Marquette Law Review

Volume 81
Issue 2 *Winter 1998: Symposium: Religion and the Judicial Process: Legal, Ethical, and Empirical Dimensions*

Article 4

1998

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LEGAL DISCOURSE AND THE *DE FACTO* DISESTABLISHMENT

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A little over a decade ago, Kent Greenawalt initiated a debate that has flourished even since; the debate centers on the claim that it is improper, or perhaps even unconstitutional, for government officials such as legislators and judges, and possibly for citizens, to rely on their religious convictions in making political decisions.[1] I do not intend to enter into the merits of that debate here, or to question whether the debate as typically framed is a meaningful one; but, I will be interested in its cultural significance. More specifically, I think that perhaps without quite intending to, Greenawalt effectively called attention to a very important feature of our legal culture—one that had gone mostly unnoticed and that is still largely underappreciated. I call this feature the *de facto* disestablishment.

In his classic study, *The Garden and the Wilderness*,[2] Mark DeWolfe Howe described a "*de facto* establishment"[3]—an unofficial but powerful privileging of religion in some aspects of our public culture that persisted despite the formal disestablishment of religion. The phenomenon I am interested in here is in a sense the converse of the one described by Howe—an informal or *de facto dis*establishment of religion. This *de facto* disestablishment is different than, and much more sweeping in its effects than, the formal disestablishment jurisprudence that is explicitly invoked in judicial opinions and lawyers' briefs. The *de facto* disestablishment operates mostly *sub silentio*, yet it powerfully influences legal thinking—and thus judicial decision-making—in a variety of ways and

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1. Although this debate has become voluminous, some of the seminal contributions have included KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988); MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS (1991); and Symposium, *The Role of Religion in Public Debate in a Liberal Society*, 30 SAN DIEGO L. REV. 849 (1993).

2. MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS 11 (1965)

3. *Id* at 11.

on a whole range of issues, many of which few people connect to the religion clauses at all. So insofar as we focus on controversies in which the establishment clause is explicitly invoked, we overlook the most significant aspects of religious disestablishment in this country.

For clarification, let me make two preliminary points. First, in describing this phenomenon as the "converse" of Howe's *de facto* establishment, I don't mean to disagree with Howe's assertion. As a historical matter there surely has been, and in some respects may still be, a *de facto* establishment of religion.[4] A critic might object that we could not have both a *de facto* establishment and a *de facto* disestablishment at the same time without experiencing terrible cultural and legal confusion. The observation seems plausible, but I think it also serves more to confirm than to refute my diagnosis.

Second, I make no claim to having *discovered* the *de facto* disestablishment. Although the phenomenon is conceived in different ways, its bare existence is by now well-known. What is *not* much appreciated, I think, is the influence, or the pervasive reach, of the *de facto* disestablishment. I will thus spend only a little time giving reasons for believing in the reality of the phenomenon, and more time discussing its scope and its consequences for legal discourse.

I. THE "RELIGIOUS CONVICTIONS" DEBATE AND THE *DE FACTO* DISESTABLISHMENT

Although the "de facto" disestablishment has apparently been in force for some time, perhaps even in some form from the founding period,[5] it became clearly manifest in the "religious convictions" debate initiated by Greenawalt. One striking fact about that debate, I think, is that it took so long to happen. In a society that researchers continually

4. *See* Theodore Y. Blumoff, *The New Religionists' Newest Social Gospel: On the Rhetoric and Reality of Religions' "Marginalization" in Public Life*, 51 U. MIAMI L. REV. 1, 6 (1996) (asserting that "'God-talk' enjoys a robust and seeming omnipresence in our public life"). In addition, Blumoff argues:

> Religious leaders in the last two decades have bathed in the luster of the political limelight, advising Presidents and legislatures, expanding for the foreseeable future the accepted range of public responses to emotionally charged moral/religious issues, tugging the entire political spectrum far to the right during the 1980s and 1990s, and defining party platforms and politics.

Id. at 4.

5. As a historical matter, religion has played a major role in our politics from the beginning, but there has also been a prominent theme to the effect that religion should *not* influence politics. *See* Michael E. Smith, *Religious Activism: The Historical Record*, 27 WM. & MARY L. REV. 1087 (1986).

find to be pervasively religious,[6] it is hard to imagine a more vital question in constitutional law or applied political philosophy. Indeed, if it is true that our society is pervasively religious but that religious belief cannot properly be the basis of political decisions, then many citizens might be effectively disenfranchised to one degree or another.[7] Yet it was not until almost two centuries after the Constitution was adopted and four decades after the Supreme Court actively involved itself in issues of religion that the question whether religious beliefs could be the basis of governmental decisions became the focal point of debate, and thus the subject of sustained discussion. Before that time, scholars like John Rawls and Bruce Ackerman had touched on the question, but more casually or as an incident to the discussion of some other concern.[8]

Yet the surprising lack of sustained attention to the question did not mean, I think, that scholars and judges were either oblivious to or uninterested in the question. It showed, rather, that they took the answer to the question largely for granted, though in different directions. Reflecting on his own earlier presuppositions, Greenawalt explained that in part due to his religious upbringing and to his early interest in the thought of Reinhold Niebuhr, he had long assumed that citizens and officials in a liberal democracy like ours *could* properly rely on their religious beliefs.[9] Other scholars had evidently assumed just the opposite. Indeed, my sense is that despite a decade of searching debate, most scholars and judges still confidently indulge largely unexamined assumptions about whether lawmakers and judges may permissibly rely on religious beliefs.

Let me mention just two recent instances that support this impression. At the AALS Law and Religion section discussion held in San Antonio in January 1996, Michael McConnell and Bruce Ackerman took sharply opposed positions on this question. With passion and eloquence, McConnell favored—and Ackerman opposed—permitting reli-

6. *See infra* notes 35-38 and accompanying text.

7. Douglas Laycock observes that the position that holds religious arguments inadmissible in a democratic political culture amounts to "a futile attempt at a coup d'etat, in which secularists would get to silence everybody on the religious side of the spectrum." Douglas Laycock, *Freedom of Speech that is Both Religious and Political*, 29 U.C. DAVIS L. REV. 793, 799 (1996). *Cf.* Edwards v. Aguillard, 482 U.S. 578, 615 (1987) (Scalia, J., dissenting) ("Our cases in no way imply that the Establishment Clause forbids legislators merely to act upon their religious convictions .... To do so would deprive religious men and women of their right to participate in the political process.").

8. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 212-13 (1971); BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 110-11, 352-53 (1980).

9. GREENAWALT, *supra* note 2, at vii-viii.

ance on religious beliefs.[10] Significantly, though, each scholar saw himself as speaking for the long-settled consensus of American political culture—one that until recently would have needed little explicit justification—and each portrayed his opponent (with complete sincerity, I believe) as someone seeking to disrupt this consensus. I think that both McConnell's and Ackerman's cultural assumptions were probably right to a degree;[11] and to the extent that Ackerman's thinking is representative, it is an expression of the *de facto* disestablishment.

