

L x A=W: ON THE WEIGHT OF LEGAL NORMS

PETER GABEL*

The Critical Legal Studies movement and the emerging Law and Political Economy Project both emphasize the way that legal rules and doctrines help both to constitute and to legitimize an unjust social and political order. Critical Legal Studies (CLS), which I have been closest to for over forty years, started out with many tendencies—Marxist and neo-Marxist, legal realist with a more leftist political bite, antiformalist with both progressive policy-oriented and deconstruction-based wings, and also with a critique of social alienation that emphasized the distortions in human relations that are masked by law’s empire, law’s historical attempt to justify as morally elevated what has been lived in reality, to some significant degree, as suffering and injustice and estrangement. But for all of the diversity in its beginning, CLS has gradually come to be understood in the public mind as primarily a deconstruction of the seemingly fixed character of legal doctrine. In the work of many actual CLS writers, and certainly in the work of many who write about CLS and its meaning as a school of left legal thought, CLS has primarily come to be associated with the idea that legal doctrines are always indeterminate in their application, and that therefore the actual application of law always requires moral and political judgment. And once thus unmasked of its pretense to neutrality and objectivity apart from choice and decision, law must be understood as an inherently politically-informed activity, with the corollary that there can be no separate arena for a professional class to legitimately engage in a specialized form of thought (or mere “craft”) called legal reasoning that is distinct from underlying moral and political commitments, however conscious or unconscious those commitments are.

*Peter Gabel is the former president of New College of California and was a law professor at its public-interest law school for over thirty years. He was a founder of the Critical Legal Studies movement and is currently co-chair of the Project for Integrating Spirituality, Law, and Politics. He is Editor-at-Large of Tikkun magazine and his most recent book is *The Desire for Mutual Recognition: Social Movements and the Dissolution of the False Self*.

As important as this last contribution by CLS has been to opening up critical thought about law, it has in my view had a shortcoming—a tendency to overestimate the plasticity of law by separating the cognitive dimension of legal thought from the world of social being out of which legal ideas are born. In Marxism, that world of social being is defined by the economy and the supposed material interests that drive it, with law serving to reflect/encode/legitimize those interests...and thus the legal norms of freedom of contract, for example, both reflect and legitimize the operation of the free market, the exploitation of labor, and at the level of the superstructure, the culture of competitive individualism. To this formulation, CLS adds that the legal norms don't merely reflect but also help to constitute those socio-economic practices through a juridico-moral discourse given a falsely determinative character, with collective obedience to law (and deference to the existing system) being the result, in part, of the appearance of determinacy (if legal norms don't dictate results, there is nothing to "obey").

But the shortcoming here, of both the Marxist account and the CLS critical modification or transformation of that account, is (in my view) that the "world of social being" is neither shaped exclusively by material interests, nor by legal discourse or any other linguistic or representational feature, but by the flow of intersubjectivity that manifests both the ever-present desire for mutual recognition pulsing through every human being from birth, and the fear of the other's disconfirmation of self that is awakened by this desire. That fear of disconfirmation, or, if you like, nonrecognition or misrecognition (though I prefer disconfirmation), is a historical artifact, the result of centuries of social alienation of self from other enacted through war and violence, through the reproduction of class societies, through patriarchy and racism, and most generally through the fear-saturated reproduction of social separation that has disabled us from becoming fully vulnerable to one another, from fully entering into each other's presence as I and Thou, to use Martin Buber's formulation.¹

This is to say that social alienation has a "weight" that shapes social relations decisively, though not completely because of the desire for authentic mutual recognition that always, in every moment, transcends it. As I show in my recent book *The*

1. See MARTIN BUBER, *I AND THOU* (1937).

Desire for Mutual Recognition: Social Movements and the Dissolution of the False Self,² this weight of social alienation is lived out and carried forward through rotating patternings in social life in which each person internalizes the degree of alienation transmitted to him/her/them through every encounter and then re-externalizes it toward others in a circulating fashion, forming the lived terrain of “society” at any given time.

