Michigan Law Review

Volume 87 | Issue 6

1989

Contradiction and Denial

Pierre Schlag
University of Colorado School of Law

CONTRADICTION AND DENIAL

*Pierre Schlag**

A GUIDE TO CRITICAL LEGAL STUDIES. By *Mark Kelman.* Cambridge: Harvard University Press. 1987. Pp. 360. $30.

I have now written several drafts of a review of Mark Kelman's *A Guide to Critical Legal Studies* — each draft more unwieldy, more cumbersome than the previous one.[1] In each draft, I found myself, in good standard book review form, writing about (what Kelman writes about (what CLS scholars write about (what liberal legal thinkers write about (what they think they are doing (when they say they are doing (law)))))). Not only was it exceedingly difficult for me to keep the players and the plays straight, but I also had all sorts of difficulties keeping my subjects and direct objects in line.

Very quickly my subjects started trying to do some impossible (often barely mentionable) things to my direct objects. Whenever I allowed the term "CLS" or "liberal legal thought" to occupy the subject space of the sentence for even a moment, it would invariably try to slam dance into the direct object, and I would invariably lose all linguistic control. After a few invocations, these linguistic subjects "CLS" and "liberal legal thought" metamorphosed into metaphysical subjects, endowed with all the privileges appurtenant to that exalted status — privileges such as identity, constancy, integrity, unity, and many others that arguably each did not deserve. Soon these metaphysical subjects took over entirely and began trying to displace each other by making all the usual metaphysical moves.

And each time I finished a new draft, I ended up with yet another deeply caricatured description of CLS and liberal legal thought. Now, I have nothing against deep (or any other kind of) caricatures, but part of the purpose of caricatures is not simply to allow one to recognize the pattern, *but to recognize the pattern in the detail.* Somehow, where discussions of CLS are concerned, that last part seems to get lost, and very often CLS scholarship is reduced to some creaky abstraction like "contradiction/indeterminacy/legitimation."

This was happening in my drafts too. I kept trying to write about Kelman's major theme: the view that standard legal thought is char-

* Visiting Associate Professor, University of Colorado School of Law. Associate Professor, University of Puget Sound School of Law. B.A. 1975, Yale University; J.D. 1978, UCLA School of Law. — Ed. I wish to thank Richard Collins, Steve Heyman, Deborah Maranville, and Steve Smith for criticism and comments on earlier drafts.

1. Manuscripts on file with the author's attorney.

acterized both by the presence of contradiction and the denial or repression of contradiction (pp. 2-3). I wanted to say two things about Kelman's double-edged theme. These two things were related (which was certainly a hopeful sign) — unfortunately, they were related paradoxically (which arguably was not).

The first thing: The reflexivity of legal thought is such that the question of whether standard legal thought denies or represses internal contradictions, as Kelman claims, is unlikely to yield an easy straightforward answer.[2]

The second thing: Standard legal thought does in fact deny or repress contradiction in an easy, straightforward manner.

* * *

The longer version of these two things goes like this: Whether one agrees with Kelman's claim that standard legal thought represses its internal contradictions depends largely, I think, on the character of one's phenomenological experience of law and legal thought. In turn, that experience, whether contradicted or coherent, depends very much on how one understands the self-image of law and legal thought. In turn, for people like us who are deeply implicated in the legal enterprise, the self-image of law and legal thought is in part a function of what we would like law and legal thought to be (and of course vice versa). All together, these observations about the reflexivity of law and legal thought caution that the question of whether standard legal thought denies or represses internal contradictions is unlikely to yield an easy, straightforward answer.[3]

Yet quite clearly, for standard legal thought, the answer *is* straightforward. Standard legal thought abhors contradiction. And it abhors paradox and incommensurability as well. In short, it abhors anything that it perceives as challenging its own self-image as an integrated, self-sufficient mode of thought that is naturally entitled to adjudicate and organize the character of social life. Indeed, despite widespread *substantive* agreement that legal thought is not an autonomous branch of knowledge,[4] *the form* of most contemporary legal thought indicates exactly the opposite.[5] Most of us continue to write and think as if legal thought were autonomous, even as we busily repudiate legal formalism (over and over again).

