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Law as a Religion

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LAW AS A RELIGION

Derrick Bell†

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INTRODUCTION

Law and religion share common elements. Both law and religion, for example, claim to elevate human conduct. Law claims to pursue justice (including racial justice) while religion claims to inspire love and good will among humans (including racial good will). Each also relies on blind faith that it achieves its fundamental goals. It calls upon this faith in defiance of evidence and reason. We know, for example, that the Resurrection of Christ could not and did not happen as a matter of science; yet, Christian religion calls upon the faithful to accept the Resurrection. Similarly, we know from history and experience that law will never deliver justice and that law in America will never deliver racial justice; yet, we are called upon to believe somehow justice is just around the corner.¹

Even today, religion and law are each great and mostly unacknowledged mysteries. People gain basic religious beliefs at an early age and simply accept what they are taught. Some recognition of law comes later, but again there is more learning than challenging. There is little thought of how religion and law came into being, or how much respect they actually deserve.

I. RELIGION

The concept of religion, likely 100,000 years old, grew out of man's recognition and need to address the fact of existence and to provide

† Professor Derrick Bell of the New York University School of Law first delivered these remarks at Loyola University Chicago School of Law on Friday, April 16, 2010, as the keynote speaker at the Midwestern People of Color Legal Scholarship 20th Anniversary meeting. The Editorial Board of the *Case Western Reserve Law Review* thanks Dr. Janet Dewart Bell for permission to posthumously publish these remarks. Professors Steven A. Ramirez and Neil Williams assisted in light editing and sourcing of the remarks.

1. Derrick Bell, *Racism is Here to Stay: Now What?*, 35 HOWARD L.J. 79, 91 (1991).

answers about the directions and purposes of life and the meaning of death. Religions vary widely, but each seeks to serve this function usually through stories of their origins that can most easily be described as miraculous and yet they offer extraordinary reassurance, particularly to those upon whom life has imposed heavy burdens.

The Christian Bible, for example, is filled with stories of Jesus' virgin birth, the miracles he performed, his resurrection and reappearance after his execution, and his ascension into Heaven. Based on our knowledge of science, we know as a literal matter that these events could not have happened, and yet proclaimed belief in them is a prerequisite for membership in most Christian denominations. Contradictory explanations are not welcomed by the Church as Galileo Galilei and a long list of scientists learned in the sixteenth century, before and since.

One need only read the Bible to learn that in the earliest writings about Jesus by Paul (circa 50–64 C.E.) there are no miracles, no virgin birth, and the resurrection is not understood as physical resuscitation.² The first Gospel by Mark (circa 70–72 C.E.) offers the first reports of the miracles.³ The virgin birth is introduced by the second gospel to be written, Matthew, in the early eighties.⁴ The resurrection, understood as physical resuscitation is introduced, or at least strongly emphasized, by Luke (circa 88–95 C.E.) and by John (circa 95–100 C.E.).⁵ Rather clearly, as more time passed following Jesus' death, the gospel writers had to work harder to show what an important life Jesus had led. Thus, the later the account of the beginnings of Christianity, the more miraculous the details have become.⁶

In modern divinity schools and in the writings of theologians, there is no question as to what the gospel writers were doing. For a variety of reasons, though, this knowledge has not filtered down to those who sit in the pews of our churches Sunday after Sunday.⁷

Judaism, the religion out of which Christianity evolved, is based on a series of Biblical stories that are revered but could not have actually happened. The offshoots of Christianity are many, the Mormons and Jehovah's Witnesses to name a few, and all assert origins in happenings that belie what we now know about science and biology. The same can be said of Muslims who are adherents of the religion of Islam. The

2. JOHN SHELBY SPONG, *A NEW CHRISTIANITY FOR A NEW WORLD: WHY TRADITIONAL FAITH IS DYING AND HOW A NEW FAITH IS BEING BORN* 87 (2001) [hereinafter *A NEW CHRISTIANITY*].

3. *Id.* at 90–91.

4. *Id.* at 97–98.

5. *Id.* at 103–05, 107, 109.

6. *Id.* at 109–10.

