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For Peter, With Love

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Before I start, a bit of context may be helpful. Peter Gabel and I go back a long way and our agreements and disagreements, just as long. As best as I can figure out, we were the only two members of the original Critical Legal Studies (CLS) crew who were deeply and permanently influenced, some might say scarred, by existentialism.[1] I was most taken by Søren Kierkegaard[2] and Jean-Paul Sartre's plays.[3] Peter seems to me to have been more taken by Martin Buber[4] and Sartre's "Being and Nothingness."[5] I suppose we met somewhere in between, perhaps in Sartre's great lecture, "Existentialism is a Humanism."[6] Peter believed then, as he believes now, in the possibility of more than fleetingly overcoming the otherness of the Other. For me the idea that it is possible to return to the prelapsarian position is unthinkable. The otherness of the Other is the ontological grounding of humanity. And so Peter experiences transcendence when dancing and singing "Tov Le'Hodot La' Adonie" and I, when walking to catch the inter-campus bus on a clear blue morning. I see the world as alienated from me; he surely sees me as alienated from the world. And yet, I know and treasure the glorious feeling of being enveloped in Peter's love.

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1. My first exposure to existentialism came in a small book by Marjorie Grene, *Introduction to Existentialism* (1959), that I picked up in high school. Surely this was an example of the Cosmos laughing at me.

2. My exposure to Kierkegaard was in Søren Kierkegaard, *Selections from the Writing of Kierkegaard* (Lee M. Hollander trans., Doubleday Anchor 1960) (1923), and in *Existentialism from Dostoevsky to Sartre* (Walter Kaufmann ed., 1956), but most important for me was "Fear and Trembling."

3. I read two of Jean-Paul Sartre's plays in my college French classes: "No Exit" (*Huis Clos*) and "The Flies" (*Les Mouches*). Neither edition can be found in my surviving mess.

4. Martin Buber, *I and Thou* (R.G. Smith trans., Scribners 1958) (1937) is likely the edition of this book, in German, *Ich und Du*.

5. Jean Paul Sartre, *Being and Nothingness: An Essay in Phenomenological Ontology* (Hazel Barnes 2001) (1956), is the likely edition of this book, in French, *L'Être et le néant*.

6. I read this version of this essay in the Kaufman reader, *supra* note 2, at 287.

Unlike Groucho Marx who quipped, "I don't want to belong to any club that will accept me as a member,"[7] I often find myself wishing to belong to clubs that would not want me as a member. So, I sit on the sidelines and watch what goes on in many organizations, CLS among them.[8] As a watcher, it is clear to me that Peter is right when he asserts that most people who participated in CLS were driven by what he calls "a spiritual impulse,"[9] though at that earlier time many members of our crew would not have accepted his current phrasing. All the particular pieces of scholarship that Peter identifies as partaking of that impulse surely are examples, and I might add others. However, I am not convinced by his assertion of temporal shift from spiritual impulse to indeterminacy. As I read them, all of these pieces,[10] including Peter's earlier piece on contracts[11] and his wonderful piece on judicial decision-making,[12] at their root participated in the indeterminacy critique, whether articulated as such or not. All of these pieces recognized the error in the claim of liberal legalists that with the application of the proper technique, law was, or could be made, determinate. Thus, each of these pieces demonstrated the existence of doctrinal possibilities other than the ones commonly accepted as correct. So, the two strains of CLS that Peter isolates seem to me to have existed in a certain tension from the beginning.

If CLS experienced the kind of falling away that Peter articulates, it came later when the indeterminacy critique turned into the critique of rights, the argument that because legal rules were indeterminate, the liberal legalist effort to articulate legal rights was, even if formally successful, bound to fall short of its stated objectives.[13] There would always be a space between the law on the books and the law in action. Yet for me, even that argument was rooted in the spiritual impulse that Peter identifies, often articulated in the underlying positive program that our critics always, but wrongly, claimed to find lacking in our work.[14] As the late Alan Freeman, both Peter's and my

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7. GROUCHO MARX, GROUCHO AND ME 321 (Da Capo Press 1995) (1959).

8. Duncan Kennedy understood my watcher status, but seems to have been deeply annoyed by it. *See* Duncan Kennedy, *Psycho-Social CLS: A Comment on the Cardozo Symposium*, 6 CARDOZO L. REV. 1013, 1016 (1985).

9. Peter Gabel, *Critical Legal Studies as a Spiritual Practice*, 36 PEPP. L. REV. 515, 515 (2009) [hereinafter Gabel, *Critical Legal Studies*].

