

# Roll Over Beethoven

Peter Gabel & Duncan Kennedy

*Roll over Beethoven  
Tell Tchaikovsky the news  
I got the rockin' pneumonia  
Need a shot of rhythm and blues.*  
Chuck Berry

Duncan

You are betraying our program by conceptualizing it. To accept or even sympathize with a statement like, "the goal is to return to the unalienated situation . . ."

Peter

Not that. We've never been there. The project is to realize the unalienated relatedness that is immanent within our alienated situation. I don't like "goal" and we can't return to what hasn't yet been realized.

Duncan

This sounds like a logical quibble, but I don't think it is. I think it's an essential, metaphysical/spiritual paradox in our real position, which is that we will go right ahead and apply to that formulation the basic premise of the limits of knowledge, the limits of conceptual understanding.

Peter

Why shouldn't we state a positive vision of what we believe is possible? It often seems to me that you don't want to carry your own committed decision toward realizing a particular social reality; you don't want to carry it for fear that it would become falsified in some way . . . you don't want to claim it, so you always elide it, if that's the right expression, you step to the side of someone who is trying to put you in the net and take a position toward yourself and what you're doing that is . . . It's like the way that when you give speeches, you sometimes slip into making a joke of something dead

serious because you want to pull the punch. I experience you as too eclectic, too unclear about what it is that we're trying to bring about. But when I say that, you always say I'm just falling into the trap of conceptual knowledge and "rationalism."

Duncan

How do you answer that?

Peter

I think we have exactly the same position on the extent to which the realization of what is good in social relations, in social life, can be captured in structural reformulations, in conceptual categories and principles, which is, "that's all wrong," and "that's part of the problem." The only way it can actually be realized is in life, in direct relations among people, as an experienced reality. But that can be evoked by knowledge, by language, by talking to each other, as opposed to being signified by it. The key difference is between signification and evocation.

Duncan

I agree with that. When you say it can be evoked . . .

Peter

To the extent that what we're talking about is not immediately given, we have to sit around and write articles and have conversations in an attempt to communicate with each other and evoke a confidence in each other about the reality of what it is that can be achieved. And that's a form of knowledge that is not "rationality"—it's not signifying knowledge. It's not that the answer is found in the denotative meaning of the words or in the structural frameworks signified by the concepts. That's the mistake that everybody who talks in structural terms makes.

Duncan

I completely agree with that. But I don't think that you yourself . . . what I'm accusing you of is betraying that very program in your perennial, constant longing for some such formulation as, "our goal is to overcome separateness and achieve the unity that is immanent in our . . ."

Peter

Not unity, but unalienated relatedness. Overcoming alienation is a precondition for genuine separateness or individuality to be possible. I claim separateness just as much as you do.

Duncan

Okay, the unalienated relatedness which is immanent in our current alienated situation. What I'm saying is, that that does not sound to me like an evocation which can fulfill the legitimate functions of communication, of language and knowledge, because it's abstract bullshit, whereas what we need is small-scale, microphenomenological evocation of real experiences in complex contextualized ways in which one makes it into doing it. I completely agree with your "doing it" formulation, that is—what did you say, it's something that can only be realized in direct relations. What I'm accusing you of is something you admitted when we were having dinner in San Francisco, which is wanting to be able to still claim some of the nimbus of philosophy by formulating, not evoking, but formulating. And what this is is the formulation which is designed to let you go marching around saying "I agree with Kierkegaard about this, and I disagree with Hegel about that," and stuff like that. It's got nothing to do with the concrete task of writing things that evoke successful moments of struggle to realize, in direct relations, what good possibilities there are in life. A little vaguer—"What good possibilities there are in life"—than "unalienated relatedness."

Peter

What are "the good possibilities there are in *life*," as opposed to each individual, particular, microphenomenological situation?

Duncan

I don't find myself that abstract formulations of the good things in life do much more for me than, say, speculations about reincarnation, and I do indeed want to make jokes and step aside when it gets down to formulating a theory of human nature which is supposed to somehow orient or frame our practical activities.

Peter

Well, that's a good idea—to undercut it the minute that it becomes frozen in the same way that rights discourse becomes frozen. The minute that it becomes frozen in a mood that corresponds to "the

program," "the program is to realize unalienated relatedness." But I'm still claiming that we can, not in that mood, make universal, positive statements about what it is that people can achieve, not in just each particular situation as intersubjective zap, and nothing more can be said but "zap" about that, which is your line . . . or "the good things in life."

Duncan

My line is much more . . . my line is that it's a good idea to call on and evoke all historic formulations, the rhetorics, the preacherly or the hortatory or demagogic rhetorics of social transformation movements. We should evoke all of them in a sort of indiscriminate mish-mash, using first one then another. But your number is . . . you don't sound like that. Let's just call it love. I mean we can call it love this week and next week we'll call it community, and the week after that . . .

Peter

It depends on the context you're in whether you call it unalienated relatedness or . . .

Duncan

Sometimes it sounds like, "All these things can be reduced to the single master concept of unalienated relatedness that is immanent in our current situation." So that that formula would then be the privileged formula.

Peter

It's not privileged. It's just a philosophical mode of getting at it.

Duncan

Why can't I just call it yearning? What's wrong with calling it intersubjective zap? Or making the kettle boil? What's wrong with calling it . . .

Peter

If everybody agreed on what making the kettle boil was . . .

Duncan

When you say, "If everyone could agree on what intersubjective zap means," you're stating the rationalist, formulaic, positivist, yuk pro-

gram, which is that the goal of talking about things like unalienated relatedness, the goal of it is to get everybody to agree on what it means. Getting people to agree on what words or phrases mean is the furthest thing from my mind. The only function of these formulae . . .

Peter

I agree, I agree.

Duncan

Consensus on what they mean is irrelevant! What counts is that they should be expressive of our common, very general yearning. Yearning. It's yearning which is, on the one hand . . .

Peter

Why are you arguing for . . . it's sort of like a populist, anti-intellectual . . .

Duncan

Anti-intellectual . . . "Hey, these theorist people, let's get them down off their high horses." "How many mailboxes have you stuffed this week?"

Peter

I've used the phrase "intersubjective zap" countless times, because it was right to use it where unalienated relatedness . . .

Duncan

Then why are you attacking it?

Peter

Because you claim it's the opposite of what I'm saying. You want to reject the value of philosophy, of trying to be explicit among a group that is in the process of achieving an understanding of what it means as opposed to falsifying it. I think we can be explicit about what it is that human beings are trying to do. What the good things in life are, in other words. Of course, I agree that there's no way to present anything like this, any knowledge, any form of thought, that can't be taken over and falsified immediately, the same way that the appointment of Sandra Day O'Connor is an attempt to falsify the meaning of the women's movement. Everything can be taken over just the

way they are by the state. All utopian descriptions can be taken over and falsified to legitimate oppression and flight and alienation. So unalienated relatedness is vulnerable to that, and it's of no value at all as what you're calling an abstract formulation; but it is of value among people in the process of realizing it, of articulating and making as explicit as possible a general theory of life.

Duncan

The value of explicitness, as you evoke it, is a tricky value. When you say "to be as explicit as possible," it makes it sound as though you think that the phrase "unalienated relatedness" is more explicit than "intersubjective zap," "the kettle boiling," "love," "community," "unmediated joy," "having a good time."

Peter

It's not in itself. But it is as part of a whole way of thinking; it is more explicit.

Duncan

I deny that.

Peter

Well, then construct a philosophy of intersubjective zap and let people read it.

Duncan

But I don't want to construct a philosophy.

Peter

Because you don't want to talk about the process of becoming other, about the falsification of relations as a displacement of the immediacy of connection into a reciprocity of roles. You don't want to talk about it.

Duncan

I'd rather avoid the vocabulary. I do want to talk about the *experience*. In fact, I spend a lot of time talking about the experience. In your model there is a tragic problem which is that in the struggle for explicitness one develops complex, but seriously complex, descriptive, analytic, categorical evocations—imagings—out of the situation, and

they're always in danger of being subverted, taken over, and turned to dust.

Peter

Right.

Duncan

So there's this conflict, which is, on the one hand, you want to get the best one you can; you want to be lucid; you want to be explicit; you want to get clear. But unfortunately the body snatchers are always nearby, and you wake up and they're all pods. The whole conceptual structure has been turned into a cluster of pods.

Peter

That's true; and that can't happen if all you do is criticize.

Duncan

That can't happen if all you do is criticize? That sounds as though you're accusing me of only criticizing, which you can't be doing because . . .

Peter

No, not in your organizing.

Duncan

But also not in my writing. Which one of us has produced a *Utopian Proposal*? You've spent more time criticizing than I have. I've spent more of my writing making affirmative statements both about technical stuff like, what should the doctrine be? and . . .

Peter

Okay, why *should* janitors teach at the law school? Why should professors do secretarial work? Obviously I agree with that stuff, but are we going to get any principle beside intersubjective zap?

Duncan

Absolutely not. The idea that you're going to justify that by "getting to a principle" . . .

Peter

You know that I don't mean, by "getting to the principle of equality" . . .

Duncan

I think you're stuck in your dialectic of clarity and lucidity versus being turned into a pod. That dialectic, that tragic situation which you find yourself in, is the situation of the philosopher, which I don't want to be in, and I believe you don't have to be in it. And it's just not true that you've got to choose between doing "philosophy" that way, or just falling back on pure negative critique. There's a whole mode of talking, writing, and doing organizing stuff which gets you out of that dilemma, as long as you don't sort of invite it, and that mode is things like having music at the meeting . . .

Peter

Which I completely agree with. Those things can be described. By phenomenological description you can capture . . .

Duncan

We should be doing that stuff rather than talking about unalienated relatedness. Unalienated relatedness is not a phenomenological anything!

Peter

Shut up a minute! I agree with you. Don't lock me in that way. I totally agree that the concepts themselves can mean anything. It's like saying "the German Nation," or "America," or "Americanism." Freedom and equality.

Duncan

We're against all that.

