Reality and Illusion

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Abstract

It is difficult to argue with the ideal of transparency in law. Transparency in the operation and effects of legal rules is essential if we are to evaluate the legal system under which we live. In his book, Hanoch Dagan sets forth a particularly compelling case for legal realism and its transparent approach to law. As compelling as this case is, however, I shall argue that it is not complete. Paradoxically, there are situations in which transparency in law—or the simple acceptance of realist insights—is neither practical nor wise. Indeed, I shall argue, there are situations in which subterfuge and illusion are vital, and are in fact what the public interest (if not the Constitution, or other iconic public documents) demands.

I. Introduction

It is difficult to argue with the ideal of transparency in law. Transparency in the meaning, operation, and effects of legal rules is essential if individual citizens are to know what conduct the law requires. Transparency is also essential in the development of norms, and in the correction of injustice. We—as a society—must frankly face the reasons and consequences of our actions, as citizens and law creators, if we are to correct legal errors and strive toward compliance with norms of freedom, equality, and the meeting of genuine and inescapable human need.

In his book, Professor Hanoch Dagan sets forth the compelling and—in my view—fundamentally irrefutable case for transparency in law. Setting his vision within the realist tradition, Dagan describes what he calls the three tensions in law: the tension between power and reason, the tension between science and craft, and the tension between tradition and progress.1 These are, in his view, the “uncomfortable but inevitable” constitutive tensions in law.2 Law is—in this sense—irreducibly complex, and this complexity must be recognized. Law is not an “autonomous, comprehensive, and rigorously structured doctrinal science.”3 Nor is it something that can be explained or guided by the “divining of one essential meaning of legal concepts” or legal goals.4 “[A]ll legal systems are patchworks of contradictory premises.”5 It is a necessarily messy enterprise, with existing categories and their underlying values always subject to debate and change. Just as

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2 See id. at 15.
3 Id. at 16.
4 Id. at 18.
5 Id. at 20.

ISSN 2291-9732
responding to human needs is often a complex, contradictory, and evolving business, so law—which is anchored in that response—is as well.

I do not believe that there is anyone who could view the totality of any complex legal system and honestly argue to the contrary. We could try to impose a single value or frozen architecture on law, but it would not describe law as it exists. We are no more operating under a system of single-value objectives than we are under a system of scientific decision-makers. Once such illusions are shattered, it is difficult to tape them back together again, as much as we—as legal theorists—might be attracted to their elegant simplicity. Thus, there is the seemingly ubiquitous observation that “we are all realists now.”

Indeed, I have argued strenuously that we must assess legal rights and competing public interests in terms of the underlying reasons that ground them. We believe that particular claims should be cognizable as individual rights or public interests because of their “core values,” or their protection of particular states of affairs for particular reasons. Individual legal rights or competing public interests are enforced by the coercive power of the state because we believe that the values that ground them are more important or more worthy, in a particular case, than competing values and interests. This is an inherently normative enterprise. In addition, because it is normative, the possibility of reassessment and change is always present. We, as a society, cannot ignore the complexity and contingency of law and law-influencing norms, in this sense. To ignore it is to willfully blind ourselves to the legal reality in which we live.

It is therefore apparently paradoxical that in this article, I will argue that there are situations in which transparency in law—or the simple acceptance of realist insights—is neither practical nor wise. In the pages that follow, I will argue that there are certain illusions that should or must be retained, and not subjected to the glare of the “realist” light. In these cases, subterfuge and illusion are vital, and are what the public interest (if not the Constitution, or other iconic public documents) demands. Illusion, in these cases, does not necessarily trump the realist enterprise in every application; but it serves a vital function that must be recognized.

I realize that this position might not be an easy sell. The idea that there are situations in which we should deliberately endorse illusion over truth, or obfuscation over clarity, contradicts the deepest instincts of logic or law. However, I hope to demonstrate why transparency has its limits, and why illusion is sometimes a critical part of the aspirations of law.

II. The Problem of Religion and Law: An Illustrative Case Study

A. The Historical Contradiction: Principle and Practice

Perhaps because of its inherent difficulties, American First Amendment Religion Clause jurisprudence is an area of law where the application of realist insights would seem to be most critical. Religion Clause jurisprudence has long been associated with the pronouncement of seemingly absolute principles which are, repeatedly, ignored in practice.