The weight of social alienation thus generated and reproduced (internalized and re-externalized) is measured at any given moment by the balance between fear of the other and the desire to transcend that fear present in the social field as an intersubjective flow of social energy, of life itself. To the extent that a given historical moment is characterized primarily by the circulation of fear of the other, to that extent the social world appears “heavy”—it weighs down upon us in its inertia as each of us feels compelled, against our own transcendent longing, to re-externalize the withdrawnness of spirit transmitted to us in a rotating fashion. And the reason for this is that ontologically we must become the way we are recognized: we are each social in our very being and we shape each other through how we experience and are experienced by each other, through the balance of fear and desire in our inter-experience.

To the extent that the weight of social alienation is “heavy” upon and within us, to that extent the norms of social life are not “indeterminate” but are rather weighted down beyond our social ability *at that moment* to lift them. This isn’t to say we can’t try, in every interaction and across social space in groups and organizations and nascent “movements”; but if the weight transmitted through social space is very heavy, it probably cannot *for the moment* be moved, although the heavy world can be everywhere influenced and inflected by our efforts. And the importance of that work of inflection, as well as the potential for it in every social interaction and flow, should not be minimized—it remains the visible source of hope as we try to find the key to reversing the circulation of alienation so that desire everywhere contained can break out, can break on through to the other side, can become a public force for good.

Because legal norms are expressive of the field of social being out of which they emerge, they carry the weight of that social

2. See PETER GABEL, *THE DESIRE FOR MUTUAL RECOGNITION: SOCIAL MOVEMENTS AND THE DISSOLUTION OF THE FALSE SELF* (2018).

field—in fact, as mere verbal concepts and accompanying signifying practices, they both “reflect” the social field in which they are enmeshed and they help to constitute that field by rotating the field itself through their legitimating prism. (The Supreme Court “pontificates” the necessity of the “world” it expresses with the rightness of that world’s “is-ness,” and adds some weight to it that way). For CLS, legal norms are indeterminate in their application to any case because CLS apprehends those norms abstracted from the field. But within the field in its social reality as a living interexperience in history, these legal norms carry the weight of the degree of social alienation shaping their transmission. Or we could say, using a kind of sculpture metaphor, that a legal norm prevailing at any time is made of the material of that moment’s social flow, and that material always has a certain weight measured by the degree of social alienation present in it.

If we were to try to express this point through a kind of Newtonian formula, we could say that $W=L \times A$, where W equals the weight of a legal norm, and L equals the legal norm itself (or doctrine or rule), and A equals the degree of alienation prevailing at a given moment. The degree of determinacy of any legal norm, then, would depend not only upon its abstract plasticity, but also on the weight it carries within itself as a manifestation of the degree of social alienation present in the social field at any given time.

Consider the legal norm prohibiting gay relationships prevailing not so long ago, perhaps fifty years ago. That legal prohibition was weighed down by the then culture’s level of social alienation that normatively channeled legitimate sexuality into heterosexual life and so to speak “clung” to that single exclusive form of intimate vulnerability as part of the denial of desire for a truly open society. In this sense, at that moment, sex between same-sex partners appeared to threaten the fear-saturated heterosexual world with loss of the “clinging” or defensive possession of one’s opposite-sex partner. As I show in “The Fear of Gay Marriage,”³ it is the generalized fear of the other, of the presence of real other persons, experienced as a terror of vulnerability, that leads to the hyper-possession of only one kind of sexual partner (heteronormativity) and the demonization of other forms of sexual expression and love. And in this environment,

3. PETER GABEL, ANOTHER WAY OF SEEING 131 (2013).

the law was not in fact plastic or indeterminate in relation to the possible application of, say, “the right of privacy” to strike down anti-sodomy laws,⁴ much less the use of a constitutional “fundamental right to marry,” or use of Fourteenth Amendment equal protection doctrine to allow gay relationships to be reconciled with the then sanctity of heterosexual marriage.⁵ The purely cognitive notion of indeterminacy would suggest that it would “always” have been possible to strike down homophobic laws by use of available constitutional doctrines, but when the cognitive is more fully embedded in the reality of intersubjective life as it is actually lived in history, we can see that the weight of the homophobic legal norms fifty years ago made them precisely “heavy” with determinacy. How our actual culture interprets the indeterminate legal materials is not merely a matter of political choice in the cognitive sense, but of the degree of alienation across the culture as a whole determining the distribution of the weight of the legal materials. When legal norms are “weighted down” by a circulating fear of the other that blocks and forbids open-heartedness, these norms become closed to liberating interpretations.