The continued entrapment of standard legal thought within the old

2. For an elaboration, see Schlag, *Cannibal Moves: An Essay on the Metamorphoses of the Legal Distinction,* 40 STAN. L. REV. 929 (1988). For a provocative discussion of contradiction in legal thought, see Carlson, *Contradiction and Critical Legal Studies,* CARDOZO L. REV. (forthcoming).

3. *See* Schlag, *supra* note 2.

4. *See, e.g.,* Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987,* 100 HARV. L. REV. 761 (1987).

5. *See, ironically, id.* at 766-69, 778.

forms of an autonomous body of knowledge is evidenced by the astonishing alacrity and the relentless systematicness with which it rejects anything (such as contradiction) that might challenge its own autonomy. Even two decades of sustained contact with foreign disciplines like economics, philosophy and literature have failed to acquaint the legal mind with its lack of autonomy. On the contrary, the foreign disciplines were immediately confined to the space of the "Law and . . ." formula — where they were relegated to the subordinate role of supplying new content to replenish the structures of old legal forms. As the expert witness is to the litigator, so apparently are the liberal arts to legal scholarship.

The almost complete subjugation of the foreign disciplines to the architectural needs of standard legal thought suggests that the legal mind is extraordinarily well equipped to overlook, deny, or repress even the most obvious and serious challenges to its own autonomy. And yet, in a paradoxical way (for it is only paradoxically that I can say this), the failure of standard legal thought to reckon seriously with these challenges is a failure of legal mind.[6] It is a failure of judgment, of self-awareness, of authenticity.[7] It is a failure of legal mind to take seriously its own reflexive character. Indeed, or rather paradoxically, standard legal thought offers a number of easy straightforward stratagems for the denial or repression of contradiction. Here are just a few.

Subject-Object Reversals. Many legal scholars understand CLS claims of contradiction as an assertion that an *object* (here law and legal thought) partakes of a certain *quality* (here contradiction). In other words, the claim is understood to be that contradiction is part of the nature of law and legal thought. Accordingly, if a legal thinker is interested in determining whether the claims of contradiction are correct or not, he or she must determine whether this object called law and legal thought really does exist, and whether it really is contradictory as claimed.

I expect that, for some people, this way of thinking about CLS claims of contradiction seems perfectly sensible — indeed natural. It seems only natural to suppose that CLS claims of contradiction are about an object and that this object should have a nature or an identity — one that is independent of the observer's conception of that object. The major reason, however, that this way of thinking seems so natural is that it is *pre-conscious projection.* And yet, of course, once one makes these pre-conscious projections explicit (as I am doing now)

6. *See generally* Vining, *Law and Enchantment: The Place of Belief,* 86 MICH. L. REV. 577 (1987).

7. A number of commentators from varying perspectives have recognized the degradation of the legal mind into mindless bureaucratic repetition of sterile legal forms. *See, e.g., id.;* White, *Intellectual Integration,* 82 NW. U. L. REV. 1, 5-6 (1987); Nagel, *The Formulaic Constitution,* 84 MICH. L. REV. 165 (1985); Kennedy, *Critical Theory, Structuralism and Contemporary Legal Scholarship,* 21 NEW ENG. L. REV. 209, 211 (1986).

they hardly seem natural at all. For instance, the paragraph immediately above *objectifies* law and legal thought, *radically separates* this objectified vision of law and legal thought from the subject (the legal thinker), and *externalizes* contradiction in the object (law and legal thought).

Of course, once one makes this pre-conscious projection explicit it does not have much value as a denial stratagem. But if the radical separation, the objectification, and the externalization remain pre-conscious, we have a terrific denial technique. For one thing, the externalization of contradiction in an objectified vision of law and legal thought spares the legal thinker from any recognition that his or her own thought processes might themselves be contradicted. This, of course, leaves the legal thinker fully confident in his or her ability to adjudicate the coherence (or lack thereof) of the legal system from a place that is itself free from doubt. More than that, however, if the legal thinker remains unaware of his or her pre-conscious projections of radical separation, objectification, and externalization, then he or she will invariably attribute those pre-conscious constructions to the texts themselves. This yields an exquisite irony: the legal thinker never really confronts *serious* claims of contradiction because he or she pre-consciously reads into these claims a view of subject-object relations that he or she (quite rightly) finds untenable on the conscious level. Thus, the claims of contradiction are never adequate and must always be rejected. What the legal thinker finds untenable, however, often turns out to be simply the pre-conscious constructions of the subject-object relation projected into somebody else's text.