6 See id. at 3.
Although there have been times when the contradiction has generated inquiry and attempted tentative qualification of the absolute principle, in many critical areas the contradiction has simply been left intact, unacknowledged and unchallenged.

Consider, for instance, the threshold definition of religion itself. Famously, the United States Supreme Court has asserted that both the nature of an individual’s religious belief, and the question of an individual’s adherence to that belief, must be left to individual determination without interference or second-guessing by the courts. In ringing terms, the Court has stated that “[f]reedom of thought, which includes freedom of religious belief, is basic in a society of free men.”7 “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, [or] religion.”8 “[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”9 Indeed, it has been suggested that a government attempt to define religion would, of itself, be a violation of the Establishment Clause.10

The expansion of “religion” for First Amendment purposes to all beliefs declared by the adherent to be religious is, of course, completely untenable. If the courts are bound to accept adherents’ declarations of the existence, content, and requirements of religion, then the reach of potential claims under the Religion Clauses becomes unlimited. Recognition of this truth has propelled the Court along a parallel course, in which it has—contrarily—assumed the power to define religion when confronted with free exercise claims.11 For instance, as a part of this parallel course, the Court has stated that protected religious beliefs do not include the “bizarre or incredible.”12 Interestingly, the contradiction posed by these parallel and conflicting doctrinal lines has never been explicitly acknowledged by the Court, let alone reconciled. The Court has simply continued its ostensible adherence to the absolute principle that adherents alone determine religious content, while often—at the same time—arrogating that power to itself.

There are also other tensions between seemingly absolute principle and compromised practice in Religion Clause jurisprudence. For instance, more than one hundred years ago the Court proclaimed that the Establishment Clause requires a “wall of separa-

7 United States v. Ballard, 322 U.S. 78, 86 (1944); see also Fowler v. Rhode Island, 345 U.S. 67, 70 (1953) (“[I]t is no business of [the] courts to say . . . what is a religious practice or activity . . . .”).
10 See, e.g., Barnette, 319 U.S. at 658 (Frankfurter, J., dissenting).
12 See Church of the Lukumi Babalu Aye, 508 U.S. at 531.
tion between church and state.” 13 The “union of government and religion,” the Court advised, “tends to destroy government and to degrade religion.” 14 Consequently, there must be a wall of separation between them for the protection of them both. 15

Such separation is, of course, a practical impossibility. As long as religious persons and institutions are a part of American society, it is inevitable that there will be some entanglement of religion and state. For instance, exceptions to the “wall” were quickly recognized for the provision of basic public services (such as police and fire protection) to religious institutions, 16 and the receipt of state subsidies and federal construction grants by religiously affiliated colleges and universities. 17 Historically, particularly difficult problems have arisen in the context of state aid to religiously affiliated elementary and secondary schools. The giving of unrestricted cash grants to such schools has been consistently prohibited, 18 while other forms of government aid have been upheld or struck down in a series of notoriously conflicting doctrinal pronouncements. 19

The Court has attempted to rationalize these results with many refined doctrinal “sub-tests”—for instance, whether the aid was, itself, of a secular nature, or could be diverted to religious purposes or functions; 20 whether public tax money would be used to subsidize and advance religious activities; 21 and whether state programs conferred a “primary” or only an “incidental” benefit on religious schools. 22 Such tests are of course highly problematic, since any activity (in its execution) could be given a religious “gloss,”


15 See id.


19 For instance, the giving of publicly funded standardized tests and scoring services in religious schools was permitted, see Wolman v. Walter, 433 U.S. 229, 239-40 (1977) (plurality opinion), but the giving of state money to nonpublic schools for the maintenance and repair of school facilities and equipment was not. See Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 774-80 (1973). The provision of secular textbooks to sectarian schools was permissible, see Allen, 392 U.S. at 248, but the provision of movie projectors, tape recorders, and record players was not, see Wolman, 433 U.S. at 248-51. Use of state tax revenues to pay for the basic bus fares of parochial school pupils as part of a general transportation program was permissible, see Everson, 330 U.S. at 8-18, but transportation for parochial school field trips was not, see Wolman, 433 U.S. at 252-55.


21 See, e.g., Nyquist, 413 U.S. at 779-80.

22 See, e.g., Allen, 392 U.S. at 243.
and any public aid that is given to a religious school will (at the very least) save that institution from making the same expenditure itself.

