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REASON, JUSTICE AND LOVE: THE CONSTITUTIONAL HUMANISM OF PETER CICCHINO

JAMIN B. RASKIN*

Reading through the articles in this symposium issue, it became clear to not only me that Peter Cicchino's life was a blessing to those who came into contact with him, but that his all-too-brief journey in legal academia will leave a major impression on the world of jurisprudence and constitutional ideas.

Everything that he taught us begins with the premise that the language of "rationality" and "reasonableness" in constitutional law must be taken *seriously*.

"A statute or government policy whose end is not rooted in human flourishing, and is not accessible through human experience, lacks the minimum degree of reasonableness required by the Equal Protection Clause and represents a radical departure from the rule of law."¹

Thus Peter closed his astonishing article in the Georgetown Law Journal, "Reason and the Rule of Law: Should Bare Assertions of 'Public Morality' Qualify As Legitimate Government Interests for the Purposes of Equal Protection Review?," a triumphant intervention in Equal Protection and Due Process scholarship and perhaps the finest law review debut of a law professor in the 20th century.

My Constitutional Law students know this article inside and out: it is the only law review article I have ever assigned in its entirety. But this cogent masterpiece should be required reading for every constitutional law student in the United States.

Peter presented a constitutional and philosophical argument that

* Professor of Constitutional Law, American University, Washington College of Law. This Essay is based on my remarks at the Washington College of Law Memorial Service for Peter Cicchino on August 30, 2000 and is dedicated to all of Peter's students in the hope that they will touch others the way he has touched them.

1. 87 GEO. L.J. 139, 193 (1998).

decisively refuted the logic of the majority in *Bowers v. Hardwick*² and Justice Scalia's dissenting opinion in *Romer v. Evans*.³ Peter's powerfully concrete and irresistibly systematic analysis swept away much of the irrationalism that still haunts American constitutional jurisprudence.

Essentially Peter argued that what constitutes a legitimate and rational governmental interest for minimum rationality review under Equal Protection and Due Process must make reference to what he carefully described as "public welfare," that is interests that relate to observable and measurable public goods, such as health, safety, economic prosperity, and so on. He contrasted these "public welfare" interests with "public morality" interests, which are not defined with respect to empirical harms and goods but rather are concerned with the prohibition or encouragement of human conduct on non-empirical grounds as simply being good or bad, moral or immoral.

Thus, Peter maintained, there might conceivably be a legitimate interest in regulating homosexual sodomy or otherwise discrimination against gays and lesbians on the grounds that such legislation is necessary to stop sexually transmitted diseases or to promote procreation. Such rationales can be empirically tested—and logically refuted, and that is precisely what Peter does brilliantly and cogently in this article. Straight people get sexually transmitted diseases just like gay people do and there is, at any rate, a less restrictive alternative to prevent such diseases than prohibiting sodomy—there is safe sex. Similarly, many gays do procreate and many straights do not, which proves that there is no means-end fit in the procreation argument. Banning sodomy simply does not work as a means to promote procreation. Every public welfare argument raised against the equality of gays and lesbians Peter takes seriously and then demolishes with the razor-like lucidity and saintly patience that were his hallmark.

Yet Peter was adamant, to the dismay of many of our friends, that such "public welfare" arguments are formally correct and play a perfectly valid role in the "contest of reasons" that he cogently described as the essence of constitutional adjudication.

What does *not* fit in proper constitutional analysis, he argued, were arguments that sodomy could be banned or gays and lesbians treated like second-class citizens simply because homosexuality is "wrong" or

2. 478 U.S. 186 (1986).

3. 517 U.S. 620 (1996).

same-sex relationships “immoral.” These arguments, he showed, cannot be logically or empirically refuted—in scientific terms, they are non-falsifiable—and were therefore in principle nothing but the codification of bias and prejudice. In a pluralistic democracy like ours, disembodied arguments about morality in public process are akin to theological and sectarian dogma. As unanswerable private preferences, they are never suitable as minimally legitimate, much less significant or compelling, interests for the purposes of testing the constitutionality of laws burdening fundamental rights. Far from inscribing true morality into law—that is, in Peter’s terms, a morality of actual human consequences—statutes based on empty claims about other people’s behavior or status being “immoral” legalize injustice and its dirty little secret, irrationality.

Peter was the ultimate rationalist. His writing repudiates all dogma, cant, illusion, unreason and mystification. His death is a tragedy because we needed his singular voice, profound sense of humor and fierce passion in the thick of battle, but it is no tragedy in an intellectual sense. If we do our Peter Cicchino homework, we will find that he has already bequeathed to us in his luminous prose the philosophical foundations and analytic tools that we need to fight for something we might call *constitutional humanism*.

Peter taught us never to accept anyone’s insistence that some empty theoretical abstraction—like morality, the free market, the forces of history, capitalism or postmodernity—must take precedence over the felt needs and desires of living humanity. Peter wanted to test all claims and pretensions of moral, economic and ideological systems against the observable, quantifiable needs of men, women and children in this world. He did not love humanity as part of an ideological construct; he loved the people that he knew in his life, not just Jonathan and his family and his students and colleagues and co-workers, but his neighbors, the kids on his block, the poor and despised, the rich and famous, and the homeless gay teenagers he rescued on the mean streets of New York. It is the interests of these people, these citizens, that government must serve or it must not pretend to act at all.

