1989

Contradiction and Critical Legal Studies

David Gray Carlson
Benjamin N. Cardozo School of Law, dcarlson@yu.edu

BOOK REVIEWS

CONTRADICTION AND CRITICAL LEGAL STUDIES

A GUIDE TO CRITICAL LEGAL STUDIES
By Mark Kelman
Harvard University Press
Cambridge, Massachusetts and London, England. 1987
360 pages; $30.00

*Reviewed by David Gray Carlson**

Mark Kelman's *A Guide to Critical Legal Studies*[1] is a disappointing account of the canonical works of the Critical Legal Studies movement ("CLS"). The book tries to cover the critical waterfront. There are chapters on the rule-standards distinction, the fact-value distinction, the intentionalist-determinist interpretations of human nature, and the legitimation theory. In addition, a lot of time is spent attacking Law and Economics, Kelman's personal specialty. The overriding theme that emerges is that liberal legal scholarship is deficient. The fault of the liberals, it appears, is the denial of contradiction. But asserting the existence of an occasional contradiction in other people's work does not necessarily make you critical. Contradiction should be the motor of dialectic, but in Kelman's work, specific contradictions are just uncriticized concepts founded on arguments from experience. All Kelman is doing is taking a few potshots at liberalism and this is not good enough. The bare assertion of specific contradictions puts Kelman on precisely the same metaphysical level as the liberal scholars he disdains.[2] An account of how some specific theory contains specific contradictions is all well and good, but it only displaces one specific theory with another, itself just as vulnerable to attack. What we need is a way out of reliance on such theories. This was Hegel's project. He showed us that contradiction

* Visiting Professor of Law, University of Michigan School of Law; Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. Thanks for reading earlier drafts go to Jamie Boyle, Bill Bratton, Drucilla Cornell, Mark Hager, Arthur Jacobson, Calvin Massey, Gary Minda, Michel Rosenfeld, Pierre Schlag, Marty Slaughter, Jeanne L. Schroeder, and Chuck Yablon.

[1] M. Kelman, A Guide to Critical Legal Studies (1987).

[2] As Hegel tells us: "Philosophy, since it is to be Ordered Knowledge, cannot . . . rest satisfied with categorical assertions of pure intuition, or use reasonings based on external reflection." 1 G. Hegel, Science of Logic 36 (W. Johnston & L. Struthers eds. 1929).

is not just a social faux pas to be corrected; contradiction is necessary, constructive, and the very substance of our condition.

In addition to an underdeveloped notion of contradiction, Kelman also hints at a pre-Wittgensteinian linguistic conservativism. If I have read him correctly, Kelman believes in the possibility of an objective meaning and therefore has all the philosophical tools needed to practice old-fashioned mechanical jurisprudence. As a result, his idea of being critical is simply to question the legitimacy of our specific laws and the possibility of consistent normative systems. A truly critical approach must go much further than this.

The first thing I will do in this Essay is describe Kelman's notion of contradiction and why it fails to be thoroughgoing. I will do this by examining Kelman's account of "rules and standards," a favorite CLS topic that Kelman describes as a contradiction. Kelman's account will be shown to be just as full of self-contradiction as the views he attacks. Second, I will suggest what a real critical approach might look like by comparing Kelman's approach to Hegel's. Finally, I will comment on Kelman's implicit view of language which, if I have read Kelman right, obliterates his claim to being critical. But before I do any of these things, I cannot resist a protest against the poorly crafted and hasty writing style in which Kelman indulges. Few sentences in his book are less than five printed lines long. In Kelman's contrapuntal style, two streams of thought are explored simultaneously in the same sentence. One theme is played out within parentheses, the other on either side of the parentheses. As a unity, each sentence is painful to read.

When Kelman is not indulging in a humorless "smarter-than-thou" tone, his prose frequently dissolves into impenetrable jargon. I will give a short example. Those who are familiar with the essay *Are Property and Contract Efficient?*, by Duncan Kennedy and Frank Michelman,[3] know it to be a clearly presented, delightfully written work. The point at the beginning of the article is that property and contract law are not a priori efficient compared to the state of nature or communal sharing, but only contingently so—that is, only given certain controversial assumptions about human nature. Here is Kelman's jargon-ridden account of that work:

> Kennedy and Michelman counter this a priori argument by noting that, in comparing a private property regime to either a state of nature or a forced sharing regime, income effects run counter to substitution effects and may or may not outweigh them. . . . The

[3] Kennedy & Michelman, Are Property and Contract Efficient?, 8 Hofstra L. Rev. 711 (1980).

> income effects argument is quite simple in the traditional form Kennedy and Michelman present, and it can be readily explained in two distinct ways. First, one can imagine that producers have an *ultimate* goods consumption target that requires *more* work effort to meet if the producer is unable to appropriate his whole initial output, either because of the state-enforced claims of the needy or forceful seizure by the strong and unrestrained. If the person we mentioned in discussing substitution effects *really* wants to consume two baubles, and there is a 50 percent tax rate, he will have to work two hours, not just one. Alternatively, one can point out that if leisure is a normal good, it will be valued more highly as a person's income rises; as one retains less of one's initially appropriated product, one will value leisure less, forgo fewer goods to get it.[4]

Am I alone in finding this "simple" rendition of Kennedy and Michelman's position impenetrable? If you really know the Kennedy-Michelman essay you might be able to guess roughly at Kelman's point.[5] But this is by no means a helpful or useful précis for those beginners who need a "guide" to CLS.

I. KELMAN AND CONTRADICTION

In the spirit of Roberto Unger,[6] Kelman's target is "mainstream liberal thought."[7] By this, Kelman has in mind a set of abstract views which, though vaguely familiar as echoes in various works, are not views that anyone really believes all at once.[8] Kelman's definition of liberalism is set forth at the very beginning of the work:

> The descriptive portrait of mainstream liberal thought that I present is a picture of a system of thought that is simultaneously beset

---

[4] M. Kelman, supra note 1, at 155-56.

[5] My translation: If people's work output is taken away (because there is no law of private property), it does not follow that they will work less. Maybe they will work harder to make up for the loss. Who knows?

[6] R. Unger, Knowledge and Politics (1975).

[7] M. Kelman, supra note 1, at 3.

[8] When forced to name actual liberals, Kelman tends to attack Richard Posner and Richard Epstein, the favorite whipping boys of the left and hardly mainstream scholars. Indeed, defeating Epstein and Posner is a veritable cottage industry. This industry exists because Posner and Epstein attempt to systematize their thought in a grand style. As a result, their flaws and failures are rendered quite apparent; anyone can trash their stuff. While such work is fun, I think it is fair to say that CLS has to do more than defeat Epstein and Posner if it wishes to defeat liberalism. But see Gregory, Book Review, 1987 Duke L.J. 1138, 1146 (claiming that "right wing Law and Economics Chicago school . . . indeed control[s] much of the legal debate" and criticizing Duncan Kennedy for aiming at "battered liberals" such as Dworkin); Hager, Against Liberal Ideology, 37 Am. U.L. Rev. 1051, 1054-55 (1988) (taking the defeat of Posner and Epstein to be an important project).

