Marquette Law Review

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

Article 7

Religion And Legal Discourse: An Indirect Relation

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RELIGION AND LEGAL DISCOURSE: AN INDIRECT RELATION

A RESPONSE TO STEVEN D. SMITH

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In his essay Steven D. Smith provides a provocative reading of an important aspect of legal culture, what he calls "*de facto* disestablishment," the implicit secular assumption that religious beliefs should bear no formal or direct relation to matters of law.[1] He sketches four "zones" within which this consensus of legal culture exerts its influence and then offers a fascinating legal issue, the measurement of damages, by which he seeks to raise some fundamental questions to the reigning secular paradigm. I find myself in general agreement with Professor Smith's thesis, though I will want to raise some critical questions about the provisional conclusions he seems to draw at the end of the essay. Indeed, I am struck by an even broader sense of congruence between Professor Smith's work on the legal and cultural dimensions of First Amendment jurisprudence and my own work in the recently published *Religion in Public Life: A Dilemma for Democracy*.[2] So the criticisms I raise should be set against the background of a more fundamental agreement on the larger issues of constitutional jurisprudence.

Given the substantial overlap in our positions, it is striking that Professor Smith cites neither my work nor any examples of the books and essays published by scholars of religion and theology on this topic.[3] Ironically, this essay is itself a minor symptom of the very malady Professor Smith so ably analyzes and criticizes viz., the separation of the worlds of law and religion. Still, this conference and this essay offer an invitation for scholars and practitioners of these fields to overcome the

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1. Steven D. Smith, *Legal Discourse and the* De Facto *Disestablishment*, 81 MARQ. L. REV. 203, 204 (1998).

2. *See generally* RONALD F. THIEMANN, RELIGION IN PUBLIC LIFE: A DILEMMA FOR DEMOCRACY (1996).

3. *See, e.g.*, WILLIAM JOHNSON EVERETT, RELIGION, FEDERALISM, AND THE STRUGGLE FOR PUBLIC LIFE (1997); *see also* WINNIFRED FALLERS SULLIVAN, PAYING THE WORDS EXTRA: RELIGIOUS DISCOURSE IN THE SUPREME COURT OF THE UNITED STATES (1994).

isolation of scholarly worlds induced by "*de facto* disestablishment," and I am pleased to have the opportunity to engage in common reflection on these matters of shared interest.

Since I am a Christian theologian my thought tends to be organized in trinitarian patterns, and so I will offer my remarks in three parts. First, I will address the larger historical and cultural context within which the phenomenon of *de facto* disestablishment resides. Second, I will offer some critical remarks on the philosophical issues raised by John Rawls and Kent Greenawalt. And then, finally, I want to focus on the four "zones" of *de facto* disestablishment and present my criticisms of Professor Smith's provisional conclusions.

I.

Early in the essay Professor Smith refers to a discussion between Michael McConnell and Bruce Ackerman in which each speaker accuses the other of disrupting a long-settled consensus in American political culture concerning the place of religious convictions in democratic deliberation. It has become common practice for advocates of particular positions on this subject to invoke the authority of an historical consensus in support of their own contemporary proposals. Ordinarily one would think that one or the other of the opposing disputants must be incorrect; surely, the historical record cannot support two conflicting construals of the American tradition. Ironically, the American tradition is itself sufficiently ambiguous to allow multiple, even conflicting, interpretations of this legal and political issue. Since the time of the framing of the Constitution American reflection on the place of religion in public life has been strikingly double-minded. The religion clauses of the First Amendment to the Constitution were designed to maximize religious freedom in both its individual and corporate forms. Two fundamental concerns: to protect the free expression of religion in all its variety and to delimit the influence of any particular religion animated the founders' thinking about religion's role in American society. James Madison, in particular, showed remarkable prescience in his concern to protect minority faiths from the tyranny of the majority, whether political or ecclesiastical.

Despite the Constitution's guarantee of religion's free exercise and its *de jure* disestablishment of religion, the *de facto* establishment of a cultural Protestant Christianity remained a reality at least until the mid-twentieth century. Even the founders recognized that the American republic required an ethical citizenry for its successful operation. Madison

in *The Federalist* number 45 argued that "the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object."[4] In the final days of the Virginia ratifying convention, he expressed his views on this matter with typical eloquence. "Is there no virtue among us? If there be not . . . no form of government can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea."[5] While he defended the right of religious liberty for all faiths, Madison, like the other founders, assumed that the primary schools of virtue for the new republic would in fact be communities of faith, particularly Christian churches.