The construction of fictions to mesh the collision of the idea of a “wall” of church/state separation with the realities of state aid to religious institutions arguably reached its zenith with the implementation of what I have called the idea of “the individual as causative agent” in Establishment Clause jurisprudence. In this series of cases, the Court shifted focus from the nature and effects of the provided state aid, to the identity of the entity whose actions or decisions directed the aid to particular religious institutions. For instance, if students or their parents funneled state aid to religious schools, no Establishment Clause problem was found. The Court used this theory to uphold tax deductions for religious elementary and secondary school expenses and public vouchers to pay for the attendance of children at religious elementary and secondary schools. In these cases, the Court reasoned that “the wall” of separation was not breached because of the intervening act of parental choice.

Perhaps the most absolute—and most violated—Religion Clause principle involves the injunction that government’s interaction with religion and nonreligion must be both even-handed and fair. In a series of ringing pronouncements, the Court has stated repeatedly that all people—religious and nonreligious—must be treated equally by government. Government can favor “neither one religion over others nor religious adherents collectively over nonadherents.” It cannot convey or attempt to convey “a message that religion [generally] or a particular religious belief is favored or preferred.” For government to “choose” one religion over other religions, or religion over nonreligion, violates the vital principles of the equality of persons and the neutrality of government.

Of course, commitment of government to a policy of strict equality—or strict neutrality—is as impossible in its way, as the idea of a “wall of separation” (discussed

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23 See Laura S. Underkuffler, Vouchers and Beyond: The Individual as Causative Agent in Establishment Clause Jurisprudence, 75 Ind. L.J. 167, 177-79 (2000).
24 See id. at 177.
27 See, e.g., id. For a critique of this rationale, see Underkuffler, supra note 23, at 187.
above) is in its. It is relatively easy to implement “equality” or “neutrality” when the question involves parity in the treatment of religious sects, and the religious sects in question are ones that are widely accepted in the United States. Thus, it is relatively noncontroversial (and routinely recognized by courts) that government cannot establish Christian Protestantism to the exclusion of Catholicism, or Judaism to the exclusion of Islam.

Far more difficult are the questions which include the privileging and promotion of “nonsectarian” monotheistic religion by government, or the privileging of “mainstream” over other religious faiths. Using theories of “accommodation,” supporting “historical practice,” and recognizing “tradition,” the Court (or its members) have signaled approval of government privileging of religion in many contexts, and—particularly—the tacit endorsement of mainstream religious faiths.32 All the while, in tandem, the Court’s professed adherence to absolute principles of neutrality and equality has continued to exist. The governing majorities of the Court have continued to insist that “[t]he First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion,”33 while ignoring (or rationalizing) the extent to which secularism, monotheism, Judeo-Christian, or “Abrahamic” beliefs have been privileged and promoted by government. Even dissenters, over the years, generally have been careful to avoid any direct challenge to the idea that commitment to principles of neutrality and equality characterizes church-state relations in the contemporary United States.

No challenge to this idea was made, that is, until the Van Orden and McCreary cases were recently decided by the Court.

B. The “Realist” Challenge to Absolute Principle: The Van Orden and McCreary Cases

Van Orden v. Perry34 and McCreary County v. ACLU,35 decided in 2005, were in many ways unlikely candidates for the triggering of an overt break with established fictions in Religion Clause jurisprudence. Both cases dealt with the constitutionality of the Judeo-Christian Ten Commandments displays on government property. The Ten Commandments, being highly sectarian in nature, presented an extreme case for those who favored some doctrinal breach with principles of religious, nonreligious, and inter-sect equality. While an incremental departure from these long-established principles might be broadly tolerated, their abolition for the accommodation of unquestioned sectarianism would not.

32 See, e.g., Sherbert v. Verner, 374 U.S. 398 (1963) (holding that the state must accommodate workers’ Sabbath-day practices); Marsh v. Chambers, 463 U.S. 783, 786 (1983) (holding that the employment of legislative chaplains and other religious practices by government are permissible as “deeply embedded in the history and tradition of this country”); Cnty. of Allegheny, 492 U.S. at 602-03 (legislative prayer, the National Motto (“In God We Trust”), and religious references in the Pledge of Allegiance (“One Nation Under God”) permissible as historical, “nonsectarian references to religion by . . . government”); id. at 662 (Kennedy, J., concurring in the judgment in part and dissenting in part) (discussing the permissibility of employment of mainstream religious chaplains by Congress).

