

### **Peller Plays Roulette**

To what extent is legal language and consciousness operating in a fantasy world of its own creation? Gary Peller in “The Metaphysics of Law” argues that law inadvertently builds its own fantasy world (“metaphysics of presence”) by constructing representations such as ‘individual, criminal intent, consent’ and assuming these and other such constructs are real and moreover predate their legal descriptions (“reification”). Peller does not see this as a recent phenomenon; rather, American law has been inventing and operating within different inflections of the same basic fantasy world for the last 100 years. The effect of this parsing is that the legal perspective of high court judges suppresses other ways of understanding human behavior and relationships. This is troubling because the assumed neutrality of the legal consciousness is suddenly no longer tenable. To better illustrate Peller’s understanding of the built-in bias of law, I would like to explore how Peller might interpret the majority decision of the judges of the US 9<sup>th</sup> Circuit Court of Appeals in the case of *Roulette v. the City of Seattle* dealing with the constitutionality of a city ordinance that forbids sitting or lying on the sidewalk. I argue that Pellerian analysis would challenge the presumed neutrality of the city ordinance, question the majority decision’s interpretation of protected expression, and expose reified concepts and the purported inevitable conclusions of legal analysis.

I will begin by describing the pillars of Peller’s argument. His analysis of law originates in a discussion about the representational nature of language itself. His critique is simply that if language has any true positive representational quality to it, it is merely artifactual. Peller’s argument is that a word in itself has no meaning. Instead, the meaning of a word “flows from the word’s relationship to other words within the socially created representational practice. It acquires its meaning from not being another word...” (6). So meaning from language “does not ‘exist’ anywhere, it is constructed in differential relations, in the blank spaces and silences of communications” (7). In the legal sphere, language is the only medium in which laws are expressed, and language is used to communicate jurisprudence and legal interpretation. Thus, Peller’s exposé of language has direct bearing on all aspects of legality. Concepts that before were seen as determinable and meaningful suddenly lose grounding in objective meaning; any purported meaning and fixity of concepts is the result of interpretive license of lawmakers and arbiters. But Peller argues that the lawmakers and arbiters are not operating in a vacuum; rather, they are simply institutionalizing dominant conceptions of the social world with regards to natural and proper human behavior and relationships. But in doing so, legal thought commits a kind of “violence” which leads to “the arbitrary exclusion of other ways of understanding the world, other knowledges...” (3). All this and yet law continues to purport its neutrality.

Peller’s critique of law continues with his deconstruction of “legal ‘rationality’, the felt necessity with which one proposition seems to follow from another” (3). This too is based on

certain underlying metaphors of organizing perception and communication that are simply “common sense” and taken for granted. So, in the eyes of the law, two phenomenologically distinct scenarios can be understood as being connected to each other through a common notion or right that is instantiated in both scenarios. For example, selling a car online and being evicted from a shanty apartment are both seen to be connected to the idea of property rights. But this connection is only imagined. Another example of the artifactual nature of legal rationality is law’s insistence on parsing up the world into neat dichotomies such as the public/private separation derived from the ever-popular subject/object dichotomy. These too are imagined and have the result of excluding other narratives that lie somewhere in between the two poles of a dichotomy.

Now let us apply Peller’s critique to the Roulette case. The issue at hand is whether or not a Seattle City Ordinance (which reads “No person shall sit or lie down upon a public sidewalk, or upon a blanket, stool, or any other object placed upon a public sidewalk, during the hours...”) violates the First Amendment protection of free expression. At the outset, we must ask whether the law as written is truly a neutral law, applying to all persons fairly and equitably. Clearly for some persons—namely the downtown homeless—the sidewalk can oftentimes be the place where they carry out day-to-day functions of living such as eating and sleeping. By criminalizing the acts of sitting and lying, the law is in effect criminalizing the homeless’ very ability to live. Indeed, the original suit brought against the city challenged the ordinance on the grounds that it violated the Fourteenth Amendment equal protection clause, but this argument did not make it to the Circuit Court.

