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Recommended Citation

Emily Fowler Hartigan, *Multiple Unities in the Law*, 36 S. Tex. L. Rev. 999 (1995).

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MULTIPLE UNITIES IN THE LAW

EMILY FOWLER HARTIGAN*

The issues in ethics among differing jurisdictions are not simply about reconciling the formal rules of plural bar associations. Multijurisdictional ethics are not merely colliding codes or labyrinths negotiated by choice of law rules. In a world newly in touch with its diversity, ethics must struggle with difference's impact on coherence. There is a crucial dilemma more profound than how to avoid violating the canons of ethics or how to dodge disciplinary proceedings, for the lawyer in a world of plural ethics: the dilemma posed by the primary tension in ethics today between reason and spirit. The jurisdiction of the "world" is concerned with not getting caught or not running afoul of what some bar committee decides is "ethical" in their back yard; the jurisdiction of the spirit of the law is something Else. The world and the spirit are not another Cartesian dualism, however—many commentators, notably many feminists, are choosing to belong to "neither one nor the other" but to both, to both the so-called secular world and to the sacred.¹ This is not a simple story.

In the *Oxford Etymological Dictionary*,² the word "jurisdiction" is identified as coming from the Latin root *dic-* that means "word" and the Greek word *dike* for justice, and from a feminine word rendered *jur-* or *jus-* that the dictionary says is "an old term of law and reli-

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1. One of the most interesting explorations of what "Else" means appears in the work of Emmanuel Levinas, a religious phenomenologist whose mentor role manifests itself in the work of Jacques Derrida, the "father" of deconstruction. Deconstruction by Derrida takes reason so seriously and lucidly that it works its way out of it, toward something "else." In American thought, Stanley Cavell of Harvard is the most renowned of this general trend of the thinker/poet/storyteller genre. The French feminists—such as Luce Irigaray—were early in the movement to include both the ordinary and the "else," spanning dualisms. See LUCE IRIGARY, *JE, TU, NOUS: TOWARD A CULTURE OF DIFFERENCE* 30–40 (1993). See generally STANLEY CAVELL, *CONDITIONS HANDSOME AND UNHANDSOME: THE CONSTITUTION OF EMERSONIAN PERFECTIONISM* (1990); EMMANUEL LEVINAS, *OTHERWISE THAN BEING OR BEYOND ESSENCE* (Alphonso Lingis trans., 1991); DERRIDA AND NEGATIVE THEOLOGY (Harold Coward & Toby Foshay eds., 1992).

2. OXFORD'S AN ETYMOLOGICAL DICTIONARY OF THE ENGLISH LANGUAGE 319 (Rev. Walter W. Skeat ed., 1946)

gion." Thus my talk of the dictions of law and religion, of world and spirit, is not ungrounded, as its roots are in the word at the center of this conversation. Nor is it irrelevant, even if unexpected, if I address the multiple unities of meaning in which a lawyer works, and call such an address multijurisdictionalism. These multiple unities, these many worlds, are emblematic of a time in which we are recognizing that multiculturalism is not a trendy political program, but a reality. We all live in more than one world, more than one meaning system, more than one "horizon" of life, to use philosopher Hans-Georg Gadamer's term.³ The dilemma for a lawyer that I want to address is also a dilemma for political and legal discourse. It is one tapped by Tom Shaffer in his book *On Being a Christian and a Lawyer*—a volume openly advocating that the lawyer remember that her ethics may require of her that she break the Code of Professional Responsibilities.⁴ I want to talk not about knowing what legal authority to elude, but about the most fundamental internal-and-external jurisdiction in which a lawyer lives, the self, in relation to the deepest challenge to that self's integrity that I see on the legal horizon.

As I hope to engage your hearing beyond the voices that may suggest that what I am about to say is out of order, let me first tell you about a book one of my students gave me to read recently. This student has come to see me several times to talk about his concern about being religious—in his case, evangelical Protestant—during his law school experience. Over the years many students have put it to me this way: Can I be a lawyer without losing my soul? The book, *Salvation on Sand Mountain*, sounded pretty flaky to me. It was, he explained, about snake-handlers in Southern Appalachia. Now, I'm a Catholic and we are one of the world's major mystery religions, but snake-handling is not named as one of our official mysteries, nor used to recite the rosary—it is not on the radar screen at all.

