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Recommended Citation

Emily Fowler Hartigan, *Surprised by Law*, 1993 *BYU. L. Rev.* 147 (1993).

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Surprised by Law

*Emily Fowler Hartigan**

The AALS¹ convention this past month provided one of those alleged rarities, a genuinely engaging panel discussion. Surrounding the key figure of Michael Sandel, Harvard philosopher of community and the “encumbered self,” were several notable commentators. To my taste, the most interesting exchange was between Sandel, a passionate and polished lecturer, and a ruddy, self-designatedly overweight federal judge, Stephen Reinhardt of the Ninth Circuit. Sandel, wiry, intense, searingly concise, delivered his defense of an ethics of appreciation which goes beyond mere toleration. Consistent with his attacks on Kantian notions of the self, Sandel argued for honor, not merely dignity, for persons. Dignity focuses on the capacity to choose ends, while honor attaches to the role, the behavior of persons in the world. In Sandel’s scheme of “judgmental pluralism” we are to make judgments about the moral worth of the practices which legal rights are fashioned to protect. One key practice which Sandel honors is that of those claimed in advance by a God Who sets a Sabbath.

Reinhardt was nothing if not direct. He characterized Sandel’s stuff as the sort of academic theorizing which has nothing much to do with the world, and which is just plain wrong. Lapsing right back into the framework of American philosophical liberalism, Reinhardt seemed to crash through the network of finely outlined distinctions laid by Sandel. He seemed at first charming but clumsy, blunt, undeterred by Sandel’s analytical finesse. Yet in his apparent rampage, he raised with almost unconscious elegance the main issue, and a deeply troubling concrete dilemma.

* Adjunct Professor, University of Pennsylvania Law School. My gratitude and love go to the community at Pendle Hill Quaker Study Center, where this first germinated.

1. Association of American Law Schools.

Reinhardt noted that Sandel's portrait of the person did not work because we are not free and we are not determined, but rather are some mix. His statement of the common sense situation of the person was tellingly set in the negative—he resisted saying we are free, because we are not ONLY free. In one sense, this concedes much of Sandel's point about the inadequacy of the Kantian, Rawlsian unencumbered rational self, yet at the same time it reveals Sandel's fatal incompleteness. And it focuses, for me, the issue of religious freedom in a postmodern age.

To come at this freedom from another angle for a moment, I want to tell the story of Reinhardt's abstraction-resistant example. The relationship between conscience and religion, and the surrounding issues converge in a case Sandel introduced; Reinhardt thought Sandel clearly wrong in his analysis. Sandel took a position on *Thorton v. Caulder, Inc.*,² the Connecticut Sabbath case. I had thought I agreed with Sandel that the Court should give deference to Sabbaths for days off. I agreed with his critique of the atomistic, all-choosing individualistic language of the Court. Reinhardt put his challenge this way: How can we deny the equal rights of atheists who want to take a day off when their children are at home? Suddenly, with the power of one long-versed in the texture of actual court controversies, Reinhardt had moved me, for *reasons* he did not claim, to knowing that he was, from my perspective, right.

Let me try to track his impact on my thought. There is something radically important about people's relations with their children. As I have a profoundly immanent notion of God, I think that much of one's relationship to God is lived out in loving one's children, honoring one's parents. I recall an obviously substance-influenced young man in Madison Wisconsin, one Fourth of July, backing off from a confrontation with us older folk, invoking our youngsters, repeating like a mantra to himself and his friends: "Children are sacred." This was from someone who loudly held nothing else sacred. His chant restored civic order in the park, and gave me some sense of the bases for respect which might carry us through a world of fractured values.

Thus, to me Reinhardt's example raised an image of something which may "claim" a parent every bit as much as

2. 472 U.S. 703 (1985).

God claims most of us who believe. Such parental commitment to children hardly portrays a “thinly constituted” person. I want to honor the role of parent much as that of faithful believer, I suspect. If the verse in my tradition—that wherever your treasure is, there will you find your heart³—is correct, each of us has our God, located in that place we find our hearts. On what basis would I differentiate profound parental fidelity from a more theistic fidelity to a religious tradition? I could try to do it facilely, by relying on the patent fact that the Constitution was talking about theists when it enumerated the right to free exercise, but *Employment Division v. Smith*⁴ and *Lyng v. Northwest Indian Cemetery Protective Ass’n*⁵ are now precedent, and they too are the law of the land. The very least those cases have done is to face us directly into the nexus of conscience and religion.

