

Foreword: The Mystery of the Social Betweens

Charles Lemert

SOcial studies of all kinds must deal with the mystery of the social between. They have not known quite what to say, for example, about the between of the State and individual.

Social sciences as we know them today are indebted to writers like Karl Marx, who in the 1840s faced straight on the massive structures of the modern world and called them what they were. The accomplishment is stunning even today for the simple reason that social structures are, by nature, as hard to pin down as they are powerful in their effects. People will talk about social things like the State as if it were a definite and visible thing. To which Tony Soprano would again be right to wonder, “New Jersey?” Where the State, or for that matter the Market begin and end in the complex life of gathered societies is impossible to say. That they are structures is impossible not to say. But how

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do structures like the State get down into the heads of individuals? This is the mystery of the Between.

The dilemma of social studies is that, in their quest for science, they drift toward observables—taking, for example, the stock market that can be observed from a balcony somewhere on Wall Street as though it were *the* Market, the center of all capital exchange in the world of economic uncertainties. Psychologists likewise organize themselves according to claims as to what constitutes the core structure of mental activity: brain, mind, the Unconscious, character, behavior, neurological development, psyche, and so on. What they are trying to avoid is cordoning themselves off from each other, not to mention from common sense. But they are not alone.

All social sciences achieve their dubious status by holding fast to particular assumptions that there is one definite structure that organizes the objects that are thought to flourish in this or that social field. Social structures, unlike other structures, being abstract, are fictions that contain a great deal of information of little direct empirical value. This mystery of the Between, as it applies to social things, usually is resolved by appeals to logic, as in: The social is what it is. Social things, thus, comprise all the various happenings that *must* be there if the data are to make sense—if, that is, the numeric calibrations of observations that can be made are to be organized into well-structured wholes like states, markets, and societies.

One of the few credits that my field, sociology, has earned in this respect is that, at its best, it does not even try to stake a precise claim in the Between. Sociology prefers to identify itself as the study not of Mind or Market or State but of Society, whatever that might be. It attempts to raid the fields of other disciplines by the crude method of pretending that there can be a “sociology of . . .” any group of things so long as it can be named. Hence, the importance of Émile Durkheim, who made the bold move that limited to a degree the endless proliferation of subjects by stipulating that sociology is, simply, the science of social things—facts that cannot be reduced to or explained by the facts of some other field.

But, here, as with Marx, the mystery of the between remained acute, still largely unsolved in our time. The Between is, in simple terms, the uncharted empirical territory between structures that are by nature abstract—hence, fictions of a necessary sort—and events that are by nature concrete and local—hence, the zest of generalizations that usually trip in the Between, well before they rise to their proper structural level. Thus, economists beg their own questions by stipulating markets appertaining to some more or less observable economic dynamic like, say, inventories; likewise, psychologists fall off their own wagon

when they are satisfied with, say, a neuroscience which has the power of biochemistry behind it that leverages itself into an elegantly incomplete science of brain as the necessary Between of well-structured mental lives.

Another of the credits due sociology, among the few it can rightly claim, is that from the beginning the early sociologists were preoccupied by the law; that is to say, they became sociologists only after the fact. Max Weber, having rejected his father's demand that he become a lawyer, became instead a social historian of the law. His doctoral thesis, *On the History of Commercial Partnerships in the Middle Ages*, was influenced by Otto von Gierke's arguments in *Das deutsche Genossenschaftsrecht* (1868–1881) that the medieval idea of corporate association is one of the betweens where isolated individuals join to protect themselves against the, then, as now, sometimes ruthless power of the state.

Likewise, Émile Durkheim, also in the 1890s, having abandoned his rabbinical lineage, turned first off to the sociology of law in complex societies. His doctoral thesis, *The Division of Labor in Society*, distinguished repressive from restitutive legal systems as the central demarcation between ancient societies, which repressed, and modern societies, which, in principle, meant to restore deviants to serviceable partnership in the moral order. In this, Durkheim drew upon the Jewish Covenant with Yahweh as a model for modern ideals of contract, hence of collective life (an extension brilliantly worked out in 1955 by the legal scholar G. F. Mendenhall in *Law and Covenant in Israel and the Ancient Near East*).

To belabor the point, it could be said also that Marx himself, having sought to set Hegel head to toe, cut his eyeteeth in 1843 on Hegel's overdetermined theory of the Between. Marx's *A Contribution to a Critique of Hegel's Philosophy of Right* includes the following: "The idea is made the subject and the *actual* relation of family and civil society to the state is conceived as its internal imaginary." (One would like to have been a fly on the wall when Louis Althusser first read that line.) Marx meant, of course, to distinguish family and civil society from the State—to put them, that is, in the social Between. Like Weber and even Durkheim, the civil Between was viewed as an at least relatively free space supportive of civil associations mysteriously populated by individuals seeking together to resist the power of the State.