The book started with a quotation from Flannery O'Connor, jolting me back into the world I knew all too well, Southern (anglo) Catholicism, a gothic genre that O'Connor and Walker Percy have made indelible. The quote, from *Mystery and Manners*,⁵ promises a descent into oneself, which entails a journey into one's region, one's place. Suddenly I was back in my grade-school years on the edges of Virginia's tidewater and Appalachian cultures. With some nostalgia, I

3. See generally HANS-GEORG GADAMER, TRUTH AND METHOD (Joel Weinscheimer & Donald G. Marshall trans., 1991).

4. THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER: LAW FOR THE INNOCENT (1981).

5. See DENNIS COVINGTON, SALVATION ON SAND MOUNTAIN (1995).

read half-way through the book. By then the author Dennis Covington, a university professor on stringer from the *New York Times* covering a murder trial, has followed the story into the Holiness church named The Church of Jesus with Signs Following—and he was “following” further than I dreamed he would. When I read one line in particular, I immediately flipped to the dust jacket to Harvey Cox’s praise, for reassurance. If some guy at Harvard, the one who wrote *Religion in the Secular City*, thought this book was wonderful, maybe I wasn’t going crazy. The next blurb on the dustjacket said “It is a rare gift to make the grotesque a source of meaning rather than ridicule” Snakes and Spirit were moving thick and fast, and what the author had just admitted was this: “I was open to mystery in a way I had never been in mainstream churches”⁶ —and he was feeling the urge to take up a snake. I was thinking he had made his unlikely journey sufficiently credible that I was in real danger of a genuine perspective shift, and my skeptical side was laughing out loud. A few pages later, the author tapped something that for a time reconnected me to some of my known world besides that of the Holy Spirit—to stories. “Narrative legal theory,” came a legitimizing, almost professional inner voice. An orientation point. The author wrote: “At the heart of the impulse to tell stories is a mystery so profound that even as I begin to speak of it, the hairs on the back of my hand are starting to stand on end.”⁷ Professor Patricia Williams—author of *The Alchemy of Race and Rights*⁸—and some of the best litigators I knew in my eight years of practice would understand about stories, I reassured myself.

But I could not really avoid what Covington was suggesting, because he came right out and said it just a couple of pages later on:

My uncle’s [suicide] confirmed a suspicion of mine that madness and religion were a hair’s breadth away. My beliefs about the nature of God and man [sic] have changed over the years, but that one never has. Feeling after God is a dangerous business. And Christianity without passion, danger, and mystery may not really be Christianity at all.⁹

My problem was that I knew it wasn’t just Christianity; I knew from my long agnostic years that Plato admits that that is just what Socrates says about philosophy. It is a divine madness, Socrates tells Phaedrus; it is a gift of the gods. There is no wisdom without it.

6. *Id.* at 137.

7. *Id.* at 174–75.

8. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

9. COVINGTON, *supra* note 5, at 177.

* * * * *

In any attempt to deal with differing jurisdictions, differing localities, differing world views, there must be grounds for hope that differences are not the end of the story, but the beginning. If what seems ethical in Nebraska is markedly different from what is taken as ethical in New Jersey, absent a dictator (or a perfect rule) what we need is conversation among jurisdictions. That is, the best locus for some creative peace among differences seems to be in the talk among those who differ. Even John Rawls is saying that the issue is not what is right, but how we are to live together.¹⁰ Secular universalism like Rawls' is one unity, one experienced jurisdiction, but only one among many.

I want to focus on the divide between the secular and the sacred that is most painful for me, and which has also received major attention in the legal academy, that between the so-called religious and the secular or rationalist forms of talk. Perhaps no chasm within public discourse is so severe as that between those who try to deny any validity to one kind of speech, either devaluing secular talk or religious talk as literally worthless or dangerous. Such mutual disregard increasingly fractures public talk about ethics. Some secularist commentators suggest that religious talk happens in a realm that is not within their experience, that it is simply Other than any way of knowing that they can recognize from their own "internal" processes. On that basis, they think it uncivil for religious people to persist in their own way of talking. Other secularists fail to acknowledge any distinctive nature of the religious, and by and large both camps within secularism fail to accord true respect to something I will call religious thought. They speak as if religion were that "childhood faith" that adults outgrow, that cultures transcend, or a private language willfully adhered to in disregard of their noncomprehension. Their repetition of (often unacknowledged) ignorance about what religion at its best might be, results in a set of arguments that are not likely to accomplish any of the political ends secularists claim to pursue, because they cannot maintain the respect for the Other that is necessary to engage the Other in true conversation. So long as rationalist arguments do not acknowledge that there are "other ways of knowing" about which no meta-epistemic scheme will afford an Archimedean point from which to dislodge the Other, they will produce arguments which rejustify rationalism to rationalists and reoffend the religious. Rational argument in its own encapsulated