And Reinhardt’s example leaves intact the dilemma about freedom and determinism. Do we choose to have children, or is that human phenomenon of the propagation of the species, highly structured, fully constrained? Is having children a matter of conscience? Is Sandel right to use the language of “dictates of conscience”? Is non-religious conscience dictated? If there is a dictating God, would that coercive discourse not also apply to non-theists (I mean, if God is all-powerful, S/He’s all-powerful whether we believe in Her or not)? If we are claimed by God, then, and not free to choose our religious identity, are not atheists part of God’s plan? Are we not to learn to appreciate the serpent, whom God made and set in the garden, in my tradition? Which serpents are unacceptable? Sandel of course cannot specify—he can only point, as he did at the end of his talk, to Judge Frank Johnson and the march on Selma as manifestly just. His final move of judgment, is itself bereft of analytical elegance.

In fact, I think it returns us to Judge Reinhardt’s homier approach. Sandel liked Johnson’s judgment, but has no means of distinguishing it from the immoral judgment of an immoral judge, aside from disagreement over whether his or her cause

3. *Matthew* 6:21.

4. 494 U.S. 872 (1990) (holding that Free Exercise Clause is not violated when state proscribes the use of, and denies unemployment benefits to users of, peyote for sacramental purposes).

5. 485 U.S. 439 (1988) (holding that Free Exercise Clause does not preclude government from permitting road construction and timber harvesting in an area of historical religious importance to Native Americans).

is just. Reinhardt does not provide such means, either, however. He claims neutrality, and that simply is inadequate at this point in intellectual history as an account of why, as Sandel responded after Reinhardt's remarks, Sandel would like Reinhardt on the Supreme Court. Sandel liked Reinhardt's politics, and so did I. Aside from Reinhardt's manifestation of good humor and political compassion, however, Sandel learned little from Reinhardt's propositional talk about why Sandel found this thickly (in several ways) constituted self so winsome. Neither Reinhardt nor Sandel talked about Who or what claimed them, or the nature of this most central constituting relationship. Sandel lauded Reinhardt's remarks, and called Reinhardt to be more explicit in his moral judgments. I went up afterwards and lauded Sandel and called him to be more explicit in his theological judgments. Because what Sandel values is that a person know Who has claimed him, yet he will not talk to us about it directly. What he wants to appreciate, make visible, foster and then judge in Reinhardt—his morality—is SECONDARY yet Sandel hides his own more fundamental, pre-social contract stance.

It is not that Sandel's politics might change, or his moral appreciation were he to talk of his prior grounding—it is that he is hiding his initial commitment in the dialogue. One commentator at the panel said Rawls' movement into the original position was like a monk making such a decision—and the simile is radically telling. It is precisely that Rawls engages in the justice-seeking business to begin with, *from* an agenda, which makes his book work⁶ . . . without that initial movement of commitment to true dialogue, the book would never have appeared, nor would his social contract seem plausible. And Sandel's passion on the issue of being claimed is his motive force, yet he does not open it to the discussion. Paul Ricoeur argues that we who believe must willingly suspend such commitment in order to enter the public discourse in respect for those who are not of our beliefs, even the atheist⁷—yet he, too, fails to identify that first move as profoundly religious. It is not that each should not engage in a new mixed discourse, but that if they do so on these grounds, why would they not both disclose and name the gift of that movement out of their first

6. JOHN RAWLS, A THEORY OF JUSTICE (1971).

7. See PAUL RICOEUR, ONESELF AS ANOTHER 25 (Kathleen Blamey trans., 1992).

language? And should they not say *why* they trust this unknown ground on which they step to have dialogue with the Other?

My concern is not to unveil Sandel—I believe such moves must be made by the speaker, the writer himself—but to identify what religious liberty means in a world of fluid discourse. Our talk in public has been variously characterized as merging horizons, as an ongoing conversation, as the constitution of communities of discourse, as making ourselves in our talk, as constructing a social world and as being constructed by a social world. What, in this dialogic constitutionalism, does religious freedom mean?