Peter

But there is something else here, which is that it *seems* to be the case—and I'm willing to say this is an open question—it seems to be the case that it is not only the constitution of these moments of connection that is of value, but also the capacity for people in a common situation of not being transparent to themselves to understand in words with each other; in other words, to theorize or imagine with each other the meaning of what it was that just happened. One time



we came back together from a panel at the Cambridge Critical Legal Studies Conference. We came into the kitchen and you said, laughing, that it's like they spin the wheel. First, it's "The means of production!" Then, "No, it's not the means of production." Spin the wheel. Whoosh. "Mother-centered childrearing!" Now that moment in which we have that shared expression in knowledge of what we already intuitively comprehended is itself an additional strengthening part of coming to believe in the reality of what we're doing. That is the value of philosophy as I'm defining it.

Duncan

It's an odd example. It's an example of a metaphor.

Peter

Yes, it is.

Duncan

Not of an attempt to be explicit, but rather of an attempt to be imagist, allusive.

Peter

But when we laughed together at your use of "spinning the wheel" and the image of the gambling table, we could then have had an explicit discussion of the meaning of those images. That kind of discussion can get us closer to knowing explicitly what we already comprehend.

Duncan

I think what I'm saying is that what we ought to do is not worry, first, about getting things clear within a single, coherent analytic vocabulary constructed synthetically or just borrowed from one of the traditions. I don't think either of those things is that important. And I'm also not too worried about the cluster of pods . . . of having them taken over once we've done it and turned into a cluster of pods. Because what I think we need to do is look for ways of talking, ways of responding, ways of doing things in which the goal is not to convince people by lucidity. It's not to grasp or control their minds by the explicitness and the beauty with which we get at the real structure of reality. But rather to operate in the interspace of artifacts, gestures, speeches and rhetoric, histrionics, drama, all very paradoxical, soap opera, pop culture, all that kind of stuff.

Peter

I think they're both very important. What I'm trying to do is defend . . .

Duncan

You think you're doing that with a concept like unalienated relatedness.

Peter

That's not fair. You're just taking two words out of a more complete attempt to capture the living reality of things like the legal system. I'm not saying, "What we need is unalienated relatedness." That's just a Moonie kind of a concept in itself. It is of no value at all in itself. The one thing that I'm defending is the moment of describing existential reality at the level of reflection. I'd call it rational, although not in the tradition . . . I would not call it analytical, and I would not go along, definitely, with "lucidity" and "analysis" as being the precondition for figuring out what you ought to do. But I would call it description—unveiling description that is explicit and prosaic, using images but coming back to something like a form of reasoning about what happened that has as its effort unveiling description—that adds to, and in some important ways is crucial to the capacity to know we're together and to gain confidence.

Duncan

I agree with that. This all sounds completely right to me. The last thing I have to say about this is that I don't know how I feel at this point about the status of attempts to be explicit and systematic in describing *universal* aspects of the human condition.

Peter

Why not? We know what intersubjective zap means, for example. In the hands of others it's falsified. But we can refer to it as something to be achieved. It's like how to evaluate whether to have a rotating chairperson at the steering committee meeting. It's the same issue. "Well, what's the situation?" That's the question. "What's going on? Where's the intersubjective zap?"

Duncan

What I like about intersubjective zap in that context is, nobody could possibly confuse it with a statement like, "We must maximize

democracy, and that's why we must have a rotating chairman." When I say, "Rotating chairman for intersubjective zap," nobody is going to say, "Well you said rotating chairman was bad for intersubjective zap yesterday, so you clearly contradicted yourself." This goes back to the issue of jokes that you raised before, and distancing. Remember, Lester Mazor, in Minneapolis, said, "Well, these aren't revolutionary, these are merely reformist." I said, "Look, the question is not revolution or reform. The question is what makes the kettle boil." Everbody laughed. The point about it is that's not going to be confused with philosophy, because it's a joke on philosophy. It's a distanced, mocking ironization of the mode of discourse in which you have abstract, analytically specified goal language, which is supposed to be the context and set the boundaries and be the reassuring structure for behavior. It just can't be that. It's obvious that you aren't binding a person to anything when they say, "Gee, let's make the kettle boil." I mean, tomorrow they may disagree with you. People are going to say, "That makes the kettle go cold."

Peter

I'm not sure that these things couldn't be turned into the same thing. What are currently colloquial, ironic angles on a mode of expression could be appropriated by a dominant discourse and then become, you know, the zealot talking about making the kettle boil, in which case you would then have to argue for democracy.

Duncan

Right, exactly, exactly. I agree with you. I think the strategy of the joke is . . . Here are two possible strategies. One is to adopt a set of classic, very abstract phrasings of the dilemma of the human condition, and the other is to adopt jokey, colloquial things. My claim is that we can defend the integrity of our own communication, the reality of our community better with jokes than we will ever be able to defend its integrity with a more abstract formulation. I may be wrong.

Peter

I don't agree with you. I think they're both important to do. As regards strategy, I think that your weakness, your weakness as an organizer, tends to be erring always, out of paranoia, in the direction of avoiding being positively explicit about what it is that you're trying to achieve, and moving in the direction of the undercut, the joke

. . . you know, continually pulling the rug out from under anything at all.

Duncan

But how do you put that together with equal pay for janitors? The way you're putting it is clearly not descriptive of my practice. My practice is incredibly no-hassle pass. "Don't give me unalienated this or that, let's talk about the no-hassle pass." People constantly say this about me, that I'm not serious, but it's just not true. The only thing I refuse is a very specific classical level of political discourse about overall goals at the level of abstraction at which you want to talk. But it's not fair to say I don't have proposals just 'cause I won't discuss, you know, the Rights of Man—ahem.

Peter

What I'm talking about is . . .

Duncan

. . . the weakness here. Obviously there is a weakness.

Peter

Well, I don't know. I think the value of philosophy depends on the developing inner reality of the group that's doing it. It's different if we're talking about people who are trying to connect and capture the meaning of their common experience than if we're talking about people who are trying *not* to connect. Remember the conversation we had at summer camp, at the end of the first group, about "the fundamental contradiction"—the relation of self and other? Everyone in the room was participating, intensely interested, and there.

Duncan

I remember it clearly.

Peter

Now why did everyone feel joy about it? Because of some value that it had, even though it was a discussion, a philosophical discussion, about the relationship of self and other. Everyone felt a different kind of joy from the moment of laughter at common recognition of an absurd false consciousness, though that's also critically important. I'm not denying that; I'm affirming the importance of the other. Now, you're saying there's so much danger to talking that way, be-

cause the pods will take it over, that we shouldn't do it. They can't take over a joke, which has its momentary unveiling that can't be captured by the other side. Whereas any philosophical discussion can be captured.

Duncan

Here's what I remember about what made it a wonderful and dramatic occasion. I think this may be quite different from your memory of it. My memory may be wrong. I think the discussion was actually not a satisfactory discussion; people were not feeling good, but were feeling more and more frustrated about whether it was possible to talk meaningfully about contradiction, self and other, and stuff like that, at all. There was a moment when someone said, "Well look, all this self and other stuff is fine. But in your relationship with your children, you can love your children, and you can act on the basis of your love of your children, and that's outside this whole discourse." Someone else said, "That's wrong. Everybody hates their children as well as loving their children. Everyone's distanced from and in contradiction with their children as well as unified with them. I think."

There was a sort of brouhaha—sudden, animated, intense, everyone talking at the same time. That's all there was to it. The conversation went on. We didn't really go back to self and other. What had happened, I think, was the experience of being free of the lie of unalienated current existence. Free of the lie that in our current situation we are ever *structurally* unalienated. The first person had affirmed that the parent-child thing could be a structural unalienation—that unalienation could just be built into the relationship. And people often assert that even if we can't have it right now, we could aspire to it. They say things like, "Here under capitalism we can't have unalienated relations with our kids." But then there had been the vicious, "Look, I don't think we should even *want* that relationship with our children." It was destruction that produced joy.

Peter

That is destroying a falsely mediated or a false unity. The phony utopian view of the family got undercut. That's not the last word on the subject of human relations.

Duncan

Certainly not the last word, but it's an example of the oddness of

. . . . The experience of intense relatedness in the group came in the moment of collective group recognition of the reality of otherness.

Peter

Of the reality of parent/child relationships.

Duncan

I think of otherness. I think, in fact, that the intersubjective zap of the moment came from that the group was together in saying that we are all separate.

Peter

Separate and together.

Duncan

The point of it was the acknowledgement of the otherness—was the refusal to pull the punch even in a goal fashion.

Peter

But the zap is in the moment of common recognition of something that was being denied. It's in the sudden experience of connectedness, not "otherness." And by the way that's not *at all* the way I remember what happened.



Peter

Now we have to have a discussion about the fundamental contradiction—all because you tied this tin can around our neck. The entire Critical Legal Studies movement has been dragging around that can

. . . .

Duncan

Let's forget about it.

Peter

No. We've got to talk about it. No one's hauling out anything I've written and saying, "I believe in unalienated relatedness." They're hauling around this thing you wrote at the beginning of the Blackstone paper, in which you stated the human condition as being one of fundamental contradiction.

Duncan

According to you, what's wrong with the fundamental contradiction approach, Professor Gabel?

Peter

First of all, there's a political problem that has arisen because of the fundamental contradiction. This problem is that it's being latched onto by various people as a statement of the position of Critical Legal Studies on the nature of human existence. And it's a position which is serving, although this wasn't your intention, obviously, is serving to rationalize both the poignant gradualism of rights theorists who say, "In light of the fundamental contradiction, let's gradually and carefully proceed to move forward to gain new rights," and by conservatives, like Phil Johnson, who say, "Yeah, I agree, there's a fundamental contradiction and therefore this is the best that we can do. Why should we do anything else in light of this risk that other people are going to reduce us to misery with a single look, devour us, hurt us, and that this is a natural aspect as far as we know of human reality. Therefore, let's do nothing." That's one problem with it. Then there is the problem of it being, as far as I can tell, relatively . . . The fundamental contradiction is an abstraction from the current paranoid status of actual relations with others to the statement of an ontological universal. Which could actually be defended with some kind of descriptive discussion of why it seems to you to be the case that this is fundamental. It seems to me that the ways in which absence, or the possibility of hostility from others, or hatred, are actually experienced between people always reveal forms of distortion in relationships that have a history that can be traced to an original alienation between one person and another, and therefore I don't agree with the notion that there is a fundamental contradiction which is just there. But the main problem with it from your point of view is that it's an example of the kind of philosophizing that can be seized on by anyone and anything can be made of it. Maybe that's why you're so against doing any sort of philosophical discussion at all.

