The Faith Healers

Calvin R. Massey

UC Hastings College of the Law, masseyc@uchastings.edu

Follow this and additional works at: http://repository.uchastings.edu/faculty_scholarship

Recommended Citation

Available at: http://repository.uchastings.edu/faculty_scholarship/1137
The Faith Healers

Calvin R. Massey

I suppose I should be flattered that, in a work which is ostensibly a review of Mark Kelman's Guide to Critical Legal Studies, Professor Fischl devotes the bulk of his analytical efforts to sustained attack on my earlier review of Kelman's book. After all, as the adage has it, never mind what they say about you so long as they are talking about you. I am not moved to respond by the occasionally ad hominem nature of Fischl's remarks, though it is always distressing to see scholarly discourse descend to that level, nor do I intend by this response to rebut Fischl's supposedly "quote by quote and citation by citation" (p. 784) attack on my review. Anyone who really cares whether I have done justice to Kelman can read Kelman, read my review, and form their own opinion. Rather, I wish to comment briefly on two aspects of Fischl's essay: (1) his failure to mention, much less attempt to refute, my central criticism of Kelman and the entire CLS project, and (2) his failure to understand why it is that CLS has invited the question that killed it.

The fundamental failure of the CLS enterprise is not so much the failure of CLS to describe, however tentatively, any alternative state of being. As I will explain below, that omission, while important, assumes its significance mostly by the very nature of the CLS effort, and thus severely undermines the utility of CLS observations. A far more central failing of

---

Calvin R. Massey is Professor of Law, University of California, Hastings College of the Law.


2. Fischl obliquely characterizes me as "harbor[ing]" "delusions of grandeur" (p. 802), laboring under "a massive neurotic projection" (p. 805), and more directly accuses me of engaging in "intentional ... Red-baiting" (p. 800).

3. To Fischl, this charge will simply reinforce my status as a captive of liberal "structures of thought" (p. 820) that "operate ... as a highly effective inoculation against the twin viruses of self-consciousness and critique" (p. 819). If I am captive, so is Fischl, for his
CLS is the remarkable conceit that by realizing the world is a mass of contradictions, it has discovered some breathtaking new insight. It is this conceit that reveals the vacuity of CLS, and it is this charge, delivered in my earlier review, that Fischl has chosen to ignore completely.

I. The Banality of Contradiction

Fischl and I agree that Kelman and other Crits have painstakingly identified "the contradictions of liberal legal thought" (p. 785). From there our paths diverge.

To the Crits, the fact that the liberal legal system simultaneously employs "mirror-image contradictory norms" leads to the "CLS claim . . . that settled justificatory schemes are in fact unattainable." In other words, liberalism is beset by such massive contradiction that there is no way to justify the selection of any given norm. But, according to Crits, liberalism has selected norms—"mainstream thought invariably treats one term in each set of contradictory impulses as privileged"—and the end result "describe[s] the program of a remarkably right-wing, quasilibertarian order."

To me, the presence of contradiction in legal thought merely reflects "the dual nature of human existence"—the idea that we are but a small part of "the whole intricately balanced organism of the natural world" that is composed of mutually dependent pairs of opposites. There can be no concept of light without darkness. The notion of a determined world lacks meaning without its paired opposite of intentionalism. There is nothing new in contradiction nor is there any escape from it. The Crits' hypothesis seems to be that our "thought structures" prevent us from the self-reflection that produces personal and societal transformation. Or perhaps I once again misunderstand, and it is the Crits who are freed from the straitjacket of "thought structures." If so, I wonder how it is that Fischl can be so certain that he is exempt from the imprisonment of the mind that seems to addle me and the several billion other people who are not caught up in CLS "thought structures."

5. Id. at 4 (emphasis omitted).
6. Id.
9. In early 19th-century Connecticut, two preachers from neighboring towns—one a confirmed determinist and the other a disciple of free will—agreed to exchange pulpits. On the appointed Sunday they met each other on horseback halfway between their communities. The determinist greeted his opposite number with the observation that "ever since Creation, God has ordained that we exchange pulpits today."

