Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells

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Critical legal scholars’ claims that law is ideological and indeterminate have provoked criticism from many sources. Arguing that earlier criticisms of Critical Legal Studies (CLS) have not understood its significance as reflecting major currents of twentieth-century thought, Professor Williams puts forward her own critique of CLS. She traces a broad range of developments in fields as disparate as physics, anthropology, philosophy, and art, and shows how each field reflects a new epistemology that rejects traditional certainties and objective truths. CLS’s significant contribution is that it seeks to incorporate the new epistemology into law. Yet, Professor Williams criticizes major themes in CLS as inconsistent with the new epistemology, arguing first that CLS’s structuralist analysis of law assumes that CLS has access to objective, fundamental truths. Professor Williams also challenges CLS claims that law is ideological and indeterminate. Drawing on Ludwig Wittgenstein’s philosophy, Professor Williams maintains that, despite the lack of an absolute, objective meaning, language fixes meaning sufficiently that legal doctrine provides a framework for a particular kind of political discourse. In the absence of absolutes, she concludes, the new epistemology teaches us that we must take responsibility for the ethical choices embodied in it.

INTRODUCTION

In the 1870s, Christopher Columbus Langdell mobilized the most prestigious sources of intellectual authority available to build a jurispru-
dence and an educational program around the model of science.¹ The
strategy proved extraordinarily effective.² Over 100 years later, virtually
every law school still uses Langdell's "Harvard model" despite the fact
that its central tenets no longer seem persuasive.³

Today, Critical Legal Studies (CLS)⁴ is attempting a project as am-
bitious as Langdell's—to reinterpret law and legal education in the con-
text of the most prestigious and authoritative intellectual currents
available. These currents of thought are different from those of Lang-
dell's day. Traditional epistemology,⁵ with its belief in the existence of
transcendent, objective truth, has been replaced in the twentieth century
by a "new epistemology,"⁶ which rejects a belief in objective truth and

¹ See R. Stevens, Law School—Legal Education in America From the 1850s to the 1980s
52-55 (1983). Langdell explicitly linked science and intellectual dignity. "If law be not a
science, a university will best consult its own dignity in declining to teach it. If it be not a
science, it is a species of handicraft, and may best be learned by serving an apprenticeship to
one who practices." Id. at 52. For a discussion of the elitist motivation behind the need to
define law as a science rather than a "species of handicraft," see id. at 92-111; J. Auerbach,
Unequal Justice 75-80 (1976).
² See R. Stevens, supra note 1, at 64, 123.
³ The claim that law is a science, and that the case method helps students to discover its
principles inductively, began to be challenged as early as 1920. Id. at 134. The case method
has survived, however, in large part because "[it] held a trump card—finance. The vast suc-
cess of Langdell's method enabled the establishment of the large-size class." Id. at 63.
⁴ Like legal realism, CLS represents at most a general outlook rather than a unified body
of thought. Id. at 155.
⁵ The term "epistemology" is commonly used to describe the branch of philosophy that
inquires into the nature and validity of knowledge. See R. Chisholm, Theory of Knowledge 1-
4 (1966) (discussing the basic concerns of epistemology). This branch of philosophy is the
foundational discipline that replaced metaphysics as the "queen of sciences," beginning in the
seventeenth century with the French philosopher René Descartes and culminating in the late
eighteenth century with the German philosopher Immanuel Kant. R. Rorty, Philosophy and
Rorty writes: "The theory of knowledge [is] the search for that which compels the mind
to belief as soon as it is unveiled. Philosophy-as-epistemology [is] the search for the immutable
structures within which knowledge, life, and culture must be contained." R. Rorty, supra, at
163. Rorty asserts that philosophy has rid itself of the assumption that any such framework
necessarily exists. Id. at 315; see also R. Bernstein, Philosophical Profiles 33-38 (1985) (ex-
ploring Rorty's version of the collapse of epistemology).
The term "metaphysical" refers to the nature of reality beyond the world of physical
appearances. Metaphysics, the search for first principles, was traditionally considered the core
of philosophy. For a more detailed account of the issues and history of metaphysics, see Intro-
duction to Aristotle (R. McKeon ed. 1947); R. Collingwood, An Essay on Metaphysics (1940);
E. Coreth, Metaphysics (1968).
⁶ To avert cries of reification, let me state explicitly that I am not asserting that the new
epistemology is an objective thing that exists in the outside world. Rather, I am offering a new
reading of well-known texts to suggest that connections formerly thought unimportant (or
nonexistent) are in fact interesting and instructive.

Translating Rorty's terminology into my own, he uses the term "epistemology" to refer to
what I call "the picture theory" or the "old epistemology," and the term "hermeneutics" to
indicate the set of intellectual tendencies that fall within the rubric of the "new epistemology." Rorty cautions, however, that "use of the terms epistemology and hermeneutics to stand for
the claims of certainty that traditionally follow. The new epistemology describes a broad shift in the theory of knowledge; it has permeated such diverse fields as mathematics, physics, anthropology, and literary criticism.

Most critical responses to CLS to date have not grasped the importance of its contribution to legal thought. Progressives outside CLS have rarely responded at a level of sophistication equal to that of the most sophisticated critical legal scholars. For example, one of the best known critics of CLS, Dean Carrington of Duke University, has argued simply that CLS, like other schools of thought based on what he sees as "nihilism," is irrelevant to the proper mission of law schools. Anyone interested in pursuing CLS's intellectual project, Carrington has argued, belongs in a graduate school setting.

This Article responds to that critique by tracing the gradual assimilation of the new epistemology into American thought in order to show how the rejection by critical legal scholars of law's traditional claim to objectivity reflects major currents in twentieth-century thought. When

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7 CLS has its own version of the relationship between law and the new epistemology, which goes something like this: In the beginning was classical legal thought, the jurisprudence of the *Lochner* Court, which treated legal reasoning as objective and as a matter of pure deduction from highly abstract principles. Cf. *Lochner v. New York*, 198 U.S. 45 (1905). Then, both the jurisprudence and the politics of the *Lochner* Court were overthrown by the legal realists of the 1920s and 1930s, who rejected the claims of classical legal thought to objectivity, and acknowledged that law has stronger links to politics than it has to logic. But in the process of exposing the flaws of classical legal thought, legal realists came face-to-face with the internal contradictions of the liberalism they espoused. Aghast, they pulled back and refused to follow their analysis through and confront the full implications of their critique of absolutes. See Mensch, The History of Mainstream Legal Thought, in The Politics of Law 18 (D. Kairys ed. 1982); Note, 'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship, 95 Harv. L. Rev. 1669, 1680 (1982).

8 CLS, the story continues, is now venturing forth where the timid have feared to tread by following through to its logical conclusions the realists' critique of absolutes. CLS literature often seems to imply that anyone with the courage to finish what the realists started will agree with CLS's assertions that legal doctrine is radically indeterminate and that lawyers' pretensions to the contrary are proof of law's ideological role in justifying illegitimate capitalist structures. See text accompanying notes 419-36 infra.

9 I use the term "progressives" here to avoid some of the pitfalls of the term "liberal." See text accompanying notes 412-18 infra.

10 But see Stick, Can Nihilism Be Pragmatic?, 100 Harv. L. Rev. 332 (1986) (sophisticated response to CLS). One scholar who labels as "nihilist" anyone who does not believe in the possibility of objective interpretation is Owen Fiss. For a discussion of the attacks by Fiss on Duncan Kennedy, Mark Tushnet, and Sanford Levinson, and the similar battle between Ronald Dworkin and Stanley Fish, see Levinson, On Dworkin, Kennedy, and Ely: Decoding the Legal Past, 51 Partisan Rev. 248, 254-56, 259-61 (1984).

the importance of critical legal scholarship is assessed in this context, this Article concludes, Carrington's charge that anyone who rejects law's traditional claim to objectivity is a nihilist (and therefore implicitly wrong)\textsuperscript{12} becomes unconvincing.

This Article challenges CLS's claim that the new epistemology is its peculiar property. The discussion focuses first on CLS's classic structuralist texts, which display a reductionist rhetorical style that is at odds with the contextualist message underlying the new epistemology.\textsuperscript{13} The critique then turns to CLS's central parable, which sets up a dichotomy between "liberals" who believe that law is neutral and critical legal scholars who believe that law is political, and in particular to the underlying assumption that the only alternative to the view of law as neutral is the CLS view of law as ideological. While a rejection of law's traditional claims to objectivity necessarily implies that law is not neutral but is in some sense political, this does not mean that law is ideological in the sense that it consistently functions to legitimate an inherently illegitimate order. Nor does a rejection of the picture theory mean that law is indeterminate, as the CLS "irrationalists" have argued.\textsuperscript{14} In fact, this Article suggests that the irrationalists' analysis, like CLS's structuralism, remains trapped in dreams of transcendence.\textsuperscript{15} The Article concludes with an alternative assessment of the implications of the new epistemology for law, based largely upon the philosophy of Ludwig Wittgenstein.

I

THE FOUNDATIONS OF KNOWLEDGE

[W]e are trying to set aside the image of man as possessor of a Glassy Essence, suitable for mirroring nature with the one hand while holding on to it with the other.

— Richard Bernstein\textsuperscript{16}

\textsuperscript{12} See id.

\textsuperscript{13} An important message of the new epistemology is that interpretations of reality are dependent on the context in which reality is experienced. A reductionist style is at odds with this message because it tends to present interpretations as if they were independent of any particular context. See text accompanying notes 326, 360-69 infra.

\textsuperscript{14} See, e.g., Dalton, Book Review, 6 Harv. Women's L.J. 229, 244-46 (1983) (describing the "irrationalist" program as premised on law's indeterminacy). Others in the irrationalist tradition include Gary Peller, James Boyle, and Joseph Singer.

\textsuperscript{15} For a discussion of the term "transcendence," see note 31 infra.

\textsuperscript{16} R. Bernstein, supra note 5, at 39.
[Traditional] systematic philosophy . . . shares the conviction that . . . philosophy as a discipline can transcend history and adumbrate a permanent neutral matrix.

— Richard Rorty

A. The Picture Theory and Traditional Epistemology

Western philosophy traditionally has sought to discover the “‘right method of seeking truth’ [by] finding some permanent neutral framework” linking man to his world. Plato accomplished this by connecting the mutable world of appearances with an immutable realm of Forms. The Forms embodied the essence of earthly objects and ideas, but were not muddied by the accidental differences exhibited by individual, worldly examples.

Plato’s idea of the Forms implied a theory of knowledge and an accompanying “picture theory” of language. According to the Platonic

17 R. Rorty, supra note 5, at 97.
18 Id. at 211; see also id. at 3-4, 8-9 (critique of this traditional aim of Western philosophy). Like all descriptions, the one that follows is necessarily limited because it is teleological: it is oriented toward the goal of describing the basic paradigm shift from the picture theory to the new epistemology. For this purpose, a description of Western philosophy (such as this one) that lumps Plato together with Kant is useful, whereas for other purposes it might be found inadequate. To a Kantian, for example, this description would be inadequate because it does not distinguish between Plato’s approach, which embraced metaphysics, and Kant’s, which rejected metaphysics.
19 “Let us posit that it [this immutable realm] is of all things most like that of which the other living beings individually and by species are parts. For this contains in itself all the intelligible living beings, embracing them, just as this cosmos unites us and all visible creatures.” Plato, Timeaus, in The Dialogues of Plato 30 (B. Jowett trans. 1955); see also Prior, Unity and Development in Plato’s Metaphysics 103 (1985). Prior describes these “Forms” as providing a “general pattern of which all actual living beings are instances.” Prior, supra, at 105.
20 Plato, supra note 19, at 320.
Wherefore also we must acknowledge that there is one kind of being which is always the same, uncreated and indestructible, never receiving anything into itself from without, nor itself going out to any other, but invisible and imperceptible by any sense, and of which the contemplation is granted to intelligence only. And there is another nature of the same with it, and like to it, perceived by sense, created, always in motion, becoming in place and again vanishing out of place, which is apprehended by opinion and with sense.

Id.
21 There are many different names for the picture theory. See J. Clegg, The Structure of Plato’s Philosophy 38-39 (1977). Wittgenstein called it the Augustinian theory. See J. Hartnack, Wittgenstein and Modern Philosophy 64-65, 70 (1965); G. Baker & P. Hacker, Wittgenstein: Understanding and Meaning 33-50 (1980). The term “picture theory” comes from Wittgenstein’s Tractatus Logico-Philosophicus (D. Pears & B. Guiness trans. 1961); that work is the centerpiece of his early view that language provides a picture of reality. See J. Hartnack, supra, at 69-70 (stating that according to the Tractatus, a word is meaningful if and only if it is a name, and serves as a picture of a fact); G. Baker & P. Hacker, supra, at 35-43 (stating that according to the Tractatus, all sentences are combinations of names and understanding a sentence consists of understanding its constituent words and its logical form).
picture theory, human understanding is reached when language captures the "glassy essence," the Form, of a particular object. For example, the word "tree" links an actual tree with the essence of what it means to be a Tree. Similarly, the word "truth" refers to a universal Truth that exists in the realm of the Forms and is only imperfectly accessible by human beings caught in the realm of appearances. Plato's paradigm demanded that philosophers generate abstract, essentialist definitions. The Good, the True, and the Beautiful might be difficult to ascertain, but philosophers did not doubt their existence.

The picture theory can be seen as a search for foundations. The core Platonic impulse was the "need to be gripped, grasped and compelled," the need for human knowledge, perceptions, and values to achieve the kind of absolute certainty characteristic (so it was believed) of mathematical truth in general, and of Euclidean geometry in particular.

As Plato's theory was assimilated into medieval thought, the realm of the Forms was associated with the realm of the Christian God. Religion, not geometry, became the source of inspiration. The human world was still regarded as a dim image of a reality existing elsewhere, but that reality was now identified as the work of a transcendent God.

B. The Kantian Maneuver

By the eighteenth century, the Enlightenment's challenge to organ-

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22 The term "glassy essence" is Rorty's. See R. Rorty, supra note 5, at 42-45. Although Rorty uses the term to refer to what he labels the Descartes-Locke-Kant tradition, id. at 8-9, he acknowledges that tradition's links with Platonism, id. at 156-64.

23 See id. at 156-60. According to Rorty, Plato sought to reach a point where "argument would be not just silly but impossible, for anyone gripped by the object in the required way will be unable to doubt or to see an alternative." Id. at 159 (emphasis in original).

24 For example, Plato describes the Form of Beauty as "eternal, unproduced, indestructible"—not beauty relative to a place or time but absolute Beauty. Plato, Symposium, in The Dialogues of Plato 581 (B. Jowett trans. 1955); see also Wedberg, The Theory of Ideas, in Plato I: Metaphysics and Epistemology 35-36 (G. Vlastos ed. 1970) (detailed study of Plato's theory of forms).

25 See R. Rorty, supra note 5, at 156 ("[T]he notion of 'foundations of knowledge'—truths which are certain because of their causes rather than because of the arguments given for them—is the fruit of the Greek (and specifically Platonist) analogy between perceiving and knowing.").

26 Id. at 156-57.

27 See id. at 160.


29 See E. Gilson, supra note 28, at 140, 212.

30 See id.; see also M. Haren, supra note 28, at 50-52.
ized religion had destabilized this Christian appeal to transcendence.\textsuperscript{31} Even thinkers who remained believers nevertheless felt the need to establish foundations for human values and knowledge independent of religion. The result was a reorientation of Platonic metaphors from a theocentric to a homocentric perspective.\textsuperscript{32}

This process of reorientation began with Descartes, who divorced the idea of certainty from the context of a universal theistic metaphysics and relocated it in the individual mind.\textsuperscript{33} Kant then completed the process\textsuperscript{34} by locating Descartes's idea of mental certainty outside the individual mind, in a newly conceived, nontheistic, transcendental realm of a priori, universal mental structures.\textsuperscript{35} This Kantian maneuver preserved philosophy's access to absolutes by preserving its claims to transcendence while divorcing transcendence from its traditional foundation in theistic metaphysics.

In the twentieth century, a diffuse but pervasive intellectual movement rejected altogether any appeal to transcendence—homocentric or theocentric—and sought to work through the consequences of a world without absolutes. This movement, the new epistemology, may be di-

\begin{itemize}
  \item \textsuperscript{31} See E. Cassirer, The Philosophy of the Enlightenment 37-92 (1951); H. Staten, Wittgenstein and Derrida 12-13 (1984). Staten, for example, draws a distinction between the strict, Aristotelian idea of “transcendence,” id. at 13, and “transcendence” used in a “special sense,” which he defines as follows:
  \begin{quote}
    Wherever philosophy speaks of necessity, whether essential or logical, or of the universality of the \textit{a priori} or the \textit{in principle}—in general, wherever the impulse to safeguard identities leads to “philosophical imperatives” that define the transphenomenal boundaries of mere phenomena—that is what in this study is called the “superhard” or “transcendental.”
  \end{quote}
  Id. at 12.
  
  My use of the term “transcendence” includes Staten’s “special sense” and also his idea that part of what defines transcendence is a sense of “compelledness,” a sense that one is compelled to a given conclusion. As Staten suggests, this experience of compelledness is crucial to the roles played by successive forms of transcendental thinking in Western philosophy. See id. When I use the phrase “the death of transcendence,” I refer generally to the demise of that experience of compelledness based on a belief in universals—whether logical, psychological, theological, or metaphysical.
  
  A persistent practice of scholars in recent Western philosophy has been to show how philosophers who herald the death of transcendence are themselves guilty of transcendental premises or conclusions. See, e.g., R. Rorty, Epistemological Behaviorism and the De-Transcendentalization of Analytic Philosophy, in Hermeneutics and Praxis 89-121 (1985) (making this argument with respect to Bertrand Russell and other exponents of English analytic philosophy); id. at 89 (coining label “de-transcendentalization”).

  \item \textsuperscript{32} See id. at 3; R. Rorty, supra note 5, at 136-37 (describing Descartes's invention of the mind as providing ground for certainty independent of theistic metaphysics).
  
  \item \textsuperscript{33} See R. Rorty, supra note 5, at 136-37 ("[Descartes's invention of the mind]... provided a field within which certainty, as opposed to mere opinion, was possible.").

  \item \textsuperscript{34} See P. Gay, The Enlightenment: A Comprehensive Anthology 17 (1973).

  \item \textsuperscript{35} See R. Rorty, supra note 5, at 132-33. Kant's approach shaped a new vision of the universe centered on human beings. This is how Kant reconfigured philosophy so that it centered on epistemology.
\end{itemize}
vided analytically into two waves. In the first wave, from about 1890 until about the time of World War II, American intellectuals developed a critique of absolutes that was derived from pragmatic philosophy and reinforced by the recent revolutionary developments in mathematics and physics. Yet, ultimately these Americans limited the scope of their critique and simply replaced the old objectivism based on absolutes with a new objectivism based on an empiricist faith in “the facts.” Only after World War II was this new form of objectivism gradually abandoned, as American intellectuals came face-to-face with the relativistic implications inherent in the new epistemology. Legal Realism is associated with the first wave; critical legal studies with the second.

II

THE ASSIMILATION OF THE NEW EPISTEMOLOGY

A. The Revolution in Mathematics and Physics

As far as the laws of mathematics refer to reality, they are not certain; and as far as they are certain, they do not refer to reality.

— Albert Einstein

One geometry cannot be more true than another, it can only be more convenient.

— Henri Poincaré

Revolutionary developments in mathematics and physics have played a central role in the development of the new epistemology during the twentieth century. Previously, mathematics and physics had been thought to correspond to an outside, objective reality. Kant, for example, made this belief a centerpiece of his philosophy, citing Euclidean geometry as proof that the human mind possessed synthetic, a priori knowledge. An early jolt to this view came in the 1820s, when mathematicians began to build fully developed, logically consistent geometries based on postulates that were fundamentally different from Euclid’s. By the late nineteenth century, mathematicians had come to view geometries as wholly formal systems with no necessary connection to an “em-

36 Quoted in F. Capra, The Tao of Physics 27 (1975).
38 See E. Purcell, supra note 37, at 47-73.
40 See M. Capek, supra note 39, at 21; E. Nagel, supra note 39, at 218-19.
These developments stunned mathematicians, but their implications did not capture the imagination of the larger intellectual community until the twentieth century, when Einstein demonstrated what the mathematicians already knew: that Euclidean geometry did not necessarily describe the physical universe. As Werner Heisenberg wrote:

The violent reaction [to this] recent development of modern physics can only be understood when one realizes that here the foundations of physics have started moving; and that this motion has caused the feeling that the ground would be cut from science.