10. Jurisprudential Panel Discussion of the American Associate Law School Convention (1995) (available from AALS).

self-congratulatory loop, does not engage the Other. For the rationalist to risk true engagement would be, I suggest, as difficult as true interfaith dialogue. However, I do not know if a rationalist has a parallel, open notion of such risk (except as expressed by Derrida as the move into the abyss).¹¹ There is one reason I know why interfaith dialogue is likely to work for the believer: Religionists who choose interfaith dialogue tend to anticipate learning something about what they care the most about and know they will never fully know: God. If I risk true dialogue with a Jew, the kind of encounter where I truly open my soul to newness about God, at least the ground of trust is that I am in God's presence.¹² That I let go of Who that is, as I talk, is terrifying but also justified. Who guarantees the ground between me and the rationalist, for the rationalist?

For me, the ground is guaranteed by God. God created reason and reasoners, and so I can risk opening to them. I have written elsewhere of my move to accord to some profound sense of conscience the same degree of political respect that I ask for my religious beliefs, *but I can do so only as a primarily, explicitly religious move*.¹³ That is, I am not argued into it. Structurally coercive discourse does not force me to see the light. Reason does not "dictate" to me. I move because of love and because my religion tells me to love my enemy. To me, the spiritual advocacy of love of the enemy is at the center of a grand joke: If I can trust to risk such love, truly trust rather than force myself, then what that grace returns to me is increase in love of myself, of my neighbor, and of my God—not to mention reason. That is why the promise of the good news is, to me, that if I love my neighbor, all that I value will be enhanced. So when rationalists or secularists start to drive me crazy by trying to silence my true voice, I tell myself that they are part of God's paradoxical sense of humor, they are necessary to my salvation, they are a face of God, too. So I can risk truly talking with them, which must in its deepest good faith entail that I open up, finally, all that I think I know, to question. That includes opening up

11. I view Derrida as making a remarkable double move, a combined hyperrationality through almost excruciatingly intense rational analysis of a text, with a mystical sense of the "kenotic" (in his tradition, *tzim-tzum*) emptying of known meaning that creates space for new meaning. This is, ironically, a religious move, as suggested in *supra* note 1.

12. Douglas Sturm affirms the possible parallel between inter-religious dialogue and "a more extensive dialogue we must initiate among all kinds of communities across the globe." Douglas Sturm, *Crossing the Boundaries: On the Idea of Inter-religious Dialogue and the Political Question*, 30 J. ECUMENICAL STUD. 1, 3 (1993). Tellingly, Sturm identifies feminist-liberationist perspectives as crucial for the sort of inter-religious dialogue that opens rather than dominates, discourse.

13. Emily Fowler Hartigan, *Surprised By Law*, 1993 B.Y.U. L. REV. 147.

my relationship with God. In my tradition, there is a powerful strand of what is called "God beyond God" in the mystics, or in less gnostic African-American preaching, letting go of God-in-a-bottle.¹⁴ That is, my tradition itself has accounts of movement into unknowing, as integral to belief. My tradition itself teaches that we do not know God in a credal strangle-hold, but in a living dance of "I believe; help Thou my unbelief." It says that God's ways are not ours, that we cannot understand God. That mystery, that unknowing, that intellectual (much less spiritual) humility, is built into the legacy of my church. Thus to move to unsureness about God is a familiar if frightening move.

What would allow a secularist to make a commensurate move? What would give them reason to trust that they will not lose who they somehow truly are, if they were to risk, in conversation with believers, some experience that there is a God? I must admit that I am not sure of the answer, but I have some intimations from conversations with colleagues who acknowledge that I am truly Other to them because of my experience of relation to God. These dialogue-partners range from defenders of religious liberty in ordinary constitutional terms to those on the edges of experience who cannot call it an experience of religion but can call it sacred, to those who allege they have no spiritual sensibilities whatsoever. What these persons have in common is an appreciation that what I am talking about is something they do not understand but they do respect. They acknowledge that the roughly nine-tenths of us who do believe in God, tell them something about what it can be to be human. For the overwhelming majority of ordinary people, to be human is to be in relation with God. We have something we call spirit, as well as mind and heart, that makes up who we are as persons.

Many rationalists do not acknowledge that there can be in human experience something not open to what they consider rational understanding, which should be respected as Other, while some who acknowledge the spiritual think it can be radically severed from the rest of the self and privatized from political discourse. Ironically, grounding out in something called universal humanism or universal human values or universal human reason, they do not count what nearly all North Americans consider constitutive of being human: relation with

14. There is increasing recognition that such an approach—called kenotic or apophatic traditionally, and "negative theology" in contemporary terms—may be key to the movement of Derrida's deconstruction. See, e.g., *DERRIDA AND NEGATIVE THEOLOGY* (Harold Coward & Toby Foshay eds., 1992).