10. Peter's piece with Paul Harris, however, is an exception. Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1983).

11. Peter Gabel, *Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory*, 61 MINN. L. REV. 601 (1977).

12. Peter Gabel, *Reification in Legal Reasoning*, *in* 3 RESEARCH IN LAW AND SOCIOLOGY 25 (Rita J. Simon & Steven Spitzer eds., 1980).

13. *See* Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984) (capturing this aspect of CLS in "The Critique of Rights").

14. Robert Gordon most eloquently expressed frustration about this in his colloquy with Paul D.

dear friend, tried to articulate in a piece that all but killed him, rights were a matter of second best.[15] First best was the experience of cultural acceptance of one's claims to deference that insured that the indeterminacy of law would work in one's favor.[16]

It was at this point that continuity and discontinuity began to appear in the CLS enterprise. The critique of rights was in part articulated with the help of some serious post-something philosophical scholarship. Barthes,[17] Derrida,[18] Deleuze & Guattari,[19] Foucault,[20] Kuhn,[21] Rorty[22] and Wittgenstein[23] began to appear in the footnotes in ways that alarmed even Rorty.[24] The ungrounded nature of language, the arbitrariness of its referents, and the implausibility of the Enlightenment project of applying reason to our circumstances scared a lot of people. Some of them went their own way—most obviously the fem-crits and the race-crits; the lat-crits and the queer theory people came later. For each group the reality of personal experience provided sufficient evidence of groundedness, one that was felt to have allowed an escape from *The Prison House of Language*[25] via the incontrovertibility of the self.

Carrington over Paul's piece, "*Of Law and the River*," 34 J. LEGAL EDUC. 222 (1984). *See* Robert W. Gordon, "*Of Law and the River*," *and of Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1 (1985).

15. Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295, 331 (1988).

16. *Id.*

17. *See* ROLAND BARTHES, WRITING DEGREE ZERO (Annette Lavers & Colin Smith trans., 1968).

18. *See* JACQUES DERRIDA, OF GRAMMATOLOGY (Gayatri C. Spivak trans., 1976).

19. *See* GILLES DELEUZE & FÉLIX GUATTARI, ANTI-OEDIPUS: CAPITALISM AND SCHIZOPHRENIA (Robert Hurley, Helen Lane & Mark Seem trans., 1977).

20. There were numerous cites, among them were MICHEL FOUCAULT, ARCHAEOLOGY OF KNOWLEDGE (A.M. Sheridan Smith trans., Routledge 1989) (1972); MICHEL FOUCAULT, THE BIRTH OF THE CLINIC: AN ARCHAEOLOGY OF MEDICAL PERCEPTION (A. Smith trans., 1973); MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977); MICHEL FOUCAULT, MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON (Richard Howard trans., Vintage Books ed. 1973) (1965); MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES (Vintage Books ed. 1973) (1970).

21. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (3d ed. 1996) (1962), was the book we all read.

22. *See* RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979).

23. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans., 1958).

24. *See* Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 401 n.117 (1982) (reporting correspondence from Rorty who said he was "trembl[ing]" in fear of the possibility of the ungrounded readings of legal texts).

25. FREDRIC JAMESON, THE PRISON HOUSE OF LANGUAGE: A CRITICAL ACCOUNT OF

It was at about this time that I began to drift away from CLS. The group was never going to disavow the political position of women and people of color, especially when that position resonated so strongly with the spiritual impulse that was one of the twin roots of our enterprise. The theoretical elaboration of that enterprise, the part of the project that most intrigued me, was going to, and did, fall by the wayside. Unfortunately, almost simultaneously there came what Peter so aptly summarizes as "the rise of Ronald Regan, thirty years of conservative ascendancy in political and legal thought, and the collapse of the Soviet Union and parallel collapse of any worldwide public sphere in which morally compelling democratic social movements could challenge conventionally legitimated democratic institutions."[26] Soon CLS had disappeared, as Duncan Kennedy once said of American Legal Realism, like water poured into sand.[27]