33 Epperson, 393 U.S. at 104.

34 545 U.S. 677 (2005).

In addition, there were ample existing doctrinal grounds—such as the immunization of the practice by history,\textsuperscript{36} or the finding of secular legislative purpose or context\textsuperscript{37}—that were available to the \textit{Van Orden} and \textit{McCreary} displays’ supporters on the Court.

\textit{Van Orden} involved a challenge to a Ten Commandments monument placed by a civic group on the Texas State Capitol grounds some forty years before.\textsuperscript{38} The monument was erected by the civic group with the approval of the state legislature.\textsuperscript{39} It was one of seventeen monuments and twenty-one historical markers on the grounds which were claimed to commemorate “the ‘people, ideals, and events’” that comprise that state’s history.\textsuperscript{40}

The \textit{McCreary} case had a more convoluted—and arguably more religiously purposive—history. The Ten Commandments displays in that case were posted by executive order in the courthouses of two Kentucky counties in 1999.\textsuperscript{41} The displays were large, and featured the Commandments as found in the King James version of the Bible.\textsuperscript{42} After the ACLU brought suit, other documents were added to the displays, such as the Declaration of Independence and the Preamble to the Constitution of Kentucky.\textsuperscript{43} All of the documents contained references to God, the Bible, and other religious themes.\textsuperscript{44}

After a preliminary injunction was issued by a federal judge, the Kentucky display was changed again. After this alteration, the display consisted of nine framed documents, including the Ten Commandments (as before), the Magna Carta, the Declaration of Independence, the Bill of Rights, and the Pilgrims’ Mayflower Compact.\textsuperscript{45} The collection was also given a title, “The Foundations of American Law and Government Display[s].”\textsuperscript{46}

In the \textit{Van Orden} case, the Ten Commandments display was upheld by the Court. In a plurality opinion announced by Chief Justice Rehnquist (and in which Justices Scalia, Kennedy, and Thomas joined), it was acknowledged that the Ten Commandments “are religious—they were so viewed at their inception, and so remain.”\textsuperscript{47} It was uncontroversial,

\textsuperscript{36} See, e.g., Cnty. of Allegheny, 492 U.S. at 602-03 (distinguishing legislative prayer, the national motto (“In God We Trust”), and religious references in the Pledge of Allegiance (“one Nation under God”) from prohibited practices, on the basis that they are historical, “nonsectarian references to religion by government”); Marsh, 463 U.S. at 787-90 (holding that nonsectarian legislative prayer had historical and civic, not predominantly religious, meaning).

\textsuperscript{37} See, e.g., Marsh, 463 U.S. at 786-92 (upholding legislative prayer as “deeply embedded in . . . history and tradition”).

\textsuperscript{38} See Van Orden, 545 U.S. 677 at 681-82.

\textsuperscript{39} See id.

\textsuperscript{40} See id. (quoting Tex. H. Con. Res. 38, 77th Legis. (2001)).

\textsuperscript{41} See McCreary, 545 U.S. at 851.

\textsuperscript{42} See id. at 851-52.

\textsuperscript{43} See id. at 852-54.

\textsuperscript{44} See id.

\textsuperscript{45} See id. at 855-56.

\textsuperscript{46} See id. at 856.

\textsuperscript{47} See Van Orden, 545 U.S. at 690.
therefore, that the monument had current religious meaning, and that this meaning was—through its placement—adopted (in a significant sense) by government. The question was simply whether government’s embrace of religion in this way was an Establishment Clause violation.

In strident terms, the plurality announced that it was not. It is clear, Rehnquist wrote, that government institutions cannot “press religious observances upon their citizens.” However, government need not “evince a hostility to religion” by refusing to recognize “our religious heritage” and the needs of religious groups. This includes government recognition that “[o]ur institutions presuppose [the existence] of a Supreme Being . . . .” For government pronouncements to “[s]imply hav[e] religious content or promot[e] a message consistent with a religious doctrine does not run afoul of the Establishment Clause.”