"Then I won't do it," shouted the intentionalist, wheeling his horse around and spurring for home.

In his Rejoinder (pp. 831-32), Fischl clearly realizes that the tale is highly ambiguous but nevertheless attributes to the tale (at least so long as I am the storyteller) a damning preference for intentionalism. In so doing, Fischl reveals his preference for ascribing to his
believe that by identifying contradiction they have discovered a devastating new truth about liberal hegemony. I greet the news with a yawn; it has been with us since the beginning, whenever that may have been. If the Crits think that by identifying contradiction we can transcend the duality of human existence, I am unconvinced. Every smidgen of history suggests otherwise. If the Crit effort is directed to identifying and criticizing the mere existence of contradictory norms within the liberal legal order, I am left wondering why I should care. Substantive criticism that identifies unjustifiable anomalies, perverse results, or other palpable failures in the legal system are of interest. Merely criticizing the system because it is riven with contradiction announces little more than that the earth revolves around the sun. If this is the level at which CLS wishes to be taken, it is irrelevant, and I am not going to talk about it any more.

II. The Significance of Contradiction

However, Crits are more likely to respond by asserting that they ascribe significance to liberalism's "privileging" of one of each pair of opposites rather than to the existence of the contradiction itself. Indeed, Fischl intimates as much when he commends Kelman ("One of the great strengths of the Guide"; p. 785) for his attempt "to vindicate the intuition that liberalism systematically favors one of the two poles in each of the contradictions" (id.). By doing so, CLS has invited the very question, or some variant, that Fischl ridicules.

Fischl contends that to articulate a purpose for the CLS endeavor is impossible and, further, that the "obsessive focus on normative questions . . . makes it all but impossible for legal scholars to comprehend the current predicament of law and legal theory" (p. 783). And what is that predicament? It is not that liberalism has recognized and responded to the inevitable contradictions of human existence by employing contradictory legal norms to respond to the duality of human existence. Rather, the predicament is "that liberalism systematically favors one of the two poles in each of the contradictions" with the result that "these privileged positions 'describe the program of a remarkably right-wing, quasilibertarian order.' "

If the "current predicament of law and legal theory," according to Fischl, is the particular political outcome that has resulted under liber-
alism, is it any wonder that observers of the CLS scene should politely inquire what sort of political outcome the Crits might prefer? But, of course, if we ask that question, we reveal ourselves to be prisoners of “structures of thought” that “operate as a highly effective inoculation against the twin viruses of self-consciousness and critique” (pp. 819). We can’t help it, we’re intellectual yahoos. Nevertheless, if the thrust of the CLS effort is to criticize virtually every outcome delivered by the prevailing liberal legal order, one is entitled to wonder how the CLS thinkers would improve the sad, bleak landscape they have described. Nor is this wonder solely the product of liberal “structures of thought”; it is inspired in large part by CLS musings. Kelman, for example, claims that “the spirit of the antirights, antilegalist approach [of CLS] is to abandon known distorting categories, to leap ahead, not fully aware how one will reconstruct the world; that is surely a move toward transformation.” Fischl apparently agrees, for he seems to claim that CLS is engaged in a “self-conscious awareness of these antinomies and their animating conceptual structures” (p. 803) that is designed to “develop . . . insights with genuine transformative potential” (p. 819).

Fischl is simultaneously committed to the search for insights of genuine transformative potential and to squelching any inquiry about the nature of that transformation. Those of us who may be curious about this transformed world are told that we are captives of a thought structure that “operates as a highly effective inoculation against the twin viruses of self-consciousness and critique” (p. 819). I think that when someone enthusiastically endorses transformation for the sake of change, it is appropriate to remind them that global warming, nuclear warfare, genocide, and massive toxic pollution, to name only a few phenomena, are all transformative. Should we “leap ahead” anyway, and fire off all those nuclear weapons, “not fully aware how [we] will reconstruct the world,” because the act “is surely a move toward transformation”?