And that is, of course, the reality described by Alexis de Tocqueville during his journeys throughout the young American nation in the early 1830's. In a section of *Democracy in America* entitled "Indirect Influences of Religious Opinions Upon Political Society in the United States" he identified Christianity as "the first of their political institutions"[6] because of its ability "to purify, control, and restrain, that excessive and exclusive taste for well-being"[7] that so dominated the American character. Despite the fact that religion "takes no direct part in the government of [American] society,"[8] it still functions, he claimed, to encourage the "sacrificing [of] private interests" for the sake of "God's plan . . . this great design . . . this wondrous ordering of all that is." Religion could function in this fashion in early America because "Christianity reigns without obstacles, by universal consent."[9] Thus Supreme Court Justice Joseph Story, writing in the same year as Tocqueville, could state without reservation the *de facto* establishment of Christianity within the early American republic:

> [I]t is impossible for those, who believe in the truth of Christianity, as a divine revelation, to doubt, that it is the especial duty of government to foster, and encourage it among all the citizens and subjects . . . . [T]here will probably be found few persons in this

4. THE FEDERALIST NO. 45, at 289 (James Madison) (Clinton Rossiter ed., 1961).

5. 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 536-37 (Burt Franklin 1968) (1888).

6. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 316 (Henry Reeves trans., Vintage Books, 1945).

7. 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 27 (Henry Reeves trans., Vintage Books, 1945).

8. TOCQUEVILLE, *supra* note 6, at 316.

9. *Id.* at 315.

> or any other Christian country who would deliberately contend that it was unreasonable or unjust to foster and encourage the Christian religion generally as a matter of sound policy as well as of revealed truth .... Probably at the time of the adoption of the constitution ... the general, if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience and the freedom of religious worship.[10]

De jure disestablishment and *de facto* establishment existed side-by-side in the American republic for nearly two hundred years. It is not surprising, then, that Professors McConnell and Ackerman can both claim an American consensus in support of their conflicting positions.

Sociologists now regularly refer to America's "three disestablishments." The first, the *legal* disestablishment is represented by the First Amendment to the Constitution and the elimination of established churches in the states by the mid-nineteenth century. As I have noted, this legal prohibition had little effect on the symbolic power of our culturally established religion, Protestant Christianity. The second or *religious* disestablishment occurred with the fragmentation of America's civil piety. With the rise of sizable Roman Catholic and Jewish minorities and the emergence of the distinctive witness of the black churches, the predominance of cultural Protestantism began to wane.

Initially these minority communities appeared to be compatible with and supportive of American civil religion. The remarkable cooperation among communities of faith during the civil rights movement encouraged many to believe that America's civic faith could incorporate these diverse religious traditions. But the fragile bonds that held these groups together burst asunder during the divisive political debate that began during the late 1960s. Traditional religious differences combined with political disagreement to spawn the third *moral* disestablishment. Divisions within the body politic rendered America's civil faith incapable of providing the common principles for personal and public morality.

During the 1950s and early 1960s it appeared that America's civic piety would have sufficient resilience to incorporate these newly influential communities of faith. Indeed, in his influential study *Protestant-Catholic-Jew*,[11] published in 1955, sociologist Will Herberg sought to identify the "American faith" that had become the nation's new

10. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 603-05 (Thomas M. Cooley ed., Little, Brown & Co. 4th ed. 1873) (1833).

11. WILL HERBERG, PROTESTANT-CATHOLIC-JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY (1955).

"common religion," a faith that transcended the doctrinal divisions that had traditionally separated these communities. The growing popularity of the phrase "Judeo-Christian" to describe the common heritage of those two distinct traditions signaled a typical American confidence in the ability of the "melting pot" to blend even the most divisive disagreements into a bland civic mixture.