What about the principles of government neutrality and equality? These seem, for all practical purposes, to be casualties of the plurality’s approach. In the plurality’s view, “[r]ecognition of the role of God in our Nation’s heritage has . . . been reflected in our decisions. We have acknowledged, for example, that ‘religion has been closely identified with our history and government’ . . . .” Indeed, the plurality argued, even the dissenters in the case “do not claim that the First Amendment’s Religion Clauses forbid all government acknowledgments, preferences, or accommodations of religion.” In this case, the monument was “passive,” and pressured no passerby to adhere to its message. It was not placed in a particularly sensitive context, such as an elementary or secondary school. In the plurality’s view, as long as government does not attempt to coerce individuals to believe the messages that it endorses, it is free to choose religion over nonreligion—and, indeed, particular religious beliefs over other religious beliefs without Establishment Clause violation.

This was a stunning doctrinal turnaround. Indeed, it was expressly disavowed by Justice Breyer, who concurred in the judgment on other grounds while vigorously adhering to the neutrality test. The dissenters (Justices Stevens, Ginsburg, Souter, and

48 See id. at 683-90.
49 See id. at 683.
50 Id. at 683-84.
51 Id. at 683.
52 Id. at 690.
53 Id. at 687 (quoting Schempp, 374 U.S. at 212).
54 Id. at 684 n.3.
55 See id. at 686, 691.
56 See id. at 690-91.
57 In Breyer’s view, “neutrality” was clearly the governing principle. In his view, under this test, the monument passed muster because it was not, in fact, a contemporary endorsement of religion by government. Its placement reflected no particular religious objective by government, and it had stood—unacknowledged, and uncontested—for nearly two generations. See id. at 698-705 (Breyer, J., concurring in the judgment).
O’Connor), in an opinion authored by Stevens, pointed out the obvious: that the monument’s message was unequivocally religious, and its placement, therefore, was an endorsement of religion by government.\(^{58}\) In the dissenters’ view, it seemed “beyond peradventure that allowing the seat of government to serve as a stage for the propagation” of this message made those who did not share its religious commitments outsiders in their own community.\(^{59}\) The “official state endorsement” of this message was, as a result, “flatly inconsistent” with the commitment to neutrality required by the Establishment Clause.\(^{60}\)

The McCreary case had the opposite outcome. In that case, Justice Breyer joined the Van Orden dissenters, and the courthouse displays were struck down. Justice Souter, writing for the majority, began with a flat reassertion “that the ‘First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.’ ”\(^{61}\) When the government acts to advance religion, “it violates the central Establishment Clause value of official religious neutrality . . . .”\(^{62}\) Favoring one faith over another, or adherence to religion generally, “clashes with the ‘understanding . . . that liberty and social stability demand a religious tolerance that respects the religious views of all citizens . . . .’ ”\(^{63}\) The displays, in that case, featured “unmistakably religious statement[s] dealing with religious obligations.”\(^{64}\) Those displays, placed by government edict, were a clear Establishment Clause violation.\(^{65}\)

Justice Scalia, writing in dissent (and for Justices Rehnquist, Thomas, and Kennedy in part), deliberately rent the fabric of the neutrality facade. Citing evidence of the religious and monotheistic assumptions of both founding-era figures and many contemporary government practices, he asked, “[H]ow can the Court possibly assert that ‘the First Amendment mandates governmental neutrality between . . . religion and nonreligion,’ . . . and that ‘[m]anifesting a purpose to favor . . . adherence to religion generally’ . . . is unconstitutional? Who says so? . . . Surely not the history and traditions that reflect our society’s constant understanding of [the Constitution’s] . . . words. Surely not even the current sense of our society,” in view of widespread, contemporary tolerance of religious references, practices, and policies by government.\(^{66}\)

Whatever the rhetoric of the Court’s tests, Scalia argued, the idea that government does not—and cannot—favor religion over nonreligion “is demonstrably false.”\(^{67}\) In fact,

\(^{58}\) See id. at 712 (Stevens, J., dissenting).

\(^{59}\) See id. at 720.

\(^{60}\) See id. at 712.

\(^{61}\) McCreary, 545 U.S. at 860 (quoting Epperson, 393 U.S. at 104).

\(^{62}\) Id.

\(^{63}\) Id. (quoting Zelman, 536 U.S. at 718 (Breyer, J., dissenting)).

\(^{64}\) Id. at 869.

\(^{65}\) See id. at 869-73.

\(^{66}\) Id. at 889 (Scalia, J., dissenting) (internal quotation marks omitted).

