



**TOURO UNIVERSITY**  
JACOB D. FUCHSBERG LAW CENTER  
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**Touro Law Review**

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Volume 35 | Number 1

Article 15

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2019

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### **Recommended Citation**

Lee, Randy (2019) "Endrew F.'s Journey to a Free Appropriate Public Education: What Can We Learn From Love?," *Touro Law Review*. Vol. 35: No. 1, Article 15.

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## ENDREW F.'S JOURNEY TO A FREE APPROPRIATE PUBLIC EDUCATION: WHAT CAN WE LEARN FROM LOVE?

*Randy Lee\**

### I. WHO IS DREW?

Drew is eighteen years old and lives in Highlands Ranch, Colorado, a suburban community outside Denver.<sup>1</sup> He attends a school a twenty-five minute drive from his home, and plans to continue to do so for at least another three years.<sup>2</sup> He likes cats and animation, and he counts “down the days till Pixar releases its movies” on DVD.<sup>3</sup> Drew also likes video games, and his favorite game is *Mario Kart*.<sup>4</sup> Drew would “rather stay in and eat peanut butter and jelly in comfy clothes than dress up for a meal out,”<sup>5</sup> and his parents concede that Drew is “a homebody.”<sup>6</sup>

All of this is perfectly normal, which is what makes it all perfectly miraculous. On top of all those other things that help to define who Drew is and what he is about, Drew is also autistic.<sup>7</sup> In addition, throughout his childhood, Drew has lived with ADHD, “‘exceedingly low cognitive skills,’ serious behavior problems,” and “‘pronounced sensory needs.’”<sup>8</sup> None of these “‘circumstances,’”<sup>9</sup> however, have prevented Drew from getting his education.

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<sup>1</sup> Ann Schimke, *Inside One Colorado Family's Long Legal Journey to Affirm Their Son's Right to a Meaningful Education*, CHALKBEAT (Nov. 15, 2017), <https://www.chalkbeat.org/posts/co/2017/11/15/inside-one-colorado-familys-long-legal-journey-to-affirm-their-sons-right-to-a-meaningful-education/>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist., RE 1, 290 F. Supp. 3d 1175, 1183 (D. Colo. 2018).

<sup>9</sup> *Id.* at 1179.

The American legal system and disabilities rights advocates know Drew as “Endrew F.,” the plaintiff in *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, which, in 2017, became the first lawsuit the United States Supreme Court had heard in 35 years<sup>10</sup> on Congress’s intended meaning for the term “free appropriate public education.”<sup>11</sup> Drew understands little about *Endrew F.*, because, as his father explains, Drew is “not to the point where he could ever understand the significance or the process or anything.”<sup>12</sup> That inability to comprehend Supreme Court analysis of legislative intent, however, does not diminish, in his parents’ eyes, all that Drew has accomplished.

## II. THE ENTITIES THAT PLAYED A ROLE IN DREW’S EDUCATION

At least four entities played a role in the education that has formed Drew: the Douglas County School District, the Firefly Autism House, the federal court system, and Drew’s family. The mission of the first, the Douglas County School District, is to educate more than 67,000 students.<sup>13</sup> To pursue this “awesome responsibility,” the District has been entrusted with “a total district budget of close to \$700 million.”<sup>14</sup>

The Douglas County Board of Education and the District’s administration describe themselves as “steadfast in a commitment to always doing [sic] what is best for our students” while still “providing the greatest value to our District taxpayers.”<sup>15</sup> The District is able to “ensure as much money as possible is allocated to our classrooms and schools,” both by “budgeting wisely and maintaining proper reserves,” and also by empowering site-based “leaders with the ability to assess their student and community needs and then to spend appropriately to meet those needs.”<sup>16</sup> Through this commitment to “responsible fiscal management,” the District maintains “a high bond rating,”<sup>17</sup> and a “Per

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<sup>10</sup> 137 S. Ct. 988, 993 (2017).

<sup>11</sup> 20 U.S.C. § 1412(a)(1) (2018).

<sup>12</sup> Schimke, *supra* note 1.

<sup>13</sup> *Transparency: We Believe in Open & Accountable Government*, DOUGLAS COUNTY SCH. DISTRICT, <https://schools.dcsdk12.org/district/transparency> (last visited Feb. 12, 2019).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

Pupil Revenue” of \$7,163 per “Funded Pupil Count.”<sup>18</sup> Consistent with legal requirements, the District’s role in Drew’s education was to offer Drew a “free appropriate public education” (hereinafter “FAPE”).<sup>19</sup>

The mission of the second entity, Firefly Autism House, is to discover and pursue what is possible.<sup>20</sup> Firefly has “changed the lives of thousands of children and families,” and Firefly reports that children in Firefly’s “Foundations of Learning program are learning five times as fast compared to their learning rates on arrival with us.”<sup>21</sup> Firefly insists that “Firefly is about Hope, Discovery, Comfort, Compassion, Understanding, A brighter future,” and Firefly’s motto is “Helping them discover the world. And helping the world discover them.”<sup>22</sup>

Firefly’s founder Diane Osaki is described as someone who “was passionate,” and Ms. Osaki “w[as] able to convert her passion” into a place that “transform[s] the lives of children with autism” by “partnering with families,” and “creat[ing] life-long relationships through [Firefly’s] thoughtful, innovative and empirical learning programs.”<sup>23</sup> The annual tuition at Firefly when Endrew F. first enrolled was \$65,000 per year.<sup>24</sup> It has since increased to \$70,000.<sup>25</sup>

The mission of the third entity, the federal courts, is, in part, to employ the “judicial Power” to resolve “Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.”<sup>26</sup> The federal law under which Drew’s case arose was the Individuals with

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<sup>18</sup> *Board of Education Approves FY 2016-2017 Budget: Plan Increases Funding for DCSD Schools and Compensation for Employees*, DOUGLAS COUNTY SCH. DISTRICT, <https://schools.dcsdk12.org/financial-services/budget-facts> (last visited Feb. 12, 2019).

<sup>19</sup> 20 U.S.C. § 1412(a)(1) (2018).

<sup>20</sup> FIREFLY AUTISM, [HTTPS://WWW.FIREFLYAUTISM.ORG/](https://www.fireflyautism.org/) (LAST VISITED FEB. 12, 2019) [hereinafter FIREFLY AUTISM].

<sup>21</sup> *Our History*, FIREFLY AUTISM HOUSE, <https://www.fireflyautism.org/about/history> (last visited Feb. 12, 2019) [hereinafter *Firefly History*].

<sup>22</sup> RayneCreative, *What is Firefly Autism?*, YOUTUBE (Apr. 28, 2017), [https://www.youtube.com/watch?time\\_continue=72&v=Rkq\\_LEPyvQs](https://www.youtube.com/watch?time_continue=72&v=Rkq_LEPyvQs); FIREFLY AUTISM, *supra* note 20.

<sup>23</sup> *Firefly History*, *supra* note 21.

<sup>24</sup> Schimke, *supra* note 1.

<sup>25</sup> Ann Schimke, *Judge: Douglas County Schools Must Pay Private School Tuition for Student at Center of Special Education Lawsuit*, COLORADOINDEPENDENT.COM (Feb. 13, 2018), <https://www.coloradoindependent.com/168615/judge-douglas-county-schools-must-pay-private-school-tuition-for-student-at-center-of-special-education-lawsuit>.