This confidence was hardly well placed. Newly emergent religious groups began to emphasize their particular and distinct identities. Jewish scholars demonstrated that the phrase "Judeo-Christian" functioned primarily to repudiate the distinctiveness of Jewish faith by assimilating its beliefs and practices to those of the dominant Christian tradition.[12] Not only did this practice hide the characteristic emphases of Judaism from pubic view; it also encouraged Christianity's historical tendency to deny Judaism's continuing religious vitality. By distancing itself from the dominant tradition, Judaism could both preserve its own heritage and protect itself from the persecuting tendencies of Christianity. Among African Americans, the black power movement spawned black theologies that rejected the influence of the Anglo-European tradition and sought to articulate the particularity of African and African American culture.

The feminist movement encouraged women to extricate their distinctive religious experience from the male-dominated patriarchal heritage within which it had been submerged for centuries. Indigenous revolutionary movements in third world countries emerged from communities of faith that stressed the uniqueness of the experience of the oppressed. As liberation theologies offered increasingly sophisticated methods for the analysis and critique of the structures of oppression, the dominant tradition of America Protestantism became the target of an emerging "hermeneutic of suspicion." American civic piety, so its critics argued, could provide the symbols for our common culture only by systematically silencing the voices of minority communities. With the empowerment of those communities, the pretense of commonality was finally revealed.

The divisions that have surfaced since the 1960s and 1970s shattered any illusion of political and religious unity within the American populace. The emergence of divisive battles over issues like Vietnam, nuclear weapons, abortion, the equal rights amendment, affirmative action, and gay and lesbian rights spread the hermeneutic of suspicion

12. *See generally* ARTHUR COHEN, THE MYTH OF THE JUDEO-CHRISTIAN TRADITION (1970).

throughout American life. Political opponents no longer assumed that they shared a common set of values or principles by which to adjudicate their differences. Moral and political options were presented as incommensurable alternatives, and the art of compromise appeared to wane. Interest group politics began to dominate the public sphere, and notions of the common good and the public welfare seemed to fade from public consciousness.

It is now clear that America's historic civic piety has disintegrated and that no new public philosophy has arisen to take its place. Consequently we live among the fragments of shattered moral and religious traditions, no one of which has yet shown its ability to provide a basis for our common public life. Some commentators have suggested that our moral disagreements are so profound that we will never reach consensus on the most basic policy issues. In such a situation politics becomes "civil war waged by other means,"[13] as force, deception, and manipulation dominate the political atmosphere. Politics thus becomes a mere clash of wills, as each party, interest, and faction, seeks to gain the upper hand in the struggle for political control. We are, one author asserts, in a state of "culture war."[14]

In light of the disintegration of America's civil religious piety, it is not surprising that many contemporary commentators have reached back to secular Enlightenment sources to claim that the founders advocated both "a godless Constitution and . . . [a] godless politics."[15] Scholars like Isaac Kramnick and R. Laurence Moore are seeking to reconstruct an historical constitutional tradition to support the legal claims concerning a *de facto* disestablishment. This notion is appealing to many scholars because of their fears that the introduction of religious beliefs into political or legal matters will only make contentious issues more difficult, if not impossible, to resolve. In light of America's third or *moral* disestablishment, claims about a legal *de facto* disestablishment have become more attractive to some. But the fundamental fact remains: The American legal and political tradition is sufficiently ambiguous to support both historical and normative claims for and against *de facto* disestablishment.

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13. ALISTAIR MACINTYRE, AFTER VIRTUE 8 (1981).

14. *See generally* JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991).

15. ISAAC KRAMNICK & R. LAURENCE MOORE, THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS 12 (1996).

II.

The philosophical issues raised by Kent Greenawalt regarding the propriety of public officials' and citizens' reliance upon religious convictions in their political decision-making must also be seen against the background of America's third disestablishment. John Rawls' attempt to identify the fundamental principles of liberal democracy takes its rise from his recognition that "the fact of pluralism" is "a permanent feature of the public culture of modern democracies."[16] Consequently, no moral doctrine or conception of the good pursued by particular groups of citizens could conceivably serve as the unifying scheme for democratic society as a whole. Indeed, "a public and workable agreement on a single general and comprehensive conception could be maintained only by the oppressive use of state power."[17] Thus Rawls argued in his early work that such comprehensive schemes should be removed from *the realm of the political*, though they may be allowed to flourish within the personal and associational lives of citizens. Moreover, Rawls proposed the norm of "public reason," the standard by which all discourse in a liberal democracy ought to be judged. "As far as possible, the knowledge and ways of reasoning that ground our affirming the principles of justice and their application to constitutional essentials and basic justice are to rest on the plain truths now widely accepted, or available, to citizens generally. Otherwise, the political conception would not provide a public basis of justification."[18]