\(^{67}\) See id. at 893.
government—with the Court’s blessing—has aided religion (through tax exemptions, exemptions from civil rights laws, and in other ways), protected the free exercise of religion, and publicly acknowledged the Creator and citizens’ religious beliefs. Nor is the idea of equality of sects any more realistic. Indeed, Scalia wrote, “[i]f religion in the public forum [had to meet this test] . . . there could be no religion [in that setting] . . . at all. One cannot say the word ‘God,’ or ‘the Almighty,’ . . . [or] offer public supplication or thanksgiving, without contradicting the beliefs” of religious or nonreligious others.

In support of his disregard of the “neutrality” facade, Scalia noted that monotheism—in the tradition of Christianity, Judaism, and Islam—accounts for 97.7% of all religious believers in the United States. This reality, he argued, compels the conclusion that “the Establishment Clause permits . . . disregard of polytheists and believers in unconcerned deities” by government, in its acknowledgments of the facts of American religious life. Subsequent decisions by the Court have tacitly rejected Scalia’s realist challenge, and left the contradiction between absolute principle and practice in place.

If the goal is the acknowledgment of truth in First Amendment jurisprudence, the Scalian position must win hands-down. Whatever one thinks of the monotheistic choice, the truth remains that federal, state, and local governments of the United States are not, never have been, and in fact cannot be, “neutral” in matters of religion. By the terms of the Religion Clauses themselves, governments cannot be neutral toward religious individuals, beliefs, practices, and institutions. Religious exercise (however defined) is particularly protected from government, while the establishment of religion (however defined) is particularly denied to government. In practice, this means that religion in public life is privileged in a myriad of ways, and circumscribed in a myriad of others. Indeed, it can be pointed out, the avoidance of privileging religion or nonreligion is a logical impossibility. Government policies and practices must establish—and thus favor—something. If those policies and practices mirror secular beliefs, then they favor the nonreligious (to the detriment of the religious). If they mirror religious beliefs, then they favor the religious (to the detriment of the secular). Whatever one thinks of the privileging of religion by government, the disadvantaging of religion by government, or the establishment by government of religious or secular practices or policies, the fact that government is not neutral, has not been neutral, and, indeed, cannot be neutral, is obvious.

Acknowledging this truth, however, leaves us with a remaining and very important question. Should we—as Scalia argued—therefore adopt a realist view, and cast aside the

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68 See id. at 891-92.
69 Id. at 893-94.
70 See id. at 894.
71 Id. at 893.
72 See, e.g., Town of Greece v. Galloway, 134 S. Ct. 1811, 1819, 1822-23 (2014) (legislative prayer permitted because “no faith was excluded by law, nor any favored”; and majority sentiments do not identify the demarcation between permissible and impermissible involvement in religion by government).
neutrality/equality illusion and the other illusions discussed above? Or should we, for some reason, continue to pretend that these illusions govern, as first principles, in American constitutional jurisprudence?

III. The Complex Role of Legal Illusion

The case opposing the deliberate use of legal illusion is not difficult to make. For instance, regarding the neutrality/equality illusion in Establishment Clause jurisprudence, Scalia presented what seems to be a cogent and undeniable case. Illusion in law, he wrote, has profound and detrimental consequences. “What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority,” he wrote in McCreary, “is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle.”73 To trumpet the principle of government neutrality—and then to ignore that principle, in a myriad of situations—risks the erosion of trust in law. “[A]n enforced neutrality that contradicts both historical fact and current practice . . . [risks] losing all that sustains it: the willingness of the people to accept [the Court’s] . . . interpretation of the Constitution as definitive,” in preference to other branches of government.74

There is, in short, a cost to hypocrisy. We already have, as a matter of fact, the establishment of monotheism by federal, state, and local governments. There are already pervasive references to “the Almighty” and “our Judeo-Christian heritage” in the process of statute-creation and case-deciding. Religion is—in a monotheistic sense—already “chosen,” acknowledged, assisted, and preferred by American government. For the Court to pretend that this reality does not exist—by professing adherence to a contrary and absolute principle—is both blind and hypocritical. The same can be said of the principle of deference to “religion,” as defined by adherents; the “wall of separation” between church and state; and any other statements of absolute principle countermanded by fact.

This critique of legal illusion seems, by its own terms, to be quite unassailable. The question is whether there are any reasons to maintain legal illusion, on other grounds.