One can see this process of projection at work in Dworkin's challenge to CLS claims of contradiction. Says Dworkin: "Nothing is easier or more pointless than demonstrating that a flawed and contradictory account fits as well as a smoother and more attractive one."[8] The argument seems to be that you too, like CLS scholars, can see contradiction everywhere, but why on earth would you want to? Now there is some bite to this claim. But the question is what does it bite? If you ask me, it ends up biting its own tail. Rather uncannily, Dworkin's argument *ultimately* demonstrates the inadequacy of viewing legal theory as originating in a subject radically separate from its object.

But first, note that Dworkin is partly right in attacking the CLS method of contradictions: if one is trying to sort the debris of the world into theoretical categories, then choosing a contradictory categorization scheme (as opposed to a noncontradictory one) will facilitate the task greatly. Of course, Dworkin's objection can easily be turned against all sorts of traditional strategies for theory building — including some of his own. For instance, consider these variations:

8. R. DWORKIN, LAW'S EMPIRE 274 (1986).

1. Nothing is easier or more pointless than demonstrating that *an extremely abstract account* fits as well as a smoother and more attractive one.

2. Nothing is easier or more pointless than demonstrating that *an account that severely restricts or truncates the data to be interpreted* fits as well as a smoother and more attractive one.

3. Nothing is easier or more pointless than demonstrating that *an account that idealizes or sanitizes the hell out of the matters to be interpreted* fits as well as a smoother and more attractive one.

As these variations suggest, Dworkin's criticism has much broader possibilities than he imagines. In part, that is because the criticism is enabled not by any flaw in the targeted theory (CLS or any other) but by the implicit pre-conscious view of the targeted theory as a creation of a free subject radically separate from its object. If one is pre-consciously prepared to see a certain theory as having its origin in a subject radically separate from its object, then one will always be able to claim that constructing such a theory is "easy" in the pejorative Dworkinian sense. The problem, of course, is that it will be equally "easy" to make that claim. Things are just getting easier all the time.

Even the structure of the Subject-Object Reversal denial mechanism is simple. Consciously, we all know that subject and object are not radically separate. Pre-consciously, however, we often use metaphors that succeed nonetheless in radically separating the two (for example, inside/outside, here/there, etc.). When we project such crude and primitive views of subject-object relations onto the texts of others, we find (not surprisingly) that their texts are weak and flawed. The texts seem to contain views of subject-object relations that are simply untenable. Unfortunately, when we make this discovery, we are very often discovering something, not about the targeted theories, but about our own pre-conscious constructions.[9] Paradoxically, standard legal thought authorizes both the denial and the acknowledgment of this discovery. Denial is often easier. Acknowledgement is often more interesting. Both are sometimes appropriate.

Grand Solipsistic Theory. Standard legal theory seems increasingly strained in its rhetorical efforts to marginalize contradiction, paradox, and the like. One particularly popular denial strategy entails the development of a sort of "theoretical minimalism" where the criteria that theory sets up for the validation of law become so utterly unassuming in fact that, in an odd bow to Stanley Fish, these criteria are always already satisfied.[10] For instance, given a suitably specified uni-

9. Actually, our conceptions of subject-object relations (both conscious and pre-conscious) are much more varied than this quick description indicates. For an excellent discussion of the role of metaphor in legal thought, see Winter, *Transcendental Nonsense, Metaphoric Reasoning and the Cognitive Stakes for Law*, 137 U. PA. L. REV. (1989) (forthcoming).

