1993

Privileged Positions

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In his response to my review essay,[1] Professor Massey (note 9) recounts the story of two 19th-century preachers—"one a confirmed determinist and the other a disciple of free will"—whose plan to exchange pulpits is abruptly aborted when the determinist seemingly overplays his hand on the appointed Sunday. Says he: "[E]ver since Creation, God has ordained that we exchange pulpits today." "Then I won't do it," replies the intentionalist, who thereupon heads homeward, presumably to preach the gospel of free will to his own congregation.

Massey offers this story in order to show that the debate between the adherents of intentionalism and those of determinism has always been with us and thus to dismiss as "banal" and "irrelevant" cls insights about the pervasiveness of such "contradictions" within liberal legal thought (pp. 822 & 823 n.11). According to Massey:

> 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 believe that by identifying contradiction they have discovered a devastating new truth about liberal hegemony [but] . . . 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. (Pp. 822–23; footnotes omitted)

The author wishes to thank Marc Fajer, Jeremy Paul, Pierre Schlag, and Steve Winter for their extraordinarily helpful suggestions.

1. Calvin R. Massey, "The Faith Healers," 17 *Law & Soc. Inquiry* 821 (1992).

0897-6546/92/1704-0831$01.00

But the preachers' tale seems in fact to convey a rather different lesson from the one Massey would draw from it—a lesson that suggests that the efforts of critical scholars to explore and map the recurring analytical structures of legal thought may be a far more important task than Massey is prepared to acknowledge.

We might start by imagining a different ending to Massey's story. Once again, the intentionalist preacher seemingly frustrates Providence by announcing that he won't go through with the agreed-upon plan to exchange pulpits. But then the story takes a twist:

> When the intentionalist departs, the determinist looks to the sky, blesses himself, and says, "Right again, Lord! That stubborn fool took the bait just like You said he would! No danger now that my congregation will be swayed by all his free-will claptrap!"

Nor need the story end there:

> As the intentionalist heads homeward, he sighs with relief, "Boy, I can't believe that he bought my righteous indignation number! Now it's off to the golf course, guilt-free!"

Or even there:

> Cut to heaven, where a certain tripartite deity—utterly bored by the preachers' seemingly perpetual dispute—smiles as He collects on a golf bet made with the Prince of Darkness.

And so on, down the hall of mirrors.

The point is that the preachers' tale could indeed be recrafted to portray a conflict between intentionalism and determinism that is as timeless as it is familiar. *But that's not the version of the story that Massey tells.* Instead, Massey's tale ends abruptly when the intentionalist plays his trump card—"Then I won't do it"—leaving the determinist speechless and the audience at home with what appears to be an indisputable instance of the exercise of a clever and indomitable free will. The moral is not—as Massey would have it—one about "the duality of human existence" or about intentionalism and determinism interacting as "mutually dependent pairs of opposites" in some "intricately balanced organism of the natural world." Rather, the unmistakable lesson is about the triumph of the self-directed autonomous subject over the countervailing claims of determinism—about a *tilt*, not a "balance," in the way that we understand our world.

Massey makes the same analytical move when he attempts to answer the question that, much to his consternation, critical scholars have assiduously refused to engage: *What would you put in its place?* Thus, Massey

"profess[es] a vision" of a world in which "*every individual is left as free as possible, within the legitimate and necessary constraints of our social being, to realize their personal fulfillment*" (p. 828; emphasis added). "Notice," he adds in the very next sentence, "that my vision recognizes contradiction" (*id.*), evidently referring to the prospect of conflict between unconstrained individual desire and the exigencies of social life. But once again, Massey's words seem to have minds of their own; once again, despite his attempts at "balance," he has unwittingly stacked the deck. For if this "vision" is supposed to "recognize" the "contradiction" between individual desire and social life—to respect, as Massey insists, "the *dual* nature of human existence" (p. 822; emphasis added)—then why does it give such extraordinarily short shrift to the "social" side of the scale? In point of fact, to the extent that the "social" side is acknowledged at all, it is defined only in terms of the hazard that it poses for the interests of the "individual": It is viewed as a "constraint" on "free[dom]" and "personal fulfillment," not as a source of moral aspiration in and of itself.[2] Notice as well that the "individual" and the "personal" score a public relations triumph that is similar to the one enjoyed by the good guys in the Gulf War: Where the "individual" gets the rhetorical equivalent of a "Patriot" missile ("free[dom]"/"fulfillment"), the "social" is stuck with a "Scud" ("constraints"). In the same vein, the "social" is put to a heavy justificatory burden that the "individual" is not. Thus, the "constraints of our social being" must be "legitimate"; indeed, they must be "necessary." By contrast, the individual's claim to "personal fulfillment" is *already* "legitimate and necessary," since the individual is to be "*left* as free as possible" to attain it—much as he presumably was in liberalism's imaginary pre-social state. (Look, ma, no mother! Ma? *Ma!*) And note, finally, the rhetorical trap that is ready to catch anyone foolhardy enough to take issue with the utility of Massey's