Certainly it cannot be what the Court currently suggests, or it is an empty phrase. That is, something about exercise of religion must be more than the freedom to think what one wishes. In the traditional liberal worldview, as well as in Sandel's, that freedom *cannot* be extinguished. If what we want is to know the phenomenology of the free-thinking slave, Epictetus did a decent job of that many centuries ago.⁸ However, we purport to be about something more political, something which directs or constrains governments. So what is my freedom of religion? *I want to suggest that it is a right which I offer to make most explicitly into a gift.* That is, I have the right to exercise my religious beliefs, but I want to offer something about that right to the public discourse, as a gesture of respect. To make it correctly, however, I believe that I must make it as a religious statement, and that to do less is to diminish both myself and the communities with which I am in relation. The gift I want to make is one which enfolds the person of conscience within that sacred Constitutional space that tradition has kept for the religious person. I want to honor, in my sense and in Sandel's, the person who feels himself to be unclaimed by God, the person who knows no relationship with God. But I want along the way the chance to suggest why neither Sandel's Claimer nor the God whom commentators like Iris Murdoch reject,⁹ can either support my movement of gift, nor be God in a postmodern world.

Some of you may find the notion that this is a gift, offensive. But see it from my perspective for a while. I am a

8. THE DISCOURSES OF EPICTETUS 304-05 (George Long trans., 1920).

9. See generally IRIS MURDOCH, METAPHYSICS AS A GUIDE TO MORALS: PHILOSOPHICAL REFLECTIONS (1992).

theist. I experience a relationship with God, and I hope to continue to grow in making it central to my life. The invitation of this God is to love with my whole mind and heart and soul and strength. There is no suggestion that I set Her aside for any purpose, including political discourse. Yet S/He has created a world in which good people do not know Her by any name save the Good, and these are my brothers and sisters. I believe that these persons are in God's image, and are part of a story of Good News which at crucial times of belief such as Jesus' eating the grilled fish after the Resurrection, includes the truth of the verse: "... and some doubted."¹⁰ There He was, in flesh and fish—and some doubted, as the Hebrew psalm-writers surely did. Like the serpent, these doubters, internal and external, are part of God's creation. I want to honor these doubters, but to do so I must first move *from* where I am, in my own voice. If you as fellow-citizen want to claim for your conscience what I am guaranteed in the Constitution for mine, then listen to why I want to honor your claim.

* * * *

Freedom has to do with the law of the unexpected. Holmes says that law is about predictability, but part of what law is for me is the Unknowable's way, and that is not our way—and yet it is. The notion of law as unexpected seems ludicrous in the light of law as order, as rule, as certainty. Yet I think of that Other side of law, and believe that there is surprise, and unlike the old nostrum that one should never ask on cross-examination a question without knowing the answer, this is about risking such open-ended questioning.

It is the law we don't already know, which comes without warning and reminds us that we are also free. I suggest that this is gift. Let me tell you one of the stories of this, which will tell you that this notion of unpredictable law as emergent gift is not a cheap notion, for me.

I am divorced. My son, who is sixteen, lives now with his father. This last year and a half, since Ben moved, has been profoundly painful for me. I am not wise enough to know which portion to relegate to the intrinsic move to separation for any sixteen-year-old son, how much to the individual story. The

10. *Matthew* 28:17.

struggle for me has been to try to give my son all the room I can, without guilt or anger (this is my *aspiration . . .*). The divorce decree stated that visitation with the non-residential parent was to be paid for 50-50. I did that all the tough initial years, as I drove to where we had all lived even when his father did not want to see him because it was too painful to reconnect and then let him go back with me. When we set up his visit to me at Thanksgiving, and I talked to his father about it, there was no issue in my mind; I had six visits ahead, and his father owed me many, many trips.

When I checked about my son's Thanksgiving visit to Pendle Hill, the Quaker study and contemplation center near Philadelphia at which I am a resident this year, my son had to tell me that his father suddenly had no intention of paying his share. The court order remains unmodified. I called Ben's father, upset that he seemed to be reverting to the sort of behavior one might understand closer to the rupture of actual divorce, but I will tell you that as I first wrote this, I did not know if I would see my son for the first time in three months, or not.

I went back to my room, and then in distraction and radical frustration, to the bathroom—locking my room door, key inside. I had to rouse one of the women on the hall who knew where the master key was out in the maintenance building, at almost midnight. She trudged over, twice. I was furious, rageful that the games of my son's father and my own vulnerability led to my subconscious's acting out and thus to my friend's inconvenience. I said to her that what made me angriest was that the impact of his actions was to lead her out in the rain in mid-November Pennsylvania.

