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EMPATHY, SPRING, AND THE FERVORINO

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This is a panel about welfare advocacy and about public interest advocacy. I will get to discuss welfare advocacy obliquely. This is a wonderful room to be able to talk about public interest advocacy. It is very striking to me and it is such a pleasure to be in this room because, if you believe that part of the great joy of being a public interest lawyer is part of the transmission of a tradition, there is a warmth and a wealth of tradition in this room.

I look in the back of the room and see Danny Greenburg, who was my extern supervisor when I was in law school. On Delancey Street, Danny fed me cheese blintzes for two years, and performed many other valuable services that kept me in law school and enabled me to see that there was something worthwhile about becoming a lawyer - a great deal.

There are also alumni of Washington College of Law here. There is Erin Loubier, Mike Barbosa, Claudia Gordon, and many more I probably am not mentioning whom came for our clinics and our externships. These alumni have gone to work and are creating their own careers in public interest law. Many of them were mentees of Peter Cicchino and it is a pleasure to feel that kind of great chain of being in this room.

This is not a fervorino. For those of you who have read Peter's work, he refers to a rhetorical device or a speech form known as a fervorino that he described as a "go-get-em speech" that the masters of the Jesuit novices would give to the troops to pump them up.¹

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1. See Peter Cicchino, *The First Annual Peter Cicchino Award for Outstanding Advocacy in the Public Interest Pall Discussion: Defending Humanity*, 9 AM. U. J. GENDER SOC. POL'Y & L. 1, 3 (2001) ("The point of the fervino . . . is to act as a moral call to arms, to inspire and console, to put into words and thereby make present the ideals we cherish and in which we believe.").

I do not do well at fervorinos, or maybe the plural is fervorini, I don't know. My speech really is not an exhortation to the converted, but more like a caution. It is a caution against trying to apply too quickly and too much without thinking about one of Peter's core beliefs that recurs throughout his writings. Let me give you a quote from his essay *To Be a Political Lawyer*. "The thing that is shocking about human reality is not that we misunderstand one another, but, conversely, that we are so capable of understanding each other, and therefore of coming to each other's aid."²

That is an expression of enormous faith in the expansiveness and empathy across lines such as race, class, gender, sexual orientation, geography, and time. That faith supported Peter's belief, which was so strong, in the inevitability that universal human rights would be recognized and implemented. These rights include not only the right to freedom of political expression, but also the right to basic human needs such as shelter, medical care, food and income.

I would argue that if humans are capable of this great overarching empathy, I think they are also really terrified of it. That empathy lies very deep within all of us, for sure. But unless you are a Peter Cicchino, in the absence of a single galvanizing event, such as an expression, a war or a movement, that empathy is almost unearthenable for most of us most of the time.

One example of a great galvanizing event is the Great Depression some sixty-five years ago that engaged families like mine and many others in a great migration.³ There was nothing in the house but, as I have heard many times, half a jar of strawberry jam and half a loaf of cheap white bread. There was no choice but to pile into the pickup truck and drive north to depend on the uncertain kindness of relatives who might just as well have been strangers.

That was an experience shared by thousands many years ago. What it brought forth was the very flawed, as we have heard, but also real social justice vision of the New Deal.⁴ While the New Deal was guilty of creating a two-track system of welfare, one for unemployed men

2. Peter M. Cicchino, *To Be a Political Lawyer*, 31 HARV. C.R.-C.L. L. REV. 311, 312 (1996).

3. See generally FRANCES FOX PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR 459-60 (1993) (discussing the devastating effect the Great Depression had the majority of the population in America).

4. See THOMAS H. GREER, WHAT ROOSEVELT THOUGHT: THE SOCIAL AND POLITICAL IDES OF FRANKLIN D. ROOSEVELT 16 (2000) (explaining that the purpose behind the New Deal was to give a larger number of individuals equal opportunity to enjoy the "good life" through new federal regulations of labor and employment); Paul W. Ward, *Washington Weekly: Nothing Red but the Tape*, THE NATION, Jan. 1937, at 8 (discussing the bureaucratic problems of Roosevelt's New Deal).

and one for women and dependent children, it at least did one thing.⁵ For a short time anyway, as poorly and with as much recrimination and lack of empathy as it might have been administered, the New Deal system of welfare for AFDC did at least recognize the moral imperative that there could and should be a national system of distribution of income.⁶ It was a creature of forced empathy.

I would say that empathy is, then, usually absent. When it is absent the two camps of the haves and the have-nots are unjoinable. There are the humans who have, who are far more comfortable with pursuing personal security as far as their resources will take them, and there are humans who lack. In many ways they are stuck where they are by the choices of others.