The Crits will accuse me of hyperbole; it is unfair to equate abandonment of the privileged norms of legal liberalism with nuclear destruction. But the hyperbole has a point that escapes Fischl. If the CLS enterprise has as a central purpose the transformation of thought and, ultimately, behavior, it is prudent to speculate on the likely nature of such transformation. Fischl contends that Crits do not know, and cannot know, the

13. One of Fischl’s favorite devices to stifle inquiry into the substance of the critical transformation is to accuse those who are skeptical of CLS of “dragging Stalin into it” (in Rejoinder, p. 837) or of “intentional . . . Red-baiting” (p. 800). This unsubtle equation of CLS skeptics with the inquisitors of the House Un-American Activities Committee may be a useful device to besmirch his critics, but Fischl conveniently ignores the infatuation of crits like Roberto Unger with the thoroughly brutal, vicious, and totalitarian politics and practices of the Red Guards of the Chinese Cultural Revolution. See William Ewald, “Unger’s Philosophy: A Critical Legal Study,” 97 Yale L.J. 665, 741–48 (1988).
nature of the transformation they seek. Thus, to Fischl, speculation by those of us skeptical of CLS about the nature of that transformation is utterly misplaced. Fischl would have you believe that the Crits have no vision of the transformed future but, presumably like Kelman, Fischl is willing to “leap ahead” and transform the world in some unknown way.

This faith is touching. It is reminiscent of the blind and unknowing faith that characterizes religious fundamentalists. At least the fundamentalists can tell you what they believe to be the fruits of their faith; Crits like Fischl deny that it is possible, or even desirable, to do so. But they want us to “leap ahead” anyway, regardless of whether the leap is into an abyss. I assume that the Crits are not nihilists but are motivated by a genuine and quite understandable desire to improve the world. If so, their blind faith that transformation will produce a better world is but a part of the larger Western myth of progress—the idea that life involves an inexorable march toward human betterment. Christopher Lasch has exposed the barren nature of that idea in his recent work, *The True and Only Heaven*.14 Lasch has effectively exploded the idea that there is such a thing as inevitable material “progress,” and he has also cast considerable doubt on the idea that there is a similarly inevitable moral progress. Yet the Crits apparently cling to the naive belief that change will automatically be beneficent, that moral progress is inevitable, for the unknown leap is a leap ahead. Native Americans over the past five hundred years have witnessed enormous change, very little of it beneficial from their perspective. Why should we assume that the Crit transformation is desirable without some better idea of its nature?

Moreover, if Crits are indeed well-meaning crusaders for a better world, it is difficult to take that proposition seriously when a Crit like Fischl disclaims the desirability of describing, or even the ability to describe, that better world. While rejecting normativity, the Crits are wedded to normativity. Their confidence that the unknown leap is indeed a change for the better reveals their attachment to the normative. To paraphrase Gertrude Stein, if there are no norms there, why are the Crits so confident that transformation is good? If there are norms there, and the transformation desired by the Crits will produce a better world, what is the character of that better world? If Fischl cannot tell me, I think it is appropriate to remain skeptical. The CLS proposal is akin to an offer to undergo some experiment the nature of which is wholly undisclosed but which is sure to transform you. When asked to describe the transformation, the promoters of the experiment blandly demur: “We don’t know,” they say, “indeed, we cannot know. But go on, leap ahead; it’s surely transformative.” Thank you; I’ll stay with the devil I know.

III. Transformative Criticism with a Point

Fischl maintains that the "obsession" of asking where you are going with your transformative insights "may render all of us considerably less likely to grasp, let alone to generate, them" (p. 819). Mary Ann Glendon has apparently not gotten the word. In her recent book, Rights Talk, she mounts a sustained attack on the American propensity to conceive of and discuss rights in a fashion that is steeped in an "intemperate rhetoric of personal liberty . . . [that] corrodes the social foundations on which individual freedom and security ultimately rest."15 To Glendon, the American vernacular of rights "is set apart from rights discourse in other liberal democracies by its starkness and simplicity, its prodigality in bestowing the rights label, its legalistic character, its exaggerated absoluteness, its hyperindividualism, its insularity, and its silence with respect to personal, civic, and collective responsibilities."16