<sup>26</sup> U.S. CONST. art. III, § 2.

Disabilities Education Act (hereinafter “IDEA”).<sup>27</sup> This act “establishes a substantive right to a ‘free appropriate public education’ for certain children with disabilities.”<sup>28</sup> In Drew’s case, the Supreme Court of the United States ultimately determined that a free appropriate public education required a school district to provide an education “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances,”<sup>29</sup> a standard requiring “markedly more” than a “merely more than *de minimis*” education.<sup>30</sup> When Drew’s case was remanded, the federal District Court for the District of Colorado held that the Douglas County School District had failed to offer Drew an education meeting this standard and ordered that Drew “and his parents are entitled to reimbursement of their private school placement from the District.”<sup>31</sup> The District subsequently indicated a desire to appeal this ruling to the Tenth Circuit once the ruling became final,<sup>32</sup> but ultimately settled the case for \$1.32 million.<sup>33</sup>

Prior to the Supreme Court’s decision in this case, an administrative law judge, the district court, and the Tenth Circuit Court of Appeals had all defined a FAPE as only requiring an education “merely more than *de minimis*” and, therefore, had all determined that Drew “had not been denied a FAPE.”<sup>34</sup>

The fourth entity that impacted Drew’s education is his family. The mission of Drew’s parents is to love Drew, love being defined as the willingness “to give up one’s life for” those whom one loves.<sup>35</sup> Love makes the recipient visible, and it also makes the recipient valuable. Drew’s parents, who own a business that “sells industrial equipment,”<sup>36</sup> spent ten years and more than \$1,000,000 on school

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<sup>27</sup> 20 U.S.C. § 1412(a)(1) (2018).

<sup>28</sup> *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988, 993 (2017).

<sup>29</sup> *Id.* at 991.

<sup>30</sup> *Id.* at 1000.

<sup>31</sup> *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.*, RE 1, 290 F. Supp. 3d 1175, 1186 (D. Colo. 2018).

<sup>32</sup> *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, No. 18-1089, at 1 (10th Cir. Apr. 5, 2018).

<sup>33</sup> Ann Schimke, *Douglas County District Pays \$1.3 million to Settle Landmark Special Education Case*, CHALKBEAT.COM (June 20, 2018), <https://www.chalkbeat.org/posts/co/2018/06/20/douglas-county-district-pays-1-3-million-to-settle-landmark-special-education-case/>.

<sup>34</sup> *Endrew F.*, 137 S. Ct. at 997.

<sup>35</sup> *John* 15:13 (Common English Bible).

<sup>36</sup> Schimke, *supra* note 1.

tuition and legal fees<sup>37</sup> trying to obtain for Drew the education they believed he should have. “Love,” it is said, “bears all things, believes all things, hopes all things, endures all things.”<sup>38</sup>

### III. THE STORY OF DREW’S EDUCATION

When Drew began school in the Douglas County School District, he had a number of attributes that endeared him to the staff. His teachers, for example, described Drew “as a humorous child with a ‘sweet disposition’ who ‘show[ed] concern[] for friends.’”<sup>39</sup> By the time, Drew reached the second grade, however, those were not the traits that were to define Drew in the education process within the Douglas County School District. In determining what constitutes a free appropriate public education for a particular child, the law requires one to be conscious of the particular child’s “circumstances,”<sup>40</sup> and as noted earlier, Drew’s circumstances were “his autism, ADHD, ‘exceedingly low cognitive skills,’ serious behavior problems, and his pronounced sensory needs.”<sup>41</sup> The Douglas County School District ultimately found that Drew “exhibited multiple behaviors that inhibited his ability to access learning in the classroom,” and that, combined with Drew’s circumstances, “result[ed] in significant impediments to his ability to access and participate in his education.”<sup>42</sup>

As Drew proceeded from one grade to the next in the Douglas County School District, both his behaviors and his circumstances became more and more problematic. Beginning in the second grade, Drew “experienced escalating problem behaviors at school, including increased tantrums, yelling, and crying, dropping to the floor and eloping from class.”<sup>43</sup> Subsequently, Drew found himself in a new

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<sup>37</sup> John Aguilar, *Douglas County Schools Must Pay the Private Education Costs of Student who Has Autism, Judge Rules: Ruling May Put an End to Long-Running Case Involving Endrew F. of Highlands Ranch*, DENVERPOST.COM (Feb. 12, 2018), <https://www.denverpost.com/2018/02/12/douglas-county-schools-private-education-costs/>.

<sup>38</sup> *I Cor.* 13:7 (Revised Standard Version).

<sup>39</sup> *Endrew F.*, 137 S. Ct. at 996.

<sup>40</sup> *Id.* at 994.

<sup>41</sup> *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.*, RE 1, 290 F. Supp. 3d 1175, 1183 (D. Colo. 2018).

<sup>42</sup> *Id.*

<sup>43</sup> *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE 1, No. 12-cv-2620-LTB, 2014 WL 4548439, at \*2 (D. Colo. Sept. 15, 2014), *aff’d*, 137 S. Ct. 988 (2017), *rev’d*, 290 F. Supp. 3d 1175 (D. Colo. 2018).

school for third grade.<sup>44</sup> There, however, Drew grew more “stressed and defensive,” and his anxiety came to pervade his parents as well.<sup>45</sup> During this time, Drew “was afflicted by severe fears of commonplace things like flies, spills, and public restrooms,”<sup>46</sup> and as his fear increased, Drew’s “social skills declined and his disruptive behaviors increased.”<sup>47</sup>

As Drew progressed to the fourth grade, his mother “would brace herself for the regular phone calls she received from school staff asking her to come in and calm Drew down—and twice to take him home.”<sup>48</sup> Drew’s “ability to function at school and access the educational environment became noticeably worse.”<sup>49</sup> Drew’s disruptive behaviors now included “disrobing,”<sup>50</sup> “climb[ing] over furniture and other children,”<sup>51</sup> “falling off furniture, hitting computers or TV screens, yelling, kicking others, kicking walls, head banging, and asking others to punish him.”<sup>52</sup> Drew “bolted from the classroom frequently and ran out of the school building and into the street on one occasion. He urinated and defecated on the floor of the ‘calming room’ twice.”<sup>53</sup> As Drew’s mother would send Drew to school, “she feared for his safety.”<sup>54</sup>

As Drew prepared to enter the fifth grade, his parents were convinced “his academic and functional progress had essentially stalled” in school.<sup>55</sup> Although the District maintained “some measurable progress” had been made,<sup>56</sup> no one disputed that Drew’s “behavioral issues interfered with his ability to learn,” and that the District’s interventions “were not effective.”<sup>57</sup> While Drew’s parents were insisting that “only a thorough overhaul of the school district’s approach to Endrew’s behavioral problems could reverse the trend,”

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<sup>44</sup> *Id.*

<sup>45</sup> Shimke, *supra* note 1.

<sup>46</sup> *Endrew F.*, 137 S. Ct. at 996.

<sup>47</sup> *Endrew F.*, 2014 WL 4548439, at \*2.

<sup>48</sup> Shimke, *supra* note 1.