10. *See* Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984).

verse, one gets the sense that virtually any state of affairs can be seen to conform with Kaldor-Hicks efficiency.[11] And try as one may, it still remains a mystery exactly what it is that is *really* ruled out by Dworkin's invitation to try to make of the legal materials, the best they can be.[12] And in the valiant battle against the bureaucratization of law's empire, the great tradition of American pragmatism along with those wonderful pithy sayings like: "think [. . .] not words,"[13] or "[t]he life of the law has not been [. . .]: it has been [. . .],"[14] can seem downright quaint . . . not a little oxymoronic, . . . maybe even a little nonreferential too.

What I find disquieting about the advent of these theories is not so much that they are wrong. Rather, it is the prospect that in their abstraction, emptiness, and utter lack of ambition for *the realization* of justice or other social virtues, these theories may well be an accurate expression of the current character of standard legal thought. Indeed, in the rush to resolve important normative matters, standard normative theory systematically and willingly subordinates normative positions to purely aesthetic criteria like coherence, consistency, and elegance.[15] The result is that important social virtues (justice, equality) are subordinated to the aesthetics of the scholarly legal text. One

---

11. POSNER, ECONOMIC ANALYSIS OF LAW 12-13 (1986).

12. *See* Dworkin, *Law's Ambition for Itself,* 71 VA. L. REV. 173, 177 (1985). For an elaboration of the theme in the text, see Boyle, *Legal Fiction* (Book Review), 38 HAST. L. REV. 1013 (1987).

13. O.W. HOLMES, COLLECTED LEGAL PAPERS 238 (1921).

14. O.W. HOLMES, THE COMMON LAW 1 (1881). Pragmatism has a great many things to recommend it, but one of them is not staying power. Indeed, the contemporary proponents of pragmatism are often not terribly pragmatic.

Pragmatism encourages us to make sense of our world not from the perspective of some philosophical idealism or rationalism, but in terms of intuitive judgments based upon customs, traditions, and values embedded in the social context. *See* Rubin, *The Practice and Discourse of Legal Scholarship,* 86 MICH. L. REV. 1835, 1878 (1988). This is great stuff, but it does pose some problems. One problem, of course, is that in our context it is precisely this sense that *there are* customs, traditions, and values embedded in the social context that is experienced as disappearing. Instead, we have the powerful rationalizing practices of bureaucracy and the market. So either the pragmatic invitation to look to context is a little vacant or it is an invitation to surrender to whatever customs, traditions, and values the market and bureaucracy produce. My sense is that the invitation to pragmatism is both, and that the *current* conceptual vacancy of the pragmatic approach is precisely what allows bureaucracy and the market to determine its missing content and structure.

As if in confirmation, one often gets the sense that all the bold calls for a pragmatic renaissance in legal scholarship are just a glossy public relations cover for the promotion of the highly stylized rhetoric of the lawyer's brief. Adoption of such a rhetoric in legal scholarship leaves something to be desired. For one thing, it leaves legal academics without much to do other than cheer or hiss the courts from the sidelines. Do it again, do it again, we like it, we like it? *See id.* at 1879. For another — and I know this is reaching wildly — it just may be that legal academics are not the best equipped or the best situated individuals to participate in fostering the pragmatic enterprise. *See id.* Of course, I could be wrong about all this. But I don't think so. You check it out. *See* Farber, *Legal Pragmatism and The Constitution,* 72 MINN. L. REV. 1331 (1988).

15. These aesthetic virtues may have some implicit connection to substantive virtues like justice, but I have not seen any good arguments to that effect lately. Still, one wonders whether there is a plausible vision of how history is made that could possibly support such a connection.

might even begin to wonder what the social significance of this sort of scholarship really is: The promotion of justice and the social virtues, or the maintenance of rationalist form in legal thought?

Entrenching Contradiction. Entrenching contradictions by giving them a flat ontological status is another way of denying contradiction. This approach simply makes peace with contradiction by according specific contradictions a flat, universal ontological role. Once a contradiction is universalized as intellectually intractable and historically invariant, it becomes a given, an aspect of the fixed background, the stage. No longer an actor, it loses its privileged relation to the action and is thus stripped of its creative intellectual force.