More elusive are the mainstream legal process scholars who choose not to reveal the nature of their system. Such scholars are much harder to defeat, and Kelman rarely tries.

> by internal *contradiction* (not by "competing concerns" artfully balanced until a wise equilibrium is reached, but by irreducible, irremediable, irresolvable conflict) and by systematic *repression* of the presence of these contradictions.[9]

Under this definition, Kelman himself is a liberal, because Kelman's own assertion of the dualisms and contradictions in liberal thought are just as beset by "internal *contradiction* . . . and systematic *repression*."[10]

Privileging one antinomy over others or repressing contradiction is a fault that can exist even as one indicts others for the crime of contradiction.[11] When Kelman asserts, "liberalism is nothing but a mass of contradiction," he certainly implies a belief that he is standing outside of contradiction and is free from it. Yet such a claim puts Kelman on the same metaphysical ground as his opponents. Kelman's complaint about the liberals therefore has the ironic effect of proving Kelman's own commitment to liberal thought.

In Kelman's view, contradiction is a crime or a disease—something his enemies have and he does not. But, as Hegel tries to prove, contradiction is the *substance* of everything we think and do, of everything that is *real* in the world. Contradiction is not a disease at all, but is the truth. For Hegel, the empirical facts *seem* permanent, but they are destined to go under. If truth is that which *lasts*, then contradiction is true, and individual contradictions are not.[12]

The source of Kelman's confusion between abstract contradiction and determinate contradictions is his reliance on experience: he presents his subjective, potentially idiosyncratic experience as if it were *without question* the universal experience of humankind. Kelman simply opposes his experience against that of his opponents, and in this sense he is the *same* as his opponents. Each side simply asserts the priority of his experience over that of the other, yet, to quote Hans-Georg Gadamer,

---

9 M. Kelman, supra note 1, at 3; see also id. at 269 ("critics have generally developed a picture of liberalism as an ideology beset by characteristic contradictions and modes of resolving them," and they have done so "in [an] unself-conscious way"). I am not sure what Kelman means by "unself-conscious." Does he mean objective or empirical? There seems almost nothing empirical about Kelman's own study of liberals.

10 Id. at 3 (emphasis in original).

11 The work of Pierre Schlag is replete with this insight. See Schlag, Cannibal Moves: An Essay on the Metamorphoses of the Legal Distinction, 40 Stan. L. Rev. 929 (1988); Schlag, *Fish v. Zapp*: The Case of the Relatively Autonomous Self, 76 Geo. L.J. 37 (1987) [hereinafter Schlag, *Fish v. Zapp*].

12 "The most common injustice done to speculative content is to make it one-sided, that is, to emphasize only one of the propositions into which it can be resolved." 1 G. Hegel, supra note 2, at 103.

> It is demonstrated for us that the consciousness, which is given in sense, certainty, perception, or understanding, respectively, is not valid. It is not real knowing. Thus we must proceed beyond the consciousness which appears in these forms, for that consciousness involves itself in contradictions which make it impossible for it to stay with the "truth" it had assumed and which make the untruth of its assumptions clear to us.[13]

Kelman's self-contradiction can be seen immediately in the opening chapter of the book, which deals with the supposed tension in law between rules and standards, a dichotomy popularized in Duncan Kennedy's path-breaking work, *Form and Substance in Private Law Adjudication*.[14] Since Kelman's work depends heavily on Kennedy's, a brief detour is necessary to examine Kennedy's dichotomy and the philosophical difficulties it engenders. Criticism of Kennedy's protean work applies equally to Kelman's epigonic rendition of it.

Kennedy identifies in specific laws the quality of "ruleness" against which he contrasts to the quality of "standardness." Kennedy defines rules in terms of "formal realizability." "The extreme of formal realizability," Kennedy writes, "is a directive to an official that requires him to respond to the presence together of each of a list of easily distinguishable factual aspects of a situation by intervening in a determinate way."[15] Standards, on the other hand, "require[ ] the judge both to discover the facts of a particular situation and to assess them in terms of the purposes or social values embodied in the standard."[16] Kennedy further suggests a kind of aesthetic connection between the values in individualism and rules, on the one hand, and the values in communitarianism and standards, on the other.

The dichotomy between rules and standards is very much infused with unacknowledged metaphysical assumptions.[17] First, ruleness is presented as a coherent thing-in-itself, but upon scrutiny, rules and standards exist only contingently.[18] A law is rule-like only in compar-

---

[13] H.-G. Gadamer, Hegel's Dialectic: Five Hermeneutical Studies 39 (1976).

[14] Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976).

[15] Id. at 1687-88.

[16] Id. at 1688; see also id. at 1770 ("rules are defined as directives whose predicates are always facts and never values").

[17] These insights are not present in Kelman's or even in Kennedy's work, but a lot of them are explicit or at least implicit in Shupack, Rules and Standards in Kennedy's *Form and Substance*, 6 Cardozo L. Rev. 947 (1985).

[18] The impossibility of a "thing-in-itself" is fundamental in Hegel. He writes:

> Things are called "in themselves" in so far as we abstract from all Being-for-Other, which means that they are thought of as quite without determination, as Nothings. In this sense it is indeed impossible to know what the Thing-in-itself is. For the question "what" demands that determination should be indicated; and since it is

ison to some arbitrarily chosen standard-like alternative. Similarly, standardness is not a thing-in-itself, but emerges only in comparison to some other rule-like alternative. Put another way, ruleness and standardness are contingent qualities of laws that cannot make sense standing on their own.

By implication, then, a concrete rule is *simultaneously* a standard, depending upon the status of the legal alternative against which it is compared. Furthermore, if you believe that there are infinite ways to accomplish a legislative intent, no given instantiation of a law is either solely a rule or solely a standard, or even mostly so; we cannot know what a legal formulation is until a *second* formulation is made against which the first one can be assessed. To put it more bluntly, laws are neither rules nor standards. Or, if the referent against which a law is tested is arbitrarily chosen, then a law's status as a rule or standard is completely arbitrary.

From the above, it follows that to claim that a law is either a rule or a standard is to deny its fundamental reality. Thus, even while maintaining a contradiction, Kennedy cannot help falling into privileging and denial. To use a technical CLS term, Kennedy's distinction is incoherent. This may sound harsh, but remember: to a Hegelian, incoherence is no crime! It is the *fact* of our finitude.