The "foundations" that "started moving" were the principles of Newtonian physics, which had been based on the idea that space, time, and matter were absolutes. Newtonian mechanics had attributed all physical events to the motion of matter in unchanging space and time, according to fixed laws of causation that, in Newton's view, had been designed and initially placed in motion by God. Newtonian physics thus provided a "picture" of an outside reality, the existence and predictability of which had originally been explained by a direct appeal to transcendence. Although this appeal to transcendence had become muted by the late nineteenth century, Newtonian physics remained firmly grounded in the picture theory.

Two separate developments—relativity theory and quantum mechanics—shattered the Newtonian world view. Albert Einstein's relativity theory rejected the Newtonian concepts of absolute space and time. According to Einstein, space is not three-dimensional and time is not a separate entity. Both form a four-dimensional continuum, and each must be measured in relation to the other. Thus, time is not an "absolute." Einstein noted that different observers would order events differently in time if they moved with different velocities relative to the

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42 A. D'Abro, supra note 39, at 35-36.
43 See M. Capek, supra note 39, at 143-56.
45 In the Newtonian universe, events occurred on the three-dimensional space of Euclidean geometry, which, to Newton, was "[a]bsolute space, in its own nature, without regard to anything external, [which] remains always similar and immovable." F. Capra, supra note 36, at 55. The changes in the physical world were described in terms of "[a]bsolute, true, and mathematical time [which] of itself and by its own nature, flows uniformly, without regard to anything external." Id. at 55; see also W. Heisenberg, supra note 44, at 122.
47 See M. Capek, supra note 39, at 382-88; see also E. Nagel, supra note 39, at 316-24 (impact of quantum theory on Newtonian physics), id. at 267-70 (impact of relativity theory on Newtonian physics).
48 See M. Capek, supra note 39, at 382-88.
49 Id. at 153.
50 Id. at 188.
events observed.\textsuperscript{51} For example, one observer might perceive events as simultaneous, while another would perceive them as sequential. Thus, space and time, instead of being absolutes, are merely words used to convey the perception of different aspects of a particular phenomenon.\textsuperscript{52}

Whereas Einstein's relativity theory had challenged the belief that the universe is capable of a single objective description, quantum mechanics reinforced and extended the separation of science from transcendent reality.\textsuperscript{53} In Newtonian physics, atoms were conceived of as solid bodies moving in empty space.\textsuperscript{54} Quantum theory held instead that, at the subatomic level, matter does not exist with certainty at definite places, but instead shows "tendencies to exist."\textsuperscript{55} Similarly, atomic events do not occur, but rather show "tendencies to occur."\textsuperscript{56}

Two aspects of quantum theory had a particularly strong influence on second-wave thinkers. First, they observed that quantum theory had to redefine atoms—traditionally viewed as particles—as both waves and particles. This new definition resulted from the limitations of the "wave" and "particle" paradigms,\textsuperscript{57} which were formulated to describe behavior in the visible world and not at the subatomic level.\textsuperscript{58} This face-to-face encounter with the potential inadequacy of everyday language would play an important imaginative role in the thinking of second-wave intellectuals, who mobilized the developments in physics to challenge the picture theory's premise that objective reality exists and is mirrored by language.

The second influential aspect of quantum mechanics was Werner Heisenberg's uncertainty principle, which is based on the observation that no electron can be said with certainty to exist at a given point—there is only a certain probability that it will be found there.\textsuperscript{59} The uncertainty principle states that any increase in the accuracy of the measurement of an electron's position in space decreases the probable accuracy of the measurement of its velocity.\textsuperscript{60} Scholars outside of physics have used Heisenberg's principle to support their belief that observers do not passively mirror, but rather interact with and affect the phenomena they

\begin{footnotesize}
\begin{enumerate}
  \item Id. at 189.
  \item See M. Capek, supra note 39, at 152; F. Capra, supra note 36, at 61-64.
  \item See M. Capek, supra note 39, at 392; E. Nagel, supra note 39, at 293-305.
  \item See M. Capek, supra note 39, at 54; F. Capra, supra note 36, at 64.
  \item F. Capra, supra note 36, at 68.
  \item Id.
  \item \"[T]he problems of language here are really serious. We wish to speak in some way about the structure of atoms . . . . But we cannot speak about atoms in ordinary language.\" W. Heisenberg, supra note 44, at 123, quoted in F. Capra, supra note 36, at 45.
  \item M. Capek, supra note 39, at 301-02; J. Gribbon, In Search of Schrödinger's Cat—Quantum Physics and Reality 91-92 (1984).
  \item W. Heisenberg, supra note 44, at 53-58.
  \item See M. Capek, supra note 39, at 292-93.
\end{enumerate}
\end{footnotesize}
observe.\(^6\)

Similarly, the mathematician Kurt Gödel's "incompleteness theorem" played an important metaphorical role in the thinking of intellectuals outside of math and physics.\(^6\) Gödel's mathematical proof demonstrated that arithmetic cannot be both complete and internally consistent.\(^6\) The incompleteness theorem, like the uncertainty principle, reinforced the conviction of second-wave scholars that languages, including mathematics, are necessarily incomplete descriptions of reality.\(^6\)

**B. The First Wave of the New Epistemology: 1890 to World War II**\(^6\)

"Until quite recently, social thinking has been predominantly metaphysical."\(^6\) "Conceptualism is the particular bugbear of the social sciences, as a century or two ago it was the bugbear of the natural sciences."\(^6\)

**I. The Assimilation of the Revolution**

By the turn of the twentieth century, American pragmatists had developed a powerful critique of metaphysics.\(^6\) In his seminal work on logic in the 1870s, Charles Sanders Peirce, a leading pragmatist, maintained that no objective a priori rationality existed that corresponded to experience. Forty years later, in *The Quest for Certainty*,\(^6\) John Dewey, another leading pragmatist, attacked the "spectator theory of knowledge," using an analysis that exhibited striking parallels to later challenges to the picture theory by second-wave scholars.\(^7\)

By the 1920s, nearly all American scientists, and many philoso-


\(^6\) E. Nagel & J. Newman, Gödel's Proof 4, 7 (1958); E. Purcell, supra note 37, at 55-56.

\(^6\) See E. Nagel & J. Newman, supra note 62, at 85-97. Note that Gödel's analysis did not rule out a metamathematical proof of the consistency of arithmetic, but only a proof of consistency that can be mirrored by the formal deductions of arithmetic. Id. at 96-97.

\(^6\) See text accompanying notes 191-94, 206-08, 212 infra.

\(^6\) To quote Duncan Kennedy, "Allowance must be made for the spurious precision of dates." See D. Kennedy, Towards an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America 1850-1940, 3 Res. L. & Soc. 3 (1980). Scholars who have discussed related themes have chosen different target dates. See, e.g., S. Hughes, Consciousness and Society 13 (1958) (1890 to 1930); E. Purcell, supra note 37, at x-xi (1900 to mid-1960s); M. White, Social Thought in America 3-5, 236-46 (1957) (circa 1870 to 1930).

\(^6\) E. Purcell, supra note 37, at 16 (quoting two unnamed sociologists who made the statement in 1930).

\(^6\) Id. at 23 (quoting Rexford G. Tugwell, sociologist and teacher at Columbia University, who made the statement in 1922).

\(^6\) The following discussion draws heavily on Edward Purcell's influential work, *The Crisis of Democracy*. See id.

\(^6\) J. Dewey, The Quest for Certainty (1929).

\(^6\) See M. White, supra note 65, at 137-46.
phers, shared a hostility to metaphysics and transcendental reasoning. During the 1920s and early 1930s, American thinkers' antimetaphysical attitude increased as logical positivism, which originated with Viennese and German thinkers, gradually spread throughout American intellectual life. The logical positivists attempted to formulate a comprehensive philosophy of science that would take into account the revolutionary developments in math and physics discussed earlier. They maintained that all metaphysical, transcendental, and a priori concepts are literally meaningless, and that "only propositions which [can] be experimentally, observationally verified [are] in any sense true." They also introduced the idea, of especial importance in the second wave of the new epistemology, that profound confusions in language led people mistakenly to believe in the existence of abstractions.

These two critiques of absolutes—by the American pragmatists and the logical positivists—melted well with the challenge to the picture theory that was implicit in the developments in mathematics and physics. In 1934, the mathematician Eric Temple Bell expressed the opinion of many American intellectuals that "certainty has vanished, and there is no hope at present of its return in any form which we might recognize."

During the first wave of the new epistemology, some American intellectuals asserted that the rejection of absolutes necessarily implied a belief in ethical relativism. Some—particularly sociologists and anthropologists—advocated ethical relativism explicitly, and defended their position as an inevitable concomitant of the death of transcendence. In 1920, for example, one sociologist asserted that "without a basis in the supernatural, in revealed religion, or in philosophy, value systems could only be products of social, economic, and psychological pressures." Ethnographic studies in anthropology popularized ethical relativism by providing illustrations of the wide range of human values. One famous

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71 See E. Purcell, supra note 37, at 21, 47; R. Rorty, The Consequences of Pragmatism xvii-xviii, 67-69 (1982).
72 See E. Purcell, supra note 37, at 47-48.
73 A. Ayer, Logical Positivism 1, 3-4 (1959); see also Feigl, The Origin and Spirit of Logical Positivism, in The Legacy of Logical Positivism 3-5 (P. Achinstein & S. Barker eds. 1969); V. Kraft, The Vienna Circle 3, 15-16 (1953).
74 E. Purcell, supra note 37, at 48.
76 See E. Purcell, supra note 37, at 49, 52-53.
77 E. Bell, Debunking Science 39 (1930) (commenting on implications of invention of non-Euclidean geometries), quoted in E. Purcell, supra note 37, at 59.
78 E. Purcell, supra note 37, at 41.
79 Id. at 42.
80 Id. (paraphrasing Harry Elmer Barnes); see H. Barnes, Leading Trends in Sociology Since Herbert Spencer, 3 Soc. Sci. 360 (1928).
81 See E. Purcell, supra note 37, at 65-73.
example is Ruth Benedict's *Patterns of Culture*,\(^{82}\) which argued that even murder and suicide are judged very differently in different cultures and that such judgments "relate to no absolute standard."\(^{83}\) Benedict later concluded: "The diversity of the possible combinations is endless and adequate social orders can be built indiscriminately upon a great variety of foundations."\(^{84}\)

But most American intellectuals did not adopt ethical relativism.\(^{85}\) Instead, they sharply limited relativism's scope by creating a dichotomy between "fact" and "theory." They focused on the most obvious implication of non-Euclidean geometries—that abstract, deductive logic has no necessary connection with an external reality.\(^{86}\) Thus, they concluded that theories do not describe an objective reality, but that facts do.\(^{87}\)

After considering the implications of non-Euclidean geometries, first-wave intellectuals concluded that the only way to determine whether a given logical system has any connection with the real world is to test its predictions empirically. In the words of one contemporary mathematician, Henri Poincaré: "One geometry cannot be more true than another; it can only be more convenient."\(^{88}\) If one theory of mathematics proves to be empirically inaccurate, it is not because "the 'mathematics is wrong, but only [because] we have chosen the wrong mathematics!'"\(^{89}\)

In turning to facts as the source of certainty, and in limiting relativism to systems of deductive logic, these first-wave intellectuals glossed over important implications of the revolution in math and physics. Both Einstein's relativity theory and Heisenberg's uncertainty principle suggest that facts are no more objective than any theoretical construct. Yet, first-wave intellectuals overlooked this. Their oversight is particularly striking today because of the high-obsessive attention that second-wave thinkers have given since World War II to the idea that facts are relative.\(^{90}\)

Similarly obsessive attention has been focused on whether a convincing distinction exists between science and subjectivity.\(^{91}\) First-wave intellectuals showed little doubt in this regard. The first-wave sociologist Luther L. Bernard took a position that was characteristic of his time.

\(^{83}\) E. Purcell, supra note 37, at 71 (quoting R. Benedict, supra note 82, at 53).
\(^{84}\) Id. at 71 (quoting R. Benedict, supra note 82, at 51).
\(^{85}\) Id. at 46.
\(^{86}\) See id. at 50-63.
\(^{87}\) See id. at 49-63. For example, the sociologist Luther L. Bernard declared, "[W]hat we need is objectively-tested fact to replace our venerable traditions." Id. at 22.
\(^{88}\) H. Poincaré, supra note 37, at 65, quoted in E. Purcell, supra note 37, at 52.
\(^{89}\) E. Purcell, supra note 37, at 55 (quoting G. Lewis, *The Anatomy of Science* 72 (1926)).
\(^{90}\) See text accompanying notes 191-94, 198-99, 219-20 infra.
\(^{91}\) See id.
when he proposed that there is a rigid bifurcation between objective science and personal conviction. Bernard and others espoused the belief that ethical beliefs have no place in what they considered "objective" scientific inquiry, and that such beliefs serve only to distort its conclusions. They attributed the failure of the social sciences to develop a true science of society before 1910 to a lack of methodological rigor and of unbiased factual observation.

Thus, first-wave intellectuals used the revolution in math and physics to support their empiricist conviction that theory is undependable, but facts are not. Their approach provided an alternative road to certainty in an intellectual climate that had rejected transcendent truths.

2. Legal Realism

Legal realism was an integral part of the first wave of the new epistemology. Like their contemporaries in other fields, the legal realists combined a critique of absolutes with a faith in the capability of science to gain access to objective reality.

Shortly after Charles Peirce articulated his critique of the notion of rationality in philosophy, Oliver Wendell Holmes presented a similar critique of law. Holmes attacked the classical view that law is composed of objective, logical rules. He acknowledged the attraction of absolutes, but argued that they are unattainable.

Legal realists melded Holmes's skepticism with the tenets of the first wave of the new epistemology. They rejected the classical belief in a deductive method of legal reasoning premised on metaphysical, a priori abstractions, and asserted that metaphysical concepts are "virtually

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92 E. Purcell, supra note 37, at 41.
93 Id. at 41-42.
94 Id. at 17. Edward Purcell tells us that, in a statement characteristic of the period, one anthropologist concluded: "Objectivity in science is manifested generally in the minimizing and elimination of the personal factor. Methods of selecting and treating of data are devised which will as far as possible rule out errors due to individual variability in subjective attitude." Id. at 21 (quoting Forrest E. Clements).
95 In his influential study, The Crisis of Democracy, Purcell did not stress the element of choice implicit in intellectuals' interpretation of the revolution in mathematics and physics. The analysis presented here highlights how second-wave intellectuals focused on aspects of the revolution in math and physics that first-wave intellectuals had essentially silenced, such as the idea that the facts are contingent on one's interpretive framework. See E. Purcell, supra note 37, passim; see also text accompanying notes 190-95, 198-207, 210-12 infra.
96 See id. at 86-87.
97 See id. at 74-76.
The realists' rejection of the classical theory of judicial decision making was the major accomplishment of their critique. It paralleled the contemporaneous rejection of the picture theory in other fields. Yet, like scholars in other fields, the legal realists accepted relativism only to advocate a new objectivism based on the facts of social science. The realists exhorted legal scholars to abandon their traditional focus on doctrinal logic and focus instead on "objective," "truly scientific" studies of actual legal processes.

Karl N. Llewellyn's 1930 article "Realistic Jurisprudence," an early battle cry of the movement, centered on the need to substitute empirical data for abstract legal verbalisms. While Llewellyn believed that legal doctrine does constrain the choices of legal actors to some extent, he rejected the classical notion that judges simply apply abstract doctrine and deduce the answers. He believed that any study of how law is made should include studies of what judges actually do, as opposed to the doctrine they quote.

Jerome Frank went considerably further, asserting that legal doctrine is irrelevant to the outcome of particular cases. He viewed doctrine as infinitely manipulable, used only to rationalize decisions that are actually motivated by other forces—notably by judges' "hunches" about how a case should be decided. Accordingly, Frank advocated the

100 J. Frank, Law and the Modern Mind 136 (1963), quoted in E. Purcell, supra note 37, at 84.

Valuable as is the language of transcendental nonsense for many practical purposes, it is entirely useless when we come to study, describe, predict, and criticize legal phenomena. And although judges and lawyers need not be legal scientists, it is of some practical importance that they should recognize that the traditional language of argument and opinion neither explains nor justifies court decisions.

Id. Cohen appealed to the ideas of American pragmatists, the Vienna Circle, and the British logical positivists to support his attack on the "meaningless" abstractions of traditional jurisprudence. See id. at 823-26.

102 See E. Purcell, supra note 37, at 89; R. Stevens, supra note 1, at 156; see also E. Purcell, supra note 37, at 24-25, 78-79 (as in many other fields, rejection of traditional epistemology was linked to reformist political tradition).
103 See E. Purcell, supra note 37, at 74, 93-94.
104 Id. at 78-79.
105 Id. at 79; see also Ayer, In Quest of Efficiency: The Ideological Journey of Thurman Arnold in the Interwar Period, 23 Stan. L. Rev. 1049, 1060-61 (1971) (reporting that Arnold asserted that statistics should serve as basis for procedural rules in order to obtain more efficient administration of justice).
106 30 Colum. L. Rev. 443 (1930).
107 See id. at 447-48.
108 See id. at 443-45.
109 See id. at 447-54.
110 See J. Frank, supra note 100, at 130-39.
111 Id.
study of the "real facts" concerning what officials actually do in disputes.\textsuperscript{112} "The rules are incidental, the decisions are the thing."\textsuperscript{113}

With a faith in the facts that was characteristic of first-wave thinkers, the legal realists united in calling for empirical studies of law as the prerequisite to reform.\textsuperscript{114} Yet, the field of law is perhaps unique in the extent to which realists became disillusioned about the ability of the facts to provide answers.\textsuperscript{115} The failure of legal scholars to incorporate empirical research into legal teaching and scholarship—although due as much to institutional and economic constraints as to insights into the intellectual limitations of the first wave—led to widespread disillusionment with the ability of "the facts" to provide useful explanations of the law.\textsuperscript{116}

This disillusionment brought legal scholars face to face with the relativism implicit in the new epistemology. It is to this confrontation that CLS has returned. CLS has attempted to follow through with the implications of the rejection of the picture theory, while avoiding the untenable claim that no human being is in a position to make and act on moral judgments. One may not agree with CLS's conclusions, but one can hardly agree with Dean Carrington and other critics who assert that this is a task unworthy of the attention of American legal scholars. As the next Section details, some of the most creative scholars of the last forty years have identified this task as the central intellectual challenge of the twentieth century.

C. The Second Wave of the New Epistemology: World War II to the Present

The demise of the new objectivism occurred gradually. Beginning in the 1920s and 1930s, linguists and anthropologists began to challenge the much-vaunted objectivity of "the facts."\textsuperscript{117} After World War II, their work became increasingly influential as other American intellectuals started to question the validity of the sharp distinctions traditionally drawn between fact and theory, science and subjectivity. This Section examines the pervasive influence of the second wave of the new epistemology.\textsuperscript{118} It represents a first attempt at linking disparate intellectual

\begin{itemize}
  \item \textsuperscript{112} See id. at 138-47, 159.
  \item \textsuperscript{113} Id. at 126.
  \item \textsuperscript{114} See Schlegel, American Legal Realism and Empirical Social Science: From the Yale Experience, 28 Buff. L. Rev. 459 (1979); see also L. Kalman, Legal Realism at Yale 1927-1960, at 33-35 (1986).
  \item \textsuperscript{115} See, e.g., Schlegel, supra note 114, at 582 (quoting letter from William O. Douglas to Robert M. Hutchins (Apr. 7, 1934) ("All the facts which we worked so hard to get don't seem to help a hell of a lot.").
  \item \textsuperscript{116} R. Stevens, supra note 1, at 141; Schlegel, supra note 114, at 544-45, 571-73, 585.
  \item \textsuperscript{117} See text accompanying notes 122-132, 156 infra.
  \item \textsuperscript{118} This is an initial study that I hope someday to expand. It suffers from the problems that
\end{itemize}
developments to provide an overview of the intellectual currents that critical legal scholars have applied to law. It is designed to show the pervasiveness of the new epistemology and to show CLS's critics that their insistence on defending the picture theory is unpersuasive. It also provides the necessary background for the critique of CLS that is presented in Part IV.

