. ISER, *THE IMPLIED READER* (1974); Grice, *Utterer's Meaning, Sentence-Meaning, and Word Meaning*, 4 FOUND. LANGUAGE 225 (1968).

140. See T. TODOROV, *INTRODUCTION TO POETICS* (1981).

141. See E. HIRSCH, *THE AIMS OF INTERPRETATION* (1976).

terpretation of a text—it seeks to reach a hidden or latent meaning.¹⁴² This is not simply a search for the author's intent, since the author may be unaware of the full significance of his text. One begins by looking at the given text, and then searches for the expressed and the unexpressed intentions. This is a search for the tacit agreement between the reader and the text. One searches for a message that may be variously described as enclosed in, under, or behind the text.

The simple verbalization of the text merely presents a surface meaning.¹⁴³ The principal concern in a contemporary hermeneutical reading is finding a better way to express what the text says to the reader.¹⁴⁴ The author is viewed as a product of his text, not as the text's producer.¹⁴⁵ Moreover, each text is necessarily woven into the framework of an already existing body of texts.¹⁴⁶ One of the primary results of creating a text is providing possibilities for the production of new and different texts.¹⁴⁷ Interpretation, therefore, is both creative and intertextual.¹⁴⁸

142. See generally DECONSTRUCTION AND CRITICISM (1979).

143. This suggests the untenability of the "plain meaning" rule, which is often invoked as a standard form of legal interpretation. See Note, *Plain Meanings and Core Meanings*, in W. BISHIN & C. STONE, *LAW, LANGUAGE, AND ETHICS* 1033 (1972). Todorov argues that [a] reading is no more than a manifestation of the work. Yet the process of reading is already not without consequences: two readings of a book are never identical. In reading, we trace a passive writing; we add and suppress, in the text, what we want or do not want to find there; reading is no longer immanent, once there is a reader.

TODOROV, *supra* note 140, at 4.

144. See Miller, *The Critic as Host*, in DECONSTRUCTION AND CRITICISM, *supra* note 114, at 217. The author concludes that "[t]he ultimate justification for this mode of criticism, as of any conceivable mode, is that it works. It reveals hitherto unidentified meanings and ways of having meaning . . ." *Id.* at 252.

145. See Gibson, *Authors, Speakers, Readers, and Mock Readers*, in READER-RESPONSE CRITICISM 1 (J. Tompkins ed. 1980).

146. See G. HARTMAN, *CRITICISM IN THE WILDERNESS* (1980). Hartman demonstrates the necessary intertextuality of written and read text, and of the text with others: "The commentator's discourse . . . cannot be neatly or methodically separated from that of the author: the relation is contaminated and chiastic; source text and secondary text, though separable, enter into a mutually supportive, mutually dominating relation." *Id.* at 206.

147. See Mistacco, *The Theory and Practice of Reading Nouveaux Romans: Robbe-Grillet's Tropologie d'une cite fantome*, in THE READER IN THE TEXT: ESSAYS ON AUDIENCE AND INTERPRETATION 371 (S. Suleiman & I. Crosman ed. 1980). "The reader too is caught up in this movement. Projected into a larger intertextual space, he is afforded the possibility of yet other circuits and connections, a fact that broadens the principle of variable readings built into the individual text." *Id.* at 384-85.

148. See Jauss, *Literature and Hermeneutics*, in WHAT IS CRITICISM? 134 (P. Hernadi ed. 1981). Jauss observes:

Every reader is familiar with the experience in which the meaning of a poem discloses itself only as he looks back upon it in the course of a rereading. It is

B. *A Hermeneutical Approach to the Study of Law*

Only recently has the application of contemporary hermeneutics to legal texts been undertaken. Walter Benn Michaels demonstrated its potential in his essay attacking formalist accounts of meaning in legal and literary interpretation.¹⁴⁹

Michaels demonstrated the contemporary hermeneutical methodology by applying it to disputed legal and literary texts.¹⁵⁰ He used Wordsworth's poem, *A Slumber Did My Spirit Seal*, to illustrate the methodology's approach to literary texts.¹⁵¹ The text of this short poem reads:

A slumber did my spirit seal;
I had no human fears:
She seemed a thing that could not feel
The touch of earthly years.

No motion has she now, no force;
She neither hears nor sees;
Rolled round in earth's diurnal course,
With rocks, and stones, and trees.¹⁵²

The meaning of this poem has been the subject of much critical debate. Michaels discussed the interpretations of two critics, Cleanth Brooks¹⁵³ and F.W. Bateson.¹⁵⁴ Brooks believes the poem conveys the poet's "agonized shock" at the death of Lucy, the supposed subject of the poem and object of Wordsworth's affection, and his horrified "sense of the girl's falling back into the clutter of things . . . chained like a tree to one particular spot, or . . . completely inanimate like rocks and stones."¹⁵⁵ Bateson maintains that the poem leads not to a statement of horror but to an expression of "pantheistic magnificence" because Lucy "is actually more alive now than she is dead [S]he is now a part of the life of Na-

then that the experience of the first reading becomes the horizon of the second: what the reader took in the progressive horizon of aesthetic perception becomes capable of being articulated in the retrospective horizon of the exegesis.