Peter’s relentless, piercing rationalism—on display in class with his intense, loving deployment of the Socratic Method—led him to criticize the Left’s recent fascination with the politics of multiculturalism. It was not that he ignored or denigrated cultural difference and the experiences of outsider groups. Far from it. He celebrated human culture in all of its forms and guises, and honored not the intrinsic self-evident virtue but the dignifying political struggles of all outsider groups.

But, fundamentally, Peter recognized, as both a rationalist humanist and a gay Catholic Italian-American working-class hero disabled by unspeakable illness in his final days, that, as he said in his remarkable address on “Defending Humanity,” “we can move beyond the things that divide us because we are united in something more fundamental than and prior to those status attributes: a common humanity.” This was the remarkable spirit that animated his every word and gesture. I am tempted to say, following Peter and Mahatma Gandhi (who Peter loved and often quoted), that after my experience of two-and-a-half precious years of friendship with Peter, I am a Catholic and a Protestant and a Muslim and a Hindu and a Jew and an African-American and a white and a Latino and an Indian and a straight and a gay and a bisexual and a man and a woman. And now also part of me has died with Peter and part of Peter lives with me as he lives with everyone else in the huge community of people he touched.

It was because of Peter’s belief that humanity has actual characteristics—like hunger and thirst and a need for shelter and clothing and love and dignity and just treatment—that he committed his life to the political proposition that people must be treated as people and not as things or commodities or pawns. He lived the ethics of Martin Buber, who insisted that proper human relationships must be in the form of I-Thou, not I-it.

Several months before Peter died, he came to address the Marshall-Brennan Fellows, upper-level law students at the Washington College of Law who are teaching constitutional law to public high school students in Washington, D.C., and Maryland. He told us how he was essentially driven from the Jesuits when he stood up for the right of one of his high school students at Gonzaga who had been suspended for a painting that he had made at school. Peter told us of the extraordinary impact this experience had on him. He wrote of this experience in the essay that is at the heart of this remarkable symposium. “In one fell swoop,” he wrote, “I lost my home, my job, my community, and a large part of my identity . . . so that a 17-year old kid could paint the pictures he wanted to paint and have his human rights of due process and free expression respected. But I have never regretted it.”

Peter understood that a key part of what we need to experience happiness is a living commitment to the progress and dignity of others. He was a kindred spirit to Martin Luther King, who showed us that all life is interrelated and all humanity is involved in but a single project. Peter believed that going into public interest law to fight the cruelty and depredations of those in charge is no sacrifice

but the coolest, most rewarding, most fulfilling thing you can do. In his last few days, Peter kept saying he could not have lived his life with any more pleasure, joy or love, and if you knew him, you knew he was telling the truth. Had he died with a billion dollars in the bank and a Swiss chalet, he would not have been one iota happier.

Peter loved popular culture, and I am the grateful heir to his Stephen King collection, which no one else seemed to want. But Peter would have detested the moral lesson of the “Survivor” television series, a barbaric and unworthy imitator of a British program called “Castaway,” where they actually tried to see how well and long a group of people could live together in a community, growing their own fruits and vegetables and governing themselves.⁴ In the American series, the players were divided into teams, forced to compete for food and luxuries, ate rats and snakes, and competed viciously, lying, cheating and conspiring for the winner-take-all prize of one million dollars. It never occurred to any of the players to rebel against the dark, authoritarian rules of the game, to declare the competition over and split the money or, better yet, give it to the Peter M. Cicchino Foundation.⁵ But Peter would have organized that revolution in a New York minute. He never would have tolerated that bleak vision of human nature. He would have taught our corporate sponsors that no one survives unless we all survive.

I always teased Peter that he harbored one irrational faith and that was a faith in the transforming power of love. But the experience of his sickness and death taught me that the transforming power of love, as exemplified by his astonishing life, is no idle superstition or flight of fancy. It is a hard, verifiable, demonstrable fact in the world, omnipresent, compelling, sometimes overflowing. Human love is indeed the one force that consistently derails and overcomes the recurring violence, selfishness and superstition endemic to the social structures that we still inhabit on this planet. Here is to the politics and jurisprudence of love that Peter articulated, defended, personified. Here is to the great Peter Cicchino.

4. Thanks to Professor Patricia Williams for revealing the genealogy of Survivor in the Nation Magazine and exposing its sadistic American reformulation. See Patricia J. Williams, *The Moral Maze*, THE NATION, Sept. 4, 2000.

5. The Foundation will go to fund the Urban Justice Center in New York, where Peter worked for many years, and the Peter M. Cicchino Awards for Outstanding Service in the Public Interest at the Washington College of Law, which will go to alumni and students who have made significant contributions to the common good. Donations should be sent to: The Peter M. Cicchino Social Justice Foundation c/o Trent Norris, McCutchen, Doyle, Brown & Enersen, Three Embarcadero Center, San Francisco, California, 94111.