

LAWYERING AT THE MARGINS: ON REASON AND EMOTION

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Lawyering at the margins is the theme of this symposium. I want to focus my remarks not on how we lawyer at the margins, but on why we might do this work. What motivates lawyers and law students to work on behalf of the poor, the dispossessed, and the disenfranchised, to perhaps spend our lives working with politically unpopular groups of people?

I take as my starting point a poster Peter Cicchino had hung outside his office door, here at the *Washington College of Law*. The text on the poster, accompanied by a line drawing of Gandhi, stated:

I do not want merely to appeal to your head
I want to capture your heart.

Peter Cicchino, as we know, had both a very large brain, and a very big heart. In terms of the former, Peter was a believer in the power of rational thinking, and engaged in reasoned debate with greater ability than anyone else we knew. In his *Georgetown Law Review* article, *Reason and the Rule of Law*,¹ he eloquently argues that law which inflicts harm on human beings without rational justification—specifically, the use of bare assertions of public morality to justify equal protection classifications—is undeserving of the name “law.”² The article, with all the 226 footnotes his student editors made him insert, is a testament to Peter’s conviction as to the importance of

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1. Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of “Public Morality” Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?*, 87 *GEO. L.J.* 139, 141 (1998).

2. See *id.* at 142 (arguing that a bare assertion of public morality cannot provide a rational basis for a governmental classification or legislative act).

rationality, and to the idea that reasoned argument can persuade.

At the same time that Peter had a famously large brain, he also had an enormous heart, and felt things very deeply. Peter had a tremendous capacity for empathy. I remember driving him to school, and listening on the radio to Beth Hart's *L.A. Song*.³ If you remember this song, it described a woman—"a local girl with local scars"⁴—who had a drinking problem, and who sang: "Man I gotta get outta this town, outta this town, and out of L.A."⁵ She leaves L.A., takes a train to "a little old town without a name,"⁶ where she meets a man who takes her in, but he "fed her all the same bullshit again—'cause he lied, he lied like a salesman selling flies."⁷ In short, she decides: "Man, I gotta get out of this town. I'm outta my pain, so I'm goin' back to L.A."⁸

I remember the song ending, and Peter saying, quite seriously, "Oh my, I really hope it works out for her." Consistently, Peter felt a connection, a human connection to others separated from him by identity, by status, by time, by space, even by the divide that separates most of us from the fictional and the imaginary. So Peter's heart and Peter's head inspire my thoughts here.

When I was a student in law school, we were told that we had to completely separate any emotion we might feel from the principles for which we were reading cases, that to succeed in law school and to be successful lawyers, we had to learn to bifurcate our reasoning from our emotions. That this is the proper way to learn to engage in legal reasoning is undoubtedly the predominant approach.⁹ As Gary Peller has written, rationality is what is believed to differentiate legal reasoning from other modes of thinking.¹⁰ Reason is considered

3. See BETH HART, *L.A. Song*, on JEZEBEL BLUES (BMI Records 1998), available at <http://www.bethhart.com/lasong.html>.

4. See *id.*

5. See *id.*

6. See *id.*

7. See *id.*

8. See *id.*

9. For important criticisms of legal reasoning as purportedly relying on reason and not emotion, see Susan Bandes, *What's Love Got to Do With It?*, 8 WM. & MARY J. WOMEN & L. 97, 97-100 (2001) (discussing the relationship between emotion and reason in the context of feminist jurisprudence); Rachel Moran, *Law and Emotion, Love and Hate*, 11 J. CONTEMPORARY LEGAL ISSUES 747, 747-48 (2001) (focusing on different conceptions of emotion and relating them to legal regulation); Martha Nussbaum, *Emotion in the Language of Judging*, 70 ST. JOHN'S L. REV. 23, 23-25 (1996) (discussing emotion in the context of judging); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1154 (1995) (asserting that legal discourse relies upon a differentiation of reason from passion).