7. JOHN SHELBY SPONG, *JESUS FOR THE NON-RELIGIOUS* xi–xii (2007).

Qur'an describes many Biblical prophets and messengers as Muslim: Adam, Noah (Arabic: Nuh), Moses, and Jesus and his apostles. The Qur'an states that these men were Muslims because they submitted to God, preached his message, and upheld his values.⁸

I could continue with a description of the origins of Buddhism, Hinduism, Jainism, etc., all of which surpass belief, but my point is that much of what we describe as religion is based on sacred happenings that as a historical matter did not happen and could not have happened. And yet, accepted believers are many. And yes, beyond their adherence to views that surpass belief and can lead to much evil, these religions can proffer inspirational guidelines for honorable and ethical living.

It is said that religious belief is based on faith, a description that tends to end rather than advance discussion. The gaining of faith can include a spiritual component that can be experienced but is no easier to define than the basics of religion are to explain in other than miraculous terms.

One aspect of religious belief is that most believers are unwilling, even unable to question the literal nature of their beliefs. Such questioning is not encouraged by most church leaders. For example, many Christian theologians find the biblical stories about Jesus are not a historical record but are intended "to narrate the identity of Jesus by showing us the kind of person Jesus was. The test of their truth is not whether the incidents they describe took place, but whether they truthfully narrate the identity of Jesus to us."⁹ The belief that this suffering servant was raised to glorious life can make sense of our lives and provide an adequate symbol of life-giving hope.

The value of these messages is less their truth than their illustrations of their revolutionary character. It is this essential element that is not emphasized in many Christian congregations. A former student who later went to a divinity school provides one explanation. He wrote me that most of his colleagues (i.e., future pastors) are afraid of preaching and teaching what they learn at seminary due to the perceived negative reactions from the conservative believers, so there is a particularly big education gap for religion between academia and the laity.

This seems unbelievable. How can ministers who learn one thing in divinity school, then go out and preach in ways that deny the enlightenment of a century or more of research and revelation? But another student told me that he was raised in an upper-middle class, quite liberal Protestant church in the Midwest. According to him, one

8. Qur'an 3:52-54, 4:163-65; MAULANA MUHAMMAD ALI, *THE RELIGION OF ISLĀM: A COMPREHENSIVE DISCUSSION OF THE SOURCES, PRINCIPLES AND PRACTICES OF ISLĀM* 219-20 (5th ed. 1983).

9. DERRICK BELL, *ETHICAL AMBITION: LIVING A LIFE OF MEANING AND WORTH* 85-86 (2002) (quoting Peter Laarman, former minister of Judson Memorial Church in New York City).

of the associate pastors at the time was a minister named Erwin just out of divinity school. He was a dynamic young preacher who was popular because he gave thoughtful homilies that challenged the congregation and provided good conversation for the post-service coffee hour.

During one of his homilies, Erwin suggested that there was no virgin birth, or at least that it made no difference because there was the miraculous in the life Jesus led, his profound teachings, and how he died.

There was a stunned silence, followed by angry words whispered in the pews, and following the service, spoken loudly to the church heads. By the following Sunday, much of the congregation was up in arms over his statement and Erwin took to the pulpit again to offer what amounted to a retraction. While most Christians accept the Bible as a testimony of faith by those whose beliefs and sacrifices mark the Churches' origins, a great many fundamentalist Christians focus on what is written there with a blinding fervency. For them, the Bible is not an anthology of sixty-six books, organized, revised, and translated again and again over a thousand years. It is, rather, the inerrant word of God and must be given the most literal, though extremely selective reading. Their opposition to homosexuality, for example (a term nowhere mentioned in the Bible), is based on a few verses in the Old Testament Book of Leviticus 18:22, 18:29, and 20:13, which states, "[i]f a man lies with a male as with a woman, both of them have committed an abomination."¹⁰ The same book would also authorize the purchase of slaves as long as they are "of the heathen that are round about you."¹¹ Exodus 35:2 clearly authorizes putting to death anyone who works on a holy day.¹² And Genesis 38:9–10 suggests that even birth control may be a capital offense.¹³

These admonitions are mostly ignored by church laity, but neither adverse publicity nor the contrary wishes of much of their memberships have moved many Christian churches to reconsider their barring of women from the clergy by either official mandate or long tradition. The usual justification is that Jesus did not choose any women to be his disciples.¹⁴ Such literalness ignores the social order in the first century in which a woman member of a band of disciples of an itinerant rabbi was inconceivable. Indeed, recent studies suggest that some of Jesus'

10. *Leviticus* 18:22, 18:29, 20:13 (Revised Standard Version).