1. The Demise of the New Objectivism

Even as first-wave thinkers were proclaiming the virtues of objective facts, the idea that facts are objective was beginning gradually to lose its appeal. Both relativity theory and the Heisenberg uncertainty principle were already well known, and their relativist implications challenged the empiricists' faith in the objectivity of facts. Developments in linguistics and the visual arts helped to popularize the idea that observers shape facts (even in the way they first perceive them) according to their own preconceived categories. These structuring assumptions, which underlie people's different notions of reality, came increasingly to be explained in terms of the rise of the concept of "culture."119 The growing dissatisfaction with facts and the rise of the concept of culture provided the foundation for the development of a series of alternatives to the picture theory.

a. The demise of the fact/theory distinction.

[A] text cites "a certain Chinese encyclopedia" where it is written that "animals are divided into: a) belonging to the Emperor, b) embalmed, c) tame, d) suckling pigs, e) mermaids, f) fabulous, g) dogs running free, h) included in the present classification, i) which behave like madmen, j) innumerable, k) drawn on camel-skin with a fine brush, l) et cetera, m) which have just broken their leg, n) which look from a distance like flies.

Jorge Luis Borges120

Borges, with his usual flair, thus dramatizes one of the central themes of the second wave of the new epistemology. His words drama-

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119 See text accompanying notes 152-154 infra.

120 Quoted in M. Foucault, The Order of Things xv (R.D. Laing trans. 1970) (source of quotation not provided).
tize his rejection of the picture theory by focusing our attention on the contingency of human categories. With the world carved up by different people in such different ways, the notion of a language ruled by objective referents becomes inconceivable.

This theme has captivated thinkers for most of the twentieth century. Influential in its early development were linguists in the first decades of the twentieth century—most notably, Ferdinand de Saussure, Edward Sapir, and Benjamin Whorf.

Whorf's work was most directly linked with abiding philosophical concerns. In his studies of the Hopi language, Whorf demonstrated that the Hopis do not share the Western idea of objectified time, and in fact conceptualize time in a manner that is more compatible with relativity physics than is the traditional Western conception. Whorf made clear the underlying philosophical motivation of his study. His fascination with Hopi time stemmed from his desire to disprove the tenet of Kantian philosophy that time is a universal category of human thought.

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121 The work of the Russian formalists was also very important in the development of the themes discussed in the text. The formalists maintained that the purpose of art was to "defamiliarize" reality—to "de-automatize" perceptions. See Wasiôlek, Introduction to S. Doubrovsky, The New Criticism in France 19 (D. Coltman trans. 1973). Like the linguists discussed in the text, the formalists focused on the contingency of perceptions and of categories of thought that at first blush seem only natural. See id. Formalism became better known in the United States as a result of the popularity of structuralism. See T. Hawkes, Structuralism and Semiotics 59-73 (1977); F. Jameson, The Prison-House of Language 43-90 (1972). Still, the overlap of formalism with other aspects of the new epistemology should not be exaggerated.

122 Saussure (1857-1913) was a Swiss linguist best known today as the founder of modern structuralism. He is known primarily for a series of lectures delivered at the University of Geneva between 1906 and 1911, published posthumously in 1915 as Cours de Linguistique Générale. See F. de Saussure, A Course in General Linguistics (C. Bally, A. Sechehaye & A. Reidliger eds; W. Baskin trans. 1959); see also T. Hawkes, supra note 121, at 19-32. For additional insights into Saussure's work, see J. Culler, Ferdinand de Saussure (1976); T. Hawkes, supra note 121, at 18-32; Lyons, Structuralism and Linguistics, in Structuralism: An Introduction 6-16 (D. Robey ed. 1973); Wittig, The Historical Development of Structuralism, 58 Soundings 145, 146-49 (1975). The study of Saussure became a booming industry once structuralism took off after 1960. See T. Hawkes, supra note 121, at 19-20.

123 Edward Sapir (1887-1939) was an American linguist. His major works include E. Sapir, Language (1921) and E. Sapir, Culture and Personality (D. Mandelbaum ed. 1949) [hereinafter E. Sapir, Culture and Personality].

124 Benjamin Whorf (1877-1941) was an insurance man by profession who studied linguistics under Sapir. For a description of Whorf's work, see G. Steiner, After Babel 88-93 (1975). Whorf's essays were largely inaccessible until republished in the late 1950s. See B. Whorf, Language, Thought and Reality (J. Carroll ed. 1956). For a particularly influential analysis of Whorf and Sapir, see Henle, Language, Thought and Culture, in Language, Thought, and Culture 1 (P. Henle ed. 1958).

125 See B. Whorf, supra note 124, at 57-60.

126 Id. at 152-53 ("It is sometimes stated that Newtonian space, time, and matter are sensed by everyone intuitively . . . . This is wrong.") The right answer is: Newtonian space, time and matter are no intuitions. They are receipts from culture and language. That is where Newton
Whorf's work on the color continuum\textsuperscript{127} was linked with the other great philosophical system at the foundation of European thought and science, British empiricism. Empiricists since David Hume have asserted that color is a universal, inseparable from perception.\textsuperscript{128} Whorf, Sapir, and others began documenting the contingency of color categories—a study that has flourished ever since.\textsuperscript{129} Linguists have shown, for example, that the Navaho have only three color terms in their language, corresponding roughly to the English words “white,” “red,” and “yellow”;\textsuperscript{130} that there is no single world for blue in Russian, brown in French,\textsuperscript{131} or, before the nineteenth century, violet in German.\textsuperscript{132}

As the physicist Werner Heisenberg put it, discussing the wave-particle problem in quantum mechanics: “The problems of language here are really serious. We wish to speak in some way about the structure of atoms... But we cannot speak about the atoms in ordinary language.”\textsuperscript{133} The work of Saussure, Whorf, and Sapir made this insight accessible to intellectuals who lacked a scientific background. The linguists' data directly challenged the interpretation of the revolution in mathematics and science that predominated among first-wave intellectuals. Whereas first-wave scholars stressed the reliability of facts over abstract theory, the linguists stressed that human beings had no access to objective facts. To the linguists, even human perceptions were filtered through the contingent categories of language.

Similar insights developed simultaneously in the visual arts. Modern art since impressionism had challenged the traditional notion of art as a mere “mirror of nature.”\textsuperscript{134} Although the impressionists did not challenge the existence of a single objective reality,\textsuperscript{135} many postwar art-
ists did. Like the linguists, they challenged the conventions behind realistic representation. A notable example is the work of the Dutch graphic artist M. C. Escher. Many of Escher’s most famous prints highlighted the conventional nature of realistic representation. In his 1953 lithograph entitled *Relativity*, Escher presented a complex scene of interlocking staircases that could be interpreted in mutually exclusive ways from mutually exclusive perspectives. In *Metamorphosis II*, a woodcut dating from 1939-1940, a pattern appears to depict birds or insects when read from the left, but when read from the right the viewer sees fish, not birds or insects. Escher’s work, which illustrated the idea that facts are dependent upon the observer’s interpretation, is but one example of recent studies by artists and art historians of the conventions hidden within realistic representation.

b. The ethnography of certainty. As the idea of the variability and contingency of different versions of “reality” gained widespread acceptance, the human experience of certainty became something to be explained. Linguists, anthropologists, and others started to explore the ways in which peoples and individuals came to feel certain that their diverse realities corresponded to an objective picture of a single outside reality. Of the various approaches that have been articulated, two are of particular importance to an understanding of the second wave of the new epistemology. One focuses on language, the other on culture.

Whorf and Sapir were the primary exponents of the linguistic ap-
approach to the study of human certainty. According to Sapir:

The fact of the matter is that the "real world" is to a large extent unconsciously built up on the language habits of the group. No two languages are ever sufficiently similar to be considered as representing the same social reality. The worlds in which different societies live are distinct worlds, not merely the same world with different labels attached.\(^{140}\)

Whorf articulated a sweeping theory of linguistic determinism, which asserted that linguistic patterns determined what individuals perceived as well as what they thought.\(^{141}\) "We dissect nature," he wrote, "along lines laid down by our native language."\(^{142}\) Because languages differ, resulting "thought worlds" would differ as well.\(^{143}\)

Whorf's theory was not widely accepted, but the less sweeping analysis of his predecessor, Saussure, which was similar in some important respects, became very influential. Whereas the primary concern of nineteenth-century linguists had been the development of language over time,\(^{144}\) Saussure concentrated on the study of language as a unified system during a given historical period.\(^{145}\) Saussure linked this approach, which he termed the "synchronic" study of language, with the demise of the picture theory.\(^{146}\) He asserted that the relationship between a word and its referent (the "signifier" and the "signified") was arbitrary.\(^{147}\) To Saussure, signs had meaning, not by virtue of some actual relationship to referents in the world, but rather by virtue of their relationship to other signs within a sign system.\(^{148}\) This theory provided an early way of explaining how meaning and certainty can exist in a world without tran-
ascendence. Saussure abandoned the idea of fixed referents in favor of a
theory of knowledge that depends on human beings alone.\textsuperscript{149}

Saussure's approach became influential during the 1960s,\textsuperscript{150} when it
was applied to the study of culture, which was to become a key paradigm
for examining the ethnography of certainty. The term "culture" today
has two distinct usages. Originally it had a normative connotation, as in
such expressions as "culture vulture" and "cultured."\textsuperscript{151} Its newer, an-
thropological connotation is found in expressions such as "the culture of
poverty" and "the drug culture." Used in this sense, the term refers to
the range of customs and expectations that define characteristic behavior
within a group. Anthropologists invented the concept of culture, but it
gradually came to function as a paradigm for analyzing human behavior,
first in the social sciences,\textsuperscript{152} and then in the humanities and in everyday
speech.\textsuperscript{153} A description of its impact on historical scholarship helps to
illustrate its importance in intellectual history.

The French historian Lucien Febvre imported the concept of culture
into historical scholarship in the 1930s.\textsuperscript{154} Febvre helped to found the
famous Annales school of historical scholarship, a group of historians
who instituted a dramatically new approach to writing history. The An-
nales historians replaced the traditional historical focus upon events and
famous people with a focus on l'histoire des mentalités—the history of
"mentalities" or ways of thinking.\textsuperscript{155} Borrowing from the ethnologist
Levi-Bruhl's basic premise that categories of thought are not univer-
sal,\textsuperscript{156} the first Annales generation concentrated "no longer [on the]
audacities of thought but [on] the limits of the thinkable."\textsuperscript{157} They
shifted the focus of intellectual history from the history of ideas to that of

\textsuperscript{149} See id. at 110-114.
\textsuperscript{150} See, e.g., T. Hawkes, supra note 121, at 19-28; see also text accompanying notes 270-97
infra (discussing structuralism).
\textsuperscript{151} See, e.g., G. Stocking, Race, Culture, and Evolution 69, 72-74 (1982).
\textsuperscript{152} Id. at 270; see also id. at 303-07 (discussing how and why anthropological concept of
culture "came to function as a kind of paradigm for the social sciences as a whole," id. at 303).
\textsuperscript{153} Id. at 306 ("[T]he anthropological idea of culture became in time part of the vernacular
of a large portion of the American public."); see also Stone, Are You a Talk Hog, a Shouter, or
a Mumbler?, Ms., Jan. 1986, at 88 ("[M]en and women come from such different cultures.").
\textsuperscript{154} See Chartier, Intellectual History or Sociocultural History?: The French Trajectories, in
Modern European Intellectual History: Reappraisals and New Perspectives 13 (D. LaCapra &
S. Kaplan eds. 1982). But see Burgière, The Fate of the History of Mentalités in the Annales,
\textsuperscript{155} See Ariès, L'Histoire des Mentalités, in La Nouvelle Histoire 402 (J. LeGoff ed. 1978);
Burgière, supra note 154, at 435. A focus on "mentalités" was only one of the contributions of
the Annales school. For a discussion of its other contributions, see Burrows, "Their Patron
\textsuperscript{156} See Chartier, supra note 154, at 19.
\textsuperscript{157} Id. at 21.
mental structures. The Annales historians attempted to recreate their ancestors’ ways of thinking and feeling in order to understand how the members of a particular culture portray its truths as certain and obvious. By the 1960s, “cultural history” had arguably become the most popular and innovative area of historical scholarship. By 1985, it could be said that “the concept of ‘culture’ is well on the way to becoming the totem for a consensus on the proper object and method of research in historiography.”

The concept of culture has also played a major, though less explicit, role in helping philosophers come to terms with certainty in a world without absolutes. Ludwig Wittgenstein, one of the most influential philosophers of the twentieth century, played a major role in integrating the concept of culture into philosophy. Wittgenstein’s early work was characteristic of the first wave of the new epistemology, but his later work, culminating in the publication of the *Philosophical Investigations*, crystallized many of the themes of the second wave. His contribution was to redefine certainty in a world without transcendence.

*Philosophical Investigations* also rejected the view that self-contained, objective meanings are determined by reference to a reality outside language. Wittgenstein used many now-familiar weapons to attack the picture theory. One was his famous “duck-rabbit,” a drawing that could be interpreted as either a duck or a rabbit, but not as both simultaneously. Another was the now-ubiquitous color hypothetical, in which he asked his students to imagine a language in which “green” and “red” were lumped together into one color, and “blue” and “yellow” into another.

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158 Id. at 29.
159 See, e.g., M. Bloch, Feudal Society 72-87 (1961).
159 See Chartier, supra note 154, at 24-25.
160 Id. at 71.
161 G. Baker & P. Hacker, supra note 21, at 1.
163 E.g., L. Wittgenstein, Tractatus Logico-Philosophicus, supra note 21.
164 See E. Purcell, supra note 37, at 57.
166 J. Hartnack, supra note 21, at 61-63; N. Gier, supra note 163, at 174.
167 L. Wittgenstein, supra note 166, at 194. The duck-rabbit drawing is reminiscent of Escher’s “metamorphosis” series, see text accompanying notes 137-139 supra, and exemplifies Wittgenstein’s interest in gestalt psychology. See W. Bartley, Wittgenstein 130-31, 137-38 (2d ed. 1985). For another example of this idea in Wittgenstein’s work, see L. Wittgenstein, supra note 166, at 54 (“I see a picture; it represents an old man walking up a steep path leaning on a stick. —How? Might it not have looked just the same if he had been sliding downhill in that position? Perhaps a Martian would describe the picture so.”).
To Wittgenstein, these and other examples supported the idea that no single reality exists independently of the observer's interpretations. Like Saussure, Wittgenstein stressed the arbitrariness of the rules governing human communication by comparing them to a chess game. But Wittgenstein took the chess metaphor further than Saussure. He developed an analogy between language and games that became one of the central metaphors of his philosophy. Wittgenstein’s description of language as a series of “language games” illustrated the way in which arbitrary symbols, governed by arbitrary rules, operate to create meaning that appears clear, obvious, and certain, but only from the viewpoint of those who accept the rules of the game.

Although Saussure and Wittgenstein each began their analysis of language with a game metaphor, they ultimately drew quite different conclusions. Whereas Saussure concluded that meaning is derived from the relationships of signs to each other within a language, Wittgenstein found meaning in language only in relation to the culture in which the language operates. “It is characteristic of our language,” he wrote, “that it is built on fixed forms of life, regular ways of behaving.” Wittgenstein occasionally said explicitly that these “regular ways of behaving” were what anthropologists would call culture. Speaking of aesthetics, he noted:

The words we call expressions of aesthetic judgment play a very complicated role, but a very definite role, in what we call a culture of a period. To describe their use or to describe what you mean by a cultured taste, you have to describe a culture . . . . What belongs to a language game is a whole culture.


See F. de Saussure, supra note 122, at 110.

L. Wittgenstein, supra note 166, ¶ 31, at 15.

For a sophisticated introduction that ties Wittgenstein’s language games into the fabric of his philosophy, see G. Baker & P. Hacker, supra note 21, at 89-98.

L. Wittgenstein, supra note 166, ¶ 7, at 5.

J. Culler, supra note 144, at 28.

G. Baker & P. Hacker, supra note 21, at 96; S. Cavell, The Claim of Reason: Wittgenstein, Skepticism, Morality, and Tragedy 168-69 (1979); N. Gier, supra note 163, at 26-28. Gier’s book must be used with care, because his contention that Wittgenstein was basically a Kantian philosopher is unconvincing, even bizarre. See N. Gier, supra note 163, at 17-32.

L. Wittgenstein, Untitled Manuscript No. 119, Sept. 24-Nov. 19, 1937, at 148, quoted in N. Gier, supra note 163, at 22. For further discussions of the idea of “forms of life,” see N. Gier, supra note 163, at 17-32; H. Pitkin, supra note 128, at 132-39; Cavell, The Availability of Wittgenstein’s Later Philosophy, in Wittgenstein: The Philosophical Investigations 158-61 (G. Pitcher ed. 1968). The term “forms of life” is controversial, see G. Baker & P. Hacker, supra note 21, at 173, and there is some evidence that Wittgenstein himself was uncomfortable with it, see, e.g., L. Wittgenstein, On Certainty, supra note 169, ¶ 385 (calling phrase “forms of life” “very badly expressed and probably badly thought as well”).

L. Wittgenstein, Lectures and Conversations on Aesthetics, Psychology and Religious Belief §§ 25-26, at 8 (C. Barrett ed. 1966). Nicholas Gier has noted other passages in which
In identifying the web of human agreements as the basis of cognition, Wittgenstein broke decisively with the traditional claim that cognition is related to a transcendent reality. "Forget this transcendent certainty, which is connected with your concept of spirit," Wittgenstein exhorted. "Certainty is as it were a tone of voice in which one declares how things are, but one does not infer from the tone of voice that one is justified." Wittgenstein urged the abandonment of the conviction, which has played a prominent role in Western thought since Plato, that human beings can ground their knowledge and ethics on a foundation as ineffably certain as the proofs of mathematics were once thought to be. He then went further, and inquired why people feel their contingencies to be certainties. Whereas traditional philosophy had explained the experience of certainty by asserting that language corresponds to reality, Wittgenstein viewed the experience of certainty as a by-product of pervasive and systemic agreements between people. Like the pragmatists before him, Wittgenstein ultimately redefined certainty as a psychological phenomenon. But, unlike some of the earlier pragmatists, this redefinition did not leave Wittgenstein suspicious of certainty. "Now I

Wittgenstein related the idea of "forms of life" to "culture." See N. Gier, supra note 163, at 27. For our purposes, the important point is not that Wittgenstein occasionally appropriated anthropological terminology, for he used a range of terms in examining the web of agreements that underlie meaning and understanding, notably "grammar" and "rules." See G. Baker & P. Hacker, supra note 21, at 178-205, 286-87.

As Stanley Cavell has explained:

We learn and teach words in certain contexts, and then we are expected, and expect others, to be able to project them into further contexts. Nothing insures that this projection will take place (in particular, not the grasping of universals . . .), just as nothing insures that we will make, and understand, the same projections. That on the whole what we do is a matter of our sharing routes of interest and feeling, modes of response, senses of humor and of significance and of fulfillment, of what is outrageous, of what is similar to what else, what a rebuke, what forgiveness, of when an utterance is an assertion, when an appeal, when an explanation—all the whirl of organism Wittgenstein calls "forms of life." Human speech and activity, sanity and community, rest upon nothing more, but nothing less, than this . . . .