In recent years Michael Fishl and Jeremy Paul have tried to resuscitate the CLS enterprise,[28] Duncan has made his own, continuing contribution to such a project,[29] a group of students at the University of Idaho Law School have joined in the effort,[30] and now Peter. I never tried. No one would follow me and should some benighted soul try to do so, that person would end up lost too, not to mention the odd fact that in the intervening years I rediscovered my first intellectual passion for corporate finance, a passion that originated back in high school, and then slid into the history of law and economy. Of these efforts at reconstruction, Peter's is the most interesting, just as was his take on judicial decision-making. It is wondrous to see the appearance of anything so far from the mainstream of legal scholarship and yet both so heartfelt and so transcendent among that scholarship's ineffable concreteness. Supernovas are more common. His emphasis on "what is morally compelling about a legal argument . . . to a really existing historical listener anchored in a web of real social relations"[31] ought to have a lot of purchase for many people, students and faculty alike. Whether these people will find morally compelling what Peter finds to be morally compelling is for present purposes irrelevant, though obviously not to Peter as moralist or me as watcher. I would, however, like to offer three observations that I hope will be of interest to those who are intrigued by Peter's enterprise.

STRUCTURALISM AND RUSSIAN FORMALISM (Princeton University Press 1972).

26. Gabel, *Critical Legal Studies*, *supra* note 9, at 521.

27. JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 273 n.3 (1995).

28. See the symposia that they have orchestrated. Symposium, *Critical Legal Studies (Début de Siècle): A Symposium on Duncan Kennedy's* A Critique of Adjudication Fin de Siècle, 22 CARDOZO L. REV. 701 (2001); Symposium, *The Epidemiology of Critique*, 57 U. MIAMI L. REV. 475 (2003).

29. DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE) (1997).

30. *See* The Crit, A Legal Studies Journal, http://www.thecritui.com.

31. *See* Gabel, *Critical Legal Studies*, *supra* note 9, at 521.

First, it bears notice that the rootedness that Peter finds in unalienated social relations, if I may shift to an earlier language of his, comes very close to being the rootedness in culture that Alan Freeman and others saw as the first best preference to legal rights and that others saw in Morty Horwitz's notion that in context, legal arguments had a tilt to them.[32] Thus, one could nestle Peter's hopes firmly within the umbrella provided by the indeterminacy critique.

Second, the moral compulsion that Peter derives from the spiritual strivings that are part of human connectedness is the kind of grounding for argument, and derivatively for law, that the Enlightenment sought in reason, that Marxism sought in historical materialism and that critical race theory and feminist theory sought in the experience of subordination. This is a long way from the existentialist notion of a self, endlessly faced with the radical otherness of the Other, always creating being, always fighting to maintain the existence that precedes essence.

Third, it seems possible to me that there is a way other than Peter's to reclaim CLS, though a scarier one. It is possible that CLS died not from a loss of moral grounding, but from a loss of nerve. If argument cannot be grounded, as post-something theorizing maintains, it does not follow that anything (or nothing) goes. What never was there before has nevertheless allowed humans to do tolerably well without it over the past three thousand years. So, the species may be able to foreswear groundedness while realizing the seemingly human impetus (and I would argue obligation) to both critique and justify rules and institutions. Realizing this, one might then decide to follow Kierkegaard and recognize that it is part of being human to make the leap of faith, to recognize in this case that, as Duncan has always said, "There are no killer arguments."[33] Humans might still proceed with the continuing work of argument, the combined work of critique and of evoking alternatives to that which is critiqued, in a way that would recognize the deeply situated judgment that an Augustinian Christian would understand is all that humans have available to them after The Fall. The patient, necessarily self-critical humility of arguments made from such a position has a certain attractiveness to me, situated as I am today among the wildly overblown claims of warring political factions acting as if saying things over and over, ever louder, makes them more likely to be true. Such a position preserves the possibility of the critique of law or of any other social

32. For a good summary of this aspect of Horwitz's thought, see Wythe Holt, *Tilt*, 52 GEO. WASH. L. REV. 280 (1984).

33. Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75, 103 (1991).

practice and yet avoids the hubris before the infinite of believing that mere humans have captured truth, rather than possibly identified error.

Yet, I would be a fool to deny that Peter's vision has, even for me, a certain attractiveness. Many years ago when Peter and I first explored these issues, he asked, "Do you mean that there will never be dancing in the streets of Berkeley?" I said that I doubted that there would be, but that should I be wrong, I would surely come to join the dance. It is good to know that at least at Beyt Tikkun there is dancing in the streets on Friday night. That is a start. Starting may be all that it takes. Still, it seems to me that Tom Wolfe was correct: "You Can't Go Home Again."[34] On the other hand, as Peter shows, it sure is fun to try.

34. THOMAS WOLFE, YOU CAN'T GO HOME AGAIN (1940).