A second problem with Kennedy's distinction between rules and standards is that the distinction presupposes a legislature with an *intent* about how legal disputes ought to be settled, but with no ability to carry out that intent. (That's the job of judges.) Without such a presupposition, it would be impossible to assess whether a judge is doing what the legislature wants.[19] Once a legislative intent is in the

---

> postulated that the things of which these are to be predicted must be Things-in-themselves, that is, indeterminate, the question, in sheer thoughtlessness, is so put as to render an answer either impossible or self-contradictory. . . . Things-in-themselves . . . are mere abstractions, void of truth and content.

1 G. Hegel, supra note 2, at 133-34.

[19] There is an assumption in Kennedy's work that this legislative intent is omnipresent. That is, for any given result of a legal dispute, there was an answer already in the head of the legislature that was preordained before the dispute ever arose. Kennedy's universe, then, is necessarily a very static, frozen one, because he supposes that a judge's decision can always be assessed according to its adherence to the legislative purpose. See Jacobson, Hegel's Legal Plenum, 10 Cardozo L. Rev. 877 (1989).

This is so, even though Kennedy himself attacks the notion that legislatures fill the legal plenum. Kennedy, supra note 14, at 1760-61. But at such moments, Kennedy assumes the legislature does not know what to do and depends on judges to be legislators. That is, judges *join* the legislature, and together they complete the legal universe. Meanwhile, rules and standards *depend* on a critique of whether the judge can violate a determinate legislative intent.

Kennedy also abandons the filled legal universe at moments when he proclaims legal doctrine to be in conflict. Id. at 1700, 1758-60. At such moments, judges are again called on to legislate, thereby completing the universe. Undoubtedly, Kennedy would find this process a

background, an effect of rules and standards can be identified. If the legislature, which cannot perfectly communicate what it wants, spends a lot of time on communicating with judges, rules appear. Because communication is imperfect, these narrow rules inevitably exclude cases that were preordained in the omnipotent legislative mind, or they will include cases that the legislature wanted excluded. Kennedy calls this the problem of over- or under-inclusiveness. When over- or under-inclusiveness occurs, a judge must reach a decision that violates the legislative intent, even though the judge knows that the over- or under-inclusiveness is a product of a communication failure.

If the legislature trusted judges to execute its intent, rules would only be a nuisance and a waste of time. No law would be needed if judges could be completely trusted, just as infinite law would be needed if judges were completely untrustworthy.[20] Suppose, however, that a set of rules created too many over-under mistakes. The legislature could correct these mistakes only by trusting judges more; that is, by leaving the law more vague, by allowing the judge more room to avoid over-under errors. But this would come at the expense of permitting judges to substitute their own views for those of the legislature. Therefore, standards, like rules, betray the cause-and-effect relation between legislative intent and the eventual results in cases. This, then, is Kennedy's assessment of the costs and benefits of rules and standards. Yet these costs and benefits cannot appear unless we presuppose a complete legislative view of how cases should come out. What could be more false than a background metaphysical presupposition such as this?

A third problem with Kennedy's distinction between rules and standards is the atomic theory on which the rule-standard distinction is based. It will be recalled that the difference between rules and standards depends on the amount of facts a judge must find to render the "correct" legal judgment.[21] That is, the fewer facts a judge must find,

---

never-ending "bad infinity." But it is still true that for the rules-standard distinction to work, the judgment must be made against the background of what Arthur Jacobson calls a "filled legal universe." Jacobson, supra, at xxx.

20 Frederick Schauer argues that there *must* be a distinction between the purpose of legislation and the meaning of rules. If the meaning of law were *only* intent, then rules would be superfluous. Schauer, Formalism, 97 Yale L.J. 509, 537 (1988). I cannot endorse the hermeneutic point of view in his article, but I will go along with Schauer insofar as to say that if judges could be trusted to ascertain the purpose of rules—that is, if judges were perfect sympathetes with regard to the legislature—the need for rules would disappear.

21 Kelman so reads Kennedy: "[Legislators] constrain decision makers to judge particular cases mechanically by applying simple rules to a limited number of readily ascertainable facts, even though the use of nondiscretionary decision-making procedures will inexorably lead . . .

the less discretion she has, and the more rule-like is the regime under which she acts. The more facts a judge must find, the more standard-like is the legal regime. With each fact-finding comes an opportunity to shape a personal vision of right that may or may not comport with the presupposed legislative intent. Thus, the aggregate of fact-finding opportunities constitutes "discretion," and rules and standards can be defined by amounts of "discretion" in them.

This theory has a definite atomic quality to it. Such atomicity, if it works, would allow us to tell the difference between rules and standards because we could count up the atoms generated by the two alternative legal formulations and know which was the rule and which was the standard. Unfortunately, this definition of judicial discretion presupposes a universe in which all facts are already given to us as discrete and separate. The problem with this view is that any given fact can easily be portrayed as ten facts, whereas any given ten facts can easily be portrayed as one. Or to put it another way, fact finding is itself subject to the limits of fact finding and cannot constitute the quantitative stuff which separates rules from standards. As a result, it is impossible to tell the difference between rules and standards without a pregiven atomic number for discrete facts—an unjustified metaphysical presupposition.[22]

Despite these criticisms, I have no doubt that this approach of locating the difference between rules and standards in fact finding has some truth in it. The difficulty—one I am not prepared to undertake at this time—is describing atomic weight of factual significance, such that standards require broad fact finding and rules require narrow fact finding. The challenge is to describe the difference between "rigid" and "open" in a metaphysical way.[23]

All of these controversial background assumptions are unac-

---

to results the policy maker did not intend." M. Kelman, supra note 1, at 15. Since I am about to criticize this view, I regret that fair play requires that I cite myself for this proposition. Carlson, Rationality, Accident, and Priority Under Article 9 of the Uniform Commercial Code, 71 Minn. L. Rev. 207, 226 (1986).

[22] "[T]he mind machine can combine and recombine facts (or rather sensations) in an indefinite number of ways. It can see different objects-events as if they were a single fact, or it can split them up until perhaps it reaches the indivisible." R. Unger, supra note 6, at 36. Close readers of Unger will recognize this passage as coming from a portion of the book where Unger criticizes the liberal habit of analysis—breaking every entity into its parts. Yet it is a belief that Unger would endorse, as applied to the issue at hand. Even if categories are capable of some unanalyzable unity, the assertion of any such unity must be criticized before it can be accepted. In particular, any single view of the atomic weight of facts would constitute a privileging move that Unger would condemn.

[23] For an interesting but nonmetaphysical testimony on rigidness and openness in legal interpretation, see Kennedy, Freedom and Constraint in Adjudication: A Critical Phenomenology, 36 J. Legal Educ. 518 (1986).

knowledged in Kennedy's article, and none of them is discussed in Kelman's book. Perhaps it is too much to ask for Kelman to have seen through the hidden traps and contradictions in Kennedy's work, but besides replicating Kennedy's errors, Kelman also introduces some errors of his own, and for this he can clearly be faulted.