Cavell, supra note 176, at 160-61.

As Stanley Cavell has explained:

Wittgenstein, On Certainty, supra note 169, ¶ 47, at 8.

Id. ¶ 30, at 6 (emphasis in original). Wittgenstein continued: "To say of man . . . that he knows something; that what he says is therefore unconditionally the truth, seems wrong to me.—It is the truth only inasmuch as it is an unmov ing foundation of his language-games.” Id. (emphasis in original).

See L. Wittgenstein, supra note 166, at 224-27; see also D. High, Language, Persons, and Belief: Studies in Wittgenstein's Philosophical Investigations and Religious Uses of Language 110-13 (1967). "Rules are established not because they are self-contained in a calculus or in our language . . . ; rather they are . . . built into a calculus or language because persons agree . . . .” D. High, supra, at 112.

S. Cavell, supra note 175, at 30.

L. Wittgenstein, On Certainty, supra note 169, ¶ 404, at 52.

E. Purcell, supra note 37, at 46.
would like to regard this certainty, not as something akin to hastiness or superficiality, but as a form of life.” He wrote, “It is the truth only inasmuch as it is an unmoving foundation of [our] language-games.”

To Wittgenstein, the fact that “rules,” “customs,” and “forms of life” produce certainty does not mean that certainties are worthless—or that they are easily changed.

Wittgenstein repeated again and again that “when we strike rock bottom we have come down to conventions.” Surely this new homocentric view leaves more room for change, flux, and pluralism than the old, transcendent approach. Since certainty and infallibility are a function, not of a relationship to outside reality, but of an established role within a given language game, if one plays a different game, or changes the rules of the original one, one may well abandon old certainties for new ones. By redefining certainty, Wittgenstein brought the new epistemology beyond the corrosive ethical relativism upon which the legal realists had foundered. This is the promise of the second wave of the new epistemology.

2. The Attack on Science and the Triumph of the Literary Model

Wittgenstein, who died in 1952, was less explicit than later thinkers about the implications of the second wave for the traditional hierarchy between subjectivity and science. Intellectuals after about 1970 tended to explore the implications of the second wave by focusing on the relative status of science and literature. This focus led to a general shift from a scientific to a literary model as scholars began to argue that neither scientific nor nonscientific disciplines could gain access to objective truth, but instead could only provide interpretations of “texts.”

Two related developments helped bring about the demise of the be-

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186 Id. ¶ 403.
187 Stanley Cavell has aptly stressed how deep and unconscious the agreements are that ground “human speech and activity, sanity and community.” Cavell, supra note 176, at 160-61. Wittgenstein was careful to distinguish the conventions that bind the community from the Enlightenment notion of the social contract. See H. Pitkin, supra note 128, at 133-39 (stressing difference between Wittgenstein’s idea of conventions and social-contract theory).
189 Using a metaphor that is particularly accessible to lawyers, the Wittgenstein scholars George Baker and Peter Hacker note that “explanations are final but are not infallible any more than a final court of appeal is infallible.” G. Baker & P. Hacker, supra note 21, at 74; see also Wittgenstein, On Certainty, supra note 169, ¶¶ 433-46, 553-54; cf. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) (“We are not final because we are infallible, but we are infallible because we are final.”).
190 See text accompanying notes 196-207, 230, 242-44 infra.
lie that science is superior to "mere" subjectivity. Historians of science, notably Thomas Kuhn\(^{191}\) and Paul Feyeraband,\(^{192}\) challenged the belief that scientific models objectively describe outside reality, and suggested a new interpretation of the revolution in mathematics and physics that was very different from that of first-wave thinkers.\(^{193}\) Their interpretation was more consonant with relativity theory and quantum mechanics, because they viewed scientific models as interpretations that were dependent on the perspective of the observer; it was more consonant with Gödel's incompleteness theorem, because they viewed those interpretations as necessarily partial.\(^{194}\) In addition, scholars such as the anthropologist Clifford Geertz, the philosopher Jacques Derrida, and the Yale literary critics proclaimed the triumph of the literary model on the ground that scientists, like literary critics, were simply offering interpretations of texts.\(^{195}\)

\(\text{a. Geertz's interpretive approach to culture.}\)

There is an Indian story—at least I heard it as an Indian story—about an Englishman who, having been told that the world rested on a platform which rested on the back of an elephant which rested in turn on the back of a turtle, asked... What did the turtle rest on? Another turtle. And that turtle? "Ah, Sahib, after that it is turtles all the way down."

Clifford Geertz\(^{196}\)

A scholar who led the way in this abandonment of the scientific for a literary model in the social sciences was the American anthropologist Clifford Geertz. In *The Interpretation of Cultures*,\(^{197}\) Geertz rejected the traditional view of anthropological analysis as "the conceptual manipulation of discovered facts, a logical reconstruction of mere reality."\(^{198}\) In place of classical anthropologists' purportedly objective observations of

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\(^{191}\) Thomas Kuhn's basic work, *The Structure of Scientific Revolutions* (1962), has proven extraordinarily influential among second wave thinkers. For a collection of critiques of Kuhn's thought, see G. Gutting, *Paradigms and Revolutions* (1980).


\(^{193}\) See, e.g., T. Kuhn, supra note 191, at 23-42, 66-135.


\(^{195}\) Because the scholars involved with the triumph of the literary model—particularly Derrida and the Yale critics—have profoundly influenced CLS, their work is discussed in some detail in the Sections that follow. See text accompanying notes 238-67 infra.


\(^{197}\) Id.

\(^{198}\) Id. at 20.
behavioral facts, Geertz proposed an “interpretive theory of culture.”

Geertz drew heavily on the work of Gilbert Ryle, a language philosopher and a contemporary of Wittgenstein. Geertz began with what Ryle had called the distinction between “thick” and “thin” description, which Ryle illustrated by imagining two boys rapidly contracting their right eyelids. One boy’s movement is an involuntary twitch, the other’s is a conspiratorial wink. As Geertz explained:

[B]etween what Ryle calls the “thin description” of what the . . . winker . . . is doing (“rapidly contracting his right eyelids”) and the “thick description” of what he is doing (“practicing a burlesque of a friend faking a wink to deceive an innocent into thinking a conspiracy is in motion”) lies the object of ethnography: a stratified hierarchy of meaningful structures in terms of which twitches, winks, fake-winks, parodies, rehearsals of parodies are produced, perceived, and interpreted, and without which they would not . . . in fact exist, no matter what anyone did or didn’t do with his eyelids.

For Geertz, Ryle’s example pinpointed the role played in language by “established codes,” which are determined by their cultural context. Geertz took these structures of signification as his subject, but rejected Ryle’s terminology, which, he wrote, “makes the enterprise sound too much like that of a cipher clerk when it is much more like that of a literary critic.”

Geertz’s advocacy of a literary model was strikingly original in 1973. He asserted that anthropological writings were not scientific analyses of objective facts, as anthropologists had traditionally claimed, but rather were interpretations. As such, not only were they not objective, but they were necessarily partial.

Cultural analysis is intrinsically incomplete. And, worse than that, the more deeply it goes the less complete it is. It is a strange science whose most telling assertions are its most tremulously based, in which to get somewhere with the matter at hand is to intensify the suspicion, both your own and that of others, that you are not quite getting it right. But that, along with plaguing subtle people with obtuse questions, is

199 See id. at 3-30.
200 According to one commentator, although there are important differences between Ryle’s work and Wittgenstein’s, many of their core ideas are complementary. See H. Pitkin, supra note 128, at 5-6.
202 C. Geertz, supra note 196, at 7.
203 See id. at 9.
204 Id.
205 Id. at 15. Geertz’s modernist concerns become particularly evident in his later essays. See, e.g., C. Geertz, Local Knowledge 147-63 (1983); Geertz, Anti Anti-Relativism, 96 Am. Anthro. 263 (1984).
what being an ethnographer is like.206

Geertz's statement describes one of the central themes of scholars who apply the literary model in their own fields: the claim that any interpretation is necessarily partial.207 This theme was developed more systematically by post-structuralists, whose work has heavily influenced the recent thinking of critical legal scholars.

b. French post-structuralism and American literary criticism. Around the time that Clifford Geertz's Interpretation of Cultures was published, a group of American literary critics was beginning to discover the new epistemology through the work of the French post-structuralists.208 An apt place to begin a discussion of the post-structuralists is with Roland Barthes's post-structuralist study of the French classical dramatist Jean Racine.209 Barthes asserted that whereas traditional critics aspire to explicate what they see as objective, unchanging texts, in fact there is no single, correct interpretation of Racine's work waiting to be discovered.210 He asserted that “Racine” exists only in our interpretations, or readings, of Racine.211

Racine lends himself to several languages: psychoanalytic, existential, tragic, psychological (others can be invented, others will be invented); none is innocent. But to acknowledge this incapacity to tell the truth about Racine is precisely to acknowledge, at last, the special status of literature . . . whose function in the general economy of our society is to institutionalize subjectivity.212

To Barthes, no interpretation could be objective; a text could have meaning only in terms of the interpretive framework chosen.213 In real life, the particular situation would always provide the relevant context, but in literature “no practical life exists to tell us what meaning we are supposed to give it,”214 so all contexts are equally possible and valid. Thus, Barthes viewed the text as a vide or vacuum, having no definite and determinable meanings. The critic, instead of discovering a meaning, pours various meanings into the vide.215 Barthes’s movement from the rejec-

206 C. Geertz, supra note 196, at 29.
208 See text accompanying notes 227-29 infra.
211 R. Barthes, supra note 209, at 171-72 (arguing that Racine's work lends itself to multitude of valid interpretations).
212 Id. (emphasis in original).
213 Id. at 171; R. Barthes, supra note 210, at 259-60.
214 Barthes, Critique et Vérité 54 (1966), quoted in Wasiølek, supra note 121, at 28.
215 Wasiølek, supra note 121, at 29-31. One result of Barthes's formulation was the breakdown of the traditional distinction between the author and the literary critic. See M. Fischer,
tion of the picture theory to a focus on the indeterminacy of meaning sounded a central theme in post-structuralist thought.

Barthes suggested a second theme that became central to post-structuralism: that literature serves to institutionalize subjectivity. He developed this claim in *The Pleasure of the Text*, by comparing criticism to an erotic adventure in which the critic "plays" with a text to uncover interpretations that society has suppressed. He also suggested a third central theme in his assertion that no interpretation is "innocent." This statement was a challenge to the traditional belief that the search for a text's meaning is a nonideological pursuit. Traditional critics, he argued, mistakenly believe that their criticism is objective because their own ideologies are invisible to them.

Barthes's insistence on the pervasiveness of ideology in interpretation, which is a central theme in CLS, reflects the influence of Critical Theory on his thinking. Critical Theorists sought to modify Marxism in light of its failure as a predictive theory. Not only had revolutions

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Does Deconstruction Make Any Difference? 86 (1985). Since the critic has traditionally played a subsidiary role in the arts, this glorification of the critic is presumably part of post-structuralism's appeal for critics.

216 See R. Barthes, supra note 209, at 171-72; Culler, Issues in Contemporary American Critical Debate, in American Criticism in the Post Structuralist Age 13 (I. Konigsberg ed. 1981) ("The question of the determinacy of meaning has become an important rallying point in the American critical debate."); see also text accompanying notes 242-44 infra.


218 Id. at 3-25; see A. Lavers, Roland Barthes—Structuralism and After 22 (1982) (linking Barthes's idea of "hedonistic release" with his response to intellectual currents within French Marxism).

219 R. Barthes, supra note 209, at 167.

220 See id. at 156-71 (after analyzing theories of various traditional critics, Barthes concludes that each theory is product of its proponent's ideology).

221 See id.; R. Barthes, supra note 210, at 255-60.


223 See G. Friedman, The Political Philosophy of the Frankfurt School 43-49 (1981). In 1848, Marx predicted a worldwide revolution of the proletariat—a prediction derived from his science of historical materialism. Many Marxists remained convinced throughout the early part of the twentieth century that the internal contradictions of capitalism made imminent revolution likely. See The Essential Frankfurt School Reader, supra note 222, at 5-6. The reconstructive efforts of the Critical Theorists entailed two projects relevant to the themes discussed here. The first was a "critique of positivism"—a critique of the science's claims to neutrality and objectivity that went far beyond similar efforts by contemporary Anglo-American scholars such as Thomas Kuhn. Id. at 371-79. The second was "ideologiekritik"—an attempt to reformulate Marxism in response to massive disillusionment about what proletarian revolutions could achieve. See id. at ix-xxi.
failed to occur in Western democracies, but the proletariat were not even aware that they were oppressed. Critical Theorists turned to Marx’s idea of false consciousness to explain these developments. They sought to explore how repressive social orders produce ideologies that present those social orders as natural and inevitable.

For American literary critics who had been swept up in the strong tide of structuralism in the 1960s and 1970s, post-structuralism was de rigueur as the latest word from the structuralists. By the mid-1970s, a broad band of these critics had adopted post-structuralism’s basic tenants. Two major variations of the new approach to criticism had emerged by 1980. One group, the “reader-response” critics, reached conclusions quite similar to Wittgenstein’s. The other group, the Yale critics, adopted the most current version of French post-structuralism, called “deconstruction” and derived from the work of French philosop-
One of the most prominent reader-response critics is Stanley Fish. Fish denies that there is any such thing as an objective text, and asserts that the proper subject for criticism is the reader's developing response to the work in question. To Fish, a description of what the text does to the reader is actually a description of what the reader does to the text; everything "in" the text is actually the product of interpretation.

Fish denies that interpretive anarchy results from this analysis because of the existence of "interpretive communities."

Interpretive communities are made up of those who share interpretive strategies not for reading... but for writing texts... This, then, is the explanation both for the stability of interpretation among different readers (they belong to the same community) and for the regularity with which a single reader will employ different interpretive strategies (he belongs to different communities.)

Insofar as both reader and writing belong to an interpretive community, the reader's range of interpretive choices will be effectively limited.

Fish's theory of interpretive communities parallels Wittgenstein's approach to language. Our "rules are arbitrary," wrote Wittgenstein, "but their application is not." As Stanley Cavell has explained:

Because the connection between using a word and meaning what it says is not inevitable or automatic, one may wish to call it a matter of convention. But then one must not suppose that it is a convention we would know how to forgo. It is not a matter of convenience or ritual, unless having language is a convenience or unless thinking and speaking are rituals.

Like Wittgenstein, Fish embraces the new epistemology without abandoning the idea of certainty. Instead, he adopts a less ambitious form of certainty than that implied by the old epistemology and relocates certainty in the human realm.

229 See generally The Yale Critics (J. Arac, W. Goodrich & W. Martin eds. 1983) (essays on deconstruction by various literary critics); Campbell, The Tyranny of the Yale Critics, N.Y. Times, Feb. 9, 1986, § 6 (Magazine), at 20 (nontechnical introduction to deconstruction and the Yale critics).

230 Fish's basic text is S. Fish, Is There a Text in this Class? (1980). For a critique of Fish, see J. Culler, supra note 144, at 65-75.

231 See T. Eagleton, supra note 227, at 85. Eagleton notes that Fish's claim—that everything in the text is a product of interpretation—"raises the intriguing question of what it is that Fish believes he is interpreting when he reads." Id.

232 Fish, Interpreting the Variorum, in Reader-Response Criticism 164, 182 (J. Tompkins ed. 1980).

233 See T. Eagleton, supra note 227, at 86-87.

234 See text accompanying notes 175-78 supra.


236 S. Cavell, Must We Mean What We Say? 270-71 (1976).

237 See text accompanying notes 162-89 supra.
The Yale critics, like the reader-response critics, started from the premise that no objective texts exist, but unlike the reader-response critics, they adopted Derrida’s deconstruction and developed their ideas in a very different direction.\(^{238}\) Deconstruction starts from the premise that all texts reflect the belief in objective truth that accompanies the picture theory.\(^{239}\) The critic’s role is to deconstruct this metaphysics by revealing how the text undermines its own claims to truth and by showing that its meaning is in fact contingent.\(^{240}\) Much of a deconstructionist’s energy is focused on illustrating that writing is less a vehicle of communication or knowledge than an independent force that renders “problematic” whatever message we try to get across by means of it. Even the simplest forms of writing—a note, say, conveying information—is like the most inviolate literary work: self-complicating and indecipherable. A text, to be sure, always seems on the verge of becoming whole, intelligible, and coherent. But the sign we hope will complete or ground it ends up deepening its complexity, functioning less as the text’s center or origin than as another turn in its labyrinth.\(^{241}\)

Deconstructionists generally direct their efforts towards showing how texts, once freed from their transcendental significance, are subject to the open-ended play of meaning.\(^{242}\) Developing Barthes’s emphasis on the “pleasures of the text,” while exposing the Nietzschean roots of that idea,\(^{243}\) the deconstructionists celebrate the indeterminacy of texts as an opportunity for joy, freedom, and play.\(^{244}\)

Derrida, like Wittgenstein,\(^{245}\) began with a rejection of the picture theory—specifically with Saussure’s insight that signs are arbitrary

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\(^{238}\) See V. Leitch, Deconstructive Criticism 32 (1983); Culler, supra note 216, at 3-4.

\(^{239}\) J. Derrida, Edmund Husserl’s Origin of Geometry: An Introduction 153 (1978); J. Derrida, Of Grammatology 18-26 (G. Spivak trans. 1976) [hereinafter J. Derrida, Of Grammatology]. It should be noted that Derrida uses the term “transcendental signified” only in describing the work of others (notably Husserl). Derrida, unlike some deconstructionists, does not claim that the transcendental signified exists at the center of all texts. See J. Culler, supra note 144, at 85; I. Harvey, Derrida and the Economy of Différence 240 (1986).

\(^{240}\) See J. Culler, supra note 144, at 85-89. For discussions of Derrida’s philosophy, see, e.g., C. Norris, Deconstruction: Theory and Practice (1982); V. Leitch, supra note 238; Spivak, Translator’s Preface to J. Derrida, Of Grammatology, supra note 239.

\(^{241}\) M. Fischer, supra note 215, at xi, 33.


\(^{243}\) See Spivak, supra note 240, at xx-xxi, xlix-xlvi, lix.

\(^{244}\) V. Leitch, supra note 238, at 36-38; Culler, supra note 216, at 12-13.

\(^{245}\) For an examination of the parallels between Wittgenstein and Derrida, see H. Staten, supra note 31.

\(^{246}\) What follows is a description of the interpretation of Derrida that is characteristic of the American post-structuralists (both literary critics and critical legal scholars). See Culler, supra note 216, at 13. Some commentators consider it a misinterpretation of Derrida. See, e.g., J. Culler, supra note 144, at 132-33. For a balanced discussion of the question, which suggests that the fault does not lie entirely with the American deconstructionists, see Rorty, Decon-
and have no necessary link to outside reality.\textsuperscript{247}

"Cat" is "cat" because it is not "cap" or "bat". But how far is one to press this process of difference? "Cat" is also what it is because it is not "cod" or "mat," and "mat" is what it is because it is not "mop" or "hat." Where is one supposed to stop?\textsuperscript{248}

The answer, according to Derrida, is that one does not "stop." Whereas Saussure, after breaking the picture theory’s link between a word and outside reality, nonetheless preserved the link between a word (the “signified”) and its referent (the “signifier”),\textsuperscript{249} Derrida rejected this one-to-one correlation.\textsuperscript{250} Meaning, he concluded, is the result of an infinite regression, a complex web of signifiers. Each signifier (for example, "cat") contains within it traces of the other words it excludes (for example, "cap," "bat," "cad," etc.). Each word, then, both differs from, and defers to, those around it.\textsuperscript{251} Language is the product of these "differ\-\-ances" (note the misspelling).\textsuperscript{252}

Derrida’s vocabulary demonstrates his fascination with the elusive quality of language. The traditional view, in contrast, had emphasized its clarity. He has combined this focus on language’s indeterminacy with a desire, reminiscent of Nietzsche, to escape from the “prison-house of language”\textsuperscript{253} to the certainties promised by the picture theory. For example, Derrida has called the infinite play of signifiers the “anguish of language”\textsuperscript{254} and “the necessarily restricted passageway of speech against

\textsuperscript{247} See text accompanying notes 145-49 supra.
\textsuperscript{248} T. Eagleton, supra note 227, at 127; see also J. Culler, supra note 144, at 96.
\textsuperscript{249} J. Derrida, Of Grammatology, supra note 239, at 30-44. Derrida’s specialized vocabulary has served to mystify ideas that might otherwise be accessible, particularly where he substitutes a new, supposedly nontranscendental word for a familiar concept. For example, Derrida rejects the word “book,” which to him entails a claim about an “external presence,” and substitutes the word “text,” which he asserts is free of any such claim. J. Derrida, Dissemination 184-88 (1981); J. Derrida, Of Grammatology, supra note 239, at 18.

