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George H. Taylor

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RACE, RELIGION, AND LAW: THE TENSION BETWEEN SPIRIT AND ITS INSTITUTIONALIZATION

GEORGE H. TAYLOR*

My reflections flow from the following recent comment by the critical race scholar Derrick Bell:

In my writing, I have focused on the economic, political, and cultural dimensions of racism, suggesting its permanence because of the social stability it provides in a system that contains great disparities in income and wealth. . . . But I want to raise . . . the possibility of a deeper foundation growing out of an undeniable fact. Most racists are also Christians.¹

This statement is Bell at his best: at once both extremely provocative and extremely unsettling. I want to explore and develop two aspects of Bell's remark. First, if we want to examine and understand the many dimensions of racism, it is not enough to employ economic, political, or cultural criteria, important as those may be. The perspective of religion or theology offers another vantage point from which to comprehend racism's workings, a perspective that may in fact offer a "deeper foundation" for understanding racism's perdurance. Second, despite the likely inclinations of many that any conjunction of race and religion would typically be a positive, even inspirational one—the story of how religious faith has sustained many engaged in the long struggle for civil rights—that is not the only story of race and religion to be told. "Most racists," Bell reminds us, "are also Christians."² In Part I, I want to relate both the positive and negative stories—including the positive value that his Christian faith

* Professor of Law, University of Pittsburgh School of Law. B.A., Brown University; M.A., University of Chicago; J.D., Harvard Law School. My thought has been stimulated by several conversations with Derrick Bell, with whom I will be co-teaching a seminar on the topic of Race, Religion, and Law during the fall of 2006 at the University of Pittsburgh.

1. Derrick Bell, speech at the Nat'l Black Law Journal 25th Anniversary Conference: Racism's Religious Perspective (Nov. 18, 2005).

2. Elsewhere I hope to explore by contrast why Judaism so early in the struggle for civil rights seemed so uniformly supportive of that goal. And of course there should be inquiry into the orientation toward civil rights of other religions such as Islam. For the present, though, I restrict myself to Christianity.

has for Bell himself³—but we must begin there by facing the negative. The negative story of racism’s employment of Christianity requires us to ask what there is about Christianity that has led to this stain. In Part II, I then expand on Bell’s comments and assess more directly the interrelation of religion and law, particularly civil rights law. I specifically attend the interrelation between the spiritual inspiration of religious faith and its potential institutionalization in law. Finally, in Part III, I assess the ascriptions of faith applied to law and their consequences for the civil rights movement. Throughout we will find positive and negative intertwined on both sides.

I. RACE AND CHRISTIANITY

For contemporary liberals, including many—White or Black—in the mainstream civil rights movement, the persistence of racism is a source of significant puzzlement. The assumption was one of evolutionary progress—perhaps slow, likely hard-fought—toward racial equality. Bell’s work testifies to the failure of that liberal vision: we are now a country, for example, with greater segregated education than three decades ago.⁴ Bell’s view, as already noted, is that religion and theology may help us understand why the liberal vision has failed.

The relation of Western racism to Christianity is complex, since both racists and their critics may profess a belief in Christianity. The division is one internal to Christianity rather than across religions. White racists make claims that their racist religious beliefs do derive from the Bible. Biblical predicates for racist claims by White Christians include the condemnation by Noah of his son Ham’s progeny, due to Ham’s misconduct. The book of *Genesis* quotes Noah saying of Ham’s son, Canaan: “Cursed be Canaan; a slave of slaves shall he be to his brothers.”⁵ The New Testament in turn differentiates between the life of the law and the life of faith. The life of the law is

3. See *infra* note 44 and accompanying text.

4. See, e.g., Greg Winter, *Schools Resegregate, Study Finds*, N.Y. TIMES, Jan. 21, 2003, at A14 (citing a study by Harvard’s Civil Rights Project).

5. *Genesis* 9:25 (Revised Standard). Christian racists have also appealed to the story in *Numbers* where God withdraws support from the Israelites because they are worshipping false gods until one Phineas demonstrates his loyalty by killing an Israelite/non-Israelite couple. See *Numbers* 25. What appeared to be in its original context a question of maintaining religious purity has been used by contemporary racists to endorse racial purity on religious grounds. See Timothy K. Beal, *The White Supremacist Bible and the Phineas Brotherhood*, in *SANCTIFIED AGGRESSION: LEGACIES OF BIBLICAL AND POST-BIBLICAL VOCABULARIES OF VIOLENCE* 120 (Jonneke Bekkenamp & Yvonne Sherwood eds., 2003).

required because of human sin,⁶ and under the life of the law, writes Paul, slaves should be obedient to their masters.⁷ Slavery as a practice is not condemned.⁸ It is true that Paul will go on to say elsewhere: “[I]n Christ Jesus you are all sons of God, through faith. . . . There is neither Jew nor Greek, there is neither slave nor free, there is neither male nor female; for you are all one in Christ Jesus.”⁹ But just as much as this language can provide support for those fighting the battle against racism, it can also be invoked by those who differentiate between the life of law in this world—which tolerates racism—and life in Christ, which lies beyond. Theologian H. Richard Niebuhr describes this latter perspective as one of a basic dualism between Christ and culture.¹⁰

Whatever its biblical origins, the historical support of racism by Christians and the Christian church is, of course, manifold. Theologian Howard Thurman recalls being asked a question which his life’s work would try to answer. How could he be a Christian when:

Your forebears were taken from the west coast of Africa as slaves, by Christians. They were sold in America, a Christian country, to Christians. They were held in slavery for some two hundred years by Christians. They were freed as a result of economic forces rather than Christian idealism Since that time you have been brutalized, lynched, burned, and denied most civil rights by Christians¹¹

6. *Galatians* 3:19 (Revised Standard).