2. Consider just a few of the more salient aspects of human experience that Massey's "vision" would seem to ignore: caring, community, connection, dependence, empathy, family, love, need, obligation, reliance, responsibility. This is ironic, given Massey's suggestion elsewhere in his piece that liberalism's "talk of rights" ought perhaps to be recast in order to take into account "a social as well as an individual dimension" (p. 826)—an insight that he credits to Mary Ann Glendon but which sounds an awful lot like the critique of rights rhetoric that scholars associated with cls were already making nearly a decade ago. See, e.g., Peter Gabel, "The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves," 62 *Tex. L. Rev.* 1563 (1984); Morton J. Horwitz, "Rights," 23 *Harv. C.R.-C.L. L. Rev.* 393 (1988); Duncan Kennedy, "Critical Labor Theory: A Comment," 4 *Indus. Rel. L.J.* 503 (1981); Staughton Lynd, "Communal Rights," 62 *Tex. L. Rev.* 1417 (1984); Mark Tushnet, "An Essay on Rights," 62 *Tex. L. Rev.* 1363 (1984); see generally Robin West, "Jurisprudence and Gender," 55 *U. Chi. L. Rev.* 1 (1988) (comparing liberal, critical, and feminist views of rights discourse). But whatever its pedigree, this "social . . . dimension" all but disappears when Massey attempts to "profess" his "vision"—a phenomenon that seems to me to be attributable not so much to any failing on Massey's part but to the question that his "vision" is trying to answer. As I argued in my review essay—and as I shall re-emphasize in a moment—*What would you put in its place?* is a question that by its very terms addresses the self-directed autonomous subject; we should hardly be surprised, then, when the self-directed autonomous subject provides the reply.

"vision": "So what are you saying?" we can almost hear some critic of cls respond, "You folks favor *il*legitimate and *un*necessary constraints on individual freedom and personal fulfillment?"

In sum, Massey's "vision" has come here not to "recognize" contradiction but to *deny* it. The message—like the lesson that accompanied the original version of the preachers' tale—is decidedly not about "the dual nature of human existence" or "the whole intricately balanced organism of the natural world" (p. 822). Rather, each of Massey's attempts to state a live contradiction turns out to be stabilized by a rhetorical asymmetry in which one of his poles dominates the other: In the preachers' tale, intentionalism gets the last word and thus easily puts determinism in its place; in Massey's normative "vision," the "individual" dominates the "social" through a series of rhetorical devices that force the latter to fight all the battles on the former's turf. And each of these moves is precisely what critical scholars mean when we talk about the phenomenon of *privileging* in liberal legal thought and discourse: Although legal decision making is rife with determinist assumptions and paternalist interventions, the texts that we generate—the statutes, the decisions, the treatises, the articles—maintain and reproduce a rhetoric of justification in which we almost invariably project ourselves, in Mark Kelman's words, as "self-determined subjects, expressing consistent, unambivalent, and unexceptionable desires, seeking their ends in a private world of voluntary transactions freed from force or nonnatural necessity by a state that imposes only clear rules against illicit force" (at 290). Privileging is thus a means, perhaps our most effective means, of denying the extraordinary distance between this utopian imagery and the far more complex experience of social life.

Ironically, Massey's repeated insistence that "contradiction" is inescapable is simply another form of this privileging and denial. Listen to him closely once again:

> [T]he 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 is nothing new in contradiction, *nor is there any escape from it*. . . . [I]t 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. (Pp. 822–23; emphasis added)

But look what Massey is privileging now: The presence of contradiction in legal thought, he contends, is natural; it's organic; it's existential; it's inescapable; why, it's . . . *determined*. Thus, Massey would elevate "contradiction" to ontological status, obscuring the distinct possibility that we may have had a hand in this particular construction of our experience—and

that this habit of dividing up the realm of the possible into a series of mutually entailed either/or choices (individual vs. social; intentionalism vs. determinism; etc.) may itself play a significant role in widening the embarrassing gap between life and legal theory.[3]