As a second example, let me describe a brief exchange that occurred at a conference held last fall at the school where I teach, the University of Colorado, concerning the recent case of *Romer v. Evans*,[12] in which the Supreme Court invalidated Colorado's Amendment 2, a sort of anti-gay rights measure. Arguing in support of the Court's decision and against the earlier decision in *Bowers v. Hardwick*,[13] one well-known constitutional scholar and legal theorist who teaches at one of the country's leading law schools maintained that laws criminalizing consensual adult homosexual conduct cannot pass even a "rational basis" test. Of course, the "rational basis" test has sometimes been thought to be so innocuous that it is almost impossible for a law to fail that test. So in a question-and-answer session, someone asked whether widespread social disapproval could not count as at least a rational basis for regulating homosexual conduct. No, the speaker replied, because on this issue, social disapproval is grounded in religious belief, and in this country religious belief cannot provide a legitimate basis for law. To me, what was interesting in this exchange was not that a prominent scholar would reach this conclusion (which many scholars no doubt share), but rather that he evidently regarded the point as so obvious that it did not require discussion or justification—or even, except when prompted by a question, mention. The illegitimacy of laws based on moral judgments grounded in religion apparently went in the category of "It goes without saying . . . ."

What these incidents reveal, once again, is the existence of a "*de facto* disestablishment." The Supreme Court has never quite *said* that the establishment clause precludes citizens or officials from relying on their religious beliefs in making political decisions; nor, I think, is the Court likely to say this—not explicitly, at least. Such a doctrine would

10. Greenawalt also participated in the debate, advocating an intermediate position.
11. *See* Smith, *supra* note 5.
12. 116 S. Ct. 1620 (1996).
13. 478 U.S. 186 (1986).

be tremendously unpopular and practically unworkable; moreover, existing religion clause doctrine is replete with fictions and easy-access evasions[14] that should permit the Court to avoid saying any such thing. Nonetheless, many scholars—and presumably, many lawyers and judges and other officials—take such a restriction for granted.

There are different ways of accounting for this *de facto* disestablishment. One might think of the *de facto* disestablishment as a sort of emanation of the written establishment clause, or perhaps as a consequence of something "implicit in the concept of ordered liberty."[15] Or, one can think of it as the product of a second, much more capacious disestablishment clause that was adopted sometime around 1870, or perhaps in the 1940s, or maybe in the 1960s when the movement to overturn the controversial school prayer decisions fizzled out. The second clause is not written anywhere in the Constitution, of course, but that need be no more than a minor embarrassment; a similar difficulty has not prevented acknowledgment of the "right of privacy," for example, or of Bruce Ackerman's transformative "activist state" amendment that was adopted on the sly—indeed, unbeknownst to everyone—in 1937.[16] Or one might think of the *de facto* disestablishment not in terms of constitutional law but of a political morality that obligates even when it is not judicially enforceable.

Since the *de facto* disestablishment operates mostly beneath the surface of the law, and since not everyone recognizes it at all, its exact boundaries are difficult to map out. Still, I want to try to chart its geography, at least in a rough way, by describing four strata or zones of religious disestablishment, starting at the core and moving outward. I will discuss the first three zones quickly so that I can concentrate on the fourth zone. This last zone is the least conspicuous—it is the area in which we are least likely to perceive the effects of religious disestablishment—but I suspect that it is also the area in which the effects of the *de facto* disestablishment are most pervasive and important. (I might

14. Such a restriction might be inferred from the "secular purpose" requirement of the *Lemon* test. But even if the *Lemon* test remains in force as a statement of doctrine, *see infra* note 23, both terms—"secular" and "purpose"—are deeply ambiguous in ways that should permit the Court to avoid making highly unpopular categorical pronouncements. *See* Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 999-1007 (1989) (discussing essential ambiguity in the concept of the "secular"); Steven D. Smith, *Free Exercise Doctrine and the Discourse of Disrespect*, 65 U. COLO. L. REV. 519, 550-57 (1994) (discussing fictional and manipulable character of legislative purpose or motivation).

15. Palko v. Connecticut, 302 U.S. 319, 324-25 (1937).

16. *See* BRUCE A. ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

add that the fourth zone is also the one most directly pertinent to the subject of this conference.)

II. ZONES OF RELIGIOUS DISESTABLISHMENT

The first zone of religious disestablishment encompasses what we might think of as the core establishment clause prohibitions and the paradigmatic church-state controversies. The core prohibitions are approximately those that were stated (or perhaps overstated) in *Everson v. Board of Education*.[17] "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."[18] And so forth. The paradigmatic controversies involve matters like aid to parochial schools, prayer in the public schools, public holiday displays containing nativity scenes or menorahs, and similar issues.

These are clear establishment clause concerns—clear not in the sense that they were the sort of things the enactors of the establishment clause had in mind,[19] nor in the sense that we can confidently predict how they will be resolved in any particular case, but rather in the sense that we know they *will* elicit establishment clause pronouncements and we know the words and phrases that those pronouncements will probably contain. There are suitable entries in the Book of Common Constitutional Prayer—for either side of each issue, of course—that will predictably be recited on the occasion of such controversies. The organizations receiving state assistance are, or are not, "pervasively religious." The aid provided to parochial schools is, or is not, sanitized by the purifying medium of parental choice. A "reasonable" or "objective" observer would, or would not, perceive endorsement of religion. And so forth.

A second zone of disestablishment covers controversies that are not paradigmatic but that clearly involve religion or religious institutions. For example, a church member involved in a relationship not solemnized by marriage is chastised by the church's elders and decides to leave the religion. The elders, consistent with the church's understanding of scriptural requirements, announce the withdrawal to their congregation by reading from the pulpit the scripture describing the former

17. 330 U.S. 1 (1947).

18. *Id.* at 15.

19. *See* STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 17-54 (1995).

member's sexual offense. Has the church committed a legally redressable tort?[20] Or a juror in a criminal case prays and receives a revelation indicating that the defendant is guilty; is the conviction reversible?[21] It is natural to think that these cases raise religion clause issues, but they do not easily conform to the paradigm cases, and it is hard to know just how to fit them into prevailing doctrinal frameworks. Not surprisingly, the courts that deal with these cases evince a good deal of uncertainty, not just about what the proper outcome is—*that* sort of uncertainty is rampant even in the paradigm cases—but about how to approach the issues or how to set up the analysis.