Duncan

First of all, I renounce the fundamental contradiction. I recant it, and I also recant the whole idea of individualism and altruism, and the idea of legal consciousness, very much for the reasons you just said. I mean these things are absolutely classic examples of "philo-

sophical" abstractions which you can manipulate into little structures. You know, there are four things, and you can have this one and not have that one; you can have that one and not have this one. You can create a little thing in which your position, vis à vis Kierkegaard is, you agree with Kierkegaard on these four points and disagree with Kierkegaard on those four points. I really see the fundamental contradiction these days as a lifeless slogan that, first of all, people can latch onto in completely good faith. No—in bad faith, but spontaneously trying hard to make things happen—can latch onto and sort of think, well, the theory of Critical Legal Studies is somehow encapsulated in these phrases, so thinking hard about these phrases will get them somewhere. Will either get them insight or get them power within the movement because they'll know how to talk about it or manipulate it, or allow them to write articles, or will entitle them to deal with other people from a position of strength.

And the same thing is true of individualism and altruism. I mean, they have this terrible quality of reified abstractions. One of my deepest objectives is not to do stuff like that—is not to do any more of it. They are very much like the idea that "unalienated relatedness is the goal of the movement," open to exactly the same difficulties.

I like the way you put it because there's not even a suggestion, not even a faint overtone that it is the substantive content of the idea of the fundamental contradiction which has caused right and left deviationists to pursue their deviations. The way you put it, it's perfectly clear that it's just a peg or a hook on which a person who already has an intention to be demobilized, or an intention to be a reactionary can hang his hat—something to incorporate into his project that will give it some surface plausibility. And that's, I think, all there is to it. I don't think Phil Johnson is made more of a reactionary or even made more plausible to a real listener by his ability to relate the fundamental contradiction idea to the history of passive, liberal tragic views like, you know, "It is because man is intrinsically alienated that we must not do anything."

Peter

But now I . . .

Duncan

Wait a minute. One more thing. I think the idea of the fundamental contradiction, before the body snatchers turned it into a cluster of



Pods . . . . The reason why it worked, briefly, the reason why, in its first early months, maybe for 18 months, the fundamental contradiction was a genuinely radical contribution, then, had to do with—a very tricky thing. It had to do with the substantive truth of what it's referring to. It didn't have to do with the truth of the formula; the formula was always a dead abstraction. But there is a truth to which it was referring, at which I was aiming the phrase, which was Sartre's idea that "Nothingness is the worm at the heart of being." The truth that everything is not what it is and is what it is not, in the realm of human reality, for people. People are what they are in the mode of not being what they are, so that if you want to understand what it is to be a person, you have to be open to experience the negation that's at the very core of your own being, and of the being of everyone else. Now I've just given another relatively reified version of it . . .

Peter

That wasn't reified.

Duncan

Pretty. "Negation is at the core of being; alienation is ontological."

Peter

You're renouncing that too? Is that your position?

Duncan

"Nothingness is the worm at the heart of being." I'm willing to embroider that on the flag.

Peter

Is that a universal? That you're willing to be pinned down to?

Duncan

Yes. As long as it's clear that the concept of a "worm" is like "making the kettle boil." The idea that nothingness is the worm at the heart of being is no more defensible, but because it's an image, a metaphor, almost a joke . . .

Peter

Now, let me take the substance of it. First of all, by the way, I understand that the point of the fundamental contradiction as you originally stated it was as against falsely mediated forms of unity among

people that have to be broken through before people can in fact experience what's going on between them in a real, honest experiential way.

Duncan

Right. Exactly. And I agree with *you* that the fundamental contradiction has long since ceased to play that role, and that's why it must be utterly extirpated and rooted out of our movement as an example of incorrect thought.

Peter

But now, that's because it has been seized on by a kind of consciousness that takes what was intended as a substantively true description of contemporary relationships between people, understandable as true by people already working together and coming to that realization. It's been taken and manipulated by people who don't share that common inner understanding. In the process of coming together and working to transform the world, there is a moment in which you *can* engage in a phenomenologically based philosophical description of what is going on. In other words, there's a value to what you wrote there, understandable by people already working together in the movement, that can be revealing. Although it always can be seized on by other people and manipulated into something false.

Duncan

That's too inside/outside for my taste. It's not that there are bad people outside the movement who will distort it, but we inside, since we share the common experience, won't. The process is internal.

Peter

I want to discuss the issue of negation, as when it gets equated with "alienation is ontological," which I believe it gets equated with, in your use of the concept "nothingness is the worm at the heart of being."

Duncan

Nothingness is the worm at the heart of being means both more than that, because it goes for . . .

Peter

The totality.

Duncan

. . . the totality of experience, and less than that, because . . . "alienation is ontological" is a reified abstraction, but "nothingness is the worm at the heart of being" is an example of poetry. It's not an abstraction. "Alienation is ontological" is my impoverished statement of what I would rather put in the form of "nothingness is the worm at the heart of being."

Peter

Now I want to criticize that.

Duncan

Yes, criticize it.

Peter

It seems to me plausible, possible that human relationships—in a plenitude of connection, which, I would say, is a utopian ideal, achievable within human history because of my extreme optimism, possibly distorted by my Pollyanna tendencies . . .

Duncan

Definitely.

Peter

It is not inconsistent to, on the one hand, realize the projective temporal character of human existence, in which no one is identity, and the living subject is continually not what he or she is by moving into the next moment in a creative and constitutive way . . . It's possible to reconcile that with unalienated relatedness, in the sense that I use the word. In other words, that nothingness, to the extent that it means that existence is in time . . .

Duncan

That's certainly *one* of its main meanings.

Peter

No. I'd say that temporality is an essential . . .

Duncan

There are two or three essential ones; maybe there are four essential ones. On some days I think there are five essential ones. But the temporality one is one of . . .

Peter

Let me finish. What I'm trying to do is *divorce* the statement, "Alienation is ontological," from "nothingness is the worm at the heart of being." Let me put it very simply. Trust among us may, although it hasn't yet occurred in human history, be creatable to the point at which the temptation to reject, objectify and misrecognize the other person is no longer a temptation, and it could still be the case that we could exist in time, negating and surpassing ourselves, but creating whatever we create in life through cooperation, love, mutual respect, mutual confirmation and so forth. So that it would still be the case that nothingness—we won't make it a worm this time . . .

Duncan

Being a worm isn't bad.

Peter

Okay. But it has a certain death-like connotation to it.

Duncan

Worms!?

Peter

We're talking metaphors, now.

Duncan

A worm is *alive*. The nothingness of the worm is alive.

Peter

What about nothingness is the bird at the heart of being? Would you accept that? Nothingness is the nightingale at the heart of being.

Duncan

Sure. One suspects that the next thing you're going to do is sort of say that, you know, nothingness is really Wonderful.

Peter

This is a good kind of conversation to have is one claim I'm making. It's a philosophical conversation.

Duncan

Let me say something. I want to attack your position.

Peter

Before you do, I want to say that it is *not* my position that unalienated relatedness is equated with merger or identity or union—I don't believe that.

Duncan

I understand that you don't believe that. From my point of view, relatedness is your cop-out. You jump off the "everything is either fused with, on the one hand, or utterly apart from on the other" problem by offering the word "relatedness."

Peter

Right. But I think that you have a false duality that keeps coming up in these conversations between union and otherness. In other words, one aspect of your current existence is you like the discovery of the otherness of the other person as being a fundamental discovery of reality, as opposed to phony unities like the family or the state, or "we doctors," "we lawyers," all of the false forms of coercive group inclusion that are in fact flights from real interaction among people is something that animates your desire to insist on the otherness of the other, on the one hand, as against phony unity, on the other. I think that relatedness is a more accurate way of describing what's going on, and that there are modes of relatedness, deeply trusting modes of relatedness, that at the moment can involve confirmation as a dominant tendency, like our friendship, I would say. It's characterized by confirmation as a dominant tendency, even though always corroded by some degree of fear, anxiety, mistrust, he's trying to get me; the potential for being—whatever you say—"reduced to misery by a friend's glance."

Duncan

I'm feeling very anxious. I have no idea why. I feel nervous that we're in a box. We're being too discursive. But, why don't we go ahead and do it for a while and then throw it out if we don't like it?

One of the things that happens at this stage is you said lots of things. And I guess one of the sources of my anxiety is a fear that if I don't go back and refute every one that I disagree with, you will have implanted it as a premise in the rest of the discussion and I'll be stuck with it. So what I've got to learn to do is to let you have said all those things without my having quarreled with them, without my having picked them apart one by one to root them out.

Peter

To some extent I'm doing that too. Although I did get into a little bit of a speech, to some extent I'm letting go of the absurd need to insist on "my view" of unalienated relatedness, and to reject "your view" and so on.

Duncan

You mean by saying it's possible . . .

Peter

Well, I'm not going into my whole theory about the denial of desire, it's origins in childhood, and how that's mediated in hierarchical institutions and all that stuff. I'm just sort of letting go for now to try to see what you're getting at.

Duncan

Yes. That's true. So things have to be let go by both of us. Let me just react about relatedness. You say what we want is unalienated relatedness. And what that affirms is that we aren't caught just sort of hopelessly, desperately in a duality of utter otherness and engulfed unity. There's a sort of intermediate ground, and not only that, on the intermediate ground of relatedness things can either be good or bad. They can be on balance, positive or negative.

What I would like to say against that would be—just expressing it that way is a way to kill it. The two things that happen which are outside the dialectic of otherness and unity are: (1) "unselfconscious and spontaneous"—that is, relatedness that just grows, so you don't know it's there until it's already there and you never see it in the process of becoming itself with your conscious, cognitive intelligence. Just one day, there it is and it's therefore a gift. It's miraculous in its having come into being. And (2) the other type is an achieved relatedness which is paradoxical. That is, when it's there, it's there by paradox, tricks, and, inasmuch as it's achieved, it's achieved by mys-

tical exercises in which one does flips and negations and jolts oneself out of the dialectic of unity and otherness. We both agree that sometimes our relationship is great. But I feel in you that you have to name it "good." And the minute you name it "good," I think you are detracting from it. Now I recognize you're going to say this is my paranoid flight.