God, having a soul. I am not very consistently interested any more in rationalistic, academic-philosophic discourse, but I know it is human, and I respect it. I still see the intensely abstract beauty of John Rawls' work, and I still can experience its elegance and goodness. I would be as appalled as I am at the negation of free exercise that the Supreme Court has performed recently, should Reasoners loose their constitutional safe-place, the free speech clause. But many of them are trying to erase my constitutional space, collapsing religion into speech, reducing the Word to words.

How do I engage these enemies-in-process-to-Beloved-Others? How do I find ethical ground to share with the Samaritan jurisdiction? What do I say to begin a conversation with those who deny the distinctiveness of my relation to God, and cannot hear me when I speak my primary language? When the very issue is the value of my language, how do I talk to the Other without betraying my language? I suspect I must do it as I am learning that one must live richly in a bicultural city: I must speak both languages. I must be willing to try to speak in Rational, although there is a paradox that I cannot overcome in that. I believe God created us with excellence, and one of those is Reason. I also believe that all the reason in the world, without love, is like a tinkling cymbal. (There is such a thing as empty reason. There are also empty words of love.) So I should begin with Reason that arises from love, but warn the Reasoners from the outset that I think Robert Bolt's Thomas More is right: finally it isn't a matter of reason; finally, it's a matter of love.¹⁵

In fairness, not to mention love, I ask the Rational reader to act in good faith in this way: please read both the parts in your language and those in mine. My language is not destructive of yours, I believe, so what I write in my primary voice will be as one priest friend exclaimed after my first preaching experience in his Mass: "full of analysis, too." But what may be difficult is that I know my reason does not ground out in reason alone; I think I do Reason pretty well, but I believe that all reality is sacred, redolent with God's grace, and that is how I hope to be present: awake to both reason and the mysterious One who created reason in love.

To the Reasoner, I will say something finally paradoxical: you both negate me and you do not. You both attempt to reduce religion to something less than religion, to dismiss and colonize it—and what you are doing is being faithful to what you hold most valuable to you, and that is by my lights holy. As my "enemy" you are also my gift. As

15. ROBERT BOLT, *A MAN FOR ALL SEASONS* 84 (1960).

Tom Shaffer accused Sandy Levinson of doing God's work in the world,¹⁶ I am trying to say without imposing my perspective that I honor you as integral to God's creation. My tradition says that all things turn to the good for those that love God and are called according to God's plan, and I believe that all are called, atheists in some strange ways as much as mystics. That my "enemies" are my gifts, does not mean that something does not have to turn, but that I do not rely on my righteousness and your lack of it, for that turning.

* * * * *

For now, I will pick three voices to engage. They belong to two law professors and one philosopher. The law professors are advocates of reason in relation to public discourse, and enter the discussion on what, if one were to accede to "sides in the culture wars," would be the secular humanist side. The philosopher, who is also a classicist, has recently been a visiting professor of law, and has added to the liberal philosophical tradition a potent argument for the necessity of including feeling in any full ethical discussion.¹⁷ She, however, still sides with reason, for political reasons.¹⁸ And I confess that a fourth has crept in, through history and accident, and my own story: I wrote a dissertation on John Rawls over twenty years ago, but only in the recent past have I had any real conversation (though very brief) with him, and am still beguiled by him despite the transparency, to me, of his myopia in relation to religion. I still am in conversation with "the father," and he is as winsome an elder Reasoner as there is.

These three (four, she confesses) are earnest, deft, and powerful analysts. Their work is focused on human value in an unequivocally committed, ethical genre that could be called passionate in its fidelity to its expressed goals. They are all writers in the masculine analytic mode primarily, but especially the philosopher explicitly (and brilliantly) attempts to reintroduce the necessary affect of moral discourse or narrative, and the law professors betray considerable intensity and dedication to their enterprise of making the world a more humane place. But none of the three can give adequate account of the realm of the spirit in public discourse, nor of the necessity for them to acknowledge it as either Other or severable for them. They

16. Thomas L. Shaffer, *Levinson Builds the Kingdom: Comment on "Professing Law,"* 31 ST. LOUIS U. L.J. 73, 80 (1986).

17. See generally MARTHA C. NUSSBAUM, *LOVES'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE* (1990).

18. Letter from Martha C. Nussbaum, Professor of Philosophy, Brown University, to Emily Fowler Hartigan, Professor of Law, St. Mary's University School of Law (on file with the *South Texas Law Review*).

do not write in a way that respects those of us who believe that we are to love God with our whole minds, hearts, souls and strengths and to love our neighbors as ourselves—and that maybe even those two can be summed up by “Love one another as I have loved you.” In that last formulation may lie the sly promise of Jesus: That if I can love these three as Jesus and Mary loved us, I will be fulfilling the command that has God’s name in it and so will those three. Enemies will have turned to friends. Let us see what happens.