10. Peller, *supra* note 9, at 1155 ("Rationality purportedly distinguishes legal

objective; passion is subjective, biased, unthinking, and irrational.

We know that this bifurcation is a historical construct, and that passion has been correlated with women, as opposed to men; that white property-owning men were thought in American and European history to be the only persons capable of rational engagement.¹¹ We know that legal reasoning differentiates itself from other ways of knowing and explaining the world, through policing certain boundaries, through the idea that we can divide subjective and objective realms of life.¹² And we should challenge this bifurcation,¹³ and the ill purposes for which it can be used.

But assuming that we can isolate the heart from the head, I would argue that there is something helpful to us as law students and lawyers that we can access through passion and emotion. We should not abandon the power to feel, nor should we believe that rejecting emotion is the right way to “do law.” Being told not to feel can rob us of a way through which we exercise our capacity to know.

I raise this because the past several months have been a very emotional time for, I would imagine, every one of us. Sometimes we may feel the paralysis of despair. The problems of the world seem insoluble. But, we should thank our lucky stars that we are able to feel, for the capacity for empathy is what motivates us to act, to feel the power to change the world.

Whether we are motivated by a sense of a common humanity, or concern for those on the short end of the stick of global capitalism, or an analysis that supports the underdog in historical power relationships, it is not just our head, but also our heart, our sense of passion, our sensibilities, that push us to make connections, and to try to move mountains.

Because legal education asks us to prioritize only reason, not emotion, I am emphasizing the latter here. But both are important. What I think operates for many of us in lawyering at the margins is a feeling of empathy that accompanies a politics grounded in specific contexts, that examines systems and histories and structures of

discourse from other ways of thinking.”).

11. See JEAN L. COMAROFF & JOHN COMAROFF, OF REVELATION AND REVOLUTION: CHRISTIANITY, COLONIALISM, AND CONSCIOUSNESS IN SOUTH AFRICA 106-07 (1991) (noting that European men considered themselves self-contained individuals driven by inner reason and not by sensory stimuli from the social and material environment, unlike women and non-Europeans).

12. Peller, *supra* note 9, at 1154 (asserting that legal thought relies on the “notion that the social world can meaningfully be described by separating subjective and objective realms of social life”).

13. See, e.g., Nussbaum, *supra* note 9, at 24-25 (asserting that emotions in fact rely upon thought).

subordination.

Thinking of Peter's poster and the words of Gandhi, I looked up the history of the War Resisters League. The League was organized in 1923 by men and women who had opposed World War I, many of whom had been jailed for refusing military service.¹⁴ The League's argument is that there is no "way to peace," but that "peace is the way."¹⁵ Its members reject the use of violence and seek to eliminate not just war but what they see as the causes of war—the suffering of homelessness, hunger, lack of medical care and poverty—without more prisons, missiles or bombs.¹⁶

The call for peace has recently been condemned as unpatriotic and un-American.¹⁷ In fact, if you remember, a number of academics were singled out this fall for various statements by the American Council of Trustees and Alumni ("ACTA") in a report titled *Defending Civilization: How Our Universities are Failing America and What Can Be Done About It*.¹⁸

But it is imperative at times like this to speak out, to, dare I say, ACTA-UP.¹⁹ We need to fight for our rights to engage in free speech, to ensure that our democracy has meaning. To that end, consider the following. The war on terrorism is a war Vice President Dick Cheney has said he does not see ending in our lifetimes.²⁰ In fact, he stated, the war on terrorism is a war that may never end.²¹ The Pentagon released a report that envisioned the use of nuclear first strikes against China, Iraq, North Korea, Syria and Libya.²²

14. See WAR RESISTERS LEAGUE, ABOUT WRL (last visited Oct. 11, 2002) (stating the League's origins and objectives), at http://www.warresisters.org/about_wrl.htm.

15. See *id.*

16. See *id.*

17. See Marie Marin, *All They Are Saying . . .*, CAPITAL NEWS ONLINE, Sept. 28, 2001, at 1 (quoting the organizer of a peace protest in New York City as stating, "The war drive has gotten to the point where any opposition to it looks un-American."), at <http://temagami.carleton.ca/jmc/cnews/28092001/n4.shtml>.