To explore this question, we will begin with a broad observation. Contemporary human life is, in fact, rife with illusion. First, there are the humanly transcendent or metaphysical beliefs—and probable illusions—under which we conduct our lives: for instance, that human life matters in the cosmic order; that the human mind can comprehend the meaning of the infinite; or that we can (somehow) control our individual and collective destinies. The fact that such beliefs are arguably ungrounded, and in part demonstrably false, does not affect our use of them. We have concluded—apparently—that we must believe what we must believe, in order to continue the conduct of our lives.

The role of illusion in human life is also apparent in settings that are more mundane. For instance, we believe, day to day, and until forced to acknowledge otherwise, that we are not (at this moment) mortally ill; that others will believe us; that our efforts will be

73 McCreary, 545 U.S. at 890-91 (Scalia, J., dissenting).
74 Id. at 893.
rewarded; and so on. Indeed, so firmly do we believe in these illusions that the absence of such beliefs is cause for mental health alarm. This is true even though, as we look back on our lives, such beliefs were as often false as true.

To put it succinctly, illusions are perpetuated for the utility of their ends; they block fears, discourage hopelessness, and convince us to continue to live our lives. They perform these functions even when, as a matter of truth, they have little to commend them.

The strategic use of illusion is perhaps most obvious in actions by government. After a recent terrorist attempt to destroy an American passenger aircraft, federal officials responded swiftly with several new security measures. Passengers on international flights en route to the United States were required to remain in their seats for the last hour of flight, without any personal items on their laps. Overseas passengers were restricted to one carry-on item. Cabin lights were kept on for the entire flight, without dimming for takeoff and landing.  

These measures—in fact—had little relevance to the security of passengers. As a New York Times editorial observed, “A reported new requirement that passengers on international flights . . . remain seated for the last hour is puzzling since it wouldn’t stop a terrorist acting before [that time].” This objection, however, misses the important point. These restrictions were implemented less for their preventive value than for the power of their illusion. They assured the public that the government could and would control the terrorist threat. As President Obama confidently stated to the public, if existing intelligence information had been properly processed, the suspect would have been “identified . . . as a dangerous extremist” who would have been prevented from flying to the United States.

This is not to say, of course, that some security measures (such as the checking of “no-fly lists” for terrorism suspects, or the more careful screening of carry-on luggage) have no impact on air transport safety. Indeed, it is probably safe to assume that they do. Rather, the point is that government’s assurance of public safety, in this or any context, is ultimately and necessarily an illusive one. Terrorists, or any other human or natural threat, can confound prevention. Yet, as government responders recognized in this case, it is not the actual assurance of safety that the situation critically demands; it is the psychological (and illusive) assurance of it.

In many legal contexts of conflicting principle and practice, the functions of illusion are not so obvious. These are not cases in which unknowables are avoided, or paralyzing risks are hidden. Rather, they are cases in which illusion in law serves a more subtle function.

If we are honest, we know that many societal ideals and aspirations are unattainable, for both theoretical and practical reasons. Yet they remain an integral part of individual and collective life. For instance, we celebrate honesty, as an individual virtue, even though we know that our success in living this virtue will be spotty at best. We believe in the ideal of the right to counsel, even though we restrict this right to certain procedures and are reluctant to commit the resources necessary to ensure counsels’ competence. We believe in the sanctity of life, even as we deny to many (for economic reasons) the health care necessary to sustain it. We stress the aspirational ideals of liberty, fraternity, and equality, for society and government, even as our laws and practices often realize more parochial, liberty- and equality-denying interests and outcomes.

In short, aspirations—including legal aspirations—are important, even if knowingly (and, one might argue, hypocritically) denied in practice. Indeed, few moral or legal principles are observed with anything resembling complete consistency. Yet—despite these “failures” or “hypocrisies” in action—we would never consider abandoning most of these principles or the ideals that they represent. The reason is simple. These principles express, albeit imperfectly, the values and outcomes to which our society aspires. Our claim of adherence to them may be illusory. But they goad us toward action, critique our efforts, and force us—continually—to justify deviation or neglect.

Consider the function of absolute but illusory principles in the religion/government context, discussed above. The principles of inviolability of individual conscience, or the “wall” of church/state separation, or the “equality” of all believers (and nonbelievers), may be all charades as legal fact. However, their roles transcend this observation. These principles—as a part of their simple and uncompromising character—express both aspirational qualities and justificatory demands. We should—these principles declare—respect individual conscience, separate religion from government, and strive toward neutral government treatment of religions and nonreligious sects.