The next morning, she was at breakfast. My friend told me a story I did not expect. On her trips to maintenance, she realized as she passed the pottery studio, that she had left pots drying which if she did not trim would ossify beyond redemption. Without my distress, she would have slept through the crucial time, and lost all her pots. As it was, she went over and rescued them all.

The notion of karma or dharma, of the way or the law of fate, is a sense of the very innards of things, of the workings of the threads of necessity and freedom which somehow transcend time and are visible to oracles but not to humans. This is a sense of law which hints at determinism, at the idea that if we just knew all the variables, we could predict—though we will

never know them all. I think there is another notion of law here, but one that can be both more creative and more liberating than that darkly outlined in Greek tragedy at first reading—because the seeming dark is in fact the holy dark, that without which we cannot be whole, and into which we must pass in order to be given and achieve (both) that which we most desire. We are constituted by the law, but we also make it up as we go along. We discover it, and we ALSO create it.

The unraveling and reraveling of this paradox sets the context for the interplay between static and dynamic ideas of natural law, and between positive and natural law notions. As an intuitive model, I would suggest that the speculation about genetics gives some hint about this interplay; in linguistic terms, I liken it to conversation. True natural law is not a rigid pre-determined set of rules in the face of which we are ultimately passive, or even a movement towards a dictated telos. There is, I suggest, a “law” of the cosmos that reflects (with varying degrees of fidelity) into human legal edicts, that is not imposed but is both given and improvised. Thus, original ideas of DNA were relatively mechanical, constructing double helixes which intertwined in beautiful but geometric systems, with twenty-three chromosomes from each parent and an infinite but somehow theoretically calculable set of combinations. Time revealed those who surmised that genetic mutations occurred during the lifetime, so that how we live affects those basic building blocks, and thus we change our very genetic legacy. “Nature” and “nurture” applied to children’s growth and also to our own bodies. Much was given; much was made; both the given and the made were related to one another fundamentally, in intricate daily steps.

Part of the given is known—and from a different perspective, it is also infinitely mysterious, unknown. Often, we think of our lives as mostly predictable—we know who our family members are, what our socio-economic status is, whether we will be fat or thin in five years, what sort of work we are likely to be doing, where we will probably live. Even if these things are up for grabs, we find a sense of identity, of what sort of person each of us is, or is becoming gradually, relatively predictable. We think of law in much the same way. There might be some changes, but by and large murder will be prohibited, some sort of honesty in trade will be regulated toward, some degree of regularity in administrative process will

be continually elaborated. Jay-walking will not become a felony.

Some areas of law will be more open-ended. Toxic waste will continue to battle with common law notions about property, as Superfund legislation directed at environmental emergency disrupts expectations. But surely we saw the environment as the nascent area of crisis legislation many years ago. We are surprised when disasters force us to focus, but we are looking at something which we have known all along at some level. And the law is not so unrecognizable from the imaginative perspective of those who stood at Sinai, once we impute to them a real appreciation of changes in culture and technology. The unexpectedness which I want to highlight about law is something less about content and "progress" naively viewed, than about the interplay between the law as "laid down" by the Creator in the blueprint of the world, and the law as the lived response of human freedom in that created world. (My use of theistic language should not obscure the correspondence between a world created and one in which one key human enterprise has been to construct/discover the "laws" of the universe from a secular-seeming perspective—I am simply speaking in my first language to the reader, who may process as she is most comfortable.) This is another face of the polarity of freedom and fate, framed as an inquiry into what we do when we "obey the law."

The obedience to the law which I suggest is one which turns away from the initial connotation which obedience conveys now in the twilight of the patriarchy. It is not a submission to the law of the father. It is more fundamentally a listening. The etymology of "obedience" is "in the way of" (ob-) hearing. The word derives from listening, from a stance of attentive openness—not from slavish surrender of will or internal coercion from childhood dictates. Obedience in this guise taps not law's capacity to oblige, but to obligate; this is not first the inexorability of law but primarily its song. There may seem to be an aspect of the siren song, the weird cantation which compels what we would resist if we but could, a melodic necessity which erases freedom. We all have internalized voices of authority, inherited more than chosen. I suggest, however, that such attention is a listening which is not unilateral in either direction—from the father-god to the powerless creatures, or from the wholly self-made ubermensch who have survived the death of God, shouted defiantly into a universe

either empty or constructed solely of our own imagination. Rather, this listening comes in something that has the rhythm of conversation. It is interactive, relational, always becoming, never foreclosing something more, ever open to newness.