11. *Leviticus* 25:44 (Revised Standard Version).

12. *Exodus* 35:2 (Revised Standard Version).

13. *Genesis* 38:9–10 (Revised Standard Version).

14. JOHN SHELBY SPONG, BORN OF A WOMAN: A BISHOP RETHINKS THE VIRGIN BIRTH AND THE TREATMENT OF WOMEN BY A MALE-DOMINATED CHURCH 6–7 (1992).

earliest followers were women and certainly women were well represented among those martyrs who chose to die, often in horrendous ways.¹⁵

The uses of religion to justify racism are too obvious to require explanation, but it is worth mentioning the paradoxical connection between racism and Christianity. In support, I want to cite Professor George D. Kelsey who in his book, *Racism and the Christian Understanding of Man*, asserts that racism is an idolatrous faith. Initially, he acknowledges racism served as an ideological justification for the constellations of political and economic power expressed in colonialism and slavery, but he adds, “gradually the idea of the superior race was heightened and deepened in meaning and value so that it pointed beyond the historical structures . . . to human existence itself.”¹⁶ “Loyalty to what the self values.”¹⁷ Professor Kelsey is not surprised that by and large the racists of the modern world have been Christians. For many, it has been the other faith or one of the other faiths. And he is not dissuaded that racism is a faith because so many Christians are racists, explaining that it exists alongside other faiths, a testimony to the reality of polytheism in the modern age.

The concept of the superior race became the center of value and an object of devotion enabling every white person to gain a “power of being” through membership.¹⁸ As a complete system of meaning, value, and loyalty, the definition of a faith, it enables the most economically and culturally deprived white man to feel superior to any black. Kelsey cites Richard Niebuhr who defines faith as “trust in that which gives value to the self,” and “it is loyalty to what the self values.”¹⁹

II. LAW

But while shaking our heads at these often contradictory beliefs and practices, let us turn to the United States Constitution, so often referred to with obvious reverence as “our secular Bible.” It is a description more telling and less complimentary than those who use it know. For in fact the text in both the Bible and the Constitution are more honored than read, more accepted than understood, more quoted than respected. Both are defended most vigorously and when challenged, most

15. Karen L. King, *Women In Ancient Christianity: The New Discoveries*, PBS (Apr. 1998), <https://www.pbs.org/wgbh/pages/frontline/shows/religion/first/women.html> [https://perma.cc/FTY5-LZUN].

16. GEORGE D. KELSEY, *RACISM AND THE CHRISTIAN UNDERSTANDING OF MAN* 9 (1965).

17. *Id.* at 26.

18. *Id.* at 9.

19. *Id.* at 26.

viciously, by those who neither know nor care to know either document with any depth beyond the comfort of unthinking acceptance.

The Constitution is this nation's secular religion. It provides a foundation for the law and a basis for effective governance.

This potential is regularly undermined, distorted, and essentially betrayed by the passage of time and given meanings by those more interested in advancing their agendas than either accuracy or truth. As a result, the profound potential of these documents is diluted by readings that are inconclusive, unconvincing, and, quite often, downright dangerous.

Both the Bible and the Constitution need serious revision or interpretations that conform to modern knowledge, lived experience, and contemporary needs. And yet, because of a rigidity founded on fear of change and the seeming security of the status quo, both the Bible and the Constitution survive as symbols of what never was and barriers to what they might become. Episcopalian Bishop John Edgar Spang writes that “[p]eople no longer believe in God in a real and operative sense, [but] they do continue to believe in believing in God.”²⁰ His statement aimed at the sectarian world of religion is applicable as well to the secular world of the law. The eminent political scientist, Professor Robert Dahl, acknowledges that the Framers were wise and great men, but their vision was circumscribed by what they knew, what they mistakenly thought they knew, and what they lived too soon to have any way of knowing. They were working without models of existing democratic governments. In addition to those limits, they were hobbled by the political necessities of a particular moment, which forced them to swallow provisions to which the most eminent among them were strongly (and rightly) opposed.²¹

Professor Dahl provides explanation to the obvious when he reports that many of the decisions the Framers made have been the reason that our government is far less democratic than it could have been. And yet, the paucity of amendments—27 in 216 years—is deemed proof that the Framers' words were profound.²² Little attention is given to the complexity of the amendment process, compliance with which can be achieved only on those too rare occasions when conditions for change are absolutely clear and without significant opposition.