<sup>49</sup> *Endrew F.*, 2014 WL 4548439, at \*2.

<sup>50</sup> Aguilar, *supra* note 37.

<sup>51</sup> Shimke, *supra* note 1.

<sup>52</sup> *Endrew F.*, 2014 WL 4548439, at \*2.

<sup>53</sup> *Id.*

<sup>54</sup> Shimke, *supra* note 1.

<sup>55</sup> *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 996 (2017).

<sup>56</sup> *Endrew F.*, 2014 WL 4548439, at \*3 (a position ultimately accepted by the administrative law judge).

<sup>57</sup> *Id.* at \*11.

the plan the District presented Drew's parents for Drew's fifth grade year was "pretty much the same as his past ones" and reflected what had become a pattern of carrying "over the same basic goals and objectives from one year to the next," a pattern that should have indicated, even to the District, that Drew "was failing to make meaningful progress toward his aims."<sup>58</sup> In response to the District's inability to innovate, Drew's parents removed him "from public school and enrolled him at Firefly Autism House,"<sup>59</sup> a move that the administrative law judge who first heard the case described as a "unilateral private school placement."<sup>60</sup> At the time tuition at Firefly was \$65,000 per year, which Drew's parents "paid in full."<sup>61</sup>

Drew "did much better at Firefly,"<sup>62</sup> and within a month of his starting there, his parents "noticed a dramatic difference in Drew."<sup>63</sup> The team at Firefly "developed a 'behavioral intervention plan' that identified Endrew's most problematic behaviors and set out particular strategies for addressing them," and "also added heft to Endrew's academic goals."<sup>64</sup> After only a few months at Firefly, Drew's behavior had "improved significantly, permitting him to make a degree of academic progress that had eluded him in public school."<sup>65</sup> Although the District refused to contribute to Drew's tuition at Firefly, Drew has continued his education there.<sup>66</sup> Thanks to that education, Drew has been able to embrace a life he can be comfortable in.

#### IV. LAW, LOVE, AND LESSONS TO BE LEARNED

It is tempting to see the story of Drew's education as a story about the importance of law and the importance of process and to attribute Drew's educational opportunities to the Supreme Court's opinion in his case.<sup>67</sup> After all, "advocates for students with disabilities

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<sup>58</sup> *Endrew F.*, 137 S. Ct. at 996.

<sup>59</sup> *Id.*

<sup>60</sup> *Endrew F.*, 2014 WL 4548439, at \*3.

<sup>61</sup> Schimke, *supra* note 1. A couple of years ago, Drew's family's health insurance began paying for "about half" of Drew's tuition. *Id.*

<sup>62</sup> *Endrew F.*, 137 S. Ct. at 996.

<sup>63</sup> Schimke, *supra* note 1.

<sup>64</sup> *Endrew F.*, 137 S. Ct. at 996-97.

<sup>65</sup> *Id.* at 997.

<sup>66</sup> Schimke, *supra* note 1.

<sup>67</sup> *Endrew F.*, 137 S. Ct. at 998.

were thrilled” with that opinion,<sup>68</sup> and insisted that its “language” was “poignant” and sent “a powerful message.”<sup>69</sup> The press noted that the “ruling held enormous significance for millions of students with disabilities across the country” and echoed the sentiment that it “sent an unequivocal message to schools about the effort they needed to make in educating students with disabilities.”<sup>70</sup> Jack Robinson, Drew’s lawyer in the case, called the opinion “a game-changer,” and Drew’s mother insisted within months of the opinion being handed down that “[i]t is already making a difference in the lives of other families.”<sup>71</sup>

The notion that law played a heroic and preeminent role in framing Drew’s education and that it will continue to play a similar role in the education of millions of other children is consistent with America’s perception of the nature of law. Americans revere law for the fundamental role it is expected to play in ordering social interaction. Abraham Lincoln once described “reverence for the law” as “the ‘palladium of our liberties, our shield, buckler and high tower.’”<sup>72</sup> In that same spirit, Professor Allen Guelzo identified the “rule of law” as that which “prevents an overmighty or impatient state from oppressing a free society and prevents society from overwhelming the state by debasing liberty into anarchy.”<sup>73</sup>

Yet, if *Endrew F.* is to serve as the “shield, buckler and high tower” that will prevent the state from oppressing students with disabilities, the opinion has gotten off to a rather inauspicious start. Professor Perry Zirkel, for example, reviewed 49 free appropriate public education cases filed in federal district courts during the twelve months immediately following the Supreme Court’s decision in *Endrew F.*<sup>74</sup> In each case, the administrative law judge had “relied on the pre-*Endrew F.* substantive FAPE standard” while “the court addressed the same issue under the *Endrew F.* refinement.”<sup>75</sup> Professor Zirkel found that “the extent of outcomes change was limited to a

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<sup>68</sup> Schimke, *supra* note 1.

<sup>69</sup> Julie Waterstone, *Endrew F.: Symbolism v. Reality*, 46 J.L. & EDUC. 527, 530 (2017).

<sup>70</sup> Schimke, *supra* note 1.

<sup>71</sup> Aguilar, *supra* note 37.

<sup>72</sup> Allen C. Guelzo, *Statesmanship and Mr. Lincoln*, WEEKLY STANDARD (Feb. 9, 2018, 4:00 AM), <https://www.weeklystandard.com/allen-c-guelzo/statesmanship-and-mr-lincoln>.

<sup>73</sup> *Id.*

<sup>74</sup> Perry A. Zirkel, *The Aftermath of Endrew F. One Year Later: An Updated Outcomes Analysis*, 352 EDUC. L. REP. 448, 449 (2018).

<sup>75</sup> *Id.*

remand in two (4%) and a reversal in three (6%) of the forty-nine rulings.”<sup>76</sup> Thus, “in the overwhelming majority (90%) of the rulings, the outcome was unchanged from pre- to post-*Endrew F.*”<sup>77</sup> In fact, of the three reversals, one changed from finding for the student to finding for the district, and two changed from finding for the district to finding for the student.<sup>78</sup> One of these latter two cases was the remand of *Endrew F.*, itself, a finding which the Douglas County School District had appeared committed to appealing,<sup>79</sup> before ultimately deciding to settle.<sup>80</sup> Under the circumstances, Professor Zirkel was led to conclude, “at this first anniversary of *Endrew F.*, the net effect appears to have been close to negligible.”<sup>81</sup>

Indeed, back in Drew’s own school district, there had been an effort to portray the post-*Endrew F.* world as business as usual, at least until the District’s decision to settle the case after having an appeal dismissed before the Tenth Circuit.<sup>82</sup> Erin Kane, interim superintendent of the Douglas County School District at the time *Endrew F.* was decided, had assured parents in the district that she did not anticipate the opinion affecting the Douglas County School District because in *Endrew F.* the Supreme Court simply had said that the legal requirement of a “free appropriate public education” requires schools to provide “more than a *de minimis* education,” and schools in the Douglas County School District already “are dedicated to setting high standards for every one of our students.”<sup>83</sup> Stuart Stuller, the District’s lawyer in the case, meanwhile, had added that Supreme Court decisions are not “the end of the argument,” but, instead, are “the start of a new argument.”<sup>84</sup>

For all the talk of powerful, poignant, and unequivocal language, there is actually very little in *Endrew F.* to make Professor Zirkel’s findings surprising or the perspective of the Douglas County

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<sup>76</sup> *Id.* at 450.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, No. 18-1089, at 3 (10th Cir. Apr. 5, 2018).