So the very wording of the law itself denied the way of life of many American citizens that use sidewalks in ways other than the majority. This raises the issue as to what the purpose of sidewalks is in the first place. In the majority opinion written by Alex Kozinski, he writes “The first step to wisdom is calling a thing by its right name. Whoever named ‘parkways’ and ‘driveways’ never got to step two; whoever named ‘sidewalks’ did” (2). Here Judge Kozinski is implying that meaning of the word sidewalk is plainly seen from the two words it is composed of: ‘side’ and ‘walk’. Here Kozinski has fallen prey to two errors. First, as Peller reminds us, words never have positive meaning and only make sense in a negative relational way. Second, Kozinski has confused a signifier with what is being signified. From a certain perspective, such as the downtown shopper, the sidewalk is indeed the place to walk to get from Starbucks to Nordstroms. But from other perspectives, some of which in fact are evoked in the ordinance itself, the sidewalk might be a place to wait for the bus, or to sit at a table and have a latte, or to have a cigarette on a break. The sidewalk takes on different meanings in all of these examples—all of which are excluded in Kozinski’s narrow definition which fails to take into account a multiplicity of contexts.

Another example of unspoken bias concerns Kozinski’s response to the plaintiff’s claim that the ordinance on its face violates the First Amendment. The plaintiffs argue that there are

instances where sitting can in fact be a mode of expression. Whether or not it is a fair and appropriate test that Kozinski uses to determine the validity of facial arguments is a separate issue. But when he applies the test, Kozinski reasons that sitting and lying “are not forms of conduct integral to, or commonly associated with, expression” (7). Once again dominant forms of understanding go unquestionably assumed here. Kozinski argues that sitting and lying are not commonly associated with expression. The meaning of these words is yet again narrowly construed. As dissenting judge Norris points out, such narrow interpretations are arrived at when activities are “judged in a vacuum” (16). Whether or not the acts of sitting or lying have expressive components of course depends on what perspective you take. From the perspective of unnoticing shoppers walking by on the sidewalk, those persons sitting and lying on the sidewalk are nuisances and perhaps partial walking obstructions. Any expressive messages of individuals sitting and lying down would be completely missed. Perhaps the message those disheveled men and women sitting on the sidewalk are expressing is “about the degradation that results from society’s failure to accommodate the essential *needs* of all its citizens” (19). Whatever it may be, the Kozinski court chooses to ignore such expressions on the grounds that they are not common. Peller’s message of marginalized ways of knowing and understanding clearly rings true here.

One final example of legal wordplay. In his analysis, Kozinski discusses the case of *Brown v. Louisiana* which found a statute unconstitutional as applied to a peaceful “sit-in” demonstration. It would seem then that sitting would be a protected mode of expression. However, Kozinski does not believe that the results of this case are applicable to *Roulette* because, as he explains, “The conduct three members of the Court found expressive in *Brown* thus wasn’t the defendants’ postures; it was their ‘silent and reproachful *presence*’” (5). Here Kozinski is drawing an artifactual distinction between the posture of sitting and the act of being present. This is an egregious example of reification of a concept obscuring other ways of understanding. The notion of “presence” or “being present” is somehow divorced from sitting—the way in which one is being present. Presence, as a reified concept, is somehow construed to be glorified mode of expression that supercedes its secondary and more mundane mode of instantiation, sitting. Kozinski’s distinction is tantamount to separating individuality from embodiment. You cannot be an individual unless you have a body. Similarly, the presence of those at the sit-in is not possible without their sitting, so sitting can be seen as being integral to their expression in this regard.

Through these considerations of the ambiguity of language supplied by Peller, we were able to interpret the findings of *Roulette* in an informative and novel manner. Teasing out the meaning of individual words like ‘sidewalk’ and ‘sitting’ may seem like a trivial and petty exercise, but in truth, it is the unquestioned and unexamined usage of language that decides the fate of many court decisions. This underscores the point that language is never neutral; it in-itself conveys prior conceptions by subtly forcing speakers to slice experience in particular ways that appear altogether natural and uncontested in a primary and fundamental way. Yet such appearances are deceiving.