The refusal to relinquish myths of perfection afflicts both documents.

Consider the Bible, the basic Christian text. Any number of studies have shown that “America is simultaneously the most professedly

20. A NEW CHRISTIANITY, *supra* note 2, at 24.

21. ROBERT DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 7–9, 11–13 (2002).

22. U.S. CONST. amend. XXVII (enacted 1992).

Christian of the developed nations and the least Christian” in both knowledge of their religion or in adherence to its basic principles.²³

Consider the fervent opposition over the last year to the health care legislation that, while finally enacted, is under challenge in the courts and its repeal was the motivation for many who voted Republican at the polls in the November 2010 mid-term elections.²⁴ Dare we ask how other nations with little claim to religious fervor tax themselves to support the well-being of all their citizens in ways that put our treatment of the least among us to shame? The record indicates that our commitment to capitalism so devalues Christian belief that religion is reduced to an emergency retreat in times of personal crisis.

In a similar fashion, law, particularly law that supports views that at a basic level are anti-Christian, is practiced with a religious intensity. And over time, both major parties exploit the racist faith of their Christian white constituencies. As Kelsey explains: “[A] Christian racist thinks he lives under the requirements of the God of biblical faith in most areas of life, but whenever matters of race impinge on his life, in every area so affected, the idol of race determines his attitude, decision, and action.”²⁵

While not practicing overt racism, many Christians and church leaders treat racism as outside religion, amoral expressions of private preferences, beyond the reach of Christian moral ideas and norms, manifestations of cultural lag and products of ignorance. Believing that racism reflects political, economic, and cultural factors, “Christians . . . have not seen the faith character of racist devotion and commitment, nor that racial antipathy is conflict in the order of humanity.”²⁶

Each of these themes could be developed at great length. And yet beyond all the inconsistencies and downright myths, significant good works are done by those motivated by their belief in religion. The same can be said about those who believe in what is generally referred to as the “rule of law.”

I worry about the future of this country, but I am not alone either in the present or in the past. As one thoughtful leader wrote:

I see in the near future a crisis approaching that unnerves me and causes me to tremble for the safety of my country. . . . [C]orporations have been enthroned and an era of

23. Bill McKibben, *The Christian Paradox: How a Faithful Nation Gets Jesus Wrong*, HARPER’S MAG., Aug. 2005, at 32.

24. Kate Pickert, *Mixed Results on the Health Reform Referendum*, TIME (Nov. 2, 2010), <http://swampland.time.com/2010/11/02/mixed-results-on-the-health-reform-referendum/> [<https://perma.cc/69S2-8G65>].

25. KELSEY, *supra* note 16, at 27–28.

26. *Id.* at 28.

corruption in high places will follow, and the money power of the country will endeavor to prolong its reign by working upon the prejudices of the people until all wealth is aggregated in a few hands and the Republic is destroyed. I feel at this moment more anxiety for the safety of my country than ever before, even in the midst of war.²⁷

The writer: Abraham Lincoln (1809–1865), in a letter to Colonel William F. Elkins, 21 November 1864, shortly before his assassination.

The country survived despite the accuracy of Lincoln's assessment. It survived because there were those who fought for justice when there was none, who worked for peace and order when violence and disorder were rampant, who at risk spoke out loudly while most sought safety in silence. In short, the nation survived because there were some who moved by their religious beliefs, trusted in the law, or accepted real risks to bring about reform.

Race is a major manifestation of my theme, but it is hard to pin down. We have seen its paradoxical ways in the election of Barack Obama to the presidency in November 2008. A great many of those who voted for him viewed his elevation as the start of a new day. It would overcome the belief systems that handicap both religion and law. Even as I joined in the celebration, I could not forget how in the past, racial progressives hailed each instance of a court decision, hard-won legislation, or executive order that progressives felt would usher in a new era of racial equality.

After a period of time, though, seemingly firm commitments to substantive progress were redefined, reversed, or simply ignored. This is the history of earlier racial breakthroughs going all the way back to the Emancipation Proclamation and forth from there through the post-Civil War Amendments, *Brown v. Board of Education*, the Civil Rights Act of 1964, the Voting Rights Act of 1965, and affirmative action policies.