These choices are institutional, political, and personal. These choices have included the choice to redline, to form exclusive communities and to create the bounds and conditions of excluded communities.⁷ These choices have consequence, not only for the immediate choosers and choosees but also for their descendants. The denials of mortgages by federal and commercial lenders to some borrowers and neighborhoods in 1950 means that in the year 2001 these borrowers, their grandchildren and their neighborhoods have missed out on fifty years of the greatest run-up of wealth in our

5. See Kathleen M. Keller, *Federalizing Social Welfare In a World of Gender Difference: A History of Women's Work in New Deal Policy*, 8 S. CAL. REV. L. & WOMEN'S STUD. 145, 145-47 (1999). The New Deal's Social Security Act of 1934 created an unemployment compensation program for able-bodied breadwinners and created three public assistance programs. See *id.* The first of the three public assistance programs aided the elderly poor, the second aided the blind poor, and the third aided women with dependant children. See *id.* Kathleen Keller argues that the Social Security Act institutionalized the "ideal of the male-headed, single-income middle-class household" and resulted in women who were dependant on male workers receiving special treatment than women who were not dependant on males. *Id.*

6. See GREER, *supra* note 4, at 16 (discussing how the New Deal intended to enable poor people to "share in the distribution of national wealth" by emphasizing each individual's economic and social rights).

7. See David A. Harris, Jr., *Using the Law to Break Discriminatory Barriers to Fair Lending for Home Ownership*, 22 N.C. CENT. L.J. 101, 103-06 (1996) (discussing how banks continue to discriminate in granting loans by refusing to lend money to residents of certain communities on the basis of race or ethnicity as opposed to creditworthiness, despite the civil rights movement and the federal anti-discrimination laws); Leland B. Ware, *Invisible Walls: An Examination of the Legal Strategy of the Restrictive Covenant Cases*, 67 WASH. U. L.Q. 737, 739-40 (1989) (explaining how restrictive covenants became the primary means that neighborhoods maintained racially segregated housing patterns in the 1930s by restricting owners from leasing, selling, or conveying their property to any member of the excluded class. The covenants were either inserted into property deeds by real estate developers or prepared by attorneys at the request of neighborhood organizations.).

Nation's history.⁸

These choices have been supported by a culture and a jurisprudence, as we know, based on the sanctity of individual and personal choice.⁹ But now, since our day-to-day is not dictated by great galvanizing events but by choices, what do we do? What, in the absence of great events, are the great disinhibitors that allow us to be empathetic and force the feeling that opens our eyes? What things, factors, or movements will force what Peter considered to be the inevitability of implementation of universal human rights?

I guess another way to phrase that question, or those questions, is in the absence of crisis, what creates a movement, and if we need a movement, what movement do we need?

That brings me, finally, to the right to welfare. This could be the right movement. It could be the right direction. I think it's the wrong step. In some ways, a right to welfare is an abomination. It's like asserting the rights of homeless people to sleep under bridges or to have their possessions in green plastic garbage bags kept free from unreasonable search and seizure. If these rights are not abominations themselves, they imply the acceptance of abominations.

I would never fail to support any measure that attempts to restore some public accountability and some recognition of the awful historical impact of majoritarian choices to the public welfare system. And while I would never fail to support any advocacy that asserts the dignity of privacy for people without shelter, I would hope that we would not stop there.

I think the movement that we need begins big and small. We should begin with policies that force the conditions of empathy so that movements are possible in the absence of galvanizing events. This means policies that force the creation of inclusive communities where people must live and share in the public debate and in the public good. We used to call this civil rights, I think.

These policies require a dedication of public resources to public fora where communal discourse can take place, like libraries, community centers and schools. We learned last week that in the City of Baltimore, where I live, that five of our smallest public libraries are going to be shut down.¹⁰ It is a small news item. In some ways it is a

8. See James J. Puplava, *Miracle of Miracles*, FINANCIAL SENSE ONLINE, Nov. 1999, at <http://www.financialsense.com/series1/miracles.htm> (discussing the unprecedented rise of the stock market and economy over the past century).

9. See, e.g., KARL MARX: THE ESSENTIAL WRITINGS 30-31 (Fredrick L. Bender ed., 1986) (arguing that under our system of democracy, the people, and hence the aggregate choice of individuals, forms the law).

10. See, e.g., *Meeting at Library Branch is Effort to Forestall Closing*, BALTIMORE SUN, June

small community tragedy.

For the moment, with our obsession with individualism, the creation of public spaces for public discourse and communication means policies that inhibit the creation of exclusive spaces. Exclusive communities are places to which people can escape to avoid the terror of confronting their own empathy. These policies do exist. They are very concrete. They include anti-sprawl ordinances.¹¹ They include ordinances called linkage ordinances.¹² These are municipal ordinances that acknowledge that there is significant public subsidy in terms of infrastructure that goes into private development. These ordinances require developers to give something back to the community by dedicating a portion of new development to affordable housing.¹³ This acknowledges that the perfect city is not the city that crowds out the poor.

These are things that are small, though in no way easy to implement in and of themselves. Maybe they create the preconditions for empathy and thus for movements to accomplish bigger things.