<sup>80</sup> Schimke, *supra* note 33.

<sup>81</sup> Zirkel, *supra* note 74, at 454.

<sup>82</sup> *Endrew F.*, No. 18-1089, at 3.

<sup>83</sup> Schimke, *supra* note 1.

<sup>84</sup> Courtney Perkes, *Schools Still Winning Most Special Ed Disputes, Even After Endrew F.*, DISABILITYSCOOP (May 7, 2018), <https://www.disabilitycoop.com/2018/05/07/schools-still-winning-special-ed/25059/>.

School District seem unrealistic. In fact, there is nothing inherent in the Court's interpretation of "free appropriate public education" in *Endrew F.* that would have necessarily allowed Drew to get the education his parents ultimately chose to guarantee for him.

In *Endrew F.*, the Court was asked to clarify the meaning of a "free appropriate public education," and, in response, the Court explicitly eliminated several meanings that had been offered for this language.<sup>85</sup> The Court, however, refused either to articulate "a bright-line rule" to define a "free appropriate public education"<sup>86</sup> or even "to elaborate on what 'appropriate' progress will look like from case to case."<sup>87</sup> The Court insisted that "[i]t is in the nature of the Act and the standard we adopt to resist such an effort."<sup>88</sup>

The Court in *Endrew F.* was willing to offer that an appropriate education must be "calculated to enable a child to make progress appropriate in light of the child's circumstances,"<sup>89</sup> and that, therefore, the adequacy of an education "turns on the unique circumstances of the child for whom it was created."<sup>90</sup> The Court indicated that "for a child fully integrated in the regular classroom," this could typically be met by "providing a level of instruction reasonably calculated to permit advancement through the general curriculum,"<sup>91</sup> or an education "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."<sup>92</sup>

The Court cautioned, however, that this should not be understood to mean "that 'every handicapped child who is advancing from grade to grade . . . is automatically receiving a [FAPE].'"<sup>93</sup> The Court warned that any rule that functioned in that manner would be

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<sup>85</sup> The Court rejected the district court's belief that a free public education is "appropriate" when the district can show "a pattern of, at the least, minimal progress," *Endrew F. ex rel. Douglas F. v. Douglas County School District RE-1*, 137 S. Ct. 988, 997 (2017), and the Tenth Circuit's belief that an education is appropriate when it is calculated to confer "some educational benefit." *Id.* The Court also rejected the position advocated for Drew that an education is appropriate when it "aims to provide a child with a disability opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities." *Id.* at 1001.

<sup>86</sup> *Id.* at 1001.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 999.

<sup>90</sup> *Id.* at 1001.

<sup>91</sup> *Id.* at 1000.

<sup>92</sup> *Id.* at 999 (quoting *Board of Ed. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203-04 (1982)).

<sup>93</sup> *Id.* at 1000 n.2 (quoting *Rowley*, 458 U.S. at 203 n.25).

akin to inviting school districts to facilitate children with disabilities “sitting idly . . . awaiting the time when they were old enough to ‘drop out,’”<sup>94</sup> or by implication, allowing school districts to meet the standard by pushing students forward “from grade to grade” whether they were actually making progress or not.<sup>95</sup> The Court insisted “every child,” even those not fully integrated in the regular classroom, “should have the chance to meet challenging objectives.”<sup>96</sup>

In a further effort to clarify the ambiguity the Court had intentionally built into its standard, the Court pointed out that although its opinion might lack a bright-line rule, it was still clear that the standard in these cases “is markedly more demanding than the ‘merely more than *de minimis*’ test.”<sup>97</sup> On the other hand, the Court also pointed out, however, that the absence of a bright-line rule should not be mistaken for “an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.”<sup>98</sup> The Court stressed that when courts review educational programs proposed by school districts, they “must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal.”<sup>99</sup>

Thus, in *Endrew F.* the Supreme Court insisted that the education a district seeks to provide must be “markedly more demanding” than what would be permissible under “the ‘merely more than *de minimis*’ test.”<sup>100</sup> The Court, however, also required that in reviewing a district’s efforts, a court must consider the child’s circumstances,” and determine whether what the district is offering a child is “reasonable,” which is, needless to say, different from it being “ideal.”<sup>101</sup> In *Drew*’s case this would mean that a reviewing court would need to decide whether in light of *Drew*’s autism, ADHD, exceedingly low cognitive skills, serious behavior problems, and his pronounced sensory needs,<sup>102</sup> the District’s efforts to address his disrobing, climbing over furniture and other students, falling off furniture, hitting computers or TV screens, yelling, kicking others,

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<sup>94</sup> *Id.* at 1001 (quoting *Rowley*, 458 U.S. at 178).

<sup>95</sup> *See id.* at 1000 n.2.

<sup>96</sup> *Id.* at 1000.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 1001.

<sup>99</sup> *Id.* at 999.

<sup>100</sup> *Id.* at 1000.

<sup>101</sup> *Id.* at 999.

<sup>102</sup> *See supra* text accompanying note 41.

kicking walls, head banging, bolting from the classroom, and urinating and defecating on the floor of the “calming room”<sup>103</sup> had been reasonable. Even accepting the District’s concession that their “interventions were not effective,”<sup>104</sup> a court could conclude that those efforts had been, at the very least, reasonable. After all, what more could have been done with the circumstances with which the District had had to deal, especially given that the District had had 67,000 other students to educate?

Even if one were to accept that the opinion in *Endrew F.* necessarily and undoubtedly did entitle Drew to a remedy from the District, one could still argue that even for Drew, the law and the Supreme Court’s opinion made little difference. After all, law attempts to make, or at least influence, choices in our lives, and by the time the Supreme Court decided *Endrew F.*, the choice to educate Drew at Firefly had been made and largely lived out. If the nature of Drew’s education really had been left to the law and the navigation of the procedures that accompany it, Drew would have remained at a school in the Douglas County School District until the federal district court in 2018 finally granted him its blessing to leave. By then, Drew would have been seventeen and would have already missed out on the vast majority of the benefits to have been afforded by his free appropriate public education. At that point, the Supreme Court’s decision could well have been seen simply as an invitation to look back at an opportunity to save a child that had been lost, and once such an opportunity has been lost, it is hard for even money to buy it back. After all, how does one measure the difference in damages between a life spent falling off furniture, hitting screens, yelling, kicking others and kicking walls, and head banging<sup>105</sup> and a life spent sharing rides to school, movies and games, and peanut butter and jelly sandwiches?<sup>106</sup>

Indeed, the only reason we are not required to ponder such questions in Drew’s life is because Drew’s parents did not wait to see what the courts and the bureaucrats thought the law meant before

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<sup>103</sup> See *supra* text accompanying notes 40-53.

<sup>104</sup> See *supra* text accompanying note 58.

<sup>105</sup> See *supra* text accompanying notes 50-53.