I have chosen David A.J. Richards because he writes so directly into the contradictions I want to examine; I chose Christopher Eisgruber because when he gave a paper at Penn Law School while I was teaching there, he acknowledged that the believer was to him truly Other; and I chose Martha Nussbaum because she wrote directly into the nexus of religion and feminism which I am exploring, and which I think is a necessary prelude to my encounter with these three Reasoners.

Nussbaum reviewed three books on feminism recently,¹⁹ yet began with a discussion of Michael McConnell and religiously affiliated law schools. I think there is indeed a connection between non-Rationalist feminist thought and non-Rationalist religious thought, but that it is barely visible because of the stereotypes in modern North American culture that surround feminism and religion.

Let me rehearse some of the stereotypes. Religion is seen as right wing. Feminism is seen by religious writers as a threat to tradition and thus to religion. Feminists tend to see religion as patriarchal and thus repressive. Feminists are stereotyped as secular pro-choice irrational outlaws. Religious thinkers are irrational anti-abortion hyperlaw-abiding yet violent repressers. It is religious thought which is at the core of homophobia, sectarian strife, and intolerance in history. It is feminists who are tradition-destroying, home-wrecking shriekers. Feminists attack rationalism, and it is reason that will save us from the politics of repression. Religion is repressive and inherently politically intolerant (after all, they think they’re RIGHT about things). So the answer is to require a certain form of discourse, rational discourse. Only by criticizing and attempting to banish religiously-based views in public discussions, will we be safe from the true roots of deepest human error. All the good things religion has seemingly done, were really done by reason. M.L. King was really acting from the wellsprings of *modus ponens* when he was most effective.

19. *Feminism and Philosophy*, THE NEW YORK REVIEW OF BOOKS, Oct. 20, 1994, at 59.

Unless we get Rosemary Radford Reuther to take a vow of obedience, she will topple the Pope and all true Christendom. But you cannot be both a feminist and a Catholic.

This last paragraph oversimplifies, but it does capture central aspects of what the Rationalist, the religious anti-feminist, and the anti-religious feminist strands of thought foster. These threads of discourse are both silly and illuminating, both wrong and right. Rightness is in the relations; as any good Socratic can tell you, it's all in how the dialogue is woven, how the threads intersect. And we already see that we are indeed dealing with multiple jurisdictions, and strange intersections.

Central to all three Rationalist writers is a concern for conscience. They identify this as a secular notion, because it is from within.²⁰ Of course, if we are made in God's image, conscience is not secular, but part of what God gave us. That we experience it as already ours does not negate its religious character. So what is it about religious sensibility that marks it off from the secular? Eisgruber claims it cannot be done. He cites Douglas Laycock's attempts to delineate religion as distinctive, and says that Laycock has not succeeded in portraying anything that the conscientious secularist does not have—at least not anything worth honoring.²¹ If religion is that dangerous, what is its danger if it is just a subspecies of conscience? If religion is somehow something that taps the non-Rational, thus leaving the person at the mercy of tendencies to burn heretics and kill infidels, then it is different from conscience. If it is not different, is not peculiarly dangerous—unless it is an illusion, and its danger lies in its very deception. And that attribution of being deceived, of operating out of non-reality, is one face of the Rationalist intolerance of religion. When I think I am having a conversation with my God, even if I agree with Buber that it isn't really God if I use the third person but only if I use the second person (I speak to, listen to, You), I am deluded. What I think is happening is not, and thus whatever I do is not to be respected. My delusion is the sort that produced the religious wars in Europe, and was the scourge of history.

However, if contrary to these Rationalist assumptions, there is a "real" possibility that I may be in genuine conversation with my God,

20. See Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1268-69 (1994); David A.J. Richards, *Sexual Preference as a Suspect (Religious) Classification: An Alternative Perspective on the Unconstitutionality of Anti-Lesbian/Gay Initiatives*, 55 OHIO ST. L.J. 491, 506 (1994).