In examining American notions of rights, Glendon does far more than simply criticize. Unlike Fischl, Glendon does know the nature of the transformation she seeks. She desires a world in which talk of rights is tempered by the acknowledgment that rights bearers also shoulder civic responsibilities, in which rights are conceived as having a social as well as an individual dimension, and in which it is recognized that not only Americans possess rights; thus our understanding of rights may be enriched by knowing appreciation of the manner by which other cultures adjust the conflicting demands of individual freedom and social obligation. Glendon does not do this abstractly but illustrates her points with reference to specific practices and precedent from such diverse fields as family law, abortion, and other aspects of the right to personal autonomy.

Glendon's book is a fine demonstration that transformative insights can be generated while one is cognizant of the nature of the transformation desired. Indeed, much of the power of Glendon's work derives from the fact that she not only has a vision of a transformed future but is able to describe in specific terms how the legal landscape could be restructured if we were to reconceive of rights in the fashion she urges. I will illustrate with one isolated example.

In discussing the problem of continuing dependency after marital dissolution, Glendon identifies three different patterns: the Continental, the Nordic, and the Anglo-American. The Continental pattern "place[s] a strong emphasis on the financial obligations of former providers, supplemented where necessary by the state."17 The Nordic approach places

---

16. Id.
17. Id. at 106.
much greater emphasis on spousal self-sufficiency, and child support is computed in such a way as to exact a substantial, but not extremely burdensome, contribution from the noncustodial parent. This system is made possible only because a relatively large part of the cost of marriage dissolution is absorbed by society as a whole through generous programs of public benefits. Divorce is treated . . . like illness or unemployment, a personal calamity whose economic consequences are mitigated through social solidarity.\textsuperscript{18}

The American approach is to

endorse in principle a Nordic-type commitment to spousal independence and self-sufficiency, but fail to establish the conditions necessary to realize this ideal in practice . . . . [T]he United States . . . has taken a most unusual and seemingly irrational stance—having embraced principles of free terminability of marriage and spousal self-sufficiency after divorce, it failed to assure either public or private responsibility for the casualties.\textsuperscript{19}

In effect, Americans are permitted to divorce their children. Glendon asserts that a rights discourse that took civic responsibility seriously would not tolerate this result. "[F]ew would defend the idea that a nation can be indifferent to the conditions under which its young citizens are being raised."\textsuperscript{20}

It is true that Mary Ann Glendon is exceptionally talented, but I doubt that she is the only person able to develop transformative insights while articulating a vision of a transformed future. If she can do it, why can't Fischl? The answer, of course, is that to envision the transformed future would compromise the very soul of the CLS effort: Criticize everything, trash all existing institutions and structures,\textsuperscript{21} and use the rubble for some unspecified, but sure to be better, new construction.

\section*{IV. Conclusion}

Ultimately, CLS asks us to engage in a religious quest. We must simply place our faith in the "transformative potential" of CLS "insights" (p. 819) and "leap ahead," reconstructing the world in some unknowable way. But this is a religion with a difference. Most, if not all, of the world's religions offer some vision in exchange for the faith of their adherents.

\begin{enumerate}
\item \textsuperscript{18} Id.
\item \textsuperscript{19} Id. at 106–7.
\item \textsuperscript{20} Id. at 107.
\item \textsuperscript{21} Mark Kelman, of course, authored one of the CLS movement's principal defenses of this gambit. See Mark Kelman, "Trashing," 36 Stan. L. Rev. 293 (1984).  
\end{enumerate}
CLS, according to Fischl, wants recruits without a vision; indeed, Fischl belittles the very idea of a vision, surprisingly adopting George Bush’s infe-
llicitous phrase, “the ‘vision’ thing” (p. 800), to spoof my demands that somebody within CLS articulate some sense of the world they hope to create by the “transformative potential” of CLS “insights.” Imprisoned by liberal thought structures, I naively profess a vision: that the world can be made a place where every individual is left as free as possible, within the legitimate and necessary constraints of our social being, to realize their personal fulfillment. Notice that my vision recognizes contradiction. Fis-
chl prefers to be sightless.