Peter

Yes.

Duncan

And it does have an element, probably, of paranoid flight.

But why can't I respond to that by saying, I feel that I'm pursued a lot, and that my ability to be happy and also to make other people happy is deeply dependent on the determination that I have to turn upon them and scream at them when they yap too closely at my heels, and that if I don't do that, then my ability to be happy and to generate happiness is just laid waste. I want paradox and unconsciousness. Paradox and unconsciousness allow one experientially, existentially, to exist outside of the contradiction-space of separateness and unity. The miraculous free will of nature in us, which generates connectedness even when we aren't thinking about it or when we're thinking against it—and free will, our own paradoxical free will and our ability to negate what we are. Those are the things that generate unalienated relatedness.

Peter

As moments of existence.

Duncan

In other words, negation is actually built into unalienated relatedness.

Peter

I agree with the idea of negation, although I actually see its negative character as tinged with some paranoia. The particular word. But it doesn't have to be. Anyway. All I want to say, instead of us trying to hammer out these fundamental questions about interrelationships, is that it is an open question whether the fact that there are people yapping at your heels or pursuing you in certain ways that are engulfing . . . that it's an open question as to whether that's ontologi-

cal or something that in fact has an intelligible history—that can be criticized and that could be transformed.

### Duncan

Actually, I'm very interested in this aspect of it. You offer, as a compromise, "Let's leave it an open question whether alienation is ontological." Something like that. Do you remember where the slogan came from in the first place? We were talking in San Francisco and you said, "One of the things about you that strikes me as paranoid is that you believe that alienation is ontological." I thought, "Now what does Peter mean, when he says alienation is ontological? What he means is that I'm saying 'alienation is just part of the nature of being; it's absolutely fundamental.' That's certainly a way to express the difference between Peter and me, which is the difference, really, between him—the gooey Pollyanna, who claims that everything can be made fine—and me—the dark, cynical meanie who wants to emphasize the down side of everything. That would be one way to have this discussion."

But in fact I don't believe that it is possible to do reasoning about or achieve synthetic or analytic truth about things like whether or not alienation is ontological. I can't even compromise with you about this, I believe so little in the mode of discourse. See, this is like the fundamental contradiction. It's as though in our discussion of the fundamental contradiction, at the end of the conversation you decided that the contradiction may be fundamental, or it may not be. And let's leave it as an open question which it is. That's not the way I'm going these days. These days I'm going for *recantation* of the fundamental contradiction. That is. Out! No more fundamental contradiction! Forget it! Let's talk about something else.

Exactly on the same level, I'm not willing to leave it as an open question, whether alienation is ontological, but not because I want to insist that it is. It's not that there's a choice between compromising and hammering it out, as you put it. We *can't* hammer this out. The idea that alienation is ontological is just a way to express an intuition, a sentiment, a way of saying that I am unsympathetic both to myths of past good scenes from which we've declined, or formulations of blissful futures. I'm just unsympathetic to them. It's not my scene. I don't believe they can be proved possible and the impulse that causes people to generate them strikes me as . . . . I actually believe it's "bad for the movement" for you to sit around trying to figure out what the origin of our alienation was, or trying to figure



out whether we can overcome it or not. It strikes me as a waste of time, but also it's a diversion of energy out of relatedness, out of unalienated relatedness, into fantasies of controlling the world by thinking about it. I guess that's what I think. And it's a way of holding off . . . it just seems to me to be a defense mechanism.

I feel you want to make up theories about the history of alienation and about the possibility of overcoming it because you overestimate the pain of alienation. The pain of alienation is bad, but life is basically okay. Here's another way of putting this in terms of a comparison between you and me. You think the bank is worse than I do. That is, by the bank I mean . . .

Peter

. . . a hierarchy of roles, a reciprocity of roles, that are artificial.

Duncan

In the reciprocity of roles that are artificial, you think people are more alienated in that bank than I think they are. I think there's more intersubjective zap and unalienated relatedness among tellers. What do you make of the fact that as we tellers stand there I'm talking out of the side of my mouth to you, virtually the whole time, and I suddenly put on my sweet face when a customer comes but the instant she just looks away to put her checkbook back in her purse, already I'm talking out of the side of my mouth about, you know, ARARARARARA. I believe much more in the clandestine, implicit networks of relatedness within structures—structures: dead, utterly paralyzing, horrid structures. I shouldn't say utterly. Not quite utterly paralyzing. And that the freedom that's expressed when the two people talk to each other out of the side of their mouths, which is a conspiratorial freedom, it's not that that's the *essence* of freedom; it can exist in fifty thousand different interstices. Graffiti in the bathroom. There's enough unalienated relatedness there so we don't need myths of the origins or the overcoming of alienation.

Peter

I think that's a good criticism of my description of the bank, except that I would describe what you're describing as an instance of the subordination of desire to these hierarchical forms, and I would say that the fact that it appears in privatized ways rather than in ways that people have confidence in limits their capacity to transform public settings.

Duncan

Let's use what you just said as our transition to the state.



Peter

Let's begin with rights and work our way up to the state. This is one way I would now put the problem with rights. At New College, people are constantly trying to figure out how to make legal arguments to support their political aims. Now, these are intensely political people—people who want to transform the society, to bring about real equality, real democracy, shared control over the workplace, more love and connection—all of that. This is what they want in their hearts and why they're at New College. But because they're going to "become lawyers," they think they have to somehow transform these feelings into "good legal arguments"—"It's not enough to have good politics; you've got to be able to make a good legal argument." So what happens is people start translating their political feelings into unconscionability arguments or right-to-privacy arguments without realizing that there is a weird dissociation taking place, as if it were inevitable that you had to take your true needs and desires and translate them into one or other of these available arguments. This is the essence of the problem with rights discourse. People don't realize that what they're doing is recasting the real existential feelings that led them to become political people into an ideological framework that coopts them into adopting the very consciousness they want to transform. Without even knowing it, they start talking as if "we" were rights-bearing citizens who are "allowed" to do this or that by something called "the state," which is a passivizing illusion—actually a hallucination which establishes the presumptive political legitimacy of the status quo.

Duncan

Let me play the role of the person who is puzzled and unsure about what you're talking about because they sort of believe in rights. I'm going to be skeptical. I say: "Look, the Supreme Court is there; the Supreme Court exercises some real power in the society, and in order to get it to do things, you have to make legal arguments to it. So I want to learn how to make legal arguments to the Supreme Court to get it to do things that will help my people. What has all this crap that you're giving me got to do with that fairly simple, instrumental

enterprise which I would like to set out in? It's as though you're telling me there's something I could do but I can't do it because it offends against some weird theory."

Peter

If you had a clear knowledge of the false consciousness of the system of thought you are participating in, and wanted to learn it simply for those instrumental reasons that you're talking about, and had integrated within that the relationship between getting a new right and furthering the cause of your political movement, I wouldn't object to that statement of what you want to learn.

Duncan

Let me go back to what seems to me fairly concrete about this. Don't talk to me about rights discourse. The question is, can we picket in this shopping center? We want to organize; we want to have a boycott, we want to do stuff in the shopping center. The police say, "You have no right to." We say we have a First Amendment right, and because the shopping center is partly public, the shopping center doesn't have the right to cause us to shut up. We make the argument. You can give me all this stuff about how I don't understand how it's related to this and related to that, but in concrete terms, if we want to be able to picket at that shopping center, we've got to be able to make the legal argument at every level. And litigate it in the Supreme Court. If we win the shopping center cases, then we'll be able to picket. So what are you talking about?

Peter

Most of the people who want to get legal rights, who are movement lawyers, don't fully get something you're claiming to already know.

Duncan

What is that?

Peter

That the production of Supreme Court opinions generates a fantasy-based ideological framework about the nature of social reality.

Duncan

In my role as a movement lawyer, I say "Wait a minute. I didn't say anything about a fantasy-based ideological framework. Here it is, a

real shopping center. I hate to tell you, Peter, the shopping center is there, and you either can get in or you can't get in. And we want to get in. To do that, we need to be able to persuade judges and courts to let us do it. I mean that's not enough: You've got to have a mass movement. Sometimes state power is used in contravention of the rules, but there's nothing unintelligible about a rule saying that labor unions can picket in the shopping center, and there's nothing unintelligible about a rule that says they can't, and the owners can get the police to throw them off. So what are you talking about?"

Peter

Much more is at stake than whether you win the case. Of course you want to win the case. But if you also want to build the movement you have to see how the Court's opinion will be aimed exactly at sinking your movement even if you win. You have to understand and help unions to understand the impact of labor law decisions on mass consciousness. The picketing war is one thing; the consciousness war is another. And the movement lawyer is implicated in both.

Duncan

At the moment, when I think about the state, the state as a collective hallucination, I don't think it's a collective hallucination any more than any other institution is.

Peter

The bank.

Duncan

Or the family, or friendship.

Peter

This is my basic claim of what occurs: that there is a broken reciprocity, a breakdown in connection among people, in which—I guess to some extent it goes back to Marx—people experience themselves simultaneously as living their actual, real lives as people with all kinds of feelings, and then as citizens of a political group. It's the same as people experiencing themselves as bank tellers hanging out next to each other on the one hand and as bank tellers who are "members of the bank" on the other hand. It seems to me a generalizable phenomenon that people in experiencing their absence of real reciprocity with each other and out of fright of that direct experi-

ence, project out a false form of unity that is imaginary in nature and attribute all kinds of powers to that collective projection. They then internalize it as an entity in which they actually believe they are participants.

Duncan

I'd like to say something different. Maybe it's not radically different. I would just say that the state is an aspect of unconnectedness rather than that the state is "caused by," or "in flight from," or anything else.

Peter

I'm not sure you should stop with "an aspect of unconnectedness." I think if you carry the description further, you can discover that belief in the state is a flight from the immediate alienation of concrete existence into a split-off sphere of people's minds in which they imagine themselves to be a part of an imaginary political community—"citizens of the United States of America." And it's this collective projection and internalization of an imaginary political authority that is the basis of the legitimation of hierarchy. It's the mass-psychological foundation of democratic consent.