<sup>106</sup> See *supra* text accompanying notes 1-6. For a view into the lives of children who attend Firefly and their families, see fireflyautism, *Firefly Autism HD—Josiah’s Journey*, YOUTUBE (Nov. 17, 2014), <https://www.youtube.com/watch?v=4r1JOQZGQSY>. For a short clip of Firefly founder Diane Osaki teaching an autistic child, see fireflyautism, *Firefly Autism—Diane Osaki and Noah*, YOUTUBE (Dec. 4, 2010), <https://www.youtube.com/watch?v=tKQ47vj41IU>.

moving Drew. Drew's parents moved Drew to Firefly when they determined that that was where their son had to be, and, therefore, where justice required him to be, and Drew's parents moved Drew at a risk to themselves and their family's finances. When they did so, Drew's parents acted out on a law that they understood in love. One could argue that it was that decision and that understanding of the law, rather than those of the Supreme Court, that most profoundly affected Drew's education.

Drew's father once explained, "We didn't want to take them to court. We didn't want to do any of this. But we were pushed into a corner and had to—to get what he was entitled to by law and what he needed."<sup>107</sup> Drew's parents understood that the law "entitled" Drew to be educated at Firefly even after the school district, an administrative law judge, the district court, and the Tenth Circuit had told them that it did not and even before the Supreme Court affirmed to them that it did. In addition, Drew's parents acted on that understanding of the law at a cost measured in "seven figures,"<sup>108</sup> knowing that they would probably never be reimbursed. Drew's parents did so because that was what their child "needed" them to do, and Drew's parents loved their child.

Law does not inherently do all we want it to do merely because it is law. If we want law to be "the 'palladium of our liberties, our shield, buckler and high tower,'" that which "prevents an overmighty or impatient state from oppressing a free society," and that which "prevents society from overwhelming the state by debasing liberty into anarchy,"<sup>109</sup> then that law must be an instrument of love: it must be formed out of our willingness to give up our life for that of our neighbor.<sup>110</sup> We should draw little consolation from Chief Justice Marshall's assurance that "[t]he Government of the United States has been emphatically termed a government of laws, and not of men,"<sup>111</sup> until we know the orientation of the hearts and minds of the "men" who create and implement those laws. Law is too easily manipulated, and people are too easily tempted in a world with far too much temptation for us to think otherwise. Law will work in our lives only

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<sup>107</sup> Schimke, *supra* note 1.

<sup>108</sup> Aguilar, *supra* note 37.

<sup>109</sup> See *supra* text accompanying notes 72-73.

<sup>110</sup> See *John* 15:13.

<sup>111</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

under the circumstances it worked in Drew's: the law must be an instrument of love.

Drew's story does not teach us that love should replace law in the ordering of our affairs. Rather, Drew's story teaches us that law is perfected only when it is an instrument of love. Law played a role in Drew's education, and it would have played a role even had it not been an instrument of love. It would not, however, have gotten Drew an education that afforded him a life in which he could find peace if, in his case, law would not have been an instrument of love.

Love does not supplant law that seeks after righteousness—it fulfills it. What distinguished Drew's parents' understanding of the law from that of the school district, the administrative law judge, the district court, and the Tenth Circuit is that Drew's parents loved Drew. This is not a criticism of the District or any of the other entities that played a role in Drew's education. After all, it can be hard to love one child when you are responsible for over 67,000 of them.<sup>112</sup> It is, however, an insistence that until we, as a political community, as "We the People," as that "more perfect Union,"<sup>113</sup> and as neighbors,<sup>114</sup> love children like Drew, until we embrace these children, we will not educate them. Only love looks at a student population of 67,000 students, a Per Pupil Revenue of \$7,163, a bill from Firefly for \$65,000, and a student like Drew,<sup>115</sup> and says, "We can do this for Drew; we need to find a way to do this for Drew."

Certainly there are those who, like Chief Justice Marshall, would insist that love is extraneous to a discussion of law: life is about power, and law and process are what limit the abuse of power. As noted earlier, however, law and process are hardly perfect checks on power. In fact, law and process are effective checks on power only to the degree that those who create and wield law and process place the interests of their neighbors on at least as high a plain as these creators and wielders place their own interests.<sup>116</sup>

No matter how clever one may be with words, it becomes very difficult to craft words in a way that they can limit the behavior of someone who has a strong interest in not understanding those words. Stuart Stuller's observation that Supreme Court decisions are not "the

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<sup>112</sup> *Transparency*, *supra* note 13.

<sup>113</sup> U.S. CONST. pmbl.

<sup>114</sup> *See Luke* 10:27.

<sup>115</sup> *See supra* text accompanying notes 48-58.

<sup>116</sup> *See infra* text accompanying notes 120-29.

end of the argument” but “the start of a new argument”<sup>117</sup> is reminiscent of a similar description of law offered by Edwin Armstrong, the primary inventor of the technologies utilized in FM radio.<sup>118</sup> Although every competent scientist of his era knew Armstrong to be the inventor of those technologies, the United States Supreme Court ultimately denied Armstrong his patent rights over them. In describing his experience in the legal system, Armstrong offered, lawyers “substitute words for realities and then talk about the words.”<sup>119</sup>

In his concurrence in *Griswold v. Connecticut*,<sup>120</sup> Justice Harlan considered the origins and the implications of the discussions Armstrong identified as law. In that opinion, Justice Harlan acknowledged not only the ambiguity of the words that make up law but also the ease with which these words can be abused. Indeed, Justice Harlan insisted that the notion that language exists capable of reigning in the decision making of judges is a promise that “is more hollow than real,” because one group of words “lend themselves as readily to ‘personal’ interpretations by judges” as do another.<sup>121</sup> Drafting and process have their place, but they can serve in that place only if the laws themselves have first found their foundation and their life in wisdom and values that place community before self.<sup>122</sup>

When the people of Israel came to the prophet Samuel demanding a king, the Lord instructed Samuel to warn the people that if they were to be led by a king, the day would come when “you will cry out because of your king, whom you have chosen for yourselves.”<sup>123</sup> That king “will take your sons.”<sup>124</sup> “He will take your daughters.”<sup>125</sup> “He will take the best of your fields and vineyards and olive orchards.”<sup>126</sup> He will take “your flocks”<sup>127</sup> and “the best of your

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<sup>117</sup> Perkes, *supra* note 84.

<sup>118</sup> For a discussion of the tragic intersection between the law and Armstrong’s life, see TOM LEWIS, *EMPIRE OF THE AIR: THE MEN WHO MADE RADIO* 28-30, 186-219 (1991); see also *Edwin Armstrong: The Creator of FM Radio*, FIRST ELEC. CHURCH AM., <http://fecha.org/armstrong.htm> (last visited Feb. 12, 2019).

<sup>119</sup> LEWIS, *supra* note 118, at 63.

<sup>120</sup> 381 U.S. 479 (1963).

<sup>121</sup> *Id.* at 501 (Harlan, J., concurring).

<sup>122</sup> See *id.*

<sup>123</sup> *I Samuel* 8:18 (Revised Standard Version).

<sup>124</sup> *Id.* at 8:11.

<sup>125</sup> *Id.* at 8:13.

<sup>126</sup> *Id.* at 8:14.