At times, Derrida appears to claim that the terms he uses are epistemologically privileged. See, e.g., J. Derrida, Positions 27 (1981). According to him, the word “differ\-\-ance,” for example, is "neither a word nor a concept" because its use is informed by a rejection of the picture-theory claims upon which the words "word" and "concept" are based. J. Derrida, Speech and Phenomena 130 (1973). As Rorty has put it, "Derrida cannot simultaneously adopt the language game account of meaning for all words, and try to privilege a few selected magic words as incapable of theological use." Rorty, supra note 246, at 18; see also id. at 9, 17-19; H. Staten, supra note 31, at 24-25.

\textsuperscript{250} See J. Derrida, Of Grammatology, supra note 239, at 38-40, 44-45.
\textsuperscript{251} J. Derrida, Speech and Phenomena, supra note 249, at 137. See generally J. Derrida, Margins of Philosophy 1-27 (1982).

\textsuperscript{252} In French, as in English, the conventional spelling contains 2 “e” ’s.
\textsuperscript{253} “We have to cease to think if we refuse to do it in the prison-house of language; for we cannot reach further than the doubt which asks whether the limit we see is really a limit.” F. Jameson, supra note 121, at i (quoting Nietzsche (source of quotation not provided)).

\textsuperscript{254} J. Derrida, supra note 242, at 9.
which all possible meanings push each other, preventing each other’s emergence." From anguish, however, Derrida proceeds to Nietzschean play, recommending “the Nietzschean affirmation—the joyous affirmation of the freeplay of the world . . . without truth.” Underlying Derrida’s enjoyment of life-played-by-the-rules-of-the-game is his sense of loss, expressed in persistent metaphors of absence. From the mild insight that each word supplements its predecessors in a given context, Derrida concluded that language is essentially deficient. The American critic Michael Fischer has summarized Derrida’s position.

The very need for a supplement testifies to a lack or absence in what has gone before. And the sign that makes up this deficiency is itself inadequate, its truth and clarity depending on additional supplements that also turn out to be lacking. What seems at first glance purposive and cumulative—one positive term adding to (supplementing) another—ends up going nowhere (or everywhere).

Derrida’s insistence that language ends up going nowhere is the aspect of his message that was most developed by American deconstructionists, in the fields of literature and of law alike. For example, the Yale critic J. Hillis Miller has written that “a text never has a single meaning, but is a crossroads of multiple ambiguous meanings.” Derrida’s American followers assert that “[a] text . . . always seems to be on the verge of becoming whole, intelligible, and coherent but the sign we hope will complete or ground it ends up deepening its complexity.”

Derrida and another post-structuralist, Michel Foucault, further developed Barthes’s initial suggestion of an alliance between the new epistemology and the study of politics. For example, Derrida claimed that a focus on the indeterminacy of language should be the aim of anyone who “does not want the police to be omnipotent.” Foucault developed this theme further, through his analysis of the way in which knowledge func-

255 Id.
258 M. Fischer, supra note 215, at 33-34.
259 Id. at xi.
260 Id. at 33.
262 J. Derrida, Limited Inc., supra note 261, at 251.
tions as a mechanism for domination. Wherein Wittgensteinians tend to use images of sharing and community in describing a web of understandings that underlie language, Derrida and Foucault use images of oppression, decrying the ideas of truth, value, and rationality, and the structures of domination such ideas necessitate. Although American literary critics have tended to marginalize the political claims of deconstruction, the approaches of Foucault and Derrida have played a central role in the work of critical legal scholars. Before turning explicitly to a critique of CLS, however, it is important to discuss one further influence on critical legal scholars: structuralism.

c. Lévi-Strauss's classical structuralism. The work of many critical legal scholars today is an uneasy combination of structuralist and post-structuralist approaches. Consequently, although structuralism is not, in my view, part of the new epistemology, its basic premises should be understood before proceeding to the critique of CLS that is presented in Part III. Most descriptions of structuralism have posited a continuum from Saussure to Lévi-Strauss to post-structuralism. But a narrative such as this one that sets up a polarity between the picture theory and the new epistemology suggests a new approach to the history of structuralism. From this perspective, structuralism is viewed as one tradition in which scholars have grappled with the implications of the new epistemology, but Lévi-Strauss's classical structuralism appears as a neo-Kantian detour.

The French anthropologist Claude Lévi-Strauss, who developed classical structuralism, began publishing his studies of myths just after World War II. Lévi-Strauss sought to impose order on the welter of different myths and versions of myths by adopting an approach that was modeled on Saussure's linguistics. He argued that culture generates meaning not because its elements are inherently meaningful, but because

264 See, e.g., S. Cavell, supra note 236, at 178.
265 See sources cited in note 261 supra.
266 See J. Culler, supra note 144, at 28-30; T. Eagleton, supra note 227, at 148.
267 See text accompanying notes 426-32 infra.
268 See, e.g., T. Hawkes, supra note 121; Wittig, supra note 122.
of the relationships among them.\footnote{See Leach, \textit{Claude \L evi-Strauss—Anthropologist and Philosopher}, 34 \textit{New Left Rev.} 12, 21-22 (1965). See generally \textit{C. \L evi-Strauss, The Raw and the Cooked} 1-31 (J. Weightman & D. Weightman trans. 1969) (explaining his approach to study of myths).} Thus, \L evi-Strauss started from Saussure's assertion that the relationship between word and referent is arbitrary,\footnote{See \textit{C. \L evi-Strauss}, supra note 271, at 6-13.} but he quickly found his way back to a neo-Kantian version of the picture theory.\footnote{See \textit{id.} at 10-11, 13.} He went far beyond Saussure's distinction between "\textit{langue}"—the rules underlying linguistic competence\footnote{The term "linguistic competence" is Noam Chomsky's. See \textit{N. Chomsky, Chomsky: Selected Readings} 7-9 (J. Allen & P. van Buren eds. 1971).}—and "\textit{parole}"—everyday speech performance,\footnote{F. de Saussure, \textit{Course in General Linguistics} 9-15 (W. Baskin trans. 1959).} and hypothesized the existence of an extremely detailed and formal "deep structure" that underlies human understanding.\footnote{See \textit{C. \L evi-Strauss, supra note 271, at 6-13.} \textit{See \textit{supra note 271}, at 10-11, 13.}} To \L evi-Strauss, all mental and social processes were fundamentally binary, and myths provided a way for humans to structure their thinking about fundamental contradictions, such as nature/culture, raw/cooked, life/death, fresh/rotten. These and other binary oppositions, which \L evi-Strauss "discovered" again and again within myths and other cultural practices, became a central feature of his analysis.\footnote{See \textit{C. \L evi-Strauss, \textit{I Structural Anthropology}}, supra note 270, at 232-41; 2 \textit{id.} at 142, 211-22; \L evi-Strauss, supra note 271, at 28, 50-55, 334-42; see also \textit{Leach, supra note 271}, at 22; \textit{Steiner, supra note 269}, at 242-43; \textit{Wittig, supra note 122}, at 153-54.} \L evi-Strauss's analysis of the Oedipus myth will serve to illustrate his technique.\footnote{The illustration that follows is taken from \textit{C. \L evi-Strauss, \textit{I Structural Anthropology}}, supra note 270, at 213-214.} He began by treating the text as an "orchestra score."

The myth will be treated as an orchestra score would be if it were unwittingly considered as a unilinear series; our task is to re-establish the correct arrangement. Say, for instance, we were confronted with a sequence of the type: 1, 2, 4, 7, 8, 2, 3, 4, 6, 8, 1, 4, 5, 7, 8, 1, 2, 5, 7, 3, 4, 5, 6, 8 \ldots, the assignment being to put all the 1's together, all the 2's, the 3's, etc.; the result is a chart:

\begin{align*}
1 & \quad 2 \quad 4 \quad 7 \quad 8 \\
2 & \quad 3 \quad 4 \quad 6 \quad 8 \\
1 & \quad 4 \quad 5 \quad 7 \quad 8 \\
1 & \quad 2 \quad 4 \quad 5 \quad 6 \quad 8
\end{align*}

We shall attempt to perform the same kind of operation on the Oedipus myth, trying out several arrangements of the mythemes until we find one which is in harmony with the principles enumerated above.

\textit{Note:}\footnote{See \textit{C. \L evi-Strauss, \textit{I Structural Anthropology}}, supra note 270, at 213-214.}
Let us suppose, for the sake of argument, that the best arrangement is the following (although it might certainly be improved with the help of a specialist in Greek mythology):

<table>
<thead>
<tr>
<th>Cadmos seeks his sister Europa, ravished by Zeus</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cadmos kills the dragon</td>
</tr>
<tr>
<td>The Spartoi kill one another</td>
</tr>
<tr>
<td>Labdacos (Laios' father) = lame (?)</td>
</tr>
<tr>
<td>Oedipus kills his father, Laios = left-sided (?)</td>
</tr>
<tr>
<td>Oedipus kills the Sphinx</td>
</tr>
<tr>
<td>Oedipus = swollen-foot (?)</td>
</tr>
<tr>
<td>Oedipus marries his mother, Jocasta</td>
</tr>
<tr>
<td>Eteocles kills his brother, Polynices</td>
</tr>
<tr>
<td>Antigone buries her brother, Polynices, despite prohibition</td>
</tr>
</tbody>
</table>

Lévi-Strauss pointed out that all the events in the first column concern the overrating of blood relations.279 "It is obvious," he continued, "that the second column expresses the same thing, but inverted: under-rating of blood relations."280 The third column refers to monsters being slain, the fourth to difficulties in walking or standing upright.281 Lévi-Strauss expressed the "fundamental meaning" of the Oedipus myth as follows:

The myth has to do with the inability, for a culture which holds the belief that mankind is autochthonous . . . to find a satisfactory transition between this theory and the knowledge that human beings are actually born from the union of man and woman. Although the problem obviously cannot be solved, the Oedipus myth provides a kind of logical tool which relates the original problem—born from one or born from two—to the derivative problem: born from different or born from same? By a correlation of this type, the overrating of blood relations is to the underrating of blood relations as the attempt to escape

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279 Id. at 215.
280 Id. (emphasis in original).
281 Id.
autochthony is to the impossibility to succeed in it. Although experience contradicts theory, social life validates cosmology by its similarity of structure. Hence cosmology is true.282

This excerpt illustrates two crucial points about Lévi-Strauss's technique. First, he was fearlessly aggressive in drawing out a "deep structure" that is far removed from the story line of a myth. He was also unself-consciously reductionist in pinpointing a single, fundamental meaning. To explain why disparate myths all boil down to parallel sets of binary oppositions, Lévi-Strauss adopted a Kantian approach.283 These oppositions, he claimed, function as a kind of grammar that is inherent in the human mind, so that when scholars study myths, they consistently uncover universal mental operations.284 Like Kant,285 Lévi-Strauss abandoned the theory that language pictures the world, but preserved the idea of universals by locating universal structures (the binary oppositions) within the mind.286

Many anthropologists, particularly those who had been influenced by British empiricism,287 distrusted Lévi-Strauss's approach.288 Structuralists' protests to the contrary notwithstanding, his claim to be studying, as he put it, "not how men think in myths, but how myths think in men"289 has given rise to charges of philosophical idealism.290 Critics

282 Id. at 216.
283 Lévi-Strauss's focus on fundamental oppositions was inspired by the work of the linguist Roman Jakobson. See Leach, supra note 271, at 17 ("The emphasis on 'binary oppositions' and 'distinctive features' which permeates Jakobson's linguistics has been assimilated en bloc into Lévi-Strauss's system of structural anthropology."). Thus, Lévi-Strauss's most important reductive assumption was accomplished by assimilation, without his having made any direct arguments to support its validity.
284 C. Lévi-Strauss, supra note 271, at 334; see T. Eagleton, supra note 227, at 104, 112; Caws, Structuralism, 7/6 Partisan Rev. 75, 79-81 (1968). Note that Saussure, unlike Lévi-Strauss, did not postulate the existence of any universal mental structures. This point is too often overlooked in accounts of Saussure that describe him as the "father of structuralism." See Lyons, supra note 122, at 15.
285 Other scholars have described Lévi-Strauss as a Kantian. See F. Jameson, supra note 121, at 108-10; Goddard, Philosophy and Structuralism, 5 Phil. Soc. Sci. 103, 119-22 (1975). Lévi-Strauss himself acknowledged that his approach was Kantian. See C. Lévi-Strauss, supra note 271, at 10-11.
286 Lévi-Strauss's Kantian assumptions served to justify his aggressively reductionist readings, which ignored a great deal of the "surface" of the texts he analyzed. C. Lévi-Strauss, 1 Structural Anthropology, supra note 270, at 92-94. Kantians, who claim to have special access to universal mental structures, believe that reductionist analysis does not distort meaning, but only separates the play of irrelevant surface detail from the one true meaning underlying the text. See Walsh, Immanuel Kant, in The Encyclopedia of Philosophy, 305, 309 (P. Edwards ed. 1967).
287 Leach, supra note 271, at 13.
288 Id. at 16.
289 This translation is somewhat controversial. Compare T. Hawkes, supra note 121, at 41 with C. Lévi-Strauss, supra note 271, at 12.
290 Leach, supra note 271, at 13. According to Lévi-Strauss:
have also argued that Lévi-Strauss's approach was excessively reductionist. An early example is Michael Riffaterre's famous criticism\(^{291}\) of Lévi-Strauss's analysis of a poem by Charles Baudelaire.\(^{292}\) Lévi-Strauss and his co-author Roman Jakobson had "uncovered" highly structured oppositions extending down to the level of individual phonemes. Riffaterre objected that they had left out important connotations of the words they had analyzed as well as equally crucial information about the cultural context of those words. He charged that they had focused on an elaborate superstructure that seemed to bear little relationship to the text.\(^{293}\) Along the same lines, another critic has written: "Lévi-Strauss'[s] interpretations frequently appear rather forced and his emphasis on bipolar oppositions too constraining."\(^{294}\) Terry Eagleton has added his own critique of Lévi-Strauss's structuralism in the form of a satire on structuralist analysis.

Suppose we are analyzing a story in which a boy leaves home after quarrelling with his father, sets out on a walk through the forest in the heat of the day and falls down a deep pit. The father comes out in search of his son, peers down the pit, but is unable to see him because of the darkness. At that moment the sun has risen to a point directly overhead, illuminates the pit's depths with its rays and allows the father to rescue the child. After a joyous reconciliation, they return home together.

What a structuralist critic would do would be to schematize the story in diagrammatic form. The first unit of signification, "boy quarrels with father," might be rewritten as "low rebels against high." The boy's walk through the forest is a movement along a horizontal axis, in

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The ensemble of a people's customs has always its particular style: they form into systems. I am convinced that the number of these systems is not unlimited and that human societies, like individual human beings (at play, in their dreams, or in moments of delirium) never create absolutely: all they can do is to choose certain combinations from a repertory of ideas which it should be possible to reconstitute.

C. Lévi-Strauss, Tristes Tropiques 160 (J. Russell trans. 1969) (emphasis in original), quoted in Leach, supra note 271, at 16. Leach pointed out that Lévi-Strauss here credits "human societies" with creative capacities that are directly analogous to those of individuals, and concluded:

At a conscious level [Lévi-Strauss] apparently rejects the abstract metaphysical notion of "group mind," which an equivalence between individual and society might invite, yet he seems to come back to the same point from two directions, firstly by reifying society and treating it as an active creative entity like an individual, and secondly by asserting that the pure individual, the "I", has no separate existence at all.

Id. at 27 (emphasis in original).

\(^{291}\) Riffaterre, Describing Poetic Structures: Two Approaches to Baudelaire's Les Chats, in Structuralism 188 (J. Ehrmann ed. 1970).


\(^{293}\) Riffaterre, supra note 291, at 201-02.

contrast to the vertical axis "low/high," and could be indexed as "middle." The fall into the pit, a place below ground, signifies "low" again, and the zenith of the sun "high." By shining into the pit, the sun has in a sense stooped "low," thus inverting the narrative's first signifying unit, where "low" struck against "high." The reconciliation between father and son restores an equilibrium between "low" and "high," and the walk back home together, signifying "middle," marks this achievement of a suitably intermediate state. Flushed with triumph, the structuralist rearranges his rulers and reaches for the next story.  

By the 1980s, when Eagleton wrote this, even former structuralists had sensed the inconsistency between structuralist reductionism and the basic thrust of the new epistemology. Structuralists themselves had shifted away from Lévi-Strauss’s approach in favor of the post-structuralism of Barthes and other thinkers.

D. Response to CLS's Critics

I have suggested that a broad range of developments in European and American thought can be organized around the theme of the new epistemology. In fields as disparate as physics, anthropology, philosophy, and art, Western intellectuals have focused on issues that relate to the abandonment of the picture theory and of the certainty it offered. By 1980, the demise of both the old objectivism (the picture theory) and the new objectivism (structuralism) had left intellectuals in general where legal realists were in 1945—face-to-face with the relativistic implications of the new epistemology.

This "story" (to use post-structuralist terminology) suggests that CLS’s effort to incorporate the new epistemology into law is an important intellectual project. Critical legal scholars are attempting to assimilate into law one of the dominant intellectual currents of our age. This history also suggests why the neo-Kantian approaches of modern liberal theorists have not provided a convincing response to CLS for many students of law, myself included, to whom the new epistemology has an

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297 See text accompanying notes 208-67 supra.

intuitive appeal.299

In addition, this history challenges the charge, made by Dean Car
rington and others,300 that CLS offers nothing but nihilism—a charge
that echoes the responses of many scholars in other fields to the new
epistemology. Scholars whose work reflects the new epistemology, rang
ning from the legal realists301 to Wittgenstein,302 have been charged with
nihilism by their opponents, as have recent literary critics303 and anthropologists304 who have rejected traditional objectivist models for the “literary approach.” This charge of nihilism is motivated by what Richard
Bernstein has called the Cartesian Anxiety, “the grand seductive Either/
Or,”305 which he describes as follows:

_Either_ there is some support for there being a fixed foundation for our
knowledge, _or_ we cannot escape the forces of darkness that envelop us
with madness, with intellectual and moral chaos.306

Scholars who have accused Wittgenstein of “undermining mathematics
[and] introducing Bolshevism,”307 or contemporary literary critics of be
ing “cognitive atheists,”308 or younger anthropologists of “an esoteric
and nihilistic venture”309 based on “epistemological hypochondria,”310
all have assumed that there are only two alternatives: _either_ their work
describes some transcendent truth, _or_ any interpretation is as good as any
other and (by extension) any moral position is as good as any other.311

Ethical relativism appeared to be the only conclusion available to

299 This is particularly true of today’s law students, many of whom have been raised on the
new epistemology in college courses on literary theory, philosophy, and other subjects.
300 See notes 10-11 supra.
301 See E. Purcell, supra note 37, at 139-78.
302 See, e.g., Bernays, Comments on Ludwig Wittgenstein’s Remarks on the Foundation of
Metaphysics, 2 Ratio 1, 6 (1959) (Wittgenstein’s views betray “mental asceticism” devoted to
goal of “irrationality”).
303 See M. Fischer, supra note 215, at xiii, 83-109 (discussing battles between post-structu-
ralist critics and their opponents); Culler, supra note 216, at 12-18 (discussing debate over
determinacy of meaning).
304 See Sass, supra note 207, at 52 (“‘What we’re getting today is mystification . . . an
esoteric and nihilistic venture,’ the product of ‘essentially literary minds hostile to applying
scientific methods.’”) (quoting comment made by anthropologist Marvin Harris in 1980)).
305 R. Bernstein, Beyond Objectivism and Relativism 18 (1983).
306 Id. (emphasis in original).
1976) (responding to such charges).
309 See Sass, supra note 207, at 57.
310 Id. The phrase is Geertz’s, see Geertz, Slide Show: Evans-Pritchard’s African Trans-
parencies, Raritan, Fall 1983, at 62, 80, though Geertz would not support the accusation.
311 For two discussions that place these claims of nihilism in the context of the philosophi-
cal issues underlying the “Cartesian Either/Or,” see R. Bernstein, supra note 5, at 40-42; C.
Geertz, supra note 196.
the legal realists in the 1930s and 1940s. During the first wave of the new epistemology, it appeared to be the logical extension of the pragmatists' critique of absolutes. The history presented here, however, suggests that some scholars in the second wave of the new epistemology have sought an alternative that rejects cognitive and ethical relativism as well as appeals to transcendence. These scholars have found within the study of language and culture a new basis for a workable, if partial, certainty, without appeals to metaphysics or to universal mental structures.