Kelman discusses rules versus standards by running (at breakneck speed) through contract, tort, criminal, and tax law in an effort to show that any given law has more than one alternative. If he finds a law that gives a lot of discretion to a judge, he labels it a "standard" (a thing-in-itself) and then shows that another alternative could have been chosen which appears rule-like in comparison. Conversely, when he finds a law that strikes him as rule-like, he draws from doctrinal materials a standard-like alternative that might have been adopted instead. The end result of his study is that legislation is in permanent conflict between rules and standards. This claim is purely a product of Kelman's notion of contradiction, in which the antinomies of his contradiction are reified into noncontingent things-in-themselves.

The contradiction is not as Kelman portrays it. For each example of a rule that could have displaced a standard, he also might have argued that the rule could have been displaced by an even more rule-like rule. Similarly, every standard that could have replaced a rule could have been called "rule replacing rule" or "standard replacing standard," because the dichotomy between rules and standards is in fact only a contingent one, not a stable contradiction that can be presented as a brute fact of legal practice.[24]

Even if Kelman had succeeded in presenting us with a coherent

---

[24] Kelman's reliance on apperception to establish the truth of propositions implies a belief in essences—unmediated facts. This prejudice seeps out in strange ways. For example: "A contract may be voided when the parties have made a mistake that 'goes to the essence of the transaction'; but there are few such readily discernible essences out there in the world." M. Kelman, supra note 1, at 46. Note that in the course of denying essences, Kelman fudges and says there are only a few. That is, there *are* essences, but few are discernible.

Yet at other times, Kelman shows that he is aware of perspectivalism, but incompletely so:

> Critics . . . frequently imply, with . . . little justification, that meaningfully unchanged "contradictions" or "clashes" continually dominate the legal agenda. Kennedy, for instance . . . , surely implies that something very much like the Fundamental Contradiction that I detailed in Chapter 1 has always existed in Western society. There may be some way of constructing ongoing, philosophical or social dilemmas that implies that there is always some need for mediation between the self and others, but it is surely also the case that our particular understanding of the contradiction is anything but historically invariant.

Id. at 234 (footnote omitted). This seems to be saying that contradiction is a brute fact that is historically invariant, but that our interpretation of what contradiction means changes with history. Kelman fails to see that the very *fact* of the contradictions he has spotted might

vision of this contradiction, it is not enough to treat such contradictions as brute facts in the world. What is the *meaning* of this contradiction? Brute facts, unmediated by apperception, do not condescend to have a meaning, but surely Kelman has not proved that his contradiction is an unmediated truth of law. Nor does he leave his contradictions uninterpreted.

There are two different meanings that Kelman attributes to the rules-standards contradiction—a minor and a major one. At times, Kelman seems to be saying that authoritative legal materials contain so many conflicting governing principles that authoritative legal sources are indeterminate.[25] This seems to be the minor meaning, because Kelman does not emphasize it. Incidentally, although the notion of the indeterminacy of authoritative legal texts is surely true, it is quite subversive to the rule-standard distinction. It will be recalled that rules and standards differ in the ability of judges to smuggle in their own subjective programs in violation of legislative intent. Yet to claim that the law is indeterminate is to deny the existence of a single legislative intent. The indeterminacy of legal authorities is a good critique, but it undermines the supposed truth that laws can be categorized as rules and standards. For this reason, the minor lesson that

---

themselves be historically contingent. See also id. at 270 ("We treat the external world as if it determines our ideas, ascribing false concreteness to the categories we have in fact invented.").

Although these passages are promising, self-reference is *not* Kelman's practice elsewhere in the book. Throughout the book he almost always asserts the "is" in a very nonperspectival way. I am left confused by Kelman's epistemology and therefore feel justified in treating Kelman as adopting a foundational point of view toward contradiction.

[25] For example, in stating that property law is full of rule-like and standard-like solutions to any problem, he writes:

> In property law, rules-standards dilemmas are likewise omnipresent. Rules exist that seemingly imply that property cannot be transferred at death except through hyperformal wills; yet many far less formal devices exist to reverse the results that would have been reached if rules were unfailingly rigidly enforced (for example quasicontracts to transfer property at death to those who served the deceased in reliance on a promised bequest; finding irrevocable *inter vivos* transfers even when the donor seems to have retained most significant control).

Id. at 38 (footnotes omitted). This passage does not seem to assert that rules or standards could be used to govern probate, but that legal doctrine is indeterminate because it contains conflicting principles by which a will, without the formalities, may or may not be admitted to probate, depending on the facts a judge finds. Hence, Kelman illustrates an example of legal indeterminacy, not a contradiction between rules and standards. But see Stick, Charting the Development of Critical Legal Studies (Book Review), 88 Colum. L. Rev. 407, 412 (1988) (reading Kelman as rejecting the indeterminacy thesis, and congratulating him for doing so).

At times, Kelman shifts to a slight variation of the indeterminacy thesis. Thus, Kelman indicates that, whereas individual laws have a purpose, the legal system as a whole does not; the legal system is simply not "thoroughgoing" in its normative program. M. Kelman, supra note 1, at 39 (mechanically applied rule against perpetuities achieves alienable estates, but other doctrines allow for inalienability). So portrayed, this is not an inevitable contradiction but a simple lack of will, a case of bad legislative housekeeping.

Kelman draws from the rules-standards distinction is logically incoherent.

In any case, the indeterminacy of law is only the minor lesson Kelman draws from the rules-standard contradiction. Primarily, Kelman seems to be saying that if you are a legislator and acknowledge the contradiction, you are obliged to see that your position is open to question. You could have written a different law from the one you wrote.[26]

As an insight, this major premise is small potatoes. There are many ways to do a task. Before the task is done, one must choose among many options. Legislators could write infinite texts, but eventually, if they choose to act, they will choose one text and reject the others.

Once a choice has been made, how useful is it to talk about rules and standards being in contradiction? Furthermore, how useful is it to observe that, whatever means is chosen, a different one *might* have been chosen. These observations are banal, but Kelman does not seem to be saying more than this.

It is true that, after one has chosen a means and acted, the act is an historical event, and either the goal is reached or not, depending on how good the instrumental judgment of the actor was. After the fact, the actor is invited to reflect on the choice and assess it as good or bad. In assessing the choice after the fact, it is sometimes carelessly deemed inevitable or not open to challenge. Such claims are rhetorically overdone. What is really meant is that the reasons for a choice seemed very strong at the time the choice was made. Careless accounts of choice after the fact may actually be false, but such mistakes do not prove that legal texts, once instantiated, are in a constant conflict between rules and standards. Once a text *is* chosen, the conflict between rules and standards has come to an end.