In describing these cases as belonging to a second zone, I do not mean to imply that there is any clear or fixed line between the first and second layers of disestablishment. Cases presenting novel issues might initially fall into the second zone, but as the issues recur and the analysis becomes routinized, they might move into the first zone. Conversely, if an established doctrine like the *Lemon* test falls into disfavor or disuse,[22] what were once paradigm cases subject to a stock analysis might slip into the second zone. Though for simplicity I have talked about layers or zones, the reality is probably more of a continuum.

A third zone, in which the influence of religious disestablishment works largely but not entirely beneath the surface of the law, is what one might call the domain of roving libertarianism. This is the zone where our erratic, half-hearted constitutional commitment to libertarianism converges with our erratic, half-hearted proscription of religious beliefs in political decision-making to produce a somewhat less erratic, somewhat more whole-hearted (three-quarters-hearted, maybe?) prohibition against particular instances of apparent paternalism. To put it differently, if the Constitution does not enact Herbert Spencer, neither does it enact John Stuart Mill; but we *do* seem to carry on a sort of active flirtation with Mill's ideas. And the same person who will scorn what he views as simple-minded libertarian objections to one sort of paternalistic measure—Social Security, maybe, or drug regulations, or seat belt requirements—may suddenly and passionately deploy the same kind of simplistic rhetoric ("What right do you have to impose your values on everyone?") when the issue changes to abortion, euthanasia, laws

20. *See* Guinn v. Church of Christ, 775 P.2d 766 (Okla. 1989).

21. *See* State v. DeMille, 756 P.2d 81 (Utah 1988).

22. For contrasting views about whether the *Lemon* test is still in force, *compare* Suzanna Sherry, Lee v. Weisman: *Paradox Redux*, 1992 SUP. CT. REV. 123, 131 (no), *with* Daniel O. Conkle, *Lemon Lives*, 43 CASE. W. RES. L. REV. 869, 874 (1993) (tentative yes).

disfavoring homosexual conduct, or the regulation of obscenity.

What accounts for these sudden reversals? The question is complicated, probably, but I suggest that an overall explanation would prominently feature the *de facto* disestablishment. The language of libertarianism has an old intimacy with the rhetoric of religious freedom—which is hardly surprising, considering that libertarianism developed in part as a component of the attack on religious establishments.[23] Thus, in opposing state-established religion, Thomas Jefferson famously employed a frankly libertarian argument: "The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods, or no God. It neither picks my pocket nor breaks my leg."[24] Much writing since then, both in scholarly journals and student papers, reflects the same cozy commingling of rationales.

One consequence of this long-standing partnership is that, even in contemporary discussions, people arguing for libertarian positions on particular issues sometimes find it convenient to ground their arguments largely in assumptions about religious disestablishment. For the occasion these people can sound like Roger Williams or Madison's *Memorial and Remonstrance.* On the other side, people arguing that religious beliefs cannot serve to justify particular laws sometimes sound, at least for the occasion, like libertarians who have looked but found no pocket-picking going on. Ronald Dworkin's arguments about abortion and euthanasia are an example of the first phenomenon;[25] I think that Kent Greenawalt's discussion of laws regulating sexual conduct is an example of the second.[26]

To be sure, a critical reader may find this mixing of positions frustrating. Why should otherwise suspect libertarian arguments become respectable just because they are made in a context that has the aura of religion? And why should religiously-grounded moral values (which seem perfectly acceptable when directed to the enactment of, say, civil rights laws or welfare legislation) suddenly become illegitimate when associated with laws that may be viewed as paternalistic—that is, if the Constitution does not forbid paternalism? In other words, on the assumption that neither the libertarian argument nor the disestablishment

23. *See* JOHN STUART MILL, ON LIBERTY 66 (Gertrude Hill ed., Penguin books 1974).

24. THOMAS JEFFERSON, *Notes on Virginia, in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 187, 275 (Adrienne Koch & William Peden eds. 1944).

25. RONALD M. DWORKIN, LIFE'S DOMINION (Vintage ed. 1994).

26. *See* GREENAWALT, *supra* note 1, at 88-97.

argument would be broadly persuasive if considered in isolation, why do two defective arguments add up to a compelling case?

My concern here, however, is not with the validity of these arguments, but rather with their significance in our legal culture. And it seems to me that, logical or not, our selective libertarianism is a reflection of the *de facto* disestablishment. As a general matter, paternalistic measures are not regarded as unconstitutional. But they *are* unconstitutional—or, more accurately, many people will say they are, and the courts are much more likely to agree—if a measure is tainted with the suspicion of religious motivation. Thus, *Romer v. Evans*[27] did not formally turn on the establishment clause, but I think it was a *de facto* disestablishment case (as under the prompting of questioning the speaker at the Amendment 2 conference in effect acknowledged). And the appellate decisions invalidating assisted suicide laws in Washington and New York cannot be understood simply in terms of their official due process or equal protection rationalizations;[28] they too at bottom are *de facto* disestablishment cases.

The fourth zone of religious disestablishment is the zone of common law or, more broadly, of nonconstitutional judicial decisions. As we have moved from the first to the second and then third zones, the influence of establishment clause doctrine on legal discourse becomes progressively less conspicuous. In the fourth zone, the outward evidence of religious disestablishment practically disappears. What does the disestablishment of religion have to do, after all, with the common law of contracts, torts, and property? My claim, though, is that the *de facto* disestablishment is especially influential in this domain. The claim requires closer attention to this fourth zone.

III. RELIGIOUS DISESTABLISHMENT AND THE COMMON LAW

A. The Puzzling Absence of Religion in Legal Discourse

To begin with, let me ask you to consider a feature of our legal culture that may seem familiar and thoroughly unremarkable, but that ought to be deeply puzzling. The feature that I have in mind is the virtual absence of "religion"—that is, of religious authorities, and of ideas and perspectives that we associate with "religion"—in the law school

27. 517 U.S. 620 (1996).

28. Compassion in Dying v. Washington, 79 F.3d 790 (9th Cir. 1996), *rev'd*, Washington v. Glucksberg, 117 S. Ct. 2302 (1997); Quill v. Vacco, 80 F.3d 716 (2d Cir. 1996), *rev'd*, Vacco v. Quill, 117 S. Ct. 2293 (1997).

curriculum and in legal discourse generally. When I was a law student at Yale in the late 1970s, I searched the catalogue for some course that would focus on the interaction of law and religion, and found nothing.[29] If I remember correctly, in one particular semester the law school offered four different courses concerned with freedom of speech—but nothing, so far as I could tell, on the religion clauses. Things change, of course, and by now, religion is probably more of a presence in law school offerings, at least at many schools. But the important point is that even when religion *is* considered, it typically appears more as a sort of specialty item or distinctive kind of problem, *not* as a valuable way of thinking about law and legal issues generally.