<sup>127</sup> *Id.* at 8:17.

cattle and your asses, and put them to his work,”<sup>128</sup> and ultimately, “you shall be his slaves.”<sup>129</sup>

It was neither an absence nor a presence of law that spurred God to warn the children of Israel as He did. Laws were nothing new to the nation of Israel. God, Himself, had created laws for them, which they had lived under since the time of Moses.<sup>130</sup> Instead, God warned the children as He did because He knew that the laws with which their earthly kings would govern them would be neither created in nor administered with love.

In contrast, the laws created by God had been created for God’s children in an act of love to serve those children. They were created by One who was both King and Father.<sup>131</sup> The laws created by their new kings would be created by people who were only their kings and not their fathers. Therefore, those laws would not be instruments of love, and, as such, those laws would come to serve the kings rather than the children.

If we saw like God, valued like God, hoped like God, and loved like God, we would govern like God. We must be careful that we always actually aspire to do all that. The temptation is to assume that we are doing it simply because we have law and process. In addition, we should not expect that we do a better job of governing by God’s love necessarily just because we govern by democracy rather than monarchy. As the Christian songwriter Rich Mullins once observed, “*democracy* isn’t necessarily bad politics, it’s just *bad math*. A thousand corrupt minds are just as evil as one corrupt mind.”<sup>132</sup>

If *Endrew F.* is to be a “game-changer,”<sup>133</sup> in the way we educate children, then the line from that opinion that we must learn to embrace is a line that instructs us that IDEA is a law whose foundation was built in love, and, therefore, whose life can be found in love: “A focus on the particular child is at the core of the IDEA.”<sup>134</sup> We “focus” on what is visible to us and on what is valuable to us, two attributes of God’s love. Therefore, a law that focuses on “the particular child” is a law that seeks to love that child.

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<sup>128</sup> *Id.* at 8:16.

<sup>129</sup> *Id.* at 8:17.

<sup>130</sup> *See, e.g., Exodus* 20.

<sup>131</sup> *See Matthew* 6:9-10.

<sup>132</sup> *Remembers Rich Mullins: October 11, 1997*, KID BROTHERS (Nov. 18, 1997), <https://www.kidbrothers.net/rmml/rmml189.html> (emphasis added).

<sup>133</sup> *See supra* text accompanying note 71.

<sup>134</sup> *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

Drew's education in the Douglas County School District ultimately broke down because Drew ceased to be visible to the District. This is not to suggest that Drew's circumstances ever ceased to be visible to the District; it is hard to imagine that they possibly could have. Seeing Drew's circumstances, however, is not the same as seeing Drew. In fact, it is likely that Drew's circumstances became so visible while he attended school in the District that those circumstances overshadowed everything else that was Drew. It was Drew's circumstances that prevented people in the District from seeing Drew. As this was expressed in the video *Mason, Cooper and Mireya's Journey*:

You can't see me, can you? You can't see how funny or caring I am or how I laugh or cry just like you, just like your kids. You can't see these things because I have autism. Since I was young, autism prevented the world from seeing these things in me, but my mom and dad see them, and so do the people at Firefly Autism. Together, they're helping me learn what comes so naturally to other people so that one day you might not see a kid who seems so different, a poor little guy, who can't control his temper, who can't seem to stop hitting himself, who can't hug or make friends, or say, "I love you."<sup>135</sup>

Drew advanced in the District from one grade to the next, year after year, although he never met the goals the District set for him. The District would set the same goals for Drew, year after year, without modification or adaptation, knowing that Drew was further from those goals in the current year than he had been at the start of the year before. The District even sought for the coming year to employ the same methods to pursue those goals that the District had employed the year before, the same methods that those working with Drew had found to be ineffective the year before. One would only respond to the needs of a child in that way if the child had ceased to be visible.

The Douglas County School District fell into a pattern of pushing Drew along from second grade to third grade to fourth grade to fifth grade, insisting Drew was getting an education that reflected

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<sup>135</sup> fireflyautism, *Firefly Autism 2015 HD—Mason, Cooper, and Mireya's Journeys*, YOUTUBE (June 5, 2015), <https://www.youtube.com/watch?v=LYxcqzVkhXs> (last visited Feb. 12, 2019).

the “high standards” the District sets “for every one of our students,”<sup>136</sup> even as Drew’s ability to function in school declined each year. The administrative law judge who oversaw the case indicated that “the District’s progress reporting was often minimal—in that many of the entries were lacking in detail or contained only conclusory statements about whether Petitioner was on target to meet the IEP goals and objectives.”<sup>137</sup>

One might wonder what would have happened to Drew if his parents had not withdrawn him from the District. At some point, Drew would have reached the twelfth grade and would have been on the brink of graduation. At that point, would Drew have had the same goals and objectives as he had in the fourth grade? Is that any different than had Drew been left to sit “idly . . . awaiting the time when they were old enough to ‘drop out’”?<sup>138</sup>

There is a scene in the movie *Super 8* where a teenage son, who has lost his mother, reminisces about what he misses most about his mom.<sup>139</sup> The boy recalls, “She used to look at me this way, like really look, and I just knew I was there, that I existed.”<sup>140</sup> The boy remembered most that he had been visible to his mother, and he had been visible to her, because she had loved him.

In *Endrew F.*, the Court observed that “[p]arents and educators often agree about what a child’s IEP should contain. But not always.”<sup>141</sup> Although the Court recognized that in this area, “disagreement arises,”<sup>142</sup> lawgivers should not be troubled by such disagreements. No one knows better than lawyers that disagreements often lead to the best decision. Such disagreements, however, should never arise because to one side or the other, the child has ceased to be visible and valuable. They should not arise because one side is seeing a child only as his circumstances,<sup>143</sup> his disabilities, “his autism, ADHD, ‘exceedingly low cognitive skills,’ serious behavior problems,

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<sup>136</sup> See *supra* text accompanying note 83.

<sup>137</sup> *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, No. 12-cv-2620-LTB, 2014 WL 4548439, at \*3 (D. Colo. Sept. 15, 2014), *aff’d*, 137 S. Ct. 988 (2017), *rev’d*, 290 F. Supp. 3d 1175 (D. Colo. 2018).

<sup>138</sup> See *supra* text accompanying note 92.

<sup>139</sup> *SUPER 8* (Paramount Pictures 2011).

<sup>140</sup> *Id.*

<sup>141</sup> *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017).

<sup>142</sup> *Id.*

<sup>143</sup> See *supra* text accompanying note 40.

and his pronounced sensory needs,”<sup>144</sup> and has forgotten that this child is not just “his circumstances” but is also someone who is “a humorous child with a ‘sweet disposition’ who ‘show[ed] concern[] for friends,’”<sup>145</sup> a child who can become someone who appreciates films and food, home and family, and learning, and who experiences joy. Such disagreements should not arise because one side has forgotten that all of that is valuable. Indeed, our law in this area can never be perfected so long as such disputes arise out of an absence of love.