To summarize, the rule-standards conflict is really not more than an issue of how to characterize specific laws. The characterizations are useful to Kennedy's work in exploring the connection between the *form* of a law and the type of mind-set a legislator had in writing that law, but Kelman is certainly confusing when he takes this useful category scheme for describing formal legislative choice and making out of it a fundamental contradiction in legal practice.

---

26 "[T]here will remain in any legal dispute a logically or empirically unanswerable formal problem, that granting substantially greater discretion or limiting discretion through significantly greater rule boundedness in the formation of the prevailing legal command is always perfectly plausible." M. Kelman, supra note 1, at 16. I assume that what Kelman means by "legal dispute" is a legislative choice.

Like all good debaters, Kelman anticipates trouble and wisely tries to set the ground rules for defeating his thesis. He writes:

> If mainstream lawyers are to make a convincing case that the Critics are wrong to see formal *contradiction*, rather than a list of policy concerns to be balanced to arrive at a rational and sensible solution, they must demonstrate some fairly general tendency for formal disputes to converge toward a single balanced solution, must counter the tendency . . . for irreducible formal conflict to persist.[27]

I *think* Kelman is saying that anyone who disagrees with his thesis must show that balancing tests can be described in terms of an objective or neutral calculus. Now by invoking the old-fashioned "balancing test," Kelman hopes to tap into the hostility that exists toward the old "Yale policy-science" attitude that expert judges can neutrally balance the wants and needs of society and come up with a "right" legal result. But the practice of balancing competing moral concerns can be saved from the elitist overtones of "correct" judgments. A legislator who is asked to choose can approach the balancing modestly, assigning herself the task of developing the best reasons she can for favoring one choice over another. It seems to me that if a legislator does the best she can and is open to other perspectives and viewpoints, she has nothing to be ashamed of. Ultimately, faced with contradiction, we *have* to balance the competing accounts and positions that are presented to us. We can do this, conscious of the ultimate inadequacy of it, without having to feel foolish about the enterprise.[28]

Kelman, however, wants to condition the respectability of pragmatic judgment on the existence of a "fairly general tendency for formal disputes to converge toward a single balanced solution."[29] But why should pragmatic judgment be shackled with the requirement that it choose between rules and standards in the same way in all cases?

If this were necessary, it would be convenient for Kelman, who would then have an easier target to oppose. It cannot be an accident

---

[27] Id. at 32.

[28] We can call this approach

> an attempt to recover the notion of *phronesis*—the type of practical reasoning that Aristotle sketched for us which does not make any appeal to ultimate foundations, eternal standards, or algorithms . . . [T]he more we understand what goes on in theoretical and scientific reasoning, the more we realize how closely it resembles the forms of reasoning and decision making exemplified by the person who exhibits *phronesis*.

R. Bernstein, Philosophical Profiles 55 (1986).

[29] M. Kelman, supra note 1, at 32.

that Kelman describes Law and Economics as the most coherent form of liberalism, because Law and Economics does indeed transform balancing tests into a neutral utilitarian calculus. Neither is it an accident that Kelman looks most brilliant when he gets to oppose a fat target like Law and Economics. But it does not seem *required* for liberals (whoever they are) to believe in neutral calculi. Therefore, if Kelman's message is that liberals require a neutral balancing test to choose between rules and standards, they can simply deny it. They can characterize themselves as pragmatic intuitionists—those who cannot describe precisely why a moral choice was made but who believe that insisting on *reasons* for action helps to emphasize the moral point of view.

Intuitionism—in the form of asserting the virtue of practical reason—is a very hard opponent, and Kelman may be telling us, "Look, I only want to critique those liberals who attempt a grand ethical system that purports to be complete and closed. I don't want to tangle with intuitionism, because I can't score any points there!"[30] But Kelman must take his liberals as he finds them. John Rawls, for example, would certainly have to be called a liberal, and his impressive system has had real staying power. This is because, at bottom, Rawls is an intuitionist,[31] and it is on this level that his contractarianism survives attack. Intuitionism is a smart move for middle-of-the-road philosophers, and it is one that a great many of them take.[32]

I disagree with Kelman's implication that liberals must view a rules-standards dichotomy with abhorrence, or that liberals are committed to believing that the formal choice over how to write a law must be describable in precise mathematical terms. Furthermore, the most ardent formalist can endorse Kelman's view of contradiction.

---

30 Kelman seems positively grateful to Law and Economics for this reason, which he praises as "the best worked-out, most consummated liberal legal ideology of the sort that CLS has tried both to understand and to critique." Id. at 114.

31 Or so I have chosen to read him. In this reading, I have distinguished company. See Hare, Rawls's Theory of Justice, in Reading Rawls 81, 83-84 (N. Daniels ed. 1975); Stick, Can Nihilism Be Pragmatic?, 100 Harv. L. Rev. 332, 377 (1986). Rawls himself defined intuitionism as the attempt to solve problems by an admittedly ad hoc balancing of competing concerns, without any attempt to formulate the universal rule that governs the decision. J. Rawls, A Theory of Justice 34-40 (1971). Rawls, of course, attempts an abstract priority of right which takes him out of his own definition of intuitionism, but in the end he seems to view his entire "original position" exercise as a means of testing the justice of his own preexisting intuitions. In that sense, Rawls's intuitions are prior and Rawls himself can be viewed as a philosopher who explores the meaning of his own intuitions. See, e.g., Yablon, Arguing About Rights (Book Review), 85 Mich. L. Rev. 871, 878-79 (1987).

32 See Bratton, Manners, Metaprinciples, Metapolitics and Duncan Kennedy's *Form and Substance*, 6 Cardozo L. Rev. 871, 884-85 (1985) (reading Duncan Kennedy as making this move).

Imprecise balancing between rules and standards can be contained by naming it "politics" and assigning it to a prelegal legislative stage. For such formalists, once the choice of a legal text is made, determinate meanings might then be derived by judges in a neutral fashion. As we shall see, this approach is perfectly consistent with Kelman's conservative approach to language.

II. HEGEL AND CONTRADICTION

I have claimed that Kelman presents contradiction as a fact in the world. More than this can be done.