21. See Eisgruber & Sager, *supra* note 19, at 1271.

if that is an acknowledged potential, if the Rationalist is not absolutist about Rationalism, then I am no more dangerous than the Rationalist. I might even be less so, but my particular religious view says that I am equally dangerous and valuable at once. My religion leaves to the Rationalist the mystery of her or his own path. (It does leave me wondering, always, what difference it makes to experience that I am loved by God, but I have only my own individual years of agnosticism and hours of daily doubt to tell me, and that is only my answer.)

What is the danger of continuing the constitutional protection for religion? Eisgruber and Richards seem to conclude that it diminishes rationalists; Richards also makes it clear that he believes that the genesis of the evil he so fiercely combats, homophobia, is in religion.²² For Rawls, the history of Europe openly manifests the evil of Christianity. For Nussbaum, religion is politically inferior, whatever that means.²³

So the realm of the illusory supposedly creates distinctive evil in the forms of religiously-based incapacity to see the gay or lesbian as fully human and a genre of intolerance unknown to secularists. For Eisgruber, the distinct evil seems to be a denial of equal regard to the deeply held convictions of secularists. For Nussbaum, it is regression into a state of belief in a transcendent (Christian) God who does not exist and belief in whom prevents growth into the correct stage of political consciousness.²⁴ For each of these three, unfortunately, the

22. Richards' main point is expressed many ways; one incarnation of this idea is that gay-bashing is a "hegemonic, homophobic religio-cultural orthodoxy." Richards, *supra* note 20, at 507. Further, he decries the "sectarian religious expression" of "irrational political prejudice" in the form of homophobia. *Id.* at 509.

23. It may mean the sort of thing argued recently by Professor Abner Greene. See Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611 (1993).

In a most rationalist mode, Scott Idelman successfully critiques the impossibility of taking religion seriously and performing Greene's attempted political balance. See Scott C. Idelman, *Ideology As Interpretation: A Reply to Professor Greene's Theory of The Religion Clauses*, 1994 U. ILL. L. REV. 337 (1994).

24. For instance, in a brilliant exhibition of writing in favor of story and feeling, she critiques Beckett because of what she identifies as his "deeply religious sensibility;" "[t]he complete absence in this writing of any joy in the limited and finite indicates to us that the narrative as a whole is an expression of a religious view of life." Martha C. Nussbaum, *Narrative Emotions: Beckett's Genealogy of Love*, 98 ETHICS 225, 251 (1988). She then accuses Beckett of "religious prejudice" because of his valuation of a "soul before and apart from all social constructing." *Id.*

Her most recent work turns from the constructed and local to the transcendent, but identifies the transcendent with abstract reason. She now lauds abstraction to the extent that she criticizes rather superficially a Hindu practice, noting that "the bare fact that a human society invented something gives it *no claim at all* to our respect." Martha C. Nussbaum, *Valuing Values: A Case for Reasoned Commitment*, 6 YALE J.L. & HUMAN. 197, 217 (1994) (emphasis added). In contrast to the Hindu practices which are blind and cruel and

disregard of religion has a degenerate strand that is of all things triumphalist. Reason has shown God to be irrational, and thus those who have moved beyond God are ahead of the believers. They (the three or the four) are impatient for us to grow up. They have yet really to accept that we have grown up; we are just different. The most unexpected irony for me is that those who profess such a fine politics of difference, have no spirituality of difference.²⁵

I remember one particular encounter with this lack of acceptance of difference, an encounter that for me illustrates the conundrum of rationalist triumphalism. At a conference on feminist theory about eight years ago, I had been struggling with the distinct hostility to religion then characteristic of mainstream academic feminism. One participant, a foundational feminist coming from a strongly secularist Jewish background, became upset when I talked of my church's apartheid against women, their refusal of priesthood to women. She found the use of the word "apartheid" offensive because what I was describing was not commensurate, she said, with the sort of racism that term evoked. I found myself led to tell her that to her the parallel was not visible, but to those of us to whom spirit was very real and in some senses the nexus of the integration of all life, the denial of the central sacramental role in our faith community, the very liturgical core of our shared mystical communion, based on our sex, was the most painful segregation of life. I had to tell her that although for her such disjunction for spiritual purposes might not be important, because of my difference from her there was nothing more fundamental to me. I accepted that she could not see on her own why such a dramatic word was appropriate for me, but I had to express my difference.