In *A Theory of Justice*, religion did not fare well when measured by the standard of "public reason." In that early work religion was most often invoked to exemplify an "unreasonable comprehensive scheme." Those who reason on the basis of theology or faith, he asserted, rely on "premises . . . [that] cannot be established by modes of reasoning commonly recognized."[19] In his more recent work, however, Rawls has granted that religious arguments can be introduced into public discourse when "there is a profound division about constitutional essentials,"[20] so long as the appeal to comprehensive reasons serves to "strengthen the ideal of public reason itself."[21] Even at its most generous, Rawls' ac-

16. John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. OF LEGAL STUD. 1, 4 (1987).

17. *Id.*

18. JOHN RAWLS, POLITICAL LIBERALISM 224-25 (1993).

19. JOHN RAWLS, A THEORY OF JUSTICE 215 (1971).

20. RAWLS, POLITICAL LIBERALISM, *supra* note 18, at 249.

21. *Id.* at 247. For his most recent statement on these matters *see*, John Rawls, *The Idea*

count of "public reason" does not provide wide opportunity for religion to provide justification for the essential principles of constitutional democracy. Thus Rawls' work has given support to those who would encourage a *de facto* disestablishment within legal reasoning more generally. Scholars like Bruce Ackerman[22] and Robert Audi[23] have introduced into legal and political philosophy two of the "dogmas of liberalism" regarding religion in public life. The first dogma states that religious beliefs are irrational or non-rational and therefore cannot meet the standards of public reason. The second dogma asserts that there are no available decision procedures for resolving religiously based moral disagreements. Either you are left with indeterminacy in such arguments, or people fanatically seize upon one of the contending positions and seek to impose it on the opposition. In neither case are we able to reach cultural or political consensus. Thus, so the common argument goes, religion should be relegated to the private realm and prohibited from public affairs.

Against this much larger cultural and political background Kent Greenawalt's work should be seen as an attempt to respond to the most stringent positions regarding religion and public reason by asserting that *under some circumstances* citizens and public officials can justifiably rely upon religious convictions in reaching political decisions.[24] In my own work I have sought to strengthen and broaden the role for religious belief and discourse in public life. Thus I have been working along parallel lines to disprove the "two dogmas of liberalism" and to disturb the consensus concerning *de facto* disestablishment. If this implicit legal consensus does depend upon the wider philosophical context I have briefly described, then the task of refuting that consensus will require rigorous historical, philosophical, and theological analysis and critique.

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of Public Reason Revisited, 64 U. CHI. L. REV. 764 (1997).

22. *See generally,* BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980).

23. *See generally*, Robert Audi, *The Separation of Church and State and the Obligations of Citizenship*, 18 PHIL. & PUB. AFF. 259 (1989).

24.

> I suggest that ordinary citizens should fee free to rely on convictions informed by religious and other similar views when they consider difficult political issues. Legislators and executives appropriately take into account citizen judgments that are formulated in this way. These officials should seek to resolve issues on the basis of public considerations (including the view of citizens), but they also may sometimes rely on their own religious or similar convictions. For judges, the demands of public reasons are more insistent, but in rare instances they may also look to more personal convictions.

KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS 7 (1995).

III.

I find Professor Smith's treatment of the "four zones of religious disestablishment" to be, for the most part, persuasive. Not only am I in agreement with his argument concerning the first two zones of explicit constitutional jurisprudence, I fear that the problems may be considerably more serious than he acknowledges in this paper; consequently, the solutions may need to be more radical. I have argued at length in *Religion in Public Life*[25] that the entire conceptuality employed by the courts since *Everson v. Board of Education*[26] is conceptually unstable and incapable of providing consistent guidelines for either establishment or free exercise clause jurisprudence. Precisely because the courts appear to accept the implicit truth of *de facto* disestablishment, they have devised a set of concepts—neutrality, separation, and accommodation – that impede clear and consistent interpretation and application of the religion clauses. My own view is that this entire conceptuality should be jettisoned and a new approach devised for First Amendment religion clause jurisprudence. I do not know whether Professor Smith would agree with this more radical approach, but I do think that his critique of *de facto* disestablishment raises profound questions for the entire conceptual framework the courts have employed since the 1947 *Everson* decision.