A crucial aspect of this sense of law is time. Time is needed in which to tell and live stories, needed to re-member our shared stories and new ones coming into being, and to find words for the stories' rules. And crucial to time, I will suggest along with many contemporary writers, is the practice of writing. Thus, the law which I have argued is both written and unwritten is always, in my story, moving toward writing. This is not to conflate law with writing—rather the opposite—but to suggest that it is in the very thing which we often think of as giving law its greatest fixity, writing, which may best manifest its unexpectedness.

In my tradition, this should be natural-seeming. After all, the “good news” is both new and written. Surely, if Jesus was the Son of God and Son of Man [sic], He had to know at some level that this would get written down in scripture. In fact, that is the very claim of John's “In the beginning was the Word . . .”¹¹ which echoes the bereshit of Genesis: “In the beginning, God created . . .”¹² Jesus was a Jew, coming into and speaking from within and without, a profoundly written tradition, one in which the world is worded into being and written in the Book.

What is, I think, most unexpected, is that we do not only listen in obedience, in this conversation of the law. We also speak and write. Roberto Unger's classic *Knowledge & Politics* ends with “Speak, God.”¹³ What our traditions say is that God has been speaking in creation—and humankind is integral to that creation—all along. Yet the speech of God alone would not be sufficient. Fate is not mechanical—it is Oedipus' and his parents' *responses* which complete the story. Life cannot be a one-sided conversation or ventriloquism. We must speak and write our parts. Our speech needs always to attend to silence—and when it comes, it must never leave behind the silence from which it comes. Yet, finally, we are called upon to answer.

11. *John* 1:1.

12. *Genesis* 1:1.

13. ROBERTO M. UNGER, *KNOWLEDGE & POLITICS* 295 (1975).

In C.S. Lewis's *Till We Have Faces*¹⁴ one of the most striking things about the woman protagonist's journey is that after she has written her complaint, the response is that finally, what the heavens have awaited has come—a woman has come with complaint. It is not men who concocted the patriarchy—it arose out of the human condition which God created. Now it is time to complain and to praise. It is time to tell the stories Elie Wiesel says God created us to hear (and the jokes, I interject). It is time for the law to be spoken as well as heard, to be created in conversation which acknowledges “that beyond words” yet dares to speak into and from shared silence.

That is why, even though I know that the Civil Rights Act of 1964¹⁵ included discrimination against anyone based on sex because it was a JOKE interjected by a Southern congressperson who thought such an addition would scuttle the bill, I know that the law can live jokes well, and serve as well as oppress. When we hear stories such as that in *The Brethren*,¹⁶ which tell of *Roe v. Wade*'s¹⁷ getting “on the agenda” in a swap for putting on the baseball free agents' case, we should hazard the laugh which such double irony invites. The hidden jokes, the story in perspective, can be stunning. But let me tell you what scares me about this unexpected, unpredictable power of law most of all. It is a fear so elemental that it predates civil law, moves across cultures, lives in humankind's hidden recesses. It is called various things, but most commonly the law of return.

I remember my client who was a member of Wicca, and of the Covenant of the Goddess, a benign pagan nature religion. Her children were taken from her because of the fear of the social workers; finally even the Native American shaman's son laid a hawk feather on her doorstep and went back to tell his office mates she was a Satan worshiper. They put her children in fundamentalist Christian homes. She kept telling me about the law of return: what goes around, comes around. She crossed paths with another client, who eventually went to trial. The second client had been selected when she was sixteen for

14. C.S. LEWIS, *TILL WE HAVE FACES: A MYTH RETOLD* (1956).

15. Pub. L. No. 88-352, 78 Stat. 241, 253 (codified at 42 U.S.C. § 2000e-17 (1988)).

16. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* (1979).