Thus, the typical law school today will likely offer a two-credit course on the religion clauses, or perhaps on "law and religion." A jurisprudence class might deal briefly with religion in connection with natural law, if only to consider the natural lawyer's claim that natural law does *not* depend on religious faith.[30] Cases involving churches or religious believers might appear in other courses. In the torts class I teach, for example, religion tends to be discussed for maybe five or ten minutes per semester in connection with questions such as whether the avoidable consequences doctrine means that a Christian Scientist who is injured must either seek conventional medical assistance or be precluded from recovering full damages. The casebook has no primary cases on this subject, but it does contain a note paragraph that briefly mentions the central issue and cites some authorities that curious students might look up.[31]

Notice that in these instances, religion is not viewed as a resource or a potentially helpful approach to understanding the day-to-day issues of law. Thus, the law curriculum's use of religion differs categorically from its use of economics, for instance, or moral and political philosophy, or feminist or critical race theory, or history, or (more occasionally) literary theory or sociology or psychology. By-and-large, religion is deemed significant and worthy of the law's attention not because it provides potentially valuable perspectives or helpful insights, but because it consti-

29. To be accurate, I should say that although I did not know it (and also did not succeed in being admitted to the limited enrollment course), Robert Cover's seminar on "Myth, Law, and History" might have answered this description.

30. *See, e.g.*, PHILLIP E. JOHNSON, *Some Thoughts about Natural Law*, 75 CAL. L. REV. 217, 226 (1987); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 49 (1980).

31. MARC A. FRANKLIN & ROBERT L. RABIN, TORT LAW AND ALTERNATIVES: CASES AND MATERIALS 403 (6th ed. 1996).

tutes a special kind of problem for the law.[32]

At least so far as the law school curriculum is concerned, then, John Garvey's comparison of religion to insanity seems apt.[33] And the neglect of religious perspectives, or of religion as a possible resource, persists in the discourse of legal practice; there is little evidence of religious ideas in the typical lawyer's brief or judicial opinion.

I propose that this phenomenon presents a puzzle that deserves some explanation. Why is it that religion is so conspicuously absent from legal discourse? A colleague for whom religious faith is not a live option has sometimes assured me that there is no mystery here. (What puzzles *him* is *my* puzzlement.) There is little evidence of religion in legal discourse, he thinks, because by-and-large people just do not believe in religion anymore. We do not use or cite religion in law for the same reason that we do not often use or cite the philosophy of Mao or Ayn Rand; it is not that they are not speaking to our questions, but only that most of us don't find what they say to be plausible or illuminating.

But this account seems at odds with the relevant evidence. Repeated surveys and sociological studies suggest that our society continues to be pervasively religious.[34] To be sure, the studies also show that the religious character of our society is diverse, ambiguous, and perhaps confused.[35] But the first part of Justice Douglas' famous assertion still holds: Whether or not our institutions presuppose a Supreme Being, "[w]e *are* [still] a religious people."[36] And although religious faith may be less common in the academy than in the population at large, still there is evidence that many law professors, perhaps even a substantial majority, embrace conventional Christian or Jewish beliefs.[37]

Nor does it seem sufficient to say that although religious belief is widespread, such belief is also controversial and thus not a suitable re-

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32. There are exceptions, of course. *See, e.g.*, JOSEPH VINING, FROM NEWTON'S SLEEP (1995). Specialized journals like the American Journal of Jurisprudence contain materials that consider religious perspectives. In my observation, though, it is still fair to say that these perspectives do not figure in mainstream legal thought in the way that economics, feminism, Critical Race Theory, and moral philosophy do; religious perspectives, by contrast to the approaches just mentioned, do not appear in standard law journals or classroom teaching materials.

33. *See* John H. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779, 794-96 (1986).

34. *See* Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047, 1085 (1996).

35. *See id.* at 1080-81, 1086-87.

36. Zorach v. Clauson, 343 U.S. 306, 313 (1952).

37. *See* Laycock, *supra* note 34, at 1079.

source for *legal* debates on *public* issues. That logic would as decisively exclude from legal discourse free market economics, Rawlsian liberalism, classic libertarianism, feminism, Marxism, and many other modes of thinking. But those other perspectives are plainly welcomed—controversial though they are.

A different solution to the puzzle would suggest that "religion" denotes a discrete set of interests or beliefs that are not often relevant to the sorts of problems addressed by the law. So there is not much evidence of religion in legal discourse for the same reason that there is not much evidence of the influence of bowling or gardening. In short, as law teachers and lawyers we do not often employ religious perspectives because religion just does not have much to say regarding the issues with which, as law teachers and lawyers, we are concerned.

This suggestion raises a complicated issue. It is true that "religion" as often depicted and understood in legal discourse seems to be a kind of self-contained package or discrete compartment holding beliefs and concerns that are largely unrelated to the general issues of daily life. This depiction is captured in Stephen Carter's observation that the law tends to treat religion as if it were a sort of private hobby, like building model airplanes.[38] Indeed, it is only the prevalence of a "self-contained package" conception of religion, I think, that can account for the tenacity of the notion that government can and should be simply "neutral" toward religion. If someone proposed that government should be "neutral" toward economics, for example, or language, we would think such a proposal was odd. We would understand that whatever it does, government is inevitably deeply immersed in economics and language—government unavoidably acts both upon and through economics and language—so it is not even clear what it could mean for government to be "neutral" toward such subjects. But if "religion" is more like a self-contained package of beliefs or interests that some people just happen to have—if it is something like building model airplanes—then the suggestion that government can be "neutral" toward religion by just leaving it alone seems more plausible.

This pervasive, if tacit, conception of religion also makes it natural for lawyers and scholars to assume that religion is relevant only to certain special legal issues. For example, Douglas Laycock—not coincidentally, a leading proponent of "neutrality"—thinks that religion, or at

38. Stephen L. Carter, *Evolution, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977, 996 (1987).

least its core beliefs, is "of little importance to civil government."[39] Indeed, even commentators who have recently argued for a greater use of religion in legal decision-making still tend to treat religion as relevant mostly to specialized or exotic issues. Scott Idleman argues carefully and energetically that judicial decisions would benefit from greater explicit reliance on religious beliefs and values. However, he emphasizes that he "does not necessarily envision an explicit role for religious values in the vast majority of legal controversies; rather, the focus is on ethically difficult cases, or other so-called 'hard cases.'"[40] Similarly, Justice Raul Gonzalez of the Texas Supreme Court is one of a very few jurists who explicitly takes the position that his religious beliefs do, and properly may, affect his judicial decisions. Still, Justice Gonzalez believes that during a long judicial career only a handful of his decisions have been directly influenced by his faith.[41] Given this understanding of religion, it is hardly surprising that most lawyers, judges, and legal scholars would assume that religion has little relevance for most of the day-to-day issues of law.