In his treatment of "zone three" Professor Smith offers an interesting observation regarding the instability of libertarian reasoning with regard to religious questions and the law. He writes:

> [T]he 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 seatbelt 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, or euthanasia, or laws disfavoring homosexual conduct, or the regulation of obscenity.[27]

He goes on to say "[i]n other words on the assumption that neither the libertarian argument nor the disestablishment argument would be broadly persuasive if considered in isolation, why do two defective arguments add up to a compelling case?"[28]

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25. THIEMANN, *supra* note 2, at 42-66.
26. 330 U.S. 1 (1947).
27. Smith, *supra* note 1, at 209-10.
28. *Id.* at 211.

While I find this analysis to be interesting and provocative, I do not find Professor Smith's reasoning fully persuasive. The "fact of pluralism" suggests that public policies which carry the force of law should be enacted only when sufficient consensus exists to justify the use of force against those who defy the consensus. In the 1920's when no public consensus existed with regard to Social Security provisions, it may well have seemed that enforced payroll deductions for future social benefits served to impose the values of one political ideology upon the whole populace. But in the aftermath of the Great Depression a thin but sufficient consensus developed to allow the implementation of such policies. Similar historical developments changed national consensus about seatbelt ordinances and, most dramatically, about smoking in public places. Laws that we now accept as commonplace would have been seen as inappropriate impositions in earlier decades, but changes in public perception, influenced by scientific or statistical evidence, brought about a sufficient consensus to justify such public policies. Today there is no such consensus concerning issues like abortion, euthanasia, gay and lesbian rights, and pornography, and so use of the force of law to establish one of the contending positions may well be experienced as the "imposition of your values on everyone else." Therefore, it seems perfectly reasonable to oppose the use of the force of law in a situation where no moral or political consensus exists. The "fact of pluralism" need not imply either the doctrine of political neutrality or *de facto* disestablishment but simply the recognition of the importance of democratic consensus in the use of coercive measures.

Professor Smith's reflections on "zone four" of religious disestablishment raise important issues not just for the legal profession but for democratic society more broadly. The absence of religious ideas and perspective in legal discourse reflects a more general tendency toward the marginalization and privatization of religion in secular democratic societies. Professor Smith's questioning of *de facto* disestablishment can be extended to secularization theories as well. For decades now secularization theories have dominated the intellectual landscape of most academic disciplines. Secularization theories have argued that as capitalist economies and democratic politics expand worldwide we will witness a withering away of religion's public role. The complexity of modern secular societies renders irrelevant religion's traditional role of providing an overarching framework of meaning for all citizens. Given the diverse ways of believing and acting in the modern world, the dominance of any single religious view would lead to suppressions of freedom contradictory to the aims of democracy. Moreover, the attempt to in-

troduce religious controls in the economic sphere could only spell disaster for the play of free market forces essential to the world of business and commerce. Freedom and self-determination are the hallmarks of modern democratic and capitalist societies, and religious beliefs, grounded as they are in authority and tradition, must give way, so the secularization theorists argue, to the inexorable forward movement of modernity. Religion in the modern world can no longer play a public role, *i.e.*, a role that provides common ground and shared principles for belief and action. If religion is to survive modernity, it must do so in the private lives of individual citizens. Religion, like other commodities in the smorgasbord of democratic capitalism is something you are free to choose or reject as personal preferences dictate. Religion in modernity is "the kind of thing you like, if you like that kind of thing."