The LGBTQ movement, as one vector of the bursting-open force of the Sixties, is an ideal vehicle for allowing us to see the relationship between the “rising” of a social movement and the gradual lightening of a legal norm, which then makes possible the reinterpretation of suddenly plastic legal materials. For the effect of this movement, like that of all social movements that are liberatory and embody the realization of previously blocked human desire, has been to partially thaw the frozen character of historical heteronormativity. The wider social movement out of which the LGBTQ movement was able to gain its traction in social space was itself a movement of the desire for authentic mutual recognition and vital, erotic human connection breaking beyond its alienated constraints. That force of desire and longing for human connection, for escape from and transcendence of the withdrawn space enclosed by fear of the other, of each other, is what actually moves in a movement: it is what the word “movement” actually refers to in its evocation of lived social being. In its LGBTQ manifestation, that movement expressed itself in a sustained, insistent challenge, across this entire fifty-year

4. *Lawrence v. Texas*, 539 U.S. 558 (2003).

5. *Obergefell v. Hodges*, 579 U.S. 644 (2015).

period, to the closure of sexual space that required the demonization and often brutalization and murder of gays and lesbians. And to the extent that the force of the movement introduced into social space a living alternative to fear of the other, of the person next to us, to that extent the collective heart became open enough to be less frightened of vulnerability, less defensively possessive of a single legitimate sexual channel, and therefore more open to the moral truth of the LGBTQ desire for participation in the erotic sphere of human community. Out of that gradual thawing at the level of social being in historical context could emerge *Lawrence v. Texas*⁶ striking down anti-sodomy laws, and then later *Obergefell v. Hodges*⁷ legalizing gay marriage, at the level of the transformation of legal doctrine.

It is the liberating and binding power of social movements, as they “emerge” and “rise up” in social being, that allows law and legal doctrine to gain the real historical plasticity that Critical Legal Studies and perhaps The Law and Political Economy Project want to claim for it. The work of showing this plasticity of legal materials in every field of law is still very valuable and worth doing as intellectual work that widens in our perceptual field the visible social space that we could walk through if we were to become able to do so. But the reality of the transformative power that this critical legal work aspires to also requires an alliance with the great disalienating force of desire and longing that pulses through every human heart, and that holds the power, when ignited and organized into a mutually affirming movement, to dissolve the false appearances which the world as a whole clings to in periods of the hegemony of fear.

If we understand this disalienating force of desire as a *radiant energy* that can, when liberated, spread very rapidly from person to person through the interbeing medium that connects us, and if we understand alienation as the counterforce of fear of the other that blocks the flow of desire and pools it up within now-separated “individuals,” we may now expand upon our Newtonian metaphor to say that the degree of alienation is a function of the fear-desire ratio prevailing at a given historical moment, or better, within or “during” a given historical time-flow. This in turn permits us to expand upon the formula $L \times A = W$, with the degree of alienation now understood as a function

6. 539 U.S. at 558.

7. 579 U.S. at 644.

of the fear/desire ratio, which can be expressed as $A=F/D$. If A is greater than 1, law is increasingly determinative in its application. To the extent that A approaches and becomes less than 1, law becomes increasingly plastic and open to liberating interpretation.

Of course these formulae should be taken lightly, but they do name something real—the collective longing and effort to overcome the historical constraints that separate us and the ricocheting power of opening our hearts to each other’s presence once we can get the ball rolling. It’s when that ricochet begins to take place that law can truly become a force for social change.