Duncan

The problem is to talk about this in the context of, let's say, a case. Let's talk about it in terms of the choice by the Legal Defense Fund and Thurgood Marshall to litigate *Brown v. Board of Education*.

Peter

Okay. First of all, *Brown v. Board of Education* is occurring during a certain level of the organization of the civil rights movement.

Duncan

We don't think it was the wrong thing for them to do, do we?

Peter

It was a good thing.

Duncan

We agree that it's a good thing to bring the lawsuit, to win it. We agree that in order to win it, you needed to be able to manipulate a set of doctrines and arguments.

Peter

Yes. A legal peg.

Duncan

We agree, moreover, that the legal pegs are not totally arbitrary in their relationship to things like authentic connectedness.

Peter

There's a relationship, but a very specific, inverted relationship, in my view.

Duncan

When they argued for equality in *Brown v. Board of Education* . . .

Peter

. . . they were appealing to authentic connectedness.

Duncan

. . . to a notion which is very important. The use of the word equality in the 14th Amendment, and the way people use the word equality when they argue about equal protection cases is not simply unconnected to what we care about. It's not as though they mean by equality chairs where we mean doors; it's directly related.

Peter

They are appealing to a feeling, a need in people for authentic connectedness.

Duncan

Moreover, I do not believe that Thurgood Marshall or the other people involved in the construction of the *Brown* litigation, I don't think they believed that the state was . . . I think that they were completely aware that the state was an abstract concept . . .

Peter

I don't believe that.

Duncan

It depends on what you mean by an abstract concept.

Peter

I think we are developing a phenomenological theory of how the state is constituted. It hasn't existed before the Critical Legal Studies movement, at least in legal theory. It doesn't help radical lawyers to say they already understand everything.

Duncan

I don't say that they had a phenomenological theory of how the state is constituted. What I'm saying is, that it's absolutely normal in any real-life setting where people are litigating, for them to correct each other for making the mistake of attributing a kind of reality to the social institution that it doesn't have. In normal, day-to-day practical discourse, without the benefit of our stuff . . .

Peter

Radical lawyers may have a sophisticated view of how the ruling class controls the law. But it's still missing the essential point—that law is just a form of consciousness, a “belief-cluster.”

Duncan

What I'm saying is that in actual day-to-day practice in dealing with these complicated institutions it's common for one person who is dealing with them to say to another person, “Why do you think they're going to do that?” And, in effect, in the course of interchange between the two people, one person communicates to the other person—you communicate to me—that I've somehow taken the formal presentation of the organization chart much too seriously, that I've personified the organization or embodied it or made it into a machine out there which I am fantasizing will crank along according to some set of rules that I'm attributing to it. And you say, “Duncan, look. Are you out of your mind? That's not the way this works.” And then you convey to me, partly because you have a specific idea that's different from what I'm saying about what's going to happen, your sense that a particular person is not a player, has no influence, when I've just been assuming that person is a player. In the course of that, we are struggling about the reification of the institution. It sounds like it's just an argument about whether this person has influence. But one of the ways in which knowledge, true consciousness is built up through the exchange is, it is revealed to me in the course of this that I was fantasizing. We don't need Critical legal theory to be effective practitioners of the de-reification of institutions.

Peter

Let me keep going. The strategy of the litigation should be to figure out how and the extent to which this will build the power, meaning, texture, and richness of intersubjective zap and the strength of the group that is asserting the claim. Well, it's also possible that you just want to win the case. There are all kinds of reasons why you might bring the suit. This isn't the only reason. But this is the politically cutting basis of the difference between our theory and a left rights theory of social change. Our theory, at least in my view, is that the objective of engaging in litigation, of working in the legal arena, is to create a more authentic politics by building the power of the movement through working in public settings which are recognized as political settings by the existing society, to transform the nature of how 'the political' is perceived by people. So that the objective decision about whether to bring a particular case is a decision that goes as follows. First, we have these immediate, concrete objectives—we want to picket at the shopping center or integrate the schools. But our deeper political objective is that we want to build the strength and energy of the existing movement. Now, in order to do that, it's necessary to understand what the impact of the granting of the new right can be as an ambiguous impact.

Duncan

You think that this is our contribution? This is what the left said in law school in 1968 and 1969.

Peter

I don't think so. I don't think the left really sees the way that getting rights can defeat the progress and the development of a movement. They just say that sometimes it's good and sometimes it's legitimizing.

Duncan

And we agree with that, right?

Peter

No, I don't agree . . .

Duncan

How do you disagree with that formulation? I thought that's what you've just been saying.



Peter

The way that I disagree with it is that the right to any of the things that we're talking about is not what the objective is. That makes it sound as if, if only everybody had their rights, we would already have the future society. And that's what . . .

Duncan

. . . we don't believe.

Peter

Exactly what people don't need is their *rights*. What they need are the actual forms of social life that have to be created through the building of movements that can overcome illusions about the nature of what is political, like the illusion that there is an entity called the state, that people possess rights. It may be necessary to use the rights argument in the course of political struggle, in order to make gains. But the thing to be understood is the extent to which it is enervating to use it. It's a diversion from true political language, political modes of communication about the nature of reality and what it is that people are trying to achieve, and it *can* contribute—although it doesn't necessarily contribute—to the vitiation of the energy of the movement when people think they have won, but in fact what has happened is that they have had a temporary victory with potential for using it for leverage to gain more power, *not* an absolute abstract gain in social progress, which can then be manipulated within the ideological framework that the right was granted from, so as to repacify the organization that led to the bringing of the case in the first place. And the only way to get at how and why that's so is to understand the next step. When abortion statutes are declared illegal on the basis of the abstract right of privacy of American citizens under the penumbras of the Bill of Rights, what happens? What happens is that there is in fact a framework of reality being signified through these opinions that I'm claiming is false consciousness. In other words, an hallucination that as long as people believe in it, they will disempower themselves. And we can say specific things about what it is, about what the false consciousness is. So my claim is that the specific aim of lawyers should be not to subordinate their sense of themselves as political actors, not to see themselves as merely representing others, but working *with* others to build the strength of existing movements in order to realize in a direct language that they believe in, their own political aims—that's the goal. Part of that

struggle consists—may consist . . . it's ambiguous how much it should consist—in using a false language of legal rights and pursuing litigation and getting new rights in order to increase or build that sense of collective power. Klare's or Freeman's work are studies of the way that the failure to grasp that essential element in the way that rights are granted can lead to the formation of an ideological architecture that re-pacifies the movement that led to the original litigation, because of the failure of the people engaged in it to understand what it meant that the state, in exchange for passivity, had granted a new right that supposedly was an increase in power. Now, it *was* an increase in power. At particular concrete moments, these gains can be used if people have their eye on the ball to keep pushing the development of the movement. But the abstract right in itself is . . . Actually it can be, in some circumstances, a marginal gain in power. It can force officials to obey their own rules. There are things about it that can lead to protective spaces that there's no reason for us to criticize. But it's also Critical for people not to "return" this power to the state, to remember that the state is an illusion and that there are no rights.

Duncan

What do you mean there are no rights?

Peter

They don't exist. They have no existence. They are shared, imaginary attributes that the group attributes to its members that don't in fact exist. It's a hallucination. Moreover, the group itself is not constituted. There is no constituted group here, that is in fact acting in any way that we should consider to be . . . There is no group discussion; there is no shared power among people generating forms of consensus about social reality. Yet there are thousands of classes each year in "constitutional law" that pretend that such a constituted group exists.

Duncan

That's all right; that's all true.

Peter

It's pretended without talking about it. And the way it happens with lawyers is that lawyers are far down the ladder from the political theory. They are taught the presuppositions of the democratic polit-

ical theory without ever in fact engaging in hardly any discussion of whether those presuppositions or what they're based on are true. So they're taught at a purely technical level how to manipulate things that are presupposed, such as that the Constitution is a democratic document, based on the will of the people. Nobody gets to discuss that. Instead, you learn constitutional law, which has good things in it like freedom of speech and equal protection. But all of which re-legitimizes the idea that there is currently existing a political group, a group in fusion, that is developing forms of shared meaning that is what people want. That is the false consciousness. That does not exist. In fact, it is invented by people in the service of maintaining their fear and anxiety about really developing such a political group, because they choose to believe it, and it's not true.

Duncan

What do you see as the relationship between the state and rights? You say that the state is a hallucination and that rights are a hallucination?

Peter

The relationship is that the state is the projected image of the unity of isolated people, the public political unity of people who are in fact isolated and not engaged in public political life, and the law is the speech attributed to it.

Duncan

And what about rights?

Peter

They refer to the field of possible social interaction among imaginary legal subjects who have freely "formed" and now "obey" the illusory political group projected out as the source of legitimate social authority. So if you look at legal ideology as a whole, you see a sequence of images forming a kind of dream-like narrative that mystifies and idealizes the painful reality of immediate social experience—the real experience corroded by alienation and mutual distance.

Duncan

Why do you think people believe in all this if its all a hallucination?

Peter

Because in the pain of our isolation we become attached to the utopian content in legal imagery. This is why I think it's dream-like. The wish to be really free and connected is partially satisfied in the fantasy that we're all part of a great democratic group, and related wish-fulfilling images are scattered throughout the discourse in a more-or-less random, pre-rational way. Then they are rationalized through a kind of "secondary process," to both fit and help shape the alienated routines of everyday life. Look at contract law. Deadening economic routines are turned into little stories about a mythical group where everyone has freedom and is entitled to security and where you get punished if you don't act in good faith like everybody else does and so on. While people in fact are wandering around in a quasi-autistic stupor exchanging blank gazes with strangers on the street.

Duncan

So are you telling movement lawyers that there's no point in trying to get people their rights?

Peter

No. I'm saying every time you bring a case and win a right, that right is integrated within an ideological framework that has as its ultimate aim the maintenance of collective passivity. That doesn't mean you don't bring the case—it means you keep your eye on power and not on rights.