III
CRITICAL LEGAL STUDIES AND THE NEW EPISTEMOLOGY

A critique of CLS must begin by acknowledging its striking contributions. Most striking is its success in opening up legal scholarship to fields outside the law, to fruitful discussions of legal practice, to diverse political viewpoints, and to playful discourse free from compulsive footnoting. CLS has also changed the terms of the debate in jurisprudence. Current legal writing about jurisprudence is far more likely today to take the new epistemology as a starting point than it was even five years ago.

The extraordinarily fruitful recent scholarship inspired by CLS has made critical legal scholars a very diverse group. This Part responds selectively to CLS by critiquing two aspects of critical legal scholarship. It focuses first on CLS's classical structuralist analysis, and concludes that this analysis is pervaded by a reductionism that is fundamentally at odds with the thrust of the new epistemology.

The critique then turns to CLS's central parable and, in particular, to its underlying assumption that the only alternative to the picture theory is critical legal scholars' view of law as ideological. While a rejection of the picture theory, and of the concomitant view of law as neutral, necessarily implies that law is political, this does not necessarily imply that law is ideological in the sense that it consistently functions to legitimate an illegitimate order. Nor does a rejection of the picture theory

312 See E. Purcell, supra note 37, at 91-92.
314 CLS has made substantial headway towards a notoriously difficult goal: it has brought "radical" thought into the American mainstream.
315 Compare, e.g., Gabel & Kennedy, Roll Over Beethoven, 36 Stan. L. Rev. 1 (1984) (a playful discourse) with this Article (compulsive footnoting).
316 Compare J. Rawls, supra note 298, at 251-59 (Kantian) with Rawls, supra note 298, at 223-24 (reinterpreting his former Kantian approach in light of the new epistemology); see also Stick, supra note 9, at 363-64.
317 See text accompanying notes 323-33, 360-69 infra.
necessarily imply that law is indeterminate, as the CLS "irrationalists" have argued. In fact, this critique suggests, the irrationalists' insistence upon law's indeterminacy is tied to their own inability to break away from the picture theory and to discard dreams of transcendence. This Part concludes by sketching an alternative to the irrationalists' approach. This alternative, based on the philosophy of Wittgenstein, attempts to follow through the implications of the new epistemology for law in a different way from that proposed by the irrationalists.

A. CLS's Classical Structuralist Analysis

Duncan Kennedy pioneered the application of structuralist theory to law. His article, *The Structure of Blackstone's Commentaries*, inspired the creation of an entire school of structuralist legal scholarship. Two structuralist tenets play an important role in Kennedy's analysis: a disregard of the text's mere surface features in favor of its deep structure, and the premise that this deep structure consists of binary oppositions.

Kennedy's analysis of the deep structure of law began with his now-famous description of the "fundamental contradiction" in law: the binary opposition between the individual and the community, which, Kennedy asserted, underlies all legal thought.

Most participants in American legal culture believe that the goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it. Others (family, friends, bureaucrats, cultural figures, the state) are necessary if we are to become persons at all—they provide us [with] the stuff of our selves and protect us in crucial ways against destruction. . . . Moreover, we . . . sometimes experience fusion with others, in groups of two or even two million, and it is a good rather than a bad experience.

But at the same time that it forms and protects us, the universe of

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318 See, e.g., Dalton, supra note 14.
319 See text accompanying notes 441-55 infra.
320 Kennedy, supra note 295. An earlier Kennedy article that also relied upon Lévi-Strauss's structuralist theory avoided many of the problems presented by Kennedy's *Blackstone's Commentaries*. See Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685, 1712 n.73 (1976). *Form and Substance* is a tour de force, a subtle and convincing analysis of contract law, describing it as an interaction between an altruistic and an individualistic model. It is convincing because it organizes contract law around a central theme that is particularly appropriate to the content of that body of law. Only later, when Kennedy and other authors began to take seriously their grandiose claims to have identified the single theme underlying all law, did CLS's structuralist analysis run into the problems discussed here.
CRITICAL STUDIES

threatens us with annihilation and urges upon us forms of fusion that are quite plainly bad rather than good. A friend can reduce me to misery with a single look. Numberless conformities, large and small abandonments of self to others, are the price of what freedom we experience in society.\(^{322}\)

Just as Lévi-Strauss claimed to have uncovered the deep structure of all myths, Kennedy claimed to have uncovered the deep structure of all law. He asserted that the contradiction was “within law, as law is commonly defined, [and] is not only an aspect, but the very essence of every problem.”\(^{323}\) Kennedy used aggressive rhetorical techniques to defend the primacy of the fundamental contradiction. “The more sophisticated a person’s legal thinking, regardless of her political stance, the more likely she is to believe that all issues within a doctrinal field reduce to a single dilemma of the degree of collective as opposed to individual self-determination that is appropriate.”\(^{324}\)

Having thus purported to establish that readers who remain unconvinced by his highly reductive analysis are simply unintelligent,\(^{325}\) Kennedy continued by setting out what he acknowledged to be “a shockingly crude model” for his analysis of law.\(^{326}\)

I propose to begin with a shockingly crude model, and see where it will lead. Suppose that the fundamental contradiction has “always” existed, in its present degree of intensity and pervasiveness. We then need to account for the obvious fact that it has either not been experienced at all, or not acknowledged, by any of the succeeding generations of Western legal thinkers between the time of the sophists and the very recent past. Let us suppose that the reason for this has been that during that whole period there have existed processes of mediation, or denial, that have functioned to hide or disguise it from those engaged in the enterprise of legal thought.\(^{327}\)

Kennedy relied on a basic premise of Critical Theory to defend his analysis of the deep structure of law: he argued that those who remain unconvinced by that analysis are gripped by an ideology that veils the truths he offers.\(^{328}\) Elsewhere in the article, the influence of Critical Theory on his analysis is even more evident. For example, he defined “liberalism” as a

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\(^{322}\) Kennedy, supra note 295, at 211-12. Kennedy’s analysis in general, and his reliance on the “fundamental contradiction” in particular, draw extensively on the work of Roberto Unger. Unger’s work, however, is considerably less mechanistic than Kennedy’s. Moreover, Unger from the beginning recognized the tension between his structuralist claims and the new epistemology. See R. Unger, Knowledge and Politics 125-27 (1975).

\(^{323}\) Kennedy, supra note 295, at 213 (emphasis in original).

\(^{324}\) Id.

\(^{325}\) See id.

\(^{326}\) Id.

\(^{327}\) Id. at 213-14 (emphasis in original).

\(^{328}\) See text accompanying notes 321-326 supra.
"mode of mediation or denial" and stressed the "apologetic" nature of any analysis that claims that the fundamental contradiction can be resolved by minor adjustments—or, indeed, major adjustments—of the existing social and economic order.

Kennedy, like Lévi-Strauss, avoided questions about the legitimacy of his deep structure in part by simply assuming its legitimacy, in part by presenting his analysis as preliminary and tentative and his premises as mere working hypotheses. But, unlike Lévi-Strauss, who ultimately claimed that his method yielded an interpretation more fundamental than any other because it uncovered universal structures of the mind, Kennedy never adopted this Kantian solution. In fact, Kennedy became uneasy with his claim that he could give a complete and final explanation for the law based on a unique new understanding of universal truths. In 1983, under the influence of post-structuralism, he renounced the fundamental contradiction.

Kennedy's renunciation appears to have stemmed from his growing disillusionment with all abstract thought. Others within CLS, concluding that Kennedy's new "nihilism" goes too far, have continued to pursue analyses premised on the existence of the fundamental contradiction. Although many critical legal scholars still consider the fundamental contradiction to be the hallmark of CLS, the more sophisticated scholars have abandoned Kennedy's original claims of privileged access.

329 Kennedy, supra note 295, at 216.
331 See Kennedy, supra note 295, at 213 ("I propose to begin with a shockingly crude model, and see where it will lead."). Lévi-Strauss hedged in a similar way in a famous early article. See Lévi-Strauss, supra note 295, at 431 (referring to deductive principles as "hypotheses").
332 See text accompanying note 277-77 supra.
333 See Gabel & Kennedy, supra note 315, at 15. Kennedy's renunciation put him in an awkward position, because he had originally argued that his structuralism was the innovative part of his analysis. See Kennedy, supra note 320, at 1724 ("What is new in this piece is the attempt to show an orderliness to the debates about 'policy' with which we are left after abandonment of the claim of neutrality.").
334 See Gabel & Kennedy, supra note 315, at 14.
335 See text accompanying notes 340-54 infra.
to objective truth. One wrote recently: "If we are rejecting essences, we cannot claim to have discovered the canonical, essential structure of thought." CLS's critics have largely failed to appreciate the irony in this disillusionment with structuralism on the ground that it makes unjustifiable claims of access to objective truth. Critical legal scholars traditionally had claimed that the picture theory was liberalism's problem; they now acknowledge that their classical structuralist texts are equally marred by such metaphysics.

Some critical legal scholars have reacted to this disillusionment with structuralism by completely abandoning the idea of the fundamental contradiction. Others acknowledge the clash between structuralism and the new epistemology, but proceed nonetheless with classical structuralist analysis. They take a deconstructive approach similar to that of the Yale critics. First, they uncover the metaphysical assumptions in a text, and then proceed to deconstruct them, showing how these assumptions are dependent on the picture theory and how they fail to persuade once that theory is discarded.

A developing critique of deconstruction shows how this approach remains trapped in the picture theory. Deconstruction as practiced in America fails to eliminate the drawbacks of traditional scholarship because the deconstructors continue to focus on the "old textbook distinctions" derived from the picture theory.

The [traditional scholars] want to reconstruct them, and the [deconstructors] want to deconstruct them, but neither is content to take them lightly, to "de-thematize" them . . . [I]t is as important for the deconstructors as for the realists to think that metaphysics—that genre of literature which attempted to create unique, total, closed vocabularies—is very important.

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338 See id. Derrida and his followers regularly accuse other authors of being ensnared by metaphysics. See, e.g., J. Derrida, supra note 239, at 3-5.
339 A notable example is Drucilla Cornell's work, which exhibits parallels with my own. See, e.g., D. Cornell, Toward a Modern/Postmodern Reconstruction of Ethics (1986); Cornell, supra note 228.
340 See text accompanying notes 238-60 supra.
341 See, e.g., J. Culler, supra note 144, at 85-86; de Man, Shelley Disfigured, in Deconstruction and Criticism 217 (G. Hartman ed. 1979); Miller, The Critic as Host, in Deconstruction and Criticism 240 (G. Hartman ed. 1979); Miller, Deconstructing the Deconstructers, 5 Diacritics 24 (1975).
342 The phrase, which is Richard Rorty's, refers to the traditional categories that Western philosophy has used to explain the world, for example, the mind/body distinction. See Rorty, supra note 246, at 1, 19.
343 Id. This excerpt continues: "Neither can afford to admit that, like the epic, it is a genre
The American deconstructors thus miss Wittgenstein's major therapeutic point: that once the picture theory's "old textbook distinctions" are discarded, the world can be reimagined. Someone who has fully absorbed this message views the picture theory's traditional quandaries as irrelevant in much the same way that the secularist views religious themes as irrelevant. In the words of one such secularist:

It isn't that we believe in God, or don't believe in God, or have suspended judgment about God, or consider that the God of Theism is an inadequate symbol of our ultimate concern; it is just that we wish we didn't have to have a view about God. ... We just regret the fact that the word is used so much.

This critique of the American deconstructors suggests a similar critique that can be applied to one kind of deconstruction that has remained influential in the law classroom. This brand of deconstruction engages students in the traditional classical structuralist readings of legal texts, with one innovation: students are then taught to "deconstruct" their own analyses. Student work that purports dutifully to uncover the fundamental contradiction in each legal text leaves one asking how this deconstruction has been informed at all by CLS's recent acknowledgment of the limitations of structuralism.

An example of this student work is an analysis of the Freedom of Information Act (FOIA) as "an archetype of an artificial mediation" of the "fundamental tension between one's self and others [that] pervades human existence." Echoing Duncan Kennedy, the student observes:

On the one hand, we need others . . . . On the other hand, our fear of harmful relations with others counterpoises our desire for participa-

which had a distinguished career and an important historical function but which now survives largely in the form of self-parody." Id. 344 Wittgenstein's work "has often been referred to as a kind of philosophical therapeutics for conceptual neuroses" embodied in the picture theory. G. Baker & P. Hacker, supra note 21, at 486.

For evidence that Derrida intends to make the same point, see Rorty, Philosophy as a Kind of Writing: An Essay on Derrida, 10 New Literary Hist 141, 149 (1978) (Derrida "is suggesting how things might look if we did not have Kantian philosophy built into the fabric of our intellectual life." (emphasis omitted)). 345 Id. at 146.

346 Id. at 146.

347 See, e.g., Note, The Freedom of Information Act: A Fundamental Contradiction, 34 Am. U.L. Rev. 1157 (1985). I cite John Moon's student piece primarily as evidence that this brand of deconstruction is being taught in the classroom. My critique is of the methodology, not of Moon's grasp of it. (For this reason, I observe in the text of this Article the otherwise offensive convention of not referring to Moon by name.) In fact, the piece shows a firm grasp of the methodology in question, as evidenced by the fact that it was chosen for publication from a number of papers written for an advanced seminar. 348 Id. at 1159.

349 Id. at 1161.

350 See text accompanying note 322 supra.
tion in a community. . . . Because of this inextricable conflict, our situation in life is quite tenuous. Thus, it is not surprising that we often seek to explain away the unpleasant contradiction between self and others. One attempt to explain away the fundamental contradiction was manifested in what is known as liberal state theory.\textsuperscript{351}

The student concludes that the FOIA is an example of the efforts of liberal governmental theory to avoid the fundamental contradiction. "The FOIA, pervasively and intensely apropos to the fundamental contradiction, is a compelling example of law as a mediating myth."\textsuperscript{352} Thus far, it is difficult to ascertain how this deconstructive analysis differs from earlier CLS scholarship that discovered and rediscovered the fundamental contradiction in every legal text.

Nor does the "deconstructive" aspect of this analysis effectively reflect the insights of post-structuralism into the limitations of classical structuralist analysis. The student author begins his deconstruction by asserting that the drawback of fundamental contradiction analysis is that it "reifies" experience. "To reify is to excise an aspect of our experience, abstract this experience into an essence, and set this essence apart from the context of daily interaction."\textsuperscript{353} Nonetheless, the deconstructor continues, "[i]f the methodology is used to deconstruct reified essences, this criticism is nullified."\textsuperscript{354} In context, this appears to be a claim that CLS's classical structuralist analysis remains valid as long as it is used (as it always has been) to critique a reified "liberalism." This deconstructive approach thus changes CLS's classical structuralist analysis very little.

Moreover, this type of deconstruction is based on the assumption that the only problem with CLS's structuralist analysis is its claim to canonical truth. In fact, CLS's approach clashes with the new epistemology at a more fundamental level because of its tendencies to idealism and reductionism. These tendencies are particularly evident in an article that, like Kennedy's \textit{Blackstone's Commentaries},\textsuperscript{355} has been extremely influential in CLS circles: Gerald Frug's \textit{The City as a Legal Concept}.\textsuperscript{356} Frug's basic thesis was that the internal logic of "liberalism" led to the legal powerlessness of American cities. It did so, according to Frug, because liberalism would not allow the existence of any intermediate organizations between the state and the individual. Frug concluded that, since the medieval city was such an intermediate body, it was nigh-inevi-

\textsuperscript{351} Note, supra note 347, at 1161.
\textsuperscript{352} Id. at 1176.
\textsuperscript{353} Id. at 1163.
\textsuperscript{354} Id. at 1165. For evidence that the "reified essences" to which Moon refers are those constructed by "liberal" theory, see id. at 1171-73.
\textsuperscript{355} Kennedy, supra note 295; see text accompanying note 321 supra.
\textsuperscript{356} Frug, \textit{The City as a Legal Concept}, 93 Harv. L. Rev. 1057 (1980).
table that the powerful medieval city would be destroyed and replaced by
the powerless American city.

Like Lévi-Strauss before him, Frug felt compelled to protest, "I am not espousing a form of pure idealism." 357 And yet, like Lévi-Strauss, he was espousing exactly that. 358 Frug insisted, "I do not deny the role of economic, social, or political factors or even other ideas in the development of cities," 359 but the structure of his argument belied this claim: he purported to explain city powerlessness completely, solely by reference to the internal, bipolar dynamic of liberalism. 360

This interpretation is based on a simplistic causal assumption—that ideas create social reality. Frug's idealism made it possible for him to explain city powerlessness without reference to the well-known fact that immigrants tended to settle in cities and that city power therefore meant power for immigrants at the expense of the "native" American population. 361 He also ignored the view that cities have tended to break down traditional mores and thus threaten Americans' sense of moral balance. 362

Frug ignored as well the complex interplay between the characteristics of actual cities and different legal theories about city power. 363 In fact, Frug supported this explanation of the course of American municipal law with only a few citations of leading cases and commentators. 364

Frug needed only such sketchy information to complete his analysis because his inquiry operated at such a high level of abstraction. He wrote of "the" medieval city and "the" early modern city, 365 ignoring the complex welter of local government units that existed during the medieval and early modern periods. 366 Indeed, his article was less a historical

357 Id. at 1078.
358 See Gordon, supra note 321, at 70 (critical legal scholar calling charge that CLS is idealistic "troubling"); cf. Gordon, New Developments in Legal Theory, in The Politics of Law 291-92 (D. Kairys ed. 1982) (calling charge "both true and not true").
359 Frug, supra note 356, at 1078.
360 See id. at 1067, 1072, 1079. Frug internalized the idealist thesis (that ideas shape social reality) so completely that he simply assumed that American cities were powerless. See id. at 1059-62. He based this assumption solely on the observation that cities have little formal power within the American legal system. See id. at 1062.
364 See Frug, supra note 356, at 1099-105.
365 See id. at 1086-87.
study than a story about a mythic struggle between "the" medieval town—romanticized as a warm, participatory association—and "the" American city—depicted as bureaucratic and alienated. According to this story, the liberal state has emasculated the modern city because it fears participatory democracy and prefers the alienated condition of contemporary social life to a sense of community.

Frug's approach shares more with nineteenth-century historical method than it does with more recent scholarship, which reflects the sensitivity of second-wave scholars to the multiplicity of interpretive possibilities. Modern historians tend to include stiff doses of primary evidence in their arguments and to offer their interpretations tentatively, because they believe that interpretation inevitably entails the simplification of complex and ambiguous material. They try to steer a course between overinterpretation and underinterpretation and to avoid interpretations that are insufficiently sensitive to life's inherent ambiguities. Frug's article ends with an attractive plea for more power and participation at the municipal level, but its appeal as a history of the American city is limited. Frug's tendency toward brutal schematization—reinforced by his tendency to rely on reified abstractions as evidence and to treat ideas as self-sufficient causes—illustrates the limitations of CLS's classical structuralism as an interpretive method.