Thus, I both disagree with Richards' like portrait of "reality" and with its facile avoidance of the possibility that religion, because it is not in Richards' ken, may be both true and at once beyond his ration-

"superficial impulse[s]," she seems to nominate her judgmental stance as operating from "a deep layer of reflection." *Id.* at 211. At the same time she elevates Kantian abstraction to a special reverence and awe that signals a "sense of divinity." *Id.* at 212. By now, Nussbaum is confused, forgetting where Kant got the reverence he held for the moral law within: Kant believed in God. And Hindu belief, in my tradition, has according to the Pope, the light of truth that is to be respected in all major world faiths. Respect does not mean slavish agreement, but it also does not dismiss so cavalierly the complex mores of ancient cultures.

25. Professor Paul Campos points out that, for Rawls, this secular fundamentalism functions as his "God term" or foundational, ultimately inexplicable—much less justifiable—value. See Paul F. Campos, *Secular Fundamentalism*, 94 COLUM. L. REV. 1814, 1821 (1994).

alistic calculation of political forces.²⁶ It is William Stringfellow, a wildly prophetic Christian, homosexual lawyer, who reminds us that the Christian is called not to be effective but to be faithful.²⁷ The Christian, Stringfellow proclaims (Abraham Joshua Heschel so echoes, as does the Muslim Rumi, the Bhuddist Thich Nhat Hanh, etc.) that a person is not encompassed by what that person thinks or knows, but by something more. That something more is the sort of thing that Harvard philosopher Stanley Cavell pursues, bursting from a rationalist framework, finding political calculation of either epistemology or ontology, ludicrously constrained.²⁸ It is "something more" that gathers the strands of the recurring idea that there are more things than are dreamed of in our philosophies, and suggests that a continuing sensibility to the unknown and unexpected is a crucial part of human life.

Not only has Richards failed to engage the realm of the unknown; he has not come to grips with the very culture he so passionately defends. Gay playwright Tony Kushner's *Angels in America*²⁹ begins to portray the world beyond mere reason, and its funky, contradictory protagonist is the redeemed gay Prior, whose frame of reference more than disrupts analysis. It flies right through the restricted maze of deductive logic, on huge silver wings. Paradoxical logic, cross-dressing, and demented angels of God announce the breakthrough of the sacred into the secular. Kushner is not simply taking advantage of the aesthetic medium; he is proclaiming an intellectual and cultural (and of course spiritual) event that is now constitutive of the public discourse. What Richards rails against religion for having destroyed—creative gay and lesbian culture—crows in spiritual triumph on Broadway. Kushner's play is not anti-reason; it simply moves beyond reason alone.

This is my main argument with these four Reasoners: They rely on reason alone. They want to banish spirit, rather than simply point

26. He reduces Martin Luther King's witness to rationalism, concluding that King's *Letter from Birmingham City Jail* "crucially turned on arguments of public reason available and accessible to all moral persons" who want to resist an "unjustly subjugating politico-religious epistemology." David A.J. Richards, *Public Reason and Abolitionist Dissent*, 69 *CHI.-KENT L. REV.* 787, 838 (1994) (footnote omitted). The oppressors are religious and political; the liberator political and rational—hardly a portrait true to King's own world view.

27. See generally *A KEEPER OF THE WORD: SELECTED WRITINGS OF WILLIAM STRINGFELLOW* (Bill Wylie Kelleman ed., 1994).

28. See generally CAVELL, *supra* note 1.

29. Tony Kushner, *ANGELS IN AMERICA: A GAY FANTASIA ON NATIONAL THEMES: PART ONE: MILLENIUM APPROACHES* (1993).

out that human spirit like human reason is open to evil, or admit that for them personally spirit talk is either impossible or too embarrassing. Nussbaum allows heart with her head, but still prohibits soul; Eisgruber and Richards cannot manage to trust soul. I am deeply wary of supposed reason alone, and of reason-and-heart without spirit, but I accept that there are those to whom that is how the world constitutes itself. Why can they not do the same for me? Why must they tell me that my dwelling in spirit is conducive to intolerance (by implication, more than is reason), has caused many historical harms, has no distinctive character, is politically unwise and thus expendable, and not realize that these same charges could be turned around and be likewise unprovable?

There is a crucial move afoot here, and it is personal-and-intellectual conversation that has allowed, for me, the next step: talking across this very difference between sacred and secular. The general framework is exemplified by my conversation with Rawls, at the Jurisprudence panel at the AALS convention this year. I tried to address him with profound respect, and yet maintain my difference. I told him that I was different, did not agree with his notion of civility (which would silence my religiously-based "untranslatable" talk) and wanted to know if we could talk as equals in public. He tried, through professing more than once that he did not understand what I was getting at, what I was doing (I had told him: talk as equals in public, about social justice). He proposed that we begin by flipping a coin and then each in turn proposing a set of principles to govern the public sphere. I said I could not do that, that I had to have actual first and second-person talk in addition to his move to immediate third-person abstraction. He said "Well then how would you begin?" I replied that I would begin with stories; could we still talk, I asked? He said he did not see why not.³⁰

There are reasons why not, of course. Then, it was time and place. Afterwards, when I went up to him to ask if he wanted to try to continue, he was as gracious as he is reputed to be, and confessed that he was comfortable where he was.