Duncan

I've recanted the fundamental contradiction, and also altruism versus individualism. I think I'm also on the verge of recanting the critique of rights. The very impulse that makes me just profoundly suspicious of the fundamental contradiction and profoundly suspicious of individualism and altruism at the moment, that tendency in my own work and thinking about things, makes me feel that the critique of rights has sort of had it too. It's now in danger of becoming a cluster of pods, and it's in real danger of having exactly the same fetishized character as the contradiction analysis, or the individualism and altruism analysis. It's as though Klare and Freeman had

laid down some ineluctable law of history, which is that rights discourse is by its very nature this or by its very nature that.

Peter

It isn't by its very nature anything. It's a problem. That's what I'd say about rights discourse. I don't know that it can be translated into or integrated with an authentic human discourse. I don't say it absolutely can't, but I know that the dominant tendency of people who want to assert the a priori value of rights—as opposed to rights as a mere tactic in the service of social struggle—is that they . . .

Duncan

It sounds as though you're about to state the critique again.

Peter

You're right. Let's trash it. I'll trash it. The critique of rights is not an abstract, reasoned position from a set of premises about communism, that rights are bourgeois whereas in communism there won't be any rights because communism is X kind of society. The critique is more sophisticated than that. But it's still wrong, and even arrogant. In fact the struggle to increase the strength and energy of a movement can partially result from the acquisition of rights. The struggle to infuse liberatory energy into existing political discourse, like that contained in legal reasoning, can, at certain moments, in certain settings, be energizing. At least that should be open to question and debated among us. But I think the critique of rights is correct to the extent that a right is seen as the same as a furthering of the movement. "The acquisition of the right equals furthering of the movement." That is false. It's false not because of the fact that the rights are subject to contradictory justifications, which is an argument that Karl Klare and you both make, but because the actual capturing of what it means to be human, and in relation to other people, is falsified by the image of people as rights-bearing citizens. It's a falsification of human sociability.

Duncan

The reason why I'm thinking that the time has come to trash the critique is that it has become like the counter-machine to the rights machine.

Peter

I'm trying to loosen it up.

Duncan

Oh.

Peter

Let's loosen it up and still keep what's valid. You want to make it okay to fight for rights in a context.

Duncan

People don't all either suffer from false rights consciousness or *not* suffer from it. There are more ambivalent relationships to it than that.

Peter

Okay, well, say the critique of the critique.

Duncan

First I have to give a different version of the critique of rights than the one you gave. Maybe they are ultimately the same thing, but mine sounds different from yours. The critique would be something like this: The problem with rights analysis is like the problem of the fundamental contradiction. It's like the problem of the notion of unalienated relatedness. That's the problem with rights. Rights are no more hallucinatory, they're no more evil, from that point of view, than talking about and taking seriously, the notion of unalienated relatedness. The difficulties of rights analysis are basically the same, if you want to talk about it at a level at which you show that it's intrinsically, essentially false. The reason why it's false is that it has the same problem of turned-into-podness.

Peter

Why?

Duncan

When people talk about individualism and altruism they begin to think, "Well, this person is an altruist," which is thought of as an attribute of the person from which one can infer or develop—you don't want to be too logical about it, but you can infer on some

level—a series of other things about how they will react. So you can say, for example, “He’s an altruist but he contradicted his ideals when he did that,” or something like that. The problem with rights analysis is the same thing: that rights analysis leads you to believe in the power of saying things like: “Well, the shopping center is private property.” It leads you to think that you’ve said something when you say that the shopping center is private property. It’s mainly a problem of vacuity.

Peter

Why haven’t you said something?

Duncan

The reason why you haven’t said something is that total agreement with “the shopping center is private property” just doesn’t generate anything more. It’s just a gesture, because there is not in existence the rational apparatus, presupposed by the statement, which will allow us to derive a lot of particulars from it. This is a different conception of the critique of rights analysis than you have. You believe it’s something more than that. As a matter of fact, what Critical Legal Studies people have been doing is carrying on the tradition of showing the vacuity of the discourse. It’s based on claims to be able to generate particulars from abstractions which are no longer plausible. It’s not that it’s impossible that they should at some time become plausible—it is often convincing that things are implicit in more abstract ideas. It’s just that in this particular case it turns out to be a flop; it’s failed; it’s lost its vitality; it’s gone. So on a technical level, that’s what’s wrong with rights analysis.

Peter

It’s contradictory.

Duncan

It’s not *only* that it’s contradictory. Sometimes it’s contradictory; sometimes it’s just vague. It can have different problems. It isn’t necessary, it’s not in the essence of things, and it doesn’t *have* to be the case that it can never work. It just seems to be the case at the moment, as far as I can tell, that it doesn’t work. And I have over and over the experience of being able to invalidate rights arguments. The experience is a negative—it’s negative critique. By invalidating them, I don’t mean satisfying myself that they’re wrong. I mean, it is

the end of the conversation, which is obviously always conditioned by my own hierarchical position as a rights priest. I am able to convince the person that I'm talking to, or I have a sharp intuition that I could, that it just doesn't work. And I'm quite sure about the experience of the non-viability of the discourse. But I want to say again, for the fiftieth time, I don't think you can reason to that conclusion out of any thing about the concept of rights or anything else. In this case, these concepts are like organic things that live and die, and this concept is dead. I think. Maybe next month a sprout will suddenly appear in the absolutely dried-out earth of the flowerpot, where you basically just put it down in the cellar thinking it wouldn't even be worth throwing the dirt out. You go down to the cellar, and by God, there's a green sprout. And rights analysis once again has got some force and has some meaning for us. That's possible.

Peter

So?

Duncan

Rights analysis is a way of imagining the world. We don't really know much about the world. One way to give it order and coherence is to imagine that it is a drama in which there is the state, and then the rights bearers, and stuff like that. The objection to those things is not that they're hallucinations. That's just not the objection. All constructs of that type are equally open to the charge that they're hallucinations. It's not that we are saying "Your problem is that you're hallucinating." It would be much more accurate to say that what we're saying here is "You're having a yucky hallucination." "Why are you choosing to hallucinate it that way?" would be a better way to put it, from my point of view. This is a criticism of you. It would be better to say we're all hallucinating, all the time. This rights plus state hallucinations is awful; it's painful; it's unattractive. It would be better to say that we can have better hallucinations. The hallucination language is too much . . .

Peter

. . . us and them.

Duncan

Us and them, real/unreal, truth/falsity. Now, I'm not a relativist. I think that the concept of false consciousness has a crucial place in the



analysis. And by the way, I do want to say the state is a hallucination. I want to be able to say the state is a hallucination often, and that rights are false consciousness. I don't want to fall into my own counter-mistake. I don't have a theory of when it is permissible to say that the state is an hallucination. There's a state of mind that people get into in which you feel that they've drifted out of any realistic understanding of it. But then they often drift back in. They drift out of relationship to it, and twenty-five minutes later in the conversation that same person is talking to you about the state, and you have the feeling that you're really on the same wavelength about the state. You haven't had to browbeat them about how they were hallucinating. And it's not that you've been subtly manipulative. You make it sound as though a person would have to say to themselves something like: "Am I infected with the disease of false consciousness about rights and the state?"

Peter

No.

Duncan

I'm saying, "You drift in, you drift out of authentic understanding of institutions." You can be hallucinating for an hour and then very lucid for an hour and then hallucinating again. You aren't going to be able to tell by the words the person's using, just as though it was an analysis. It's the same criticism that I'm making over and over again. I feel that you're looking for the *words*, so that, like, the diagnostic tool would be to get the person to write an essay about the goals of the civil rights movement, and if they answered the question wrong, they would betray themselves as suffering from false consciousness. It's as though you all have in your minds that the critique of rights could be reduced to a test. Whereas it seems to me that the truth of it is infinitely . . . again, interstitial. And it's only when you actually hear it and see all of it that you know whether the person is suffering from false consciousness. Even if they spend their whole day writing about how the Declaration of Independence should now be declared for Thailand, and that would solve the problem of Indochina, that person may be still perfectly, adequately related to the universe.

Peter

Okay. First of all, the drifting-in-and-outness is a characteristic of false consciousness.

Duncan

Of all consciousness.

Peter

I think you're into some kind of self-abnegation here. You're "just like everybody else." There's a Critical part of becoming a radical that involves a desire to transform and overcome false ways of perceiving reality, like the following: A judge comes into a cocktail party, and people are too impressed. None of us are free from the power of symbols.

Duncan

It's a familiar experience—feeling that people are too impressed, and saying to yourself, "I'm actually not that impressed, and my feeling of not being so impressed is truer, and I actually want to affirm—I'm not a relativist—that in this setting *I'm right*, and their reaction is a false reaction; it's bad." But at the same time I also feel the need to recant and renounce the idea of *consciousness*. One of the things that identifies us as part of the "bad" aspect of the radical tradition is that we treat false consciousness as a reified structure. What we really mean by false consciousness is, we can see a pattern; it's a patterned thing. The pattern is: there's a judge; there's a cocktail party; there is a non-judge private party at the cocktail party. We see it happen. We feel we've seen it before. We feel that the private person being impressed is not actually being the particular person we know. They're in a sense just a robot, really just a robot.

Peter

Or being "other."

Duncan

Structuredness and patternedness and otherness all mean the same thing, on one level, here. It's a routine; it's an act; it's a set of tics; it's a number. The judge comes in. I say, "Oh!" And although I really am saying "Oh" quite spontaneously, nonetheless it's programmed. And you sit back . . . . You, the third person, can look at this and say, "I don't know how I feel about this judge yet. It's silly to

have reactions to this person before you've actually heard, for example, whether she's a total moron. I'll wait and see whether I'm impressed until, you know, I've got a little more evidence." When I'm going "Oh!" I look silly to you; I look like a controlled puppet.

Peter

Which you're saying is the case.