The attempts by secularization theorists to marginalize and privatize religion have run up against the empirical reality of flourishing public religion in almost every contemporary democratic society. The public role of religion in American electoral politics, in the complex disputes of the Middle East, in the tragic conflicts in Northern Ireland, in the freedom struggles in the Philippines and the Eastern European republics provides ample evidence that the predictive power of secularization theories is limited. As John Keane has recently argued,[29] secularization theories have not only become historically anachronistic; they may also contribute to the growing tendency for intolerance within democratic societies that enforce secularization through the rule of law. The time has come for a fundamental reconsideration of the validity of secularization theories.

Religion, as Professor Smith points out, is by its very nature pervasive; it is comprehensive in the sense that it influences all aspect of the religious believer's life. It is this very comprehensive quality of religious belief that leads Rawls to doubt whether religious belief can ever serve as the primary basis for the justification of the constitutional principles of a liberal democracy. While I firmly reject the privatization or compartmentalization of religion, I am reluctant to follow Professor Smith's suggestions concerning a more direct relation between religious convictions and legal discourse, if that is indeed what he proposing. And, so I want to conclude these remarks with some reflections upon his provocative example of the place of religion in the measurement of damages within the legal system.

Professor Smith has shown, persuasively in my judgment, how con-

29. John Keane, *The Limits of Secularism*, TIMES LIT. SUPP., Jan. 9, 1998, at 12-13.

sideration of the "vertical dimension" of our lives, the dimension of the "religious," can provide deep moral guidance that might otherwise not be available to the legal profession.[30] The problem arises with the fact that law is by its very nature *coercive*; and we must raise the question whether the religious dimensions of our lives should ever be used in a coercive manner. Should, for example, consideration of the "vertical" dictate legal limits to the amount of damages assessed in a liability case? Even though a particular individual might acknowledge the important lessons drawn from Tolstoy and other religious sources, it is not apparent that the *law*, which applies coercively to all citizens, should also acknowledge those lessons.

Christian theologians have long struggled with the question of how the standards of the Christian Gospel, the so-called "law of love," should relate to the more retributive standards of law effective within the state. How do love and justice relate to one another? How does the command to "love your enemies" square with the necessity to engage in defensive acts of war to protect innocent citizens? How can the Christian obligation to forgive the sinner be congruent with the need of the state to punish the offender? While there have been many solutions offered to this dilemma throughout the history of Christianity, almost every theological proposal requires a distinction between the standards which reign in the "city of God," "the kingdom of the right hand," or the "church," and those which reign in the "city of man," "the kingdom of the left hand," or the "world." The vertical dimension cannot *without some adjustment* become the standard for coercive action within a pluralistic society.

"It is not given to man to know his own needs," Tolstoy wrote. The implication is, of course, that human needs are known finally only to *God*. So it would also follow that it is not given to the *law* to know human needs, surely not in the way in which they are known to God. For that reason the vertical religious dimension should not, I believe, play a direct role in the shaping of law or in the coercive determination or measurement of damages. Religious reflections of the sort Professor Smith has so powerfully displayed in this essay function, rather, to suggest the limits of the law to address the full range of human needs. The vertical dimension reminds us of our fallibility and particularly of the folly of valuing human life in purely economic terms. Thus, its relationship to law is primarily indirect, critical, and corrective.

Thus, it seems that the vertical dimension of human life could, in-

30. Smith, *supra* note 1, at 221-27.

deed, function to influence the very concept of justice that is operative within the legal system. Professor Smith is certainly correct when he calls into question the notion that monetary compensation will make the injured party "whole." There is more to injury and to recovery than simply monetary damages. But it is not clear to me that it is the role of the *law* to treat personal injury "as one of the necessary challenges and mysteries in human existence, rich with tragedy, opportunity, and promise," even though I believe that latter claim to be true.[31] Whether injured persons recognize the opportunities for growth inherent in personal tragedy depends upon many factors, virtually all of which reside outside the sphere of the law. Perhaps damages awarded to the victims of injury should have the goal not of "making whole" but of providing the material conditions that allow the re-shaping of character to take place. Then justice (the awarding of monetary damages) may indeed serve love (the positive re-shaping of character). But the relationship between justice and love, between law and religion, should always remain indirect, so that the limits and possibilities of both realms might be protected. If that is the force of Professor Smith's proposal, then in this case legal and theological reflection reach a common conclusion. And that fact alone might serve as encouragement to those who would bring the worlds of law and theology into closer proximity.

31. *Id.* at 223.