19, 2001, at 3B (noting that “[t]his month, Mayor Martin O’Malley expressed interest in exploring whether private foundations might help prevent the planned closings of five library branches this summer.”); Jamie Stiehm, *Pratt Officials Eye Eleven Libraries for Closure, Residents at Meeting Told First Five Branches to Close In Summer*, BALT. SUN, Apr. 11, 2001, at 1B (explaining that “Enoch Pratt Free Library officials issued a list last night of 11 neighborhood library branches that are candidates for closure, sparking an outcry of protest at a spirited public meeting”).

11. See, e.g., Shala Gallentine, *County Seeks Anti-Sprawl Regulations*, AUGUSTA CHRON., Nov. 28, 2000, at C06 (“As Athens-Clarke County commissioners prepare to vote . . . on a proposed new zoning ordinance designed to curb sprawl, they join a nationwide trend that encourages strong city centers, walkable neighborhoods and protected open greenspace. In states such as Georgia that don’t have anti-sprawl laws, some municipalities are creating their own long-term growth strategies to combat sprawl.”). But see Michael Allan Wolf, *Environmental Law Slogans for the New Millennium*, U. RICH. L. REV. 91, 94 (2001) (arguing that the downside to the anti-sprawl ordinances may include disregarding older and more dilapidated neighborhoods comprised of lower income residents and heightened environmental justice violations).

12. See, e.g., San Francisco, CAL. PLANNING CODE § 313 et seq. (1990) (outlining the Office Affordable Housing Production Program (OAHPP), which imposes a housing obligation on office building developers based on the number of new employees expected to move to the area because of the office development. This obligation may be satisfied by paying linkage fees to the city affordable housing fund or by making payments to housing development projects). See generally Jane E. Schukoske, *Housing Linkage: Regulating Development Impact on Housing Costs*, 76 IOWA L. REV. 1011 (1991) (discussing how linkage ordinances offset housing burdens and promote the development of affordable housing).

13. See generally Jennifer M. Morgan, *Zoning for All: Using Inclusionary Zoning Techniques to Promote Affordable Housing*, 44 EMORY L.J. 359 (1995) (explaining how municipalities have responded to the pressing need for safe, sanitary, and affordable housing by implementing programs, such as housing linkage, that shift some of the burden of producing low-income housing from the state and local government to developers).

Some British researchers, whose work I read recently, have proposed a human rights urban policy that calls not for full employment but for something called full engagement.¹⁴ Full engagement means that individuals receive the basic subsistence necessary to be educated and to be housed without question.¹⁵ But also, the right to full engagement means reciprocal duty. This does not mean the compulsion to workfare, but communal participation in some way. This would not entail the United States' current and truly reprehensible policy of service work, which usually consists of spearing garbage on a highway. Rather, full engagement would entail a concrete recognition of the worth that any individual might bring to uncompensated activity. This could include care-giving, volunteering, driving a next-door neighbor to the doctor's office or using your talent for art in public ways. Parenthetically, we used to call this the WPA.¹⁶ A lot of us are stuck in a time that began before we were born.

These researchers have proposed this only for those who lack, but maybe for those who have as well. There could be the equivalent of a community service requirement to acknowledge our obligation to give back and return something for the extraordinary public subsidies we receive and enjoy, such as the mortgage interest deduction and the highway infrastructure that gobbles up allocations for public transit and allows us to drive away from our empathy.

To close, last week my neighbor asked for permission to cut some branches down from my forsythia, which looked really dead anyway, for something that he called 'forcing.' Yes, why not. It sounded good to me. When I came back last weekend from a weekend away, on my kitchen counter was a small purple vase with three big, arching sprays of big, bright golden flowers.

14. See Colin C. Williams & Jan Windebank, *Self-Help and Mutual Aid in Deprived Urban Neighborhoods: Some Lessons from Southampton*, 37 URB. STUD. 127, 139 (2000) (outlining a policy of full engagement that would serve urban communities by utilizing the skills and abilities of all community members).

15. The right to housing, whether you should have to buy it on the open market at all, is another question, and the possible subject for quite a big symposium.

16. See Don Adams & Arlene Goldbard, *New Deal Cultural Programs: Experiments in Cultural Democracy*, at <http://www.wvcd.org/policy/US/newdeal.html> (last visited Oct. 3, 2001) ("The largest and most important of the New Deal cultural programs was the Works Progress Administration (WPA), a massive employment relief program [that] put the unemployed back to work in jobs which would serve the public good and conserve the skills and the self-esteem of workers throughout the U.S.").

Empathy is something the flowering of which must be forced. We are not Peter Cicchinos. We must, however, recreate the conditions of proximity and intimacy to allow human empathy to reassert itself. This is not impossible. This is spring. This is resurrection. This is Passover.

This ends my poor excuse for a fervorino. Thank you for being here, and we thank Peter for bringing us here. Thank you.