The problem is that the "self-contained package" conception is a serious distortion of religion as most religious people themselves understand it. Or, rather, this conception may be common enough, but it typically appears within communities of faith as a criticism of religionists who are perceived as hypocritical, weakly committed, or lacking in spiritual understanding. It is thus a familiar observation that for Brother Backslider or for Sister Lukewarm, religion amounts to a Sunday morning exercise without observable implications for the concerns of the rest of the week. But this observation always implies that the "Sunday only" observant does not really understand or is not actually practicing his or her religion. In effect, legal discourse has taken this critical or pejorative depiction of religious *deviation* and embraced it as a positive conception of *religion.*

In reality, religion is not a small subcategory of human concerns or a

39. Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 317 (1996). Laycock goes on to explain that government does not need religion to secure loyalty or social solidarity. But I do not think this explanation is meant to qualify the basic assertion; on the contrary, the sense of the argument is that *if* religion were important to government it would be so mainly for the purpose of securing social solidarity, but in fact religion is not needed even for *that* purpose.

40. Scott C. Idleman, Note, *The Role of Religious Values in Judicial Decision Making*, 68 IND. L.J. 433, 434 (1993). *See also id.* at 455 (arguing that "judges legitimately can or should employ religious values when deciding hard cases").

41. Raul A. Gonzalez, *Climbing the Ladder of Success—My Spiritual Journey*, 27 TEX. TECH. L. REV. 1139, 1148 (1996).

narrow, discrete set of beliefs and interests. Instead, what we call "religion" typically amounts to a comprehensive way of perceiving and understanding life and the world; it affects *everything*. From a religious perspective, all of the issues of life take on a different appearance or meaning. Despite his view that religion has directly influenced his decisions in only a few cases, Justice Gonzalez notes that our "views on how the world began, sin, forgiveness and redemption influence[] our attitudes, behavior, and everything that we do. This is true whether one is a Christian, atheist, agnostic, or a secular humanist."[42]

Once we set aside the distorting image of religion as a "self-contained package," it hardly seems surprising that religion might be relevant to the broad range of issues considered in the law. After all, religious teachers, prophets, theologians, and mystics have over the centuries spoken profoundly on the crucial issues of birth, life, family, work, commitment, government, justice, violence, deceit, and death. These are the same kinds of issues that come before the courts on a daily basis for discussion and resolution. It would be remarkable if religion did *not* have much to say about many of these issues.

If religious belief is still widespread in our society, and if religious perspectives are potentially relevant to many legal issues, then it seems that something else must account for the absence of religion from legal discourse. Religious beliefs and perspectives, it seems, are treated like hearsay evidence or coerced confessions; they *would be* relevant, or even decisive, but they are legally inadmissible.

This restriction seems especially severe with respect to judicial common-lawmaking.[43] In this respect, there may be a parallel between what I have been calling the third and fourth zones of religious disestablishment. In the third zone, I have suggested, the *de facto* disestablishment reinforces and is reinforced by our erratic commitment to libertarianism. Although neither the libertarian argument nor the disestablishment ar-

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42. Gonzalez, *supra* note 41, at 1157. Paul Johnson makes the point from a traditional theistic perspective:

> The existence or non-existence of God is the most important question we humans are ever called to answer. If God does exist, and if in consequence we are called to another life when this one ends, a momentous set of consequence follows, *which should affect every day, every moment almost, of our earthly existence.* Our life then becomes a mere preparation for eternity and must be conducted throughout with our future in view.

PAUL JOHNSON, THE QUEST FOR GOD 1 (1996) (emphasis added).

43. *See* Idleman, *supra* note 40, at 442 (noting that "religion and religious values (at least as traditionally defined) are generally viewed as illegitimate sources from which to draw in the judicial decision-making process.").

gument might alone be persuasive, when taken together they can produce a relatively more forceful condemnation of certain kinds of paternalism. Similarly, in the fourth zone it seems that the *de facto* disestablishment combines with a kind of residual legal positivism to produce a relatively strong restriction on the invocation of religion by judges.[44]

We have a long-standing commitment that is, to the notion that what law *is* is one thing and what law *ought to be* is another, and that judges are properly concerned only with the former. Legislatures *make* law; courts merely *apply* the law, and it is improper for judges to resort to their own philosophical or moral views in deciding what the law is. Of course, this positivist conception of adjudication has been widely debunked. Prevailing theories of interpretation tend to insist that judges may, and indeed must, make some resort to their moral and philosophical views—which is not at all the same, proponents of these theories maintain, as simply writing the judges' political preferences into law.[45] Indeed, although the rhetoric of "no judge-made law" is still amply represented in discussions of constitutional adjudication,[46] since *Erie v. Tompkins*[47] the conventional view regards *common law* as exactly that—judge-made law.

But however flawed the traditional positivist view of adjudication-as-law-application may be, and however much it is disparaged in legal scholarship generally, the view seems to gain strength when paired with the assumption of the *de facto* disestablishment that any governmental reliance on religion is improper. Once again, this is a point about our legal culture, not about what logic requires. With respect to constitutional interpretation, Stephen Carter has plausibly argued that if judges may properly consult views of morality or philosophy outside the text, then there is no good reason to restrict them from considering religious perspectives.[48] A similar argument could be made, perhaps even more cogently, about judicial common law-making.[49] Still, the *de facto* dises-

44. For a related discussion, see *id.* at 453-54. *See also* Jonathan Edward Maire, *The Possibility of a Christian Jurisprudence*, 40 AM. J. JURIS. 101, 105-06 (1995).

45. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE (1986). For a recent and (in this respect) similar theory of interpretation as applied to constitutional adjudication, see MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS (1994).

46. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990).

47. 304 U.S. 64 (1938).

48. Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932 (1989).

49. *See generally* Maire, *supra* note 44.

tablishment's restriction seems especially powerful in this domain. This fact likely reflects the convergence of a questionable restriction on reliance of religious beliefs with a dubious legal positivism, which in combination may help account for the virtual absence of religious perspectives in legal discourse.

B. An Unlikely Instance: The De Facto *Disestablishment and the Measurement of Damages*

So far I have talked in abstract terms about the effects of the *de facto* disestablishment on legal discourse and adjudication. What would be helpful at this point would be a discussion of a range of common law issues showing just how those issues would be resolved differently if different religious perspectives were used. This discussion might compare secular contract, tort, and property law with, for example, Catholic, Protestant, Mormon, Jewish, and Muslim versions of the same subjects.

Unfortunately, I have neither the time nor even a fraction of the competence needed to provide this discussion.[50] Still, I do want to support my general thesis by considering one specific (and, you may think, unlikely) example. Perhaps no issue is more universal in common law cases than the issue of damages. Especially in personal injury cases, in which injunctive relief is rarely sought, virtually every case potentially—and, if the plaintiff succeeds in establishing liability, *actually*—will raise the question of how to measure damages. And except in special situations, such as the case of the injured Christian Scientist who refuses medical assistance, it might also seem that the measurement of damages is as far removed from religious concerns as any legal question that courts must address. I hope to convince you, however, that religious perspectives are highly relevant to damages issues and that the absence of such perspectives in the discussion of damages likely reflects the subtle but far-reaching influence of the *de facto* disestablishment.