I have not seen this denial stratagem used in standard legal thought. It seems to be more popular among CLS scholars.[16] It is not clear to me, however, why this stance should seem appealing to CLS scholars, if it is at all. Attributing a universal ontological status to specific contradictions may appear to be radical and destabilizing (especially when everyone else worships at the altar of coherence). But despite these appearances, such depictions are likely to succeed only in enveloping contradiction in the secure stability and the comfortable coherence of the monistic form.

Sectorization. According to William James, the appropriate scholastic response to a contradiction is to make a distinction.[17] In contemporary legal thought, this response translates into the claim that if one pays sufficient respect to the jurisdictional scope — the sectors — within which ostensibly conflicting doctrines are supposed to apply, then one will find that the conflicts really are illusory. Instead, the doctrines are safely contained within their own limited fields of application.

This stratagem for the denial of contradiction seems to be a hybrid of Zeno's paradox and marginal analysis. The idea behind sectorization, I suppose, is that if one produces distinctions at a rate marginally faster than the production of contradiction, then the sum of these curves will always yield coherence, not contradiction. This is a great denial strategy, and it would work just fine except for one thing: it is hardly self-evident that the production of distinction and the production of contradiction are independent functions.[18]

Theoretical Unmentionables. Theoretical unmentionables are another way of containing the recognition of contradiction within manageable proportions. Any theory or mode of thought has certain gaps, holes, and absences that, by virtue of the internal constitution of the

16. Littleton, *Feminist Jurisprudence: The Difference Method Makes* (Book Review), 41 STAN. L. REV. 751, 783 (1989) (noting that male CLS scholars suggest that the fundamental contradiction is part of human nature).

17. W. JAMES, ESSAYS IN PRAGMATISM 141 (1948).

18. *See* Schlag, *supra* note 2.

theory or mode of thought, cannot be articulated in positive terms.[19] Sometimes these gaps, holes, and absences bear names and thus appear to have integrity and substance, even though, by definition or by theory, nothing positive can be said about them. These, then, are *theoretical unmentionables,* those wonderful theoretical spaces that we are quite sure exist, but that by virtue of the constitution of the theory we cannot say very much about. All theories and modes of thought have them. A major distinction among theories and modes of thought, however, is how rapidly they resort to the invocation of theoretical unmentionables to resolve potential difficulties like contradiction, paradox, and incommensurability.

From this perspective, God is no doubt the all-time champion theoretical unmentionable. Featured in the same role today are some more secular derivatives including pragmatism, practical reason, good judgment, discretion, and balancing. Contradictions can be denied by referring them for resolution to the social/conceptual space identified by these theoretical unmentionables. The unmentionables will generally work fine until one of three things happens:

> 1. Somebody actually tries to say something about the structure and content of these theoretical unmentionables, . . . in which case they become theoretically very mentionable. They acquire a positive content, a structural identity, and thus become subject to the very same contradictions that caused their parent discourse to produce them in the first place. Or,
>
> 2. Somebody points out that these theoretical unmentionables really are unmentionable and that accordingly, their explanatory power is, uh well, somewhat limited. Or,
>
> 3. The theoretical unmentionables are renamed and perhaps even reconceptualized in a way that the original purveyors of the terms do not like. Theoretical unmentionables are especially vulnerable to this sort of thing because their internal structure and content is, . . . unmentionable. Just as an example: "pragmatic craft" can become "good judgment," which can become "good sense," which can become "great *karma.*" The point is that the people who think they have really said something in the statement, "Mr. Justice Brandeis showed great pragmatic craft" would be probably be somewhat displeased to hear this translated as "Mr. Justice Brandeis had terrific karma." But really: pragmatic craft/terrific karma — what's the difference? (It's not that there isn't any — it's just that I'd like to see it explained.)

* * *

On the whole I think standard legal thought greatly underestimates the extent to which its discourses are internally contradictory, incommensurable, and paradoxical. And apart from the fact of denial,

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

there is no great surprise or mystery about the sources of this denial. On the contrary, given the multiplicity of available contradictory discourses, denial is vastly overdetermined.