Indeed, by attributing these dichotomous conceptual structures to the "dual nature of human existence," Massey has quite unintentionally set up the critic of liberal privileging for an extraordinarily effective one-two punch: *Either* human activity is intended *or* it is determined—the "intricately balanced organism of the natural world" simply leaves us with no other choices—and those who would challenge the former as a naive and impoverished account of human experience must *for that very reason* prefer something closer to the equally naive and impoverished determinist alternative. This is precisely how Massey, in his original review of the *Guide*, could make the breathtaking leap from Kelman's trenchant critique of intentionalism to the assumption that critical scholars believe that "choice is illusory" and that "we are all determined by extrinsic factors";[4] it is precisely how Daniel Farber could infer from Kelman's critique of value-subjectivity that critical scholars think that "suppressing 'undesirable' groups would be a good government policy";[5] it is precisely how Eugene Genovese could read Kelman's critique of liberalism's venerable public/private distinction as a "siren call" for "privileging the claims of the state" and accordingly accuse cls of courting "totalitarian dangers";[6] and it is precisely how Massey, in his response here, could conclude from my critique of his unwitting but persistent privileging of the self-directed autonomous subject that I must therefore have a "preference for the unrestrained power of community" (p. 828). The irony, then, is that each of these leaps and inferences represents another instance of the very privileging that Kelman is talking about: Surely no one in her right mind could *really* believe that choice is illusory, that we should suppress undesirable groups, that we should flirt with totalitarianism, that we should embrace unrestrained community power. What choice do we have, then, but to Stand by Our Man, the self-directed autonomous subject?[7]

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3. For insightful elaborations of this point, see the work of Pierre Schlag (particularly "Contradiction and Denial," 87 *Mich. L. Rev.* 1216 (1989), and "Normativity and the Politics of Form," 139 *U. Pa. L. Rev.* 801, 805, 907 (1991)) and of my colleague Steve Winter (particularly Foreword: "On Building Houses," 69 *Tex. L. Rev.* 1595, 1597 (1991), and "For What It's Worth," 26 *Law & Soc. Rev.* 879 (1992)).

4. Calvin R. Massey, "Law's Inferno," 39 *Hastings L.J.* 1269, 1294 (1988) (book review).

5. Daniel Farber, "Down by Law," *New Republic*, 4 Jan. 1988, at 36, 38.

6. Eugene D. Genovese, "Critical Legal Studies as Radical Politics and World View," 3 *Yale J.L. & Hum.* 131, 144–45, 147 (1991) (book review).

7. Within the legitimate and necessary constraints of his social being, naturally.

For the record, the misreading of Kelman and cls continues unabated. Thus, Massey is simply wrong when he suggests that critical scholars subscribe to the "Western myth of progress—the idea that life involves an inexorable march toward human betterment"—and thus naively believe that the insights we might generate about liberal legal thought will nec-

Which brings us to what may be the most subtle and yet the most powerful agent of privileging at work in Massey's response: the continuing obsession with The Question—*What would you put in its place?*—that has plagued critical scholarship from the get-go. As I attempted to show in my review essay, the difficulty with The Question is that it assumes precisely the premises that critical scholars have been urging us to examine and rethink: that we are self-directed 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; that by changing law we can thereby remake social life to conform to our desires; that we are Supreme Court Justices issuing opinions—or legislatures enacting statutes—rather than merely law professors writing articles that far more often than not perform the same function in the life of our profession that the chaplain's pre-attack blessing of the troops does for the military. The problem with The Question, then, is that it reflects and reinforces each of these beliefs and enables us to assume that our *own* attempts to provide answers to it are significant and meaningful—and thus to portray ourselves, *to* ourselves, as "whole and intact, as self-directing individual liberal humanist subjects at once rational, morally competent, and in control of their own situations, the captain of their own ships, the

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essarily lead to a better world (p. 825). In fact, Kelman spends the better part of a chapter describing the rejection of that myth by critical scholars (at 213–41), and accordingly the critical claim is far more modest: How can a responsible search for an "escape" from our current predicament even be contemplated without an honest and painstaking attempt at an examination of the predicament itself?