What then, when the rationalist father of the dominant discourse is comfortable? Do I try to tell him how destructive patriarchy has been, how dehumanizing rationalist discourse has become in some parts of (especially the legal) academy, how violent the hegemony of privilege is? Do I try to match his historical estimation of religion with the historical narratives of feminist and religious thinkers decry-

30. See *supra* note 10.

ing phallogocentrism? I have already told him that I honor his rationalism, respect the beauty of his intricate opus, but want to know if he can talk with me in public as an equal—is his comfort, his lack of curiosity, his effective dismissal of my voice, something to be attacked? He knows he does not fully understand me, and he and the reasoners do not want to, perhaps because they think they already know what it is I mean, and they have transcended my superstition, thank you. It appears they have no notion that I might offer them something new. I do not want conversion, of them or me, but openness to the new. What does the Rawlsian disinclination, mirrored in Nussbaum's dismissal-by-politics and Richards' dismissal-by-moral-inferiority of the public voice of the non-rationalists, mean to public discourse?

Let me suggest a step—not an answer, but the story of what a next step might require rather than where it may go, because that is precisely the mystery. The next step would be to propose that what a friend said to me at the AALS convention, is the most honest move in this discourse that I have yet heard. My friend is a law-and-religion scholar and avowed secularist, but akin to Sandy Levinson and Doug Laycock, he attends the discussions with deep attention. He is wrestling with his Judaism. And what he said to my frustration was to me astonishing, and necessary, as he said what I could not. (In true conversation, one can only wait for the other to answer, not psychologize the other's proposed discourse.) When my friend mentioned the representative notion that religious talk was not accessible to him, I answered with an expletive deleted, because he had used the word "understand." I said that of course he could understand—and he then said that I was right that it was somehow cognitively available to him, but that it was emotionally unavailable. His block, his distance from religion, was emotional. Of course, we began to talk about the Holocaust. This is not a new thought; the German intellectual giant Jurgen Habermas has said that all is changed after the Holocaust, and all talk of politics (and theology, of course) must take account of that. This is not to exclude other things that must be mentioned, like North American slavery and contemporary homophobia, but it is one that comes at a peculiar angle in an academy largely populated by Anglo-Protestants and Jews.³¹

31. During the Law and Religion panel discussion at the 1994 American Association of Law Schools Convention, Sanford Levinson commented that the combined faculties of the elite law schools contain fewer than a handful of openly professing Christians.

My friend knows what his fears about that conversation between sacred and secular are, and he is working with them. I do not hear his non-comprehension as willful, as some deliberate withholding, but as something he is willing to examine, but only if the ground of discourse seems safe. How do believers make it safe, I start to ask, and then realize that both the Reasoners and the Others must contribute to the safety, and both must accept the inherent dangers of the unknown.

This sort of discourse is one Tom Shaffer talked about in his portrait of the lawyer who has a tradition, *On Being a Christian and a Lawyer*.³² There is built-in discomfort. There is the prospect of unpredictable change, if there is real engagement. Catholic theologian David Tracy puts it bluntly: "It cannot be overemphasized that, if genuine dialogue is to occur, we must be willing to put everything at risk."³³

Such a requirement seems rather steep for a discussion of multi-jurisdictional ethics. Yet we are talking about the possibility of any form of coherence in the public order, without which everything is at risk anyhow. When a culture tries to become a multiculture, it risks genuine incoherence and intractable (versus felicitously periodic) chaos. It risks unprogrammable anarchy, and unchosen violence. It risks a degree of injustice that can corrode all involved. We are not in easy times but in the proverbial "interesting times" and there is no way without risk. There is no way except by way of unknowing,³⁴ to get to what we do not know. I suggest that we embrace mystery and risk with whatever form of optimism, sometimes called faith, that we may muster. And then start to talk with one another as if our lives, and perhaps our souls, depended on it.

32. See generally SHAFER, *supra* note 4.

33. DAVID TRACY, *DIALOGUE WITH THE OTHER: THE INTER-RELIGIOUS DIALOGUE* 95 (1990).

34. "In order to arrive at what you do not know, you must go by a way which is the way of ignorance." T.S. Eliot, *East Coker*, in *COLLECTED POEMS* 187 (1963).