A critique of CLS's classical structuralism must address the formal defense of CLS's structuralist analysis that has been offered by James Boyle. Although Boyle is several steps ahead of many other critical legal scholars in spotting the crucial theoretical issues for CLS, his proposed solutions have perpetuated or submerged many of the problems discussed above and have ultimately failed to rescue CLS's classical structuralist

primarily derived from the work of Otto Gierke, a German historian in the romantic tradition. See Frug, supra note 356, at 1086. Frug consistently cites Gierke's interpretation of medieval political theory as evidence of how medieval town-dwellers actually felt about town life. Thus, when Frug discusses "the" medieval town, note his inattention to variations; his evidence consists only of Gierke's interpretation of medieval political theory. For example, Frug writes:

[M]edieval political thought did not seek to distinguish the separate interests within the town or between the town and the rest of society, but rather sought to analyze their harmonious unity. Neither the idea of an individual identity separate from the town nor that of town autonomy separate from others in society implied a notion of opposition between the parts and the whole. The individual contributed to town functions and the town contributed to society's functioning.

Id. at 1086-87. Note Frug's failure to distinguish between claims about political theory and claims about individual experience, as well as his reliance on a one-sided romantic interpretation of medieval life as organic and unalienated. His schematic description has been largely dismissed by historians. See, e.g., H. Hartog, supra note 363, at 9 (1983) (referring to Frug's "grandiose version" of the history of city status).


368 See Frug, supra note 356, at 120-49.
analysis. Boyle has attempted to address the inconsistency between CLS's classical structuralism and its aspirations toward the new epistemology, describing this as a tension between the structuralist and the subjectivist strands within critical legal scholarship.369

Boyle designates as structuralist any author whom he views as accepting the picture theory.370 He thus includes not only established structuralists such as Lévi-Strauss but also scholars such as Clifford Geertz, whose self-descriptions would stress their opposition to structuralism.371 Boyle's redefinition of structuralism enables him to blur the distinction between unruly interpretations such as Frug's *The City as a Legal Concept*,372 which is marred by philosophical idealism, excessive abstraction, and reductionism,373 and any interpretation that does not pay formal obeisance to the inevitable partiality of texts. Boyle effectively submerges the peculiar weaknesses of CLS's structuralist interpretations by implying that identical problems occur in any text.374 This claim is inaccurate, since many interpretations based on the picture theory are convincing in all but their claim to be the one "true" interpretation.

The strength of Boyle's article is his attempt to address directly the inconsistency between CLS's structuralism and its aspirations towards the new epistemology. One option for CLS is to abandon the fundamental contradiction, but this route Boyle rejects. Like others before him, Boyle refuses to give up his truths, which for him link up individual experiences of oppression and inspire people to political action.375 He writes: "I am convinced of the rightness of these ideas."376 He is so convinced, in fact, that he takes as a given the structuralist analysis of the prominent critical legal scholar Roberto Unger,377 even though, as he admits, this requires a "leap of faith."378 He writes: "If we reject Unger's

369 See Boyle, supra note 336, at 688.
370 Id. at 742.
371 See id. at 743. Boyle admits in a footnote that Geertz's work "is normally thought of as the opposite of the structuralist abstractions." Id. at 743 n.166. Boyle argues that Geertz is "in fact" as structuralist as the structuralists, and attempts to marginalize the differences between Geertz and the structuralists. See id. at 742-43. Ironically, Boyle did covertly privilege his interpretation, while Geertz did not. Boyle's charge that Geertz claimed to have discovered the one true interpretation in his ethnographic studies shows that he missed Geertz's basic message, which is that ethnographers do not provide objective descriptions of objective behavior, but rather interpretations of natives' interpretations of their behavior. See C. Geertz, supra note 196.
372 Frug, supra note 356.
373 See text accompanying notes 356-68 supra.
374 See, e.g., Boyle, supra note 336, at 742-43.
375 See id. at 747-48.
376 Id. at 748.
377 See R. Unger, supra note 322.
378 Boyle, supra note 336, at 760.
leap of faith, we will never be able to experience the total critique for which he argues so persuasively."379

While Boyle avoids the legal realists' problem of ethical relativism, his argument seems vulnerable to those for whom his chosen "leaps" hold little appeal. If Boyle's is the only answer that CLS can give, what does CLS have to offer to those who remain unconvinced? In their structuralist phase, critical legal scholars seemed so sure of themselves, and they apparently remain sure to this day. Yet, they now appear to have lost the power to distinguish their claims from alternative claims that inspire people to political action. For example, many progressive lawyers believe that the idea of rights has great liberating potential, whereas critical legal scholars characteristically argue that rights deliver very little to the oppressed and instead play a major ideological role in supporting the capitalist system.380 Both sides can cite examples, even the same examples, to support their point. Have critical legal scholars lost their ability to respond, both to those who dispute their negative assessment of rights as well as those who dispute other standard CLS positions? This is the effect of Boyle's intuitionism. Not only does Boyle's approach require CLS to give up its exclusive claims to fundamental truths; it also leaves CLS unable to respond persuasively to anyone who does not already accept his leap to structuralist faith.

Boyle's analysis also raises the question of how CLS can now make a convincing distinction between liberalism's inconsistencies and its own. CLS's classical structuralist texts have implicitly asserted that their purpose is to unveil liberalism's contradictions and so destroy the false consciousness that makes liberalism appear benign. This position makes it awkward for critical legal scholars to discover a central contradiction in their own thought. Boyle rises to this challenge: While liberalism has contradictions, he concludes, CLS has "transformative tensions."381 He turns in his defense of structuralism to Derrida's notion of the "dangerous supplement."382

Derrida's "dangerous supplement" shows how language reinforces

379 Id.
380 See, e.g., Klare, Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law, 4 Indus. Rel. L.J. 450, 468-80 (1981) (contradictions of liberal political theory result in incoherence and in potential manipulation of labor by management). Karl Klare's article is but one expression of the longstanding tensions between CLS and progressive lawyers that are a topic of endless discussion at annual CLS conferences and in CLS literature. See, e.g., Gordon, supra note 358, at 281-82 (noting tension between "theorists" and "practitioners"). For one progressive lawyer's attempt to address this issue head-on in the context of the women's movement, see Schneider, supra note 313.
381 See Boyle, supra note 336, at 745. Boyle is referring to the tensions between structuralism and subjectivism.
382 See id. at 744.
Derrida points out that whenever there are two dichotomous terms, one not only contradicts, but also depends upon, its opposite. Boyle explains, for example, that maleness cannot be defined except by reference to female qualities. A trace of female qualities is always incorporated (albeit in a marginalized role) within the male, and that trace always threatens “to revolt against its marginalized status.” Thus, femaleness is the “dangerous supplement” of maleness.

Boyle argues that, in a similar way, CLS’s structuralism is the dangerous supplement of its opposite, which he calls subjectivism and is roughly what I call the new epistemology. This argument misconceives the message of the dangerous supplement. Derrida uses the concept to show the mutual dependence of the oppressor and the oppressed. His message surely is not that “male” and “female” establish each other’s validity as interpretive constructs, but just the opposite: that the arbitrary division of humans into two “opposite” sexes is obfuscatory rather than helpful, since females regularly exhibit “male” characteristics and vice versa.

Thus, Derrida’s point is to highlight the hierarchical, contingent, and ultimately unsatisfactory nature of the male/female dichotomy. He does not, as Boyle appears to assume, use the dangerous supplement argument to establish as a general principle that, given two opposing theoretical constructs, each opposite establishes the conceptual validity of its fellow. Thus, Derrida’s “dangerous supplement” argument does not support Boyle’s contention that Lévi-Strauss’s reductionist, neo-Kantian structuralism remains a useful interpretive method for scholars persuaded by the relativism and contextualism of the new epistemology.

Boyle identifies two other ways to deal with the inconsistency between the new epistemology and structuralists’ claims of privileged access to fundamentals. The first he calls “Verfremdung,” protesting that...
no English equivalent is available.\textsuperscript{390} Boyle’s “Verfremdung” reflects the desire of second-wave scholars to uncover the contingency of arrangements traditionally accepted as givens.\textsuperscript{391} Yet, the goal of defamiliarizing hardly justifies the sweeping reductionism of CLS’s classical structuralism. Boyle apparently acknowledges this point when he notes that the more important “mediating concept”\textsuperscript{392} is what he calls “immanent critique.” Boyle’s immanent critique entails a claim that CLS’s structuralist analysis merely describes an existing liberal belief structure.\textsuperscript{393} This approach does not change the claims of special access to the truth about liberalism that are so prominent in the CLS structuralist analyses that purport to discover liberalism’s deep structure. How can CLS deliver the truth about liberalism when it denies the existence of a hierarchy of texts? Boyle addresses this question when he asks:

\begin{quote}
[W]hat status does the deep structure have? Is it the deepest stratum in the accumulated sediment of liberal rhetoric? Is it the idealized picture of our contemporary individual experiences of social life? Is it the lowest common denominator in the beliefs of great liberal theorists? . . . The answer to this question appears to be that it is an amalgam of all of these, which Unger invites us to hold together by faith long enough to have the experience of total critique.\textsuperscript{395}
\end{quote}

What happens if we accept the invitation, but remain unconvinced? Boyle, once again, appears to have no answer. Nor does his invitational terminology mitigate his refusal to give up traditional CLS claims of access to the truth about liberalism.

In the end, Boyle’s discussion of immanent critique boils down to the claim that, if CLS’s interpretation of political realities is taken as a given, CLS’s structuralism can coexist with its aspiration to avoid essentialist arguments and espouse the new epistemology. This is as uncon-

\begin{itemize}
\item \textsuperscript{390} Boyle, supra note 336, at 746. “Defamiliarization” is one suitable candidate. The term was introduced by English translators of the Russian formalists. See Wasiolek, supra note 121, at 19. Russian formalists used art to defamiliarize reality in much the same way as Andy Warhol used his giant Campbell’s soup can to defamiliarize an ordinary object half a century later.
\item \textsuperscript{391} Boyle explains: “Verfremdung . . . signifies the sudden feeling of alienation when one becomes aware of the artificiality or unreality of a context . . . . By analogy, the description of an ideological structure to the subject affected by that structure is supposed to render opaque what had previously been transparent, and thus make the subject aware that there is an element of choice suppressed beneath the prereflective understanding that this is the way things are.” Boyle, supra note 336, at 746 n.173.
\item \textsuperscript{392} Id. at 746.
\item \textsuperscript{393} Id. at 736-40, 746.
\item \textsuperscript{394} Boyle indicates at one point that “immanent critique” is the same as deconstruction, but at other points claims only that it entails the analysis of a discourse to see if it violates its own internal logic. See id. at 739-40, 746.
\item \textsuperscript{395} Id. at 758-59 (footnotes omitted).
\item \textsuperscript{396} See id. at 689.
\end{itemize}
vincing as the argument that if we accept God as a given, no contradiction exists between a belief in God and a careful refusal to accept claims of privileged access to pre-existing truth.

Boyle also argues that CLS's "mediating devices" work at a "local" level but "break down when we expand our theory to a large-scale analysis of social experience." 397

The successful theory, the one holding its subjectivist and structuralist strands together long enough to have critical "bite" on the social world, is likely to be a local critique. The greater the claims that we make for our belief structure, the wider its supposed application, the more we will have to "privilege" or "armor" it against countervailing subjective beliefs. The more we privilege it, the more ossified it becomes. 398

It remains unclear, however, why a claim to have decoded the fundamental contradiction within the classroom is epistemologically less troublesome than a claim that this contradiction pervades society. The local application makes equal claim to epistemological privilege because it depends on the claim that the classroom mirrors a larger reality. As Boyle himself illustrates:

I try to explain the individual experiences of first-year law students by a structural account of the politics of law. I might claim that the paranoia, loss of self-esteem, and roller-coaster oscillations of the first-year are, in part, caused by the structural contradictions of an elite conception of law that on the one hand insists that legal doctrine is infinitely manipulable and on the other hand offers a picture of the rule of law as being both apolitical and nondiscretionary. 399

Note that the structural contradictions in the classroom are produced by the structural contradictions of liberalism, a causation that appears to dissolve the distinction between Boyle's local critique and CLS's grandiose classical structuralist claims.

In summary, Boyle correctly asserts that the new epistemology leads to

[a] modernist picture of personality [that] shows us that our beliefs and ideals are not a unified Cartesian system of interlocking and consistent rational arguments. We believe different things at different times; we inhabit multiple discourses, each of which has its own mini-constellation of obligatory beliefs. 400

But he incorrectly argues that he can reconcile this view with CLS's classical structuralist analysis and, in particular, with its obsession with

397 Id. at 756; see also Note, supra note 347, at 1163-64.
398 Boyle, supra note 336, at 773 (emphasis in original).
399 Id. at 747.
400 Id. at 771.
the grand fundamental contradiction. Richard Bernstein explains why when he notes that adherents of the new epistemology are skeptical of the tendency to reify changing fluid distinctions into epistemological and metaphysical dichotomies. They reject . . . all forms of totalizing schemes or totalizing critiques. They defend [instead] a robust pluralism that does justice to the tangled quality of our experience.  

CLS's continuing refusal to abandon its reductionist structuralist analysis clashes with the contextualist message at the core of the new epistemology.

B. Law as Ideological and Indeterminate

This Section turns to CLS's central parable, which creates a rhetorical universe peopled by liberals who believe that law is neutral and objective and by critical legal scholars who admit that law is political. This dichotomy between liberalism and CLS is designed to support critical legal scholars' claim that a rejection of the picture theory leads inevitably to a rejection of liberalism and an adoption of their view of law as ideological and indeterminate. In fact, this Section argues, while a rejection of the picture theory necessarily implies that law is in some sense political, this does not necessarily mean that law is ideological, as critical legal scholars persistently assume, nor that law is indeterminate, as the CLS irrationalists have argued.

I. Law as Ideological

At the center of the CLS universe is a straw man: the liberal committed to the picture theory who is oblivious to physics since Einstein

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401 R. Bernstein, supra note 5, at 18. Bernstein is actually talking, in the past tense, about pragmatists. For evidence that Bernstein links pragmatism to themes central to the new epistemology, see id. at 17-20. See also Rorty, Pragmatism, Categories, and Language, 70 Phil. Rev. 197, 197 (1961) (exploring parallels between pragmatist philosophy of Charles Peirce and Wittgenstein's philosophy); R. Rorty, supra note 71 (exploring continued vitality of pragmatism and its view that there is no common or general quality defining an eternal truth).

402 These concepts of the "liberal" and of "liberalism" were articulated by Roberto Unger in his book, Knowledge and Politics. See R. Unger, supra note 322, at 63-103. For the standard CLS uses of the terms, see Boyle, supra note 336, at 704, 721; cf. Rorty, supra note 246, at 2 (noting that literary deconstructionists require "two different straight persons: a macho professional philosopher who is insulted by the suggestion that he has submitted to a textual exigency, and a naive producer of literature whose jaw drops when she learns that her work has been supported by philosophical oppositions. . . . Both go all to pieces at [the deconstructionists'] news.").

and to philosophy since Kant, and who believes that law, when objectively applied by a neutral judge, gives correct answers in specific cases. Although this straw liberal has been a stock character in CLS texts since Kennedy's *Blackstone's Commentaries*, the existence today of liberals who fit this description is highly doubtful. Few American lawyers today believe that law is a neutral system of self-executing rules. In fact, the central goal of legal realism more than a generation ago was to put to rest this view, which had been the official ideology of classical legal thought. A talk with practicing lawyers, political scientists, or second- and third-year law students today will confirm that this core lesson of legal realism has now been widely accepted. Critical legal scholars nevertheless insist that liberals still don’t understand that law is not neutral and objective. One wonders whether anything would convince them that we are all realists now, short of a universal adoption of the CLS view of law.

Critical legal scholars support their contention that liberals still believe law is neutral by focusing on appellate decisions and on treatises, in which the rules of the game encourage judges and scholars to write as if neutral principles require a particular result. But they ignore the fact that in the law office, classroom, or legislature, the rules of the game allow lawyers to acknowledge that legal outcomes involve a complex interplay of doctrine, prejudice, politics, and custom. Critical legal scholars seek further support for their contention by pointing to the liberal thought of various neo-objectivist academics of the past several decades, specifically to the process movement of the 1950s, the neo-Kantianism inspired by John Rawls, and the law and economics movement. All these movements were responses to legal realism inspired by the desire to find a firm philosophical basis for the law before lawyers had absorbed the second wave of the new epistemology. But they do not reflect

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403 Kennedy, supra note 295.
404 See Forbath, supra note 402, at 1050 (questioning “whether people in general believe that the judicial process is apolitical and governed by reason,” and suggesting alternative reasons why people are committed to the “rule of law”); see also Stick, supra note 9, at 345-52.
405 See Boyle, supra note 336, at 704, 770.
407 See, e.g., H. Hart & A. Sacks, The Legal Process—Basic Problems in the Making and Application of Law 3-6 (tent. ed. 1958); see also Mensch, supra note 7, at 29-30 (critical legal scholar discussing legal-process literature); Peller, supra note 337, at 1183-91 (discussing Hart & Sacks).
410 See Boyle, supra note 336, at 702.
411 See id. at 702-04; Stick, supra note 9, at 345-52 (discussing various theories of legal
most lawyers'—or even law professors'—view of law.

CLS's most powerful rhetorical means of imposing and policing its dichotomy between liberals and critical legal scholars are its all-encompassing definitions of "liberalism" and "liberal legalism." Critical legal scholars use the term "liberalism" to refer to both liberals and conservatives and in fact often cite contemporary conservatives as examples of the liberal position. Throwing the net of liberalism even wider, critical legal scholars use it to encompass not only contemporary liberalism and conservatism but also the *Lochner* Court's turn-of-the-century formalism. *Lochner*-era scholars, unlike most lawyers today, did believe that the neutral application of objective principles could yield the correct answer in specific cases. Critical legal scholars thus justify their claims of an inevitable link between liberalism and the picture theory by insisting that no meaningful distinction can be drawn between contemporary conservatives, contemporary liberals, and classical legal thinkers.

Although critical legal scholars have become self-conscious about their claim to have privileged access to the essential structure of legal
thought, they still advance without embarrassment their traditional claim of privileged access to the truth about liberalism. Regardless of what liberals say, they conclude, liberalism is inevitably linked with the picture-theory view of law as a neutral system of self-executing rules. This rhetorical structure helps critical legal scholars portray as unquestionable their most problematic assumption—that the only alternative to the picture theory is the conclusion that law is ideological.

If law is not neutral, it clearly is in some sense political. But in what sense? The claim that law is political does not mean that law is necessarily ideological, which is what critical legal scholars normally mean when they say that law is political. Critical legal scholars persistently assume that law functions to legitimize an inherently illegitimate system, using a law-as-opiate-of-the-masses argument drawn from Critical Theory. A rejection of law as neutral clearly allows, but does not mandate, this conclusion. An assertion that law consistently plays an ideological role is a conclusion based on politics, not on epistemology. The issue of whether law is ideological is an important one that critical legal scholars should address directly, instead of assuming that their conclusions follow naturally from a rejection of the picture theory.