17. 410 U.S. 113 (1973).

the attentions of the president of the Junior Chamber of Commerce, then thirty-four with three children and wife. After he waited until two days after her statutory rape birthday to seduce her, he took graphic pictures of her on site at his business, a pizza chain. They had a child. He moved on to another woman after using my client's short-lived but spectacular physical beauty. When the stories came out in the papers, the case was wild and notorious, and my Wicca client saw the understory right away. "What goes around, comes around," she said, especially as she learned how the judge threw out our pleadings on the most outrageous pretexts; our main cause of action, negligent infliction of emotional harm, he deemed excluded because HIS NOTES of the pretrial conference did not detail it, although the pleadings did. The judge was weary, sodden, manipulable by the bullying male attorneys who overtly approached him *ex parte* and bragged of it. He ruled with complete abandon, complete lack of precedent or law. We went to the jury without the main evidence (the pictures), the crucial law (the multiple criminal statutes the defendant had breached), and the cause of action on which we had a prayer. "What goes around . . ." our older, more seasoned client intoned.

The day after the two-week trial ended, the judge went on a bike trip. He skidded down a hill and spent six weeks in intensive care from which no one expected him to emerge. He lived, but never presided over another day of court.

I am frightened of the power of that punitive-seeming law of return. It threatens. It seems to say that the dictum that "by the same measure with which you give out, you will receive,"¹⁸ is a rigid reflection of your soul. All you have been given, for good or ill, is of your own making. You are what you have done.

It makes no sense at a distance: Somali children cannot have given out the measure of starvation. Victims have not done what is done to them. All is not deserved. But there is that insinuation, that suggestion that law is in fact something which levels as a bomb levels, annihilates, punishes. This is the accusation which Job resisted, and which the story of Jesus—executed as a criminal—says is a lie. Yet what is this law of return, and what is the nature of things, the law of human good and evil?

18. *Matthew 7:2.*

My suggestion is this: It is a law in the making. It is not ended with Josef K. in Kafka's *The Trial*¹⁹; law is not only the faceless bureaucratic charge of our ubiquitous guilt. More than that (for law is that harshness, also), true law is open. It is the answer which Josef makes through Franz, who writes of it. Franz Kafka's writing about writing is compelling, telling of writing to live, of writing as life, for him. He writes of a world in which Josef is trapped under law—but the author and the reader are not trapped. The author and reader are in conversation, and they do not accept the law as *The Trial* portrays it. Kafka enacts the law as inexorable, tells its dark secret, and thus renders it unacceptable. He frees himself in telling the reader, and the reader in reading the text accepts this urge beyond condemnation. Our participation in his text, our rejection of anonymous guilt, moves the law through and beyond what modern bureaucratic numbing has let it become. Kafka writes the story of unredeemed law, he writes himself free, and we may respond with him, in redemptive insistence on something more.

If law is not solely inexorable, what is it? I suggest that it is always moving toward newness. Perhaps it does not move at the pace many of us would want, but that joke in the Congress almost thirty years ago made it the law that women and people of color and believers could not be treated as they had been without legal consequences. That is not a vacuous moment in history, that joke. At times it has relapsed into empty promise, but at times it has told law firms that partnership decisions are under the law, and even the hugest of the legal establishment's bastions must navigate the waters of the Civil Rights Act. Sometimes such laws touch hearts. Sometimes they even touch minds. Sometimes they finally convince detractors that it's just plain easier in the end to take the laws seriously than to engage in elaborate pretexts, as Aristotle said that to lie took a smarter person than he was.

And so it is that we do not only listen for the law. We also try to speak it. That is sometimes what I find most unexpected—or, rather, not that we speak, but that somehow after that audacity, God, the Other, listens.

What comes of this listening God? This is the retelling of the story which transforms fate. Suppose we are fated to marry

19. FRANZ KAFKA, *THE TRIAL* (Schocken Books 1968) (1956).

our mothers or fathers, and kill the other parent? Suppose that Freud has simply made more subtle what Oedipus lived and Sophocles recorded? If there is to law that which is given, not to be changed in itself, may the given not change by how it is lived, by the texture of the story? One aspect of this freedom from fate is in Oedipus' story²⁰: the oracle says that the city which is home to Oedipus when he dies will fare well. That city might have been Thebes, need not have been Argos. The oracle's story includes freedom within it. When Dylan Thomas says that "time held me green and dying, and I sang in my chains like the sea" it is the song which counts, and the singing transforms the very chains.