Compare the ways in which we deal with catastrophic personal injury in our day-to-day lives with the way the law treats the same kind of injury. Imagine, for example, that someone loses a limb in an automobile accident. The injury means that the injured person will not be able to live the same sort of life that he or she had planned on and prepared for before the accident. The person may have to pursue a different career and may not be able to engage in many of the leisure activities that

50. For a helpful set of essays that begin this undertaking in a preliminary way, see Robert F. Cochran, Jr., *Christian Perspectives on Law and Legal Scholarship*, 47 J. LEGAL EDUC. 1-38 (1997).

he or she previously enjoyed. The person's life—plans, dreams, daily activities—may be drastically altered.

Naturally, we would regard such an injury as a serious loss or tragedy that warrants sorrow or regret. But this observation only begins to describe the reaction. Often we would come to understand that along with the loss there is also a benefit. The new way of life necessitated by the injury will have its own peculiar limitations and frustrations; it may also have its distinctive, perhaps unexpected, rewards. These disadvantages and advantages are likely incommensurable. It is impossible to quantify, and difficult to even rank, the value of one way of life as opposed to another. It may thus be difficult either for the injured person or for an outsider to say that the life that had been chosen, but that was foreclosed by injury, is simply superior to the life that was accepted in consequence of the injury.

Sometimes, of course, the injured person *would* say that. At the other extreme, it is not uncommon to hear people who have suffered some misfortune or reversal in life plans report, at least in retrospect, that they have actually profited from what they took to be a tragedy, or that they have come to feel grateful for their unsolicited change of fortunes. Perhaps the event removed them from a career path that they now see to have been unconducive to personal happiness or fulfillment. Perhaps an injury forced them to focus on what matters most in life. A psychologist who has studied reactions to loss reports that "[d]eath often forces us to place a high priority on people within our daily lives whom we had previously taken for granted. Survivors frequently become less oriented toward the future and live more fully in the present."[51] Another study of how widows react to the loss of their spouses found that "[a]fter the first year of bereavement, most widows view themselves as much more assertive, stronger, and warmer." Dealing with tragedy often leads to "a more authentic identity."[52] In any event, in real life, experiencing an injury is rarely a matter of linear or unmitigated loss. Life is more complex than that.

Tolstoy expressed this insight in radical form in a story called "What Men Live By."[53] The central, mysterious character in the story is Michael, who was discovered lying helpless and naked on a cold night by

51. LOUIS E. LAGRAND, CHANGING PATTERNS OF HUMAN EXISTENCE: ASSUMPTIONS, BELIEFS, AND COPING WITH THE STRESS OF CHANGE 31 (1988).

52. MORTON LIEBERMAN, DOORS CLOSE, DOORS OPEN: WIDOWS, GRIEVING AND GROWING 165, 168 (1996).

53. LEO TOLSTOY, *What Men Live By*, *in* THE PORTABLE TOLSTOY 484 (John Bayley ed. 1978).

Simon, a poor shoemaker. Michael lives and works with Simon and his wife for years without telling them who he is or where he came from, except to say that he has been "punished by God."[54] Ultimately, though, he reveals that he is an angel who had been sent, six years earlier, "to fetch a woman's soul."[55] He reports:

> I flew to earth and saw a sick woman lying alone who had just given birth to twin girls. They moved feebly at their mother's side but she could not lift them to her breast. When she saw me, she understood that God had sent me for her soul, and she wept and said: "Angel of God! My husband has just been buried, killed by a falling tree. I have neither sister, nor aunt, nor mother: no one to care for my orphans. Do not take my soul! Let me nurse my babes, feed them, and set them on their feet before I die. Children cannot live without father or mother."[56]

Michael returned and explained why he could not take the woman's soul; but God ordered him to go back and carry out the assignment, and then punished him by consigning him to live as a man on earth until he learned wisdom.[57] His probation is completed when, six years later, he meets the two girls whom he had left helpless by their dead mother.[58] They had been adopted by a neighbor who herself lost her only child. This neighbor explains: "[H]ow lonely I should be without these little girls! How can I help loving them! They are the joy of my life!"[59]

What Michael learns through this experience is that, in his words, "[i]t is not given to man to know his own needs .... It was not given to the mother to know what her children needed for their life .... Nor is it given to any man to know whether, when evening comes, he will need boots for his body or slippers for his corpse."[60] What seems good for me now may in fact be bad, and *vice versa*. Nonetheless, through his own punishment and through the suffering and sacrifice of others, Michael has also learned what men live by. "I have now understood that though it seems to men that they live by care for themselves, in truth it is love alone by which they live. He who has love, is in God, and God is in him, for God is love."[61]

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54. *Id.* at 501.
55. *Id.*
56. *Id.* at 501-02.
57. *Id.* at 502.
58. *Id.* at 504.
59. *Id.* at 500.
60. *Id.* at 505.
61. *Id.* at 504-05.

We might try to express a related insight in more mundane, less religiously weighted terms by saying that life, or lives, have both a horizontal and a vertical dimension. Day-by-day, we concentrate mostly on the horizontal dimension. We have goals, and we measure our success by the progress we make toward realizing our goals. There are tangible goods that we plan and work to acquire—money, status, educational achievements, career advancement—and we count our welfare by our gains and deficits in acquiring these observable goals. But there is also a less tangible, vertical aspect of life—a dimension of depth—consisting of self-understanding, sense of purpose, friendship and affection, and other more spiritual values. And gains in the horizontal dimension do not necessarily correlate with progress in the vertical dimension; on the contrary, often there seems to be an inverse relationship between these kinds of values.

That is why our reaction to injury is so complex. What we think of as personal injuries usually denote a setback in the horizontal dimension of life; this is what it typically means to describe something as an injury. However, that sort of injury may also have complicated effects for our welfare in the vertical dimension, which is precisely why we sometimes conclude that what we initially regarded as a personal tragedy was in fact an unexpected, unsought blessing. The tragedy may even have saved our soul; in losing our life, or at least a part of it, we may find it.

Of course, this discussion of horizontal and vertical dimensions is little more than a cumbersome attempt to express a wisdom that is perfectly familiar in everyday living. Your grandfather or my mother-in-law might convey the same basic point in platitudes or proverbs. "For every dark cloud ...," and so forth. But the fact that this wisdom is so ho-hum makes it all the more remarkable, I think, that these commonplace understandings seem to vanish when we turn to the *legal* treatment of injuries.