No philosopher has thought more about the status of contradiction than Hegel has. Hegel saw in contradiction the substance of reality, the tool of the Absolute Subject by which all concepts are destroyed so that the Subject, after being sundered from itself through its objectification in particulars, could return to itself. Contradiction is the motor of Hegel's dialectic. Hegel saw contradiction as the truth of being. Hegel claimed to have proved the necessity of an Absolute Subject with no determinateness whatsoever. But this Absolute Subject has to sunder itself into particulars in order to be.[33] That is, for the Absolute Subject, determinate being is necessary and yet *not adequate*. In the world of particulars, contradiction is the means by which determinate being must constantly destroy itself in the process of developing ever more adequate concepts. Because all concepts are *contingently* defined, by reference to the things they are not, concepts admit the reality of their negation and hence contain the seeds of their own destruction. Any given concept is inadequate to its object and, because of the negativity it contains, must go under.[34] No partial view of things can contain the reality of contradiction; only Hegel's entire ontological system, in which contradiction is the substance of reality, can contain contradiction.[35] Thus, Hegel would say that liber-

---

[33] This occurs at the beginning of the *Logic*, in which Pure Being is, and always was, Pure Nothing, implying a modulation or movement which is Becoming. Becoming produces Determinate Being, which is defined by what it is not. This "other" is the negation of the thing-in-itself and guarantees the destruction of the particular Determinate Being under consideration. 1 G. Hegel, supra note 2, at 94-95.

[34] Finite things are; but their relation to themselves is this, that, being negative, they are self-related, and in this self-relation send themselves on beyond themselves and their being. . . . The finite does not only change, like Something in general *but it perishes; and its perishing is not merely contingent, so that it could be without perishing*. It is rather the very being of finite things, that they contain the seeds of perishing as their own Being-in-Self, and the hour of their birth is the hour of their death.

Id. at 142 (emphasis added).

[35] Mark Hager, in his critique of Kelman, sees this lucidly. Hager, supra note 8, at 1058

als are not the only persons whose ideas suffer from contradiction. This disease afflicts all ideas which purport to be partial accounts of the world.

One of the implications of Hegel's view of contradiction is that to suffer from it is no embarrassment. To the contrary, contradiction cannot be avoided.[36] To express ourselves, we *must* speak in concepts, which are contradictory and which must go under. Yet by expressing ourselves, however inadequately, we provide the stuff of growth. As each concept is negated, a new, better concept takes its place, which at first *seems* contradiction-free but is not. Meanwhile, the death of a concept is illusory, because its replacement is dependent upon, preserves, and has identity with the concept it destroyed.[37]

This allows Hegel to view philosophical failures in a very generous light. Failed concepts do not suffer blame for having failed, because their failure is inevitable. Failed concepts become the very basis of the new, more adequate replacement. Failed ideas are enshrined in their more adequate replacements, and we are therefore to be grateful to failed philosophers (as Hegel often is)[38] and generous to them in their humiliation (as Kelman is not).

This attitude would allow for a much more generous attitude toward liberalism than Kelman and many other CLS practitioners have exhibited. To the extent that liberals are contractarians or utilitarians who view the community as a mere instrument of individuals, the

---

("It is confusing for CLS not to acknowledge this point and sometimes not even to recognize it.").

36 Pierre Schlag, who seems to be a Hegelian by instinct if not by training, therefore quite rightly complains that being wrong has been given a bum rap. Schlag, *Fish v. Zapp*, supra note 11, at 50.

37 "To transcend (*aufheben*) has this double meaning, that it signifies to keep or to preserve and also to make to cease, to finish." 1 G. Hegel, supra note 2, at 119.

> Negation is just as much affirmation as Negation. . . . That [which] is self-contradictory resolves itself not into nullity . . . but essentially only into the negation of its *particular* content, that such negation is not an all-embracing Negation, but is *the negation of a definite somewhat* . . . [I]t has a *content*. It is a new concept, but a higher, richer concept than that which preceded; for it has been enriched by the negation or opposite of that preceding concept, and thus contains it, but contains also more than it, and is the unity of it and its opposite.

Id. at 65.

38 Hence it had come to pass that to present the realm of thought in its philosophical aspect—that is, in its own immanent activity, or (which comes to the same thing) in its necessary development—this had to be a new undertaking, and to be begun from the very beginning; but the traditional material—the well known forms of thought—must be regarded as a highly important pattern—in fact a necessary condition, a presupposition to be thankfully acknowledged, even if only providing here and there a barren clue or, as it were, the lifeless bones of a skeleton, sometimes even flung together in disorder.

Id. at 39.

falsity of the individualist's view of the independent and self-standing subject guarantees that contractarianism will go under. But liberalism, as Hegel realized, is to be celebrated for its achievements, which are to be preserved in its more adequate replacement. Thus, Hegel struggles to preserve individuality against the community and, like the liberals, searches for ways to mediate between individual being and group being.[39]

Hegel shares a prejudice about contradiction with Kelman. Both believe that a contradictory concept cannot last and must be destroyed. This is the insight that drives Hegel's logic. Charles Taylor, who identifies this moment in Hegel as being at the very center of the *Logic*, critiques this assumption as a potent interpretation of reality, but not an ontological necessity.[40] Taylor thus leaves open the possibility of an equilibrium or stasis between the object and its negation.[41] He suggests that Hegel's logic could be reissued as a hermeneutical dialectic—a potent but unproved interpretation of how things work—rather than as an ontological dialectic—a logically necessary process. Although Hegel meant the latter, Taylor bids us to use Hegelian logic in the former sense.[42]

Tying this back into CLS, Taylor's view of Hegel bids us to ex-

---

[39] One of Drucilla Cornell's projects is to emphasize the individualist side to Hegel's philosophy, which is too often taken to be oppressively communitarian. See Cornell, Dialogic Reciprocity and the Critique of Employment at Will, 10 Cardozo L. Rev. 1575 (1989); Cornell, Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation, 136 U. Pa. L. Rev. 1135, 1179-96 (1988); Cornell, Taking Hegel Seriously: Reflections on *Beyond Objectivism and Relativism*, 7 Cardozo L. Rev. 139 (1985); Cornell, Toward a Modern/Postmodern Reconstruction of Ethics, 133 U. Pa. L. Rev. 291, 297-99, 361-63, 373-74 (1985); see also Benson, Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory, 10 Cardozo L. Rev. 1077 (1989) (grounding contract in pure, undetermined autonomy).

[40] [T]he derivation of Becoming here is not as solid as that of *Dasein*. This is the first, but not the last place in the *Logic* where Hegel will go beyond what is strictly established by his argument, because he sees in the relation of concepts a suggestion of his ontology: here the universality of movement and becoming in the relation of Being and Non-Being. But of course as probative arguments these passages are unconvincing . . . however persuasive they are as *interpretations* for those who hold Hegel's view of things on other grounds.

C. Taylor, Hegel 233 (1975).

[41] [I]t looks as though each entity essentially contains the seeds of its own destruction. But of course however much we may be tempted to speak of something containing its negation in the contrastive sense, when we move to the frontier at which things 'negate' each other by interaction, it is just as false to say that each contains its own negation. Quite the contrary, to the extent that they maintain themselves, they hold their 'negations' off. If they fail to do so, of course, they go under, but they are not essentially determined to do so by the very way in which they are defined.