18. See JERRY L. MARTIN & ANNE D. NEAL, AM. COUNCIL OF TRUSTEES & ALUMNI, DEFENDING CIVILIZATION: HOW OUR UNIVERSITIES ARE FAILING AMERICA AND WHAT CAN BE DONE ABOUT IT (last visited June 10, 2002) (criticizing professors for making statements that question U.S. policy), available at <http://www.goacta.org/Reports/defciv.pdf>.

19. See Mari J. Matsuda, *Asian Americans and the Peace Imperative*, 27 AMERASIA J. 141, 141-47 (Winter 2001/2002) (advocating Asian American participation in a peace movement in the wake of the terrorist attacks of September 11, 2001).

20. See Bob Woodward, *CIA Told to Do 'Whatever Necessary' to Kill Bin Laden*, WASH. POST, Oct. 21, 2001, at A01 (quoting Vice President Cheney as stating, "It [the war on terrorism] is different than the Gulf War was, in the sense that it may never end. At least, not in our lifetime.").

21. See *id.*

22. See P.S. Suryanarayana, *America's Nuclear Hit-List*, HINDU (India), Apr. 30, 2002

Meanwhile, the Bush administration has refused to ratify the Comprehensive Test Ban Treaty.²³ There are quite serious discussions as to whether to introduce torture of suspected terrorists as a U.S. practice of interrogation.²⁴ Our government is currently seeking a “divorce” from the International Criminal Court.²⁵ The administration this week refused to condemn the recent coup in Venezuela of the democratically elected Hugo Chavez, and, in fact, seems to have met with the business elite who planned the coup before it took place.²⁶

Examining these facts, it would seem fair to state that our government invokes universal principles when it is politically expedient, and appears not to envision itself as part of a world community. But, unlike our government, we must think ourselves beyond the constraints of national borders. We have to stand up and say that we value all lives. Everyone has the right to human happiness, whether American or Afghani, Palestinian or Israeli, Rwandan or Bosnian.

Perhaps this seems simplistic and naive. But to take a page from Peter’s book, namely his essay *Defending Humanity*,²⁷ there is hope, because we are united in something fundamental—a common humanity.²⁸ This humanity is one that does not stop at U.S. borders, but spans the globe. I want to end with Peter’s words, which he intended as an exhortation, to console us against despair, and to inspire us to lawyer on the margins:

Be human beings. Go out and befriend the poor and the oppressed wherever you may find them. Identify those who impoverish and oppress them. And then make some trouble!²⁹

(commenting on the Bush administration’s growing hostility toward other nations), at <http://www.hinduonnet.com/thehindu/2002/04/30/stories/2002043000041000.htm>.

23. See *id.* (expressing concern about the United States’ apparent willingness to disregard significant international agreements such as the Comprehensive Test Ban Treaty and the Nuclear Non-Proliferation Treaty).

24. See Thomas Adcock, *Cardozo Panel Weighs Torture of Terrorists*, 227 N.Y. L.J., May 17, 2002, at 16 (referring to a proposal by Professor Alan Dershowitz for the use of “torture warrants”).

25. William Orme, *UN Celebrates World Court, U.S. Reiterates Sharp Opposition*, CHI. TRIB., Apr. 12, 2002, at 3 (discussing the Bush Administration’s position that crimes against humanity would be better prosecuted at the national level instead of in an international forum).

26. See Scott Wilson, *Chavez Raises Idea of U.S. Role in Coup*, WASH. POST, May 5, 2002, at A20 (outlining the U.S. response to Chavez’s removal from presidency).

27. See Peter M. Cicchino, *Defending Humanity*, 9 AM. U. J. GENDER, SOC. POL’Y & L. 1 (2001).

28. See *id.* at 2 (discussing the importance of recognizing basic human rights).

29. *Id.* at 9.