## V. WHAT’S JOB GOT TO DO WITH IT?

Job was a man with a large family, great wealth, and good friends.<sup>146</sup> Indeed, Job was so richly endowed in all these areas that Job was regarded as “the greatest of all the people of the east.”<sup>147</sup> Job, however, was more than just a great and wealthy man: Job was also “a blameless and upright man,”<sup>148</sup> the kind of man “who fears God and turns away from evil.”<sup>149</sup>

Satan appeared one day, before the throne of God, after “prowl[ing] about the world seeking the ruin of souls,”<sup>150</sup> and God, for some reason, chose on that day to direct Satan’s attention to Job.<sup>151</sup> Satan, for his part, seized this opportunity and invited God into a kind of wager over the depth of Job’s faithfulness.<sup>152</sup> As part of this wager, God placed all that Job had<sup>153</sup> and even all that Job was<sup>154</sup> in Satan’s power. For his part Satan then set off to create sufficient desolation in Job’s life that Job would “curse [God] to thy face.”<sup>155</sup>

Satan, needless to say, exploited this opportunity to the fullest. Under Satan’s power, Job’s servants were killed,<sup>156</sup> Job’s livestock

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<sup>144</sup> See *supra* text accompanying note 41.

<sup>145</sup> See *supra* text accompanying note 39.

<sup>146</sup> Job 1-2 (Revised Standard Version). All versions of the Bible cited to below are to the Revised Standard Version.

<sup>147</sup> *Id.* at 1:3.

<sup>148</sup> *Id.* at 1:8.

<sup>149</sup> *Id.*

<sup>150</sup> *Prayer to Saint Michael the Archangel*, EWTN, <https://www.ewtn.com/devotionals/prayers/michael.htm> (last visited Feb. 12, 2019).

<sup>151</sup> Job 1:8 (“Have you considered my servant Job?”).

<sup>152</sup> *Id.* at 1:9-12.

<sup>153</sup> *Id.* at 1:12.

<sup>154</sup> *Id.* at 2:6.

<sup>155</sup> *Id.* at 1:11. See also *id.* at 2:5.

<sup>156</sup> *Id.* at 1:15.

were stolen,<sup>157</sup> Job's seven sons and three daughters were all crushed in a storm and died,<sup>158</sup> Job's body broke out in "loathsome sores from the sole of his foot to the crown of his head,"<sup>159</sup> Job's friends falsely condemned him,<sup>160</sup> and Job's wife broke down and called on Job to "Curse God, and die."<sup>161</sup>

As Job, subsequently, sat silently among the ashes for days, scraping his sores with a piece of broken pottery<sup>162</sup> while his friends prattled on and on for more than twenty chapters about how Job must have been wicked after all,<sup>163</sup> Job insisted he was still blameless, and Job insisted he had received "evil" "at the hand of God."<sup>164</sup> Needless to say, in the midst of so much suffering and droning, Job longed for justice. Job longed for his rights under the law to be vindicated. Job longed for the process he was due.<sup>165</sup> The almighty lawgiver, however, remained throughout this time noticeably silent and noticeably absent.

When Job's god finally did show up, it was not to engage in legal analysis or in response to Job's right to be heard. It was to remind Job of the awesome power of Job's god, a god whose voice "thunders," whose mighty arm casts down the proud,<sup>166</sup> and whose feet "tread down the wicked where they stand."<sup>167</sup> Confronted by such a god in full anger, Job acknowledged his ignorance,<sup>168</sup> Job abandoned his insistence on being heard, Job returned to the "dust and ashes," and Job "despised" himself.<sup>169</sup>

This story of Job resembles the story of Job one finds in the *Bible*.<sup>170</sup> It is, however, not that story. It is not that story because this story contains a different god from the one found in the *Book of Job*. The god in this story does not love Job, and, thus, to this god, Job is neither visible nor valuable. That makes this story particularly

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 1:18-19.

<sup>159</sup> *Id.* at 2:7.

<sup>160</sup> *See, e.g., id.* at 2:4-5.

<sup>161</sup> *Id.* at 2:9.

<sup>162</sup> *Id.* at 2:8.

<sup>163</sup> *Id.* at 2:4-25.

<sup>164</sup> *Id.* at 2:10.

<sup>165</sup> *Id.* at 13:3 ("But I would speak to the Almighty, and I desire to argue my case with God.").

<sup>166</sup> *Id.* at 40:12.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 42:3 ("Therefore I have uttered what I did not understand.").

<sup>169</sup> *Id.* at 42:6.

<sup>170</sup> *See generally Job.*

disquieting: the Almighty Lawgiver, Controller of the Consequences of our Choices, does not see us nor hear us nor value us.

In our human condition, conditioned as we are to expect that our gods and kings will only be kings and never fathers, we are tempted to impose upon the true God of Job, the loving God of Job, the less than noble attributes we have experienced through our earthly kings. In such moments, we are tempted to replace the story of Job to be found in the *Bible* with the story of Job shared here. We are tempted to believe that Job's God could reduce one of His children to nothing more than a pawn in a celestial board-game between Himself and Satan. We are tempted to accept that Job's God could allow Job to suffer for no reason, that there could be a moment during which that God could forget about Job and not hear Job's voice, and that that God's answer to the cries of the poor could be captured in a response like "Shall a faultfinder contend with the Almighty?"<sup>171</sup> We are tempted to believe that Job's God could encounter one of His children and, in the wake of that encounter, leave that child to "despise" himself in "dust and ashes."<sup>172</sup>

Having seen the God of the real story of Job, however, the Jewish people, when they subsequently encounter the God of Jonah, still see "a gracious God and merciful, slow to anger, and abounding in steadfast love, and repentest of evil."<sup>173</sup> The Jewish people are able to do this, because they understand that there is only one God, and He "do[es] not change."<sup>174</sup> Therefore, the God of Job must be the God of all the prophets, and, therefore, the God of Job is both king and Father, a powerful God, but still a God of love, a God to whom Job is always visible and always valuable.

True, this God may for a time appear to break ties with Job; yet, through it all, His covenant with Job is "everlasting."<sup>175</sup> He may "put the fear of [God] in their hearts," but it is only to make sure that Job "will never turn away from [God]."<sup>176</sup> Job's God, appearances aside, rejoice[s] in doing [Job] good," for, ultimately it is only "in

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<sup>171</sup> *Id.* at 40:2.

<sup>172</sup> *See supra* text accompanying notes 24, 169.

<sup>173</sup> *Jonah* 4:2.

<sup>174</sup> *Malachi* 3:6.

<sup>175</sup> *Jeremiah* 32:40.

<sup>176</sup> *Id.* at 32:40, 32:41.

doing [Job] good,” that Job’s God “rejoices.”<sup>177</sup> This is a God who is “just in all his ways, and kind in all his doings.”<sup>178</sup>

The god of Job in the story presented here could not be the God of the other Jewish prophets. A god who would turn Job over to Satan and then wash His hands of Job is not the God of Isaiah who has engraved us “on the palms of [His] hands.”<sup>179</sup>

A god who could be coaxed into giving over one of his children on a wager or a whim or even a dare is not the God of Jeremiah, who is always attentive to the plans He has for us—“plans for . . . a future and a hope.”<sup>180</sup>

A god who would reduce one of his children to nothing more than a pawn in a celestial board-game between himself and Satan is not the God of Abraham who has a plan for our lives as beautiful as all the stars in the heavens,<sup>181</sup> a plan that extends out generations and remains always attainable to that God even when that plan seems laughable to us.<sup>182</sup>

A god who could remain indifferent or inattentive as his child’s ravaged body lay in the ashes is not the God of Moses who promised He “will not fail [us] or forsake” us.<sup>183</sup>

A god who could ignore his child’s pleas to be heard for twenty chapters is not the God of the Psalmist, who hears the cries of both the poor and the righteous, and “delivers them out of all their troubles.”<sup>184</sup>

Understanding the real story of Job that appears in the *Bible* turns on remembering that the Lord takes “no pleasure in the death of the wicked, but that the wicked turn from his way and live,”<sup>185</sup> and that He “does not willingly afflict or grieve the sons of men.”<sup>186</sup> Certainly the heart of Job is pierced even in the real story, but Job’s heart is not pierced for no reason. Job’s heart is “pierced” so “that thoughts out of many hearts may be revealed.”<sup>187</sup> Job, in the real story, is not a pawn in a celestial board-game between himself and Satan. Instead, Job is

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<sup>177</sup> *Id.* at 32:41.