In the legal domain, the basic principle is that one who has been injured by another's wrong is entitled to be made "whole," or to be compensated in damages in an amount that will restore him as nearly as possible to the position he would have been in but for the wrong.[62] In

62. *See* Emmet J. Agolia & Kathleen M. Beckett, *Personal Injury*, *in* DEALING WITH DAMAGES 137, 138 (Norman Jay Itzkoff ed. 1983) ("[T]he object [of personal injury damages] is to make the plaintiff whole, addressing the totality of the wrong done...."); DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 14 (1985) ("*Hatahley*'s rule—that the fundamental principle of damages is to restore the injured party as nearly as possible to the position he would have been in but for the wrong—is the essence of compensatory damages.").

implementing this "make whole" principle, the law proceeds (or purports) to quantify the gravity of the injury in dollar terms so as to determine the payment that will restore the injured person to his deserved level of overall welfare. More specifically, a court will typically break the injury down into categories—lost income, medical expenses, pain and suffering, psychic injury or emotional distress—and will fix a dollar amount that will leave the injured person "paid in full" for each of these types of loss.

This treatment departs from the ordinary wisdom of injury in two vital respects. First, and most obviously, the law purports to quantify and put a price on aspects of life that—as nearly everyone would admit—manifestly cannot be quantified in this way. In reality, even the measurement of types of loss that are economic in form, such as lost salary or medical expenses, cannot—in most cases—claim even approximate accuracy.[63] And the ostensible quantification of other, more intangible losses—pain and suffering, emotional distress, loss of companionship, death—is an exercise in near unintelligibility. What does it even mean to ask for the dollar value of a lost limb, or a lost loved one, or a lost life?

It is true, of course, that if compelled, as in life we sometimes *are* compelled, we *can* assign a number to these losses. Proponents of law-and-economics make much of this capacity. I recall a conversation with an economist friend. "You may *say* you simply could not put a dollar figure on the loss of your eyesight—that the very notion of any such equation is nonsensical," he said. "But if I put a gun to your head and demand an amount, you'll give me one." He was right, of course. And if you put a gun to my head and demand my opinion on whether "justice" is green or blue, I will give you an opinion on that question as well. ("It's green. Definitely green.") It does not follow that either question is anything but nonsensical.[64]

This difficulty, sometimes discussed under the heading of incommensurability[65] or commodification,[66] is well known. But legal discourse

63. *See supra* note 70.

64. *See* Steven D. Smith, *The Critics and the Crisis: A Reassessment of Current Conceptions of Tort Law*, 72 CORNELL L. REV. 765, 774-75 (1987).

65. *Cf.* ALASDAIR MACINTYRE, AFTER VIRTUE 64 (2d ed. 1984) (explaining that "different pleasures and different happinesses are to a large degree incommensurable; there are no scales of quality or quantity on which to weigh them").

66. *See, e.g.*, Allan C. Hutchinson, *Beyond No-Fault*, 73 CAL. L. REV. 755, 762 (1985) ("In pursuing the liberal approach [to compensation], the market has converted health into another commodity to be traded for and traded off. Human life and suffering represent just

on damages also departs from ordinary wisdom in a less obvious but perhaps even more important way. By-and-large, legal discourse treats injury as pure loss; it sees no benefit in personal misfortune. Damages calculations do not offset lost salary or compensation for pain and suffering with any credit for enriched insight, enhanced self-understanding, a chance for reflection on the purpose of life, or the possible recovery of one's soul.

To refer to the terms I used earlier, within legal discourse life seems to consist only of the horizontal dimension; the law scarcely recognizes a vertical dimension. As a consequence, personal injury appears not as one of the necessary challenges and mysteries in human existence, rich with tragedy, opportunity, and promise. Instead, personal injury basically presents us with an accounting problem.

An observer seasoned in life but previously unschooled in law, upon being initiated into the law's treatment of personal injury, might plausibly conclude that at least in this respect the law is almost fanatically obtuse. (And in my observation, that is just what nonlawyers often *do* think.) Of course, the experienced lawyer or judge might explain that this criticism is unfair. Only the most detached academician would actually try to justify the law's treatment of damages by arguing that they *do* in some real sense make the injured person "whole"—perhaps by restoring his or her "pleasure/pain ratio."[67] Real lawyers and judges know that any such account is fanciful.[68] They also know perfectly well that injury is a complicated human phenomenon, not merely an accounting problem. Still, the law *must* indulge some drastically simplifying assumptions, the standard explanation continues, in order to deal with the fact of injury at all. After all, how is a jury to know whether an injury produced some spiritual benefit for a victim? And how could any such benefit be quantified? In short, it would simply be impossible for the

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one more variable in the production-consumption equation.").

67. *See* Peter A. Bell, *The Bell Tolls: Toward Full Recovery for Psychic Injury*, 36 U. FLA. L. REV. 333, 398 (1984).

68. *See, e.g.*, McDougald v. Garber, 536 N.E.2d 372, 374 (N.Y. 1989) (observing that the "familiar proposition that ... [t]he goal [of compensatory damages] is to restore the injured party, to the extent possible, to the position that would have been occupied had the wrong not occurred" is, at least with respect to noneconomic losses, a necessary legal fiction). *See also* DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 136 (1973):

> In all these [nonpecuniary injury] cases courts have spoken of damages as compensatory, but the term is misleading. They are no doubt compensatory in the sense that they are not merely nominal and in the sense that they are not necessarily punitive. They are not, however, compensatory in the sense that they represent a money award for a money loss or one measurable in money.

law to take the full reality of injury into account. So we treat injury as quantifiable and unmitigated loss because that is the only thing we *can* do.[69]

When I raise this sort of problem in a torts class, students often respond in that way. Some of them evidently find the response persuasive, and in fact it may be the best available justification for our approach to damages. I do not find the response completely convincing, though. In the first place, it proves too much. If the fact that we *cannot* realistically do something means that we should not try or at least pretend to do it, then it seems that we should not pretend to do much of what we pretend to do now. We cannot realistically translate many intangible injuries into monetary terms. Especially when the injury culminates in death, as in a survival claim brought to recover for injuries such as pain and suffering experienced *by a decedent*, we manifestly cannot do anything at all to compensate the victim. So perhaps we should return to the old common law assumption that when an injured person dies, his tort claims die with him. Indeed, realistically, and especially when the injured person is young, perhaps not even employed yet, it is almost farcical to pretend to compute even what is conceptually the most measurable loss—that is, lost salary or income—with all of the implicit predictions of life span, future jobs, promotions, and lay-offs, not to mention changes in the economy such as inflation, that this calculation necessarily entails.[70] Once again, these difficulties are well known and the standard response is that we just have to "do the best we can." But the gulf between aspiration and reality is so wide here that this counsel begins to seem faintly ridiculous. It is as if you ordered me to leap over the Eiffel Tower and, when I said I couldn't do it, you replied, "Maybe you can't actually do it, but do the best you can."