In an effort to explain this “now you have it, now you don't” racial policy transference, I have noted the importance of what I call Interest Convergence.²⁸ Reform does not come because of the seriousness of the racial injustice, or the effectiveness of the arguments seeking reform. Rather, major racial steps reflect the outward manifestation of unspoken and perhaps unconscious conclusions by high-level policy makers that the racial remedies, if recognized in a proposed policy, will

27. Letter from Abraham Lincoln to Colonel William F. Elkins (Nov. 21, 1864), in *THE LINCOLN ENCYCLOPEDIA*, 40 (Archer H. Shaw ed., 1950).

28. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 *HARV. L. REV.* 518, 523 (1980).

secure or advance societal interests deemed important by the upper classes or on occasion the country as a whole.²⁹

There is, in effect, a convergence of interests between what blacks seek and what white policymakers perceive they or the country need. When conditions change and the difficulty of implementing these breakthroughs increases, often because of the resistance of groups of whites who view any progress for blacks as harmful to them, rationales are found to justify what Professor Lani Guinier deems interest divergence.³⁰

Barack Obama's election was a dramatic example of Interest Convergence. It differs from the traditional racial progress model in that the policymakers were not a small elite group, but sixty-nine million voters³¹ who believed that their interests converged with the dramatic promises Obama made to them. Many were willing to work hard and contribute much to make their beliefs real. Others insisted till the bitter end that they would vote for Senator McCain. They stubbornly did not want to acknowledge they had changed their minds. In the end, they voted out of a different kind of fear: fear for their own economic survival. In the throes of economic collapse, self-interest trumped racism. Enough whites were willing to throw the dice on the young black man to assure the election of President Obama.

Facing lost jobs and foreclosed homes, they had to ask themselves if they wanted a really smart young black guy or a stodgy old white guy from the same crowd who put us in this hole. Now, almost two years into his first term, the question is whether President Obama will be able to resist the strong opposition from those interests, i.e. those who are determined to oppose the changes he has promised to make. The results of the mid-term election do not offer support for the hope that he will succeed.

He is under steady attack on his every move by a host of republicans, most from very conservative districts and states. In addition to their efforts to prevent passage of any health reform measure, they oppose his stimulus plan and other measures intended to create jobs and stabilize the economy with arguments whose hypocrisy can best be measured by how those same republicans with alas substantial democratic help, who routinely voted for billions for the Iraq and Afghanistan wars and huge tax cuts for the rich with never a

29. Derrick Bell, *Reconstruction's Racial Realities*, 23 RUTGERS L.J. 261, 263 (1992).

30. Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, 91 J. AM. HIST. 92, 100 (2004).

31. FED. ELECTION COMM'N, FEDERAL ELECTIONS 2008: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES (2009).

question about budget breaking or burdening with debt our children and grandchildren.

His ability to resist giving in to interest divergence this time, as wielded by the powerful still quite willing and able to manipulate the relatively powerless into voting their emotional rather than economic interests, may depend on his maintaining a continuing alliance with the millions who supported his campaign through volunteer work, contributions, and reluctantly recognized self-interests.

His success in this effort has not been impressive. The mainly black racial militants in our midst who view Obama with great suspicion are complaining as they did during the campaign that his election will hurt rather than advance issues of key importance to blacks and other peoples of color. Their concerns, despite being contrary to our expectations, are understandable. Obama's elevation to the White House had increased racist manifestations rather than reduced them.

Rather than an end of religious ignorance and racialized political arrogance, Obama's election and his first two years in office make clear just how embedded both remain and how effectively his enemies are able to harness religious and political fundamentalism against any efforts toward progressive thinking and action on the array of threats that the nation is facing.

CONCLUSION

Law and religion are each ultimately about belief systems—systems that require faith notwithstanding reason, evidence, and experience. As with many belief systems, adherents profess faith while ignoring fundamental tenets proffered in support of that faith. This cognitive dissonance constitutes space for those manipulating those who maintain these faiths. Our history of racism, our national belief system, shows that it trumps both law and religion in that the racial hierarchy persists notwithstanding religious precepts or legal reforms promising otherwise. Yet, we continue to believe that somehow law can deliver us from injustice and oppression.