Id. at 236.

[42] Id. at 218. For a critique of these views, see R. Bernstein, supra note 28, at 167-68.

amine whether our *own* systems might be partial systems, subject to destruction through negativity. This might be so even if our theories are full of talk *about* contradictions. If we present contradiction as a brute fact in the world—as I think Kelman does—then our systems themselves are shot through with contradiction, and they too must fall. For example, Kelman endorses the "fundamental contradiction" of Duncan Kennedy—the desire to be safe from the Other and the desire to fuse with the Other. Yet this theory of human existence can only be understood as itself suffering from contradiction; it is understandable only through its negativity. We can conceive of fundamentally contradictory humans only by conceiving of the opposite. Hence, *within* the idea of contradictory humans is the idea of noncontradictory humans. Hegel would say that the negativity inherent in the concept will lead to the death of the concept and its replacement by a more adequate concept. This promises the nonfundamental nature of our contradiction and the possibility of a genuine community in which we make our own the community's standards, while simultaneously maintaining our individual freedom.

The problem in Kelman's account of contradiction comes from relying on mere experience to establish the reality of contradiction, rather than relying on a purely groundless form of logic, as Hegel purported to do. David Lamb has written:

> If someone claims to have knowledge of an object by virtue of its properties, something should be known about the properties it does not have. *But these properties are not given in the immediacy of perception and are external to the simple consciousness depicted in the present phenomenal standpoint.* Yet for a percept to possess determinate properties in its own right, it must possess properties which are not given in passive perception, since only in the possession of them can it enjoy independence. This is the paradox of the Perceiver's standpoint.[43]

Thus, a reliance on our experience to prove the inevitability of contradiction forces us to confront that which we do not perceive—the negativity inherent in, and destructive of, the perception as an adequate account of the world. For this reason, Kelman can testify to his experience of contradiction all he wants to, and can present empirical evidence of contradictions from here to doomsday, but he does not begin to reveal the whole truth of contradiction through such appeals.

Yet, if we are to be consistent, even this notion must be viewed only as an interpretation, and, as such, itself shot through with con-

---

[43] Lamb, Sense and Meaning in Hegel and Wittgenstein, in Hegel and Modern Philosophy 70, 88 (D. Lamb ed. 1987) (emphasis added).

tradiction. But, as an interpretation, it seems more adequate than Kelman's notion of contradiction as a brute fact. Hegel's use of contradiction leaves open a greater possibility for growth than Kelman's presentation of contradiction which seems a dead end, a "bad infinity" whereby *nothing* can be done to escape our alienation. And yet the inevitability of alienation seems just what Kelman dislikes about liberal thought—the idea that individuals are forever separate from the Other.[44]

III. LINGUISTIC CONSERVATISM

Legal realism was based on the idea that language is indeterminate and that the real force of legal reasoning comes from human choice, not from the words themselves. This insight destroyed the notion that we could, in a literal sense, have a nation of laws, not of men. Instead, the realists revealed legal reasoning to be political, not neutral.

Kelman is quite hostile to this insight. The realists were "fixated on the indeterminacy of language," says Kelman,[45] and he criticizes CLS for perpetuating this error: "[M]ost CLS adherents often rehearse the story of language indeterminacy and seem to believe (incor-

---

[44] In assessing whether we should accept Hegel's system as a basis for real life, one may fairly ask, "Why should I make this commitment to contradiction without some guarantee that it will provide a good life? Why is this system better than the system I now live by (assuming, of course, that the principles of my life can be graced with the term "system")?" This question was actually put to me by one of the readers of an early draft, but it amounts to asking, "What's in it for me? What is the cash value of Hegel's *Logic*?"

A Hegelian must reject the premises of the question, i.e., that the selfhood of finitude is a valid and adequate concept of subjectivity. Hegel is arguing that the subjective point of view from which the question is asked is a false subjectivity that is bound to go under. Hegel bids us to give up that kind of subjectivity and return to our *true* subjectivity:

> [I]t is the duty of man to rise to that abstract universality of outlook for which it is indeed indifferent whether the hundred Thalers exist or not, whatever their quantitative relation to his fortune, just as much as he should be indifferent to his existence or nonexistence—in finite life (for a condition, a determinate being, is here intended) . . . .

1 G. Hegel, supra note 2, at 101. Therefore, Hegel would reject any challenge by an historically contingent person as illegitimate—not the true notion of subjectivity at all.

The implications of this answer are both frightening and exhilarating. On the one hand, Hegel requires that we give up the particulars of our hard-won and ferociously defended place in the hierarchy because such particulars are not the truths of our subjectivity. Hegel's philosophy is not for the self-satisfied historical subject who can only ask, "What's in it for me?" Hegel requires a kind of person who yearns to escape her finitude and participate in an eternal life. The pull of such a vision can never be entirely eliminated by the historically situated self, no matter how hardened we make ourselves to the Other. Anyone who has opened herself to religious vision will agree that Hegel must reject the very premises of the determinate subject's demand for guarantees.

[45] M. Kelman, supra note 1, at 12.

rectly, I think) that it is quite important to their work . . . ."[46]

However vague and confusing Kelman's own linguistic views are,[47] at least he *clearly* thinks that the issue is unimportant. Instead, Kelman portrays CLS as abandoning the formalist-realist debate:

> There is a CLS vision of legal indeterminacy that is quite distinct from the Realist one. This stronger CLS claim is that the legal system is invariably simultaneously *philosophically committed* to mirror-image contradictory norms, each of which dictates the opposite result in any case . . . . While settled *practice* is not unattainable, the CLS claim is that settled *justificatory schemes* are in fact unattainable. Efforts at norm legitimation are radically indeterminate not because the source of authority *cannot* speak clearly (though, rather incidentally, she often cannot) but because if pressed, she would not want to.[48]

If I have read this correctly, for Kelman, philosophical norms are in contradiction, but *language* can tell us what to do. Language can settle practice: "It *is* possible to establish legal rules, increasingly detailed in covering available cases, that can become mechanically applicable to the vast bulk of actual controversies, but *practice* may well become settled only at the cost of *principled doctrine* becoming chaotic."[49] Does this not describe the most old-fashioned, prerealist kind of formalism? Joseph Beale could have written these words.[50] Kelman implies that we cannot resolve the contradictions of ethical the-

---

[46] Id. at 13.

[47] Although Kelman himself does not state forthrightly what his views are, he does say the following in a footnote, "The account of CLS views on indeterminacy most consistent with my own view is Andrew Altman, 'Legal Realism, Critical Legal Studies, and Dworkin,' 15 *Phil. & Pub. Aff.* 205 (1986)." M. Kelman, supra note 1, at 303 n.27. I read this work to see whether *it* has an explicit view of language, but it does not. This work does talk about how meta-interpretations of law—i.e., claims that the law contains the ideology of individualism or the ideology of community—are perspectival, but it does not quite address the question of whether individual statutes have embedded within the words the one and only meaning they can have. You can believe in a prerealist view of language and still believe the law is indeterminate because the authoritative texts in which law is found are full of centuries of contradictory principles and standards, each with overlapping jurisdiction.