7. *Ephesians* 6:5 (Revised Standard).

8. For exemplification of this stance, see the writings of the fourth century theologian Augustine. See SAINT AUGUSTINE, *CITY OF GOD* Bks. XVII-XXII, 223-24 (Gerald G. Walsh, S.J. & Daniel J. Honan trans., Wash. Catholic Univ. of Am. Press 1954).

9. *Galatians* 3:26, 3:28 (Revised Standard).

10. Niebuhr writes:

[I]t seems to be true that [Paul and Martin Luther] were deeply concerned to bring change into only one of the great cultural institutions and sets of habits of their times—the religious. For the rest they seemed to be content to let state and economic life—with slavery in the one case and social stratification in the other—continue relatively unchanged.

H. RICHARD NIEBUHR, *CHRIST AND CULTURE* 188 (1951).

11. HOWARD THURMAN, *WITH HEAD AND HEART: THE AUTOBIOGRAPHY OF HOWARD THURMAN* 113, 114 (1979). Thurman recalls being asked similar questions by Gandhi. See *id.* at 132. Gandhi told him that the main obstacle to the spread of Christianity in India was its identification “with Western culture, with Western civilization and colonialism.” *Id.* at 135. The greatest enemy to Jesus in India was not any indigenous religion such as Hinduism “but Christianity itself.” *Id.* For Thurman’s most developed response to the question posed about his Christianity, see HOWARD THURMAN, *JESUS AND THE DISINHERITED* (1949). This book was

Theologian after theologian has lamented how segregated the American church has been and remains. In 1971, Benjamin Mays wrote that throughout his lifetime, “the local white church has been society’s most conservative and hypocritical institution in the area of White-Negro relations.”¹² He recalls that when African Americans started to move into southwest Atlanta, the White exodus was so fast that, as just one example, the membership in a local White church went from 800 to 200 over the course of a few years and the financial strain was so severe that the church had to fold.¹³ Reinhold Niebuhr long expressed regret that “the churches . . . have been the most segregated communities in the South, and for that matter, in the nation.”¹⁴

Dr. Martin Luther King, Jr. himself observed that Blacks were not welcome in churches attended by Whites. Although these “white fellow citizens would insist that they were Christians, they practiced segregation as rigidly in the house of God as they did in the theatre.”¹⁵ Dr. King expressed considerable disappointment with White churches and their leadership.¹⁶ It may be true that many White religious leaders told their worshippers they should follow desegregation orders because they were the law, but Dr. King had longed to hear these ministers insist that compliance was in order “because integration is morally right and because the Negro is your brother.”¹⁷ It should not be forgotten that Dr. King’s iconic *Letter from Birmingham Jail*¹⁸ was written in response to a statement by White clergy that the civil rights movement in Birmingham should slow down.¹⁹ In this *Letter*, King wrote that the greatest threat to Blacks’ “stride toward freedom” was

of significant importance to Martin Luther King, Jr. See THURMAN, *WITH HEAD AND HEART*, *supra* at 255 (citing the observation of a secondary source).

As but one recent example of Christianity’s racist history, the Church of England has just “voted to acknowledge its historical complicity in the global slave trade.” *Church of England to Apologize for Slavery*, USA TODAY, Feb. 9, 2006, at 12A.

12. BENJAMIN E. MAYS, *BORN TO REBEL: AN AUTOBIOGRAPHY* 241 (1971). See also *id.* at 243 (“Segregation in the House of God has been a great strain on my religion.”); THURMAN, *WITH HEAD AND HEART*, *supra* note 11 at 118 (“I did not know of any religious institution that had successfully projected itself into our society in an environment . . . in which no lines were drawn as to race and color.”).

13. MAYS, *supra* note 12, at 250.

14. REINHOLD NIEBUHR, *PIOUS AND SECULAR AMERICA* 82 (1958).

15. MARTIN LUTHER KING, *WHY WE CAN’T WAIT* 48 (1964).

16. *Id.* at 89-90.

17. *Id.* at 90.

18. *Id.* at 76-95.

19. See *id.* at 80.

not the Ku Klux Klan but the White moderate, including the White moderate clergy, “who is more devoted to ‘order’ than to justice.”²⁰

African American Christians must then address why they have “remained loyal to a religion responsible for their enslavement and subsequent segregation.”²¹ White Christians must pose a similar question: why have *they* remained loyal to a faith with this history? Can the “true” Christianity be separated from a racist allegiance to this religion? Generalizing the problem, Howard Thurman has asked: “What is the anatomy of the process by which the *powerful and the powerless* can draw their support and inspiration from the worship of the same God and the teachings from the identical source?”²² There are various ways these questions can be answered, but this inquiry must begin with an appreciation that theology itself provides an explanation for the interrelation of Christianity and racism. As Christian theology has emphasized, humans have a “bias toward sin.”²³