Not only does Fischl lack vision, he apprehends my vision through the distorted lens of his CLS bias. In his rejoinder, he accuses me of giving “extraordinarily short shrift to the ‘social’ side of the scale” (p. 833), presumably because I am willing to recognize that individuals do matter, and that not every conflict between “individual desire and the exigencies of social life” (id.) must be resolved by preferring, as does Fischl, the community’s desires. According to Fischl, my vision “privileges” the individual, but, of course, his preference for the unrestrained power of community is merely the product of his keenly honed “self-conscious awareness of these antinomies and their animating conceptual structures” (id. at 803). Fischl assails me for my alleged “unsuccessful efforts . . . to ‘recogniz[e] contradiction’ ” (id. at 833) but reveals himself to be as wedded to his privileged positions as he accuses me of being to mine. Fischl ridicules those of us who maintain that aspirations for self-determination and autonomy are a fundamental part of the human character22 and thereby displays an ill-
concealed loathing for the very possibility of a self-determined, autono-
mous human. Contrary to Fischl’s charge, my position is not that we are invariably self-determined autonomous people, but that over a wide range of human activity we act as if we are, that the belief that we are is as important as whatever the metaphysical reality may be and, most impor-
tant, that there is an inevitable duality to us: we are simultaneously self-
directed and autonomous and the product of our particularized and general-
ized social existence. That fact does not lead to Fischl’s cavalier rejection of self-determination and autonomy any more than it provides a basis to ignore social determinism.23

22. In a single image, Fischl manages neatly to skewer loyalty, country music, and his critics by ridiculing our position as one in which we “Stand by Our Man, the self-deter-
mined autonomous subject” (Rejoinder, p. 835). If there was ever an illustration needed to explain to the crits why their ideas are dead on arrival on the doorstep of ordinary people, here it is.

23. Similarly, Fischl contends that I am of the view that “[e]ither human activity is intended or it is determined” (id.) and that there is no other possibility. One of the points of my earlier essay, repeated here, is that humans are simultaneously both intentionalists and determinists. Either Fischl fails to understand my point or he prefers to distort my views for the sake of scoring an argumentative coup.
Finally, Fischl asserts by implication that I think that "we are self-determined autonomous subjects who 'make' law, but that law plays no important role in making us; that 'law' is an object that we can reshape simply by issuing 'it' solemn normative prescriptions; [and] that by changing law we can thereby remake social life to conform to our desires" (Rejoinder, p. 836). As usual, it is more complicated than this. We are, in part, self-determined autonomous subjects who make law, and the law we make and have made in the past is inextricably a part of the social reality that helps to define us. This is part of the duality of human existence that Fischl does not understand. Similarly, while law has an objective quality it is much too facile to assume that we can alter the social implications of law by simply directing formal change to law.24 Nor is there any reason to think that changes to law will necessarily produce the desired social changes intended to be wrought by legal change. Once again, Fischl misses the point of my stress on the duality of human existence. Indeed, Fischl exemplifies the Cartesian-Newtonian man who sees life as a sequence of causal relationships, for he is apparently unable to grasp my point that life is much more holistic than that. Post-Newtonians are able to understand that legal change (or any change) is likely to have quite unforeseeable consequences. One would think that Fischl might agree, but rather than admit agreement with a self-confessed prisoner of liberal thought structures, he prefers to distort my point.

It is impossible not to harbor skepticism about an intellectual movement that asks us to adhere to it on the basis of faith alone and to pledge that faith for wholly unknown or unrevealed objectives. It is difficult to take seriously the claims of an intellectual movement that accuses its adversaries of clinging to a political agenda while denying the existence of its own, especially when at the moment of denial and attack the mask slips and shards of the political preferences of its adherents are revealed. It is not "The Question" that killed CLS so much as it is CLS itself.