The Scalian position assumes that we (as a society, and in law) can “face the truth” about illusion in Religion-Clause jurisprudence, without negative individual consequences. In other words, Scalia assumes that there is no difference—to affected individuals—whether the privileging of particular religious views or sects occurs in the defiance of absolute principle, or whether it is an entrenched and expressly sanctioned feature of American public life.

In fact, there is a vast difference between declaration of a principle that government must respect individual conscience, stay out of religious matters, and maintain official neutrality, with the occasional breaking of those principles, and a declaration that government favors religious institutions and practices of a monotheistic, “Judeo-Christian,” or “Abrahamic” kind. There is (for example) a profound difference between government neutrality that is highly valued, but sometimes breached, and an official position of a theocratic kind. These differences inhere in the presumptions that we bring to legal questions and the way that we, as a society, view transgressions. There is a difference
in the *culture* of goals, attitudes, and boundaries that we encourage and create. There is a
difference in our acts, our aspirations, and our sense of national identity.

Consider, for instance, what the express abandonment of the neutrality principle—as advocated by Scalia—would mean. The overt preference for monotheistic, Judeo-Christian, or “Abrahamic” religions which this government endorsement exhibits would eliminate any need for the legal justification of privilege, inter-religious sensitivity, or other such restraints. Those who hold monotheistic or “Abrahamic” views would not only be *permitted* to fuse their particular beliefs and practices with government—they would be endowed with a mantle of *justified* and *state-sanctioned superiority* (over Hindus, Jains, Sikhs, Taoists, atheists, agnostics, and others) while doing so.

Legal norms in the United States are not simply technical rules or dispute-resolution mechanisms; they are statements of the minimal, collective understandings on which we, as a society, agree. The principle of neutrality, whatever its flaws in operation, sends a powerful message to those who are not a part of the monotheistic majority that Scalia cites. That message is that the presumptive societal and legal norm in religious matters in the United States is equality. And deviations from that norm are suspect, always, before the law.

The role of illusion in law is, in short, a complex one. For courts, executives, and other law-making bodies to deliberately engage in illusive representations and illusive practices carries potentially steep institutional costs. Failure to grapple with the truth of facts, or the truth of the implementation of principle, may warp or preclude the conduct of public debate about those issues and the forcing of corrective processes. Failure to grapple with truth may also, when perceived by the audience of those law-making bodies, undermine their institutional credibility and their ability to enforce their will.

That said, the role of illusion is not so simple. There are situations where transparency—in the sense of rejection of illusion—is neither practical nor wise. There are situations in which “the truth” is unknowable, and yet government must claim to “know” and reassure. There are situations in which “the truth” is paralyzing, or demoralizing, or otherwise seriously undermining, such that government leaders—in balancing risks—must prioritize that fact. There are situations in which the question is *principle*, not “fact” at all—with the (perhaps) unspoken understanding that principle is always compromised to some degree in practice, with the resultant questioning of simple calls for “truth.”

What does this mean for the realist enterprise? It complicates it, certainly. It means that there is another constitutive tension in law beyond those that Dagan identifies as power and reason, tradition and progress, and science and craft. It is a tension that goes beyond the working out of the realist enterprise, to a questioning of the evaluative limits of the enterprise itself. It is not that we should reject the realist revelation of the existence of illusion in law; it is that we need to rethink our response to that revelation. We might all be realists now; but we are also, on some level, and of necessity, idealists. The celebration of the fruits of the realist enterprise must consider that tension, as well.
IV. Conclusion

After reading Dagan’s book, one is impressed. The book is a beautifully executed and powerful statement of the realist enterprise, and why it must influence law. But one is left with a nagging question. If the case for a realist approach to law is so overwhelming, as I believe it is, why are we still fighting this battle for its legitimacy? Why, nearly one hundred years after the realist revolution, must we continue to beat back attempts to assert various “idealist” visions of the law?

There is no doubt, in my mind, that all sophisticated scholars of American law take legal realism seriously. The question is, rather, its ability to satisfy our deepest legal and societal ideals. Realism, by its own terms, unmasks how law falls short of normative ideals and the ends of justice. However, law is more than simply an imperfect tool. It is also the vehicle for aspirations, and the expression of collective (if often unattainable) truths. In addition to tensions between law as power and reason, and between law as tradition and progress, between law as science and craft, there is another tension. It is between law as politics, and law as sacred text. It is between law as the real, and law as the ideal.