Moreover, it is not true that our present approach represents the only thing we can do, or the only practicable approach to measuring damages. There is nothing inexorable about the "make whole" principle; alternatives are at least imaginable. To mention just one possibility, we might build a law of damages around something like an

69. *Cf.* Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 71 (1993) ("Some courts say the purpose of compensation for pain and suffering is to come as close as possible to rectification, even while admitting that there is no way we could know what coming close would mean.").

70. *See* Saul Levmore, *Self-Assessed Valuation Systems for Tort and Other Law*, 68 VA. L. REV. 771, 795-810 (1982). Levmore observes that if the calculation of lost income is taken seriously, "the jury will be exposed to a mind-boggling series of issues and experts." *Id.* at 809. The problem presents a "hopeless situation." *Id.* at 801.

"adjustment" principle. In this approach, our message to an injured person would be something like this: "We know that you have suffered an injury and that it will necessitate, in some respects, a new way of life for you. We do not know just what that new way of life will entail; neither, probably, do you. We also must candidly confess that even if we did know exactly what direction your life will take, we have no way of assessing the value of one kind of life as opposed to another. Indeed, that value will to some extent be determined by you. What we are confident of, though, is that your transition to a new way of life will surely entail difficult and costly adjustments including medical expenses, perhaps counseling, retraining, periods of unemployment, and so forth. In awarding damages, our objective will be to facilitate this adjustment. We will not pretend to award damages in an amount that will make you 'whole,' or restore you to the position you *would have* occupied, since we know that we have no way of doing that, even approximately."

I am not prepared here to make the argument that we should replace the "make whole" principle with an "adjustment" principle, or with some other principle. My point is only that we are not predestined to follow our current approach, with its one-dimensional and often preposterous ways of talking about injury. And the question that follows, once again, is why the rich, subtle understandings of injury that we encounter in everyday life are filtered out of legal discourse, with the consequence that the legal treatment of injury can seem so flat and superficial.

This is itself a very complicated question; but again, I think that the *de facto* establishment is at least part of the explanation. Of course, this is conjecture; it is difficult to demonstrate just why a particular conversation *has not* happened. My conjecture is based in part on a conversation I had with a colleague several years ago. I was considering writing an essay criticizing the "make whole" approach to damages and raising some of the considerations I have just discussed. His prompt response was that the law could not properly recognize what I have called the vertical dimension, or the intangible benefits that injured people sometimes come to attach to their injuries, because this dimension and these benefits are "religious" in nature.

My reply at the time was that my colleague was just wrong. The benefits that people sometimes attribute to injury *might* be religious in character, but there seemed to be no reason why they *need to be* religious. For example, an agnostic without any religious pretensions might well say, "My injury forced me to think seriously about what was really important to me, and I realized that my career had led me to neglect the things that matter most—my family and friends (or my music, or my

writing). Who could have guessed it?—not me, certainly—but I am actually happier now than before."

As a formal matter, this reply seems correct. Deep, intangible values are surely not experienced only by people who think of themselves as "religious." But, this observation may miss the point. "Religion," after all, has never been adequately defined even in explicit religion clause analysis; and in the inarticulate conventions of the *de facto* disestablishment, "religion" is, if possible, an even more amorphous category. Within the loose terminology of this mute jurisprudence, the critical question is whether a reason, motive, or consideration *seems* (in a rough, free association sense) "religious"—whether it somehow resonates with images or dimly intuited notions of "religion." In that loose sense, my argument about a vertical dimension of life and about intangible benefits that flow from injury may well be a religious sort of argument. It may be guilty of religion by association—by the cultural residue of its association with the beatitude "Blessed are they that mourn,"[71] or with Augustine in the first chapters of *City of God* telling those who felt ruined by the barbarians' sack of Rome that these apparent evils were imposed by Providence to bring men to God,[72] or with Thomas a' Kempis in his *Imitation of Christ* counseling on "the uses of adversity"[73] (a theme that has been taken up in many a Sunday sermon since that time). The story I relied on earlier by Tolstoy was plainly religious in its content and inspiration; indeed, Tolstoy explicitly offered it as a sort of sermon or reflection on some verses in the First Epistle of John. More generally, it probably *is* fair to say that the most profound meditations on the meaning or the redemptive value of suffering occur in religious traditions and texts—the book of *Job*, the Sermon on the Mount, the *Bhagavad Gita*, or the Buddha's first sermon.

At least in this crude sense, in other words, my argument refers to considerations that probably *are* religious in nature; and as a matter of culture it is the crude sense that seems to control. It thus seems quite likely that my colleague was correct, at least as a matter of legal culture, and that it is the rough prohibition of the *de facto* disestablishment that is at least partly responsible for excluding what would otherwise seem relevant wisdom from our consideration of the law of damages. And if the *de facto* disestablishment has affected our thinking about *this* mun-

71. *Matthew* 5:4.

72. AUGUSTINE, CITY OF GOD 1.1 - 1.29.

73. Thomas a Kempis, *Imitation of Christ in* THE CONSOLIDATION OF PHILOSOPHY 123 (1943).

dane issue, then it seems likely that its restrictions have pervasively influenced our approach to the whole range of common law issues.

IV. CONCLUSION

My principal purpose in this essay has not been either to support or oppose the *de facto* disestablishment, but merely to call attention to its existence and its range. If a tacit and irregular but nonetheless powerful prohibition excluding religion from public and especially legal discourse has been in effect for some time, then those of us who are interested in "law and religion" need to pay attention to that phenomenon, hidden though it may be.

Still, one advantage of identifying the *de facto* disestablishment is that naming it and seeing it for what it is might help us to consider whether this disestablishment is a healthy and desirable part of our legal culture. Is the *de facto* disestablishment something we should preserve and perhaps extend, or is it something we should resist and perhaps repudiate?

In a sense, of course, that question is already at the heart of the "religious convictions" debate, and this essay does not either assess or add to the various positions that have been taken in that debate. On the other hand, if we appreciate the extent of the *de facto* disestablishment, the arguments in that debate might appear in a somewhat different light. The debate is not merely academic and technical, and it is not only about abortion, animal rights, and laws regulating sexual conduct or euthanasia. Rather, the debate concerns a present and pervasive part of our legal culture, and it has implications, at least potentially, for virtually every kind of issue that courts address, including the measurement of damages in personal injury cases.

Moreover, if this discussion of the problem of measuring damages is at all sound, and if that issue is at all typical, then it seems that the *de facto* disestablishment may have a troubling consequence: It deprives legal discourse of the counsel of our deepest convictions and reflections, and thereby renders our discussions superficial and obtuse. There is a respectable argument, I think, that legal discourse serves its mediating and diplomatic function best precisely by being craftily obtuse. Still, in considering whether the disestablishment should be maintained, this is a cost, or a benefit, that ought to be counted.