David Westbrook's *Between Citizen and State: An Introduction to the Corporation*, with its eye-opening clarity, its verve and humor, and its overall brilliance will serve readers who desire, as one should, to understand the corporations. In a world in which transnational corporations seem to hold upper hand, this would exclude practically no one.

The service this book renders is all the more cultivated by its astonishing kindness. I mean nothing sentimental by this. But it must be noted that this wonderful book takes the long tradition and vexed meditations of social scientists by the scruff of the neck and washes away their failures with fresh warm water.

Though the book will, one supposes, be read first and foremost by students of the law, it should be read by anyone of whatever professional or amateur inclination to understand the residue of virtues that remain in the modern social order. Modern society has suffered in recent decades at the hands of bullies and bombasts of all stripes—from war criminals recklessly running proud modern states back into the feudal grounds from which they arose to involuntary associations of false prophets who are convinced they know better than the moderns when in fact they do not care to know anything more than the crap held in by their ideological sphincters. It is not a happy world, these days in the early 2000s. And it is particular unhappy that new thinking about the Between of citizen and State is so rare.

Between Citizen and State begins to resolve these mysteries. First, and for all students of the social, it establishes a way to fill the Between of social things. Much like the writings of von Gierke and Weber, this book appreciates the strategic role of the corporation in modern life. In terms that would have pleased Erving Goffman, Westbrook characterizes the corporation as theater in which stock characters and ordinary scripts enjoy dynamic and friendly relations. Between and among the principal characters—stockholders, directors, and managers—are obligations and protections meant to serve the good of all.

The book is filled with charming passages such as Westbrook's recapitulation of Benjamin Cardozo's famous opinion in *Meinhard v. Salmon* where Salmon did not disclose to Meinhard the facts of actions that altered their partnership. "Disclosure creates a kind of community, or more precisely, reinforces the community entailed in the business association. People should know where they stand. Cardozo is explicit: if a fiduciary were allowed to take opportunities for himself rather than the beneficiary of his trust, then 'He might steal a march on his comrade under cover of the darkness, and then hold the captured ground. Loyalty and comradeship are not so easily abjured'" (p. 79). The charm in Westbrook's disclosure of Cardozo's elegant regard for the moral basis of the law is that of revealing the best that social relations can be and seldom are.

It is this sort of thinking for which Weber and Durkheim, even Marx, were reaching when they established the modern social sciences on the loose sand of the Between of structures and individuals. The looming power of the structures

of modern capitalism was, as Weber put it, an enormous cosmos that clouded the ability of individuals to find their way. The sand did not help.

Like so many who came after them, hope was in the liberation of civil society. But liberty without friction gets you nowhere. Civil society, like civility, its derivative, has too long been a slogan that organizes the failure of liberal thought to fill the Between that, lacking substance, allows states to whack citizens. The trouble with so many of the appeals to civil society is that they leave the civil empty—a kind of open territory in which agents meet to assault states—with what weapons exactly? New Jersey indeed!

What legal theories of corporate law accomplish where most social sciences fall short is to fill that space with real content—in the case of *Between Citizen and State*, with the corporation. It may well be, referring again to von Gierke, that the medieval corporate associations were in fact the bodies that gave birth to the modern idea of liberty. Corporations are first, and perhaps foremost, personalities with duties and responsibilities. In a sense there can be no individuals unless individual personhood is called out in public—and the first instance of that calling out was the corporation.

Not all corporations are kind; most, one supposes, are anything but. But Westbrook allows us to see that the corporation is the concrete and particular form of the possibility of public life and meaningful action. Whether a business partnership or an association of rebels, those who would act require protection. Law is the friction that puts solid ground under the feet of actors. Trust is the fundament of joint action, whether for profit or revolution.

This is such a simple thing. “Disclosure creates community.” Trust, whether fiduciary or social, is thus central to community. Erving Goffman would not have been pleased with this conclusion—believing as he did that we are all necessarily dupes and dopes.

I do not assume that David Westbrook is the only lawyer who understands these things. But surely he is among the best at exposing them in ways that we occasional outlaws and regular innocents as to the nature of the Law can understand. Not only that but anyone who tries to figure out what is wrong with most social sciences as they are taught and written would do well to study this book for its contributions to a kind but serious theory of the social Between.