In analyzing sin, an easier answer theology provides here rests on a separation of the sinful earthly life and a life in grace in a realm beyond. This is the often customary side of Christianity attentive to individual salvation. As Mays writes critically of this approach, if the righteous are rewarded in heaven, there is no deep need for Black or White churches to be concerned about working to end the exploitation and mistreatment of Blacks here on earth.²⁴ Yet African American theologians such as Mays, Thurman, and King found this approach to be terribly inadequate, as did White theologians such as Reinhold Niebuhr. By contrast, a *political* theology attends social existence and historical meaning;²⁵ it concerns itself with the possibility of justice in our own historical time.²⁶ King writes, “only a ‘dry as dust’ religion prompts a minister to extol the glories of Heaven while ignoring the social conditions that cause men an earthly hell.”²⁷

20. *Id.* at 84. King later writes with sadness of the resistance of White moderates but states they “are not our main enemies. They are our temporary obstacles and potential allies.” *Id.* at 119.

21. Dennis C. Dickerson, *African American Religious Intellectuals and the Theological Foundations of the Civil Rights Movement, 1930-55*, 74 *CHURCH HISTORY* 217, 231 (2005) (citing HOWARD THURMAN, *JESUS AND THE DISINHERITED*, *supra* note 11).

22. THURMAN, *WITH HEAD AND HEART*, *supra* note 11, at 116 (emphasis added).

23. 1 REINHOLD NIEBUHR, *NATURE AND DESTINY OF MAN* 250 (Charles Scribner’s Sons 1964).

24. MAYS, *supra* note 12, at 242.

25. See LANGDON GILKEY, *ON NIEBUHR: A THEOLOGICAL STUDY* 20 (2001).

26. *See id.* at 228.

27. KING, *supra* note 15, at 67.

In political theology, the doctrine of sin provides insight into the “daemonic misuse” humans make of their freedom.²⁸ The doctrine of sin probes more deeply than liberal assumptions of human progress²⁹ and helps us understand why such evils as racism continue to persist. Sin consists of human rebellion against God, an effort to put oneself in the place of God.³⁰ Humans think of themselves as an ultimate good.³¹ Sin is manifested as pride, self-love, and self-righteousness.³² Sin is human freedom wrongly used.³³ Sin has particularly pernicious consequences in human society. Writes Niebuhr, “[t]he ego which falsely makes itself the centre [sic] of existence in its pride and will-to-power inevitably subordinates other life to its will and thus does injustice to other life.”³⁴

Under this view, racism is itself a sin. For Dr. King, “[s]egregation . . . ends up relegating persons to the status of things. Hence segregation is not only politically, economically and sociologically unsound, it is morally wrong and sinful.”³⁵ Benjamin Mays concurs: “The sin of man asserts itself in racial pride, racial hatreds and persecutions, and in the exploitations of other races.”³⁶ *Religious* categories may most deeply capture racist belief. The sin is one of pride. The racist replaces God as the source of value with self and race. Religious categories also capture what Derrick Bell describes as “the religious faith-like foundation of so much racist belief and behavior based on those beliefs.”³⁷ The sin of racist pride is itself “an idolatrous or false faith because for the racist, race is the final point of reference.”³⁸ The complexities of racism are deepened when the response by the Christian racist to these claims is that his or her belief is not a false faith but rather a faithful account of a privilege

28. NIEBUHR, *NATURE AND DESTINY OF MAN*, *supra* note 23, at 24. In this and the next several paragraphs I draw on George H. Taylor, *Racism as “The Nation’s Crucial Sin”: Theology and Derrick Bell*, 9 MICH. J. RACE & L. 269, 293-95 (2004).

29. See, e.g., NIEBUHR, *NATURE AND DESTINY OF MAN*, *supra* note 23, at 24 (contesting the “modern optimism [in] a philosophy of history expressed in the idea of progress”).

30. *Id.* at 179.

31. *Id.* at 122.

32. *Id.* at 188 (pride, self-love) and 200 (self-righteousness).

33. *Id.* at 16.

34. *Id.* at 179.

35. KING, *supra* note 15, at 82. See also THURMAN, *WITH HEAD AND HEART*, *supra* note 11, at 223 (noting that King viewed segregation as sinful); Dickerson, *supra* note 21, at 218 (same).

36. MAYS, *supra* note 12, at 162.

37. Derrick Bell, speech at Carnegie-Mellon University: Martin Luther King, Jr.: Was He a 20th Century Jesus? 5 (Jan. 16, 2006).

38. Bell, *Racism’s Religious Perspective*, *supra* note 1, at 4 (citing GEORGE D. KELSEY, *RACISM AND THE CHRISTIAN UNDERSTANDING OF MAN* (1965)).

granted by the Bible and Christian doctrine.³⁹ There is here a sense of certainty of the truth being one's own, that Whites are chosen and that others are rightly subordinate. The notion of religious faith often seems to entail a deeper sense of meaning that supports both the claim of certainty and the disparagement of those not chosen. Christian non-racist must fight Christian racist; as previously addressed, each side claims the Bible for their own.

For the Christian fighting against racism, the doctrine of sin helps explain the pride and self-righteousness of the racist. The religious category of sin is attentive to this tragedy of human life, an attention that exceeds, in Niebuhr's words, "the dimension within which modern [i.e. liberal] culture seeks to comprehend human existence."⁴⁰ Racism is not an accidental or momentary event in history. Theology provides an account of racism's perdurance.