Duncan

Here's the problem. The problem is the tendency to develop a *theory* that I am a robot, that there is actually a program, a set of electrodes that has been implanted in me by, say, Capitalism or The System, or something, so that I am now a programmed entity, and until someone plucks out the electrodes, I'm a pod. That's wrong. When you are watching me being impressed by the judge, when you say, "Duncan suffers from false consciousness," that is exactly like saying, "Duncan is a rights-bearer." I'm saying that we reify false consciousness exactly the way we perceive other people reifying rights. It's absolutely true that I suffer from false consciousness. But false consciousness is momentary; it may go on, momentarily, indefinitely into the future. But I am always completely free at that cocktail party. My liberty is my essence. And it's always completely possible that at the next cocktail party you'll be sitting there and you'll say, "Hey, I've seen Dunc at fifty cocktail parties." You'll say to Karl, "Hey, Karl, watch this: When Potter Stewart walks into the room, just watch what happens." And you and Karl will be smugly sitting there. You've got the idea that I suffer from a false consciousness about judges. But then I'll walk into the room and I will look at Potter Stewart, and you'll realize that I'm not even thinking about Potter Stewart, and you'll get, then, an authentic, direct intuition of my disengagement from being impressed by judges. You're then going to say, "Duncan no longer suffers from false consciousness" and look for an event, an historical explanation of how that happened. What I'm saying is that to some extent, what's got to be accepted is that there wasn't any event. There is an irreducible element of the absurd and the free in people's choices to fit themselves into these patterns. If there are no electrodes in their heads, it's always a choice to be patterned according to false consciousness.

Now the whole critique of rights, the way we tend to develop it, denies that. It suggests that rights analysis (the bad thing) is like pneumonia. Once you've got it, you've got it, until you've gotten an

antibiotic and been cured of it. We talk about rights analysis as though . . . . It's the way I used to talk about classical legal consciousness. When I first started doing historical research, I sort of imagined that people in the late nineteenth century *had* classical legal consciousness. Now, I used to say to myself that that was a dangerous way to think about it. But there was some real tendency on my part to think about it that way. So I was working it out as though I had a scalpel and I was opening up their heads and analyzing the classical legal consciousness there was in their heads. False rights consciousness is treated, in our discourse, that way; and it's a mistake to understand it that way.

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Peter

I agree with the criticism of the tendency to treat false consciousness as a "something" that people have, that has something like a fixed character, which they then are cured of when they don't have it. You make it something thing-like in nature. And now the question is how to grasp its reality as opposed to its fixed-character reality, which you're saying we tend to attribute to it in our writing. This is how I would disagree with your way of framing the situation of someone who has an excessive deference to the judge or believes in the ideological framework of American political theory as a democracy from which rights flow. You seem to have a radical conception of free will that I'm not sure that I agree with, because my view of the possibility of someone changing their view on seeing the judge is that a real change—that is, a dominant change in that person's perception of the world—can only come through participation in a social movement, or social group of some kind. Through action—to gain a greater sense of confidence in real connectedness . . .

Duncan

If you're truly going to argue that it's "ontological," that you can only change your dominant being by participation in collective something, I want to respond to that. I think that's nutty! It's an example of what it is to think that you can dominate the world through theory. *Only* this way, *only* that way.

Peter

Overcoming alienated conditioning requires more than free will. Do

you think somebody gets over a neurosis by waking up one morning and saying, [snaps fingers] "That's that"?

Duncan

I think how people get over neuroses is just incredibly mysterious. You're talking about it just like Freud, in which, you know, you just spin the wheel, and whatever slot the little ball drops into becomes *the truth*. Now we've got collective getting over neuroses. I think that's about as real as the fluctuation between "the material base determines the cultural superstructure" and "mother-centered child-rearing determines the economy." You're talking as though we know things we don't know. How we get over neuroses is a totally profound mystery of the human spirit, and you can't successfully reduce it to ontology. It's just intellectualism to think you're going to be able ever to invent a theory that says it has to be collective. Sometimes people get over their neuroses, as far as I can tell, by going away for long periods of time, and being distant, and withdrawing. Sometimes they get over them by a kind of collective experience which is totally alienated, and they come back to you from the alienated collective experience and say, "I feel much better. You know, I went off and I was in this group and it turned out really not to be a group at all, and I feel much better." Sometimes they all get in a hot tub. My experience of reality is so different from anything which would ever allow . . . That's what I'm claiming is the problem: It's the impulse, the desire that there should be a "dominant mode of being," which can *only* be changed in some particular way. When we are relating in a relatively unalienated way to other people, we're much more ad hoc than that.

Peter

Maybe you think that when I'm talking that way that I'm appealing to an abstract theory that is fixed.

Duncan

The word "ontological" suggests that.

Peter

But I think that the word "ontological" is a true word—that there is something called "social being."

Duncan

"Ontological" just means fundamental in this case. It has no other real meaning.

Peter

The way I'd put it is this. Because of the alienation that we are born into, owing to the lack of connection that characterizes social life, we have to go through a social process in order to come to want to transform the society and see things as they really are. There is a process that one must go through, in which one is affirmed in one's humanity in a way different from what occurs, of necessity in our society, in childhood. And part of the way that that affirmation occurs is through participation in some kind of social movement. Now what I mean by social movement is *not* that you join a party or that you're in the labor movement, or anything like that; it can happen in an incredibly heterogeneous way. By social movement all I mean is that individual growth and change occurs not through mere free will, but through affirmation by the other. Through a gradual, slow process of affirmation by the other that can, in fact, often does, have an ad hoc character as opposed to an institutionalized character. That happens in a whole complex of ways, and is supported by the desire in everyone to overcome the position of passivity and powerlessness that's the starting point.

Duncan

I think the way to put it would be not to distinguish between the alienated starting point and the experience with other people as though you got over X through doing Y, because from my point of view it isn't meaningful to say—it's just not in my experience to say—that it is through the doing that the person gets over it any more than to say they are able to *do* because they are getting over it. My model is one in which it is not meaningful to try to establish a priority between the behaviors, say, of entering into the movement and the getting over.

Peter

I agree with that. Ontologically the claim I'm making is that it is through one another that we come to our own power. You can't get access to what is unconscious except through the affirmation by the other of a greater potentiality in yourself. We can't do it alone.

Duncan

I don't believe that's true. But I must admit that if it turned out to be true, I couldn't say that it defeated some theory of mine. I don't believe that you can *know* the answer. I don't think that you can answer that kind of question . . . . Do you *have* to do it through the other, or, gee, could you do it either through the other or through introjected others, by residues and getting the unconscious back? Why would one want to have theories about how it had to be one way or the other?

Peter

That's a different issue. I don't want to talk about it.

Duncan

You think we've talked it into the ground.

Peter

We've talked it into the ground. We talked about it yesterday; you said what you said and I said what I said.

Duncan

But the problem with the conversation, from my point of view, is I have the feeling that you think we're talking, when what's going on from my point of view is we're simply re-hashing the same thing. In other words, when you say all that, you expect me to respond. The only way I can respond to that is, "This is not my level of discourse." When you say, "Duncan, what you need to understand is the *only* way to overcome it is through another person's affirmation," I'm in the other room. My mind wanders.

Peter

I'm trying to describe something which is totally indeterminate.

Duncan

But which is nonetheless somehow "ontological." Which I see as just completely "could be absolutely anything." It is a fundamental, profound disagreement about the possibilities of theory, right? Isn't that what it's about?

Peter

What I'm trying to do isn't theory. Or rather, the type of theory that we're trying to develop is descriptive of the movement of human consciousness; the ways in which the legal system, legal reality as a totality, is a movement of human consciousness that is not supposed to be theorized about from the outside, but should be described from the inside in terms of what it means for human beings to think that they are rights-bearing citizens. What it means for the inner life of social groups seeking social change and legal change, and how those are related—it's a phenomenological inquiry having to do with the inner experience of people of each other and of the way they represent the world to themselves. The type of theory that you are so sharply Critical of is different from this kind of description.

Duncan

What do you see as the criticism I'm making of the way you do this, and why am I missing the point?

Peter

I see the criticism that you're making as that I am . . . I think that you slip me, because maybe of the way I put things, or something, into the category of reasoning from a set of premises about the nature of reality, to certain conclusions about what must happen. But what I think I'm doing is attempting to describe reality without reasoning from any *a priori* "premises."

Duncan

That's half of my criticism. But the main criticism that I'm making over and over again is that you can't plausibly describe "being" except in the vaguest and most general way. You *can* plausibly describe relatively contextualized, nonabstract, rich, human situations, but you can't . . .

Peter

Universalize it.

Duncan

You are trying to do something that I don't think you can do, which is not to reason from premises to conclusions, though I do sometimes think you're doing that, only occasionally. The real criticism is . . . is my belief that *you can't plausibly claim to do a phenomenology of being that*



*will generate description at the level of abstraction that you want to.* That's the criticism. It's not mainly focused on derivations. It's like whether one could, plausibly, generate a description of human reality which would describe people either as *having* to have another to recognize them, to overcome their neuroses, or, on the contrary as being able to use earlier social experiences and do it in the desert without another.

I don't believe you can have a meaningful conversation at that level. It's not because of the problem of derivation. It's because I think it's just made up. From my point of view, it is just like the choice between mother-centered childrearing and the means of production. It's a longing to get it together at that level of abstraction.

Peter

We're talking about different kinds of abstraction and different ways of theorizing. The reason for being against the means of production, and mother-centered child rearing, as explanatory tools, is that that way of thinking, instead of being based on a phenomenological description of social being, is based on a mode of thought, called explanation from premises, that is inadequate phenomenologically, and leads to partial interesting ways of characterizing sectors of human life, but always makes much greater claims for what it's shown than it actually has.

Duncan

What you're saying could perhaps be true as a description possibly of Aquinas, but not for an instant of Marx or Chodorow. Marx doesn't start from any premises. He claims to start by building up, on the basis of research, knowledge. All Engels' stuff about Manchester & the Working Class is there. He's an historical materialist. He thought he was making empirically-based generalizations.

Peter

But you can't grasp the movement of social being . . . . I have to use words that mean something to me. You can't grasp the movement of social being without a method that already is enriched and textured enough to be able to grasp from the inside what is going on and what we're looking at. I think the problem with Marx and Chodorow is that the generalizations drawn, and the nature of the reasoning itself, is not adequate to the true nature of human reality.

I just think we have a disagreement. You're saying that the type of theorizing that I'm saying is possible is not possible.

Duncan

My feeling about what's wrong with Marx and Chodorow is the longing to get it right at that level of abstraction. It has nothing to do with the problem of premises, or the techniques of reasoning. In Marx, for example, my feeling about Marx is that Marx's works are often incredibly complexly subtly refusing to have abstract premises and reason from them.