Id. at 139-40.

149. Michaels, *Against Formalism: The Autonomous Text in Legal and Literary Interpretation*, 1 *POETICS TODAY* 23 (1979).

150. *Id.* at 23; cf. *supra* text accompanying notes 110-13.

151. Michaels, *supra* note 149, at 29.

152. W. WORDSWORTH, *POETICAL WORKS* 149 (T. Hutchinson ed. 1936).

153. See Brooks, *Irony as a Principle of Structure*, in *LITERARY OPINION IN AMERICA* 729 (M. Zabel ed. 1951).

154. See F. BATESON, *ENGLISH POETRY* 32-35, 77-91 (1950).

155. Brooks, *supra* note 153, at 729, 736.

ture."¹⁵⁶ Michaels pointed out that these two critics agree that Lucy is now one with the "rocks, and stones, and trees" but disagree on what this signifies.¹⁵⁷ According to Michaels, the question is, "What is a rock?"¹⁵⁸ This question can only be answered by knowing whether Wordsworth was a pantheist. The text cannot present the answer, because it allows both interpretations.

The historical evidence concerning Wordsworth's attitudes might resolve this interpretive dispute. Michaels cited authority for the proposition that Wordsworth regarded rocks not "as 'inert objects' but as 'deeply alive, as part of the immortal life of nature.'"¹⁵⁹ This suggests that Bateson's reading is more correct than Brook's, but this can only be a tentative conclusion. The text of historical evidence is open to the same ambiguity as the written text. Michaels indicated the inconclusiveness of extrinsic evidence by hypothesizing a letter by Wordsworth in which he concludes with the following postscript: "I have definitely become a pantheist."¹⁶⁰ Superficially, this would confirm Bateson's reading; one might think that Brooks would have to "send [Bateson] a congratulatory telegram."¹⁶¹ As Michaels points out, however, "it requires little more than glancing familiarity with the academic (or any other) world to recognize the Utopian character of this scenario."¹⁶² There are no conclusive dispositions in a field where dispute constitutes a livelihood. Some would argue that the postscript was ironical. They might cite *A Slumber Did My Spirit Seal* as extrinsic evidence supporting their view.¹⁶³ This sort of interpretive dispute seems characteristic of the legal field as well.

Michaels illustrates the point with a discussion of the parol evidence rule,¹⁶⁴ which is the accepted standard for (not) admitting extrinsic evidence to "explain" disputed terms. The hermeneutical implications are obvious. The rule allows extrinsic evidence "only" when the contract terms are ambiguous. "Ambiguity," however, is both functional and contextual. In other words, the issue of ambi-

156. F. BATESON, *supra* note 154, at 80-81.

157. Michaels, *supra* note 149, at 30.

158. *Id.*

159. *Id.* (quoting E. HIRSCH, *VALIDITY IN INTERPRETATION* 239-40 (1967)).

160. Michaels, *supra* note 149, at 31.

161. *Id.*

162. *Id.*

163. *Id.*

164. The Uniform Commercial Code's general statement of the rule is representative: "Terms . . . set forth in a writing intended by the parties as a final expression of their agreement . . . may not be contradicted by [extrinsic] evidence . . ." U.C.C. § 2-202 (1978).

guity arises only in the context of disputed meanings. This is likewise the only possible setting in which the parol evidence rule may come into play. The circularity is apparent.

Michaels demonstrated the point with an analysis of Judge Friendly's opinion in *Frigaliment Importing Co. v. B.N.S. International Sales Corp.*¹⁶⁵ The defendant, B.N.S. International, had contracted to sell to the plaintiff, a Swiss company, 75,000 pounds of "U.S. Fresh Frozen Chickens, Grade A." The defendant-seller shipped older "stewing chickens" rather than the young "fryers" and "roasters" that the buyer had anticipated. The plaintiff-buyer contended that "chicken," in trade usage, meant a "broiler, a fryer or a roaster." The defendant maintained that he was not aware of such usage and called an expert witness who testified, "Chicken is everything except a goose, a duck, and a turkey. Everything is a chicken but then you have to say, you have to specify which category you want or what you are talking about."¹⁶⁶

The issue presented in the case was, "What is chicken?"¹⁶⁷ The court ruled that it was proper to admit extrinsic evidence to aid in the interpretation of this term, because "the word 'chicken' standing alone is ambiguous."¹⁶⁸ Michaels observed that the word "chicken" is not in and of itself ambiguous: "'Chicken' is not, after all, an example of lexical ambiguity; in fact, from the standpoint of the dictionary, 'chicken' seems a more than usually precise word."¹⁶⁹ Michaels illustrated this point by contrasting the statements "he spent the morning at the bank" with "he likes chicken."¹⁷⁰ The first statement may mean that he was either where money is handled or where a body of water is held back from land. The second statement seems to be less ambiguous—it "clearly" expresses its subject's dietary preference.

Michaels argued that Friendly's belief in the term's ambiguity resulted from the extrinsic evidence of conflicting meanings rather than from the word itself.¹⁷¹ The interpretative difficulty results

165. 190 F. Supp. 116 (S.D.N.Y. 1960).