Yet just as theology helps explicate the racist depravities of human nature, so does it reveal an enduring source of sustenance that helps gird those engaged in the long battle against racism and towards civil rights. Theology goes beyond liberal categories in addressing not only the tragedy of human life but also its majesty.⁴¹ The story here is the perhaps more familiar one of the way religion anchored the civil rights movement.⁴² Dr. King has written of his experience that "God's companionship does not stop at the door of a jail cell."⁴³ Derrick Bell relates how, "[p]articularly in hard times, my Christian faith provides reassurance that is unseen but no less real. It never fails to give me the fortitude I need when opposing injustice For me it is my most powerful resource."⁴⁴ Howard Thurman acknowledges how failure, hatred, and tragedy may continue, yet, he insists that "[n]evertheless, in all these things there is a secret door which leads into the central place, where the Creator of life and the God of the human heart are one and the same."⁴⁵ Both Bell and Thurman explicitly draw on their

39. See *supra* notes 5-10 and accompanying text.

40. NIEBUHR, *NATURE AND DESTINY OF MAN*, *supra* note 23, at 122. In earlier work, I have analogized the tension in Bell's work between his claim that racism is permanent and his call nonetheless for action to alleviate racism with Niebuhr's claim that sin is an ineluctable element of human life and yet action toward social justice is yet available. See Taylor, *Racism as "The Nation's Crucial Sin"*, *supra* note 28.

41. NIEBUHR, *NATURE AND DESTINY OF MAN*, *supra* note 23, at 122.

42. See DAVID L. CHAPPELL, *A STONE OF HOPE: PROPHETIC RELIGION AND THE DEATH OF JIM CROW* (2003) (so asserting).

43. KING, *supra* note 15, at 75.

44. DERRICK BELL, *ETHICAL AMBITION: LIVING A LIFE OF MEANING AND WORTH* 76 (2002).

45. THURMAN, *WITH HEAD AND HEART*, *supra* note 11, at 269.

race's history of spirituals and gospel hymns and such enduring messages of these songs as: "There are some things I may not know,/ There are some places I can't go,/ But I am sure of this one thing/ That God is real."⁴⁶

In my own experience, I was moved by the religious faith of key figures I came to know during my association with the United Farm Workers (UFW), a movement whose goals can certainly be conceived as advancing civil rights. I worked for the UFW for nearly a year, mainly as a boycott organizer in Los Angeles and then also as an organizer on an election proposition campaign, again in LA. The leader of the UFW, Cesar Chavez, has amply described the racism he experienced growing up in California as a child of Mexican heritage,⁴⁷ and his religious faith is also well known. Chavez has related that since his childhood, "my need for religion has deepened. Today I don't think that I could base my will to struggle on cold economics or on some political doctrine. I don't think there would be enough to sustain me. For me the base must be faith."⁴⁸ I was also privileged to know the Reverend Chris Hartmire, long-time director of the National Farm Worker Ministry (NFWM), whose headquarters were in LA right next door to the local offices of the UFW. Chris was instrumental in my staying with the UFW longer than the few months I had originally planned. I never talked to Chris specifically about his faith, but it was very apparent that deep springs sustained him over the years he spent moving the farm worker ministry away from its history of social service assistance toward direct support of the Union's organizing mission in the fields. This was a very contested goal among California churches, a principal base of the NFWM's financial support.⁴⁹

46. DERRICK BELL, *GOSPEL CHOIRS: PSALMS OF SURVIVAL FOR AN ALIEN LAND CALLED HOME* 188 (1996) (quoting Kenneth Morris, "Yes, God is Real," in *SONGS OF ZION* 201 (1981)). As evident from its title, Bell's book pays homage to these traditional Black hymns. See also THURMAN, *WITH HEAD AND HEART*, *supra* note 11, at 216-17 ("The genius of the slave songs is their unyielding affirmation of life defying the judgment of the denigrating environment which spawned them.").

47. See JACQUES E. LEVY, *CESAR CHAVEZ: AUTOBIOGRAPHY OF LA CAUSA* 24-25, 28-30, 65, 67, 83-85 (1975). The pains of this discrimination led him to insist as an adult that the UFW must be an integrated Union. "Black people, brown people, they're all part of the Union," we said. . . . I've been discriminated against, and it's a very horrible feeling." *Id.* at 198.

48. *Id.* at 27.

49. For a history of the NFWM's struggles, see SYDNEY D. SMITH, *GRAPES OF CONFLICT* (1987). It remains for me a question whether Chris Hartmire's long service is exemplary of the actions Whites can undertake on behalf of others or, because its sustained dedication is so unusual, rather a mark of how exceptional such actions are. Cf. KING, *supra* note 15, at 89 ("I am thankful . . . that some of our white brothers in the South have grasped the meaning of this

Finally, during my time with the UFW, I also came to know the Reverend James Lawson. While he was more well known as a minister in Memphis during the sanitation workers strike of 1968 and as an architect of the nonviolence movement in the Southern struggle for civil rights, Reverend Lawson had recently moved to Los Angeles to become the minister of a large Methodist church there. The geographic area I covered as a boycott organizer included his church, and for several months I was regularly able to use a church phone, and I spoke with him several times. Reverend Lawson was interested in having members of his Black congregation demonstrate active support for the UFW by joining my weekend picket lines, and he was also helpful to the UFW's effort to encourage the African American mayor of Los Angeles, Tom Bradley, to support the Union's boycott.