<sup>178</sup> *Psalms* 145:17.

<sup>179</sup> *Isaiah* 49:16.

<sup>180</sup> *Jeremiah* 29:11.

<sup>181</sup> *Genesis* 15:5.

<sup>182</sup> *Id.* at 18:12.

<sup>183</sup> *Deuteronomy* 31:6.

<sup>184</sup> *Psalms* 34:17.

<sup>185</sup> *Ezekiel* 33:11.

<sup>186</sup> *Lamentations* 3:31.

<sup>187</sup> *Luke* 2:35.

an instrument in the hands of God being wielded for the salvation of His friends.

As Aretha Franklin might put it, the encounter between God and Satan in the *Book of Job* is a case of “who’s zoomin’ who.”<sup>188</sup> While Satan believes that he and God are playing for the destruction of Job, God knows that they are really playing for the salvation of Job’s friends, who have become separated from God by their own understandings, pride, and blindness.<sup>189</sup> Only by confronting Job’s three friends with Job’s desolation is God able also to confront them with their own false sayings,<sup>190</sup> and, thus, their arrogance, cruelty, and inability to comprehend the true nature of God. After God has successfully exposed their brokenness and primed their hearts for healing, God affirms to the three friends Job’s role as His instrument in their salvation in three ways. God does so first by referring to Job in His conversations with the three friends exclusively as “my servant Job”; four times in two sentences God refers to Job, and each time God does so as “my servant Job.”<sup>191</sup> Second, to restore the relationship between themselves and God, God requires the three friends to offer their sacrifices through Job and to seek Job’s prayer for God “not to deal with you according to your folly.”<sup>192</sup> Third, God assures the three friends that God “will accept [Job’s] prayer” for them, and, indeed, God did “accept[] Job’s prayer.”<sup>193</sup> Thus, Job’s suffering and then his prayers are the channel through which God’s redeeming grace is able to flow over Job’s friends. In the real story, God does not forget Job; instead, Job’s God pursues his other children, and God brings them home.

Even in Job’s own life, God ultimately makes all of this “work[] for good”<sup>194</sup> once Job “had prayed for his friends.”<sup>195</sup> “The Lord restored the fortunes of Job,” “gave Job twice as much as he had before,” and “blessed the latter days of Job more than his beginning,” even restoring to Job “seven sons and three daughters,” the same

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<sup>188</sup> ARETHA FRANKLIN, WHO’S ZOOMIN’ WHO (Arista 1985).

<sup>189</sup> *Proverb* 3:5 (“Trust in the Lord with all your heart, and do not rely on your own insight.”).

<sup>190</sup> *Job* 42:7.

<sup>191</sup> *Id.* at 42:7-8.

<sup>192</sup> *Id.* at 42:8.

<sup>193</sup> *Id.* at 42:9.

<sup>194</sup> *Romans* 8:28.

<sup>195</sup> *Job* 42:10.

number and distribution of children that Job had had before.<sup>196</sup> Even more, however, through Job's suffering and then intimate encounter with God, Job's relationship with God is brought closer to God. Job is transformed from one who only "had heard of thee by the hearing of the ear," into one "now [whose] eye sees thee."<sup>197</sup>

In the end, Job never gets his hearing, his due process, but God still heard and listened to every word of Job. The law guarantees process to make sure people get heard, but being heard is different from being listened to. Fortunately for Job, when one's God is also one's loving Father, one can rest assured that just because one does not have his hearing or does not hear his God, that doesn't mean His God is not listening. When Job got law created and administered in love, what Job got was more than the process he had sought.

There is a story about a law and a man who was robbed, stripped, beaten, and left "half dead" by the side of the road.<sup>198</sup> It is a story that was shared with a lawyer who was "desiring to justify himself,"<sup>199</sup> and believed he could do so by his manipulation of words.<sup>200</sup> In the story, people come upon the broken man lying by the side of the road, cross over to the other side, which, of course, makes the bleeding man less visible, less accessible, and then pass the man by.<sup>201</sup> The law in the story is to love "your neighbor as yourself."<sup>202</sup>

Finally, a man, a Samaritan, comes along who views the bleeding man with "compassion,"<sup>203</sup> extravagantly even recklessly so, because this Samaritan not only binds up the bleeding man's wounds, but also pours "oil and wine" on them,<sup>204</sup> and then the Samaritan puts the bleeding man "on his own animal," brings "him to an inn" and cares for him there.<sup>205</sup> Ultimately the Samaritan continues on his way, but before he does, he makes sure that the man will be cared for "whatever" the cost.<sup>206</sup>

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<sup>196</sup> *Id.* at 42:10, 12-13.

<sup>197</sup> *Id.* at 42:5.

<sup>198</sup> *Luke* 10:30.

<sup>199</sup> *Id.* at 10:29.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 10:31-32.

<sup>202</sup> *Id.* at 10:27.

<sup>203</sup> *Id.* at 10:33.

<sup>204</sup> *Id.* at 10:34.

<sup>205</sup> *Id.* at 10:33.

<sup>206</sup> *Id.* at 10:35.

Each person in the story who passed by on the other side of the road found an exception to the rule, an exception which could accommodate his schedule, his agenda, his resources, his responsibilities, his priorities, and his proprieties. The lawyer with whom the story was shared found ambiguity in the language of the rule.<sup>207</sup> Only one person, however, found a way to use the rule to heal the man who lay bleeding by the side of the road, and that person was the man who loved him.

In the beginning of his story, Job thought that if he could just get enough process or enough law or the right law, he could still get a right outcome, even in a wrong world. I wonder if we think the same for Drew and children like him: that if we just give them enough process, enough law, that we can get them the right outcome, even in a world that doesn't see them or seem to value them.

Perhaps, there is a change in policy, procedure, or perspective that will save all the children. Certainly, there should be. Failing that, maybe all who make law could take it upon themselves to do so in a manner that sees like God, values like God, hopes like God, and loves like God. If they did so, perhaps they would govern like God, and we would trust in them, and all things would be made "for good."<sup>208</sup> This would not be a call simply for judges to do what they want to repair whatever laws they see as broken. Judges are to seek in their application of the law the intent of the law. Instead, it would be a call to all who make and apply law to do so in the image and likeness of God.

Until we encounter either of those options, however, perhaps it is best that we do what Drew's parents did: embrace each child we encounter on our journey, use the law and our lives to love them, one at a time, as best we can, and always resist the temptation to identify a reason that allows us to cross over to the other side of the road.

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<sup>207</sup> *Id.* at 10:29.

<sup>208</sup> *Id.* at 8:28.