Similarly, compare Massey's reference to Roberto Unger's supposed "infatuation" with "the thoroughly brutal, vicious, and totalitarian politics and practices of the Red Guards of the Chinese Revolution" (note 13) with the decidely *un*infatuated and *anti*totalitarian analyses of those "politics and practices" in Unger's *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy*, part 1 of *Politics: A Work in Constructive Social Theory* (New York: Cambridge University Press, 1987), the work to which Massey evidently refers. Thus, Unger argues that the Cultural Revolution was a "failed attempt" to break out of the rigid institutional structures of the Soviet communist model (*id.* at 241–46); that the potentially revolutionary practices of "criticism and self-criticism" were ultimately deployed not to "escape from the consolidation of bureaucratic power" but as "a weapon of intimidation in an elite conflict" and "a subtle method for reasserting consensus and control," so that the "fundamentals of power at every level would remain out of bounds to conflict and complaint" (*id.* at 242–43); that these critical practices—even in the hands of those who utilized them in an "attempt to chasten and, if possible, to destroy the established bureaucracies of party and state and to produce a new man or woman, new above all in their attitude toward authority"—were undermined by the "single-minded focus" on the struggle between elites and masses, so that the "crudest allocations of personal role, or the most rigid conceptions of the style of association suitable to each domain of social life, could be accepted so long as they did not overtly involve the feared contrast between elite and mass" (*id.* at 568–70); and that the Cultural Revolution was in the end "a case of failure in breakthrough toward an alternative mode of socialism and industrialism, unless the breakthrough is defined as a return to a clearer version of preexisting institutions, a return permitting limited decentralizing experiments and achieved at the cost of a protracted ordeal of provoked, uncontrolled, and suppressed insurrection" (*id.* at 245).

Hercules of their own empires, the author of their own texts."[8] As Massey's unsuccessful efforts here to "recognize" contradiction and to capture "the duality of human existence" suggest, it ain't necessarily so.

But what The Question does for the questioner is only half the story. Consider as well what The Question does to the dialogue with the *questioned*. Imagine for a moment that you share a home with a spouse or a significant other. On the one hand, you love this person very much and are dedicated to "making life" with him and to making your relationship "work." On the other, you are experiencing some difficulties that cannot fairly be characterized as "minor": He frequently interrupts you when you are trying to make a point; he has on a number of occasions said things that have humiliated you in social settings; and he has repeatedly made important decisions without consulting you in advance or taking your interests and desires into account. While you are certain that none of this is intentional on his part, you are understandably quite concerned about the source of these seemingly related behavior patterns. You are worried that they represent some sort of subconscious response to things that *you* are doing in the relationship; you are even more worried that they do not. The trouble is, every time you attempt to discuss the subject with him—every time you try to get him to talk with you about what you think is happening, where it might be coming from, and how it all is making you feel—he has the same response: "It's Karl, isn't it?" he will say, referring to a man you knew and loved in college, who is still single and who still drops by to see you when he passes through town. "You just can't let go of him, can you?" he adds in an accusing tone. "You just can't stop thinking that you might be happier if you were with him than you are with me." Rhetorically, this is an enormously effective move on your partner's part: With a single stroke, he has managed (1) to terminate further discussion of *his* behavior; (2) to change the subject to focus on the issue of *your* motives and desires; and (3) to defend the status quo by raising the stakes with the not-too-subtle suggestion that you might be planning to . . . well, put something in his place.

This, then, is the performative effect of The Question in modern legal discourse: It effectively stalls any examination of the recurring analytical structures of liberal legal thought. It changes the subject to the issue of the motives of the critic. (They're almost surely oedipal. Why can't we leave it at that and quit dragging Stalin into it?[9]) It privileges the status quo by suggesting that the only alternative is an irresponsible leap in the direction of liberalism's usual suspects. It's a trap that betrays our capacity even to begin to understand our current predicament, a task that is challenging enough as it is.

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8. Schlag, 139 *U. Pa. L. Rev.* at 805.
9. Or the Red Guards, for that matter; see *supra* note 7.

I certainly find it challenging, for I don't mean to suggest—as Massey would have it (note 3)—that critical scholars are somehow "freed from the straitjacket" of the complex interplay between law, culture, and our structures of thought that we are attempting to bring into view. Although it is surely the case that some of us speak *as if* we have found a vantage point from which to examine this interplay "from the outside"—a privileged position of our own, so to speak—I suspect that most critical scholars would readily admit that the opposite is the case, that we experience the same contradictory beliefs and impulses (self vs. other, public vs. private, rules vs. standards, intentionalism vs. determinism, etc.) as everyone else. The difference lies in our attempts at self-conscious awareness of these antinomies and their animating conceptual structures—and in our sense that this is a legitimate and in fact vital area of scholarly inquiry if we are to avoid mere apologetics—not in our successes thus far in overcoming them.

But I'm having a déjà vu; haven't I written these words before?[10]

10. I have. See "The Question That Killed Critical Legal Studies," 17 *Law & Soc. Inquiry* 779, 802–3 (1992).