What I retain from these figures is a faith that both undergirded and led to social action. While the religious right has recently been more prominent in its public activities, it was not that distant in the past that a progressive religious force was more visible, the source of considerable political power, and the subject of national attention.⁵⁰ I also take from these figures a faith not that focused on doctrine but on sustaining beliefs that guided their action and derived from what were for them essential religious verities such as: "there is God within each of us,"⁵¹ "walk and talk in the manner of love, for God is love,"⁵² "do unto others as you want others to do unto you." These beliefs have been the source of sustenance, counsel, and action, even against enemies such as the racist Christian.

II. RELIGION AND LAW

But invocation of these verities also elicits their current limits. Statements such as "there is God within each of us" or "God is love" have become ritualized. They are now simply platitudes whose routine incantation obscures and dispels the power of their meaning. Present is an enduring tension between an inspiring spirit and its institutionalization, a problem at issue both in religion and in law.

social revolution and committed themselves to it. They are still all too few in quantity, but they are big in quality.").

50. Cf. Garry Wills, *An American Iliad*, N.Y. REV. OF BOOKS, Apr. 6, 2006, at 20, 22 ("There was a time, not so long ago, when religion was a force for liberation in America.").

51. Bell, Martin Luther King, *supra* note 37, at 2.

52. KING, *supra* note 15, at 64 (citing one of the commandments of nonviolent demonstrations).

This problem is one that Derrick Bell has particularly addressed in some recent work. He adverts to a scene from Nikos Kazantzakis's novel, *The Last Temptation of Christ*, where after the Last Supper Jesus informs his disciples that he knows he must die. One of the disciples, Jacob, promises that Jesus's words will live in new scriptures and laws governed by new high priests. Jesus protests that these actions will crucify the spirit, and Jacob replies that the encabined spirit will *look like* spirit and that will be enough.⁵³ Bell recognizes the need for church structure in order for the message of Jesus to thrive,⁵⁴ but he is particularly concerned that "the structure has replaced the spirit it was supposed to support and enhance."⁵⁵ Highlighting the prominence issues of religion and faith have gained in his current work, Bell argues that "[t]he needed revolution is, as Jesus recognized, less about political change than spiritual reformation."⁵⁶ How can the dynamism of faith be preserved from its ossification in church structure?

This problem has been identified by several of the theologians and activists I have previously mentioned. Howard Thurman recognizes on the one hand the value of organization to perpetuate Jesus's spirit, yet he appreciates on the other hand that the dynamic idea "is also destroyed by the very organization that preserved it."⁵⁷ Elsewhere Thurman writes that:

There is an intrinsic contradiction between the freedom of the spirit and the organization through which that freedom manifests itself. . . . The sense of freedom . . . must be structured and contained within a mold. . . . But, when, inevitably, the mold begins to choke the spirit, the mold is broken and the spirit breaks out anew, only to encrust itself in another mold, and so the process continues.⁵⁸

53. See, e.g., Bell, Racism's Religious Perspective, *supra* note 1, at 6-7 (quoting NIKOS KAZANTZAKIS, *THE LAST TEMPTATION OF CHRIST* 419 (P.A. Bien trans., Bantam Books ed., 1961)); Bell, Martin Luther King, Jr., *supra* note 37, at 7 (same).

54. See Bell, Racism's Religious Perspective, *supra* note 1, at 8.

55. *Id.* at 7.

56. *Id.* at 12. These words appear in the concluding paragraph of Bell's speech.

57. *Id.* at 7 (quoting Howard Thurman, *The Task of the Negro Ministry*, in *A STRANGE FREEDOM: THE BEST OF HOWARD THURMAN ON RELIGIOUS EXPERIENCE AND PUBLIC LIFE* 193 (Walter Earl Fluker & Catherine Tumbers eds., 1998)).

58. THURMAN, *WITH HEAD AND HEART*, *supra* note 11, at 181.

When asked how he could be a Christian when Christians have acted to perpetuate slavery and hinder minority rights,⁵⁹ Thurman distinguishes between Christianity the organization and the religion of Jesus. Jesus's spirit, he maintains, is on the side of those advancing "freedom, liberty, and justice for all people"⁶⁰ Dr. King expressed concern that organized religion was inextricably bound to the status quo and that he might need to turn his faith "to the inner spiritual church, the church within the church as the true *ekklesia* and the hope of the world."⁶¹

The most probing question raised here by Bell, Thurman, and King is not whether their vision of Jesus's spirit is more "true" to that spirit than is that of racist Christians. As previously noted, racist Christians also claim biblical legitimacy for their views. A debate about which side is more authentic is one in which neither side will concede. What remains fundamental, though, is to reaffirm that the vision of Jesus's spirit shared by Bell, Thurman, and King does itself have biblical authority and to pursue that vision against not only racism, but against the loss of that vision in the institutionalized church.⁶²

The problem here is a generalizable one: how can any organization retain its inspiring vision? This issue arises frequently in commercial entities, for example, when the first entrepreneurial generation is replaced by a second managerial generation focused on regularizing the organization's work. How does the firm remain innovative and dynamic?⁶³ In a provocative recent book called *The Dark Sides of Virtue*, David Kennedy has examined similar problems in international human rights organizations which come too often to focus on structure—their own institutional self-perpetuation—rather