Peter

Yes.

Duncan

And when he does do that—talk very abstractly—he does it just as one of many techniques—that's what I think of as his Hegel dimension. Which I like. I'm all in favor of doing that. I'm all in favor of sometimes starting with very abstract premises, and then reasoning from them. Sometimes I'm in favor of doing that. Sometimes it works. My critique of Marx and Chodorow has nothing to do with the critique of deduction, for example. My most basic problem with both of them is that they think they can settle things too high up. They think they can get more out of study than it's possible to get. They've gone to the library, and they're determined that by the time they get back from the library, they're going to have settled the problem of, you know, the human race.

Peter

Let me just ask two questions.

Duncan

I think we're getting somewhere all of a sudden. I'm feeling better. Because I feel now you're recognizing the peculiarity of my theory. On some level I now feel recognized by you as a person who has an odd view that you don't really fully get which needs to be explored.

Peter

True. I didn't know that you thought . . . But you do agree that the problem with explanatory abstractions, with reasoning from *a priori* premises that are not fully grounded in consciousness, is different

from the problem with descriptive abstractions which I claim can be drawn from the universality of lived experience. You reject both but you agree they're not the same.

Duncan

I agree they aren't the same.

Peter

I'm interested in the extent of free will issue. It's traditionally beaten down by all left social theorists, not recognized, dealt with either as individualism or else, because it doesn't fit into psychoanalytic or Marxist theories of conditioning, it's criticized as utopian, and ideological.

Duncan

But it's big in existentialism.

Peter

It's big in existentialism, but existentialism is not really part of, regarded as the Left. So that actually is a question that needs to be reopened: the issue of free will and appealing to the freedom of the other as an essential aim of what we're doing. There is an element of paradox in it, because the way that I have come to feel stronger about free will has been partly through contact with others who have affirmed its existence in me. I mean, I can't reflect myself to myself except through the mediation of how I come to know myself; and how I come to know myself comes through the way I've been experienced by others. In other words, whether I feel free is directly related in a certain way, not caused by, but in a certain way is directly related to how much love I felt at birth.

Duncan

It sounds as though you're saying that how much love you experience at birth determines how free you can feel afterwards?

Peter

No. It's the totality of your relationships with others throughout your life, not how much love you received at birth. To the extent that the early experiences are very schizy people sometimes go through certain breaks and recover in all kinds of complex ways.

Duncan

I'm glad to hear you affirm that.

Peter

Absolutely. I don't think we disagree on the indeterminate nature of the growth process. We only disagree for the moment on whether social relationships are essential to it in a way that can be known. Let me make my one methodological criticism of your position. There's no way to engage in a particular local, small, micro-phenomenological investigation, I believe, without your universal capacity to grasp the interior reality of a situation that is not yours.

Duncan

Say that again?

Peter

In other words, you think you've overcome the problem of universality by saying you only want to stick to particular, contextualized situations. And I'm saying that the interpretive capacity that you're using inherently appeals to universality, an interior universality between you as the knower and the thing that you're looking at.

Duncan

I don't know what you mean by an interior universality. But I certainly agree that it would be contradictory of my line to claim you could escape the problem of universals by sticking to particulars. Particulars are just constituted in the dialectic with the universals, so there's no . . . . That would just be falling into the trap that I'm claiming to escape. To escape it what I would have to do is to appeal to my capacity to create artifacts and talk that is meaningful, compelling, does something, relates people to each other and gets through. There are many particular analyses that are totally dead and deadening. And it's possible to talk quite generally about being human in ways which are quite moving. That's not the distinction. The distinction is about the degree of logical structure.

Peter

I'm not arguing for logical structure.

Duncan

Okay. You're against that. It's not that. Let's say: the possibility of

abstract characterization, abstract universal characterization—that's what it's about. You are not a positivist, you're against logical structure, and you believe everything has to be based in the human and the living—all that I completely agree with. Where we disagree is about what *works*.

Peter

That I think is indeterminate. I'm claiming to agree with you on what will work. There's no situation from which you can predict, in my theory, what to do in any given situation.

Duncan

I misstated it. I think that if you want to communicate with people the particular and the general have to be in a particular kind of relationship. It seems to me at the moment that communicating effectively in the interest of getting people to be freer and remaking the social universe—communicating with them effectively both about our own experience inside the social universe and about possibilities of action that are in them—that doing it effectively seems to be linked up with getting that general abstract message very firmly rooted, locked down into the evocation of things that are pretty concrete. Attempts to get in touch with people using descriptions of human being which aren't locked down that way tend not to work. Tend to be generally unsuccessful.

I have a theory—this is just a theory—about why that might be so, which is a theory of the interstitial character, the implicit, caught-up-in-the-folds character of freedom. That is, that freedom exists in the interstices of these structures, and is a way of destroying them and transforming them but never being outside them, so that freedom is always interstitial. So until you've created enough of a picture so that the person can imagine themselves being free within the structure, it's hard to get through to them—until they can see for themselves, "Oh, here I am in this situation. Here's how I might move, too." Or, "Duncan's saying, 'in this situation you ought to move that way'." It has to be concretely enough described so that you could say, "If I were there, I'd never go that way." Doing that is a specific skill.

I suppose I like this strategy, and this picture of why this strategy will work, because it fits my antagonism to philosophy. If you really take seriously the notion that freedom is *just* interstitial, doesn't have an essence, it's just things you can do in spite of the structured char-

acter of the situation, that's freedom— then it's always there; there are always millions of things you can do in spite of the structured character of the situation. But there'll be a completely different set of things the next instant. And there are things you can't do, though the only reason why you can't do them, often, is, just, you can't do them— there's not much behind that.

That fits my angle. It also fits the specific politics of building syndical groups in large bureaucratic organizations, groups which don't have any hope for seizing the state and imposing a new universal order, or legislating a program based on some abstract principles, but also don't have much hope of a breakout of universal love, in which one day in the street everyone recognizes themselves, and each other. That is, it's in a political conjuncture where it looks like it's trench warfare for decades.

Peter

I agree with much of that but I still think it's incredibly important to articulate and try to embody what life could be like beyond trench warfare. For me it's an important part of what moves people in addition to music at the meetings. A little more theorizing at the meeting wouldn't be all bad.

#### ENDNOTES

The following notes have been prepared by the editors of the *Stanford Law Review* to identify and, in some cases, explain references in the Dialogue which may be unfamiliar to readers.

See page 1 Peter Gabel is Professor of Law at New College of California School of Law and Duncan Kennedy is Professor of Law at Harvard Law School.

See page 4 "Intersubjective zap" is a sudden, intuitive moment of connectedness. It is a vitalizing moment of energy (hence "zap") when the barriers between the self and the other are in some sense suddenly dissolved. Reflective understanding of another person is *not* what is meant by the phrase.

See page 5 "Making the kettle boil" is a metaphor for the aim, or project, of good politics to generate certain feelings and attitudes in a group; to move a group of people from a state of just sitting around, or inertia (water sitting in a kettle), to one of energy and action (boiling water).

See page 7 "Body snatchers" and "cluster of pods" are references to the film *Invasion of the Body Snatchers*. There have been two versions, the first released in 1956, and the second in 1978. In both versions, pods sent into space by an alien civilization find their way to Earth. When a pod comes into contact with a sleeping human, it develops into a duplicate body, killing the original, and effectively taking over the human form for alien purposes.

The reference illustrates the manner in which one's ideas and expressions can be appropriated by others for their own purposes. Like one of the pod-bodies in *Invasion of the Body Snatch-*

ers, an appropriated phrase loses some of its original meaning and sense of historical contingency.

See page 7 See D. Kennedy, Utopian Proposal or Law School as a Counter-hegemonic Enclave (Apr. 1, 1980) (unpublished manuscript prepared as a dissent to the Report of the Committee on Educational Planning and Development [The Michelman Report], Harvard Law School, May 1982, on file with the *Stanford Law Review*).

See page 12 Harvard Law School's "no-hassle pass" movement was an attempt during the 1982-83 year to adopt as an official school policy the right of students called on in class to "pass" (not answer a question in class from a professor) without being hassled by their professors.

See page 11 The "fundamental contradiction" is introduced and discussed in Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 211-13 (1979).

See page 14 For a discussion of individualism versus altruism, see Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). For a discussion of legal consciousness, see Kennedy, *Toward a Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, in 3 RESEARCH IN LAW AND SOCIOLOGY 3 (Spitzer ed. 1980).

See page 17 "Nothingness is the worm at the heart of being" is from J.-P. SARTRE, BEING AND NOTHINGNESS 21 (1956).

See page 19 The notion of "the projective temporal character of human existence" is derived from the writings of Martin Heidegger and Jean-Paul Sartre. See M. HEIDEGGER, BEING AND TIME (1962); J.P. SARTRE, BEING AND NOTHINGNESS (1956). The theory is that human consciousness always projects itself forward into the next moment. It exists by virtue of its projects, and thus has no fixed or complete identity. Its essence, its structure, its being, is its projective character. An object, such as a table, on the other hand, has no such projective character—it is a fixed being, an essence, complete in itself.

See page 24-25 See P. Gabel, Ontological Passivity and the Constitution of Otherness Within Large-Scale Social Networks: The Bank Teller (June 1, 1981) (unpublished manuscript on file with the *Stanford Law Review*).

See page 33-34 See Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law*, 62 MINN. L. REV. 1049 (1978); Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 62 MINN. L. REV. 265 (1978).

See page 40 In calling himself a "rights priest," Professor Kennedy is making an ironic and self-deprecating reference to the power and legitimacy he gains from being a professor at Harvard Law School, where a great deal of traditional teaching about rights is done.

See page 49 See N. CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE PSYCHOLOGY OF GENDER (1978). Chodorow is a feminist writer who focuses on the relationship between mother-centered child rearing and the reproduction of sex roles. For a short summary of her views, see Chodorow, *Mothering, Male Dominance, and Capitalism*, in CAPITALIST PATRIARCHY AND THE CASE FOR SOCIALIST FEMINISM 83 (Z. Eisenstein ed. 1979).