2. Law as Indeterminate

Recently a group of critical legal scholars known as the "irrational-

\footnote{See, e.g., Boyle, supra note 336, at 715. ("[W]e cannot claim to have discovered the canonical, essential structure of thought from which liberal theorists depart at their peril.")}

\footnote{My critique is not motivated by a desire to vindicate liberal theorists but rather by my objection to critical legal scholars' insistence on a bright line distinction between their own "radical" outlook and that of "liberals." As critical legal scholars themselves at times admit, few differences of opinion exist between them and liberals on a wide range of issues. See, e.g., Kelman, supra note 406, at 298-304. The convergence of their views reflects the fact that many liberals and critical legal scholars share an underlying premise not shared by traditional radicals. Whereas traditional radicals distinguished themselves from liberals by insisting that society could be restructured only by revolution, see, e.g., K. Marx & F. Engels, The Communist Manifesto 101 (D. Struik ed. 1971) (1848); V. Lenin, State and Revolution 9-10 (1932), both critical legal scholars and traditional liberals focus on the transformation of society from within, see, e.g., R. Unger, supra note 322, at 191-295; Greer, Antonio Gramsci and "Legal Hegemony," in The Politics of Law 304 (D. Kairys ed. 1982). My point is not that no differences exist among the broad band of American progressives, but that much more of a continuum exists than CLS is willing to acknowledge. CLS's term "liberalism" is just the kind of huge, ultimately contentless word that confuses rather than promotes conversation.}

\footnote{See, e.g., Freeman, Truth and Mystification, supra note 330, at 1229; Gabel & Feinman, supra note 330, at 183; Kairys, Introduction, supra note 330, at 5; Kennedy, supra note 330, at 43; Trubek, Where the Action Is, supra note 330, at 610-15; see also Arato, Esthetic Theory and Cultural Criticism, in The Essential Frankfurt School Reader 185, 200-02 (A. Arato & P. Gebhardt eds. 1978) (tracing history of concept of ideology with the Marxist tradition).}

\footnote{See, e.g., Kairys, Introduction, supra note 330, at 17.}

\footnote{Critical legal scholars have begun to question this assumption. See Schneider, supra note 313 (critical legal scholar questioning whether notion of rights consistently plays ideological role in law).}
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ists” have developed a different argument. Like other critical legal scholars, the irrationalists begin with the familiar claim that liberal legalism is illegitimate unless legal doctrine can give neutral answers that reflect objective truth. The irrationalists then seek to show that legal doctrine is “infinitely manipulable”—that any side can use any doctrine for its own purpose. They argue that because law is not neutral, it is wholly indeterminate. Therefore, the irrationalists argue, liberal legalism fails in its attempt to justify law as neutral. Consequently, they conclude, law is inherently illegitimate, and its claims to neutrality serve to disguise its role as a method of domination.

The remainder of this Section will examine the irrationalists’ argument from a Wittgensteinian perspective to show that their leap from the rejection of law as neutral to a conclusion that law is indeterminate reflects a fundamental failure to abandon the universe shaped by the picture theory.

422 For arguments related to the one developed in this Section, see Graff, “Keep off the Grass,” “Drop Dead,” and Other Indeterminacies: A Response to Sanford Levinson, 60 Tex. L. Rev. 405 (1982); Stick, supra note 9, at 352-69.

423 The phrase is Joseph Singer’s. See Singer, The Player and the Cards: Nihilism and Legal Theory, 94 Yale L.J. 1, 10 (1986). Duncan Kennedy has for years spent substantial amounts of class time “flipping” arguments to point out that the application of legal rules does not give answers automatically. See, e.g., Kennedy, supra note 320, at 1723. The technique of flipping, however, obscures the fact that certain arguments sound supremely unconvincing when used by certain parties, and that the legal culture makes some arguments unconvincing in certain contexts.

The point that texts are infinitely manipulable has also been made in the context of literary theory. See M. Fischer, supra note 215, at 53 (analyzing work of post-structuralist literary critic J. Hillis Miller).

As in Derrida, a stark either-or logic is at work here. Either we get a poet right in one “final decisive formulation,” or we find ourselves lost with our author in the “blind alleys” of language. Either we can seize the meaning of texts in a “single, definitive interpretation” or they are “unreadable.”

Id. (footnote omitted); see also Abrams, How To Do Things with Texts, 46 Partisan Rev. 566, 570 (1979) (“Derrida remains committed to absolutism; for he shares the presupposition of the views he deconstructs that to be determinately understandable, language requires an absolute foundation, and that, since there is no such ground, there is no stop to the play of undecidable meanings.”).

424 CLS’s focus on indeterminacy recasts in post-structuralist terms the realists’ earlier critique of classical legal thought. See, e.g., Cohen, supra note 101, passim (legal realist arguing that categories of classical legal thought are “transcendental nonsense” and yield no firm answers). The realists’ argument was melded with Critical Theory in the early 1980s by critical legal scholars who argued that law was “incoherent.” See, e.g., Trubek, Where the Action Is, supra note 330, at 595-96. For examples of the post-structuralist “indeterminacy” version of this critique, see Dalton, supra note 14, at 234-35 (discussing radical version of indeterminacy); Dalton, An Essay in the Deconstruction of Contract Doctrine, 94 Yale L.J. 997, 1007 (1985); Peller, supra note 337, at 1169-70, 1174-81; Singer, supra note 423, at 10-14. See generally Symposium: A Critique of Rights, 62 Tex. L. Rev. 1363 (1984). For an early version of the indeterminacy argument, see Levinson, Law as Literature, 60 Tex. L. Rev. 373 (1982).

425 See text accompanying notes 225-26 supra.
The irrationalists' view has been heavily influenced by post-structuralism and, in particular, by the post-structuralist interpretation of the philosophy of Jacques Derrida. At the most superficial level, the irrationalists' analysis of law employs Derrida's vocabulary—such terms as "traces," "différence," "iterability," and "aporia." This vocabulary serves to provide the irrationalists with the same aura of power and authority within the academic community that Derrida's work has had. The irrationalists also have adopted the urgent tone that is characteristic of Derrida and the Yale literary critics. For example, just as the literary critics praise their own courage for uncovering subversive truths, so the irrationalists claim that they have fearlessly followed through the subversive implications of the new epistemology at considerable personal risk.

The irrationalists also adopt Derrida's insistence that "free play" is the goal of deconstructive discourse, as well as the deconstructionists' focus on the way knowledge serves to reproduce illegitimate power structures. Finally, they adopt Derrida's focus on the indeterminacy of language. They seek to establish the indeterminacy of law, which, they assert, is falsely seen by liberals as a system of self-executing rules.

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426 See text accompanying notes 246-67 supra; see also Boyle, supra note 336, at 707, 732 n.141; Dalton, supra note 424, at 1007; Peller, supra note 337, at 1160 n.6. For an alternative application of Derrida's theory to law, see Balkin, supra note 383.

427 See, e.g., Boyle, supra note 336, at 691, 748. An "aporia" is the place at which language encounters an impasse. See J. Culler, supra note 144, at 23, 96.

428 See M. Fischer, supra note 215, at 135. Fischer notes that deconstructionist literary critics greatly exaggerate the professional risks associated with their work, and that they have in fact achieved power and legitimacy in their fields by espousing their supposedly subversive views. Id. at 97-109; see also Campbell, The Tyranny of the Yale Critics, supra note 229.


To its discredit, the legal establishment has recently taken steps that confirm critical legal scholars' predictions of persecution. See Kuttner, Free Ideas at Harvard Aren't So Free, Boston Globe, May 18, 1987, at 19.

430 See Boyle, supra note 336, at 688 (adopting Derrida's playful style, suggesting an analytic structure, and asserting, "I am happy to say [these categories are] absolutely useless for classifying or categorizing theorists"); see also Peller, supra note 337, at 1262; text accompanying notes 242-44 supra.

431 See, e.g., Boyle, supra note 415, at 1005, 1049; Dalton, supra note 424, at 1000-01; Dalton, supra note 14, at 230-33; Peller, supra note 337, at 1180, 1279-84.

432 It remains unclear whether Derrida in fact treats language's indeterminacy as an overriding principle. Some scholars believe that the American post-structuralists' obsession with indeterminacy derives from a misinterpretation of Derrida. See, e.g., J. Culler, supra note 144, at 132; H. Staten, supra note 31, at 358. It is difficult to avoid the conclusion, however, that, at least in some passages, Derrida does elevate the principle of indeterminacy to the level of a universal truth. See J. Culler, supra note 144, at 131-32; Culler, supra note 216, at 13.

433 See, e.g., Boyle, supra note 336, at 721; Dalton, supra note 424, at 1005-07; Peller, supra
deconstructing these rules, the irrationalists hope to show that the rules do not have an internal logic that compels specific results. Legal realists, who engaged in a similar exercise, concluded that the classical idea that law compels a specific result through its own internal logic is "transcendental nonsense." The irrationalists, girded with Derridaen learning, jump from the long-established tenet that law does not function by internal logic to the conclusion that law is therefore radically indeterminate, and that any legal argument can be argued for any given position. This rhetorical structure sets up a false dichotomy between two alternative conclusions: Either one believes the liberals' picture-theory analysis or one adopts the irrationalists' view of law as radically indeterminate.

Is there no third alternative?

3. A Wittgensteinian Alternative

The irrationalists' proposed dichotomy echoes Richard Bernstein's "grand seductive Either/Or": "Either there is . . . a fixed foundation for our knowledge, or we cannot escape the forces of darkness that envelop us with madness, with intellectual and moral chaos." The irrationalists share this dichotomy with Dean Carrington and differ only in their attitude toward the chaos. While CLS's critics view it as dark and threatening, the irrationalists embrace it with celebrations, as found freedom, "with a certain laughter and a certain dance." But the rigid either/or persists: the only alternative to the picture theory is chaos, dark or playful. Wittgenstein's philosophy suggests an alternative view that explains why language does communicate, despite the fact that words themselves have no abstract, objective, or essential meaning.

The irrationalists' claim—that the only alternative to the picture theory is indeterminacy—retains validity only if one remains trapped within the paradigm presented by the picture theory. The irrationalists base their claim of indeterminacy on the assumption that, because legal rules do not compel specific results, those rules cannot help in deciding cases and, therefore, must perform a merely ideological function. This claim reflects the traditional conception of understanding or meaning as something that operates according to fixed rules, with no possibility of doubt about how those rules apply. One of Wittgenstein's major

434 See, e.g., Boyle, supra note 415, at 1015-23.
435 Cohen, supra note 101, passim.
436 See, e.g., Peller, supra note 337, at 1168.
437 R. Bernstein, supra note 305, at 18.
438 Id.
439 See text accompanying notes 8-11 supra.
440 J. Derrida, supra note 251, at 27.
441 See G. Baker & P. Hacker, supra note 21, at 318; L. Wittgenstein, supra note 166, ¶ 79.
projects was to challenge this theory. Wittgenstein tried to show that a concept need not be delimited by sharply defined rules in order to have meaning. Considering the meaning of the proper name “Moses,” for example, Wittgenstein wrote:

We may say, following [Bertrand] Russell: The name “Moses” can be defined by means of various descriptions. For example, as “the man who led the Israelites through the wilderness,” “the man who lived at that time and place and was then called ‘Moses,’ ” “the man who as a child was taken out of the Nile by the Pharaoh’s daughter” and so on.442

If it later turns out that one or more of these characteristics was incorrectly attributed to Moses, one need not, indeed should not, conclude that Moses never existed. Even though Moses is “defined” by reference to these attributes, if one attribute is abandoned, the definition of Moses simply shifts to the other attributes.

Furthermore, a definition will vary depending upon its particular context. As Wittgenstein put it:

And this can be expressed like this: I use the name “N” without a fixed meaning. (But that detracts as little from its usefulness, as it detracts from that of a table that stands on four legs instead of three and so sometimes wobbles.)443

Suppose, Wittgenstein suggests, a person calls an object a chair, but when she approaches it, it disappears. As soon as she concludes that she must have been mistaken in her initial assessment, the chair reappears, and she can sit in it and otherwise treat it like an ordinary chair.444 Wittgenstein asks:

Have you rules ready for such cases—rules saying whether one may use the word “chair” to include this kind of thing? But do we miss them when we use the word “chair”; and are we to say that we do not really attach any meaning to this word, because we are not equipped with rules for every possible application of it?445

He argues, thus, that concepts need not be secured against every possible contingency, nor need rules be developed to deal with all the situations that people can easily imagine, such as the case of the disappearing chair.

Wittgenstein446 and the irrationalists agree that concepts need not

442 L. Wittgenstein, supra note 166, ¶ 79, at 36-37.
443 Id. at 37.
444 Id. ¶ 80, at 38.
445 Id.
446 For Wittgenstein, language could be vague without being inadequate. See G. Baker & P. Hacker, supra note 21, at 373-74. Indeed, Wittgenstein argued that vagueness was actually indispensable to the efficient use of language. Id. at 374-75. For a discussion of the idea of vagueness in Wittgenstein’s philosophy, see id. at 367-85.
be sharply bounded by rules. But, whereas the irrationalists retain the traditional expectation that rules should deal with every possible contingency in order to be valid, Wittgenstein argued that rules that fail to satisfy the traditional expectations are not thereby flawed. Sometimes a loosely defined concept is just what we need to convey our meaning; sometimes it is not. The context determines what is required. "[A]n explanation serves to remove or to avert a misunderstanding—one, that is, that would occur but for the explanation; not every one I can imagine. . . . If I tell someone 'Stand roughly here'—may not this explanation work perfectly? And cannot every other one fail too?"

Only if we insist on a metaphysical guarantee of determinacy will we see as woefully inadequate a language that fails to provide such a guarantee but nonetheless functions as a medium of communication. The irrationalists, in the post-structuralist tradition, focus on language's inability to provide certainty, but they tend to overlook or marginalize the fact that language often functions successfully nonetheless.

Wittgenstein examined what certainty is, rather than focusing on what it is not. As he saw it, the problem is not that language fails to function like a machine, but that a machine is the wrong metaphor for language. People expect that rules will function like machines. Wittgenstein reinterpreted the machine metaphor, pointing out that the movements of machines are not completely predetermined. "[D]o we forget the possibility of [a machine] bending, breaking off, melting, and so on? Yet in many cases we don't think of that at all. We use a machine, or the drawing of a machine, to symbolize a particular action of the machine." Wittgenstein implied that language in general and rules in particular function more like the actual than the idealized machine. This indicates not that language is inadequate, but only that the traditional expectations for language created by the picture theory are unrealistic.

Rather than relying on the picture theory, Wittgenstein used the concept of culture to explain the human experience of certainty.

Is what we call "obeying a rule" something that it would be possible

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447 See, e.g., Peller, supra note 337, at 1170.
448 L. Wittgenstein, supra note 166, §§ 87-88, at 41.
449 Some of the more sophisticated post-structuralist legal scholars have grappled with this issue. See, e.g., Peller, supra note 337, at 1170 ("I am not arguing that we never communicate or understand each other when we speak or act. That would be absurd. Rather, there is no way to achieve closure with respect to the meaning of expressions or events." (emphasis in original)). The question is why closure should be required if it is unnecessary for communication.
450 L. Wittgenstein, supra note 166, §§ 193-194, at 77-78.
451 Id. § 193, at 77-78; see H. Staten, supra note 31, at 18.
452 See text accompanying notes 175-77 supra.
for only one man to do, and to do only once in his life? . . . It is not possible that there should have been only one occasion on which some-
one obeyed a rule. . . . To obey a rule, to make a report, to give an order, to play a game of chess, are customs (uses, institutions). To understand a sentence means to understand a language.\footnote{L. Wittgenstein, supra note 166, ¶ 199, at 80-81.}

Obeying a rule is a custom that makes sense (becomes reasonably determinate) only in a given cultural context. According to Stanley Cavell:

We learn and teach words in certain contexts, and then we are expected, and expect others, to be able to project them into further contexts. Nothing ensures that this projection will take place (in particular, not the grasping of universals . . . ), just as nothing insures that we will make, and understand, the same projections. That on the whole we do is a matter of our shared routes of interest and feeling . . . — all the whirl or organism Wittgenstein calls “forms of life.” Human speech and activity, sanity and community, rest upon nothing more, but nothing less, than this.\footnote{Cavell, supra note 176, at 160-61.}

The irrationalists not only demand that law function with machine-like predictability, but also insist on looking at law as a series of abstract doctrines.\footnote{See, e.g., Dalton, supra note 424, at 1009.} Because legal doctrines function in a much “thicker”\footnote{See text accompanying note 202 supra.} context, the irrationalists cut law off from the “forms of life”\footnote{See text accompanying note 176 supra.} within which legal doctrine functions. In other words, studying American law by looking only at its formal rules makes as much sense as studying American manners by simply reading a book of etiquette.

Such an approach may tell you the official rules, but it won’t tell you how life is lived. It will tell you as much . . . as the rules of baseball could tell you about some particular game—say, some exciting seventh game in the World Series.\footnote{Sass, supra note 207, at 50 (quoting anthropologist Renato Rosaldo criticizing anthropologists’ traditional approach to study of culture).}

This quotation suggests the need for a “thick description” of the way law works, to reinsert legal doctrine into the “forms of life” of which doctrinal discourse is an integral part. Ironically, the focus of traditional Anglo-American jurisprudence on case law comes closer to thick description than does CLS’s purportedly more sophisticated focus on legal doctrine.\footnote{See H. Pitkin, supra note 128, at 51.}

If the new epistemology does not necessarily imply that law is ideological or indeterminate, what are its implications for law? Legal doctrine functions not so much to compel specific answers as to provide an
approved language for talking about the issues in a given conflict. For example, when one advocate argues that a proposed exercise of eminent domain is for a legitimate public purpose, but her opponent argues that the purpose involved is clearly private, commentators' attention generally focuses upon where the parties disagree. But the purpose of legal doctrine is not to compel a conclusion about the dispute, but rather to create a consensus about which issues are potentially relevant to its resolution.\textsuperscript{460} Doctrine, in other words, describes the scope of the conversation, not its outcome.

An acceptance of the new epistemology necessarily leads one to the conclusion that doctrine's role in constraining discussion is political.\textsuperscript{461} But, as I have shown, it does not follow that law is inherently a method of domination, as critical legal scholars often appear to assume.\textsuperscript{462} The message of the new epistemology is that, in the absence of absolutes, our law—like our language—is what we choose to make it. Since our choices about doctrine constrain the scope of our conversations about vital issues, and delimit future sense and nonsense,\textsuperscript{463} they are important choices indeed. For example, do we want to choose a legal system in which our pain at seeing poor people homeless has no voice? Do we want a law in which our sharp concern over environmental degradation is discussed largely in terms of whether bureaucrats have followed the correct procedures in enforcing often unsatisfactory statutes? Do we want a law blind to the important differences between a huge commercial supply contract and an arrangement by which an elderly worker has earned his living for his entire working life?

Such choices are clearly matters of pressing moral significance. The ultimate message of the new epistemology is not ethical relativism, but that ethical choices are ours to make, and that we must accept responsibility for the constraints and choices we have embodied in our law.

\textbf{Conclusion}

This Article has had three goals. First, it has critiqued the critics of CLS, notably Dean Carrington, who have based their challenge to criti-
cal legal scholars on charges of nihilism. This Article demonstrates the cardinal weakness of this response to CLS—that it accepts CLS’s position that law’s legitimacy depends upon a successful defense of the picture theory.

The Article’s second goal has been to articulate an alternative critique of CLS. The major tenet of this critique is that CLS’s analyses of law do not follow naturally from a rejection of the picture theory. In fact, CLS’s classical structuralist texts reflect a reductionist methodology that loses its persuasiveness once one rejects CLS’s claim of privileged access to the essence of law. Moreover, critical legal scholars’ conclusion that law is ideological is a conclusion that does not flow naturally from a rejection of the picture theory. Finally, the claims of the CLS irrationalists are inconsistent with the new epistemology because their view of law as indeterminate reflects an underlying assumption that law either provides sure access to objective truth or is fundamentally arbitrary and irrational.

The third goal of this Article has been to introduce an alternative interpretation of law based on the new epistemology, an interpretation that breaks out of the seductive either/or. I have argued that the demise of the picture theory leads neither to ethical relativism nor to a universe of mere irrationality and free play, but rather to a better understanding of what the experience of certainty, all along, has been. Certainty results not from any eternal verities untouched by human hands, but rather from our culture, our customs, our politics, and our forms of life. This message has at once reassuring and frightening implications, for it highlights our responsibility for the certainties we choose.