59. See *supra* note 11 and accompanying text.

60. THURMAN, WITH HEAD AND HEART, *supra* note 11, at 114.

61. KING, *supra* note 15, at 92. In this passage, he immediately goes on to thank those who have broken ranks from organized religion to support the civil rights struggle. *Id.*

62. Cf. PAUL RICOEUR, LECTURES ON IDEOLOGY AND UTOPIA 312 (George H. Taylor ed., 1986).

We cannot eliminate from a social ethics the element of risk. We wager on a certain set of values and then try to be consistent with them; verification is therefore a question of our whole life. No one can escape this. . . . I do not see how we can say that our values are better than all others except that by risking our whole life on them we expect to achieve a better life, to see and to understand things better than others.

Id.

63. See, e.g., THE DYNAMIC FIRM: THE ROLE OF TECHNOLOGY, STRATEGY, ORGANIZATION, AND REGIONS (A.D. Chandler et al. eds., 1998).

than substantive outcomes.⁶⁴ The classical treatment of the troubling relationship between inspiration and organization can be found in Max Weber's discussion of the bureaucratic routinization of charisma.⁶⁵

For present purposes, I want to attend the interrelation of vision and organization, not in the context of religion's institutionalization in the church, but in the nexus between the anti-racist religious tenets affirmed so deeply by advocates such as Bell, Thurman, Mays, and King, and their potential institutionalization in law. Let me offer as an example the stance of Dr. King in 1963, which is the time period recounted in *Why We Can't Wait*.⁶⁶ As Dr. King reminds us, nearly a decade after *Brown v. Board of Education*⁶⁷ declared state-sponsored segregation unconstitutional, the drive for civil rights still had to face a panoply of state and local laws and practices that "negate constitutional mandates as blatantly as if each community were an independent medieval duchy."⁶⁸ Restrictions on voting meant that in Birmingham, for example, just over twelve percent of the voters were African American despite representing forty percent of the city's population.⁶⁹ Courts freely imposed injunctions to thwart civil rights drives and legally tie up cases for years.⁷⁰ There was "an imperative need," wrote King, "for legislation to outlaw our present grotesque legal mores."⁷¹ Direct action—the work of the inspiring civil rights vision—was not enough. King criticized the treatment of demonstrations as ends in themselves.⁷² This would be to transfer focus from the goals of civil rights to valorizing its organization. Recall David Kennedy's analogous criticism of international human rights groups.⁷³ Achievement did not rest finally on the heroism or numbers of marchers—important as these were—but on the change in larger institutions such as the legal system.⁷⁴ In turn, legal recourse was not sufficient, either; direct action was needed to promote any legal change.⁷⁵

64. DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* 350 (2004).

65. See 2 MAX WEBER, *ECONOMY AND SOCIETY* 1121-23 (Guenther Roth & Claus Wittich eds., 1978).

66. KING, *supra* note 15.

67. 347 U.S. 483 (1954).

68. KING, *supra* note 15, at 140.

69. *Id.* at 49.

70. *Id.* at 70.

71. *Id.* at 139.

72. *Id.* at 116.

73. See *supra* note 64 and accompanying text.

74. KING, *supra* note 15, at 117.

75. *Id.* at 42.

At the end of 1963, Dr. King was well aware both of the many civil rights compromises in the United States's past⁷⁶ and of the multiple pressures on compromise now—due to the fear that Blacks would go too far in pressing for racial redress⁷⁷—but he had confidence that Congress would write strong civil rights legislation. This confidence was not due to belief in the inherent progress of the law but in the power the civil rights movement had manifested.⁷⁸ He knew additional pressure would be necessary to ensure that any law was enforced, a “task of conforming custom to law,” but the passage of law was a significant achievement.⁷⁹ There was a vital interrelation of an inspiring faith and its institutionalization in law.

Subsequent history would prove—as King would acknowledge later in his life⁸⁰—that the hopes of 1963 were too optimistic. The resistance to civil rights continued to remain strong, and the Supreme Court has cut back on protecting the promise for equal rights. In cases such as its 1974 decision in *Milliken v. Bradley*, for instance, the Court disallowed remedies to combat segregated schools across district lines.⁸¹ There was a parallel trajectory in the UFW's pursuit of laws to grant farm workers—who are not covered by the National Labor Relations Act⁸²—the right to organize collectively. California's passage of the 1975 Agricultural Labor Relations Act⁸³ provided the UFW a “powerful new framework for organizing,”⁸⁴ and the Union knew that to preserve the Act's power, it would need to maintain pressure on the state government to enforce the law just as it had required pressure to ensure passage of a strong law.⁸⁵ Yet growing resistance to the Act, efforts to use its provisions to thwart the Act's efficacy, and later Republican control over administration of the Act, led to the Act's basic dormancy.⁸⁶ Critical scholars such as Mark

76. *See id.* at 131 (citing, for example, the Missouri Compromise allowing slavery in new states, the Hayes-Tilden Compromise that led to the end of Reconstruction, and the Supreme Court's compromises in *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

77. *Id.*

78. *Id.* at 117.