166. *Id.* at 119.

167. *Id.* at 117.

168. *Id.* at 118.

169. Michaels, *supra* note 149, at 26.

170. *Id.*

171. *Id.* Judge Friendly's conclusion may be the same. In *Frigaliment* he ultimately held that the buyer had failed to show that its interpretation was more reasonable. Trade usage indicated that the term was quite vague. See *supra* text accompanying note 166. Friendly later had second thoughts about imposing a trade usage on the claimant in such a case. See *Dadourian Export Corp. v. United States*, 291 F.2d 178, 186 (2d Cir. 1961) (Friendly, J., dissenting). In his dissent Judge Friendly indicated that *Frigaliment* would

from the dispute rather than from any ambiguity inherent in the term. This led Michaels to conclude that "the word 'chicken,' standing alone, in itself, is neither ambiguous nor vague (nor clear nor precise) and the contract isn't either."¹⁷²

Thus, we may conclude that neither a text nor a word can have an objective meaning, independent of its context and purpose. The problem with the disputed contract term is its context. This problem cannot be resolved by identifying words that are less vague or ambiguous, because there are none. Michaels maintained that the process of adjudication does not depend on words that have a plain meaning.¹⁷³ Meaning depends upon "undisputed contexts," that is, the meaning of a disputed term depends upon identifying agreement in one piece of language which can compel agreement on the meaning of another.¹⁷⁴ In Michaels's words, "No text by itself can enforce such an agreement, because a 'text by itself' is no text at all."¹⁷⁵ While it is true that "chicken" has a plain meaning, "plain meanings are functions not of texts but of the situations in which we read them."¹⁷⁶ This line of reasoning demonstrates the hopeless circularity of the parol evidence rule. The rule disallows extrinsic evidence that will "contradict" the terms of a contract,¹⁷⁷ but does not establish guidelines that aid in determining the admissibility of evidence. The litigants disagree on the terms of the contract—it is the crux of their dispute. The judge necessarily decides which evidence is at odds with the terms of the contract according to (his view of) what the contract says. A rule that proscribes the admission of "evidence that will vary the text then becomes an exhortation to interpret correctly instead of incorrectly and, as such, has no methodological significance whatsoever."¹⁷⁸

Michaels's essay reveals fundamental insights for legal study: Legal discourse has essential characteristics only when it is part of an ordered system in which it receives and manifests meaning. Contemporary hermeneutics suggests the need to shift away from the traditional essentialistic explanation of the relationship be-

have been better decided under the doctrine of mutual mistake. *Id.* at 187 n.4. This conclusion would have rescinded the contract and would have acknowledged the hopeless ambiguity of the word "chicken."

172. Michaels, *supra* note 149, at 26.

173. *Id.* at 31.

174. *Id.*

175. *Id.*

176. *Id.* at 33.

177. *See supra* note 164.

178. Michaels, *supra* note 149, at 28.

tween language and reality and towards an understanding of language that is more relativistic and functional. In Wittgenstein's terms, it requires a shift from a "picture theory" of language to a "use theory" of language; this will involve an analytical shift of focus from essences towards relations among phenomena.¹⁷⁹

V. CONCLUSION

The aim of this discussion has been to identify the fundamental features of several contemporary movements in continental thought and to indicate their relevance to legal study. These three areas are independent schools of thought, yet they are related in their rejection of idealism, positivism, and objectivism. They are united by their attention to the underlying phenomena under examination, whether it be the phenomenon of consciousness, the deep structure of observed phenomena, or the discursive text. They differ in their approach to each respective concern. Phenomenology seeks to develop a complete descriptive account of the phenomenon of consciousness; structuralism seeks to identify the organizing elements of the human mind that give form and order to experience; hermeneutics seeks to go beyond the apparent statement of a text to an interpretation that reveals the possibilities of meaning inherent in a text.

Each of these methodologies has great significance for legal scholarship. Tentative efforts at applying these methodologies reveal their contributions towards clarification, explanation, and increased understanding. A phenomenological analysis of negligence reveals the nonexistence of a radical break between intentional action and negligence. The assertion of this break has led to an erroneous criticism of the punishment of negligence. A structuralist analysis of the development of legal doctrine reveals its underlying order. The identified process of the rational unconsciousness explains logically the shifts in legal decisions and reveals that legal thinking is not an autonomous matter of reasoning, but rather reflects the fundamental patterns of human thought. A hermeneutical analysis of legal texts suggests the error of advancing isolated, objectively known meanings for words and terms; what is often identified as ambiguous or vague is not an intrinsic quality of the

179. L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G. Anscombe trans. 1953). His proposition 43 reads in part: "For a *large* class of cases—though not for all—in which we employ the word 'meaning' it can be defined thus: the meaning of a word is its use in the language." *Id.* at 20 (emphasis in original).

usage, but a result of its disputed context.

This discussion has had an unavoidably tentative and suggestive quality. American scholars have only begun to give attention to the philosophical and critical movements that have developed in Europe over the last half-century. We can expect a new vitality in American legal scholarship as it begins to draw on the thoughts of continental theorists.