A different aspect of freedom's dance with fate, with law as given, is that suggested to me by Juliana of Norwich's full meditation, usually quoted only partially: Sin is necessary, but all shall be well, and all shall be well, and all manner of thing shall be well.²¹ *The fact of the fated transgressions is not all the story.* The law of the oracle, of our legacies, of what the Creator has made, is not all there is. We are also authors, co-creators, law-crafters, story-tellers. And we are not alone, just the individual with God the Father. God is more mysterious than that, and we are more multiple, more connected, more in flux together. It is given that we must die, but what we do with *that* law is all of a life full of the unexpected.

My suspicion—and as it is one of life's true mysteries, that is all it can be: a suspicion, like one of Socrates' myths punctuating his "rational" dialogues at points which will sustain no more such "reason"—is that the reason for the unexpected is that God gave us law to make us free. Law is the last outpost before the abyss, and the first oasis beyond it, but the leap through the void is where love truly grows real. Catharine MacKinnon has portrayed the effects of power, dominance, on what we call love. When there is an imbalance of coercive power, then love is never fully free. God the Father cannot feel very well-cherished by adults, so long as the law is punitive and inexorable. But set us free, loose those chains so that we can if we choose say yes or no to true relationship with One made equal by neediness like our own, and our yes is love

20. SOPHOCLES, OEDIPUS THE KING (Peter D. Arnott trans., Hilan Davidson 1930).

21. See JULIAN OF NORWICH: SHOWINGS 225 (Edmund Colledge & James Walsh trans., 1978).

given freely to the Other. If there is a law of love, it cannot command, nor is it a matter of obedience to the Father or the state. We have grown so used to a law of calculation and retribution and raw obedience, however, that a law of love and conversation still comes as radically unexpected.

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Now, in the back of my mind, ranging about like one of Patricia Williams' polar bears just out of inner sight, is Judge Reinhardt. If he found Sandel out to lunch, what would he make of this patently spiritual stuff? I suspect that at this juncture in the history of American culture, it would depend if the conversation were considered "public" or "private." In so-called "public" discourse, the penchants of the judge are irrelevant, according to his version of neutrality. But in "private," I suspect that he might well be like the judge for whom I clerked when I finished law school. My judge would talk of his final grounding from time to time, in his soft, even voice, especially at the dinner the former clerks give him every year. It wasn't so much denominational—he did not refer to the Presbyterian church which had since reinstated him on its board of elders after kicking him off as he desegregated the schools in the late sixties—as it was Biblical. It would be the kind of quiet statement of fidelity to God's love and justice which only a full evening of table fellowship could truly sustain. It was in a gathering of friends, a time of communion and remembrance. Direct references to God were circumspect and often wry in his opinions, and rare. Yet his fidelity was clear and consistent, even when twelve years after the controversial bussing orders, his windshield was shattered the night a movie about bussing was on national TV. My judge lived and worked in a very real world, one in which his children were threatened for his actions, his friends turned their backs literally, and he endured threats of what Julius Chambers, the plaintiffs' attorney underwent—firebombing—for actions Sandel would find as courageous and just as Frank Johnson's.²² And he knew that the only way to live the courage which law required was in the freedom of God's love. The gift which I propose in theory, one of expanding what the

22. See *supra* p. 149 (referring to Frank Johnson).

Constitution makes sacred for religion into the realm of "secular" conscience so that what we know as religious liberty at its best will belong to us all, is one I saw him extend in his courtroom to atheists, Muslims, prisoners, social security disability aspirants, ingrates and illiterates. What he extended was more than basic human respect, more than a formal constitutional right, and no less than holding the difficult balance of the individual and corporate conscience when in tension with the demands of the state. He did it because we are all God's creatures. Someday I'd like to have a conversation with Reinhardt about that, and Sandel, and call them both to tell their stories as part of fuller accounts of making judgments in law.

However, they are not here, and you are. So I call on you to lift the corner of the self-censoring which brackets the spiritual in your scholarship, scholarship which is often passionately motivated by things which touch on the numinous. As Sandel wants the community's discourse to be enriched by the moral, I want it liberated by the spirit. For some of you, this might involve lapsing into talk which is not so fluent for you as your academic language. For some, it may seem hopelessly private or inchoate. Those who find themselves to be "hopeful agnostics" for example, may wonder what of value is to be said. I can't know, but I do believe, that what is to be said can be difficult, whole, risky, wonderful, liberating and most unexpected. I believe that such talk in all its plurality and ambiguity, even if halting at first, will not only set the speaker free, but also make true religious liberty more likely in its institutional and its community identities.