79. *Id.*

80. *See, e.g.*, DAVID J. GARROW, *BEARING THE CROSS* 537 (1986).

81. 418 U.S. 717 (1974).

82. *See* National Labor Relations Act, 29 U.S.C. § 152(3) (2000) (specifically excluding “agricultural laborer” from the category of protected employees).

83. CAL. LAB. CODE §§ 1140-1166 (1975).

84. Jennifer Gordon, *Law, Lawyers, and Labor: The United Farm Workers' Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today*, 8 U. PA. J. LAB. & EMP. L. 1, 32 (2005).

85. *Id.* at 33, 35.

86. *Id.* at 40, 43-44.

Tushnet have generalized the insight: the grant of legal rights does not protect against their manipulation or their subsequent removal.⁸⁷ Civil rights and farm worker legislation created important footholds within the legal system, legal rights rather than simply moral ones. But the institutionalization of these values facilitated the exertion of countervailing pressures upon them.⁸⁸

The lessons of the interrelation of values and their legal institutionalization are several. On the one hand, commentators on both the farm worker and civil rights movements continue to assert the importance of legal rights.⁸⁹ Newer generations of African Americans, for example, return to weigh the positive symbolic and material value of the grant of legal rights. "For blacks," writes Patricia Williams, "the prospect of attaining full rights under law has been a fiercely motivational, almost religious, source of hope ever since arrival on these shores."⁹⁰ Williams insists that "blacks believed in [rights] so much and so hard that we gave them life where there was none before."⁹¹ On the other hand, the creation of these laws needs to be treated with caution. Derrick Bell's writings attend the historical evidence of doors once opened being closed. Rights are important—Blacks "cry out in petition and prayer for the light of racial justice"⁹²—but again and again expectations are dashed.⁹³

Even if values need institutionalization, Bell focuses attention on the way these values provide a vantage point from which to criticize law's failure to incorporate them. For Bell, religion provides nourishment not only to push for legal change but to withstand and critique the law's failure to effect this change.⁹⁴ "We're a race of Jeremiahs," Bell writes, "calling for the nation to repent."⁹⁵ Dr. King

87. See, e.g., Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1386 (1982).

88. The countervailing pressure had more influence in part due to failings of entities such as the UFW to respond. During this period, the UFW was caught in the difficulties of its own transition from a movement to an organization. See Gordon, *supra* note 84, at 40-44.

89. See, e.g., *id.* at 66-67 (discussing academic and other positive commentary on the value of farm labor and other labor laws).

90. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 154 (1991).

91. *Id.* at 163.

92. Derrick Bell, *Bluebeard's Castle: An American Fairy Tale*, in *AFROLANTICA LEGACIES* 155, 159 (1998). This narrative recounts the multiple times in United States history that rights have been granted to Blacks and then eroded.

93. *Id.*

94. My colleague Jules Lobel has written of how his Jewish faith has provided a source of resistance against existing law. See JULES LOBEL, *SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA* 32, 48 (2003).

95. DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 157 (1992).

was famously willing to disobey judicial rulings that in his view perpetuated injustice and segregation, because they were not just laws.⁹⁶ The law of God provided a vantage point from which to criticize existing human law.⁹⁷ Human law is not necessarily just or normative merely because it is enacted law.⁹⁸

Lest we grant religion final priority in the tension between originating values and their institutionalization, we should also acknowledge in a last turn of the circle that law can also hold religion to account, as it requires the hard work of spelling out the legal details of religion's aspirations.⁹⁹ Often religion's values are painted with such broad and abstract strokes that it is difficult to ascertain what would be the specificities and potentially necessary compromises of these values in their legal manifestations.¹⁰⁰ Once more we have no easy reconciliation between religion and law in the pursuit of civil rights.

96. See, e.g., KING, *supra* note 15, at 82-84 (differentiating between a just and unjust law).

97. See *id.* at 83:

An unjust law is a code that a numerical or power majority group compels a minority group to obey but does not make bidding on itself. This is *difference* made legal. By the same token, a just law is a code that a majority compels a minority to follow and that it is willing to follow itself. This is *sameness* made legal.

Id. (emphasis in original). As is also well known, Dr. King was willing to suffer the penalties imposed for breaking the law. This, he argued, demonstrated his respect for law. *Id.*

98. The potential for criticism of existing law comes not just from adherents of natural law such as Dr. King, but from classical positivists such as Austin, Bentham, and Hart. See, e.g., H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 598 (1958) (discussing as the positivist stance an insistence on avoiding two dangers: "the danger that law and its authority may be dissolved in man's conceptions of what law ought to be and the danger that the existing law may supplant morality as a final test of conduct and so escape criticism"). As this quotation indicates, positivists would, of course, disagree with Dr. King's contention that an unjust law is not a law. See *supra* note 96 and accompanying text.

99. See, e.g., DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM (2004) (arguing how *Brown* should have been decided).

100. Religious organizations have certainly been prominent in pursuit of general if not specific legislative implementation of policy goals. For example, the United States Conference of Catholic Bishops has developed an Environmental Justice Program. Lucia A. Silecchia, who advised the Bishops on this Program, explained to me that the goal was to develop basic principles, with more specific implementation left to legislative bodies. Lucia A. Silecchia is a law professor at Catholic University of America, Columbus School of Law. Conversation with the author, Apr. 11, 2006.