[48] M. Kelman, supra note 1, at 13 (emphasis in original). Kelman's parenthetical remark (authority incidentally often cannot speak clearly) is unexplained. I take this remark to repeat the idea that authority specifically chooses *not* to be clear because authority dares not take a stand between conflicting norms and wishes to be ethically ambiguous.

[49] Id. at 46 (emphasis in original); see also id. at 47: "The Realist hope that vague language will be rescued by recourse to settled purpose is turned on its head in the CLS critique: language remains relatively clear, but a knowledge of purpose makes the clarity appear arbitrary." The argument here seems to be that words have a fixed meaning, but the purpose of a law is up for grabs. Because this is so, specific laws have a legitimacy problem but no problem with determinacy. See also id. at 39 (rule against perpetuities capable of "mechanical imposition").

[50] In fact, Frederick Schauer recently has. Schauer, supra note 20. But for its wit and charm, Schauer's article easily could have been written by Kelman.

ory, but we can leave that to the realm of politics. The political realm could generate laws that judges can neutrally apply by reading the words of legal texts and doing what the texts tell them to do. If this is done with sufficient precision, then "settled" practice is attainable. This view reintroduces the separation of law and politics in precisely the way Langdell would have applauded.

Meanwhile, according to Kelman, the political authorities refuse to speak clearly, leaving us in a bind. Although Kelman would undoubtedly applaud this failure to render the law certain as an opening for lawyers "committed to radical politics,"[51] he still apparently believes that this opening could be closed if only the legislature would *speak* the words that would eliminate judicial discretion. Metaphysically, this is not very different from the prerealist, American Law Institute-style appeal to more legal certainty as the program of our profession.

And yet Kelman knows that he is not supposed to believe that meaning is in the words. Occasionally sentences appear that reflect a hermeneutical turn, but they inevitably dissolve into confusion. Take the following:

> Every post-Realist law student ought to know that when the town council declares that there shall be no vehicles in the park, it becomes no easier to tell whether it meant to bar wheelchairs, bikes, or a statue of a general in his jeep if we simply think harder about what the word *vehicle* means. (Naturally, the linguistic indeterminacy critique is apposite whether the rule maker is a legislature . . . whose work a court seeks to interpret, or a judge whose product will serve as precedent for future judicial work.)[52]

The first sentence in the passage hints that Kelman does locate meaning outside the words themselves. But he comes back with a sentence that hints at a misunderstanding—that the word "vehicle" is simply unclear and that the legislature must do better if it wants to communicate more clearly; for this reason, the linguistic indeterminacy critique is apposite, but only at the point legislation is drafted. Only then can language be made clear. This, needless to say, is not the lesson of legal realism. This is simply an appeal to more certainty if legislators are to contain judicial discretion. It is in fact superformalism—exhorting those legislators who distrust judges to get back to their desks

---

[51] Certainly one of the most irritating moments in his book is when Kelman implies he is "committed to radical politics." M. Kelman, supra note 1, at 137. I should like to know what this means. I do not consider writing law review articles about Richard Posner a commitment to radical politics.

[52] Id. at 12.

and sharpen their statutes with more precise legal vocabulary.[53]

Even if I am wrong in finding linguistic conservatism amidst Kelman's fuzzy prose, Kelman is even more wrong in asserting that the nature of language is unimportant to the CLS enterprise. You cannot be critical of the subject-object distinction and simultaneously assert the possibility of an unmediated, objective meaning. In any case, his apathy on the question of language leaves him with nothing to say about one of the most interesting debates among legal academics today. This is the debate between the linguistic indeterminists (led by Stanley Fish) and those who *concede* linguistic indeterminism (as Kelman does not) and who wish to replace linguistic certainty with stable interpretive communities (led by Owen Fiss). Kelman's comments on this debate must of necessity be those of an outsider, but he *does* side with the view that such communities are not adequate to make up for the indeterminacy of language. Kelman writes, in his standard bad-boy style:

> According to Paul Brest (who is sympathetic, in this regard to CLS), even if such a unified community did exist, which it doesn't, and even if everyone in it didn't carry within him contradictory maxims and ideals that are available to resolve every controversy, the "community" would consist of a bunch of stuffy old privileged white males, whose opinions would scarcely be worth tossing onto a trash heap.[54]

Kelman then dismisses the argument as "not altogether unimportant,"[55] by which he means it *is* totally unimportant, if, for Kelman, the meaning is really there—in the words. Meaning is external to and alien from us, and for Kelman, nothing the community could say about meaning would make a difference. So the reason its opinion

---

[53] Perhaps it does not follow from Kelman's apathy about the nature of language or from the quotes I have presented that Kelman also endorses a prerealist view of language. Yet that is the way Professor Frances Olsen reads him. She has contributed the following sales blurb for the back of Kelman's book:

> Kelman . . . thoroughly disposes of the common misreading of CLS. The common misreading is that CLS literature stands for the proposition that legal rules are all totally indeterminate and nonbinding, no rule leads you in any direction, all language is hopelessly indeterminate. Kelman suggests that CLS has never made that claim . . . .

Olsen, Book jacket to M. Kelman, supra note 1. Needless to say, I cannot endorse Professor Olsen's reading of CLS, but I do think her reading of *Kelman* is accurate, and so, obviously, did the editors of the Harvard University Press.

[54] M. Kelman, supra note 1, at 14. The issue is the determinacy of language. Therefore, the fact that we believe contradictory things need not have been mentioned, unless we believe contradictory things about what words mean. Linguistic certainty could *solve* the problem of our political confusion. Hence, Kelman is not helpful when he reminds us that we disagree about politics.

[55] Id.

about meaning is scarcely worth tossing onto a trash heap is not because the community is stuffy or white or male; it is because the community simply has nothing to do with what words mean.

CONCLUSION

Kelman's book on CLS is underdeveloped and inadequate. The book shows that Kelman has not fully grasped the meaning of contradiction and everywhere relies on reifications and sense-certainty in his account of the world. In short, this book is simply not sufficiently critical. It fails to confer a *meaning* on critical practice.

In the future, CLS needs to be more self-reflective. This may come as a surprise to those who feel CLS has been nothing *but* self-reflective. But deeper we must go. And Hegel is the philosopher who just might be able to show us the way. For Hegel, contradiction has *meaning*, and more! Contradiction, for Hegel, is the very substance of our lives. It is not to be regretted or denied but embraced as both the fact of our finitude and our salvation from it.