III. FAITH IN LAW

I now turn from a tension between religion and law to the appropriation in law of religious attributes, to what is commonly denominated civil religion.¹⁰¹ We must take seriously what is at stake in claims of faith in law, faith in the Constitution, or faith in a political leader. My concern is that in areas such as civil rights, these political and legal faiths may be intolerant of, and resistant to, the insights and critiques of religious faith. Although I do not pursue the theme here, a faith in the market may resist similar critiques.¹⁰²

The theme of civil religion's faith-like belief in law is a persisting one. Paul Kahn, for instance, writes: "The structure of the legal imagination, I think, shares at least as much with religious belief as with logic."¹⁰³ Sanford Levinson in turn observes: "[T]he public rhetoric of American political culture remains organized, in substantial ways, as a faith community centered on the Constitution."¹⁰⁴ I borrow from Paul Ricoeur's description of ideology three aspects of the belief in law that need to be disentangled: first, this belief can be constitutive; second, it can act to legitimate; and third, it may be distorting.¹⁰⁵ The *constitutive or integrative*¹⁰⁶ function of civil religion seeks to bring conceptual order to society, "to supply a set of

101. See, e.g., SANFORD LEVINSON, CONSTITUTIONAL FAITH 10 (1988) (describing as the American civil religion "that web of understandings, myths, symbols, and documents out of which would be woven interpretive narratives both placing within history and normatively justifying the . . . American community").

102. For example, Marilynne Robinson argues that we have "theologized our own economic system." The teachings of this theology are, she argues, simple:

There really are free and natural markets where the optimum value of things is assigned to them; everyone must compete with everyone; the worthy will prosper and the unworthy fail; those who succeed while others fail will be made deeply and justly happy by this experience, having had no other object in life.

MARILYNNE ROBINSON, THE DEATH OF ADAM 101 (2005).

103. PAUL W. KAHN, THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA 37 (1997). See also Robert L. Tsai, *Sacred Visions of Law*, 90 IOWA L. REV. 1095, 1097 (2005) ("[L]ife under law . . . continues to share much of its basic texture with religious existence.").

104. LEVINSON, *supra* note 101, at 52 (criticizing this fact). See also *id.* at 14 ("[W]orship of the Constitution is a thread running through much American political rhetoric."); Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 23 (1984) (criticizing an American "civil religion whose central tenet is Constitution-worship"). Cf. Mark Lilla, *Godless Europe*, NY TIMES BK. REV., Apr. 2, 2006 at 14 ("political life rests on a religious foundation") (describing Isaiah Berlin's characterization of the views of Joseph de Maistre).

105. See RICOEUR, *supra* note 62.

106. See, e.g., *id.* at 253. See also LEVINSON, *supra* note 101, at 15 (same).

beliefs channeling our conduct.”¹⁰⁷ The civil religion provides an “aspirational vision” reflected, for example, in the Constitution’s language “of a ‘more perfect Union’ where ‘domestic Tranquility’ is achieved because the ‘Blessings of Liberty’ are used on behalf of ‘the general Welfare’ in order to ‘establish Justice.’”¹⁰⁸ When Dr. King writes of Black nationalist groups that have precisely “lost faith in America,”¹⁰⁹ the loss is a sense that this country’s constitutive identity does not belong to them. The *legitimizing* function of civil religion occurs because no political or legal system and no political leader relies simply on the use of force. Rather, these systems and leaders rely on the citizenry’s belief in the legitimacy of their authority.¹¹⁰ Robert Tsai writes: “Faith provides context for and lends legitimacy to actions taken in law’s name.”¹¹¹ The *distorting* aspect of civil religion occurs when it becomes idolatrous,¹¹² when it deifies law, Constitution, political or legal system, or political leader.¹¹³ These elements become viewed—whether by liberal or conservative—as somehow absolute and immune from criticism.

Theological and religious categories help us understand both the functioning of civil religion and its limits. For our purposes, the concern is not that civil religion’s faith-like character should be eliminated. That would be to reject the positive, constitutive, and properly aspirational role that civic religion may play. It might also be to reject some sense of an underlying positive “spirit” of the law, when that spirit may instead need protection against forces that treat law simply as instrumental, a function of economic and legal order, rather than as a larger notion of justice.¹¹⁴ Rather, the concern, particularly in areas such as civil rights, is that faith in law not become dogmatic, insular, and immune to criticism from external values such as religious faith. As throughout, the goal is to maintain the tension—both in criticism and insight—in the relation between religion and law.

107. See LEVINSON, *supra* note 101, at 36.

108. *Id.* at 4 (quoting U.S. CONST. pmbl.).

109. KING, *supra* note 15, at 87. Interestingly, in the same passage Dr. King writes of these groups’ repudiation also of Christianity, so a loss of particular religious and civic faiths that led many to adopt another faith, Islam. See *id.*

110. See RICOEUR, *supra* note 62, at 199.

111. Tsai, *supra* note 103, at 1103.

112. See LEVINSON, *supra* note 104, at 88.

113. See *id.* at 170 (rejecting deification of the law).

114. For an appraisal of the various forms of sterility created by legal formalism, see JEAN STEFANCIC & RICHARD DELGADO, *HOW LAWYERS LOSE THEIR WAY: A PROFESSION FAILS ITS CREATIVE MINDS* (2005).

